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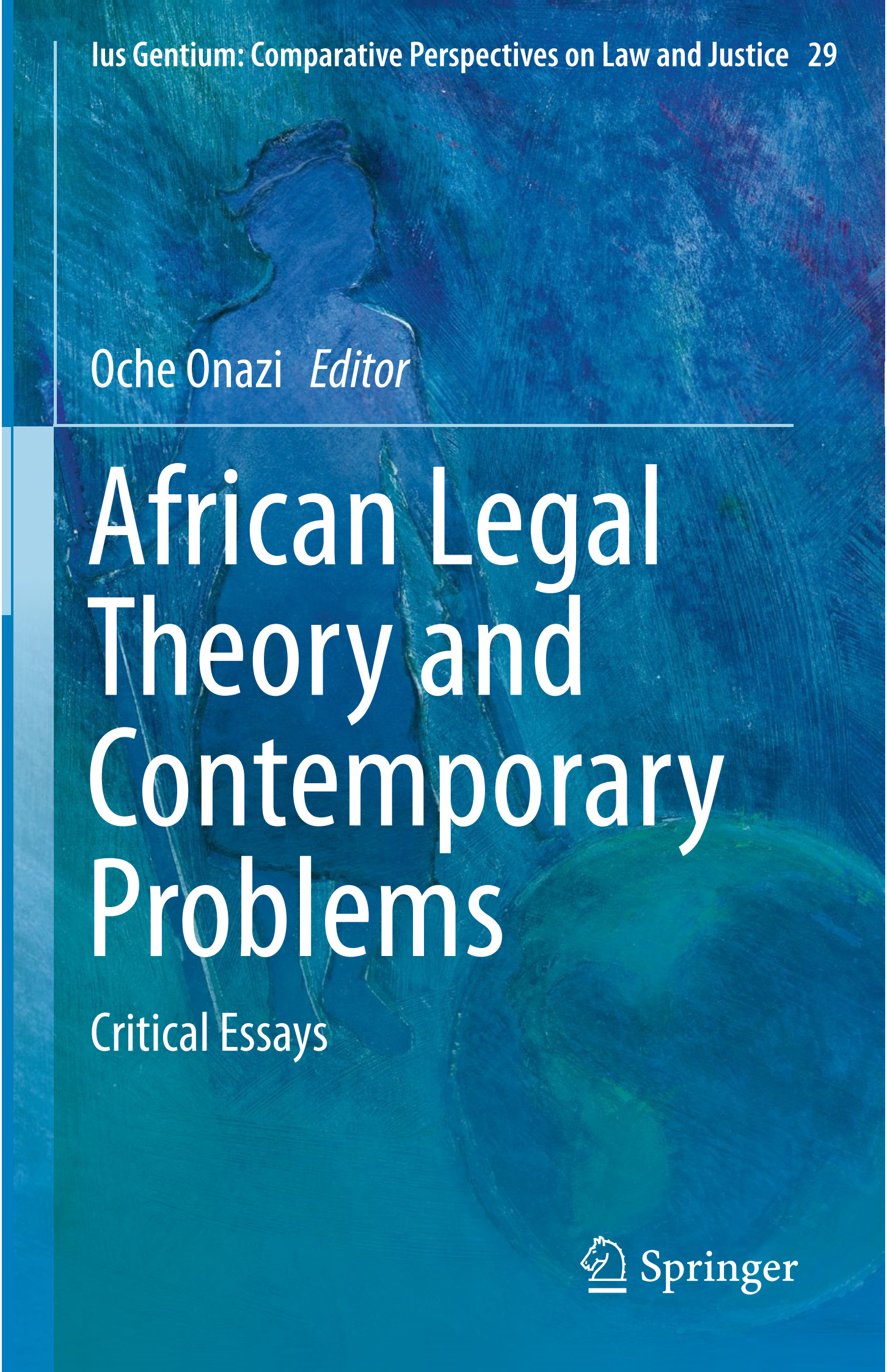

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African Legal Theory and Contemporary Problems

Critical Essays

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Chapter 2
On 'African' Legal Theory: A Possibility, an Impossibility or Mere Conundrum?

Chikosa Mozesi Silungwe

2.1 Introduction

Does an identifiable body of African legal theoretical or philosophical scholarship exist? If such scholarship exists, what is its nature or form? Is it folly for (mainstream) discourse to confront the global phenomena without any consideration of the African legal theoretical or philosophical scholarship? While these are important queries, however, I suggest that the inquiry ought to move a number of steps backwards. Before we advocate the reflection of 'African' legal theory, jurisprudence or philosophy in resolving 'contemporary global challenges', we must ask this question: Is the conception of 'African' legal theory, jurisprudence or philosophy a possibility, an impossibility or a mere conundrum? In this Chapter, I argue that if the descriptor 'African legal theory, jurisprudence or philosophy' suggests a purist conception of 'African' legal theory, jurisprudence or philosophy then the intellectual enterprise so undertaken is futile and impossible.[1] In the context of the creation of 'knowledge' under the Enlightenment period and indeed in light of the capitalism and the colonialism projects that underpinned modernity, there has been a pervasive process of 'othering'; of declarations of 'not-knowledge'. A related point here is that the human as a social being constructs a 'reality' she responds to. This construction of reality is influenced by what is presented as 'memory'. Given how pregnant 'reality' and 'memory' are, I contend that it is more plausible to envision 'African' legal theory, jurisprudence or philosophy under Homi Bhabha's idea of 'culture's in-between' (Bhabha 1996, pp. 53–60); which denies a purist conception of 'culture' and emphasizes the diversity of influence (1996). This interpretation is pertinent since in the

[1] See also Woodman and Obilade (1995, pp. xxiv–xxvi).

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consideration of 'Africa' as a space and the received-ness of 'law' and 'the legal' in that space, the understanding of any phenomenon as 'African' ought to be a nuanced engagement. I am not denying the ability of the constituency re-identified as 'African' to *know* or to *think*. I am suggesting that scholarship must, first, acknowledge that the violence of modernity on 'knowledge' or 'thought' has been far-reaching and deep-rooted. Second, the de-Europeanization or de-Americanization among the authorship of (supposedly) 'African' legal theory, jurisprudence or philosophy does not necessarily imply that the underlying conceptions of the resultant scholarship are not rooted in modernity. An approach to what may be called 'African' legal theory, jurisprudence or philosophy based on the idea of 'culture's in-between' acknowledges two things: First, the convoluted socio-political environment of 'law' or the 'legal' in Africa (or in the African) which permeates into its theory, jurisprudence or philosophy. Second, the diversity of influence that underlies the 'culture's in-between' thesis presents a window for the consideration of what is being termed 'African' in theory, jurisprudence or philosophy in confronting global phenomena.

2.2 The Thesis on African Legal Theory

It is more precise to talk of the theses on African legal theory. I identify at least three here. The first one – what I call the sentimentalist approach – states that African legal theory is a pre-colonial repertoire of 'norms' with historical continuity (for example, Elias 1962, 1971; Okoth–Ogendo 1989). The second one – what I call the revisionist approach – states that African legal theory is a colonial invention with a historical specificity and whose core purpose was to entrench colonial capitalism and late imperialism (Snyder 1981, pp. 90–121, 1984, p. 34; Fitzpatrick 1984, p. 20; Seidman and Seidman 1984, p. 44; Chanock 1985; Ranger 1983, pp. 211–262; Mamdani 1996). The third one is the legal pluralist approach. Here, the proponents argue that the analysis of the lived reality of the 'indigene' society is critical; whereby State or lawyers' (customary) law may be recreated and re-interpreted to serve interests of the 'indigene' society (Benda–Beckmann 1984, p. 28; Woodman and Obilade 1995, pp. xi–xxvi).

The conception of African 'customary' law, for example, assists to elaborate upon the three approaches: Under the sentimentalist approach, the extent of the survival, transformation and historical continuity of the norms are often taken for granted. In relation to land, 'customary' (land) tenure has a communitarian *ethos*. Indeed, once colonial rule got entrenched, the communitarian *ethos* of 'customary' (land) tenure was 'profoundly shaped' and often served the interests of the colonial State, private Europeans and an African elite comprising mostly of male, African chiefs and an emergent male-dominated entrepreneurial class (Peters 2009). Peters (2009, p. 1317) has observed that this communitarian *ethos* to 'customary' land tenure stemmed from a patronizing, imperial attitude amongst the early colonial administrators and missionaries who viewed 'communal' tenure as inferior to individual, private landholding that was pervasive, for example, under the English

landholding system. This process of 'shaping' often led to a restatement of 'customary' law of a colony.[2]

Some of the most prolific proponents of the revisionist approach include Francis Snyder, Peter Fitzpatrick, Martin Chanock, Mahmood Mamdani, Anne and Robert Seidman, Terence Ranger and VY Mudimbe (2004). These proponents have criticized the sentimentalist approach on the grounds that it reifies a normative continuity from pre-colonial to colonial (African) society; they also raise methodological concerns relating to the ascertainment of the 'norms'; and more critically, they argue that the interface between the colonial ruler and the male, African elite has produced that which has been called 'customary' law and has been applied in the colonial, 'native' courts (for example, Roberts 1984). They also argue that the violence occasioned by the incidence of colonialism in Africa, for example, entails that the erstwhile 'acephalous' African groups were, in the words of Roberts, subjected to 'discontinuities, abrupt transition and coercive domination' (Roberts 1984, p. 3). Fitzpatrick (1984, p. 20) and Snyder (1984, p. 34) have gone on to argue that this 'shaping' is generally imbricated in the capitalist mode of production. Economic and political interests have greatly influenced the interpretation and re-interpretation of the 'customary' space (Fitzpatrick above; Snyder above). The 'myth' of the 'customary' space, it has been argued, was a necessary 'totem' for colonial capitalism to flourish (Fitzpatrick 2001; Paliwala 2003).

The legal pluralist approach acknowledges the effect of colonial capitalism and late imperialism on 'Africa' and the 'African'. However, this approach suggests that the existence of an African legal theory 'may be distinguished by a predominant concern with characteristic features of African law' (Woodman and Obilade 1995, p. xi). In any event, the sentimentalist and legal pluralist approaches are complementary. In this case, the proponents of the legal pluralist approach argue that it is perilous to differentiate an 'understanding' of the norms of African legal theory that have been passed down generations of State agents or intra-community from the 'lived' reality of the 'indigene' society (Snyder 1981, 1984).

However, reality raises its own conceptual challenges. It has been argued that reality is a mosaic that is subjective and, among other things, it is prone to the complexities of perception, depth of knowledge, and interpretation (Bless 2004; Bourdieu 1990). Hence, to the extent that 'reality' – as lived or otherwise – is prone to construction, the legal pluralist approach to the African legal theory is tenuous.

The three theses to African legal theory revolve around the existence or lack of a particular, purist conception of 'culture'. I return to the point under Sect. 2.4 below. Suffice it to say that, indeed, the debate that ensues here raises question in relation to what constitutes 'Africa'. Is it merely a space, a body of *gnosis* or both? I proceed on the basis that any discussion of African legal theory must acknowledge that 'Africa' may be conceptualized as a space and not an exclusive and purist body of knowledge. In this way, it is possible for scholarship to acknowledge that the violence of modernity on 'knowledge' or 'thought' has been far-reaching and deep-rooted.

[2] In the case of the Malawi, for instance, one finds a restatement of customary land law under the Restatement of African Law Project that was done by the School of Oriental and African Studies of the University of London: see Ibik (1971).

2.3 The Creation of 'Knowledge': The Legacy of Modernity

I propose two flaws with a purist African legal theory in light of the creation of 'knowledge' under the Enlightenment and the legacy of modernity. This is the first flaw: In the context of the creation of 'knowledge' under the Enlightenment period and indeed in light of the capitalism and the colonialism projects that underpinned modernity, there has been a pervasive process of 'othering'; of declarations of 'not-knowledge'. I reiterate the views of Boaventura de Sousa Santos in 'Beyond Abyssal Thinking' here (Santos 2007). 'Beyond Abyssal Thinking' is a biting polemic on the creation of 'knowledge' and the attendant processes of 'othering'. Santos demonstrates that a harsh process of 'othering' through the making of the 'visible' and the making of the 'invisible' has always been the foundation of modernity. He contends that, in fact, the 'greatest manifestations of abyssal thinking' are modern knowledge and modern law on the back of their claim to scientific truth. Santos states,

> Modern knowledge and modern law represent the most accomplished manifestations of abyssal thinking. They account for the two major global lines of modern times, which, though being different and operating differently, are mutually interdependent. Each one creates a sub-system of visible and invisible distinctions in such a way that the invisible ones become the foundation of the visible ones. In the field of knowledge, abyssal thinking consists in granting to modern science the monopoly of the universal distinction between true and false, to the detriment of two alternative bodies of knowledge: philosophy and theology. The exclusionary character of this monopoly is at the core of the modern epistemological disputes between scientific and nonscientific forms of truth.[3]

But is this surprising? Modernity has been driven by a triumvirate of Enlightenment-based knowledge, colonialism and the capitalism project. Indeed, modernity when envisaged as a value system that puts at its core reason, the individual, and social progress, the creation of 'knowledge' may be easier to comprehend (Comeliau 2002). First, reason involves the explanation of 'matter' that originally was understood in the context of a divine authority. Hence, the nature of 'knowledge' that was made visible has a predominantly European tradition. The arts and humanities, the social sciences, and the natural sciences in the academy have a distinct Enlightenment origin. Anything else outside the Enlightenment is 'not-knowledge' and immediately invisible (Santos 2007). Second, the individual is the main driver. The centrality of the individual is based on the myth of equality of footing in terms of choice, access, principle, resources and opportunity (Comeliau 2002, p. 24). Third, social progress is defined under an economic prism of prosperity, growth or poverty. It becomes the sole goal of the livelihood of the individual. Comeliau observes,

> Beginning with the Enlightenment, this individual rationality is applied to the *goal of social progress*, a concept we have now integrated so deeply that we are scarcely capable of understanding its radical novelty [.][4]

[3] Santos (2007, p. 3).

[4] Comeliau (2002, p. 24) [emphasis in the original].

The flipside is Mudimbe's conception of 'Africa' and 'identity'. He begins with an unswerving probe as follows,

> The question of African identities generally imposes itself as obvious and rarely interrogates its two components, 'Africa' and 'identity.' What do they mean and since when, exactly? Moreover, and more importantly, there is always, implicit, another question: Who's speaking, and from which intellectual background, and in order to produce what and communicate a knowledge to whom?[5]

On account of the Enlightenment, Mudimbe argues that 'Africa' as a space – certainly sub-Saharan Africa – has been a victim, at best, or a mimic at worst, of the 'colonial library'. It is impossible, in his view, to conceive of a purist, body of knowledge that is 'Africa' or 'African'. This then leads to yet another perspective of an understanding of the legacy of modernity: The Enlightenment discovered disciplines and valorized salvation, power-knowledge and education conceived as *doxa* as opposed to *epistème* (Carmen 1996, p. 60).[6] The most poignant exposition of the disciplines is through what Homi Bhabha calls mimicry. He states,

> The discourse of post-Enlightenment English colonialism often speaks in a tongue that is forked, not false. If colonialism takes power in the name of history, it repeatedly exercises its authority through the figures of farce. For the epic intention of the civilizing mission, 'human and not wholly human' […] often produces a text rich in the traditions of *trompe l'oeil*, irony, mimicry, and repetition. In this comic turn from the high ideals of the colonial imagination to its low mimetic literary effects, mimicry emerges as one of the most elusive and effective strategies of colonial power and knowledge.[7]

Bhabha then concludes thus,

> The success of colonial appropriation depends on a proliferation of inappropriate objects that ensure its strategic failure, so that mimicry is at once resemblance and menace.[8]

The second flaw with a purist conception of African legal theory is this: Beyond the gloom arising out of the legacy of modernity in the context of knowledge-production, an agitation for a purist African legal theory, jurisprudence or philosophy is tenuous on the basis of two other limbs: reality and memory. The human as a social being constructs a reality she responds to. Social constructionism scholars such as Peter Berger and Thomas Luckmann have argued that while social practices of human beings shape or construct the 'reality', at the same time these human beings may experience (or seek to experience) this 'reality' as if it is fixed or pre-ordered (Berger and Luckmann 1971).[9] In other words, human beings construct their (social) world which then becomes the 'reality' (Berger and Luckmann above; Burr 2003, pp. 185–190). Within these parameters, 'reality' is a 'contested space'. These then resonates with Mudimbe's colonial library or Bhabha's query on mimicry. In relation to memory, I will reiterate Zygmunt Bauman's observations.

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[5] Mudimbe (2004).

[6] On the disciplines: See Foucault (1991).

[7] Bhabha (1984, p. 126) [internal citation omitted].

[8] Bhabha (1984, p. 127).

[9] See also Burr (2003), especially Chap. 9.

He has argued that in the post-Enlightenment period, memory – or more precisely, 'collective memory' – is intimately tied with the colonial encounter (Bauman 2009). Indeed, the traditions, narratives and practices produce a group psychology that is (often) contradictory.

Finally, how do we conceive of the de-Europeanization or de-Americanization among the authorship of African legal theory? I assert as follows: mere de-Europeanization or de-Americanization among the authorship of 'African' legal theory, jurisprudence or philosophy should not quickly presuppose a 'purist' African legal theory. What ought to be crucial here is the violence and indeed the ring fencing modernity has had on 'knowledge-production' (Santos 2007; Comeliau 2002). Hence, the fact that the authorship of 'African' legal theory has been de-Europeanized or de-Americanized does not mean the scholarship is not rooted in modernity. I dare say, of course, it is. This is the case given the receivedness of 'law' or the 'legal' in Africa the space. The 'African' law school is at once Anglo-, Franco-, or Lusophone-based. Ahiauzu, for instance, acknowledges this dilemma that comes with mere de-Europeanization or de-Americanization among the authorship of African legal theory in the following manner,

> An obvious problem could however be that having been trained in the Western tradition of legal theory […] we are ill-equipped to tackle the project. Our thinking with relation to law is fundamentally Western and in order to successfully accomplish tasks in African legal theory we would have to, as it were 'think outside the box'. We would have to create a new box to think in. In order to think differently we would require a different 'frame' from which to think. But even that would still require us to set out what it means to be African. However, herein could lay our special advantage – that we are able to explore two traditions and thereby get a better understanding of law. In trying to break out of the box we would be challenging the presumptions on which the box is founded. We would be able to discover another world in legal theory that is not Western. We would also be able to engage in comparative studies and better explore all the possible ramifications of legal concepts that the limits of boxes may deny us.[10]

2.4 What 'Culture's In-between' Offers

'African' legal theory, jurisprudence or philosophy may be conceptualized under Bhabha's idea of 'culture's in-between'. My proposition is as follows: An approach to what may be called 'African' legal theory, jurisprudence or philosophy based on the idea of 'culture's in-between' acknowledges two things: First, the convoluted socio-political environment of 'law' or the 'legal' in Africa (or in the African) which permeates into its theory, jurisprudence or philosophy. Second, the diversity of influence that underlies the 'culture's in-between' thesis presents a window for the consideration of what is being termed 'African' in theory, jurisprudence or philosophy in confronting global phenomena.

[10] Ahiauzu (2006).

What then is the conception of ‘culture’s in-between’? In a few paragraphs it is a daunting task to do justice to Homi Bhabha’s conception of ‘culture’s in-between’. Bhabha’s starting point is that there is no ‘pure culture’. In other words, Bhabha forcefully argues that the notion of ‘pure culture’ is a myth. Bhabha begins from T.S. Eliot and observes,

> What is at issue today is not the essentialized or idealized Arnoldian notion of ‘culture’ as an architectonic assemblage of the Hebraic and the Hellenic. In the midst of the multicultural wars we are surprisingly closer to an insight from T. S. Eliot’s *Notes towards the Definition of Culture,* where Eliot demonstrates a certain incommensurability, a necessary impossibility, in *thinking* culture. Faced with the fatal notion of a self-contained European culture and the absurd notion of an uncontaminated culture in a single country, he writes, ‘We are therefore pressed to maintain the ideal of a world culture, while admitting it is something we cannot *imagine.* We can only conceive it as the logical term of the relations between cultures.’ The fatality of thinking of ‘local’ cultures as uncontaminated or self-contained forces us to conceive of ‘global’ cultures, which itself remains unimaginable. What kind of logic is this?[11]

Bhabha points out that while Eliot made his point in the context of the colonial encounter; the assertion remains valid in the ‘contemporary condition of third world migration’.[12] Bhabha quotes Eliot extensively as follows,

> The migrations of modern times […] have transplanted themselves according to some social, religious, economic or political determination, or some peculiar mixture of these. There has therefore been something in the removements analogous in nature to religious schism. The people have taken with them only a part of the total culture. […] The culture which develops on the new soil must therefore be bafflingly alike and different from the parent culture: it will be complicated sometimes by whatever relations are established with some native race and further by immigration from other than the original source. In this way, peculiar types of culture-sympathy and culture-clash appear.[13]

Hence, on the basis of the ‘part culture’, ‘culture-sympathy’ and ‘culture-clash’, Bhabha argues for the conception of ‘culture’s in-between’. He states,

> This ‘part’ culture, this *partial* culture, is the contaminated yet connective tissue between cultures – at once the impossibility of culture’s containedness and the boundary between. It is indeed something like culture’s ‘in-between’, bafflingly both alike and different. To *enlist* in the defence of this ‘unhomely’, migratory, partial nature of culture we must revive that archaic meaning of ‘list’ as ‘limit’ or ‘boundary’ Having done so, we introduce into the polarizations of liberals and liberationists the sense that the translation of cultures, whether assimilative or agonistic, is a complex act that generates borderline affects and identifications, ‘peculiar types of culture-sympathy and culture-clash’. The peculiarity of cultures’ partial, even metonymic presence lies in articulating those social divisions and unequal developments that disturb the self-recognition of the national culture, its anointed horizons of territory and tradition. The discourse of minorities, spoken for and against in the multicultural wars, proposes a social subject constituted through cultural hybridization, the overdetermination of communal or group differences, the articulation of baffling alikeness and banal divergence.[14]

[11] Bhabha (1996, pp. 53–54) [internal citations omitted].

[12] Bhabha (1996, p. 54).

[13] Eliot in Bhabha (1996, p. 54).

[14] Bhabha (1996, p. 54).

Bhabha contends that an understanding of 'culture' as precisely 'culture's in-between' ought to be based on what he calls 'discursive doubleness' (Bhabha 1996, p. 58). Discursive doubleness is not based on duality or binarism. It is based on hybridity; on strategies of hybridization. Bhabha states,

> Strategies of hybridization reveal an estranging movement in the 'authoritative', even authoritarian inscription of the cultural sign. At the point at which the precept attempts to objectify itself as a generalized knowledge or a normalizing, hegemonic practice, the hybrid strategy or discourse opens up a space of negotiation where power is unequal but its articulation may be equivocal. Such negotiation is neither assimilation nor collaboration. It makes possible the emergence of an 'interstitial' agency that refuses the binary representation of social antagonism. Hybrid agencies find their voice in a dialectic that does not seek cultural supremacy or sovereignty. They deploy the partial culture from which they emerge to construct visions of community, and versions of historic memory, that give narrative form to the minority positions they occupy; the outside of the inside: the part in the whole.[15]

In this way, I interpret Bhabha's account of 'culture's in-between' as inherently wary of binaries; or being dialectical. It is possible however to suggest that 'culture's in-between' is a 'dialectic' phenomenon that does not necessarily lead to a Hegelian concrete – the synthesis – but to a uniquely Bhabhaian 'third space' (Bhabha 1995). In fact, in an interview with WJT Mitchell, Bhabha has said,

> I'm looking for a form of the dialectic without transcendence, as you put it. But you are also right when you say that there are certain dialectical structures, certain conceptual pairings, that you can live neither within nor without. To write contra Hegel requires that you 'work through' Hegel toward other 'supplemental' concepts of dialectical thinking. You do not surpass or bypass Hegel just because you contest the process of sublation. The lesson lies, I think, in learning how to conceptualize 'contradiction' or the dialectic as that state of being or thinking that is 'neither the one nor the other, but something else besides, Abseits,' as I've described it in *The Location Of Culture*.
>
> This is where the influence of Walter Benjamin has been formative for me. His meditations on the disjunctive temporalities of the historical 'event' are quite indispensable to thinking the cultural problems of late modernity. His vision of the Angel of History haunts my work as I attempt to grasp, for the purposes of cultural analysis, what he describes as the condition of translation: the 'continua of transformation, not abstract ideas of identity and similarity.' His work has led me to speculate on differential temporal movements within the process of dialectical thinking and the supplementary or interstitial 'conditionality' that opens up alongside the transcendent tendency of dialectical contradiction – I have called this a 'third space,' or a 'time lag.' To think of these temporalities in the context of historical events has led me to explore notions of causality that are not expressive of the contradiction 'itself,' but are contingently effected by it and allow for other translational moves of resistance, and for the establishment of other terms of generality.[16]

Bhabha here asserts that the 'third space' resides within the contradiction and it is in this space of contradiction that 'culture's in-between' thrives. Within the 'third space', other norms or 'other terms of generality' emerge. I will discuss three examples to make the point: anti-witchcraft laws in Africa; anti-homosexuality laws in Africa; and *ubuntu* as a human rights norm.

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[15] Bhabha (1996, p. 58).

[16] Bhabha (1995).

2.4.1 *On Anti-witchcraft Laws*

Witchcraft, as a belief system, typically entails that a person has the power to inflict (usually) an injury through supernatural means. The belief in witchcraft is pervasive in Africa (for example Quarmyne 2011, p. 478). Anti-witchcraft laws are colonial constructs meant to assimilate the native African into a 'civilized' form of belief based primarily on Christian doctrine. These laws proscribe – through criminal law – the native African's quest for the metaphysical *why* to an 'occurrence'; which can be 'a misfortune, disease, accident, natural disaster and death' (Byrne 2011). Hence, in a number of English common law jurisdictions in Africa, the typical criminal law on witchcraft makes it an offence to accuse another person of witchcraft or indeed to profess the belief in witchcraft. For example, under the Malawian Witchcraft Act of 1911, witchcraft is not recognized at law. It is an offence to allege that someone practices witchcraft. Section 4 of the Act provides,

> Any person who, otherwise than in laying information before a court, a police officer, a Chief, or other proper authority, accuses any person with being a witch or with practising witchcraft or names or indicates any person as being a witch or wizard shall be liable to a fine of […] and to imprisonment for five years.

It is also an offence for one to claim that he practices witchcraft. Section 6 of the Act provides,

> Any person who by his statements or actions represents himself to be a wizard or witch or as having or exercising the power of witchcraft shall be liable to a fine of […] and to imprisonment for ten years.

In the latter case, a person is charged with pretending witchcraft. Section 5 of the Malawian Witchcraft Act also criminalizes the employment or solicitation of a witchfinder. In practice, it is often the 'accused witch' who often faces the wrath of the anti-witchcraft laws (Byrne 2011). The law enforcers in Malawi seem to implicitly recognize the existence of witchcraft.

Further, in the post-Cold War period, most African countries have adopted largely, liberal democratic constitutions. These constitutions provide, among others, the right to the enjoyment of one's culture, and the freedom of expression including belief. The constitutions also typically have a proscription against statutory laws or 'customary' laws or practices that are inconsistent with the constitutions themselves.

Indeed, the Malawian example I have highlighted above reveals a delicate balancing act between the constitutional provisions on the right to culture and freedom of expression on the one hand and the criminalization of witchcraft as a belief system on the other. Similar tensions emerge in South Africa, Zimbabwe, Tanzania and Zambia, for example, where the law does not recognize witchcraft as a belief system and criminalizes the system accordingly. Cameroon presents a unique case where the State legal system recognizes witchcraft as a belief system but still criminalizes it (see Quarmyne 2011). Either way, the interface between a purported 'indigene' 'culture'–norm and a norm of received law results in the transmogrification of the former. The received legal norm is defining the ('cultural') status quo.

2.4.2 *On Anti-homosexuality Laws*

Here, I will not go into a detailed discussion of the homosexuality debate in Africa. I simply point out that the global North-global South 'cultural' linkages underpinning the debate have made it the most polarized and emotive. In a number of English common law jurisdictions, the provisions in a criminal code that deal with 'carnal knowledge against the order of nature' or those on 'gross indecency' have been used against persons that engage in 'homosexual' practices. Indeed the provisions under these criminal codes were largely influenced by the morality of Victorian England and spread throughout the British Empire as part of the colonizing and civilizing project (see for example Read 1963). Hence, the period between the mid-nineteenth century CE and the end of the First World War must have witnessed plenty an encounter of a British colonizer telling the colonized local what sexual intercourse according to the order of nature was, or indeed, what ('acceptable') decency was. There were consequences for engaging in carnal knowledge against the order of nature, or engaging in acts of gross indecency. At the turn of the twenty-first century CE, we witness a predominantly indigene African religious right wing that is vehemently opposed to lesbian, gay, bisexual and transgender rights on account of 'culture'. The 'culture' argument has also meant that any suggestions to repeal the laws on sodomy based on the morality of Victorian England are met with even more vehemence. Unlike the case with anti-witchcraft laws, here we have a situation where a norm of received law and morality is actually appropriated as an indigenous one. The received legal and moral norm is appropriated as the ('cultural') status quo.

Again, some largely, liberal democratic constitutions recognize lesbian, gay, bisexual and transgender rights through the proscription of discrimination on account of a person's sexual orientation. Notable among these is the Constitution of South Africa. Section 9 of the South African Constitution provides,

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, **sexual orientation**, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

However, the recognition of the legal norm on sexuality in a constitution as text has not meant that incidents of homophobia are inexistent. In the case of South Africa, despite a clear provision on non-discrimination on the basis of sexual orientation, cases of homophobic violence have been reported in the country.

In Malawi, Section 20 of the Constitution provides,

(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or **other status** or condition.
(2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

It is possible to interpret 'other status' under subsection (1) of section 20 of the Malawian Constitution more expansively to include the recognition of lesbian, gay, bisexual and transgender rights. The matter has not benefitted from judicial interpretation. Suffice it to say that the debate on homosexuality in Malawi proceeds on the basis that the Constitution or statutory laws do not recognise non-heterosexual orientation. In sum, from a comparative constitutional perspective, what the positions under the South African and Malawian constitutions confirm is that the recognition of a legal or moral norm under a ('cultural') status quo is not necessarily dependent on the constitution as the text.

2.4.3 *On* Ubuntu *as a Human Rights Norm*

The discussion on *ubuntu* seeks to highlight the problems of precision of language when an indigenous norm is appropriated into (mainstream) discourse. The discussion also demonstrates an instance where an indigene African norm has a positive complementary interface with mainstream discourse. Indeed, in the latter case, the uniqueness of the positive complementarity lies in the fact that it is based solely on the conceptual properties of the indigene African norm.

The term *ubuntu* is *Nguni* which may be loosely translated as 'personhood, humanity, humanness and morality' (Mokgoro 1998; Nkhata 2010, p. 31). Scholars do concede that the term is elusive to define with precision. Mokgoro, for example, notes,

> The concept *ubuntu*, like many African concepts, is not easily definable. To define an African notion in a foreign language and from an abstract as opposed to a concrete approach to defy [sic] the very essence of the African world-view and [sic] can also be particularly elusive. I will therefore not in the least attempt to define the concept with precision. That would in any case be unattainable. In one's own experience, *ubuntu* it seems, is one of those things that you recognise when you see it. I will therefore only put forward some views which relate to the concept itself and like many who wrote on the subject, I can never claim the last word. In an attempt to define it, the concept has generally been described as a world-view of African societies and a determining factor in the formation of perceptions which influence social conduct.[17]

While, Mokgoro proffers a way of translating *ubuntu* as a 'world-view', other scholars have also conceived of the norm as 'a philosophy of life' or 'a social value'. The depiction of *ubuntu* as a philosophy of life stems from its full *Nguni* expression

[17] Mokgoro (1998, p. 2).

umuntu ngumuntu ngabantu; which is literally translated as 'a person is a person through others' (Nkhata 2010, p. 34). Nkhata (2010, pp. 36–37) has argued that *ubuntu* as a philosophy of life must be understood as interdependence and not communalism or communitarianism. *Ubuntu* here is almost akin or in fact central to the state of human being-ness. The other case where *ubuntu* is conceptualized as a social value is understood as 'group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity' (Mokgoro 1998, p. 3). Indeed, *ubuntu* has traversed all aspects of life including religion, politics, law, business, social security, education, healthcare, gender and globalization (Nkhata 2010, p. 38).

Ubuntu as the social value of *human dignity* is the most visible in human rights discourse. The link between *ubuntu* and human dignity is in recognition at international law of the 'inherent worth' of every human being (Kamchedzera and Banda 2009, pp. 76–81). Human rights discourse recognize that human dignity cannot be lost (for example, Kamchedzera and Banda, above). Perhaps the link between *ubuntu* and human dignity may also be discerned from the Kantian notion of dignity; a human being is not a means but an end in himself or herself (Kant in Kamchedzera and Banda 2009, p. 77). If *ubuntu* and Kantian dignity define human being-ness, it follows that the parallels are swiftly made at international law. Hence, *ubuntu* as a norm in human rights discourse represents an instance where an 'African' norm and a norm rooted in modernity are complementary. There is no transmogrification. There is no appropriation of one over the other.

2.4.4 Convolution, Socio-political Environments, Diversity of Influence

With the three examples above, I have endeavoured to demonstrate in graphic terms the futility of a purist notion of African legal theory. The stories on anti-witchcraft laws and anti-homosexuality laws seek to demonstrate the internal contradictions that arise from monocultural reification of legal (or even moral) norms. The inconsistencies in the treatment of the same norms under a constitutional order on the one hand and a statutory setting on the other reveal the socio-political factors that may underwrite a legal framework. A number of personas have played lead acting roles in the historical narrative of 'knowledge', and the legacy of modernity in Africa as the space. The persona include the European missionary, the European colonizer, the European entrepreneur, the indigene African male, and the nascent indigene African right wing religious leader. These leading actors, however, thrive with a supporting cast – a 'vagabond population' – which instrumentally leads to the Foucauldian subjectification of the vagabond population as the 'uncivilized' or 'marginalized' or 'minority' (Rabinow 1984, pp. 3–29). It is possible to argue that a universal narrative of 'culture' becomes of a form of discipline. Indeed, this has been the critic of liberalism which, as it were, emphasized the universality of

‘culture’; read ‘western culture’. Similarly, agitations for a ‘purist’ African legal theory, jurisprudence or philosophy falls within the same trappings of a universalizing narrative of ‘culture’.

2.5 Conclusion

The central point I am making is this: A purist conception of ‘African’ legal theory, jurisprudence or philosophy is an intellectual enterprise that is futile and impossible. An approach to what may be called ‘African’ legal theory, jurisprudence or philosophy based on the idea of ‘culture’s in-between’ acknowledges two things: First, the convoluted socio-political environment of ‘law’ or the ‘legal’ in Africa (or in the African) which permeates into its theory, jurisprudence or philosophy. Second, the diversity of influence that underlies the ‘culture in-between’ thesis presents a window for the consideration of what is being termed ‘African’ in theory, jurisprudence or philosophy in confronting global phenomena. Hence, a purist conception of ‘African’ legal theory, jurisprudence or philosophy assumes a perilous monolithic, homogenous and universal interpretation of a much more nuanced territory.

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