

Legal Positivism and the African Legal Tradition: A Reply

Olufemi Taiwo

THERE IS an emergent but fast consolidating tradition of philosophizing about African phenomena—political, economic, epistemological, etc. This tradition, literally speaking, freezes African development in history, politics, law, philosophy, etc., at the point where the first set of Africans to do so made contact with Europeans. As far as the purveyors of this tradition are concerned, whatever came after this contact, contaminated as it is by the impact of this contact, is not and may not be called African. This is the dominant orientation in African philosophy today. The recent piece on “Legal Positivism and the African Legal Tradition” by F. U. Okafor (*International Philosophical Quarterly*, 24 [1984], 157–164) is located within this tradition. In this rejoinder, I take issue with Okafor on a number of important points arising specifically from his paper but generally present in various works done from the perspective of this tradition. Even though the assumptions of this tradition are seriously questionable and, in places, have been shown to be false,¹ the appearance of Okafor’s paper convinced me that the proponents of this viewpoint somehow believe that if they repeat this historical distortion often enough, persistence alone will transform it into a truth.

As a consequence of the long Western occupation of the African continent through both informal empire and colonialism (and neo-colonialism), many traditional African institutions have undergone radical mutations such that their African pedigree may no longer be obvious. However, others have successfully resisted the crush of Western acculturation. Yet others have survived enough to enjoy a degree of peaceful coexistence with their Western opposites. One such set of institutions which continues to exist opposite Western ones is “the African legal institution.”

According to Okafor, although there are elements of western-type legal systems and institutions inherited from colonialism which are not “altogether alien to the African legal tradition,” there are others whose principles are entirely alien to the traditional African legal experience (Okafor, “Legal Positivism,” p. 157). The specific one Okafor discusses in this paper is Legal Positivism. “Legal positivism is a theory which recognizes as valid laws only such enforceable norms as are enacted or established by the instrument of the State” (*ibid.*). Based on this definition the rest of the paper is devoted to showing “how [legal positivism] is not only contrary to, but also militates against the African legal experience in particular and African ontology in general” (*ibid.*).

I shall not seek to respond to all the contestable points raised in Okafor’s paper,

¹See for instance Paulin Houtondji, *African Philosophy: Myth and Reality* (Bloomington: Indiana Univ. Press, 1983).

especially those dealing with what he calls the African ontology, the African *Weltanschauung*, etc. Such a detailed response will warrant a whole paper whereas this is just a rejoinder. In what follows, I focus on two issues which I believe lie at the heart of Okafor's paper: his description of the African legal tradition and his account of legal positivism.

Okafor's paper is replete with locutions like "the African legal tradition," "traditional Africans," "African legal experience," "typical African legislative assembly," "the African," "the traditional African legal values," "traditional African values," "our traditional system," etc. To someone who is not very familiar with the philosophical scene in Africa, such locutions are unproblematic. To many Westerners who, in their ignorance, believe that all Africans are the same, the locutions will not draw any attention. However, those of us who have followed the often sterile debate on the existence(?) of African philosophy or its non-existence cannot fail to notice that the descriptions Okafor uses come from the perspective I alluded to at the beginning of this reply.

Implicit in the affirmation of "the African legal tradition" is the assumption that there is one single legal tradition to which Africans subscribe or at the least one dominant tradition to which most of them subscribe. Beneath talk of "the traditional African" lies the view that this entity is counterposed to or coexisting with "the modern (westernized) African." There is a further assumption that when the wraps of western values, legal, ethical, etc., are removed there will lie the mummified remains of some pristine African personality, ethics, law, etc. practically unaffected by the long occupation of Africa by Western colonialists. Alongside these assumptions is an unfounded expectation that this pristine African reality is *utterly* different from what you will find in other parts of the world.

I argue, on the contrary, that "the African legal tradition," "the African," etc., are all myths invented by their purveyors to camouflage the fact that *they* are shaping diverse African practices to fit *their* theories. On another level, these myths offer somewhat effective stratagems to evade taking responsibility for the often philosophically unsound *melange* their authors serve up as "African philosophy." Let me explain.

Africa is a vast continent. It is proverbially diverse and one of the reasons usually cited for Africa's backwardness is its national and ethnic diversity. Unless one is a very poor student of the social sciences, it is hard to imagine that such a continent with a kaleidoscope of peoples and cultures would share a tradition in anything, especially in the remote past when inter-racial and inter-ethnic communication was not nearly as efficient as it is today. The truth is that Africa, like any other continent, before the coming of Europeans, was characterized by numerous and often strikingly different cultural, linguistic, legal, etc., systems, institutions, and practices. The mechanisms of dispute resolution, adjudication, and promulgation were as different for the Yoruba who developed huge state systems and the Igbo who did not as they were for German *Mark* and Russian *Mir*. To collapse all these traditions into one which prevailed over all the areas is to mistake the common occupation of a geographical continuum for social consensus. To this extent, Okafor's imputation of a single tradition to the whole continent is false. It will not be any less false if he were to rejoin that "the African legal tradition" he speaks about was *merely* dominant. There was no such "dominant" tradition.

If there is no single African legal tradition, it is even less true to talk of "the traditional African." Who is this "traditional African"? Is it the African peasant in the countryside who is already implicated in a monetized economy, who has to share his

or her visual space with the ubiquitous Coca-Cola? Is it the uprooted peasant who is sweating it out in the urban industries, the mines, etc.? Even when we are able to isolate this strange animal in what consists his or her traditionality? The history of the contact with Europe dates back for some Africans to the Middle Ages or even earlier and for some to the 15th century. Is Okafor suggesting that we can ignore or strip away the impact of over 500 years of close contacts either on the consciousness of Africans or on their material existence? This kind of dehistoricized, detemporalized conception of an African can not help provide answers to the nagging questions posed not only in law, but in other areas as well, for the consequences of the contacts with European and other peoples. This conception is part of a mind-set which assumes that an African is an African only when he or she is shown to be different from other human beings. But there is nothing peculiarly African about the questions that various African legal systems evolved to answer: the ordering of social relations, the determination, protection, etc., of entitlements, the protection of life and limb, of possessions and property, etc. The difference can lie only in answers and here there is as much diversity in Africa as in Asia, in Europe, etc. Indeed we find that when Okafor tries to explicate the nature of divine and human laws in "the African legal tradition" (p. 160) his exposition will, without alteration, apply to the same phenomena in Charles V's Holy Roman Empire or Ancient China.

Let us even suppose that there was a time when the reality of Africa was as described by Okafor. What would follow from that? Do Africans ever change? Do Africans not learn new truths every day both from a revision of their old truths and acquisitions from other peoples with whom they come in contact? It is the failure to put the fact of change and historicity at the heart of his paper that made him ignore the most significant problems of legal positivism in an African context.

Of course Okafor is right that legal positivism is dominant in anglophone Africa. However, the most important failing of legal positivism does not lie in its un-Africanness. The point rather is that even if it is African, legal positivism is a bad legal theory and must be rejected as such. Furthermore, in the contexts in which it is dominant, legal positivism provides a very easy way out for unimaginative, squirming judges who wish to dodge responsibility for *their* interpretations of the law. By the myth that judges and other officials of the legal system merely apply but do not interpret the law, legal positivism enables judges and other officials of the legal system to hide under the veneer of having no control over their pronouncements to endorse some of the most unjust and, sometimes, inhuman legal practices in our countries. Instead of wasting precious time and energy on showing that legal positivism falls short of the standards of a mythical African legal tradition, it will have been more interesting to show how legal positivism might have made it easier for judges to escape censure for their roles under, say, Idi Amin in Uganda or Ian Smith in Zimbabwe (then Rhodesia). It is curious that in a paper designed to show the incompatibility of legal positivism and a so-called African legal tradition there was no mention of a single municipal legal system in Africa, past or present. Instead we have numerous extrapolations from unargued assumptions and wishful projections especially in areas dealing with the irremediably religious nature of "African ontology" and its relation with "the African legal tradition" (pp. 160-161).

By professing merely to describe the discontinuity between "the African legal tradition" and legal positivism, Okafor deploys a tactic that many others use who claim to be doing African philosophy. This tactic enables them to avoid assuming responsibili-

ty for defending a viewpoint which, more often than not, is wrong. By serving it up as a description, the unwary observer is lured into believing that there is or may be a corresponding reality. We may agree or disagree on the adequacy of the description but such an agreement or disagreement must be predicated on an initial agreement that the description has content. But what is and ought to be at issue really is a viewpoint, an interpretation, a perspective. Philosophy is not chronicles. Having been deflected, instead of attacking the inadequacy of the perspective, we are nudged into a sterile discussion of the aptness of the description. The philosopher-chronicler goes free, the search for the philosophical "Prester John" goes on, African philosophy remains undone. In this case, too, Okafor has encased *his* viewpoint in "the African legal tradition." He has dodged responsibility.

The second problem in Okafor's piece relates to his account of legal positivism. Needless to say, if he is right in his characterization of legal positivism as a theory which recognizes as valid laws only such as are promulgated by the State, it is obvious that "customary laws, positive international laws, and even conventional constitutional law would fall outside the field of jurisprudence. . ." (p. 159). I wish to point out that it is a serious deficiency in Okafor's scholarship that his paper employs the formulations of legal positivism by Thomas Hobbes and J. Austin. It is a serious omission that H. L. A. Hart's seminal reformulation of legal positivism is not mentioned at all in Okafor's paper. It is a serious omission insofar as it is one of Hart's main aims in *The Concept of Law* (Oxford: Clarendon Press, 1961) to displace the sovereign from his pedestal and exorcise the bogey of the State from legal positivism. In fact, Hart consciously attempts to meet the criticism that charges legal positivism with inability to accommodate societies that have no clearly identifiable sovereign or State. The success or otherwise of Hart's project may be debated, but the fact that he did make the attempt must be acknowledged and confronted in a paper that seeks to show that legal positivism is inapplicable to a large number of human beings in a significant part of the world. It is not an exaggeration to say that a successful demonstration of the incompatibility of legal positivism with several significant, efficient, etc., legal traditions will greatly diminish its appeal. By not confronting Hart, I do not believe that Okafor's project could have succeeded. Nor did it succeed. The sooner African philosophers abandon emotional props like "the African legal tradition," "the traditional African values," etc. for concrete examinations of specific legal traditions which necessarily are hybrid, and other specific philosophical practices, the sooner will we come to do relevant philosophy and one which will contribute to a genuine dialogue with the rest of the world.