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Research Paper

The Place of Natural Law in Kenya's Jurisprudence

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ABSTRACT: The Natural law theory is one of the central theories of jurisprudence. It has had a tremendous effect on various pieces of legislation across the world both at the national and international level. A number Kenya's laws borrow significantly from the Natural law theory. Additionally, much as its influence may be waning, its impact will continue to be felt for many years to come. As such, the paper seeks to illustrate the waning influence yet ever present and perhaps, ever increasing impact of the natural law theory on Kenya's laws.

I. INTRODUCTION

This paper seeks to discuss the place of natural law school in Kenya's jurisprudence. The discussion will seek to highlight how the natural law school has influenced various pieces of legislation in Kenya. It will illustrate, through decided cases, how the natural law school has subsequently been applied in different matters handled by the courts. The discussion will begin with a brief overview of the natural law school. It will then proceed to specific thematic areas within the natural school of law. The provisions of various Kenyan laws as well as decided cases will be weaved into the thematic based discussion.

II. AN OVERVIEW OF THE NATURAL LAW SCHOOL

The natural law school is premised on the argument that what "is" the law is based on a higher law dictated by reason and thus is also what the law "ought" to be.[1]By extension therefore, natural law is thought to acquire a sanctity that puts it beyond question.[2] According to Cicero, true law is right reason in agreement with nature, applies to all men and is unchangeable and eternal.[3] The original basis of natural law theory was that law is universal, eternal and unchanging and that there is only one source of law and that the enforcer of this eternal and unchanging law is God.[4] While there have been different natural law theorists over different time periods, there is a common strand that runs through the theories they advanced. This common strand is illustrated by certain common principles found in the arguments advanced by the various natural law theorists. These principles include:[5]

- The existence of absolute values against which the validity of law should be tested.
- The existence of a rational order which can be known by man.
- That a law which lacks moral validity is wrong and unjust.
- That what is good is in accordance with nature and what is evil is contrary to nature.
- That man can become aware of the universal, eternal and comprehensible values, if he observes nature and understands it correctly. Consequently, from these values, he may derive appropriate value statements.

[1] M D A Freeman, *Lloyds Introduction to Jurisprudence* (7thedn, Sweet and Maxwell 2001) 3.
[2] Ibid.
[3] Quoted in W J Hosten, A B Edwards, F Bosman & J Church, *Introduction to South African Law and Legal Theory* (1995) 43-72 at pp 46.
[4] Onony John Paul, *Key Issues in Jurisprudence: An In-depth Discourse on Jurisprudence Problems* (Law Africa Publishing 2010) 17.
[5] Ibid.

These principles are illustrative of the essence of natural law. Freeman puts it succinctly when he states that the import of natural law lies in the constant assertion that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason.[6]

Natural law theorists also came up with the Overlap Thesis which postulates that there is a conceptual relationship between law and morality.[7] Put differently, the central argument of the Overlap Thesis is that there is some kind of nexus, a non-conventional relationship between law and morality and that consequently, the notion of law cannot be fully articulated without some reference to moral solutions.[8]The overlap thesis arguably flows from the natural law principle that laws must have a moral validity in order for them to be regarded as right and just.

III. THE PLACE OF NATURAL LAW SCHOOL IN KENYA'S JURISPRUDENCE

The principle and philosophies of the natural school of law litter various areas of Kenya's jurisprudence. This section seeks to bring to the fore a number of areas which directly flow from the arguments propounded by natural law theorists.

IV. NATURAL LAW AND POLITICAL PHILOSOPHY

The main political philosophers of the natural law school were Thomas Hobbes, John Locke and Jean-Jacques Rousseau. The theories advanced by each of these three philosophers have invariably found enunciation in Kenyan jurisprudence. In his acclaimed treatise, 'The Leviathan', Thomas Hobbes argued that the state of nature is completely devoid of justice and that the world is a state of all against all.[9]He further contends that as a result of a state of everyone looking out only for him or herself, life was solitary, poor, nasty, brutish and short.[10] Consequently, Hobbes came up with what are referred to as Hobbes' Laws of nature which sought to address the concerns he had identified. His second law of nature postulated that there was need to enter into a social contract in order to mutually restrict the power of each person. He contended that pursuant to the social contract, everyone would confer all their power and strength to the state which would consequently be possessed of sovereign power over all its subjects, including the sole prerogative to define what is tantamount to right or just.[11] The ideas advanced by Thomas Hobbes are captured, albeit with some modification, in the Constitution of Kenya 2010. Article 1 of the Constitution of Kenya 2010 vests all sovereign power in all the people of Kenya. It also echoes the arguments advanced by Hobbes as it provides for delegation of the sovereign power of the people to certain state organs namely; Parliament, the Executive and the Judiciary. However, unlike Thomas Hobbes who argued that upon delegation, the state acquires absolute or sovereign power over all its subjects, the Constitution of Kenya 2010 limits the power delegated to the state. It does this through the express requirement that any sovereign power delegated to the state shall be exercised in accordance with the provisions of the Constitution. As such, the state only exercises its power within the confines of the constitution. Furthermore, the constitution provides for the doctrine of separation of powers which is a tool for limiting state power. The court's interpretation of the doctrine of separation of powers is aptly illustrated in *Otieno Clifford Richard v Republic*[12]where the court stated that:

"…The doctrine of separation of powers came into force between the 17th and 18th centuries through the efforts of philosophical luminaries such as Harrington, Montesquieu and John Locke. From the onset, the basic intention of the doctrine was to limit and control the existence and exercise of the state power of the three principal organs of government, namely, the Legislature, the Judiciary and the Executive. Under the doctrine, each of these organs has distinct state functions whose exercise must be checked by the other two, for and on behalf of the people…No one organ should trench on the powers of another…"

John Locke

Like Thomas Hobbes, John Locke also advocated for the need of the existence of the state for different reasons. While Thomas Hobbes saw the state as a necessary entity to facilitate orderly and peaceful coexistence in society, John Locke argued that the state was necessary so as to protect the property rights of individuals. Locke

[6]Freeman (n1) pp 91.

[7] Kenneth EinarHimma, 'Philosophy of Law' (Seattle Pacific University) <http://www.iep.utm.edu/law-phil/> accessed 22 March 2014.

[8] Ibid.

[9] T Hobbes, *Leviathan*(1651) (ed Macpherson, 1968) 238, 232.

[10] Ibid.

[11] Ibid.

[12]Miscellaneous Civil Suit no 720 of 2005, available at eklr <http://kenyalaw.org/caselaw/cases/view/35061/> accessed 22 February 2014.

contends that the state of nature is a state of perfect freedom and equality, but not one devoid of law or rights.[13]He therefore disagrees with Hobbes' assertion that the state of nature was one characterized by inequalities where it was only the fittest that survived and thrived. According to Locke, the only deficiency of life before the social contract was the lack of clearly defined property rights. Consequently, he advocated for a system of government that would guarantee property rights. Put differently, Locke contended that natural law provides individuals living in the state of nature with natural or pre-political rights to life, liberty and property.[14] He disagrees with Hobbes assertion that rights are dependent on the existence of a sovereign lawgiver. On the contrary, he asserts that rights and more specifically, property rights are an intrinsic part of human existence.[15] Locke's arguments on property rights are captured in Article 40 of the Constitution of Kenya 2010.[16]The article is heavily nuanced by Locke's argument about the existence of pre-political rights to life, liberty and property. It recognizes the inherent right to property by expressly forbidding the arbitrary deprivationof an individual's property.[17] Additionally, it forbids the state from curtailing the enjoyment of property rights on such grounds as race, sex, pregnancy, religion amongst others.[18]The extent of the protection accorded to property rights by Article 40 is such that it only allows deprivation of property by the state where it is for a public purpose.[19] However, even where such deprivation occurs, the state must provide adequate compensation to the affected party (ies).[20] Additionally, it must allow such person(s) to seek legal redress in court where they are not satisfied with the process.[21] In *Henry vs. Dubuque and Pacific Railroad Company*,[22] the court was emphatic on the inherently existent nature of the right to property. In the court's words:

'…. the plaintiff needed no constitutional declaration to protect him in the use and enjoyment of his property….to be thus protected and secure is a right inalienable, a right which a written constitution may recognize and declare, but which existed independently of and before such recognition and which no government can destroy….'

From the above discussion, it is arguable that Article 40 of the Constitution of Kenya 2010 seeks to ensure the existence of a stable system of property rights guaranteed by the state. This, in essence, was the central argument of John Locke.

Jean-Jacques Rousseau

In his book, "The Social Contract", Jean-Jacques Rousseau argued that the state of nature in which man lived was primitive without any law or morality. In other words, it was a society characterized by disorder. However, societal developments necessitated the establishment of proper institutions of law that would ensure there was a semblance of order in the society. Therefore, Rousseau argued that individuals had to come together and through a collective will, abandon any claims to natural rights. Individuals would thus be subject to this general will which would in return ensure the preservation of all in the society. The concept of participatory democracy flows from the general will of the people. This is because by having a general will, everyone would be entitled to participate in making laws that governed the society as nobody's will was subordinate to that of another. The Constitution of Kenya 2010 echoes Rousseau's arguments on participatory democracy. Article 1(2) of the Constitution provides that the people may exercise their sovereign power either directly or through their democratically elected representatives. It is, however, important to point out the fact that the constitution goes beyond participatory democracy. Despite the fact that Rousseau was critical of representative democracy, the constitution in Article 2 embraces both participatory and representative democracy. As such, the constitution does not adopt Rousseau's formulation hook, line and sinker.

V. NATURAL LAW AND MORALITY

As had been indicated earlier in this submission, one of the central claims of natural law theory of law is that there is no fine divide between the notion of law and the notion of morality. This section of the paper seeks to illustrate how this claim has influenced various aspects of Kenya's jurisprudence both in terms of

[13] J Locke, *Two Treaties of Government* (1690) (ed P Laslett, 1988) 270-271.
[14] Ibid.
[15] Ibid.
[16] Article 40 of the CoK 2010 deals with the protection of the right to property.
[17] Article 40(2)(a) of the CoK 2010.
[18] Article 40 (2)(b) of the CoK 2010.
[19] Article 40 (3)(b) of the CoK 2010.
[20] Article 40 3(b) (i) of the CoK 2010.
[21] Article 40 3(b) (ii) of the CoK 2010.
[22]2 Iowa 288 (1855).

legislative provisions and judicial pronouncements. The influence of morality on Kenyan law can be seen in a number of legislative provisions which in essence are moralistic rules. Such include sanctions against such acts like abortion, homosexuality and prostitution among many others.

VI. HOMOSEXUALITY

For a long time, it has been argued that homosexuality in all its forms, is contrary to the morals of the people of Kenya. Additionally, according to strict natural law adherents, all homosexual acts are contrary to the order of nature. The dissent against homosexuality has found expression in various pieces of Kenya's legislation. For instance, although the constitution does not explicitly forbid homosexuality, it has provisions whose effect is arguably to implicitly forbid homosexuality especially with regard to the setting up of a family. A provision which readily comes to the fore is Article 45(2) of the Constitution which provides that every adult has the right to marry a person of the opposite sex. The PenalCode [23](hereinafter, the Act) contains more explicit provisions against homosexual acts. Section 162 (c) of the Actmakes it an offence punishable with imprisonment of up to fourteen years for any person who permits a male person to have carnal knowledge of him against the order of nature. In *Julius WaweruPleuster vs. Republic*,[24] the appellant was charged with committing an offence under section 162 of the Penal Code. The facts of the case were that the appellant had sodomized one DM. He thus sought a second appeal against the conviction by the trial court. However, his appeal was disallowed and the court upheld his sentence. The case is illustrative of the fact that the courts will readily invoke section 162 of the Act in dealing with offences of a homosexual nature such as sodomy. Section 163 criminalizes any attempts to commit any of the offences enumerated in section 162. Section 165 makes it felonious for any male person, whether in public or private, to commit any act of gross indecency with another male person. Additionally, the section makes it an offence for any male person to procure another male person to commit any act of gross indecency with him. The spirit and letter of Section 162 is arguably targeted at homosexual acts.

VII. ABORTION

Arguments against abortion flow from both strictly natural law propositions as well as from the overlap thesis. Both of these schools of thought have influenced various pieces of Kenyan legislation.There are those who have argued that abortion should be outlawed because it is contrary to one of the commandments of God which forbids taking away of human life. They further contend that life begins at conception and that as such, abortion should not be permitted because it essentially amounts to killing another human. This argument has found constitutional pronouncement in Article 26 (2) of the Constitution which provides that the life of a person begins at conception. Article 26 (4) is more explicit. It provides that abortion is not permitted except in rare circumstances where the existence of certain conditions necessitates undertaking the procedure. Section 228 of the Penal Code equally espouses the spirit behind the outlawing of abortion.[25] More specifically, Sections 158-160 of the Penal Code address abortion. Section 158 makes it an offence to attempt to procure an abortion. Section 159 makes it an offence for an expectant woman to ingest any poison or other noxious fumes with an aim of occasioning her own miscarriage. In *Elnora KulolaIlongo vs. Republic*,[26] the appellant had been tried on a charge of procuring abortion contrary to section 159 of the Penal Code. The particulars of the charge were that the appellant being with child and with an intent to procure her own miscarriage, unlawfully administered to herself a poison called Aspirin and Fansidar. The trial court had found her guilty of the offence. However, the appellate court overturned the conviction on the ground that the evidence which was used to find the appellant guilty did not meet the high threshold required in criminal cases. The case is, however, illustrative of the fact section 159 of the Act is in force and that that where applicable, a person will be readily charged under the section. Section 160 makes it an offence to aid or abet the commission of abortion. All these provisions against abortion flow from the fact abortion is regarded as immoral in the Kenyan society. As such, morality informed the formulation of the law governing abortion in the country.

It must be remembered that during campaigns preceding the 2010 constitutional referendum, one of the grounds that made religious groupings oppose the then proposed constitution was thatit permitted abortion.[27] One of the churches at the forefront in advancing this position was the Roman Catholic Church. The church's anti-abortion

[23] Cap 63 Laws of Kenya.

[24]Criminal Appeal no 177 of 2006.

[25]The section makes it an offence to commit any act that would prevent a woman who is about to be delivered of a child from giving birth to a child alive.

[26]Criminal Appeal no 43 of 2007.

[27]Maya Zozulya, 'Kenyan Abortion Laws: Concern and Controversy'2010Consultancy Africa Intelligence 2010<http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=390:kenyan-abortion-laws-concern-and-controversy&catid=59:gender-issues-d> accessed 22 March 2014.

position is traceable to the *Humanae Vitae* of 1968 which condemned both sterilization and abortion. As stated in the *Humanae Vitae*:

"…Similarly condemned is any action, which either before, or at the momentof, or after sexual intercourse is specifically intended to prevent procreation- whether as an end or as a means... It is never lawful, even for the gravestreasons, to do evil that good may come of it... even though the intention isto protect or promote the welfare of an individual, of the family or of society in general..."[28]

This proposition in the *Humanae Vitae* is a classic illustration of the natural law school argument that the end result of coitus has to be reproduction or procreation. In other words, the papal encyclical arguably contends that nothing should come in between the copulation process and the birth of a child. Such natural law arguments had a significant bearing in the enactment of Article 26 (2) and (4) respectively of the constitution. Both Articles seek to deter abortion.

VIII. PROSTITUTION

Widely regarded as the oldest 'profession', the subject of prostitution has attracted heated debate both for and against the practice. The arguments advanced against the practice have largely been informed by moral propositions. A larger percentage of the Kenyan population regards prostitution and its attendant activities as immoral. This is reflected in the laws addressing the subject. While the Penal Code does not have any express provisions outlawing provisions, it has provisions which are indirectly targeted at curbing the practice. Section 153(1) and 154 (1) of the Penal Code make it an offence for either a man or a woman to live on the earnings of prostitution. Section 155 makes it an offence to use any house or part of a house for prostitution purposes. Section 156 makes it an offence to aid or abet the commission of prostitution by availing premises which are used as brothels. Additionally, section 151 makes it an offence to detain any person for immoral purposes. All these provisions are a manifestation of the overlap thesis which is one of the hallmarks of the natural law school. They point out to the fact that there is a nexus between law and morality; that the morality of a people will almost always inevitably have a significant bearing on the laws that they make.

IX. BESTIALITY

Like in most countries, this act is criminalized because it is regarded as unnatural. In other words, it is against the laws of nature for man to have any sexual relations with an animal. It is an evil act and as such, is contrary to nature. Section 162 (b) makes it an offence to have carnal knowledge of an animal. Additionally, section 163 makes it an offence to attempt to have carnal knowledge of an animal. In *Stephen MutheeWakuthiye vs. Republic*,[29]the appellant sought to have the High Court set aside a conviction by the subordinate court which had found of guilty of committing an unnatural offence contrary to Section 162(b) of the Penal Code. The particulars of the charge at the trial were that on the 10th day of January 2012 at Murubara Village in Kirinyaga County, the appellant had carnal knowledge of an animal namely a cow. The appellate court upheld the conviction by the trial court but only reduced the sentence from five years to three years in light of the fact that the appellant had since reformed. In addition to being unnatural, this act is also criminalized because it violates the silent yet prevailing moral laws that govern the Kenyan society. It is these silent laws which assumed a prominent position in the legislation against bestiality. This equally illustrates the nexus between law and morality and propounded by the natural law theorists.

X. THE INTERNAL MORALITY OF LAW

The notion of an internal morality of law was advanced by Lon Fuller. He contended that law is subject to a procedural morality. He further argues that human activity is purposive and that the law making process is no exception to this rule. By extension therefore, Fuller posits that law is an activity and that a legal system is the product of a sustained purposive effort. He further submits that the only thing which can amount to law is that which is capable of performing the law's cardinal function of guiding behaviour. However, for the law to be able to perform this function, Fuller argues that there are certain principles which any system of rules must possess. These include:

- Expression of the rules in general terms.
- Public promulgation of the rules.
- Expression of the rules in understandable terms.
- Consistency of the rules with one another.
- Prospective effect.

[28] Peter de Rosa, *Vicars of Christ: The Dark Side of the Papacy* (Crown Publishers, 1988) 227.
[29]Criminal Appeal no 21 of 2013.

- Must not require conduct beyond the powers of the affected parties.
- Must not be subject to such frequent change that they become unreliable.
- Must be administered in such a manner that is consistent with their wording.

Fuller submits that these internal principles constitute a morality because law essentially has positive moral value in two particular respects. These are: the law conduces a state of social order and secondly; it does so by respecting human autonomy because rules guide behaviour. Fuller's principles have invariably informed Kenya's jurisprudence. For instance, the 2010 Constitution was publicly promulgated on the 27th of August 2010. Additionally, it was to have prospective effect just like most other laws of the country. Furthermore, the laws made by the legislature are required to be published in the Kenya Gazette. This can also be termed as means of promulgation. The case of *Nazlin Umar Fazaldin Rajput v Attorney –General & 2 others*[30] can be used illustratively. In making its judgment,the court among other authorities relied on a paragraph from Blackstone's Commentaries which states that:

"A bareresolution confined in the breast of the legislator without manifesting itself by external signs cannot be properly called a law. It is requisite that this resolution shall be notified to the people who are expected to obey it".[31]

Article 50 (1) (1) of the Constitution of provides for the right to a fair hearing to among others include the right of every accused person not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law. This is equally an illustration of the prospective operation of the law as per the principles enumerated by Lon Fuller.

XI. THE PRINCIPLE OF UNIVERSALITY

One of the central principles of natural law is that there are certain universal, eternal and comprehensible values. This principle advances the natural law theory that seeks for universality and commonality in certain fundamental values, human laws and institutions across the entire globe. A manifestation of this principle can be seen in the establishment of global institutions such as the United Nations as well as in the development of human laws which are common across different countries. Human rights can be used illustratively. Almost all countries in the world have embraced the culture of guaranteeing and respecting a certain minimum standard of human rights. Kenya is no exception. One of the hallmarks of theConstitution of Kenya 2010 is that it provides for a more robust framework of human rights as compared to the 1969 constitution.[32] Existence of the Bill of Rights is equally common in constitutions of many other countries of the world. This is a reflection of the fact that there exists some sense of universality and commonality in the laws of various countries as far as the subject of rights is concerned. For instance, the case of *JWI V Standard Group Limited & Another*[33] can be used to illustrate how the courts have dealt with certain aspects of human rights. In the matter, the court stated that:

'In the context of the issue under consideration, human dignity need not be pleaded as a right for it to be enforced because it is inherent and together with the right to life, they form the basis for all other rights to be enjoyed by a human being qua human being'.[34]

The case of *M A vs. R OO*[35] can be used to illustrate the transnational nature of certain laws. The case involved a dispute about child custody between the appellant and the respondent. In making its determination, the court made reference to an international instrument, the United Nations Convention on the Rights of the Child. It specifically relied on Article 3(1) of the UNCRC which requires the best interest of the child to always be given primary consideration. By applying this instrument, the court was implicitly highlighting the fact that its applicability transcends geographical boundaries; that is to an extent universal.

[30]Constitutional Petition No. 6 of 2010,(2010)eKLR.
[31] Ibid.
[32] The entire Chapter 4 of the Constitution is on the Bill of Rights.
[33] Petition no 466 & 416 of 2012, Available at eklr, <http://kenyalaw.org/caselaw/cases/view/89895> accessed 22 March 2014.
[34] Ibid.
[35] H.C Civil Appeal no 21 of 2009.

XII. LIMITATIONS/ CRITICISMS OF NATURAL LAW

This section of the paper seeks to address some of the limitations of natural law both in the general societal context and as far as legal systems are concerned. The discussion will focus on specific thematic areas which address various tenets of natural law.

Belief in God

One of the central bases of the arguments advanced by traditional natural law theorists was the belief in God. They postulated that natural law emanated from a superior being, God, and that as such, it was binding to all human beings by dint of deference to the superior being.[36] This claim of natural law runs into certain challenges especially when examined from a twenty first century perspective. First, this proposition if interpreted strictly, excludes persons who though expected to obey the law, have no belief in God or any superior being whatsoever. As such, it is impossible to bring this people under the purview of laws which emanate from a superior being whom they do not believe in. Second and more importantly, the constitutions of majority of the countries in the world today are explicit that they shall be secular states; that there shall be no state religion.[37] The import of this as far as laws making is concerned is that belief in God or a supreme being can no longer inform the law making process. In other words, it is no longer acceptable in most countries to posit that a certain proposition should be a law on the basis that it emanates from God.

Outcomes

One of the limitations of natural law flows from the outcomes that may result if it were to be followed to the letter. For instance, natural law frowns upon any measures which would prevent procreation during or after copulation. According to natural law, the main aim of sexual intercourse is penetration and insemination.[38] Put differently, the sperm has to fertilize the egg. The challenge that arises is that certain prevailing circumstances have necessitated the adoption of measures whose effect would be to prevent procreation or more specifically, fertilization from taking place. For instance, the use of condoms during sexual intercourse has been widely advocated as it helps to reduce the chances of contracting HIV/AIDS and other sexually transmitted infections. Strict traditional natural law theorists are still opposed to the use of condoms as they prevent procreation. However, it is evident that the use of condoms has been on the increase both as a family planning tool and as a tool for reducing the spread of sexually transmitted diseases.

The Overlap Thesis

The overlap thesis postulates that there is a conceptual relationship between law and morality.[39] It advances the argument that the morality of a people will almost always inevitably influence the laws that they make. However, this proposition is faced with a number of hurdles. First, it is based on the presupposition that there is a universal morality or perhaps in the case of a country, that there is a national morality. This is hardly the case. Morality is relative and varies from place to place and from country to country. For instance, while many European countries and the United States have embraced homosexuality in their laws, most African countries are against homosexuality. Some such as Uganda have gone to the extent of enacting legislation against homosexuality.[40]

A key challenge that emanates from the overlap thesis is the fact that the law is always inevitably bound to run into difficulties whenever it attempts to legislate on moral issues. A case in point is Article 10 as read with Article 73 of the Constitution of Kenya 2010. These provisions are arguably an attempt to prescribe a certain minimum morality that is expected of the country's state officers. The challenge that arises is the interpretation and application of such legislation. For instance, the standards for determining the envisaged objectives of Article 73 may vary. Secondly, legislating on moral issues runs the risk that such laws may end up not even being worth the paper that it is printed on. A case in point are the provisions of the Penal Code which ostensibly seek to outlaw prostitution. At best, such laws have only struck at the branches rather than at the root of the problem. This is because individuals have found ways to circumvent the law and thus perpetuate the practice. Perhaps the law would have been more forthright in outlawing prostitution rather than making it an offence to live on the earnings of prostitution. However, were it to do so, then it would have to deal with the

[36] Victor Bradley Lewis, 'Aquinas Theory of Natural Law: An Analytic Reconstruction' Journal of History and Philosophy Volume no 37 Issue 3 (1999)pp 526-528.
[37] Kenya is no exception. Article 8 of the Constitution of Kenya provides that there shall be no state religion.
[38] Supra n 28.
[39] Supra n 7.
[40] Uganda Anti-Homosexuality Act 2014.

definitional problems that would arise in setting out what constitutes the crime. One needs not belabor the point that enforcement of such a law will be an insurmountable, almost unachievable task.

Simplicity

Natural law in some sense can be said be too simplistic. It is simplistic because it presupposes that human beings are much less complex than they actually are in reality. For instance, one of the principles of natural law states that it is based on a rational order which can be known by man. By dint of this assertion, natural law presupposes that every man has an innate ability to perceive the rational order. By extension, it presupposes that all men will have a common perception of the rational order. This submission contends that this is too simplistic a view. From the very onset, the very existence of a rational order is contested. Additionally, even if it were to exist, one can hardly expect that all individuals will have the same perception of the rational order. To that extent therefore, the argument on the existence of a rational order falls flat on its face. It cannot effectively advance the ideologies propounded by the natural law theory.

Universality

One of the principles on which natural law is hinged is that the law is or ought to be universal. In other words, natural law has very limited room for individualism, situationalism, consequentialism or relativism. Natural law is seemingly based on the premise that the law ought to apply to everyone equally irrespective of their circumstances. It advocates for common laws for all individuals without taking due regard to their particular and in some instances, peculiar circumstances. Following such a proposition and especially in a twenty first century setting runs the risk of subverting the rights of minority groups. But perhaps a bigger and more formidable challenge is the fact that different countries have varying practices and this is reflected in the kind of legislation that they have. It would be foolhardy to expect such countries to abandon their legislation and join a certain bandwagon simply because that is in keeping with the natural law principle that law ought to be universal. Even the best intentioned laws such as the United Nations Convention on the Rights of the Child may be universal in spirit but are hardly universal in application. Indeed, one is left to wonder how it will be possible to merge the laws of countries such as Netherlands which allow prostitution and smoking of bhang and other drugs with the laws of such countries as Kenya which forbid abusing of such drugs as bhang and equally seek to indirectly forbid prostitution. One can rightly argue that finding a compromise position would be unattainable. Consequently, it is evident that attaining universality of laws in certain respects is almost next to impossible.

XIII. CONCLUSION

The contribution of natural law to Kenya's jurisprudence cannot be understated. However, one must not lose sight of the fact that the propositions of natural law have run into a number of challenges. These challenges have invariably served to erode any gains that natural law may have had in the past. More importantly, the challenges have provided an effective tool to refine other laws that have been developed. This is because such laws have either directly or indirectly sought to address the shortcomings of natural law. As such, natural law still retains an important position in global as well as Kenyan jurisprudence. Though fading away quickly in certain regards, it will hardly be on its deathbed any time soon.

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