

AN AFRICAN IDEA OF NATURAL LAW
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Abstract

The advent of liberal democracy ushered in series of agitations for the recognition of certain rights accrued to human nature. These rights are variously called human rights. Human rights are justiciable; violating them have serious legal implications for the violator. Thus, human rights are legally insulated from all forms of abuses. The term “human rights” is misleadingly suggestive of universality. Three reasons account for this. First, cultural diversity defeats any overt or implied notion of absolute universal human rights (this does not apply to basic or fundamental rights). Second, some of these rights are blatantly in violation of what has been accepted as natural order. Finally, some of those rights are antithetical to all religious beliefs and practices. Debates on LGBTQIP2SA+ should take into cognizance these three reasons. In this paper the authors discuss LGBTQR+ from an African perspective of the natural law theory. The paper argues that from the perspective of the natural law (1) LGBTQIP2SA+ does not have a natural space in Africa, (2) LGBTQIP2SA+ is an unnatural order and therefore is not a human right issue, (3) LGBTQIP2SA+ has serious spiritual implications for the African, and (4) LGBTQIPSA+ is culturally, a pollutant.

Introduction

A human society without law, in the phraseology of Thomas Hobbes, is nasty and brutish. A civil society is a society of law and law enforcement agents. Law without enforcement is as bad as lawlessness. Essentially, the full effects of law are realized in enforcement. Who enforces the law? Who or what is the source of the law? These questions are approached differently by the different schools of law. A legal positivist will say laws are enforced and posited by a civic authority respectively; thus, laws are made and enforced by a human authority elected to do so by law. Legal realists, on their part, will say that judges are both the makers and enforcers of the law. For the Marxian school, laws are made by the bourgeois and enforced by the bourgeois against the proletariats; laws are instruments of oppression and exploitation, the aforementioned schools of law are foreign to the indigenous culture of the African. The African, as Mbiti says, is a notorious religious person and their religiosity characterizes every sphere of their social, political, and economic life. Thus, the institutions of the indigenous African are rooted in religion. It is for this reason that the natural law theory finds expression in traditional African jurisprudence. It should be disclosed at the outset that African metaphysics could best be described as pantheistic. Everything has an inherent divine nature and power. Nothing is mundane matter; matter is a domain of vital forces or spiritual beings. In other words, the spiritual realm is accessible only through the medium of matter. This elucidates why the African is symbolic in their religious practices. In the hierarchy of beings, the creator God occupies the apex, followed by the gods (Africans don't have the notion of gods, they rather call what Europeans call gods idols), the ancestors, the

traditional rulers (including the traditional religious leaders), man, animals, and plants. God, the highest being, is the source of regulatory principles, including morality and law. With this background in mind, we can better appreciate the centrality of the natural law in African jurisprudence and judicial practices. This paper engages the issue of LGBTQR+ from the point of view of the natural law theory. A survey of the natural law in general begins the engagement. Closely following this will be a discussion of the African conception of the natural law. Next will be an exposition of LGBTQR+. Finally, we shall situate the debate on LGBTQR+ within the context of African perspective of the natural law theory. To the natural law theory in general we now turn.

The Natural Law Theory in General

Francis Njoku says the natural law contains “moral principles which are eternal, universal and immutable on which human law is to be based” (2007:41). Andrew Uduigwomen avers that what is central to any explication of the natural law is that in nature “there exists an ultimate norm of right and wrong” knowable by human reason and that this norm constitutes the basis for municipal law (2010:140); P. Fitzgerald offers a detailed explanation to this view, (1966:15). The natural law theory finds expression in the rational nature of man. Johannes Messner argues that “The *specifically human conduct*, which is thus implied by rational conduct accordingly signifies man’s natural law: man’s authentic mode of conduct which depends upon his self-determination and responsibility as rational beings” (1965: 13). The nature of man imposes moral obligation and responsibility on him; reason discloses to man those principles of conduct which are appropriate to his nature as a rational social being. To the natural law theory, law is a “phenomenon of social necessity based on ... moral principles that derive from man’s rational nature (Njoku, 2007:39). Such moral principles are basic, self-evident and universal since they proceed from the nature of man and not from experience. Are all laws based on these universal moral principles? These basic and self-evident moral principles become the foundation for all laws. We shall call these universal moral principles *foundational moral principles of law*. By this we should be understood as meaning any law which *ultimately* default, in upholding these principles is without legal foundation and as such lack justiciability or judicial merit. Any violation of a fundamental moral principle triggers a reaction from the conscience of man.

The fundamental moral principles of law are absolute, subject to no revision or legislative tinkering (Aristotle’s position that natural law is subject to change should be understood in terms of the laws of natural science, not in terms of natural moral laws). To review the fundamental moral principles of law will amount to violating the moral configuration of man and a total violation and desecration of human nature. In other words, such an attempt is nothing but a recreation of human nature by human beings. Since the hallmark of human nature is reason or rational, altering this nature may lead to de-rationalization of man. A de-rationalized man is an animal in a human form.

The Stoics’ principle of living in accordance with nature underscores the centrality of the natural law theory legal and moral reasoning. Any human conduct that runs contrary to human nature is an aberration. The nature of man is that he is rational and his decisions and actions are guided by reason. Cicero is perhaps influenced by stoic jurisprudence when he reasons that “Nature has provided mankind with the rules” to guide the conduct of man and that these rules, which form the basis of law, are “discovered by Reason” (Njoku. 2007: 49). Cicero reasons as follows:

There is in fact a true law namely, *right reason* which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performances of their duties; by its prohibitions

it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul *wholly* is impossible. Neither the senate nor the people can absolve us from our obligations to obey this law. and it requires no Sextus Arelus to expound and interpret it. *It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow.* But there will be one law, eternal and unchangeable, *binding at all times upon all peoples'*, and there will be, as it were, one common master and ruler of all men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of a man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment (Marcus Tullius Cicero, 1929: 215 - 216, all emphases are ours).

This quote from Cicero is a summary of the natural law and its scope and immutability. The source of the natural law is God or Nature. The natural law is an eternal, universal and true law. God is the source of the natural law to those who believe man is created by God. Those who hold a contrary view place the source of the natural law on man's unique nature, reason. This is inconsequential. What is at the bottom of the debate is that the natural law is *discoverable* through reason alone, man is not the author of the natural law. The positivists' attempt to separate law from morality and thus to relegate the natural law to the domain of morality is quite disingenuous. Law without morality is invalid. Law, essentially, is for the maintenance of a just society. Will there be justice, for example, if a man is permitted to sleep with another man's wife? Adultery is a moral issue. Law must enforce those moral issues the violation of which injures others and violates the principles of justice. All criminal activities are moral issues. Criminal law seeks to enforce moral compliance. Before municipal law, natural law existed and manifested in moral values. Moral laws performed the role that municipal laws perform; namely, prescribed conduct in the form of commands and prohibitions, and in some cases, had a penal code for offenders. Municipal laws are *expanded clauses* of natural law and morality. Natural law and morality are the legal constitution of the world; municipal law, on the other hand, are man-made legislations. These legislations derive their validity from the natural law and morality; they are subject to natural law and morality.

Thomas Aquinas' account of natural law, although heavily coded in religious language, is quite refreshing and intellectually engaging. He defines law generally "as a dictate of practical reasoning emanating from the ruler who governs a perfect community" (*Summa Theologica*, 1947: Pt I-II, q. 90, a. 1). It is trite knowledge that no human community could be described as a perfect community; hence, the ruler in question cannot be man, but God. On natural law Aquinas remarks:

Now among all others, the rational creature is subject to Divine providence
 \n the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called natural law (*Summa Theologica*, 1947: Pt I-II, q. 91, a. 2).

There is no doubt from the above quote that the natural law, the bases of municipal law, emanates from God and is innate in man. Our conscience, which he refers to as "synderesis", contains "the precepts of the natural law. which are the first principles of human action"

(*Summit Theologica*, 1947: Pt 1-11, q. 94, a. 1). Commenting on Aquinas' view on the natural law, Anthony J. Lisska asserts that human disposition has a tendency towards a specific end, an end which determines the well-being of man. In his words, "This is the crux of natural law moral theory. Nature has 'determined,' as it were, the ends which lead to the well-being of the individuals of the natural kind" (Lisska, 1996: 102). What is the relationship between the natural law and human or municipal law? Aquinas' answer is very instructive:

Accordingly, we conclude that just as, in the speculative reason, from naturally known indemonstrable principles, we draw the conclusions of the various sciences, the knowledge of which is not imparted to us by nature, but acquired by the efforts of reason, so too it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular demonstrations, devised by human reason, are called human laws,..." (*Summa Theologica*, 1947: Pt 1-11, q. 91, a. 3).

When human law deviates from the precepts and principles of the natural law, "it is no longer law but a perversion of law" (*Summa Theologica*, 1947: Pt I-II, q. 95, a. 2). The purpose of human law, according to Aquinas, is for social control and the cultivation of virtuous character, in other words, human laws are coercive instruments for good character formation and reinforcement (*Summa Theologica*, 1947: Pt I-II, q. 95, a. 1).

The National Law from an African Perspective

Africans are theistic both in theory and in practice. Atheism is a concept that is completely alien to the African. Reality as a whole, to the African, is an embodiment of divinity. The existence of God is self-evident and the first truth an African will discover: "*Obi nkyere abofra nyame*. To wit, No one points God to a child," goes an Akan proverb. It is crucially significant to note that Africans are monotheists. Polytheism is inconsistent with the African worldview. What the non-African refers to as gods are nothing but idols. God is one. He manifests in diverse ways to his creation. The entire universe is under the control of God. All human rulers, to the African, are divine representatives. Thus, African societies are theocratic. It is from this worldview that discussion on African perspective of natural law becomes intelligible.

Obi nkyere abofra nyame has both literal and metaphorical meaning. Literally, the proverb means God is self-evident to everyone, including little children. Metaphorically, it conveys the universal and innate knowledge of good and bad. Thus, moral laws are inscribed in the hearts of the people. Fundamental moral principles are universally binding on all mankind. These fundamental moral principles are natural laws. The ultimate author of natural laws is God, the supreme ruler of the universe. Man-made laws are valid in so far as they do not violate any natural law. Natural laws are sacred and their violation constitutes the highest form of offence; such an offence is a taboo. Taboos are considered an assault on God himself, a profanation of nature. Breaking a taboo amounts to desecrating natural purity. The Builsas call it *Kisuk*, that which threatens life and for which life must be given to preserve life. Animals are usually sacrificed to restore the purity of nature. Failure to do this, the Builsas believe, will cause catastrophe to befall the offender, then- family or even the entire community. For instance, all forms of incest and all forms of unnatural sex attract unimaginable repercussions. Heterosexuality is the only natural sex form there is. All others are taboos.

Andrew Uduigwomen, writing on African idea of the natural law, opines that "the idea of universal moral order, of good or bad, of acting rightly or wrongly is quite clear to every traditional African. Such evils or vices as murder, adultery, ..., and the like are condemned by traditional Africans. Such evils and vices are said to disrupt the natural order and hence violate

the ontological order or natural law” (2010:149). Since God is the author of natural law, violating natural law incurs divine sanctions: “Every abuse of the natural order is regarded as a sacrilege which incurs punishment and demands restitution” (Uduigwomen, 2010:149). Natural laws are enforced by the elders and traditional rulers. Because Africans believe in the unity of beings and interaction of vital forces, the domain of the natural law extends to non-human entities. If a human being engages in sexual intercourse with an animal, the latter is killed while the former undergoes rigorous spiritual purification. The place where the act occurred is equally purified to pacify the spiritual forces and the earth which might have been offended.

LGBTQQIP2SA+

One of the most contentious issues confronting policy makers in our century is the demand on governments to promulgate positive legislations to secure and protect the rights of the members of LGBTQIP2SA (Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, Intersex, Pansexual, Two-Spirited and Asexual). Most religions do not sympathize with some of the members of this group. The complexities engulfing the gender have rendered definitions of these terms very complex. A lesbian, to have an expansive definition, is a woman (not only a biological woman, but a psychological woman) who has sexual desire for women (as in the above). Thus, a trans-woman (who is a biological man) and a trans-man (who is a biological woman) who engage in sexual activity are lesbians (they may be practicing heterosexuality, notwithstanding). Two biological women in sexual relationship are equally lesbians. Also, two trans-women engage in sexual relationship are lesbians (notwithstanding the fact that they are biologically men). At least, we can recognize three categorizations of lesbians. The same scheme applies to gays, sexual attraction among men (biologically or in terms of gender identity). The terms ‘woman’ and ‘man’ have assumed other categories other than their traditional designations. Two men, in the biological sense, who are married, may in fact be a woman and a man in terms of their gender identity. The same goes for women. Essentially, people choose their gender, nature imposes their sex on them. Whether or not they are determined to make those choices is an issue that requires examination; this will be done later.

Bisexuality implies duality, etymologically. However, difficulties with clarification of the term arose with modern conceptualizations of gender. Bisexuality traditionally hinges on the binary conception of gender. The emergence of more genders has affected the definition of bisexuality. Bisexuals are people who have sexual attraction to people of their own gender and people of other genders. This is different from pansexuals or omnisexuals who have sexual affection for people of all genders.

Transgenders are people whose knowledge of gender and experiences is different from their biologically assigned sex; they identify with other genders other than the gender conforming to their biological form. In simple terms, transgender is gender-switch. Queer refers to people whose gender expressions do not conform to dominant expectations - they may not identify with any gender at all - gender-neutrals. Questioning is a term that designates people who are still exploring their gender identity. They may eventually self-identify with any of the genders with the exception of man, woman and intersex. Intersex is a biological formation in which a person possesses bodily or genitalia characteristics of both women and men. This is different from two spirit persons. Two spirit is an embodiment of masculinity and femininity. Asexual refers to a state of lack of sexual attraction or affection. This may be as a result of some biological or hormonal suppression.

Not all members of LGBTQIP2SA generate controversies. Intersex, two spirit and asexual, in the final analysis, are biological mutations or configuration. Humans have no control over what nature has formed them. Discriminating against an individual on the basis of their unique natural formation is considered insensitive and inhumane and an invitation of such

deformities unto oneself or one's family. Africans believe nature cannot and should not be mocked or criticized.

LGBTQQIP2SA in the Context of African Perspective of the Natural Law

Africans do not deny the fact that LGBTQQIP2SA exist. However, this group has the same ontological basis as do social deviants (with the exceptions pointed out above). A call for positive legislation for this group amounts to calling for ratification of immorality. Africans strictly adhere to heteronormativism. Biological mutations are the work of nature and the African respects that. It is important to note that the metaphysical worldview of the African is inherently dismissive of all unnatural sexual orientations and practices.

Lesbians, gays, bisexuals and transgenders, within an African context and within the framework of an African perspective of the natural law, are social misfits. Their activities constitute immoral acts. African ethics has two branches: normative ethics and what we may loosely call *natural* ethics. The former refers to the norms, values and ethical principles of a given culture or ethnic group. On account of cultural diversity, these norms, values and principles are culturally relative (fundamental principles are common in all cultures). The latter, on the other hand, refers to the eternal and universal principles which maintain the sanctity of nature. Nature is the author of these eternal principles. Natural ethics holds that humans should not desecrate the normal order of nature and that man must live in accordance with nature. Nature embodies both the spiritual and the physical. Human conducts that desecrate nature are considered taboos by the African. Normative value and principles are generically called "sin" while the principles of natural ethics are called "taboo." Breaking taboos is the highest form of offence. *Kisuk* or *musuo* as the Builsas or Akans (Builsas and Akans are ethnic groups in Ghana) will respectively call it, signifies a greater offence than murder. Murder is not a taboo. Any offence whose repercussion does not extend beyond the agent is not a taboo. The repercussion for breaking a taboo extends beyond the offender to their immediate family, clan or entire community. Incest, lesbianism, bestiality, and homosexuality are all taboos. Punishments for such acts are meted out against the whole community. These acts profane nature, the gods and God. Sodom and Gomorrah were completely destroyed by God when they practiced homosexuality. The African believes such acts are provocations that attract divine sanctions or curses. Offenders who are caught are made to appease the deities by means of sacrificing animals and undergoing ritual purification.

Transgenders would not have attracted any negative reaction from Africans if they had not allowed their choice of gender identity to influence their choice of a sex partner or spouse. A trans-female who gets married to or engages in sexual relationship with a biological man is a homosexual. The same conclusion applies to a trans-male who engages in sexual relationship with a biological woman. A trans-female in a relationship with a trans-male does not violate natural order (although within the gender identity bracket, such a union will hardly take place). Two trans-females or two trans-males in a sexual relationship are also homosexuals. These considerations are reasons enough for the African to reject transgenderism. Transgender sexual relations are taboos. This does not mean, however, that there are no transgender tendencies in Africa. There are biological males and females who are feminine and masculine respectively. These tendencies show in the mannerism of the persons involved. Among the Builsas, a man who behaves like a woman is called *nidwa-nipok* and a woman who behaves like a man is called *nipok-nidmi*. The two terms have both positive and negative connotations. *Nidwa-nipok* is positive when a man manifests the motherly qualities of a woman (metaphorical) and negative when he literary behaves like a woman. Same goes for *nipok-nidwa*. Among the Ewes in Ghana, a man who behaves like a woman and a woman who behaves like a man are *nyornugborrne* and *ntsugborrne* respectively. Such people do not claim gender identity either

than their biologically assigned gender. Society recognizes and identifies them with their biologically assigned gender. What defines gender in Africa is one is genitalia, not dispositions or psychological attachment to a particular gender. For the African, gender is not a social construct, it is not by choice, but by nature. There are only males and females. Thus. Africans recognize only cisgender. And personhood is defined by one being a woman or a man. In the absence of that, there is no personhood. There is no gender neutrality which provides the basis for defining a person. Everybody knows their gender from birth, there is no doubt or question about it.

Cisgender is the basis of marriage within an African context. Marriage involves a biological female and a biological male. Marriage, like all other social institutions of the African, involves spiritual rites for legitimacy. God, the gods and the ancestors must approve of one's marriage. Same sex marriages are considered evil. Placid Temples *Bantu Philosophy* encapsulates the metaphysical worldview of the African. Africans believe in the unity and interaction of forces. In that interaction, the purity of the interacting forces must at all times not be desecrated. Same sex marriage is a desecration of the unity of forces, the highest sexual offence. God, in the African worldview, exists in everything, including human beings. This is not markedly different from the Biblical account that the bodies of believers are temples of the spirit of God. The human body is sacred

The Question of Rights of LGBTQQIP2SA

Can members of this group lay claim to any rights within an African context? To the extent that they are humans, they can lay claim to all rights which all humans are entitled to. No one should be denied fundamental rights. Fundamental rights are inalienable and justiciable. Human rights accord with human nature and are self-evident; anything short of this does not qualify to be human right, it is an aberration.

Members of LGBTQQIP2SA+ are not being denied human rights in Africa. What they seek legal rights of does not qualify to be human rights. They are seeking legislation for that which is considered taboos. Sexual perversion cannot be legalized in Africa under the guise of human rights. Karl Marx says "The relation of man to woman is the most natural relation of human being to human being" (Marx in Bottomore ed. Watts & Co., 1963:154). That which is unnatural and inconsistent with natural law must not gain positive legislation. Rather, to preserve the purity of nature negative legislation is essential to hold negative and unnatural human tendencies under check.

Africans consider it an affront and culturally imperialistic for Western cultures which have their unique and peculiar worldviews and experiences to mount diplomatic pressure on African states to recognize, accept and give legal backing to that which is a taboo. Cultural imperialism is a violation of the rights of autonomy of other cultures and must be fiercely resisted.

Conclusion

This paper attempted to situate the debate on the rights LGBTQQIP2SA+ within the context of African conception of the natural law theory. As we have seen, within the framework of the natural law theory, there could be no justification for the activities of LGBTQQIP2SA+. That which is contrary to nature and natural law must not be endorsed by communal law. Positive legislations must aim at enforcing compliance of that which accords with nature. Biologically, man is determined. We are condemned to remain so. As biological beings, we owe it a duty to preserve and perpetuate our continuous existence. Sexual intercourse is primarily for procreation, the pleasure that flows therefrom is just an enticement. Sexual pleasure is a

secondary function of sex. Same sex marriages or relationships conceive sex as a means of recreation. On the issue of sex, animals, to a large extent, have proven to be better friends of nature than sex perverts.

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