

THE IMPORTANCE OF LEGAL ETHICS AND JURISPRUDENCE IN NATION BUILDING. THE KENYA CASE.

Michael N. Mabururu

Philosophy connects with law obviously, through the philosophy of Law or as our learned friends would prefer to call it, through jurisprudence. Moreover, since ethics is a branch of philosophy, it means that philosophy is also connected to law through legal ethics.

A perennial question of jurisprudence has been whether there is a relationship between law and morality. Those who believe that there is no such relationship are known as "legal positivists"; those who do are usually tagged "natural lawyers".

The term 'positivism' is used to refer to the belief that the legal system is made of certain definite commands issued by a sovereign – and the valid basis of his commands is to be assumed by all. This sovereign makes rules, and these rules are the laws which must simply be; it is not our business to ask questions about the fairness or justice or the moral content of those laws. This is the positivistic approach. Its counterpart is concerned with the *content* of the laws, with the justice or morality of those laws. It asks whether it a fair law and if it conforms to the law of providence. This is the natural law approach. The law will not be valid, in principle, unless it complies with certain rules embodying the attribute of fairness. In essence we are saying that there are objective moral truths in law and these truths are at least partly constitutive of the truth conditions for propositions of law.

Natural Lawyers tend to render superior justice in their legal profession than Legal positivists. This is because of the legal positivist view of morality and law as separate entities that must not be confused. Its concern is with whether or not the rule is valid or invalid. But the validity of a rule does not make that rule right morally. At least from a philosophical standpoint a good law should not offend morality. Therefore we have a problem with legal positivism since it does not give room for any aspect of morality in its practice. We have to transcend what the law says (its positive aspect) and reach its nature. Odera's position seems reasonable: though law is different from morality the two somewhat overlap. But we feel that something more should be added to this statement which is that law cannot contradict morality; if it does then it cannot serve as an instrument intended for fairness or justice.

The procedures of establishing justice in law may however differ from those in morals – moral wrong or guilt does not depend on legal proof. The procedures of legal justice are different. The process of justice in law requires that every legal guilt be proved, making use of all permissible and valid evidence. Judicial law is objective, it must be seen to draw its inferences) solely from the evidence laid down before the court and made available to all parties concerned. This is treating law as Positive Law i.e. law as a system sufficient in itself and free from morals.

The bottom line in our argument is that the legal profession – especially the legal positivism approach to law – needs philosophy to put checks and balances in its practice.

When introducing justice, we could consider it from a moral philosophical perspective or

simply from a legal perspective. From the latter, justice simply means that the laws are firstly being followed, and that they are further being applied uniformly to all who come before the regular courts. The role then, of the officers of the court is foremost in all this. Justice in court is strict "fairness" and the concern is that whatever is being done, whether it is the advocate arguing, or the judge presiding, it should be guided by even-handedness. The judge should try to be as fair as possible between the parties; he must give a verdict that makes sense in terms of justice. But this is justice according to law and such a justice does not take into account the moral aspect of law. Law should rest on rationality, indeed. But now, how can lawyers reconcile two seemingly inconsistent truths: the dictates of justice and truth on the one hand and his client's interest on the other. Rarely do lawyers consciously address their minds to the principle of rationality. Why? Because the legal profession is a source of daily bread for practitioners, it is for them a trade. And in as far as this goes, most lawyers are after clients who bring them lots of money. For instance, why does it become necessary that a lawyer should appear in court in the simplest possible case, where advice to the client would be sufficient, and the client could then handle his own case? Is there any professional necessity for the lawyer to appear *always* or is it purely a concern for monetary gain? In our view, rational thought should guide the legal officer otherwise, the practicing lawyer might not, in these circumstances; be able to rise above the concern for daily income. Otherwise, the integrity aspect will always be compromised and hence justice will be sacrificed for the sake of self-gain.

How then do philosophy (morality) and law (justice) contribute to nation-building?

Philosophy is important in nation-building because it keeps checks and balances in the practice of law if law rests on rationality. By rationalizing, some kind of value-judgement must be brought in which will involve the concept of "good" or "bad" and will depend on the manner in which these conflicts have been resolved. The manner of resolving them must refer to the common interest of mankind in general, of the broad society, or of a particular social unit. The approach that does the least injury to these common interests is to be described as "good" or "right". In this regard, philosophy goes beyond that area of law called the positivistic approach and calls back rationality to the practice of the legal profession. It demands of us to be intellectually rational, indeed, even to be candidates for moral nobility. People who have no morals will contribute little to nation-building as evidenced the level of looting and corruption by those in authority in many African countries.

In conclusion, we must acknowledge the fact that law has two important aspects (which themselves have attracted much philosophical attention) the positive and the normative. The positive approach represents law as a handy device of control, being invariably attended by some definite sanction or consequence. The normative approach is however, what we need to move on to. Every legal system is based explicitly or implicitly on some form of legal philosophy and it is here we encounter moral and ethical questions. In the legal profession, focus should not be singularly on the positive aspect of law or on the success of the practice as if their truth were all that counts. The legal practitioners must also consider the rightness or wrongness (moral aspects) of the practice of law. The ethical values should be taken into serious consideration by the practitioners of law.