The Ethical Nature of Legal Obligation: In Search of a Basis for Interpreting Article 259(1) of the Constitution of Kenya, 2010

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By

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Declaration

I, ADRIAN MUNEGENE NYIHA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 8th January 2021

This dissertation has been submitted for examination with my approval as University Supervisor.

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Dr. Antoinette Kankindi

List of Cases

Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others [2014] eKLR.

Council of Governors and 47 others v Attorney-General and 3 others (Interested Parties); Katiba Institute and 2 others (Amicus Curiae) [2020] eKLR.

EG v Non-Governmental Organizations Co-ordination Board and 4 others [2015] eKLR.

Federation of Women Lawyers-Kenya and 3 others v Attorney-General and 2 others [2019] eKLR.

In the Matter of the Speaker of the Senate and Another [2013] eKLR.

National Coalition for Gay and Lesbian Equality v Minister for Justice (South African Constitutional Court).

Non-Governmental Organizations Co-ordination Board v EG and 5 others [2019] eKLR.

Planned Parenthood of Southern Pennsylvania v Robert P Casey et al (Supreme Court of the United States) (1992).

List of Legal Instruments

The Constitution of Kenya (2010).

List of Abbreviations

'Constitution'; 'The Constitution of Kenya, 2010' – *The Constitution of Kenya* (2010).

Abstract

Constitutional interpretation in Kenya is crucial for the Constitution of Kenya, 2010, to improve the lives of Kenyans as desired, so much so Article 259(1) prescribes a definite approach of interpretation.

This provision states that the document is to be interpreted *purposively.* However, the proper method for interpreting the Constitution is controversial, according to Kenyan courts. 'Purposive interpretation' of the same document, and sometimes even the same provisions, would appear to yield widely divergent results. The question underlying this controversy is about the basis of legal interpretation, that is, the ethical nature of legal obligation and its relationship to moral obligation. Analyzing this question sheds light on the purpose of the law in general and of the Constitution in particular and the correct interpretation of Article 259(1). This research analyses the ethical nature of legal obligation as a basis of purposive constitutional interpretation.

This study uses a qualitative, desk-based approach. Sources used include provisions of the Constitution of Kenya, 2010; jurisprudence from Kenyan courts on interpreting the Constitution; and secondary sources discussing the ethical nature of legal obligation, its relationship to moral obligation, and the basis of purposive constitutional interpretation.

The study finds that legal obligation is founded on moral obligation. Specifically, the purpose of the law is the common good. Therefore, the meaning and authority of every law, including the Constitution, is derived from the common good, which thus forms the basis for interpretation of the Constitution and, therefore, of Article 259(1).

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1. Introduction

1.1. Background

In 2004, Kenya's Constitution of Kenya Review Commission released a draft constitution as part of a constitutional review process that had begun in the previous century. The process ended only as recently as 2010. Prior to 2004, courts' powers had become, to a large extent, instruments for satisfying the interests of politicians, who were perceived as indifferent or even inimical to the best interests of the people – and not without reason.[1] The political context of the entire post-independence period permitted this state of affairs to exist.[2] Judges would often perform this servile role through a narrow and textualist interpretation of constitutional provisions.[3] In response to this, proponents of political reform championed a so-called purposive paradigm of constitutional interpretation. This interpretation was to be premised not on the intention of the legislators, but on the principles of the Constitution and the desires of the people.[4]

The resultant Constitution of Kenya, 2010, has been touted as a chance to positively transform her economic, social, cultural, and political spheres, and in doing so, forge an abiding Kenyan unity.[5] Kenya's new fundamental law is meant to positively affect and improve the reality of people's lives.[6] In keeping with the desires of the people, Article 259(1) of the Constitution provides for a purposive, people-centered paradigm of interpretation. Judges, legislators, and all persons interpreting the Constitution have a duty to do so in a manner that advances its purposes, values, and vision.[7] In other words, the Constitution mandates them to heed the desires and aspirations of the people of Kenya.[8] The Supreme Court of Kenya has asserted as

[1] A documentary by Ng'weno H, *The making of a nation (Episode 9: The rise of Moi. 1978-1982)*, Nation Media Group, 2012.

[2] Ng'weno H, *The making of a nation: A political history of Kenya (Episode 2: Dividing the nation: 1964)*, Nation Media Group, 2012; Yongo C, 'Constitutional interpretation of rights and court powers in Kenya: Towards a more nuanced understanding', 27 *African Journal of International and Comparative Law* 2, 2019, 205 and 206.

[3] Thiankolu M, 'Landmarks for *El Mann* to the Saitoti ruling: Searching (*sic*) a philosophy of constitutional interpretation in Kenya', 1 *Kenya Law Review* 1, 2007, 189 and 190.

[4] Thiankolu M, 'Landmarks for *El Mann* to the Saitoti ruling', 190.

[5] Hornsby C, *Kenya. A history since independence*, IB Tauris and Co Ltd, New York, 2012, 792; and Mutunga W, 'The 2012 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions', University of Fort Hare, Inaugural Distinguished Lecture Series, 16 October 2014, 1.

[6] Ghai Y, 'Kenyan Constitution: History in the making: The challenges of implementation', as cited in a concurring opinion by Maraga D CJ in *Council of Governors and 47 others v Attorney-General and 3 others (Interested Parties); Katiba Institute and others (Amicus Curiae)* [2020] eKLR, para 105.

[7] Articles 10(1)(a) and 259(1)(a), *The Constitution of Kenya* (2010).

[8] Kangu JM, *Constitutional law of Kenya on devolution*, Strathmore University Press, Nairobi, 2015, 31.

much on numerous occasions in statements that are, at least, highly persuasive as *obiter dicta*, if not binding as *ratio decidendi*.[9]

This interpretative paradigm implies the common good of the people as its standard, although it conceals a hidden barb. Desires and aspirations can be quite subjective. However laudable they may sometimes be, if desires and aspirations are the standard to which constitutional interpretation should conform, there is a risk that this interpretation may diverge from the objective good of the people. It may diverge from objective moral truth, that is, from the knowledge of objective standards of good and evil against which decisions and decision-making processes can be evaluated in terms of their aims and means. In an inversion of what should be the case, the Constitution's meaning is not *essentially* tied to a public good outside subjective experience, precisely because this meaning is reducible to subjective desires and aspirations.[10] This inversion is exactly what the Constitution and the Supreme Court appear to mandate. If this is the case, it confirms that there is a problem: purposive constitutional interpretation may diverge from the common good of the people, that is, the purpose of the Constitution. It would further explain why purposive constitutional interpretation sometimes yields contradictory results.[11]

The refusal of some judges to refer to the moral questions implied in the issues raised before them would seem to be related to basing constitutional interpretation on this potentially subjective standard. One Kenyan High Court judgement affirms a dictum of the South African Constitutional Court asserting that 'the dictates of the morality which the court enforces are to be found in the text and spirit of the Constitution itself.'[12] Taken together with the dependence of the Constitution on the subjective desires and aspirations of the people for its meaning, this relegates morality to the realm of subjective opinion in the courts. In another judgement, the

[9] See, for example, *In the Matter of the Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR, paras 86 and 156; *Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others* [2014] eKLR, para 364; and *Council of Governors & 47 others v Attorney-General and 3 others* [2020] eKLR, paras 105 and 122.

[10] Barber S and Fleming J, *Constitutional interpretation: The basic questions*, Oxford University Press, New York, 2007, 166.

[11] See, for example, *Federation of Women Lawyers-Kenya and 3 others v Attorney-General and 2 others* [2019] eKLR, paras 200, 237, 299 and 300.

[12] *National Coalition for Gay and Lesbian Equality v Minister for Justice* (South African Constitutional Court) as cited in *EG v Non-Governmental Organisations Co-ordination Board and 4 others* [2015] eKLR, para 90.

Court of Appeal treats morals as irrelevant to constitutional interpretation.[13] One survey of a cross-section of advocates and judges confirms the prevalence of this belief among them.[14]

While judges do have the mandate to adjudicate disputes according to the law, the extent to which this is distinct from an arbitrary exercise of judicial lawmaking is questionable, for the Constitution can be made coherent even with purposes that contradict each other.[15] Locating these purposes in the past or present subjective attitudes and beliefs of the Kenyan people is, at best, a difficult affair. It would seem extremely arduous because of the extensive empirical research it would require, not to mention the challenges entailed in articulating hopes, dreams, desires, and values with precision. If moral truth is not objective, as the aforementioned High Court judgement would appear to suggest, even a judge's recourse to morality to make the law intelligible to himself, as may indeed often happen,[16] is an arbitrary imposition of his own conception of law on other people.[17] More importantly, even in the event of success in discerning the elusive desires and aspirations of the people, the prevailing understanding of 'purposive interpretation' would cause 'correct' adjudication to run the risk of being divorced from objective moral truth, for instance, the objective common good of the Kenyan people.

Nevertheless, the separation of constitutional interpretation from objective moral truth in Kenyan courts has long antecedents and deep roots, including the English legal system transferred to Kenya during the colonial period. Even at the height of political agitation, this separation found endorsement among native political reformers for its perceived impartiality and justice.[18] This legal system was itself informed by a strictly positivistic understanding of the law as the will of the sovereign. Indeed, in the nineteenth century and at least the earlier parts of the twentieth century, judges believed themselves bound to justify their interpretations of statutes as expressions of the intent of the legislature that enacted them,[19] a sentiment that

[13] Waki J in *Non-Governmental Organizations Co-ordination Board v EG and 5 others* [2019] eKLR, pages 2 and 3.

[14] Kulundu H, 'A philosophical analysis of legal positivism with respect to the place of morality in the Kenyan judicial system', Unpublished MA Thesis, Kenyatta University, 2013, 123 and 124.

[15] See, for example, *Federation of Women Lawyers-Kenya and 3 others v Attorney-General and 2 others* [2019] eKLR, paras 200, 237, 299 and 300.

[16] Hart HLA, *The concept of law*, Oxford University Press, Oxford, 2012, 204 and 205.

[17] See Dworkin R, 'Law as interpretation', 9 *Critical Inquiry* 2, 1982, 189 and 196.

[18] Morris HF, *Some perspectives of East African legal history. Crime in East Africa 3*, The Scandinavian Institute of African Studies, Uppsala, 1970, 25 and 26.

[19] Cornish W, 'Sources of law' in Cornish W, Anderson S, Cocks R, Lobban M, Polden P and Smith K, *The Oxford history of the laws of England: Volume XI: 1820-1914 English legal system*, Oxford University Press, New York, 2010, 53-57.

mirrors the Constitution's affirmation of popular sovereignty.[20] Yet adjudication that is 'correct' according to the desires and aspirations of the people but divergent from objective moral truth would hardly have a positive effect on their lives. It would frustrate the purpose of Article 259(1) of the Constitution. Unfortunately, the understanding of purposive constitutional interpretation implied in the Constitution warrants such adjudication.

As this background attempted to illustrate, Article 259(1) is simultaneously compatible with the objective common good of the people and its contrary. This problem requires further investigation.

1.2. Statement of the Problem

Article 259(1)(a) of the *Constitution of Kenya,* 2010 (hereafter, the Constitution) demands that its interpreters construe the document in a purposive manner. However, there is a need to establish the meaning and scope of 'purposive interpretation' since numerous people, all ostensibly interpreting the Constitution to promote its purposes, have construed the document to mean things so divergent as to be at times opposed to each other. The root of such divergences seems to be the absence of a shared understanding of the purpose of the law in general and the Constitution in particular. This study analyses the ethical nature of legal obligation and its relationship to moral obligation as the basis for purposive constitutional interpretation.

1.3. Justification for the Study

This study determines the basis of purposive constitutional interpretation. This is a step towards enabling Kenyan legal practitioners to interpret and apply the Constitution and the legislation subordinate to it for the good of the Kenyan people.

1.4. Significance of the Study

This study attempts to establish a common basis for purposive interpretation of the Constitution. Thus, it will assist Kenyan legal practitioners of good will to interpret the Constitution and other Kenyan legislation in a manner favorable to the good of the Kenyan people.

Furthermore, in pursuing its objectives, this study sheds light on the nature and relationship of law and morality with insights from the Kenyan situation. For this reason, it will benefit legal

[20] Article 1(1), *The Constitution of Kenya* (2010).

philosophers and political theorists by fostering contemporary jurisprudential thought in the Kenyan context.

1.5. Aims and Objectives

1.5.1. Aim

This study attempts to establish the basis for purposive interpretation of the law in general and the Constitution in particular. To do this, it analyses the ethical nature of legal obligation and its relationship to moral obligation.

1.5.2. Objectives

1. To analyze purposive legal interpretation.
2. To illustrate the relationship of legal obligation to moral obligation.
3. To determine whether the ethical nature of legal obligation is the basis of purposive legal interpretation.

1.6. Hypothesis

This study assumes an intrinsic relationship between legal obligation and moral obligation which underscores the ethical nature of legal obligation as the basis of purposive interpretation of the law in general and the Constitution in particular.

1.7. Research Questions

1. What are the overall structure and basis of purposive legal interpretation?
2. Because of its content and structure, is there a hierarchical relationship between legal obligation and moral obligation?

1.8. Scope and Limitations of the Study

This study investigates the nature of legal obligation and the relationship between legal obligation and moral obligation with the aim of establishing the basis of purposive interpretation of the law in general and the Constitution in particular.

Therefore, this study cannot rely on a framework of legal relativism because such a framework would exclude the possibility of an intrinsic relationship between law and morality.

1.9. Literature Review

The relationship between legal obligation and moral obligation and the relationship of legal obligation to individual fulfillment have been extensively studied in Anglo-American jurisprudence. The major contemporary trends – modern legal positivism, contemporary natural law theories, and interpretivism – differ in how they conceive the distinction between legal obligation and moral obligation.

Hart, perhaps *the* modern legal positivist, for example, understands legal obligation as a particular kind of belief that some course of conduct is a standard for one's action. This belief is held in common with others and because of the general conformity of the group to this course of conduct.[21] Hart also holds that legal obligation is premised on the belief one has in the authority of whoever posits legal ordinances. This belief is itself based on generally accepted rules.[22] Moral obligation, on the other hand, he understands as the personal conviction, widely shared in a particular society, that some course of conduct is a standard for one's action. Moral obligation is premised on the belief that some good is important for the community.[23] For Hart, both kinds of obligation are assumed to be subjective. Furthermore, since legal obligation and moral obligation have different bases in Hart's legal positivism, they would appear not to be intrinsically related to each other. Indeed, belief in the obligatory character of laws need not be supported even by the belief that it is good to obey them.[24] This claim is encapsulated in Hart's separability thesis, that is, the proposition that law retains the force of law even if it is immoral.[25]

Green disagrees with a formulation of Hart's separability thesis that denies any necessary connections between law and morality.[26] He formulates a list of numerous necessary connections in support of his claim. For example, he states that law and morality both contain norms, and that the content of every moral norm could be the content of a legal norm.[27] However, Green does agree with what he asserts to be the core of Hart's separability thesis, namely, that it is not a necessary truth that law reproduces or satisfies certain moral demands.[28]

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[21] Hart HLA, *The concept of law,* 116, 255 and 256.
[22] Hart HLA, *The concept of law,* 116 and 117.
[23] Hart HLA, *The concept of law,* 169 and 255.
[24] Hart HLA, *The concept of law,* 255 and 256.
[25] Green L, 'Positivism and the inseparability of law and morals', 83 *New York University Law Review* 4, 2008, 1056.
[26] Green L, 'Positivism and the inseparability of law and morals', 1041 and 1044.
[27] Green L, 'Positivism and the inseparability of law and morals', 1044.
[28] Green L, 'Positivism and the inseparability of law and morals', 1056.

Although it can be evaluated against moral criteria, law can be immoral without ceasing to be law. It then appears that since law purports to impose an obligation, and since this obligation is not necessarily moral even from the point of view of the legislator, then legal obligation is distinct from moral obligation.

Shapiro's theory seems to elaborate this positivist thesis. He describes law as social planning, that is, the guiding of the conduct of members of a community over time by adopting ends, positing means for their achievement, adopting these means as new ends, and so on.[29] Given that these ends are posited,[30] they do not necessarily coincide with the moral good. This is so because these ends and the moral good would appear to have different sources: the legislator for the ends of the law and human nature for the moral good. Shapiro's argument also reveals that, in modern legal positivism, the capacity of the agent to adopt ends of his action forms the foundation for the distinction between legal obligation and moral obligation, both of which are understood to be subjective.

Gardner also analyzes the relationship between law and morality. He explicitly asserts that law is law even if it is immoral, and that law has the aims of its makers.[31] In other words, it is a posited standard of conduct. This confirms further that in modern legal positivism, legal obligation is distinct from moral obligation.

These views all seem to affirm the double thesis that the foundation of legal obligation is authority, and that this foundation is distinct from the basis of moral obligation. The basis of moral obligation, they seem to assume, is merely subjective. Thus, according to Hart, the same person can be subject to a legal obligation and a moral obligation that contradict each other.[32]

On the other hand, there are numerous opponents to this position. Fuller attempts to prove that the foundations of a legal order comprise what he calls a 'merger' of law and morality, a criterion of legal validity that is endorsed because it is believed that to do so is morally good.[33] Law, therefore, has an inherent moral quality: it can be good or evil. He conceives of law as justified by morality. The nature of legal obligation as 'legal' depends on moral obligation and, therefore, legal obligation is a form of moral obligation.

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[29] Shapiro S, 'Was inclusive legal positivism founded on a mistake?', 22 *Ratio Juris* 3, 2009, 329-331.
[30] Shapiro S, 'Was inclusive legal positivism founded on a mistake?', 333.
[31] Gardner J, 'Ethics and law', in Skorupski J (ed), *The Routledge companion to ethics*, London, Routledge, 2010, 420.
[32] Fuller L, 'Positivism and fidelity to law: A reply to Professor Hart', 71 *Harvard Law Review* 4, 1958, 656.
[33] Fuller L, 'Positivism and fidelity to law', 639 and 642.

Finnis raises objections of a different kind. According to him, the individual is only bound to achieve objects that are ends which correspond to his nature and perfect it.[34] A legal obligation is binding insofar as it corresponds to one or more of the goods that perfect man's nature and directs him to achieve them in a way that respects simultaneously all the basic goods of his nature as basic goods, without devaluing any of them.[35] Finnis seems to confirm the thesis that legal obligation is a form of moral obligation.

What these critiques of the separability thesis have in common appears to be the understanding that law is founded on morality. Therefore, the obligations imposed by the law are necessarily moral. It seems that there is no such thing as an 'immoral legal obligation' according to these views, since an 'immoral legal obligation' would not be an obligation at all. Moreover, obedience to the legislator would appear to be demanded by human nature only insofar as it is a means to achieving objectively good ends.

Dworkinian interpretivism objects to positivist theses in a vastly different way. According to Dworkin, what we call law is actually a practice of interpretation: it is the attribution of a purpose to each demand of the law as well as to law generally, the construction of the law according to the values of each interpreter.[36] In the West, these values are generally identical to the liberal political ethic, which would permit each individual to choose their own values and act according to them, subject to the rights of others.[37] The criterion of legal validity, then, is not a posited rule external to the interpreter, but the understanding of the law that a majority of interpreters in a society agree upon by consensus based on their moral convictions.[38] What counts as law, then, is determined by what is perceived to be moral. Legal obligation would seem to be founded on a morality that excludes authority except insofar as authority is seen as a means to achieving or as forming part of what is perceived to be moral.

Raz would appear to overcome this tension through his conception of the nature of political authority. According to Raz, the authoritativeness of laws lies not only in their instrumental value, their value as means to moral ends,[39] as Finnis would appear to assert, but also in the

[34] Finnis J, *Natural law and natural rights,* Oxford University Press, Oxford, 2011, 14 and 15.
[35] Finnis J, *Natural law and natural rights,* 105 and 106.
[36] See Dworkin R, 'Law as interpretation', 189, 193 and 194; Finnis J, 'On reason and authority in *Law's Empire*', 6 *Law and Philosophy* 3, 1987, 358 and 359.
[37] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral. Una reflexión a partir de las luces y sombras en la propuesta de Ronald Dwokin', 56 *Persona y Derecho* 1, 2007, 303-305.
[38] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 305.
[39] Raz J, *Between authority and interpretation: On the theory of law and practical reason,* Oxford University Press, New York, 2009, 103.

intrinsic value of obeying the commands of a legitimate political authority.[40] Obedience to a legitimate political authority is necessary for being able to experience oneself as a full member of one's political community, i.e., to identify oneself with a political community that one believes to be, and to be accepted as being, respected and respectable.[41] This identification depends on one's ability and willingness to accept as one's own the standards of conduct that the political community endorses, including its laws, and this, in turn, depends partly on one's moral judgement giving basic approval to these standards.[42] Yet, it is the fact that the political community endorses these standards that turns adherence to them into an act of union with it.

For Raz, the foundation of legal obligation, then, is legitimate political authority. However, he seems to diverge from modern legal positivism in asserting that authority is only legitimate if it is perceived by its subjects as being instrumentally and intrinsically moral,[43] though he does not appear to have analyzed the principles that underlie his claim.

While each of the cited studies yields insights into the nature of law, insights which will be explored later in the study, it is important to note that studies on either side of the dichotomy do not seem to sufficiently reconcile their views with those opposed to them. This study intends to inquire into the experience of legal obligation as distinct from moral obligation and the subordination of law to morality to overcome the dichotomy. This study will seek to reconcile the opposing views through personalism drawn from Aquinas's idea of law and Joseph Raz's theory of law. It is hoped that by doing so, this study provides a path to achieving a better understanding of the basis, meaning, and scope of purposive interpretation of the law, and specifically, as it could be applied to Article 259(1) of the Constitution.

[40] Raz J, *Between authority and interpretation*, 106.
[41] Raz J, *Between authority and interpretation*, 106.
[42] Raz J, *Between authority and interpretation*, 106 and 107.
[43] Raz J, *Between authority and interpretation*, 107.

1.10. Definition of Terms

‘Legal interpretation’ refers to the process of discerning the meaning of a law, generally considered. ‘Law’ here includes ‘constitution’.

‘Moral obligation’ is that which a person ought to want and do.

‘Legal obligation’ is that which a person ought to want and do according to the law. It is the purpose to which the law ordains our conduct.

‘Common good’ refers to the total sum of conditions that permit the holistic flourishing of the members of a community, shared as a purpose by the members of that community.

1.11. Outline of the Study and Flow of Argument

The study analyzes legal interpretation as seen from the internal viewpoint to determine its structure. From the structure of legal interpretation, the study draws conclusions about certain characteristics of the basis of legal interpretation. It then proceeds to determine the relationship between legal obligation and moral obligation to ascertain the purpose of the law, which is the path to its meaning, and, therefore, a basis for the interpretation of any law, including the Constitution. Since Article 259(1) details how the Constitution is to be interpreted, this is also a basis for the interpretation of Article 259(1).

1.12. Summary of Overall Results

The study finds that legal interpretation, as seen from the internal viewpoint, takes the form of an attempt to understand and develop the law according to its best possible purpose. Since a community is the subject of this purpose (whence the authoritativeness of the law), the interpreter’s action is simultaneously an attempt to identify himself with the community whose law he interprets, thus coming to share a purpose in common with the others in the community.

The study also finds that legal obligation is founded on moral obligation. Specifically, the purpose of the law is the common good.

1.13. Summary of Overall Conclusions

Therefore, the meaning and authority of every law, including the Constitution, is derived from the common good, which thus forms the basis for interpretation of the Constitution and, therefore, of Article 259(1).

1.14. Chapter Breakdown

Chapter 1: Introduction

Chapter 2: Theoretical Framework and Research Methodology

Chapter 3: The Structure and Basis of Purposive Legal Interpretation

Chapter 4: The Relationship between Legal Obligation and Moral Obligation

Chapter 5: Discussion, Conclusions and Recommendations

2. Theoretical Framework and Research Methodology

2.1. Theoretical Framework

This study relies on Dworkin's theory of interpretivism, Aquinas's understanding of the law, Karol Wojtyla's notion of participation in his description of the person and the community, and finally, aspects of Joseph Raz's theory of law.

Interpretivism, first propounded by Ronald Dworkin, asserts that law is created through the action of authorities and their subjects.[44] In acting according to the law, authorities and their subjects interpret the law in a manner coherent with their conception of what the law ought to conform to, the ultimate justification of the law.[45] For Dworkin, this justification is the liberal political ethic, which includes permitting persons to choose their own conception of the purpose of life without imposing any one conception on them.[46]

Aquinas defines law as an ordinance of reason made for the common good by him who has charge over the community.[47] His understanding of the law and the human person according to this definition seems to assert that positive law imposes obligations on persons only if it is in conformity with objectively discernible ends of the human person, in this case, the common good. John Finnis is perhaps the most renowned modern proponent of Aquinas's theory of the law and the human person, emphasizing the value of laws as means to attaining moral ends.[48]

Karol Wojtyla's notion of participation refers to the experience a person has of another not just as a human being, but as a person, through the experience he has of his own self.[49] It is through participation that the objective worth of other persons enters the individual's subjective experience. This worth is part of the objectively discernible ends of the human person which, in Aquinas, include the common good. It can be seen that Wojtyla expands Aquinas's understanding of the human person by examining the person and his interactions with other persons in community from the viewpoint of the person's lived experience.[50] Wojtyla uses the notion of participation to explain that the common good is only truly common when it is shared

[44] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 285-286.
[45] Dworkin R, 'Law as interpretation', 194.
[46] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 303-305.
[47] Aquinas T, *Summa theologiae,* I-II, q. 90, a.1.
[48] Finnis J, *Natural law and natural rights,* 14 and 15.
[49] Wojtyla K, 'Participation or alienation?', in Wojtyla K (Sandok T, trans.), *Person and community. Selected essays,* Libreria Editrice Vaticana, Vatican City, 2008, 202.
[50] Wojtyla K, 'The person: Subject and community', 33 *The Review of Metaphysics* 2, 1979, 273 and 274.

by persons who desire it for the sake of each and every other member of the community, because they know every person to have a worth equal to their own.[51] The common good understood in this way is the condition for individual fulfilment.[52] Moreover, the common good so understood is also the condition for the fulfilment of the community. Since, in Aquinas, the purpose of the law is the common good, Wojtyla's explanation from the subjective dimension of the person further illuminates this same purpose of the law. Wojtyla thus sheds light on how the purpose of the law, the common good, is experienced by everyone, including, of course, the person engaged in legal interpretation.

Pilar Zambrano reconciles Aquinas's natural law theory with Dworkinian interpretivism. She shows that the interpretation of law can evade arbitrariness only if it makes reference to objectively discernible ends of the human person.[53] Dworkinian interpretivism's choice of the liberal political ethic as the ultimate justification of the law would imply that every person potentially has their own interpretation of the law, because the standard for determining the meaning of the law would be subjective.[54] However, according to Zambrano, the fact that there are objective ends of the human person bestows upon the law a grounding which allows it to have objective meaning.[55]

Joseph Raz affirms that law has both an intrinsic and an instrumental value. Its intrinsic value lies in the fact that a person who obeys the law of a political community obeys that community's legitimate authority figure or figures. Since legitimate authority figures make decisions in the name of the entire political community,[56] obedience to legitimate authority is a form of union with the political community. Legitimacy, in turn, depends in part on a judgement that the standards that the authority enacts are moral and should be adhered to.[57] Legal interpretation, therefore, is an attempt to discern the meaning of the actions of legitimate authorities.[58] Owing to the nature of both obedience and legitimacy, legal interpretation is an attempt to assume what we perceive to be the worldview of the enacting authority, including their view of morality, and apply these standards to different situations. These standards are

[51] Wojtyla K, 'The person: Subject and community', 295 and 301.
[52] Wojtyla K, 'The person: Subject and community', 302.
[53] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 323 and 324.
[54] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 322 and 323.
[55] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 323 and 324.
[56] Raz J, *Between authority and interpretation,* 101-102 and 104.
[57] Raz J, *Between authority and interpretation,* 107.
[58] Raz J, *Between authority and interpretation,* 114 and 115.

standards of good and evil which are likely to indicate the enacting authority's view of morality and their worldview in general.

Raz's analysis of the authoritativeness of laws sheds light on Aquinas's understanding of law and has the potential to fill out Finnis's exposition of the theory.

2.2. Research Methodology

The study uses a qualitative analysis design and a doctrinal, descriptive research methodology. It will entail the analysis of Kenyan case law on interpreting the Constitution. It will also review literature on the nature of legal interpretation to determine what purposive legal interpretation is, and the nature, content, and structure of legal and moral obligation.

3. The Structure and Basis of Purposive Legal Interpretation

3.1. Introduction

Law in general and every law has intended purposes. To attain a fuller understanding of any law, as interpreters attempt to do, it is necessary to examine it from what Hart calls the internal point of view[59] and thus see what can be called its internal structure. Such a structure would mean the law as viewed in the light of its intended purpose. In turn, the internal structure of legal interpretation would consist, in part, in viewing the law from this perspective.

However, legal interpretation encounters difficulties whenever the law is understood to have no objective grounding that indicates for it a definite purpose. This happens, for example, when unjust laws are thought to share with just laws an equal status as laws. Only if the law has an objective purpose can legal interpretation have an objective basis that gives coherence to the law. The present chapter will attempt to demonstrate the need for clarity on such a basis from Dworkin's interpretivism, Pilar Zambrano's critique of interpretivism, and Raz's theory of authoritativeness. The analysis will include decisions of the Kenyan Supreme Court.

3.2. The Internal Structure of Legal Interpretation

3.2.1. A Sketch of the Internal Structure of Legal Interpretation

Hart[60] begins by setting out the basic problem that necessitates interpretation: the ambiguity of the law. Laws, he says, usually make use of general terms. In part, laws do this because they are intended to apply to a range of possible courses of conduct and a variety of subjects. This is one reason why laws are ambiguous. For instance, a law may forbid entering a park with a vehicle. One may think that the term 'vehicle' certainly includes 'motor-cars'. But what about bicycles? Airplanes? Roller-skates?[61] Even the laws that tell us how to interpret other laws have this ambiguity, and for the same reason.[62] This first reason is related to another: since legislators cannot anticipate every possible situation, then the law cannot express an intention specific to every possible situation. The legislator cannot make a choice regarding something he does not know, but only regarding general aims.[63]

[59] Hart HLA, *The concept of law*, 89.
[60] Hart HLA, *The concept of law*, 126 and 128.
[61] Hart HLA, *The concept of law*, 126.
[62] Hart HLA, *The concept of law*, 126 and 128.
[63] Hart HLA, *The concept of law*, 128 and 129.

Ultimately, then, whether a general term used in the formulation of a law encompasses a given situation is a matter for the person confronted with that situation to decide. He makes his decision according to the purpose of the law,[64] regardless of whether, as he interprets the law, he purports to deduce from the general aim what specific decision to make, or even to deduce the general aim from the phrasing of the law, or instead intuits the general aim and its proper method of application.[65] Seen from the internal viewpoint, legal interpretation is an attempt to discern the purpose of the law, which alone makes the law intelligible. This is part of the *internal structure* of legal interpretation. However, Hart's analysis does not yet fully reveal what purpose the interpreter of the law understands himself to have when interpreting the law. Without an attempt to clarify this purpose, an account of the internal structure of legal interpretation would remain incomplete, hence the need to examine the merits of Dworkin's interpretivism.

3.2.2. The Internal Structure of Legal Interpretation According to Dworkin's Interpretivism

According to Dworkin, legal interpretation is like literary interpretation.[66] When a person interprets a literary work, he has opinions about the importance of the different elements of that work as well as the facts closely related to it: the text, the author's intention in writing the text, the author's background, etc. He has a criterion according to which he determines what is the 'best interpretation' of that work.[67] He may believe that the different chapters of a novel ought to come together to form an intelligible story. Or he may think that the absence of intelligibility in a story is itself a poetic statement about the non-existence of objective meaning. He may believe that, although a work of art is comprehensible as a poetic statement, it is best understood according to the intentions of the work's author. On the other hand, he may object to such a position on the ground that authors themselves have the experience of seeing in their work things which they did not intend from the outset.[68] The choice of any of these options depends on what he conceives a literary work to be or, more precisely, on what he thinks is the source of a literary work's meaning.

[64] Hart HLA, *The concept of law*, 129.
[65] Hart HLA, *The concept of law*, 139 and 140.
[66] Dworkin R, 'Law as interpretation', 179 and 180.
[67] Dworkin R, 'Law as interpretation', 186.
[68] Dworkin R, 'Law as interpretation', 189 and 190.

Similarly, because the source of a law's meaning is its purpose, legal interpretation is also a choice of one among various possible purposes of a law, as Hart affirms.[69] Legal interpretation is the choice of what he thinks to be the best possible purpose that the law can have.[70] Legal interpretation is a creation of the law in the image of what one deems to be its best possible version.[71] Precisely because the law has general aims such as 'liberty' and 'justice', the best possible version of the law derives its meaning from these values according to the best possible understanding one can have of them.[72] However, this version is a version *of the law*. It must be coherent with the law, or else it is not the law but something else.[73] From this explanation, the internal structure of legal interpretation seems to consist in the attempt to understand the law according to the best possible purpose that can inform it while preserving the law's coherence.

However, questions regarding the importance of coherence remain. It is not yet clear why it is important that current interpretations of the law should be recognizable as being part of existing law and not deviations from it. And even after finding an answer to these questions, there would still be something lacking in this account of the internal structure of legal interpretation, namely, the fact that law is an ordinance of a legitimate authority, at least in Raz's view.

3.2.3. Authoritativeness as a Moral Requirement of Law

Raz explains that law necessarily claims legitimate authority.[74] To say that a law is authoritative is to assert that it is taken as a rule of the group, a decision of the group, because it is enacted by someone recognized as having the right to be obeyed by the group, as being a 'legitimate' authority.[75] Therefore, to act according to the law is to act according to the intention of this legitimate authority and, in doing so, to come to identify oneself with the group.[76] This identification admits of varying degrees according to the extent to which members of the group share common purposes.[77]

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[69] Hart HLA, *The concept of law,* 129, 139 and 140.
[70] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 285 and 286.
[71] Dworkin R, 'Comment' in Gutmann A (ed), *A matter of interpretation: Federal courts and the law,* Princeton University Press, Princeton, 1997, 122.
[72] Barber S and Fleming J, *Constitutional interpretation,* 156.
[73] Dworkin R, 'Law as interpretation', 195.
[74] Raz J, *Between authority and interpretation,* 112.
[75] Raz J, *Between authority and interpretation,* 104.
[76] Raz J, *Between authority and interpretation,* 106.
[77] Raz J, *Between authority and interpretation,* 106 (he mentions a 'fullness' of membership and asserts that a person's identification with a community depends on the extent to which he is able and willing to accept its standards of conduct – its norms – as his own).

However, a person is perceived to be a fully legitimate authority only when it is perceived to be moral to obey his commands, to adhere to his intention.[78] Furthermore, his authority is more complete when it is perceived to be not only instrumentally, but also intrinsically moral to obey him.[79] Law is not solely a means for fashioning individual conduct to enable people to achieve their goals, as Finnis appears to assert.[80] Since the authority makes decisions on behalf of the group, law also enables its interpreter to identify with a community that he believes he ought to identify with. When one accepts the standards endorsed by the authority on behalf of the group as his own and identifies himself more completely with the group, he thus acquires a sense of belonging that is intrinsically good, crucial for a meaningful life.[81] This would imply that legal interpretation entails an evaluation of the intentions of a legitimate authority to determine the possibility of identifying himself with the purpose of the group through those intentions. Legal interpretation, then, would also be an attempt to identify oneself with the group.

Admittedly, Raz's analysis has a shortcoming implied in its own logic: identification with the intention of the authority is not necessarily identification with the community, precisely because the authority is not always legitimate. As a result, the interpreter's identification with the intention of the authority may not lead him to achieve the sense of belonging that Raz holds so dear. An interpreter in such a situation may impute moral intentions to an authority and perceive him as legitimate, or simply adopt an alternative source of the meaning of the law, if the law is to be worth obeying from his viewpoint.

Furthermore, an authority may not represent a group. Identifying with an authority may not be, in Raz's terms, intrinsically moral, but only instrumentally moral. In such a case, if the interpreter identifies himself with the authority, he would fail to identify himself with the group, to belong to it. Yet from common experience, it seems false to say that this would prevent him from identifying with the community. Therefore, identification with one's community does not require the existence of a legitimate authority. Legal interpretation is an attempt to identify oneself with one's community through its common purposes because the community is the subject of the law's purpose, hence the importance of coherence.

[78] Raz J, *Between authority and interpretation,* 107.
[79] Raz J, *Between authority and interpretation,* 106.
[80] Finnis J, *Natural law and natural rights,* 132, 244 and 252.
[81] Raz J, *Between authority and interpretation,* 106.

3.3. The Basis of Legal Interpretation

For Dworkin, the best possible purpose of the American Constitution is what we may refer to as the liberal political ethic.[82] Nearly thirty years ago, in *Planned Parenthood of Southern Pennsylvania v Robert P Casey et al*, the Supreme Court of the United States clothed the thought at the heart of the liberal political ethic in poetic phrasing:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[83]

Some Kenyan courts endorse a similar ethic as the purpose of the Kenyan Constitution. In their view, constitutional interpretation is bound to adhere to the potentially mercurial 'aspirations of the people'. In fact, the Supreme Court of Kenya has affirmed this on at least three separate occasions: in *In the Matter of the Speaker of the Senate and another v The Attorney-General and 4 others* in 2013,[84] *Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others* in 2014,[85] and *Council of Governors and 47 others v Attorney-General and 3 others (Interested Parties); Katiba Institute and 2 others (Amicus Curiae)* in 2020.[86] Thus the Kenyan Supreme Court of Kenya seems to concur to some extent with the Supreme Court of United States, affirming that each generation would have the right to define its own concept of existence, meaning, the universe, and the mystery of human life.

As Zambrano notes, in this ethic, every interpreter may have his own evaluative criterion of the law and, for each interpreter, his criterion would be valid.[87] If the law is given its meaning by a 'best possible purpose' that is consistent with it, and if each individual is free to determine his notion of what is 'best', as the liberal political ethic would affirm, then the law has a multiplicity of meanings that are valid for different individuals.[88] Legal interpretation requires an objective basis that can engender coherence. Moreover, as can be seen from the discussion of Raz's view, the fact that the basis of legal interpretation engenders coherence is closely related to the fact that it leads to the identification of the interpreter with the community. The

[82] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 302 and 303.
[83] *Planned Parenthood of Southern Pennsylvania v Robert P Casey et al* (Supreme Court of the United States) (1992).
[84] *Speaker of the Senate and another v The Attorney-General and 4 others* [2013] eKLR paras 155-157.
[85] *Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others* [2014] eKLR, para 364.
[86] *Council of Governors and 47 others v Attorney-General and 3 others (Interested Parties); Katiba Institute and 2 others (Amicus Curiae)* [2020] eKLR, paras 79, 105, and 122.
[87] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 323 and 324.
[88] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 323 and 324.

latter explains why coherence is important. Therefore, the objective basis of legal interpretation, the purpose of the law, includes coming to share a common identity and purpose.

Before expanding on this in the next chapter, it will be instructive to look at some of the jurisprudence emanating from the Kenyan Supreme Court that enlarges on the value for the legal interpreter of having a common identity with his community.

3.3.1. Insights from the Supreme Court of Kenya

The Kenyan Parliament comprises two Houses: a National Assembly, in charge of the government of the entire nation, and a Senate, comprising Senators in charge of legislation for counties – infra-national units to which a limited range of government functions are devolved. In 2013, the National Assembly tabled a bill that would determine the division of revenue between the national and county governments. Although the Senate should be involved in drafting bills that have a significant impact on county governments,[89] the Speaker of the National Assembly forwarded the bill to the President for his assent, without the Senate's involvement. The Speaker of the Senate sought an advisory opinion from the Supreme Court concerning whether it was necessary for the Senate to be involved in the process.[90]

Basing its reasoning on the vital role of the Senate in fulfilling popular aspirations for shared prosperity,[91] the Court argued that the involvement of the Senate in the process is a requirement that expresses the sovereign intent of the people.[92] According to a proper reading of the Constitution, the Senate must be involved in the division of revenue to ensure that the county governments have sufficient resources to perform their functions. In this way, the Senate safeguards devolution and exercises oversight for actual service delivery in otherwise neglected regions.[93] Thus devolution contributes to the desires and aspirations of the people for shared prosperity.

Of relevance for the basis of legal interpretation is the Court's assertion that the Constitution 'articulates the shared aspirations of the nation, the national ethos, the values which bind its people, and the moral and ethical direction which that nation has identified for its future.'[94] The

[89] Article 96(2), *The Constitution of Kenya* (2010).
[90] *In the Matter of the Speaker of the Senate and Another* [2013] eKLR.
[91] *In the Matter of the Speaker of the Senate and Another* [2013] eKLR, paras 104, 173, and 189.
[92] *In the Matter of the Speaker of the Senate and Another* [2013] eKLR, paras 131 and 189.
[93] *In the Matter of the Speaker of the Senate and Another* [2013] eKLR, paras 187 and 189.
[94] *In the Matter of the Speaker of the Senate and Another* [2013] eKLR, para 50.

Court is bound to give effect to these through its interpretation of the Constitution.[95] Indeed, as the Court said in a later decision, its role 'entails [implementing the Constitution in such a manner that it] succeeds in reflecting the desires and aspirations of the people'.[96] Thus, the Court will succeed in giving to the Constitution 'a dynamic, progressive' interpretation responsive to 'societal changing conditions' and the context of the people.[97]

As noted from Pilar Zambrano's view on Dworkin's interpretivism, the emphasis on the current aspirations of a people as a basis for legal interpretation is problematic because of the danger of relativism and incoherence into which it can lead. That notwithstanding, it is also revelatory of an important truth: legal interpretation is a process that requires the unity of the interpreter with his community in the sense of having a common purpose with it.

From Raz, it was noted that legal interpretation, ideally, is also the identification of the interpreter with the community whose law he interprets. The understanding that the Supreme Court of Kenya has of the Constitution would appear to add that this identification also *precedes* the interpretation of the law. Indeed, interpretation would appear to have two faces: understanding the law in the light of the source of its meaning, that is, the shared purpose of the community, and developing the law according to that purpose. Thus, it can be rightly said that to lead to unity in a community, the basis of legal interpretation must be not only objective, to enable coherence, but also *shared*, to allow a community with a common identity to bloom into existence and persons to *belong*.

[95] *In the Matter of the Speaker of the Senate and Another* [2013] eKLR, para 187.
[96] *Council of Governors and 47 others v Attorney-General and 3 others (Interested Parties); Katiba Institute and 2 others (Amicus Curiae)* [2020] eKLR, para 105.
[97] *Council of Governors and 47 others v Attorney-General and 3 others (Interested Parties); Katiba Institute and 2 others (Amicus Curiae)* [2020] eKLR, para 107.

4. The Relationship Between Legal Obligation and Moral Obligation

4.1. Introduction

As the previous chapter tried to demonstrate, legal interpretation, as seen from the internal viewpoint, is an attempt to understand and develop the law according to its best possible purpose, a purpose whose subject is the community that has it in common. For that reason, the interpreter's action is an attempt to identify himself with the community whose law he interprets.

The law's purpose is the source of its meaning. Therefore, this purpose is the basis of legal interpretation and the criterion according to which one interprets the law. If this criterion is subjective, then not only would the law have a multiplicity of meanings valid for different individuals,[98] but the community subject to a law interpreted in such a way may also splinter into smaller groups divided according to their interests. The unity of each group would be based on purposes that would differ from one group to another. Such purposes mediate the identification of each group's members, that is, assuming they identify with each other within the group. The coherence in the law and stable unity in communities require an objective criterion for interpreting any laws governing the community. This criterion is objectively the purpose of the law.

From the perspective of the objective purpose of the law, the present chapter investigates the possibility of a hierarchical relationship existing between legal obligation and moral obligation due to the nature of the law and the nature of moral obligation. In analyzing the nature of legal obligation, the argument sheds light on the purpose of the law as the source of the law's meaning and, hence, the basis of legal interpretation. It undertakes this analysis from Aquinas's idea of law, aided by Finnis's exposition of it and Wojtyla's perspective of the human person's lived experience of community and the common good.

4.2. The Nature of Moral Obligation

A discussion about the nature of moral obligation, which is understood to be that which a person ought to want and do, must deal with the question of what is good, or desirable. To assert that anything is objectively good is to assert that its desirability depends not on the whims of the person who desires it, but on the nature of both the person and the desired object. If this

[98] Zambrano P, 'Objetividad en la interpretación judicial y objetividad en la moral', 323 and 324.

assertion is true, then the object really is good, and really can make the person better in some objective way.[99] It improves the person. And since some objects are more desirable than others, then there is a hierarchy among these objective goods, for some are more capable of improving the person and the community.[100]

As Aquinas affirms, the good of the whole community, the common good, is better than the good of the individual.[101] The individual never exists in isolation, but always with others with whom he can choose to relate as persons upon becoming aware of their value. Awareness of the value of a person includes the awareness that they, too, are conscious and self-determining, that they possess themselves[102] and orient themselves towards aims[103] in respect to which they are already 'oriented' by nature, with some improving them and others harming them. In every relation with a person, we acknowledge, experience, and act towards them as another self with an equal value to our own, to greater or lesser degrees, or we fail to do so.[104] Individuals who relate with each other in such a way and know each other to be similarly related to the others become a community, a distinct subject with its own identity and purposes which each of these individuals shares.[105] Such relation is necessary for the formation of communities and follows upon treating persons as they ought to be treated, acting according to their objective goodness. In other words, individuals, who always exist with each other, must either treat the others as *persons* and come to form a community or communities, precisely by affirming their personhood, their free self-orientation towards objective goods; or fail to do so and, as a result, fail to flourish as a person. The value of persons demands affirmation and, because of their nature, this takes the form of promoting their free pursuit of objective goods. It is the nature of persons that gives rise to their rights as persons and the duties of every person to every other.

From the above, it is apparent that the good of the whole community must be experienced as desirable, not only for oneself, but also for the sake of the others who form part of the community, because one experiences their fulfillment as desirable for himself.[106] The common

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[99] Wojtyla K, 'On the metaphysical and phenomenological basis of the moral norm', in Wojtyla K (Sandok T, trans.), *Person and community. Selected essays,* Libreria Editrice Vaticana, Vatican City, 2008, 76.
[100] Wojtyla K, 'On the metaphysical and phenomenological basis of the moral norm', 77.
[101] Aquinas T, *Summa theologiae,* I-II, q 90, a 2; Wojtyla K, 'Thomistic personalism' in Wojtyla K (Sandok T, trans.), *Person and community. Selected essays,* Libreria Editrice Vaticana, Vatican City, 2008, 172 and 173.
[102] Wojtyla K, 'The personal structure of self-determination' in Wojtyla K (Sandok T, trans.), *Person and community. Selected essays,* Libreria Editrice Vaticana, Vatican City, 2008, 192.
[103] Wojtyla K, 'The personal structure of self-determination', 189.
[104] Wojtyla K, 'Participation or alienation?', 201 and 202.
[105] Wojtyla K, 'The person: Subject and community', 301.
[106] Wojtyla K, 'The person: Subject and community', 301 and 302.

good is truly common when we experience it as being shared by the members of a community of which we form a part and when every member of the community desires the good of every other.[107] This implies the experience of the community as a 'we', that is, the identification of each individual with the community, in which each person discovers himself.[108]

This analysis has attempted to demonstrate that a person ought to strive for that which is objectively good. Since moral obligation is what a person ought to want and do, then it is such a good that defines the nature of moral obligation. More important, however, among the various objective goods that an individual can strive for, is the good of the entire community considered as such. That is, he ought to strive for the good of the entire community, not only for himself, but also for the sake of every other person who forms a part of the community.

The good of the entire community, or the common good, which is a specific moral obligation, is central to the nature of legal obligation in the sense that it is the purpose of the law.

4.3. The Nature of Legal Obligation

The nature of legal obligation is here discussed in light of Aquinas's definition of the law as 'an ordinance of reason for the common good, made [and promulgated] by him who has care of the community.'[109] For this chapter, of prime importance among the elements of this definition is the second, namely, that law is an ordinance directed to the common good. In other words, the purpose of the law is the common good, that is, the shared purpose of all who form part of the community.[110] As the previous sub-section attempted to demonstrate, the good of the community is more complete than the individual good, not only because it includes the conditions for each individual to achieve fulfillment, but also because it is the principle of union among members of a community.[111] Indeed, the common good is the very reason why individuals come together to form a community. It is unachievable by the solitary individual.[112] It includes the material, psychological, intellectual, volitional, affective, and spiritual benefits needed by every individual and by the community as a whole for their holistic flourishing.

One reason why the common good is the purpose of the law is the third element of this definition: the law is made by him who has care of the community – in other words, that

[107] Wojtyla K, 'The person: Subject and community', 301.
[108] Wojtyla K, 'The person: Subject and community', 301.
[109] Aquinas T, *Summa theologiae,* I-II, q 90, a 4.
[110] Aquinas T, *Summa theologiae,* I-II, q 90, a 2.
[111] Aquinas T, *Summa theologiae,* I-II, q 90, a 2.
[112] Finnis J, *Natural law and natural rights,* 144 and 145.

community's authority and/or legislator. As Aquinas explains, the law orders the conduct of the members of the community. This ordering is an ordering of free actions which, if they are to remain free, should be ordered by the agents towards their end.[113] Otherwise, there is no free quest for any end, and there is no fulfillment of the kind that can be called fully human. Therefore, the making of a law belongs either to the whole community or to a person or body that is in charge of it. In his interpretation of Aquinas, Finnis says that to co-ordinate the actions of every member of the community to the common purpose of any group requires either unanimity or authority – on behalf of the community, an authority makes decisions about which end to pursue or which course of conduct to follow.[114] And since the purpose for which the community exists is to be united in the common good, then this is the proper purpose of the ordinances of authority, whence the hierarchical relationship between legal obligation and moral obligation. We ought to obey the authority and the law for the sake of the common good, just as it was demonstrated in relation to the nature of moral obligation. In fact (and quite in keeping with the internal structure of legal interpretation), it can be established that the force of legal obligation is derived from moral obligation, which, in turn, is derived from the nature of the person and the community. Moreover, it is the reason for the existence of authority.

It is from the factual ability of a person or body of persons to co-ordinate action for the common good that they have the authority to legislate.[115] However, as Raz notes, a person or body of persons is only recognized as being fully authoritative when it is legitimate, i.e. when it is perceived to be moral to accept the standards for conduct that it proposes as one's own, for the sake of the entire community.[116] It is from its capacity to bind members of a community in the common good that law derives its authority. The purpose of the law is not solely to coordinate the actions of the members of a community for the common good but to bring them to desire and strive for the common good and, therefore, become united in desiring, achieving, and enjoying it. This is what it means to say that the lawgiver intends to make good citizens.[117]

What has been said so far about the purpose of the law applies primarily to the Constitution, which is, after all, a law and the fundamental law of Kenya's legal order.[118] Therefore, the basis for the interpretation of the Constitution, as well as any law, is derived from the ethical nature

[113] Aquinas T, *Summa theologiae*, I-II, q 90, a 3; Finnis J, *Natural law and natural rights*, 146.
[114] Finnis J, *Natural law and natural rights*, 232.
[115] Aquinas T, S*umma theologiae*, I-II, q 90, a 3, ad 2; Finnis J, *Natural law and natural rights*, 252.
[116] Raz J, *Between authority and interpretation*, 106.
[117] Aquinas T, *Summa theologiae*, I-II, q 92, a 1, ad 2.
[118] Article 2(2), *The Constitution of Kenya* (2010).

of legal obligation, specifically, from the foundation of legal obligation upon the common good. Article 259(1) of the Constitution, which describes how to interpret the Constitution, should itself be interpreted in a manner that promotes the union of the citizens of Kenya in desiring, achieving, and enjoying the common good.

5. Discussion, Conclusions, and Recommendations

5.1. Summary of Findings

According to the previous chapters, legal interpretation, as seen from the internal viewpoint, takes the form of an attempt to understand and develop the law according to its best possible purpose. Since a community is the subject of this purpose, the interpreter's action is simultaneously an attempt to identify himself with the community whose law he interprets, thus coming to share a purpose in common with the others in the community. The purpose of the law is the source of the law's meaning and, consequently, the basis of legal interpretation. If this basis gives coherence to the law, then, by this very fact, it must be both objective and shared by a community.

Moral obligation can be described as the orientation of the individual to objective good and, above all, to the objective good of the community, together with others and for the sake of the community. In brief, moral obligation is the orientation of the individual to the common good. Legal obligation, in turn, is the orientation of the individual to the common good through authoritative ordinances. The common good is the core of legal obligation, the purpose of the law, and the source of the law's meaning and authoritativeness. Therefore, legal obligation is founded upon moral obligation. The ethical nature of legal obligation, that is, the fact that the law derives its meaning and authority from the common good, is the basis of interpretation of the law and, consequently, the Constitution, proving the truth of this study's hypothesis.

5.2. Discussion of Findings

On the one hand, Finnis draws valid conclusions about legal and moral obligations from an objective point of view. He concludes that legal obligation exists only insofar as it is a means of achieving moral ends that are important for the community. However, his analysis seems to leave out the subjective dimension, the lived experience, of legal and moral obligation. On the other hand, modern legal positivists such as Hart, Green, Shapiro, and Gardner, as well as Fuller, Dworkin, and Raz, would all seem to cast legal and moral obligation as matters solely of subjective experience. While this yields important insights, this nevertheless seems to be an unfortunate reductionism, especially considering the thought of Finnis. It is in light of Finnis's contributions that this study refrains from using a framework of legal relativism.

Inspired by the approach of Karol Wojtyla, the present study examines both the objective and subjective dimensions of legal and moral obligation and attempts to integrate them. In

observing that legal obligation is founded upon moral obligation, the study's findings agree with Dworkin's claim that, in the person's lived experience, the legal *is* moral. Yet the study advances beyond Dworkin's relativism by establishing a basis for this lived experience in the nature of the human person, the same nature that Finnis takes as a starting point for his analysis of legal and moral obligation.

Furthermore, through looking at the subjective dimension of legal obligation, it finds that authoritativeness is a significant constituent of legal obligation. This explains why the interpretation of the law should be coherent. In this regard, it would agree with the positivists that legal obligation has an origin closely connected to its being endorsed by the community in which the subject of the law finds himself. However, contrary to the positivists, the study finds that the source of legal obligation is not distinct from the source of moral obligation. Rather, they both spring from the nature of the human person. Moral obligation founds legal obligation and is the basis for the authoritativeness of the law. Contrary to Raz's suggestions, the interpreter doesn't need to identify with his community *through* the intentions of the authority that enacts the law. He is right, though, in affirming the importance of this identification and discerning in it the basis of this identification. This study expands on why this identification is important. Authoritativeness is not merely an instrumental reality, as Finnis says, but instead is the expression, as it were, of the person's orientation to existing in community with others.

The following sub-section illustrates what the findings of the study imply about the proper construction of Article 259(1) of the Constitution, which details how the Constitution is to be interpreted.

5.3. Implications of Findings

5.3.1. The Study of Legal Obligation and Legal Interpretation

The study illuminates the complementarity of both the objective and subjective dimensions in the analysis of legal obligation and legal interpretation. Legal obligation and legal interpretation cannot be properly understood if either their objective or subjective dimension is neglected.

5.3.2. Interpretation of Article 259(1) of the Constitution of Kenya, 2010

Article 259(1) of the Constitution reads as follows:

> **259.** (1) This Constitution shall be interpreted in a manner that—

(*a*) promotes its purposes, values, and principles;

(*b*) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(*c*) permits the development of the law; and

(*d*) contributes to good governance.

To interpret the Constitution in a manner that promotes its purposes implies interpreting it in a manner that promotes its prime purpose, the purpose of every law: the common good. Furthermore, this prime purpose underpins the understanding an interpreter should adopt of the values and principles of the Constitution. For example, 'human dignity', one of the national values and principles according to the Constitution,[119] should be understood not merely as stemming from the capacity to direct oneself towards any end whatever,[120] but rather as founded on the ability of every individual to achieve a profound significance for his community. Promoting human dignity would aim not at securing the power for unrestricted choice, but at promoting the free adoption by individuals of the affirmation of the worth of every other as their purpose.

The Constitution is to be interpreted in a manner that objectively benefits each member of the community according to the requirements of his nature and personhood. Its interpretation should also lead to a deeper consensus within the community around those objective truths. The interpreter must be neither a tyrant nor a benevolent dictator, but a leader who guides his community by a *dialogic* path of least resistance to full and inclusive flourishing. A dialogic method of legal interpretation would include the rest of the community in discerning and clarifying the common good together, with the aim of achieving consensus about their common purpose.

Interpreting the Constitution according to the common good advances the human rights and fundamental freedoms in the Bill of Rights according to Article 259(1)(b). Moreover, it does so in a manner consonant with the dignity of the human person, giving to each right and fundamental freedom its proper meaning. Since legal interpretation has a unitive aspect, the purpose of the law can become shared to an ever-greater extent by the members of the community who adopt it as their own, as their standard for action. Insofar as the law is

[119] Article 10(2)(b), *The Constitution of Kenya* (2010).

[120] Christiano T, 'Two conceptions of the dignity of persons', 16 *Jahrbuch fur Recht und Ethik,* 2008, 111-112.

understood as an expression of this purpose by those who seek to comprehend the law, to interpret it, it would be deemed desirable to freely adopt it. The law would rule the actions of men, both authorities and their subjects, because it would rule their hearts, and it is in this that the rule of law consists.

Yet the purpose of the law does not remain static in its expression. The circumstances in which the community and its parts find themselves change frequently. To ordain human conduct towards the common good, the law must develop. As an interpreter, fixing one's eyes, not on the law's present form, but the common good, permits the adaptation of that form to the present requirements of the common good. Seeing the common good as the basis of legal interpretation permits the development of the law in a direction that is beneficial and unitive, as per Article 259(1)(c). Not only does such interpretation permit the development of the law, but it also enables authorities to adapt their actions to the common good and the citizens to comply with the law for its achievement. The common good serves as the guiding star for every exercise of authority, constituting the core of the good and legitimate governance which Article 259(1)(d) demands.

5.4. Recommendations

The nature of the study has led to recommendations focused on further study of its subject matter and related phenomena.

The startling lack of a national ethos in the Kenyan context and the presence of communal identities and a sense of belonging among her tribes[121] allowed this concluded study to better appreciate the relationship between authoritativeness and the formation of a common identity. Different contexts permit certain truths to come into view more easily than others. For this reason, it is recommended that the legal thought of other African jurisdictions and cultures be examined on their terms to uncover the truths that they have to offer.

Moreover, this study benefitted immensely from examining both the subjective and objective dimensions of its subject matter. The application of a similar approach to other fields of law is recommended as it is sure to yield novel and valuable theoretical insights about the nature of law and legal phenomena. Similar remarks can be said of a deeper analysis of both dimensions of the subject matter of this study and related phenomena, such as authority.

[121] Presidential Taskforce on Building Bridges to Unity Advisory, *Building bridges to a united Kenya: From a nation of blood ties to a nation of ideals,* 2019, paras 7 and 26.

Finally, this study highlights the importance of a paradigm of legal interpretation that would facilitate the emergence of a shared identity, a shared purpose, and a shared way of achieving it. Further study into the possibility of integrating open communal dialogue into the process of legal interpretation would be a vital step in turning this concept into a reality.

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