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Constitutional Amendments and Social, Economic and Political Controls in African States: A Critique of Kenya' Legal and Moral Disconnect

By

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Abstract
Constitutional amendment or review have occupied many countries in post-independence Africa. Close to 30 countries in African have had either minor or major amendments in their constitutions. This has taken place immediately after independence but most during the 90s to 2018. While constitutional amendment in great democracies like America and German aim at expanding the democratic values and ideals and improve governance, on the contrary, African states' constitutional amendment aim at pervasion and suppression of constitution to cause and warrant some particular action in favor of the rich, the political class and those in power. The truth behind the amendments are to weakened democratic principles and values, target those who are perceived as repels, kill political participation and space or sometimes make electoral laws which are flawless to enable manipulation of election. This has posed a state of political and constitutional instability where by the principle of constitutionalism seems to be under great threat. More than often, it has been said that Africa is still struggling to come out of colonialism fever, however, it is clear that such constitutional amendments taken have yielded any desirable fruits. Kenya has fallen into this trap in that since independence, the constitution has undergone a review 12 times culminating to major constitutional amendment of 2010. In the 2010 constitution a number of changes and amendments where introduced to curb the social, economic and political challenges and menace. Upon completion, 2010 constitution was regarded as the most reformist, revolutionary and progressive constitution in the world. However, ten years down the line the country is still considering further amendment to deal with, ethnicity, corruption, polarized election, safety and security, responsibility and rights, shared prosperity, and inclusivity. It is considered view of this article that this constitutional and legal maneuver will not impact positively not unless morality and law are both annexed as two normative system in controlling and regulating the social, economic and political challenges and misdemeanor currently facing the country. This paper argues against the deterministic philosophy where people think that every situation needs to be dealt with through written laws with stringent measures.

Key words: Constitutional amendment, Constitutionalism, Legal Determinism, Morality.

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1.0 Introduction

The question that this paper will tackle is whether it is possible to establish a constitution which is made up of laws, regulation and provision which can solve all issues affecting the social, moral and political life of man in the society. The same question can be made more explicit by asking whether the problems ailing the social economic and political development of this country is related to the constitution, that is, lack of enough legislations, clarity and discreetness to guide the process and system of governance. This paper being a philosophical investigation, views the problem to be underpinned in the disconnect between morality, cultural and religious values on one hand, and the law on the other.

In order to systematically discuss this, we shall start by presenting the context analysis of the problem in African and specifically in Kenya. We shall discuss the functions and identity of constitution and its relevance. This will be followed by critical assessment of how the principle of the constitution making has been realized in Africa. Moreover, historical analysis of the law and western religious development will be annexed to shade light on how western and moral system have coexisted. Finally, we shall show the place of morality in helping societies solve problems which cannot be handled with mere law. It is a considered view of this paper that a deeper and more reasoned understanding of the process of making the societal values and morals applicable in Kenyans laws will be a perfect solution.

1.1 Statement of the Problem

There has been a growing emphasis in many African states that constitutional amendments and review are to solve social economic and political challenges facing the continent. This view has drifted African continent into thinking that every human situation or matter can only be solved through legislations. In Kenya the situation currently being experienced is that of a push to have legislations that can solve moral issues which touch the ethical and moral behavior of the people. In the recent push tapped Building Bridges Initiative (BBI), there has been a move to come up with legislation to deal with ethnicity, corruption, polarized election, safety and security, responsibility and rights, shared prosperity, and inclusivity. By way of reasoned argument based on strong fundamental principles of morality, this paper argues that it is not possible to use legal system to solve issues of morality. Morality should underpin all the social and legal code. As such morality is very important in that it is the one that builds the conscience, moral consciousness of the person and the society.

1.2 Contextual Analysis

A constitution is a legal document that sets out the basic principles about the way a national state is ruled and governed (Edling, 2003). According to Aristotle, a constitution is "a certain ordering

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of the inhabitants of city state" (III.31276b1-11). In a constitution, there are a number of core aspects that must be included or rendered succinctly. First, the political aspect of the constitution needs to be handled to the letter. This aspect touches on matters dealing with the general structure of the political system. This includes the governance, the citizenship, electoral process, how the separation of power is provided for in the larger division between the executive, the legislative and the judiciary and lastly the levels of governance and their roles and the relations. Second, and equally important is the social dimension which should also be properly and firmly dealt with. This dimension spells out how the social and moral value of the society or communities represented forms the general provisions of the laws and the constitution. This is mostly set in the preamble of the constitution and becomes the basis upon which that constitution can be realized. Third, the Legal dimension which is, perhaps, the most commonly acceptable dimension by the jurist for it is the legal perspective of the constitution. This dimension sets the processes that a given state will adopt in coming up with laws, the protection of human rights and fundamental freedoms, the division and the working of the judiciary and its independence on matters of judicial processes. H.L.A. Hart (1996) empp believes the criteria of legal validity are contained in a rule of recognition that sets forth rules for creating, changing, and adjudicating law. Without this, there is a vacuum in law which will make the constitution to have a lacuna which is dangerous for the state.

All these forms the basis upon which a constitution can be said to be progressive, reformist and revolutionary in helping the people living in a particular society or nation to establish harmonious and peaceful lives where they coexist. As a matter of fact, when the constitution is built on these three solid dimensions, the legitimacy of the laws and regulation is easily achieved because such laws reflect the general life of the people which they would all agree as the best life for the community

1.3 Legal Normative System in Post-independence Africa

African emancipated themselves from the power of the colonialist through the process and the struggle for independence. When African states gained independence around 1960s, one of the things that independent states had to come up with was their respective constitution. However, having not had an African constitutional history different from the colonialist constitutions, the constitutions that they depended on in creating their own were those of the colonial masters. They did a benevolent eclecticism which involved the choice from colonial constitution what they thought was the best workable provisions and articles. This ideally made the colonialist constitution to set precedence in all independence African constitution. They wanted the constitution which would glorify the African and make them free especially having been in colonial suppression for long. Soon or later they realized that the constitution which they created were missing some components.

With the resurgence of African political ideologies, like consciencism, humanism, negritude, African socialism, a stage was set for the African to make African identity and values as the corner stone of all their initiatives. African became so aggressive and pushed for the dropping of western symbolism, elements, and connotations from their way of life. They rejected imperialism, class society, inequality, injustice, intimidation, suppression and oppression of the

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western colonies and sought to create their own systems and institutions of governance. This forced many African countries to carry out constitutional review or reforms immediately after independence. In such reforms and with the state of colonial fever (not wanting to be under anybody rule) many irresponsive African political leaders saw this as a chance to change the constitution and introduce entrenchments to suit their political agenda which in most cases were personal, or ethnical or regional. This is the irony that has kept ailing Africa's social, economic and political situation up to date. This process in most cases was thought to bring immediate changes on the social, economic and political fabric of the state but there is a lot that meets the eye.

With this in mind, from 1960s approximately 30 countries in Africa countries witnessed constitutional reviews and amendments which in one way or the other accelerated subversion of constitutionalism. This freedom killed constitutionalism and instead propelled a philosophy of African leaders themselves doing what they felt as good and not the people of African states. This saw the creation of the OAU where the leaders wanted to join hands to grow the social economic network but also to protect themselves politically. For instance, it is strange that in the preamble the African leaders' states that this OAU was made by the African leaders and not the African people. Specifically, the charter says, "We, the Heads of African States and Governments assembled in the City of Addis Ababa, Ethiopia" (OAU charter 1963).

While OAU insisted that African state should be left by colonialist to discern and redesign their destiny, they soon realized that they could not progress without depending on the western colonial powers. They needed to cooperate, collaborate and coordinate with them. According to Che-Mponda and Aleck Humphrey (1987), "Independence is the fulfillment of the yearnings for equality, freedom and justice. But it does not forestall interdependence. Precisely because of this…, Africans found their independence to be somewhat of a farce." (Che-Mponda et alia 1987, 7: 53-63). This perhaps is the first challenge that hit the African leaders who wanted to govern Africa in their own styles and preferences with the feeling that the absence of the western colonialist gave them independence to do all they wanted the name of going African

According to John M. Finnis, the reasons we have for establishing, maintaining or reforming law include moral reasons, and these reasons should therefore shape our legal concepts (Finnis, 2011:266). Contrary to this view, many African countries have drifted into wrong reasons for constitutional reviews. Most recently the AU got concerned with the constitutional amendment by various states in Africa among them being Algeria, Burundi, Chad, Gabon, Republic of Congo, Rwanda, Togo and Uganda. It was observed that many constitutional amendments are those that are either advocating or are in favor of incumbent presidents to continue enjoying protracted rights. Furthermore, others have been done with the aim of concentrating more power and authority on the presidency. In Uganda, for instance, the amendment of 1966 led by Milton Obote, made himself both the Head of state and head of government. This came about when the constitution of 1966 relabeled the position of leader of the party having the greatest numerical strength in parliament as the president. (Uganda constitution, April 1966). The same context existed in Rwanda where despite the constitution of 1962 allowed maltiparyism, the situation on the ground only allowed the Rwanda Democratic Movement (MDR Parmehutu) to thrive and dominate the political scenes. As matter of fact it

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was elevated to be the country's only party through the amendment of 1978. This amendment strangely destroyed the spirit of constitutionalism in that it guaranteed that only the National Revolutionary Movement for Development (MNRD) and its chairman could run for president (Rwanda constitution 1978: Art 40).

Additionally, some amendments are those that have seen some countries extend the term limit of the presidency. Globally, the extension or abolition of term limit is a reverse to the hard won democratic and political right. This trend is not only an African tendency, but also a character that has been minimally practiced in the western world. The impact of it has influenced African states. For instance, Russia president, Vladimir Putin, benefited from this undemocratic practice when in March 2018 Russia consented to the removal of term limit. China followed soot when its parliament removed the term limit allowing president Xi Jinping becoming president for life.

The spread of this trend has impacted negatively in African states because of the huge influence that Russia and China have in African. A survey done in East African reveals that in Rwanda, the constitution review of 2015 provided for reducing the term of presidency from 7 years to 5 years and went ahead to open a window for President Kagame to run for a further two terms. This will become operational in 2024 which will allow President Paul Kagame to be in office till 2034. This extension was supported by 98% of the voters. In the same vail, one example where the removal of term limit has not only opened a can of worms through introduction of a different political dispensation, but also, caused violence and war is Burundi.

Here the citizens vote in favour despite the fact that this was an illegal and illegitimate amendment. Out of 4.7m voter, 73% of this supported the amendment to extend the term limit which saw President Pierre Nkuruziza being allowed two more terms. The case of Rwanda and Burundi is far from alone, in Africa since 2015, Algeria, Comoros, Togo, Gabon, Uganda, Chad, Cameroon, Djibouti, Republic of Congo, Sudan, Eritrea and DRC have all joined in this bandwagon. This is not only alarming, but also a measure of how greedy African leaders have become to subvert democratic principles which have been fought since independence. Surprisingly, all these are happening despite the fact that AU had stablished *African Charter on Democracy, Election and Governance* which provided that no member state can use illegal means to access power or to maintain power. (*African Charter on Democracy, Election and Governance* 2007: 24) This charter castigated and termed as illegal any change of the constitution or amendment or revision of the constitution to maintain or access power. The African Union set the sanctions that were to be meted on such states or political leader. (African Charter 2007: Art 24, 2-5).

1.4 Kenyan's Constitutional Amendments

Kenyans situation has not been any different. Kenya gained independence in 1963 with a new constitution which is referred to as Independence constitution which was different from that of the colonial power, the British constitution. Since then, this constitution has undergone12 amendments. Of these 12 amendments there has been two major constitutional review. The constitutional review of 1969 saw the promulgation of a new constitution which replaces the independence constitution of 1963 (Act No. 5 of 1969). Similarly, the constitutional review of

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2010 brought about a new constitution which is currently in existence. This constitution replaced the constitution of 2010.

Just like many African states, many of the early amendments where instigated and initiated by presidents and the ruling party to serve their own interests. The reasons explained above for reviewing the constitutions in African were witnessed in the case of Kenya in that the first four amendments were done to consolidate the presidential power. The major aim of the amendments was to consolidate power, have a bigger control of the state, make everyone subservient to him and galvanize his support in the entire country. For instance, the amendment of 1964, just one year after independence was driven by the yearning for control and consolidate the presidential power. It is for this reason that the scrapping of the office of the prime minister was (Act No 28of 1964). The fact that the prime minister was in charge of government was threating to the presidency then. This amendment did not allow any public participation and involvement. It was done by parliament to serve the interest of the ruling party which was by then predominantly Kanu with a few member form other parties. In equal measure, in 1966 the presidential power was augmented to have such powers of exercise of emergency power. This was removed from the purview of parliament. This meant that the president could order detention of any individual without try in court. This was meant to consolidate the power of the president to manage, deal, intimidate and oppress those who were perceived anti regime (Act No 18 of 1966).

Moreover, further amendments such as that of 1968 did more destruction by repealing from the constitution one of the greatest people-oriented segment of governance, that is, the provincial assemblies. This is what is commonly referred to as majimboism. This regional level governance structure was one form of decentralization that was aimed at devolving governance, administration, resources and authority close to the people. Because of the fear that this level of government brought in regard to consolidating people, people participation and political involvement of the people on the grassroots, it was thought that it was working against the Kanu government. This is due to the fact that majimboism was making regions independent and autonomous in decision making especially when it came to elections. It was scrapped in order to make people rely solely on national government and the provincial and district forum for social, economic and political development (Act No 16 of 1968). Notwithstanding all this, the amendment of 1976 is the one which serves better in demonstrating the fact that amendments in Kenya's constitution also contributed to the killing of the fundamental principles of democracy and constitutionalism.

The 1976 amendment gave power for the president to act arbitrary to the due process of the law in that those who had been found by the court to have committed electoral malpractice could now be pardoned by the president and allowed to contest subsequent elections (Act No. 14 of 1975). This, in essence, made the president to have such sweeping power to decide who is to contest for what seat. This was a dangerous move because, this amendment meant that the president could pardon only those who tore the line and were ready to support him.

Consequently, the spirit of free and fair nomination of candidate and election were watered down altogether because those who were ardent supporters of the president could involve themselves in electoral malpractice because the president was actually in charge and in

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control if in case anything happened. In 1982 unprecedented amendment took place which was greatly contested. The proposal to make Kenya a one-party state was made through an amendment which was supported by the Kanu proponents and luminaries. Through this amendment Multi-partyism was abolished making Kenya a one-party state. According to Jando (1980) the move to have a one-party state was to reduce the threat to political stability. The political import of this is that Kenya became a single party state with only one-party dominating. Due to the fact that the government had been formed by Kanu, Kanu was crowned as the ruling party. To make matters worse the same amendment abolished secret balloting where each person could be accorded the right of privacy in making his political choices and instead, exposed the citizenry to a system open to public swaying, manipulation and intimidation. This meant that election could only be done though mlolongo system.

As time went by, people became aware of political rights and political space. Various civil rights and non-governmental agencies started pushing for democratic space for people to participate in their political party of their choice. It didn't take long before the agitation to remove 2A from the constitution started. Contrary to the previous politically self-serving government amendments, in 1991 a proposal was made to repeal the section 2A of the constitution that made Kenya a one-party system and by so doing Kenya became a multi-party state with a strong move to embrace democratic principles and values (Act No. 12 of 1991). This saw many parties come up to compete for the political space in preparation for election. This opened the political horizon of Kenya and saw tremendous progress in governance, leadership and democracy.

The climax of this was when Kenya came up with the 2010 constitution which was referred as a landmark in changing social, economic and political situation. Among the democratic values that it provided for was the limit of term of presidency, the limit of the power and authority of the presidency, independence of the judiciary and subsequent separation of power through constitutional entrenched checks and balances. This being the case, Kenya was lauded by other countries in the world for the critical steps in assenting to the most vibrant, revolutionary and reformist kind of constitution. Before the dust of glory settled, there is a move to change the constitution to ancho in provisions to deal with what can majorly be considered as issue of moral and social aspects. This paper argues that the mere change or review of constitution cannot manage to deal with moral issues and character formation. In is a considered view that in order to make people change their moral and fabric and be honest, humble, considerate, kind, altruistic, sociable, beneficent, humane, selfless and virtuous, we need proper inculcation of moral, ethical and religious values just like other parts of the world have done.

As a matter of fact, constitution amendment cannot solve issues related to moral fabric and social systemic decay of the society. This is because the constitution cannot establish a compelling force for people to exercise moral and social values which are dependent on character building and inculcation of a habit which goes beyond the letter of the law and other provision. There is a need for a moral support and religious beliefs which would form a foundation for the overwhelming desire for love for other, honest, trustworthy, fidelity, humility, hospitable, support for others, responsiveness and other virtues which together make the human community a good place to live. The mere constitution and its inherent laws and provisions does

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not guarantee the best ideal society desirable for living. This is true because the moral character is not contained in the document but in the subject or in the people themselves.

1.5 Identity and Functions of a Constitution

A constitution is meant to lead a political community, that is, the people living together to achieve the best, the greatest good, the happiness. This is what is intended by the any community which is led by a proper authority. Aristotle puts it in a better way when he says, "The good life, happiness is the proper end of city state." (1.1.1252a1-7). There are three basic tenets of a constitution. These tenet gives a constitution its unique character and specificities without which any document of laws and guidelines cannot qualify to be called constitution. In other words, such characterization uniquely spells out that a given group of laws and regulation can be regarded as a constitution if they have the following.

First, a constitution must be a supreme law of the land. This is meant to bring to the principle of supremacy of the constitution to light. The constitution of any state is the highest law of the land. Usually all other acts, legislations, conventions, reviews amendments are read in tandem and in consistent with the constitution. In Kenya the Constitution 2010 provides that the constitution is the supreme law of the republic and binds all person (Art 2 sec 1). It goes to categorically declare that any law that is inconsistent with the constitution is void (Art 2 sec 4). This therefore means that the constitution occupies the central place in guiding other regulation. It is the one that makes all other laws to stand. Without the constitution, all acts, regulation will not stand on their own. According to US constitution (art VI, clause 2) establishes this fact by pronouncing that the constitution, that is, the federal laws is the supreme law of the land and it takes priority over any other law that is inconsistent to it. In other words, this is what distinguishes law as a system of norms from other systems of norms, such as ethical norms. As John Austin describes it as "the essence or nature which is common to all laws that are properly so called" (Austin 1995, p. 11).

Among the three-basic tenet of the constitution, this is perhaps the most fundamental and essential. It sets the authority upon which the constitution is made and the power that it carries in the state. It is the framework upon which the state operates its structure, organization, systems, governance and administration. With this, the spirit of Kenya constitution goes deep to provide for how values and principles of governance (Constitution of Kenya, Art 10) where by a proper guidance is given on how people should carry themselves in the society. It insists that all Kenyans must be guided by the value of patriotism, national unity, rule of law, democratic values, and participation of all in matter regarding their life in the society. It emphasizes on human dignity, equity, social justice, inclusivity, equality, human rights, non-discrimination and protection of marginalized and vulnerable groups. It gives regard to good governance, integrity, transparency and accountability. All this are projected to bring sustainable development and prosperity to all in the country. o reinforce these, the constitution contemplates expressly values and principle of public service (Art, 232) which together shades light on how to eliminate corruption, ethnicity, greed, injustice, inequality and social disorder. For instance, in this article, the constitution spells out that values and principles should be adhered to by all public officer in public and in private services. These should include: high standard of professional ethics,

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efficient, effective, prompt, impartial and equitable use of economic resources. It emphasizes very fundamental aspect like involvement and participation of people in policy; equality in provision of services, accountability for administrative action, transparence, fair competition and merit as the basis of appointments and promotions and inclusivity all which are deemed necessary for a proper social and legal order.

Second, the constitution must be a framework for government. Constitution is that laws, regulation and precedence by which a state establishes the character and the conception of its government. Aristotle thought of a constitution as that tool that organizes the offices of a city state, particularly the sovereign (III.6.1278b8-10). This ideally mean that in order to have a clear information about the internal life of the state, you look at what the constitution provides about the conforming guidelines about how public office are structured, organized, regulated and controlled.

Third, the constitution is that by which the state sets a legitimate way to grant various powers and how the power is to be exercised accordingly. This entails a process by which power is limited. According to John Locke, the government can and should be legally limited in its power and that its authority or legitimacy depends on it observing these limitations (Locke, 1690:190). This was a very fundamental aspect in his politics in that he saw that the government should be limited in terms of the extent of its exercise of it. The limiting factor of the government power is when the government is supposed to act only within the provisions of the constitution, the laws, and the rule of law which the people have set in the constitution.

2.0 Western Legal System: Their Creation and Idea of Law

Any attempt to understand the origin and the idea of the law be it historically or scientifically lands us on two broad interconnected elements. The first of these two is the idea of the enacted or the imperative element of the law. Generally, what this means is that form which the law takes. This idea can be said to be the science or the logic of the law. It is the modern understanding of the law as a set regulations and guidelines which govern the behavior of the people in a state (polis). However, the question that this first element raises about the law does not address the source of those enacted laws and rules. This perhaps is what the second idea will pronounce itself to.

The second idea of the law is that which we call traditional or habitual element. This element is the older part of the law, that is, the one that looks back to historical development of the law. This element is the one upon which juristic nature of the law proceeds by analogy. This historical element answers the question, what are the things that the law encompasses. The law has some element of traditional beliefs, cultural values, moral values, religious and social values and lastly the general philosophy of the people making the law. This is ideally because the law is human initiative meant to guide individual in a society on how to live well with others. When the law develops rightly and constructively through these steps, as manifested in the two ideas above, then the law becomes a manifestation of people intrinsic and extrinsic expectation and aspiration for a good political order. Ideally speaking time is of essence in the development and realization of the law. This is because as time goes by inculcation, reorientation, reexamination and internalization of the laws and regulation, they become absorbed in the element of legal

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system and eventually the enacted rule becomes a traditional principle. Consequently, there is a gradual transformation of element of enacted or legal system into the second element, that is, the traditional element of the law. This traditional element again informs a new legislative and judicial experience which leads to better enactment. Through this cyclical and encyclical process, the legal system is strengthened and reinforced through the examination of the traditional element and the legal enacted and imperative element.

The western legal philosophy and its totality of legal system has benefited from this circle as opposed to African legal system. It is said that the intentional and deliberate interconnectivity, coexistence and inclusivity of the social, cultural, religious, traditional and philosophical perspectives with the law (constitution) is the first ever step towards the realization of the culture of law-abiding citizen. This is because the law becomes a rubber stamp of people's lived experiences and expectation, desire and love for a good social order. According to Friedrich M. Watkins, the influence of religious notions upon the western legal thought and how much they continue to mold it cannot be denied (Watkins, 1948).

In the Old Testament, the Judaistic legal system included the sanctification of each member who obeys the laws set by Yahweh and it was an open demonstration of those who had a good will. In other words, the western people have a deep understanding of the law and a deep respect of the law not because of the fear of the punishment but because of the fact the law is part of their social, cultural, moral, religious order which have long been accepted and observed from time immemorial. Furthermore, this is evidentially true when the law is introduced to the young people through traditional believes, cultural values, moral conducts. According to Carl Joachim Friedrich, laws are best learnt not as laws but as ideals or values that are regarded highly by the society. He insists that "for the child who learns from his earliest days that one can insure one 'self to be good, insure one 'self to be a man, by obeying these commandments has thus already absorbed attitudes which are typical of the western legal community" Friedrech, 1958: 11).

African states have failed to recognize that the laws and rules must first be manifested in the circle above. They have thought of law as strange rules, dos and don'ts, firm regulation, strict principles which are supposed to be adhered to make man a moral, religious, social and cultural being. They have reversed the hierarchy of priority in such a way that African countries want to enact rules and constitution to compel people to live by the moral, religious, cultural and traditional values. This, in my view, has made Africans to desire laws including those directing them to adhere to very basic fundamental ethical lifestyle like be good, consider others, be honest, be a person of good will, treat others as human beings, humanity is one and not many (inclusivity). Treat others the way you will want to (common prosperity).

3.0 Law and will of God in Commanding the Universe: Religious Perspective.

Religious values and religious historical influence of social and legal order has remained inevitable and unimpeded throughout history. Religious values form the pillar of every human being in the sense that every man consciously or unconsciously forms and develops a question intending religious values. To be fully human is to open to the divine (Lonergan, MIT 1967: 149). Man, usually experience this dimension immensely and forcefully through the experience of the holy, fascinating and openness of mind and heart to the possibility of the divine

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intervention and determinism of fate in one's life. The relationship between religion and laws date back to antiquity where we are led to the question; to what extend can one say that law that are used today are a manifestation of the thoughts, desires and the intent of the ancient Judaism where God revealed his laws? This question is meant to make us think of how religious development has shaped the source and the functioning of the law.

In the Old Testament narratives, it is almost clear that God, Yahweh is the supreme legislator who comes up with the laws for his people to observe. He secures the observance and reinforcement of these laws with the reward and punishment. The people's behavior towards these laws was of fundamental importance. Due to this, God makes a distinction and warns His people against mere observance of the law. This is perhaps what should draw out minds more deeply. That the mere observance of the law was condemned as opposed to realizing the broader reasons, the importance, and the need to follow the law. This is what is regarded today as interiority, internalization and immanent obligation of the law. The Israelites saw the law as God calling them to a strong relationship and guiding them by giving them the laws to help them make good this relationship. From these narratives, we can pick few points of relevance. First, that law works well when there is faith in the authority making the law. In the Old Testament, Yahweh was the creator of all the laws, people had faith in him because the law were not meant for mere observance but to revitalize the relationship between them. God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original (Feinberg, 1979, p. 41).

Friedrich (1963) puts it correctly by saying "it is always of decisive importance for law that the obligation of its norm is firmly anchored in a conviction concerning the legitimacy of the authority which created the law". This does not matter whether it is God (in the case of Judaism) or the people in the case of contemporary society. This conviction is shared equally by both Jeremy Bentham and John Austin (1995) who argued that the principal distinguishing feature of a legal system is the presence of a sovereign who is habitually obeyed by most people in the society, but not in the habit of obeying any determinate human superior.

Secondly, law is supposed to help in clarifying and in giving certainty where there is none, or weak, and in restoring justice and provision for fairness. These can only be achieved if legal norms and social order are let to be deeply influenced by the faith in such legitimacy of the government which is enforcing them and by whom it is created. This is really to say that any law will only impact on the social life of the people if there is sense of certainty, justice and fairness. It should not favor, segregate, discriminate or alienate some section at the favor of the other. This was critically realized when the Israelites recognized the legitimacy of God and believed that he wanted all to know clearly and certainly, he wanted all to have equality and fairness and above all to have justice

Third, especially among the Greeks and the Romans, religious believes influenced and molded their obedience and faith in the laws. For them, the enforcement of the laws was realized along with the faith in the community of the city state which was to be endured. People had faith in the heroic wisdom of the legislator of the old times. In the Old Testament this is seen to have

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more weight in that it was not Moses, nor the prophets but the one God through the mouth of Moses (Lev. 19 1-2).

Fourth, the element of sanctification through the obedience to the laws is essential among the Old Testament teaching. This religious understanding that religious laws given by God, were used to sanctify the community of the people who obeyed them became a fundamental legal basis. The sanctification of each member of the polis was meant to foster equality of all men by all obeying the laws and all becoming God's people by doing his will. This religious thinking commonly known as the Old Testament thinking, later became an extraordinary feature and important component of the legal thought in the western world and Europe. This is true because the Roman legal thinking forms the most fundamental legal philosophy and ended up forming the sole basis for western outlook. This philosophy was not without a basis. According to Friedrich (1963) its basis was as we have seen from the traditions, norms, moral thinking and social teaching of the ancient Judaism. This aspect is actually missing in Africa where laws have only been coiled to arrest, deter, correct, stop, or give way for certain behavior without a strong basis on its tradition, norms, morality and religious traditional teaching which are the components of any legal thought and philosophy.

Fifth, the egalitarian nature of the law is critical in the understanding of how the law, morality and religion should reinforce and mutual coexist. The term egalitarian means the state of being equal. It is the process of equality, fairness, and equity and common standards. This is one of the fundamental aspects that we find present in the Old Testament. Judaism had a basic believe of egalitarian nature law in that law was the equalizer, the standard by which all were regarded as equal and as of equal regard before all situation including of accusations. Equality came about in two ways. First, in the law itself compelling and causing equal regard and measure, a sword that cuts all sides equally. Two in the fact that all those who obey the law are regarded as Yahweh children and implies an equality of all men. All men of good will were to obey the law which was the first condition in becoming a community of God.

Christianity took this principle of egalitarian from Judaism and made it deeper, fundamental and immanent for the observance of her believers. Christianity went deeper and sharply distinguished between mere observances, that is, pharisaical legalistic ethics on one hand, which involves outward observance without inner conversion, and pure legalistic ethic, on the other, which is known as the virtue ethics of the Christianity. For instance, in the New Testament, Jesus says "I have not come to destroy law, but to fulfill it" (Mt 5:17). Perhaps the meaning of this is that Jesus was not interested with outward observance with connation of hypocrisy but an immanent transformation which makes one pure in heart and mind. The fulfillment in actual sense consists in the demand for pure ethical attitude beyond the reach of men. This new approach to law and its essence build a very intriguing aspect of a law, that is, law with a spiritual authority. This is portrayed when in sermon of the mount where beatitudes are made as the foundation of virtue ethics which target a totality of human transformation from within involving mind, emotion, feeling and obligatory desire for the law.

Sixth, the concept of law and punishment is centrally critical in religious development. Law and justice are two sides of one coin. The central role of the law is foster justice yet unjust laws are not. In the words of Augustine, *Lex iniusta non est lex* "it seems to me that that which

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would not be just is not law." (Civitas Dei xix, 21). In the Old Testament, man was supposed to justify himself before God. How was this done? In front of God every man would appear and answer to question of justice. One was only just if he was obedient to the law and commandments of God. Secondly, and of most significant, one had to atone for his sins by appropriate punishment. In the NT it is said that one was to justify himself by obedience to one God, His will, His laws, constitutions. This ideally puts the term justice and right on one plane. This is because one was only just if he followed the laws, but he was righteous if he obeyed with humility, honest and dedication all the laws and obligation of God. This religious thinking should be sought in Africa so that it shapes the African way of legal thinking and reasoning in founding a true African legal jurisprudence for law can only be understood as emanation of justice.

Lastly, according to the Jews, to be good man one needed to do obey the laws, obey the established norms and traditions, and do this willingly and profoundly. This is important in the sense that the Jews took it upon themselves to obey the law and the other enabling norms and traditions. This was an individual or personal responsibility and not forced. This mean that they agreed to do all that the authority had commanded them. This attitude is critical even today in the sense that the authority, the sovereign is the people themselves. They should act from the laws that they have made as an individual responsibility, absorb the right attitude and dispositions. Then seek the understanding of these laws and acceptance of them based on individual desire.

4.0 Morality and the Law a Concomitant duo

There is evidence indicating that that no man can live alone. Man needs other for basic survival and for his progress socially, culturally, morally as well as politically. This is not a recent expression though. It is a hackneyed adage which was known right from the ancient times. Aristotle pronounced it more profoundly when he said that man is a political being desiring to live with others or to live in the midst of others (Aristotle Politics, Book 1.2.15). Man is by nature a social animal; an individual who is unsocial naturally and not accidentally is either beneath our notice or more than human. In order for this society to survive, it is inevitable that there must be customs, cultures, traditions which try to set the morals, values, the expected behavior (norms) and the prohibited and condemned characters (taboos).

Subsequently, for any society to survive and remain responsive to its own people laws and regulation are unavoidable and imperative. These laws put together what has been founded strongly by the communal traditions, cultures, values and general ethos and firms up that which will be upheld as legitimate and mandatory to be adhered by everybody. Bentham and Austin saw law as a phenomenon of the society, but failed to realize the fact that it is the people will that gives birth to them. For them they established a theory of a sovereign, a determinate person of group who have supreme and absolute de facto power who are obeyed by all but not don't obey anyone else. This in consequence will govern all regardless of the status and the level thereby creating a state of equality, justice, equity and fairness to all. These laws, because they are the reflection of the summum bonum of the society, becomes the best expectation and modal of life for everybody. In Aristotle words, "every community aims at some good; every city is a community; and therefore, every city aims at some good." Aristotle (Book 1, 1.1.5). They therefore define the societal relations, their rights and the obligations. Due to this, the correct

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import of this strong foundation is that these laws become the mandatory cause of conduct which is willed and accepted by members of a given society as established by the legitimate authority of that society.

According to legal moralists, a society is not something that is kept together physically; it is held by the invisible bonds of common thought. Devlin (1965) argues that if a society allows the bonds to be too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price. (Devlin 1965, p. 10). This actually is the sense by which we emphasis that laws cannot exist without the existence of a community. Likewise, a community cannot exist without people. When we talk of the law, are inexplicably talking of a group of individuals bound together under a political organization. The Latin expression *ubi societas ibi ius,* where there is society there is law, perhaps summarizes this better. The emphasis here is that we cannot have a society without laws. By this we do not mean that they must be written, but what we mean is that they must be consciously known. There is no other conceivable way by which large communities can be constituted other than through some coercive legal orders.

Coincidentally, one fundamental question is whether there can be laws that actually covers all the expected behavior of the people. The answer to this will form the correct assumption upon which the argument of this paper is build. According to legal moralist the answer will be on the affirmative. For them it is possible. Legal moralism argue that the law can legitimately be used to prohibit behaviors that conflict with society's collective moral judgments. For them this can happen even when those behaviors do not lead or cause physical or psychological harm to others. According to this view, a state can curtail one's freedom simply because it conflicts and goes against the society's moral norms, values, ethos, and principles or what is commonly referred as collective morality. With this view it would seem permissible for the state to use its coercive power to enforce society's collective morality (Devlin, 1965).

This paper openly rejects this view because the situation in Kenya has been that morality is conventional and cannot be universalized and made to be enforceable by the law. It is the view of this paper that we cannot have laws that guide all our external and internal behavior, legal and moral behavior. While it is easy to make laws to control, guide, direct, limit or easy our external actions and behavior, it is not easy to provide succinctly the social order and legal order to govern our inner world, internal fabric, our inner dimension, which is commonly known as our conscience. According to Hans Kelsen, the purpose of laws is to "bring about certain mutual behavior of individuals; to induce them to certain positive or negative behavior, to certain action or abstention from action" (Kelsen 2007:75). This ideally means that law is interested with the outward or external behavior. What is then concerned with the inner, internal dimension? It is morality.

Morality is set of ethical principles that define what is morally right and morally wrong. It defines the beliefs, values, principles and behavior standards which are acceptable by the society. By this we mean that morality is not mandatory and enforceable by the state or by use of sanction and punishment. It is the purview of the society, that is, people living together to cultivate, inculcate and foster the right morality which can impact positively on the behavior of the people. This ideally makes law and morality as two pillars which form the normative system

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that controls and regulates behavior. The origin and the shared purpose of both of them is what makes them to be mutually conceivable, innately reinforcing and co-existential. The origin is from the communal values, ideals, norms and general ethos. Their purpose is to control and regulate human behavior according to what has been agreed by the community so as to create a harmonious and effective inter relationship among the people living in a particular community. This harmony is only created when each person lives in such a way that he recognizes the fundamental rights; of right to life, equality, justice and dignity and worth of everyone. Law and morality cannot be separated because of their purported function and the *sui generis*. The reasons are as provided below.

Furthermore, morality is very important in that it is the one that builds the, conscience, moral consciousness of the person and the society. This is true in the sense that moral values are internal fabric from which all our moral obligation and responsibility is founded. Moral consciousness is the awareness of activities that are within us which deal with values and devalues, what is right and wrong, what is of moral priority and what is the reverse, what is worthwhile and what is not, what is of real value and that which is an illusory. The consciousness of this activities and their concomitant happening is what we call conscience. This conscience is always in touch with the right values, the right conduct, the right behavior, the right feelings, the virtues, and the obligation that a person makes and it is the measure by which we can know whether we are doing what is right or wrong. This level so to speak, control and regulates all the internal actions which are not on the purview of the legal or social order. For instance, there are many actions which are internal and take place within a person. They are not illegal because they are not external to be categorized as such, however, they are unwarranted by morality. For instance, the feeling of greedy, being ungrateful, being unkind and unforgiving, not helping others, not considering others or even being against the spirit of the law. This is really to say that what can help control and regulate such actions is not the law but the morality.

In the case of Kenya, the nine-reform agenda tabled recently in Bomas of Kenya majorly fall into this discussion. For instance, shared prosperity, responsibility, inclusivity, ethnic antagonism, lack of national ethos, divisive elections are not equivocally matter that you can enforce with the legal code (BBI report of the task force Nov 2019) For the case of corruption, security and devolution legal order can be created but the success of these will depend largely on the moral inculcation and moral foundation of the agencies involved and the people themselves. This argument is contrary to what John Austin that for the purpose of the jurist, law is absolutely independent of morality.

John Austin didn't see that law should form its basis on the morality or religious code. He insists that "law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation" (Austin 1832: Lecture V, p. 157). By this he meant law doesn't take cognizance of what people feel about it. Good or bad law is law and should be followed. Despite all these Austin accepted that there are so many rules which govern and regulate human behavior which are morally desirable but they are actually not in the social or legal code. Augustine comes handy in his pronouncement. He says that ordinary positive law is restrictive and merely prevents evil but does not make men good. This is the aspect that this paper aims to bring out. No matter what legal or social order,

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without morality, men will only remain at the restrictive stage. For him, eternal law places limit to all positive law which the latter may not transgress without losing its quality of law. He concludes that even so it could be a mistake to think that there is no connection between moral which for him is eternal law (*rex aeterna*) and law which is positive law (*rex temporalis*) (Civitas Dei xv.16)

As a consequence, one could argue that morality builds a person character before he gets into the confines of social and legal order. In other words, before the question of legality or illegality of a given action, there rises a question of moral value. The question of what is the best way to live as person in the society or what is the proper way of relating with others in terms of justice, love, mutual support is very important and it is what is missing in our society. A society that misses to articulate this and get an answer is doomed even if they establish as many laws as they could. This is because the laws will not work alone as normative system without a proper morality guiding human life. Plato had this to say, "states consists not only of their elements, but have in them something analogous to the principle of life in the human frame, is a truth strongly felt by Plato." (Rep V.462D).

Additionally, morality is explicated and explicitated along with cultural values. They support each other in realizing a harmonious society. According to Brain Cronin, cultural values are the meanings, beliefs and the truths of a society. Every society has a core of beliefs which all accept, value, cherish and would hand over to the next generation. Cronin, 2006: 148). Cultural values are not just thought, just expressed in the community's myth, legends, laws, institutions, ceremonies and feasts. Some societies were so sophisticated that they had democratic values like respect of individual rights, justice, equality, check and balances, participation and involvement of the people and pursuit of the truth. These were will cultivated together with strong moral values. They were achieved and not just given. They were nurtured in families, education and philosophy. This aspect of culture s well expressed by Bernard Lonergan when he insisted that, "over and above mere living and operating, men have to find a meaning and value in their living and operating. It is the function of culture, to discover, express, validate, criticize, correct, develop, improve, such meaning and value." (Lonergan MIT, 1978:32). This is what is meant by the culture being the basis for the social, moral, and legal matrix of the community.

Conclusion

In conclusion, law and morality are two dynamism which together build social and legal order in society. In order to achieve proper control and regulation of the behavior in the society, the government must first arouse the moral sentiment or consciousness of the people because it is more of a personal deliberate choice to be good and behave well. The paper concludes that law cannot be able to enforce some actions especially those that don't lead to physical and psychological harm.

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