

## MORALITY AS THE BASIS OF LAW OF CRIME: MATTERS ARISING

\*Cali C. Ojimba

### Abstract

The influence of morality on the civil and customary criminal law has remained a subject of debate over the years. Many writers have drawn peoples attention to the fact that there are much difference in ideal of the proper place of morality in resolution of criminal matters in society. The common position of that it will be unthinkable for people to impose their moral ideas on the generality of the population. They ideal, they advocated is that everybody should be left as much as possible to live according to his or her moral ideal. Much unnecessary obscurity and confusion is caused in the discussion of this issue by failure to make explicit, what one understands as morality. In this paper, we shall examine its contents and juxtapose its position within the context of law of crime Drawing inferences from the opinion of many writers in the field, we shall be able to establish in the end, how these two concepts in jurisprudence Intermingled in forming the basis for maintenance of law and order in ideal Societies, Nigeria inclusive.

### 1. Introduction

The definition of law as a generic legal term is fraught with difficulties which academics and legal writers have grappled with over the years. Pardfield<sup>1</sup> simple defined it as a code of conduct imposed upon and enforced among members of a particular society. The purpose of law in society is to ensure that rules or laws are made to ensure that members of the society may live, work together in an orderly and peaceful manner.

Whenever any of the rules are broken, compulsion is used to enforce obedience. In this regard, we may be tempted to say that two basic Ideas, underscores the existence of law in society. These ideas are:

- (1) Order, in the sense of a method
- (2) Compulsion: That is enforcement of obedience of rules or laws laid down. Put differently, the proper purpose of the criminal law process is to prevent anti social behaviour that threaten the very existence of the society.

On the issue of morality, it is an obvious fact that man resort to all kind of rules to guide their behaviour in society. These moral rules or ethics are a reminder of the fact that immoral act such as telling lies or engaging in homosexuality is a private thing.

Coming to the questions of law Von Jhering<sup>2</sup> described it as an instrument for serving the needs of society and their purpose is purely for the guide and protection of interest of society.

---

\* CALI C. OJIMBA, B.Sc. (Hons.) Pol. Sc., LLB, LLM, BL.) is a Lecturer in the Faculty of Law of Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus.

<sup>1</sup>Pardfield B, "Law Made Simple", London Butherworths (1985) P. 1

<sup>2</sup>Adaramola F. "Basis jurisprudence" Lagos, University of Ilinous Printing Press Urban Champaign Ilinous U.S.A. P. 216.

In another dimension, Ehlirsh<sup>3</sup> stressed that the real source and purpose of Law in Society is to serve the need of people who evolve various patterns of conduct that is presumed to be ideal in the running of society.

Since society is dynamic, it is evident that law should change with the said dynamism. It is an incontrovertible fact that law and morality are both systems of rules which have distinct characteristics. They both regulate human conduct in society. In fact Thomas Hobbes<sup>4</sup> stated that law and morality are identical

However, agreement on this position is not universal as there are obvious differences between the two of them.

### **The Differences**

1. Whereas law is a coercive order, morality is persuasive.
2. Sometimes law are intended to generate a specific mode of basic conduct but morals are not intended to do so.
3. Rules of law are enforced by force but moral rules are enforced by ones conscience.

In this regard, Prof. Adaramola<sup>5</sup> commended as follows:

Law is a coercive order that seeks to bring about a specific mode of human conduct and breach attracts sanctions.

But basically, they have areas of convergence.

### **The Overlap**

This is a convergence of both concepts (i.e criminal law and morality) where each influences the other.

First - Certain legal rules are prescribed by moral order such as  
lesbianism or homosexuality

Section 214 - 233<sup>A</sup> of the Criminal Code of Southern Nigeria<sup>6</sup> regarded such moral wrong as a crime

Secondly- Certain moral rules are prescribed by legal order and have high contract of morality e.g. A moral rule, that is neutral can be enforced by legal rules.

Thirdly- Some rules are common to moral rules and legal order for example prohibition against stealing, S 383 killing another person, S 306 CC abortion, suicide S 328 CC, S 327 CC, Perjury.

Even in Christian theology the bible made such moral wrong as a crime and punishable for e.g.

Exodus chapter 20 v. 15 provides that:

"Thou shall not steal"

v. 16 You shall not give false witness against your neighbour

v. 13 You shall not murder-

---

<sup>3</sup>Ibid P. 220

<sup>4</sup>Ibid P. 216

<sup>5</sup>Ibid P. 53

<sup>6</sup>Sections 214- 233<sup>A</sup> of the Criminal Code of Southern Nigeria

v. 14. You shall not commit adultery".

In the North, the Penal Code made similar condemnation. Under the Penal Code<sup>7</sup> (Law of Northern Nigeria 1963 Cap. 89) comprehensive provisions were made for the enforcement of morality for example as S200-203 relates to punishment against obscenities and S 282 - 285 relates to indirect offences such as cruelty to animals.

These rules are common to moral and legal order.

As a social fact, there may be many reasons why the time systems, may fail to correspond even where a great measure of coincidence between them may be essential to the survival of society.

This is so because, moral sentiments or some matters may be insufficiently developed or mobilized to be translated into law as it is the case in legal prohibition of cruelty to children, or prohibition of valid discrimination.

Suffice it to say that certain natural law interest have reduced moral to a spices of imperatives comparable to the rule of law. There are scholars who argued that even if law and morals are discernable they still form an integral part of legal development.

There are various ways in which this position has been put forward it has been argued over and over again that law in action is not a mere system of rules but resolves the use of morality to solve legal problems. The application of these principles to legal rules, distills strict moral content out of a legal order though it is admitted that this deeds need not permit the revolving, indices.

At any rate, it should not be over looked that even the positivist does not deny that many factors including immorality may and is not crucial in the development of legal rule and that where there is a gap or possible chain within the legal system, moral or extra-legal pressures may cause the gap to be filled or the chain to be determined in one way or the other.

On the whole, in considering whether Law should be employed to enforce moral rules, the views of stoic philosophers like J S Mill, Lord Devlin, Plato and Stephen becomes important.

J. S. Mill<sup>8</sup> held a liberal view. He divided morality into public and private ones. In his opinion, the rules of private morality concerns the individual and his conscience. Private immorality is presumed to harm no one. Such as private drunkenness, homosexuality between two consenting adults. etc,

He therefore stood for the individual in respect of the following matters:

1. The value of personal freedom of the individual.
2. The moral value of not being coersed to do what is right.
3. The misery that will result from criminal punishment of immoralities.
4. The likely importance of the law leading to its ridicule to serve as the difficulty detection of crime and the possibility of successful prosecution.

---

<sup>7</sup>Laws of Northern, Nigeria 1963, Cap. 89 Penal Code

<sup>8</sup>Supra Adaramola F. P. 57.

Plato and Stephen<sup>9</sup> held an extreme view on legal enforcement of morality in platos opinion, society exists to promote the moral good of it members, even though neither the individual nor the society is harmed by it. This equally was Stephen view.

The next issue because, the place of Criminal Law in enforcement of etical and moral conduct in society which is situating criminal law in its proper perspective.

### **Criminal Law in proper perspective**

The function of criminal law, is to preserve public order and decency. To protect the citizen from what is offensive and injurious and provide sufficient safeguard against exploitation and corruption of others - particularly those who are specifically vulnerable, those who are weak in body and those who are physically, officially or economically dependent.

Delving<sup>10</sup> went further to underscore the potency of societal morality which he stated inter-alia that:

An established morality is as necessary as good government to the welfare of the society. Societies disintegrates from within more frequently than are broken up from external pressure. They are disintegrative when no common morality is observed and history shows that loosening of normal rules is often, the first state of disintegration.

Since no limit is placed on power of society to legislate against freedom, there can be no limit on its powers to legislate against morality. In summarizing his position on this issues he raised posers which he equally answered it took the following form:

- (1) Q. How do we discover the moral standard of society?
  - A. Take the view of the reasonable man on the street, the witness in the Jury Box or the passenger on the Mass Transist Bus.
  - Q. When can a society exercise its power of legislation against immorality.
  - A. Before contemplating such legislation, legislators should consider the following point:
    - i. Individual must be left with much freedom as it is reasonable to do so.
    - ii. Legislation should not be on a wave of indignation but should take into account the likely variability of tolerance from one generation to the other so as to ensure law durability
    - iii. Enforcement must be a clear possibility that there must be at least adequate police, court and good will of the general public.
    - iv. The value of legal proceedings and instrument for enforcement of morality must be clearly considered.
    - v. It is desirable to have a moral standard that is higher than law to allow the individual a free choice of what is good and what is bad.
- (2) Legislation should not be on a wave of indignation but should take account the likely variability of tolerance from one generation or the other so as to ensure laws durability.
- (3) Enforcement must be a clear possibility the there must be at least adequate police, court and good will of the general public.

---

<sup>9</sup>Ibid.

<sup>10</sup>Ibid Pp. 53-59

- (4) The value legal proceedings and the sanctions for enforcement of morality must be clearly considered.
- (5) It is desirable for a moral standard that is higher than the laws, allow the individual a free choice of what is good and what is bad.

In this vein, Prof. Adaramola argued that there is no basic principles with which to determine the immoralities (if any) which are to be made punishable as each case must be decided on society and society basis and the particular circumstance. We align ourselves with Professor Adaramola positive.

### **Conclusion**

From all the postulates submitted therein, it is quite obvious that despite the argument that morality should be used as the basis of criminality in private society with shades of opinion differencing, it is very clear that morality has a strong basis for enforcement of criminality in various societies, Nigeria inclusive.

This is so because, the influence of morality on civil and criminal matters in Nigeria still remains sacrosanct. For instance, in customary jurisprudence, a thief who steals a goat, or yam seedlings or garri is cursed by the gods and even sometimes struck by thunder.

Bearing the factor in mind, Julius Stone<sup>11</sup> maintained that four essential requirement, are needed for the sustenance of a legal order.

The first is that a legal order must arise in modern states, whether unitary or Federal State and regardless of its particular ideology.

Secondly, a legal order must distinguish itself from a moral or social order.

Thirdly, the concept of law as a class concept must apply to all members in the given class.

Fourthly, A legal order as an inexperienced simple entity must distinguish itself from the individual norms which are part of it. Aligning himself with this submission Elegido<sup>12</sup> submitted that it is clearly short-sighted to restrict morality form law as an accident victim should be helped by standard, a person should be forced to keep the promise he made or a murderer should be punished are all moral issues which the law cannot over look.

Accordingly, the purpose of law in society will at all times material seek to promote societal values and punish deviate behaviours that will not augur well for the general peace and harmony in society.

### **Recommendations**

1. In line with Elegidos view, law must have a great deal of moral content.
2. When this is done, it will eliminate alarming increase in violent crime, suicide, drug abuse, teenage pregnancy and other social vices that is prevalent in society.

---

<sup>11</sup> Ibid

<sup>12</sup>Elegido, J.M.; Jurisprudence P. 32.

3. As opined by Professor Elias and in line with Article 17 of the African Charter on People and Human Rights, the state should have the duty to protect and promote traditional values practiced by the community.
4. By so doing, Nigerian cultures which enhance and promotes dignity of human being and which are consistent with the fundamental objectives of states policy as described in Chapter 11 of the 1999 Constitution (as amended) shall be enthroned.
5. Finally it is recommended that some ethical approaches of imperatives comparable to rule of law should be jettisoned.

When this is done, we will have a relatively free and just security that cannot be dictator to by an intellectual oligarchy or by those of an aristocates.