



RE-APPRAISING THE RELATIONSHIP BETWEEN LAW AND MORALITY IN NIGERIAN JURISPRUDENCE

By

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ABSTRACT

This paper re-examines the intricate and often contested relationship between law and morality, exploring whether and to what extent legal systems can or should embody moral principles. Drawing from classical and contemporary jurisprudential thought from natural law theorists such as Aquinas and Fuller to positivists like Hart and Kelsen, it interrogates the assumption that legality and morality are either distinct or inherently intertwined. The analysis revisits key moments in legal philosophy where moral reasoning has shaped, constrained, or legitimised legal authority, with particular attention to issues of justice, legitimacy, and social order. By engaging with modern pluralistic societies and their complex moral landscapes, the paper questions the adequacy of traditional dichotomies between moral and legal normativity. It further considers how moral pluralism, human rights discourse, and globalisation challenge the conventional boundaries of legal reasoning. Ultimately, the study argues for a more dynamic and dialogical understanding of the law–morality nexus, one that recognises law as both a product of moral reasoning and a mechanism that shapes moral consciousness. This re-appraisal underscores the need for renewed jurisprudential reflection on the moral foundations of law in an era marked by ethical fragmentation and shifting notions of justice.

1.0 INTRODUCTION

The relationship between law and morality has long occupied a central place in jurisprudential discourse, provoking enduring debates about the nature, purpose, and legitimacy of legal authority. While law commands compliance through institutional power, morality appeals to conscience and ethical reasoning. Yet, the two often intersect in shaping societal norms, justice, and human behaviour. Classical theorists such as Aquinas and Bentham viewed morality as foundational to law,¹ whereas positivists like Hart and Kelsen insisted on their separation.² In a world marked by moral pluralism, human rights controversies, and shifting social values, this distinction appears increasingly unstable. This paper re-appraises the law and morality

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I Tiwari, 'Law and Morality: Connections and Distinctions' *Indian Journal of Integrated Research in Law* (2023) 3 (3) 1; GJ Postema, *Bentham and the Common Law Tradition* (Oxford University Press 2019).

²HL Hart, 'Positivism and the Separation of Law and Morals' in *Law and Morality* (Routledge 2017) 63-99; C Adair-Toteff, 'Law's Limit': The Kelsen/Hart Debate' *History of European Ideas* (2025) 1-5 <https://www.tandfonline.com/doi/abs/10.1080/01916599.2025.2581662> accessed 13 November 2025.



relationship, arguing for a nuanced understanding that recognises their mutual influence within contemporary legal and ethical thought.

The basic principle of morality is also a basic principle of law, which means that good must be done and evil must be avoided.³ According to Hart, regarding the place of morality in laws, he elucidated in the following words:

The law of every modern state shows at a thousand points, the influence of both the accepted social authority and under moral ideals. These influences enter the law either abruptly and avowedly through legislation or silently and piecemeal through the judicial process. In some systems as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice on substantive moral values. The other ways in which law mirrors morality are myriad, and still insufficiently studied. Statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles⁴

Although a rule of law does not become illegal or inoperative merely because it is against the moral code of a society, morality often gives content to law, as opposed to the claims of the positivist; many laws are therefore predicated or based on moral values.⁵

Like ethics, morals concern customs or social mores, deriving from the Latin term *moralis*, meaning relating to character, conduct, or custom. Morals simply mean principles of human behaviour in accordance with the standards of right and wrong. It is concerned with humans, especially the distinction between good and bad or proper and improper demeanour. One is said to be moral when one adheres to conventionally accepted standards of conduct based on a sense of right and wrong.

³ NC Aja, 'Hart on Law and Morality Complementarity: Implications for International Law' *Niger Delta Journal of Gender, Peace & Conflict Studies* (2024) 4 (2) 149.

⁴HLA Hart, *The Concept of Law* (2nd edn. Oxford: Oxford University Press 1961).

⁵WK Frankena, *Thinking About Morality* (University of Michigan Press 2025); C Smart, 'Law and the Control of Women's Sexuality: The Case of the 1950s' in *Controlling Women* (Routledge 2024) 40-60.



According to Baker,

Moral law commands that good be done and evil be avoided. It is called the norm of morality; however, by the norm of morality, one often means the moral principles which determine the nature of that which is wrong or morally good without explaining the source of the obligation⁶

Supporting this view, Lord Devlin declared:

We cannot divorce morality from law. The preservation of moral standards is the responsibility of the state, and thus the state should not feel shy to deal with it, whether the act is committed in the open or in secret⁷

It is argued that every attempt to rigidly divorce law from morality must meet with grave difficulties, as it is bound to occasion untold injustice. One may, however, concede that some degree of separation between them is necessarily unavoidable; yet it is obvious that morality is intrinsically linked with law. Morality conforms with conventional standards of moral conduct, a system of moral principles. It seems that laws are made to enforce moral comportment or conformity to conventional standards, which means that law is empty without its moral content. It seems equally true that law is at the service of morality. However, can it then be said that it is morality that gives law its legal backing? The truth of the matter remains that law and morality are in symbiotic relationship.⁸ Moreover, morality and the law are mutually terms intrinsically linked with each other.

To the naturalist, law and morality are connected. To them, law is not simply what is enacted in statutes, and if legislation is not moral, then it is not law and has no authority. St. Thomas Aquinas called such a law without moral content a 'Perversion of law'. Natural law theory

⁶T Baker, 'On the Genealogy of Moral Hazard' *Texas Law Review* (1996) 75 237; W Świątkowski and B Dompnier. 'When Pursuing Bad Goals for Good Reasons Makes it even Worse: A Social Value Approach to Performance-Avoidance Goal Pursuit' *Social Psychology of Education* (2021) 24 (3) 653-77.

⁷R Dworkin, 'Lord Devlin and the Enforcement of Morals' *YALE IJ* (1965) 75 986; J Angel, 'The Divorce of Law and Morality' *The Western Australian Jurist* (2017) 1 437.

⁸N Tupanceski and D Kiprijanovska, 'Medicine, Law and Human Rights - A Symbiotic Relationship' *Medicine and Law* (2014) 40 33.



asserts that there is an essential connection between law and morality.⁹ This view is frequently summarised by the maxim: ‘An unjust law is not a true law’. It follows that if it is not a true law, there would be no need to obey it.¹⁰

Aristotle, one of the foremost Greek philosophers, was of the view that law and moral value must be combined to form a perfect legal code. Plato also assumed that law had to be based on morality to produce a perfect kind of social living, which everybody longs for.¹¹ According to the Marxist interpretation, law and morality are linked together. Karl Marx contended that law and morals are determined by the material conditions of human beings.¹²

The relationship between law and morality is the most obvious and prominent. There has always been a debate on whether the law should legislate morality, and views are varied on what is likely to be the consequences of legislating some people's morality as the morality of everybody.¹³ Thus, issues of homosexuality, gay marriage, lesbianism, and so on, have attracted various comments, especially as they relate to the reasons why the law cannot be used as a weapon to stop such practices.¹⁴ There is no doubt about it: there is a nexus between law and morality. The law prohibiting stealing and murder, among several others, is hinged on morality. It is therefore morally wrong to steal just as it is morally wrong to kill. It must be observed that we need to know that the relationship between law and morality is not always as clear as these examples. For instance, while it is legally and morally wrong to kill, it is not legally wrong to watch a person drown in a swimming pool, even though the same act may be morally wrong.¹⁵ It is not legally wrong to refuse to help an accident victim, even though this will also be morally wrong.

There is also the argument that there should be a limit to the extent the law will interfere in the private lives of citizens. Cases made against criminalising homosexuality, gay marriage, and prostitution are based on this ground. It has been argued that whatever people in this category

⁹AH Chroust, ‘The Philosophy of Law of St. Thomas Aquinas: His Fundamental Ideas and Some of His Historical Precursors’ *Amsterdam Journal of Jurisprudence* (1974) 19 1.

¹⁰SL Brock, *The Legal Character of Natural Law According to St. Thomas Aquinas* (University of Toronto 1980).

¹¹ Ibid.

¹²G Ampolini and NJ Momade, ‘Ethics and Social Transformation in Marxist Thought’ *International Journal of Research and Innovation in Social Science* (2025) 9 (3) 890-901; N Churchich, *Marxism and Morality: A Critical Examination of Marxist Ethics* (James Clarke & Co. 1994).

¹³K Greenawalt, *Conflicts of Law and Morality* (Oxford University Press 1989).

¹⁴C Smart, ‘Law and the Control of Women's Sexuality: The Case of the 1950s’ in *Controlling Women* (Routledge 2024) 40-60.

¹⁵WS Quinn, ‘Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing’ *The Philosophical Review* (1989) 98 (3) 287-312.



do is done in the privacy of their homes; hence, since they do not constitute a threat to the people around them or the public at large, it would be going too far for the law to poke its nose into their private lives. Nevertheless, what happens when a homosexual decides to practice the act on a young boy? Or where he does influence such a boy to be a partner in such a practice?¹⁶

Therefore, in the Nigerian legal system, not every moral issue is legislated upon, mostly because Nigeria is a country with more than 250 ethnic groups, all having their views on what is morally right. However, the best solution to this problem is to find moral values that are mostly common to this divergent tribal group and legislate on them.

2.0 THEORIES ABOUT THE RELATIONSHIP OF LAW AND MORALITY

There are diverse theories on the relationship between law and morality. These theories examine how law upholds moral values in societies. The first theory is the Confucian theory originating from China. The Chinese Confucian scholars considered morals to be the goal of law, and the law to be a tool for morals. What they mean here is that the sole role of law is to maintain morals.¹⁷ The Chinese Law code of the Tang Dynasty saw morality as the root of the law, politics and human behaviour. Their legal system accepted that societal moral was the foundation upon which individual behaviour is based and deep-rooted. The Chinese philosophy of law and morals regards what is illegal as immoral. It believes that if something is immoral, then it must be punishable.¹⁸

An interesting case decided by a Magistrate Court illustrates the relationship between law and morals in Chinese legal philosophy. In the Chinese magistrate's court, two farmers were jostling for a small hen. The issue was who owned the hen? The Court simply asked the parties what the hen ate that morning. One said the hen ate beans, the other said rice.¹⁹ The Magistrate ordered that the hen's stomach be cut open. They found that the hen had eaten beans, and the farmer who said rice was punished for being dishonest.

This Chinese case is quite provoking; ordinarily, this should have been a civil case, but the farmer who said rice was punished. The reason for the punishment was dishonesty, which is a

¹⁶J Jiao and Others, 'Navigating LLM Ethics: Advancements, Challenges, and Future Directions' *AI and Ethics* 2025 1-25.

¹⁷YH Jiang, 'Confucian Political Theory in Contemporary China' *Annual Review of Political Science* (2018) 21 (1) 155-173.

¹⁸ Ibid.

¹⁹ Ibid



moral issue taking the form of law. This case is proof of the earlier propositions about the Confucian theory.

The Chinese Confucian theory clarifies the relationship between law and morality not only in China but also in related jurisdictions in Eastern Asia. This theory appears to be consistent with most native and customary law in practical terms, where the distinction between criminal and civil cases is completely blurred or does not exist at all.

The next theory is that of the Natural Law School. In this School, Aristotle canvassed that natural law demands obedience to positive law regardless of contemporary shortcomings, if any. Under these circumstances, it is appropriate to equate Aristotle's natural law to social norms and behaviour acceptable to a society and his conversion law to legality in the modern scene.²⁰ The former should be the direct element of the latter, while the latter should be the compelling element of the former.²¹

Therefore, a combination of the two will give us a perfect jurisprudential hybrid, and to achieve social stability, the latter should take into cognisance the question of efficacy of the law.

Another theory formulated by **Thomas Aquinas** and **Lon Fuller** argued that there is a higher law, which is reflected possibly by a moral code to which law must conform.²² They believe that one should disregard a law that conflicts with the moral code except where doing so will cause social instability. According to **Aquinas**, the moral code is God made law, while **Fuller** laid down criteria which a legal system must conform to. They include generality, promulgation of rules, non-retroactivity, consistency, realism, constancy and congruence.

Jeremy Bentham propounded another theory on the relationship between law and morality, which was later refined by **John Stuart Mill's** analysis of Utilitarianism. He proposed that moral law was the law that should benefit the most in society, not the few. He stated that even if the code offended a person but benefited the rest, it would still be better and well preferred, but Mill refined this idea. He said that while this idea was good, people do not have to follow the social norms of their behaviour. They can act the way they want, but their action must not

²⁰T Burns, *Aristotle and Natural Law* (Bloomsbury Publishing 2011) 224.

²¹Ibid. See also N Biggar and R Black, *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (Routledge 2017).

²²OC Lewis, 'Fuller: The Morality of Law' *Case Western Reserve Law Review* (1965) 17 (1) 349; I Tiwari, 'Law and Morality: Connections and Distinctions' *Indian Journal of Integrated Research in Law* (2023) 3(1) 1.



harm others. The question is, what is the act that harms?²³ According to **Edwin Schur**, there are some crimes which do not harm anybody except the perpetrator himself.²⁴ For instance, crimes like drug abuse, abortion and homo-sexually, and lesbianism do not harm anybody except the perpetrators. The problem with his proposition is that it is difficult to say that a person using drugs and addicted to them is doing it of their own free will.²⁵

There is also the legal positivism theory. If there is one doctrine that is distinctively associated with legal positivism, it is the separation of law and morality.²⁶ The principal aim of jurisprudential positivists has been to establish that the essential properties of law do not include moral bearings. Such legal positivism indeed involves nothing more than the contention that there is no necessary connection between law and morality.²⁷

Legal positivism comprises numerous contributions that often diverge, sometimes even conflict on key issues. There are three views which stand at the heart of the positivist's theory. The first view, in the words of **Kelsen**, is that law is an 'instrument of social control'. Laws are rules which compel individuals to perform or forbid them from acting.²⁸ For instance, criminal law prohibits individuals from injuring another by way of punishment, and by the order of specific performance, contract law will impose on parties to a contract to perform what they have promised to do under the contract.

Second, law is a social phenomenon; it is a social institution, and therefore, what the law is is basically a matter of social facts. This is in line with the propositions by the early positivists such as **John Austin**, who stated that "the existence of law is one thing; its merit or demerits is another". Supporters of this view are concerned with whether the law exists, namely, whether the relevant authorities recognise the law, rather than whether the law is good or bad.²⁹

The third view is that of the separation thesis, which was put forward by **Hart**. The separation thesis distinguishes law and morality. As **Hart** formulated, "it is in no sense a necessary truth

²³R Wacks, *Philosophy of Law: A Very Short Introduction* (Oxford University Press 2014).

²⁴EM Schur, 'The Limits of Criminal Justice' *Harvard Civil Rights-Civil Liberties Law Review* (1979) 14 801.

²⁵X Danish, 'Mortality in Laws and Victimless Crimes' *King's Student Law Review* (2011-2012) 3 137.

²⁶R Alexy, 'On Necessary Relations Between Law and Morality' *Ratio Juris* (1989) 2 (2) 167-83.

²⁷MS Moore, 'The Various Relations Between Law and Morality in Contemporary Legal Philosophy' *Ratio Juris* (2012) 25 (4) 435-71.

²⁸H Kelsen, *General Theory of Law and State* (Routledge 2017) 5.

²⁹A Fanani and MS Zulkarnain, 'Understanding John Austin's Legal Positivism Theory and Hans Kelsen's Pure Legal Theory: An Introduction for Beginners' *Peradaban Journal of Law and Society* (2022) 1 (2) 107-18.



that law reproduce or satisfy certain demands of morality, though in fact they have often done so". Thus, what is morally wrong can still be legally right.³⁰

2.1 CLASSICAL LEGAL POSITIVISM

Although legal positivism can be traced back to earlier philosophers such as **Thomas Hobbes and David Hume**, legal positivism was founded on the literature of **Jeremy Bentham**, on whom **Austin's** theory was based and developed. To **Bentham**, Law based on legal fictions, equity and natural law, is vague and uncertain as it cannot provide a reliable public standard which can reasonably be expected to guide behaviour. He went further to state that the courts are not sufficiently accessible, for the language they use is not comprehensible to the ordinary person. As such, **Bentham** suggested that law should be codified.³¹

Austin argues that there should be a separation between what the law is and what the law ought to be, and thus the separation between law and morality. Taking Austin's Command Theory, which remains the central tenet of his formulation, he asserts that the notion of law lies in the command given by the sovereign. Arguably, this was borrowed from Bentham, who views law as the command of a sovereign backed by a sanction.

2.2 Hart's Positivism

Hart's theory is developed from the theories propounded by Bentham and Austin. He asserts that,

‘The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional but in some sense, obligatory’.³²

Hart refused to admit a connection between law and morality. He proposed the '**separability thesis**', which remains a central part of his theory. The separability thesis referred to the separation of law and morality. An extreme positivist, Faber, argues that the definition of law should be completely free from morality, rejecting any moral consideration related to the concept of law, legal validity and legal system. **Hart** believes that whilst law does not necessarily reproduce or satisfy demands of morality, in fact, it has often done so. As **Hart**

³⁰SR Perry, 'Hart's Methodological Positivism' *Legal Theory* (1998) 4 (4) 427-67.

³¹P Mitsis, 'The Stoic Origin of Natural Rights' in *Cicero and Modern Law* (Routledge 2017) 455-479

³²V Pavithra, 'HLA Hart and the Concept of Law: A Jurisprudential Insight' *Supremo Amicus* (2018) 5182.



describes, although a legal system must exhibit some specific conformity with morality, or must rest on widely diffused conviction that there is a moral obligation to obey it, it does not follow that the criteria of legal validity of a particular law used in a legal system must include, tacitly if not explicitly, a reference to morality.³³

3.0 RELATIONSHIP BETWEEN LAW AND MORALITY: THE NIGERIAN PERSPECTIVE

In Nigeria, there are many ways in which morality can arguably be said to connect with law. The idea of criminal responsibility under the Nigerian Criminal Code makes it clear that the law has moral values. The law says that a man is not held criminally responsible for acts which happened either by accident or independently of the exercise of his will. The combination of law and morality under this Nigerian law shows how morality impinges on law. The framers of the Criminal Code saw the need in this regard and reinforced the moral element with the legal element to make the law acceptable in society.

The Nigerian courts have expressed their views about law and morality. Their views seem to have been adopted by some Nigerian Judges to the effect that law should be interpreted and enforced as it 'is' and not as it 'ought' to be. Thus, in *Nigerian Bank for Commerce and Industry v Standard (Nig) Engineering Co. Ltd*,³⁴ the court held that:

The order he made became a moral issue in the light of his findings that the contract was frustrated by the supplier, who was the agent of the respondents. Courts of law do not pursue moral issues outside the prescient of the law.

From the above, it is settled that Nigerian judges interpret the law as it is and do not take any moral consideration into place. If any law exists that lacks some moral efficiency, then the judge should wait until the legislators amend such a law. In the case of *Nnamah v State*,³⁵ the Court of Appeal sentenced the appellant, one Michael Oynyibor Nnamah, to death for

³³ Ibid.

³⁴(2002) 8 NWLR (Pt 768) 132.

³⁵ (2005) 9 NWLR (Pt. 929) 147



stabbing³⁶ Kingsly Ifeanyi Abiti. The Court cited section 24 of the Criminal Code of Nigeria as one of the reasons for its decision. The court held further that:

The second segment of the section of the Criminal Code under consideration provides that a person is not criminally responsible for an event which occurs by accident. This means that an accidental event is one that was not intended by the actor. It is not foreseen by him and is not reasonably foreseeable.

Upon the evidence adduced and accepted by the lower court, it is clear that the act of stabbing the deceased from the back by the appellant was not done accidentally. This clearly shows that the law has made provision available for morality to impinge upon law.

Moral values determine the kind of conviction that would be given in a criminal case. Before a man can be sentenced to imprisonment or death, the judge will look at the evidence against the accused and see how criminally liable he is before conviction. If this is not done, it undermines the whole basis of criminal responsibility under the criminal code. The whole idea of criminal responsibility is to see that a man who is accused of a crime gets what best serves the entire community.

4.0 AREAS WHERE LAW AND MORALS CONNECT IN NIGERIA

In the Nigerian legal system, not every moral issue is legislated upon, mostly because Nigeria is a country with more than 250 ethnic groups, all having their views on what is morally right or wrong. However, the best solution to this problem is to find moral values that are mostly common to this divergent tribal group and legislate on them. Under the Nigerian criminal law system, there are some crimes which are said to be morally unacceptable and have been codified. These include;

- i. Adultery,
- ii. Murder,
- iii. Stealing,

³⁶ Section 24 Criminal Code Law cap C 38. Laws of Federation of Nigeria, 2004



- iv. Prostitution,
- v. Homosexuality, among others.

All the above-listed have some moral connotations in virtually every society in the world. They have also been classified as legally punishable under various Nigerian Penal codes. It is intended to discuss them here in some detail.

4.1 Adultery

Adultery is sexual intercourse between a married person and someone other than their spouse. Historically, adultery has been a serious offence in many cultures. Even in jurisdictions where adultery is not itself a criminal offence, it may still have legal consequences, particularly in divorce cases.³⁷

Under the Nigerian Criminal Code for the South, the act of adultery is not a criminal offence, but it can be a ground for the dissolution of a marriage. Thus, **section 15 (2) (b)** states:

The court hearing a petition for a degree of dissolution of marriage shall hold the marriage to have broken down irretrievably if, but only if the petition satisfies the court of one or more of: that since the marriage the respondent has committed adultery and the petitions find it intolerable to live with the respondent³⁸

On the other hand, the Penal Code for the Northern part of the country criminalises or sees the act of adultery as an offence and punishable under the Code. Thus, sections **387** and **388** of the Penal Code spell out punishment for a man and a woman who commit adultery, respectively.

Section 387 states thus:

Whoever, being a man subject to any native law or Custom in which extra- marital sexual intercourse is sexual criminal offense, has recognized as intercourse with a per son who is not and whom he knows or has reason to believe is not his wife,

³⁷A Miller, Punishing Passion: A Comparative Analysis of Adultery Laws in the United States of America and Taiwan and Their Effects on Women 'Fordham International Law Journal (2017) 41 425.

³⁸ Matrimonial cause Act, 1970



such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

Similarly, s. 388 of the Penal Code provides as follows in respect of women. Whoever, being a woman subject to any native law or Custom in which extra-marital sexual intercourse is recognized as a criminal offence has sexual intercourse with a person who is not and whom she knows or has reason to believe is not her husband³⁹ is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extend to two years or with fine or with both.⁴⁰

4.2 Murder

In Nigeria, murder is a criminal offence both under the Criminal Code and the Penal Code. Section 316 provides that murder occurs where a person intended to cause the death of the person killed or that of another person. The watchword in this definition is ‘**the intention to kill**’. It is immaterial whether he missed the person originally intended to kill or some other person. Thus, in the case of *Basoyin v A.G Western Nigeria*,⁴¹ a husband who intended to kill his wife, who was carrying their baby on her back, pursued her and inflicted machete cuts on her back. The baby fell and died of head injuries. It was held that the husband was guilty of murder because he already had the intent to kill, and this he demonstrated in the circumstances in which the machete cut inflicted on his wife, and it is immaterial whether the accused missed his target and the death of another person resulted.⁴²

Similarly, section 223 provides that:

If a person by doing anything which he intends or knows to be likely to cause death commits culpable homicide by causing the death of a person whose death he neither intends nor knows, the himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been

³⁹ Ibid.

⁴⁰ Cap 89, Penal Code, 1963

⁴¹ (1966) NMLR 287

⁴² Criminal Code, Cap C38 Laws of the federation, 2004



if he had caused death he intended or knew himself to be likely caused".

From the above, it is morally wrong to kill. This explains why life is sacred and the reason behind the contention whether human authorities have the competence to terminate it. By this, it is meant that homicide is only unlawful where it is not justified or authorised by law. This is the purport of section **306**, which provides that: ‘It is unlawful to kill any person unless such killing is authorised or justified by law’.⁴³

4.3 Stealing

It is morally wrong and legally wrong for an individual to take that which does not belong to him without the consent of the owner. The offence is called theft in the north, while it is called stealing in the South. By section **383** (1) of the Criminal Code, ‘a person who fraudulently takes anything capable of being stolen or fraudulently converts to his own use or the use of any other person, anything capable of being stolen is said to steal things’.⁴⁴

Section **286** (i) of the Penal Code provides that ‘Whoever, intending to take dishonestly any movable property out of the possession of any other person without the person's consent, moves that property to take it is said to commit theft’.⁴⁵

Since it is morally wrong, Nigerian legislators have enacted the punishment of the offence of stealing and theft respectively in section **390** of the Criminal Code and section **287** of the Penal Code.⁴⁶

Thus, section **390**: ‘Any person who steals anything capable of being stolen is guilty of a felony, and is liable, if no other punishment is provided, to imprisonment for three years’.⁴⁷ Also, section 287 provides that ‘Whoever commits theft shall be punished with imprisonment for a term which may extend to five years or with fine or with both’.⁴⁸

4.4 Prostitution

⁴³ Penal code

⁴⁴ Criminal Code Law

⁴⁵ Penal code

⁴⁶ Thus, section **390**: ‘Any person who steals anything capable of being stolen is guilty of a felony, and is liable, if no other punishment is provided, to imprisonment for three years’. Also, section 287 provides that ‘Whoever commits theft shall be punished with imprisonment for a term which may extend to five years or with fine or with both’.

⁴⁷ Criminal Code law

⁴⁸ Penal code



In Nigeria, prostitution is an illegal trade, even though some have argued that it is a necessary evil because it helps to minimise rape occurrence. Prostitution is considered to be a societal filth. The Nigerian Criminal Code punishes people who solicit prostitution and those who make profits from setting up brothels. This is as can be seen in section 222 (a), which states thus.⁴⁹

Whoever, having the custody, charge or care of a girl under the age of sixteen years, causes or encourages the seduction, unlawful carnal knowledge, indecent prostitution of, or the commission of an assault upon, such a girl, shall be liable to imprisonment for two years.

For this section, a person shall be deemed to have caused or encouraged the seduction, unlawful carnal knowledge or prostitution of, or the commission of an indecent assault upon, a girl who has been seduced, unlawfully carnally known, or indecently assaulted, who has become a prostitute, if he knowingly allowed her to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character.

4.5 Homosexuality/Same Sex Marriage

Same-sex sexual activity is illegal in Nigeria. The Nigerian government had in 2013 passed the Same Sex Marriage Prohibition Act which makes same sex unions in Nigeria a criminal offence punishable by a sentence. The Act also criminalises public display of affection between same sex gender partners.⁵⁰

Section 1 (1) and (2) of the Act provides as follows:

Marriage or civil union entered into between persons of the same gender shall not be solemnised in any place of worship, such as the church and the mosque or any other place in Nigeria. Only a marriage contracted between a

⁴⁹ Criminal Code Law

⁵⁰AE Arimoro, 'The Criminalisation of Consensual Same-Sex Sexual Conduct in Nigeria: A Critique' *Journal of Human Rights and Social Work* (2019) 4 (4) 257-66.



man and a woman under Islamic law, Customary Law and the Marriage Act is valid in Nigeria. The registration of gay clubs, societies and organisations, their sustenance, processions and meetings are hereby prohibited. The show of same sex amorous relationships, directly or indirectly, is hereby prohibited.⁵¹

The law provides appropriate punishment for breaches. Henceforth, persons who enter a same gender marriage or civil union contract commit an offence and would be jointly liable on conviction for a term of 14 years imprisonment each.⁵²

Similarly, any person or group of persons who witness, screen, shield, aid and abet the solemnization of same sex marriage contracts or civil union or support the registration of gay clubs, Societies, and organisations, processions or meetings in Nigeria commits an offence and shall be liable on conviction to a term of 10 years imprisonment.

The Act has received overwhelming support from the Nigerian people, while American and other European countries condemned the passage of the law by Nigeria.

Conclusion

The relationship between law and morality is hard to describe and effectively evaluate. However, the line may be drawn with respect to the aspect of law that has been surveyed. For instance, if it is criminal law, the positive school of thought and their view that law must be written and punishment prescribed will be very much manifest. Thus, with respect to criminal law, it may be said that ‘law is law and morality is morality’. This is the apt manner in which the whole argument touching on the relationship between law and morality may be succinctly described in Nigeria. Several authorities are in line with this reasoning.

First, section **36(12)** provides that:

Subject as otherwise provided by the constitution, a person will not be convicted of a criminal offence unless that offence is

⁵¹ Ibid.

⁵² Ibid.



defined as a penalty and therefore is prescribed in a written law.⁵³

What this means is that an offence must be in respect of a matter prohibited by law for which punishment is prescribed. For the avoidance of doubt, the said section is reproduced *ipsima verba* in the Criminal Code Act.

Also, **Section 2** provides that⁵⁴ ‘An offence or omission which renders the person doing the act or making the omission liable to punishment under this Code, or under any Act, in Law, is called an offence.’

In *Cartel v Iresons*,⁵⁵ Campbell, C.J. submitted that:

It is our business not to estimate the degree of the moral guilt in the act of the appellant, but to see how such an act is treated by the legislature. I cannot be bound by any opinion I may form from the morality of that act, but I must see what it is that the legislation has chosen to punish.

Similarly, **Lord Atkin** argued in the popular case of *Proprietary Article Trade Association v A.G. Canada*,⁵⁶ that:

Morality and criminality are far from co-extensive, nor is the sphere of criminality necessarily part of a more extensive field covered by morality, unless the moral code necessarily disapproves of all acts prohibited by the state, in which case the argument moves in a circle.

Similarly, in *Aoko v Fagbemi*,⁵⁷ it was held that the appellant had not committed an offence on the ground that adultery is not defined as an offence under the criminal code, even though it is an offence under the Penal Code.

⁵³ Constitution of the Federal Republic of Nigeria 1999 (as amended)

⁵⁴ Criminal Code Act Cap C38, Laws of Federation, 2004.

⁵⁵ 1858 EB& E91

⁵⁶ (1931) AC 310 at 324

⁵⁷ (1961) 1 ALL NLR 400



It may therefore be submitted that the decision in *Shaw v DPP*⁵⁸, in so far as it is not in tandem with the relevant provisions of our laws, especially **section 36(12)** of the 1999 Constitution cannot pass the validity test, the act not having been criminalised by any written law in the face of **section 36(8)**⁵⁹ of the Constitution. The section states as follows:

No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

In *Bronik Motors v Wema Bank*,⁶⁰ the Supreme Court held that it will, in the spirit of judicial review and separation of powers, review all acts of government and, where it finds fault, set it aside and declare it null and void. This is in line with section **1(3)**⁶¹ which states that: ‘*If any other law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.*’

However, in a civil matter, the court may apply equity, whose tenets and principles are predicated on morality and good conscience. This is essential because, as was held in *Eves v Eves*,⁶² equity has not passed the age of childbearing. Nevertheless, it is a trite principle that equity follows the law and does not intend to do battle with the law or pour water on the fire of the law. Therefore, the court may not rely on a procedural technicality which may give some parties an undeserved victory in litigation. To this extent, it is argued that the connectivity of law and morality in Southern Nigeria goes in a circle as decided in *Proprietary Article Trade Association v A.G Canada*,⁶³ but the criminal justice system prevalent in Southern Nigeria does not allow the mixture of law and morality, thus law and morality cannot for all intents and purposes, be put into one cup, as shown in the case of *Aoko v Fagbemni*.⁶⁴

In other aspects of law, particularly contract, there seems to be an interplay between law and morality in Southern Nigeria; thus, the law in enforcing contracts entered into by parties looks

⁵⁸ (1963) AC 220; (1961) 2 ALL ER 440

⁵⁹ Constitution of the Federal Republic of Nigeria 1999 (as amended)

⁶⁰ (1983) ISCNLR 296

⁶¹ Constitution of the Federal Republic of Nigeria 1999 (as amended)

⁶² (1975) 1 WLR 1338.

⁶³ The Criminal Code (R. S. Can., 1927, c. 36).

⁶⁴ (1961) ANLR 400.



at whether any of the parties has a hard conscience to defraud the other. Similarly, in the law dealing with unjust enrichment particularly as it concern public officers there is an interplay of law and morality in the sense that ordinarily, the position of the law is that if a public officer enriches himself owing to the office he occupies, he can only be prosecuted and imprisoned but morality has come to add that apart from such imprisonment such enrichment (that is the amount embezzled) is held in a constructive trust for the populace.

In Northern Nigeria, the connectivity of law and morality is particularly evident. This is because Sharia law, which is predominant in Northern Nigeria, is a law based on religion and, as such, intertwined with morality. As indicated earlier, adultery is forbidden by morality, likewise in Islamic law. This is in line with the naturalist school of thought.

From this, it can be seen that the relationship between morality and law in Nigeria has several points of contact, especially in the Penal Code that applies in the northern states of the country. It must be mentioned that new circumstances and situations emerge, which could stretch and even redefine the extent of the relationship between them. Nevertheless, for law to be effective in any society, it must reflect to some extent, reflect some of the moral values of the society. That is the only way to ensure that the moral values of the society are integrated into legislative measures for the overall benefit of the country.