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## Morality as a philosophical basis of Nigeria legal system: a justification

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### ABSTRACT

The philosophical basis of a legal system is the determinant factor of the content and focus of the legislation and judicial decision emanating from the legal system operating within the society. The focus of every legal system should be the pursuit of a society where men's ambition is actualise within the purview of accepted norms and values guiding the people within the society. The aim of this paper is to examine the concept of morality and law, the intricate relationship between the two concepts and the moral contents in the Nigeria legal system. The methodology adopted is basically doctrinal with the primary source from various legislation and case laws. The secondary source includes articles in journal, internet sources, bible, etc. The paper concludes that there is no distinction between morality and the law but that the two concepts should be seen as complementary to each other in terms of regulating human behaviours. It is also our conclusion that a critical examination of Nigeria legal system through her legislations and judicial decisions is predicated on the basis that law and morality are two sides of the same coin.

**Keywords:** Morality, Law, Legal System, Philosophical, Society

### 1. INTRODUCTION

Morality and law are aimed at regulating human conducts and affairs. Various schools of thought have emerged in order to explain the relationship between the two concepts. Of

importance is naturalist and positivist school of thought. While naturalist opined that there exist a deep connection between morality and law and that the authority of the law is derived from its consistency with morality, positivism held that law and morality are separate from each other and they can be termed mutually exclusive.

From time immemorial when there is no formal process of making law, men have a way of regulating their affairs through various moral codes and these moral values are sustained through various means among which are: taboos, abandonment, outcast etc. It shows therefore that the process of law making to regulate the affairs of men is not alien to men *ab initio*, it is just a mere formalisation of an existing system. An attempt to therefore distinguish a process that metamorphosed from an existing system may lead to a fallacy of circularity and a chasing shadow exercise. This is not to argue that there is no differences at all between law and morality, rather, it is another way of saying that the former emanated from the latter in order to ensure that the latter is made mandatory.

Law also serves as a regulatory mechanism to morality. This is because of the dynamic nature of human being in particular and the society at large. As society is growing, some moral codes and values which have crystallized into customs need to be changed and regulated. A time, due to a new emerging ways of life, the old ones may need to give way for novel ones. All these factors make law as the regulator of our various moral codes and values. Considering the population and the new developed modes of human inter relationship, the need for the law to regulate these affairs within the purview of morality. Hence, law and morality are meant to regulate human affairs within the context of what is good and what is bad and what is right and what is wrong.

Based on this conception, the Nigeria legal system which is fashioned after the Received English law is developed. The legal system is aimed at promoting morality among the people.

This is echoed in the preamble to the 1999 Constitution when it said

And whereas the Provisional Ruling Council has approved the report subject to such amendments as are deemed necessary in the public interest and for the purpose of promoting the security, welfare and GOOD GOVERNANCE (emphasis added) and fostering the unity and progress of the people of Nigeria with the view of achieving its objective...

From the above, it shows that there can be governance which is not good, but good governance can only be achieved where morality is the drive of the legal system. This is because the aim of morality is nothing but the augmentation of good and reduction of evil in our society. A keen look at the various legislation and judicial precedents that form the basis of the Nigeria legal system as we shall soon see depicts the above submission.

## **2. CONCEPT OF MORALITY AND LAW**

Moral philosophy or morality is derived from the Latin word "*moralis*" which means customs or manners. Morality is basically concerned with society, with relations between men, with how men ought to behave with their fellow men. It is concerned with general rules governing relations between men and rules of the society they ought to adopt. It entails human principles of right and wrong and deals with how humans treat themselves in order to promote

mutual welfare, growth, creativity and meaning in striving for what is good over what is bad, and what is right over what is wrong.

Morality is a concept relating to certain normative patterns which aim at the augmentation of good and reduction of evil in individual and social life. It deals with the absolute ideal or the universal good. The essential principle of morality according to Aristotle is enunciated in the Latin maxim "*bonum faciedum malumque vitandum*" which means good must be done and evil must be avoided." The aims of morality in its social signification are directed towards increasing social harmony by diminishing the incidence of excessive selfishness, noxious conduct towards others, internecine struggle and other potentially disintegrative forces in societal life.

On the other hand, there is no equivocal definition of the concept of law. Various scholars have attempted to define the word "law" from the perspective of the various schools of thought in jurisprudence. The search for an acceptable definition of law as a matter of fact has led to a plethora of theories epitomized by different schools of jurisprudence all of them trying to unravel the origin, nature and essence of law particularly its role in the society. It is worthy of note that there can never be a universal definition of law. This is because the various definitions are predicated on a particular aspect of law without regards to other aspects.

This point is noted by Bodenheimer when he observed that:

The law is a large mansion with many halls, rooms, nooks and corners. It is extremely hard to illuminate with a searchlight every room, nooks and corner at the same time, and this especially true when the system of illumination, because of limitation of technological knowledge and experience, is inadequate, at least imperfect.

According to the naturalist school of thought, law is a collection of objectives moral principles based on the universe and can only be discovered by human reason. Finnis, one of the proponents of this school of thought opined that law is concerned with the identification of the conditions and principles of practical right mindedness of good and proper order in society and in the conduct of individuals who compose it. The positivist school of thought viewed law as a command backed by sanction. John Austin, the leading proponent of this school defined law as a command set, either directly or circuitously, by a sovereign individual or body to a member or members of some independent political society in which his authority is supreme.

Savigny viewed law from the perspective of the historical school of thought as the expression of the common consciousness of the people. According to him, law is formed by custom and popular faith by internal, silently operating power, not by the arbitrary will of a law giver. Ihering conceives of law as the sum of the condition of social life as secured by the power of the state through the means of external compulsion. The realist school of thought viewed law as the decision of the court on a particular subject matter. The American realist and jurist, Oliver Wendell Holmes says "that the rules which the court will follow; the prophecies of what the court will do in fact and nothing much pretentious are what I mean by law."

Lauterpach defines law as the maximum of socially obtainable morality while in the African traditional settings; the idea of law is defined as the habit, usages, *custos et mores* operating within and accepted as binding on members of an ethnic community, prescribing

conduct and having sanctions attached to them in the case of non compliance. These sanctions are enforceable by the power of the community as a corporate entity.

According to the Black's Law Dictionary, law is

a system of principles and rules of human conduct, being the aggregate of those commandments and principles which are either prescribed or recognized by the governing power in an organised jural society as its will in relation to the conduct of the members of such society and which it undertakes to maintain and sanction and to use as the criteria of the actions of such members.

Law can also be defined to mean some set of rules and regulations designed by a legitimate authority with the sole aim of regulating human conducts and inter relationship in the society failure to which attracts sanctions. It creates a right as well as a corresponding obligations and duties. These rules and regulations, it is submitted, develop as a result of conventions and common usage or pattern of behaviour approved either expressly or impliedly over time within the society.

Adaramola defines law as

A normative psychological instrument of social management, social motivation, social control, and social change, produced from practical social necessity by which a politically organised society influences human conduct within its jurisdiction.

### **3. RELATIONSHIP BETWEEN MORALITY AND LAW**

According to Immanuel Kant, the distinction between morals and law is to be found in the fact that the law regulates the external relations of men while morality governs their inner life and motivation. The above statement implies that there are distinction between morality and law. One thing pertinent to know is that both law and morality are normative rules that prescribe standard of behaviour that guides human conducts in the society. In spite of these striking similarities, there are some differences between law and morality.

They are:

- (i). Enforcement of the rules of law is by power which is external to the person that is expected to obey it while moral rules are enforced by the conscience of the person that requires obeying it.
- (ii). A rule of law is coercive due to the sanction attached to it while a rule of morality is persuasive. The breach of moral codes merely attracts social condemnation or neglect while a breach of law attracts definite punishment. It may be in force of sentencing or damages.
- (iii). Morality is highly subjective and relative while law tends towards objectivity. Moral rules are arbitrary depending on individual background while law is specific.
- (iv). Obedience to law is mandatory while obedience to moral is not. Law is concerned with actions while morality stresses motives.

The relationship between law and morality has generated controversies between the natural law thinkers and the positivists. While the natural law school of thought opined that law and morality are two sides of the same coin, positivists are of the view that there exist no relationship between law and morality. This controversy has snowballed into the popular Hart- Fuller Debates.

H.L.A Hart in his lecture delivered at Harvard School of Law in 1957 titled "*Positivism and the Separation of Law and Morals*" vigorously argued that there must be separation from law and morality and that the two concepts should be put in a water tight compartment such that they are not interrelated. Fuller in his reply to Hart's argument published an article titled "*Positivism and Fidelity to Law: A Reply to Prof. Hart*" where he vehemently argued that morality cannot be separated from morals. Hart published his book "*The Concept of Law*" in 1961 as a rejoinder to Fuller's article while Fuller published a book titled "*The Morality of Law*" in 1964 as a reply to Hart's argument.

The Hart- Fuller debate can better be appreciated by examining the Nuremburg Trials. Nuremburg trials were a series of 13 trials carried out in Nuremburg, Germany between 1945 and 1949. The trial was held for the purpose of bringing Nazi war criminals to justice who includes: Nazi party officials, High Ranking Military Officers, German Industrialists, Lawyers, Judges, Doctors etc. In this paper, we shall examine the popular German 1949 case known as Grudge Informer case and the Justice Trials.

The fact of the Grudge Informer's case was that the wife of a German reported her husband to the Gestapo for criticizing Hitler's conduct of war. The husband was tried and sentenced to death which sentence was later converted to service in the Russia war front. After his survival from the war front, he came back and instituted a legal action against his wife for depriving him of his liberty. The wife contended that her action was legal because her husband committed an offence against the Nazi law of 1934; a law which was valid at the time of the sentencing. The court was thus faced with a dilemma whether there is a moral duty to obey the law or a moral duty to do what is right. The court found the wife guilty and held that the law under which her husband was sentenced (the law authorizes spouse to spy on and denounce each other at the instance of criticizing Hitler's action ) was contrary to sound conscience and sense of justice of all decent human being. Such law was held to be invalid for devoid of morality.

In the Justice trial, officers who aided and implemented the obnoxious and anti human Nazi laws were convicted and sentenced for various forms of punishment including capital punishment. The trial held that they ought to know that such laws are unjust and anti human laws and ought not to have implemented same.

### **3. 1. Hart's view**

H.L.A Hart is one of the legal positivists in the 20<sup>th</sup> century. He argued that law and morality are two distinct and separate concepts which should not be treated as same thing. Hart says that there is no logically necessary connection between law and coercion or between law and morality than it was to try to explain how the one might be necessarily related to the other. According to him, law and morality are two parallel lines which can never be met and there is the need to distinguish between "law as it is" and "law as it ought to be". Whether law is unjust or not, it is still a law nevertheless which must be obeyed or else one will face the consequences. Though he postulated that the essence of positivism is not to lend support to an unjust law, the only panacea to such unjust law according to him is to work to alter such law.

Hart's reaction to the Nuremburg trial is that the Judges were wrong in arriving at their various decisions. He opined that since the basis upon which the husband was sentenced (in the Grudge Informer case) is a valid law at that time, the judges ought not to enquire whether such law is just or unjust; moral or immoral. This is because law and morality are distinct concepts and that morality ought not to be used as a tool for amending an existing law. Hart retorts that there could be a just application of an unjust law. The various examples of these include: the Pharaonic Decree ordering the extermination of all Jewish male babies being delivered in Egypt, Herodian Decree ordering the killing of all children below three years in Judea in 1. A.D.

### **3. 2. Fuller's view**

On the other hand, Fuller argued that any law that is devoid of morality is not a good law and such law ought not to be obeyed. According to him, law and morality cannot be separated from each and that there is the need for law to comply with the rules of morality which he called "inner morality of law". Fuller criticized Prof. Hart and hailed the judges in Nuremburg trial for declaring that Nazi's law is an unjust law thereby achieving fidelity to law. He also contends that there cannot be a specific definition of law. Likewise, even morality cannot be defined precisely. Therefore, he argues that because there is no precise definition of law and morality, it is futile to argue that both of them are separate.

Fuller further proposed two kinds of morality that shows the moral content of law. They are: the morality of aspiration and the morality of duty. The former refers to the morality of good life or the expression directed towards the achievement of human excellence while the latter refers to the condition essential for orderly social living or existence. The morality of aspiration resembles that of aesthetics- the artistic expression of excellence, whereas the morality of duty resembles law.

Fuller identifies 8 characteristics which a good law with rules of morality (inner morality of law) must possess.

They are:

- a) Generality
- b) Promulgation
- c) Absence of Retroactivity
- d) Abuse of Contradictory Rules
- e) Congruence between Rules and Administration
- f) Clarity of Rules
- g) Avoidance of Frequent Changes
- h) Absence of Law Requiring the performance of an impossibility (*Lex non cogit ad impossibilia* )

According to him, any law that does not comply with these characteristics is nothing but an affront to man's dignity as a responsible and free will agent.

### **3. 3. Critical appraisal**

It is our humble view that morality and law cannot be separated from one other rather they should be seen as a twin concepts meant to complement each other. Morality should be

meant to complement the provisions of the law. Any law that is devoid of morality in our humble submission should be expunged, repealed or disregarded. This is because the law makers are not meant to be dictators by passing into law any conduct that appeals to their sentiment but rather, law should be used as a tool for social engineering and to preserve societal norms and values. Hence, where the people have derailed from their moral values and codes, the law should come in to enforce morality in order to ensure that moral decadence is not inculcated in the society. This view was corroborated by the H.L.A Hart, one of the leading Positivists.

According to him,

The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider general ideas. These influences enter into the law either abruptly and avowedly through legislation or silently and piecemeal through the judicial process.

Also, Honore posited that

if positivism is interpreted as requiring that nothing in law that does not conform to socially accepted criteria, it is inconsistent with positive law. This is because law purports to be morally in order. Hence, it is always possible to argue against a certain interpretation of the law that it is morally indefensible and there is always a certain pressure within a legal system to render it morally defensible. In that way, critical morality necessarily becomes a persuasive source of law.

From the above, it shows that the aims and functions of law is inconsistent with the separatist thesis.

#### **4. CONTENTS OF MORALS IN NIGERIA LEGAL SYSTEM**

Having submitted that laws should not be voided of immorality particularly in this dispensation, we will therefore examine these elements of morality in Nigeria legal system. Morality can come into law in two ways which are: through legislations and legislative reforms and through judicial decision.

Before examining the above two modes, it need be stated that Nigeria legal system had witnessed some level of immorality particularly in the era of the military juntas (1966- 1999). Some of the military decrees that are devoid of inner morality as enunciated by Fuller are:

- a) The Draconian and Horrendous Decree No. 4 of 1984 under which Tunde Thompson and Nduka Irabor (Journalists of the Guardian Newspaper) were jailed.
- b) The Retroactive Miscellaneous Offences Decree of 1984 under which Bernard Ogedegbe and two others accused of being drug couriers were sentenced to death by firing squad.
- c) The procedure under which Tajudeen Bello, whose appeal was pending before the Court of Appeal was executed.

- d) The killing of Ken Saro wiwa and 8 others Ogoni's environmental activists by a Special Tribunal Constituted by General Sani Abacha.

However, the above decrees have either been expunged or they are inconsistent with the provision of the constitution thereby making them null and void. They are no more part of our laws.

#### **4. 1. Legislation and legislative reforms**

There are so many legislations enacted in Nigeria which have element of morality. In fact, it is plausible to say that Nigeria legislation is just a process of giving effect of law to the existing moral codes in our societies. This is because our constitution which is the grundnorm is bereft of immorality. Our laws are reflective of our norms and values. Some of the legislations that we will examine in this paper are: Constitution, Criminal Code, Matrimonial Causes Act, Anti-Corruption Laws, Sexual Harassment in Tertiary Education Institutions (Prohibition) Act 2016 and Same Sex Marriage (Prohibition) Act 2016.

##### **4. 1. 1. Constitution of the Federal Republic of Nigeria**

A critical look at our constitution, one will observe that the constitution is an embodiment of moral codes and values. In justifying the above assertion, the constitution goes ahead to prescribed national ethics for the nation. According to section 23, the national ethics is defined to include Discipline, Integrity, Dignity of Labour, Social Justice, Religious Tolerance, Self Reliance and Patriotism. Apart from this, the inclusion of fundamental rights as contained in section 33- 44 of the constitution is an attestation of the constitution to preserve our universal moral values. Of particular is the right to fair hearing which is encapsulated in the Latin maxims "*audi alterem portem*" and "*nemo dat quod non albeit*" meaning "let the other party be heard" and "you cannot be a judge over your own case."

Another content of morality worthy of note under the constitution is the establishment of code of conduct for public office holders. Section 172 provides that a person in the public service of the Federation shall observe and conform to the code of conduct. The purpose of the code of conduct is to ensure transparency through declaration of assets by public office holders, avoiding conflict of interest with one's duty, restriction from obtaining gift or benefit on account of anything done in the discharge of one's duty, prohibition of foreign account, etc. Apart from this code of conduct for public officers, there are other codes of conduct which are meant to regulate the conducts of certain professional bodies. E.g Rules of Professional Conduct for Legal Professionals, Code of Conducts for Judicial Officers, Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria etc. All these codes of conduct are definition of moral values as it is applicable to some professions with a sanction or force of law.

##### **4. 1. 2. Criminal code Act**

Taking a cursory look at the criminal code, it is no doubt to conclude that the code is aimed at protecting and preserving our social and moral values from decadence. The following are the content of morality deduced from the code.

They are:

- a) Prohibition of offences against morality such as rape, sodomy, bestiality, defilement of girls under thirteen, causing or encouraging the seduction or prostitution of a girl under sixteen, keeping brothel, attempt to procure abortion, persons trading in prostitution. The Act defines unnatural offences as having carnal knowledge of any person against the order of nature; or of an animal and prescribed fourteen years imprisonment for person guilty of these offences.
- b) Other offences which are prohibited by the codes are: perjury, fabricating evidence, perverting justice, murder, stealing etc.

#### **4. 1. 3. Matrimonial causes Act**

The prohibition of marriages between persons within the degree of consanguinity and affinity is another symptom of morality in the Nigeria laws. Section 3(1)(a) provides for void marriage under the Act to include where ‘the parties are within the prohibited degrees of consanguinity or subject to section 4 of this Act, of affinity’.

Parties are said to be within the degree of consanguinity if they are related by blood and parties are within the degree of affinity if they are related by marriage. It is worthy of note that while the Act places an absolute prohibition on marriages of persons within the degree of consanguinity, marriages of persons within the degree of affinity may be allowed subject to the application for permission to a judge and such permission must be to the satisfaction of the judge. This proviso can be traced to the holy book of Christian. According to the book of Moses, Israelites are forbidden and restrained from marrying their kindred and relations.

#### **4. 1. 4. Anti corruption laws**

The various anti corruption laws in Nigeria are another proof of morality in our legal system. These laws are meant to promote sanctity in our various institutions. The laws are: Economic and Financial Crime Commission Act, ICPC Act, and Money Laundering Act.

#### **4. 1. 5. Sexual harassment in tertiary education institutions (prohibition) Act 2016**

The Act was promulgated to prohibit various forms of sexual harassment in our tertiary institutions. This giant step is as a result of some educators terrorizing students (particularly the female ones) for failure to be sexually abused. The Act extends sexual harassment to include a sexual intercourse between an educator and a student below the age of 18 years or physically challenged. This means that educators are absolutely prohibited to have sexual intercourse with a student below age 18 or physically challenged whether his or her consent is obtained or not. Other forms of unwelcome sexual attention, expressly or impliedly, from the educator to the students are also prohibited.

Other acts prohibited by the Act are:

- a) Grabs, hugs, rubs or strokes or touches or pinches the breast or hair or lips or hips or buttocks or any other sensual part of the body of a student
- b) Displays, gives, or sends by hand or courier or electronic or any other means naked or sexually explicit pictures or videos or sex related objects to a student
- c) Whistles or winks at a student or screams or exclaims or jokes or makes sexually complimentary remarks about a student’s physique.

All these provisions are meant to promote morality in the tertiary institution environment and to ensure a healthy society devoid of unholy sexual communism.

#### **4. 1. 6. Same sex marriage (prohibition) Act 2014**

The Act prohibits a marriage contract or civil union entered into between persons of same sex and that such marriage contract or union shall not be recognised or entitled to any benefit of a valid marriage. The Act goes further to prohibit any certificate issued by a foreign country in respect of union between same sex as invalid in Nigeria and that benefits accruing from the said certificate shall not be enforced by any court of law in Nigeria. The Act also prohibits the registration of gay clubs, societies and organisation, their sustenance, processions, meetings, and public show of same sex amorous relationship either directly or indirectly. According to the Act, any person that enters into same sex marriage contract or civil union has committed an offence and liable on conviction to a term of 14 years imprisonment. Anyone who administers, witnesses, abets or aids the solemnization of such marriage is also punishable by the provision of the Act.

#### **4. 2. Judicial decision**

It is worthy of note that the Nigeria legal system is predicated on the received English laws which contains the common law of England, doctrine of equity and statute of general applications. The doctrines of equity were developed by the court of chancery through the Lord Chancellor who was an ecclesiastic and the keeper of the King's conscience. The fact that conflict between common law and equity was resolved at the instance of the doctrine of equity attests to the fact that our legal system is predicated on the concept of morality. These doctrines of equity were developed through judicial decision. Notable among the equitable maxims which were developed to inculcate and promote morality are:

- (i). Where equities are equal, the first in time will prevail

This maxim was implored by the Supreme Court in the case of *Achilihu v. Anyatonu* when the court held that

Where two documents are opposite, then the principle of 'when the equities are equal, the first in time will prevail' will apply. In the instant case, there are two distinct decision of two customary arbitral bodies embodied in Exhibit C & E. the decision of the Udoha Urata, an arbitration panel earlier in time, represented in exhibit E prevailed.

- (ii). Equity will not suffer a wrong to be without a remedy (*Ubi jus ibi remedium*)

This equitable maxim is an expression of moral codes and values and same has been imported to our legal system. In the case of *Mudashiru v. Onyeanu*, the Supreme Court held that "the court will do justice even where the law or statute does not specifically provide for such a situation. Thus, whenever a court finds that a plaintiff has been wronged by a defendant especially where the defendant has breached the duty he owes to the plaintiff, consequently causing a legal injury, there must be a remedy".

Other equitable maxims which tend to promote morality are:

- (i). He who seeks equity will do equity
- (ii). He who comes to equity must come with a clean hand.
- (iii). Equality is equity
- (iv). Delay defeats equity
- (v). Equity looks into the intent rather than the forms
- (vi). Equity looks on that as done which ought to be done (*Omnia Praesumuntur rite ac sollemniter esse esse acta* )
- (vii). Equity imputes an intention to fulfil obligation
- (viii). Absence of obligation is the absence of consideration
- (ix). Invalidity of contract secured under duress.
- (x). Equity aids the vigilant and not the indolent (*vigilantibus et non dormientibus jura subsenuit* ).

## 5. CONCLUSIONS

In this paper, we have examined the concept of morality and law and how the two concepts are related to one another. We have equally discussed the contents of morality in our legal system. It need be stated that despite the level of moral content in our legal system, our society is still far from justifying these moral contents as the level of moral decadence is on the high side. The more the promulgation of legislation to regulate our moral lives, the more the level of decadence emerging in various unique forms. Of note is the prevalence quick way of making money among the youth also known as “Yahoo Yahoo” which is fast becoming a virus in our society and the high level of sexual communism and infidelity among couples. These menaces have crippled our societal mores and values and the need for legislations to be enacted in other to forestall these menaces.

The reason for the above antithesis is nothing but poor implementation of these laws. The various institutions saddled with the responsibility are too weak and needed to be strengthened by the government. Our law makers should be up to the task by promulgating new laws to meet the reality of the society and to be in conformity with the basis of our legal system, i.e to promote morality. We conclude that even though morality is no doubt the basis of our legal system, it is still far from the means and mode of executing and implementing these laws and if the truth must be told, our society is a glorified moral decadence masquerading as sanctity and ideal state. What an antithesis!

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