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LAW AND MORALITY: AN EVALUATION OF THE ROLE OF RELIGION IN CRIMINALIZATION

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ABSTRACT

There exists a raging controversy as to the distinction between what is legally wrong and therefore a "crime" and what is morally wrong and therefore a "sin". This discourse is therefore a spirited attempt at resolving conflicting views in this area of the law. It considered the role of the church and other religious schools of thought in the molding and the formulation of the criminal law in alliance with the codification of some forbidden human conducts which is a legislative function. It was observed that criminal laws reflect the moral and ethical beliefs of the society. Murder for instance, is forbidden not only by the criminal law, the violation of which attracts earthly sanction or punishment, but also by the moral law, the violation of which attracts eternal sanction or punishment in the hereafter. The significance of "moral law" lies in the fact that it compels most people in the society to conform to the standards necessary for public order regardless of whether a police man is watching or not. The significance extends to the fact or discovery that the old English judges were much attuned to the moral sentiments of their communities on the basis of which criminal laws were enacted against adultery, rape, murder, stealing, arson etc. and this historical foundation justifies the definition of a "crime" as a "moral wrong". It was concluded that though all criminally wrongful acts are also morally wrongful, not all morally wrongful acts are criminally wrongful and the marriage between the criminal law which is purely a legislative creation and moral laws which operate within religious realms, rather than their divorce, is good for the health of the society.

Keywords: Law, Religion, Morals, Crime and Criminalization.

1. INTRODUCTION

In the exercise of their interpretative jurisdiction, the courts try as much as possible, to be guided by the intention of the legislature and accordingly seek for it.[1] When found, the intention of the legislature reveals the raw materials, which, when put together, influenced the output of the legislative process. Such raw materials may originate from the social, political, economic, religious or moral realities relevantly material to the time and purpose of the enactment. Accordingly, it would seem that the early church, in the course of propagating its religious beliefs, influenced and/or played key roles in the moulding of criminal statutes and indeed, in criminalizing human conducts. The categorization of prohibited conducts into "mala in se' and "mala prohibita" offences was credited to religious beliefs in the concept and practice

[1] Eskridge, W.N. Dynamic Statutory Interpretation, 2nd Edn (India, Universal Law Publishing co. Pvt. Ltd. 2009) p. 112

of "sin" which attracts eternal condemnation and punishment in the life after before the judgment throne of god. "Mala in se" offences are products of premeditation or malice afore-thought on the part of the role-actor while *mala prohibita*_offence spring on the spur of the moment without premeditations. Mala in se offences are grievous and weighty in the eyes of the law and accordingly visited with serious consequences in terms of punishment.

These religious beliefs constituting "sin or immorality" are found in source documents such as the Holy Bible or the Holy Qur'an . Problems are arise where these 'sins' or acts of immorality are not taken cognizance of and accordingly codified by the legislature. It would therefore seem that a dividing line is universally drawn between "sin" or "immorality" as a religious concept and "sin" or "immorality" as a legal concept with regard to their transformation into offences which are punishable by law. Here comes the controversial and continuing debate as to "what is law" and "what ought to be law". In a law court, guilt must be punished without prejudice, and if there is no guilt, then once again, prejudice must not be allowed to rear its head[2]. Sin, is therefore a prejudice.

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It would therefore seem that criminal laws reflect the moral and ethical beliefs of the society. Murder, for example, is considered to be morally wrong and most persons would not murder another human even if it were not forbidden by all legal systems and jurisdictions. In the primitive societies, the influence of religion on law was obvious, but it is not so obvious in modern societies. In primitive communities, religion, morals and law were indistinguishably mixed together. In the Ten Commandment for instance, you find the first commandment which is religious: "God spake these words and said: "I am the Lord thy God: Thou shalt have none other God but me". You find the fifth commandment which is a moral precept: "honour thy father and thy mother: that thy days may be long in the land which the Lord thy God giveth thee". You find the eight commandments which is a legal duty: "thou shalt not steal" this intermingling is typical of all early communities.[4] Murder, then, is forbidden not only by the criminal law, but also by the moral law. This moral or ethical commitment to the law is known as the "law behind the law". The importance of the "law behind the law" lies in the fact that it compels most of the people in the society to conform to the standards necessary for public order regardless of whether a police officer is watching them or not. Public order is not possible without the "law behind the law" as there are not enough police to enforce criminal law without this moral and ethical backing. Without moral or ethical commitments, there would be nobody to watch the watchman or to police the police.[5]

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[2]Cicero, Murder Trials (England, Penguin Books Ltd, 1980) p. 123.

[3] Denis Lloyd, The Idea of Law: A Repressive evil or Social Necessity. (Penguin Books Ltd, England, 1983) pp. 48-49.

[4] Lord Denning, The Changing Law (New Delhi-India, Universal Law Publishing Co. 2010). P. 99. See also, Exodus Chapt. 20.

[5] Gardner T.J. & Manian V, *Criminal Law: Principles, Cases and Readings*, 2nd Edn (St. Paul, West Publishing Co. 1980) p. 9.

2. MATERIALS AND METHOD

This discourse is conceptual and doctrinal in nature. It analytically appraised some religious views, scholarly texts, opinions and precedents. It also analyzed relevant Nigerian penal statutes particularly, the penal code, in contradistinction to the common law where none exists in this area of the law. The historical nature of the subject matter constitutes a disconnect between it and current journal articles and internet materials.

3. CONCEPTUAL FRAMEWORK

Certain key terms and/or concepts which are likely to dominate our discourse need some clarifications by way of definitions as they would form a formidable building blocks. These would include, law, morals, religion, crime (offence) and crimilization.

3.1 What is law?

A system of rules. Of rules plus judicial discretion? Of principles? Or is it just organized public opinion? Is it a thing, entity, or concept at all-and if not, does this make the original question ("what is law?") meaningless? Where does law come from?[6] All definitions or characterizations of law veer between two extreme positions: one extreme emphasizes its coercive character, the other lays stress on the social acceptance the actual observance of law by the community to which it is addressed. The coercive aspects of the legal norm rest both on the source of authority (sovereign command, hierarchical order) and on the enforceability by sanctions-which may be civil, criminal or administrative.[7] Austin defines law as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. It is a command of the sovereign backed by sanctions."[8]

3.2 Morals

Morals or morality is the conscience, character or the general principles of right conduct, congnisable and enforceable by eternal forces. It is the law of conscience, the aggregate of those rules and principles of ethics which relate to right or wrong conducts which prescribe the standards to which the actions of men should conform in their dealings with each other.[9] In every society, there is a close connection between social morality and the legal order. There has never been, and cannot be, a complete separation of law and morality. Historical and ideological differences concern the extent to which the norms of the social order are absorbed into the legal order. and while, in the traditional, more or less custom-bound society, the flow was essentially in one direction, the gradual transformation of social behaviour into legal custom, and from custom into legislative prescriptions, in the contemporary, highly articulate and organized society, the law becomes in turn, increasingly a major factor in the formation of social morality. Ultimately, the relative impact of the multitude of individual ethics upon social morality, and in turn, the impact of social morality upon the legal order, will greatly depend on the character of the society.[10]

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[6] Posner, R.A. *The Problems of Jurisprudence* (New Delhi-India, Universal Law Publishing Co. Pvt. Ltd, 2010) p. 1.
[7] Friedman, W. *Legal Theory*, 5th Edn (India, Universal Law Publishing Co. Pvt. Ltd, 2008) p. 14.
[8] Friedman, *op. cit* at p. 258. See also, Austin, *Lectures on Jurisprudence* 86, 4th Edn, (Campbell 1876).
[9] Henry Campbell Black, Black's Law Dictionary, 6th Edn (West Group, St. Paul, 1991) p. 1009.
[10] Friedman, W. *Legal Theory* 5th Edn (New Delhi-India, Universal Law Publishing Co. Pvt. Ltd, 2008) pp. 42-43).

3.3 Religion

Religion may be defined as, the bond uniting or linking man to God. It is a virtue designed to render worships or services to God in recognition of his supremacy, control and origin of all things. In its broad sense, it includes all forms of belief in the existence of a superior or Supreme Being exercising power over human beings, by volition, imposing rules of conduct with future rewards and punishments.[11] It is a sacred history, beginning with the creation, leading to a consummation in the future and justifying the ways of God to man. It is a conception of righteousness guided by divine will. It is man's personal relationship with his creator.[12] This takes it out of "idol worship" since no man is created by idols.

3.4 Crime[13] and Criminalization

Criminalization is the rendering of an act criminal and punishable by statutory enactment. Criminalization is the source, origin and foundation of the substantive criminal law which is designed to prevent harm to the society, declares what conduct is criminal and prescribes the punishment to be imposed for such conduct.[14]

A disturbing trend in the study of criminal law is the incoherent and inconsistent meanings and definitions assigned to "crime" or "offence" as a legal concept by jurists and legal writers which tend to affect the basis of criminalizing some human conducts. The English Legal Writers, Smith and Hogan, warn us of the frustration and futility attendant in attempts to define the subject matter of a particular branch of the law. This frustration is even more manifest in the various attempts to define "crime" or "offence" as a legal concept. According to them:

> It is now rather unfashionable to begin law books with definitions. One reason for this is the difficulty frequently encountered in defining the subject matter of a particular branch of the law; and nowhere has this been more greatly felt than in criminal law. But a book about crimes which does not tell the leader what a crime is, allows him to proceed with his own preconceived notions in the matter, and it is well recognized that there is a popular meaning of crime which is different from, less precise, and narrower than, the legal meaning. A law book must be concerned with the legal meaning of crime and the reader is entitled to know what it is, or at least why it is so difficult to tell him. An attempt to define a crime at once encounters some difficulties if the definition is a true one, it should enable us to recognize any act (or omission) as a crime or not a crime, by seeing whether it contains all the ingredients of the definition. But reflection will show that this is impossible"[15]

It is agreed that there is the need to define the subject matter of every discourse or concept notwithstanding the difficulties associated with such an exercise. Nonetheless, it must also be pointed out that there are as many definitions of a concept or subject matter as there are persons who care to define such concept or subject matter and there is no futility in attempting to define a concept since every definition which brings out the essence of what is sought to be defined will stand the test of time.

[11] Henry Campbell Black, *op. cit.* p. 1292.
[12] Russell, B. *History of Western Philosophy* (London: Unwin Paperbacks, 1981) p. 311.
[13] The words "crime" and "offence" are usually, interchangeably used and one when used, may mean the other.
[14] Henry Campbell Black, *op. cit*, p. 374.
[15] Smith & Hogan, *Criminal Law,* 10th Edn (London, Butherworths, 2002) p. 15.

It would seem that the most analytical definition of what constitutes a "crime" is as proffered by Lord Atkin in the English case of *Proprietary Articles Trade Association v. Attorney General (Canada)*[16] to the effect that:

> The criminal quality of an act cannot be discerned by intuition or can it be discovered by reference to any standard but one: "Is the act prohibited with Penal Consequences."[17]

The Nigerian Court of Appeal seems to follow suit when it held that: "A crime is a positive or negative act in violation of a Penal Law."[18] These definitions are ostensibly, in line with the principles of legality which insists on the certainty of the law. Conducts amounting to crime, must be publicly and clearly declared in statutes for the avoidance of doubt by members of the public who are mandated to observe and comply with their dictates. In fact, one of the ways of justifying punishment is by publicly enacting and declaring penal statutes. According to Hart:

> Before we reach any question of justification we must identify a preliminary question to which the answer is so simple that the question may not appear worth asking; yet it is clear that some curious theories of punishment gain their only plausibility from ignoring it, and others from confusing it with other questions. This question is: why are certain kinds of action forbidden by law and so made crimes or offences? The answer is: to announce to society that these actions are not to be done and to ensure that fewer of them are done. These are the common immediate aims of making any conduct a criminal offence and until we have laws made with these primary aims, we shall lack the notion of a "crime" and so of a "criminal".[19]

It would seem that the above definitions of "crime" have nothing to do with issues or factors that influenced the legislative mind in its bid to criminalize certain human conducts. The definitions are simple, pure and legalistic. Nonetheless, efforts have been made by jurists and legal writers alike to incorporate "morals" in their definition of what constitutes a "crime" or an "offence". Indeed, the old English Judges were much attuned to the moral sentiments of their communities on the basis of which criminal laws were enacted against adultery, rape, murder, stealing, arson, etc and this historical foundation may justify the definition of a "crime" as a "moral wrong."[20]

The English Jurist and Legal Writer, Kenny, defines a "crime" as: "a wrong whose sanction is punitive and is not remissible by an individual but by the state if remissible at all".[21] The word "remissible" as used by Kenny here, may mean "state pardon" as obtainable in

[16] (1931)AC 310. *The Nigerian Criminal Code Act* (Cap. C. 38) LFN 2004 made no attempt to define a "crime" or an "offence" as the case may be. But section 28 of the Penal Code Act (Cap. 532) LFN (Abuja) 1990, defined an "offence" to include an offence under a law for the time being in force and this does not help us in any way in getting to the substance and/or ingredients of the concept.

[17] Hart, H.L.A, *Punishment and Responsibility* (Essays in the philosophy of law) 2nd Edn (Oxford University Press, 2008) p. 6.

[18] *Amgbare v. Slyva* (2009). See also, Henry Campbell Black, op. cit at p. 370

[19] Hart *op. cit.* pp. 7-10.

[20] Turner JWC, Kenny's Outline of Criminal Law, 18th Edn (Cambridge University Press, 1962) p. 8.

[21] Section 175 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) empowers the president to the grant any person concerned with or convicted of an offence created by the National Assembly a pardon either freely or subject to lawful conditions. See also, section 212 of the constitution for similar provision empowering state governors to act in like manner in deserving circumstances.

Nigeria upon the exercise of the "prerogative of Mercy" by the appropriate authority.[22] It must be pointed out that, historically, morals played a significant role in moulding and shaping the criminal law. To this end, the English Master of Rolls, Lord Denning, opined that: "in order that an act should be punishable, it must be morally blameworthy, it must be a sin."[23]

The first requirement of a crime is that there must be a vicious will, which means blameworthiness. The alliance between the criminal law and moral sentiment is in all ways, healthy and advantageous to the community and it is desirable that criminals should be hated.[24] This historical development must have been due to the influence of the church under which the criminal law was equated with the concept of "sin" as principally fueled by cannon law or the teachings of the church. For instance the doctrine of "mens rea" otherwise known as the principle of "no liability without fault" was also a creation of the church which was later given statutory stamp of approval in most common law jurisdictions, including Nigeria. Thus, the Criminal Code, applicable in the Southern part of Nigeria provides:

> Subject to the express provisions of this code, relating to negligent acts, and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident.[25]

A similar provision in the Penal Code, applicable in the Northern part of Nigeria states that:

> Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution[26]

The words "will", "intention" and "knowledge" as used in these penal statutes may be interchangeably used with "blameworthiness" as used by the jurists in their various definitions of the concept of crime. They also mean "malice aforethought" as used in some penal statutes.

4. JUDICIAL ATTEMPTS TO CRIMINALIZE IMMORAL CONDUCTS OR SINS

Generally, the broad spectrum of the criminal law may be divided into "mala in se" and "mala prohibita" offences and it would seem that the former was used to enforce the moral code as opposed to criminal law simpliciter.[27] This practice finds expression in two English decisions as herein discussed.[28] In *Shaw v. Dpp*,[29] the appellants published a 28 page book (The Ladies' Directory) wherein they advertised the names of prostitutes, their telephone numbers, addresses and services. They were arrested and charged with "conspiracy to corrupt public morals". In affirming their conviction, the House of Lords (with Lord Reid dissenting), held that there was an offence at common law of conspiracy to corrupt public morals which needed no proof that anybody was actually corrupted and that it was for the jury to say whether, on the facts presented by the prosecution a crime was committed. A fundamental problem here, is that there

[22] Lord Denning, The Changing Law (Universal Law Publishing Co. Pvt. Ltd, New Delhi-India, 2010) p. 112.
[23] Harris, J.W. *Legal Philosophies*, 6th Edn (Butterworths, London, 1997) p. 129.
[24] Sections 24 and 25 of the Criminal Code Act (Cap. C. 38) LFN 2004.
[25] Section 48, Penal Code Act (Cap. 532) LFN 1990 (Penal Code not reviewed in the 2004 Laws of Nigeria).
[26] "Mala in se" Offences require proof of intention (i.e. *mens rea*) for liability while "mala prohiba offences" are of strict liability in the form of proof.
[27] *Shaw v. Dpp* (1962) AC 220 and *Kniller v. Dpp* (1973) AC 435.
[28] (*Supra*). See also, *R. v. Rowley* (1991)1 WLR 1020 (CA).
[29] (*Supra*). See also, *R. v. Gibson* (1990)2 QB 619 (CA).

was no penal statute in England at the material time which made "conspiracy to corrupt public morals" a crime, yet the court assumed the role of the Legislature by holding that such offence existed at common law. According to the court (Per Lord Simon): "There remains in the courts of law, a residual power to enforce the supreme and fundamental purpose of the law to preserve not only the safety and order but also the moral welfare of the state."

In *Knuller Ltd. v. Dpp*,[30] the appellants published a magazine (the International Times), which contained on inner pages, columns of advertisements inserted by homosexuals for the purposes of attracting persons who would indulge in homosexual activities. The magazine had a circulation of over 30,000 copies. It was not disputed that a great many copies found their way into the hands of young persons and school boys, but the prosecution did not make any point of fact that it was likely that males under 21, the age of consent to homosexual activity at that time, would reply and react to the advertisements. The appellants were charged in two counts; the first count alleged a conspiracy to corrupt public morals. The particulars were that the appellants conspired by means of the advertisements to:

> Induce readers thereof to meet those persons inserting such advertisements for the purposes of sexual practices taking place between such male persons and to encourage readers thereof to indulge in such practices with intent thereby to debauch and corrupt their morals.[31]

The second count alleged a conspiracy to outrage public decency by the publication of the "lewd, disgusting and offensive "advertisements.[32] The appellants were convicted on both counts and their appeals to the Court of Appeal were dismissed. Fundamentally, and as was the case in *Shaw v. Dpp*, there was no penal statute which made the facts in this case criminal, as required by the principle of legality which demands that criminal offences be clearly defined to enable people who wish to be law-abiding to live their lives confident that they will not be breaking the law.[33] There is yet to be an authoritative decision on whether there is a substantive offence of corrupting public morals. If there is such a substantive offence, then, a conspiracy to corrupt public morals should be charged as a statutory offence and not a common law one.[34]

The matter is made more complex by the fact that an offence of conspiring to outrage public decency cannot take place in a private home. To "outrage" means to disgust No one actually needs to be outraged, it is sufficient that an ordinary person would be likely to be outraged if he saw the conduct. It is difficult to see which types of behaviour would constitute a conspiracy to outrange public decency if done by two people which would at the same not amount to the crime of outraging public decency if done by one person. There is doubt as to whether there is an offence of corrupting public morals. The court of Criminal Appeal in Shaw's thought that there was, but the House of Lords considered only conspiracy and not whether a substantive offence existed.[35]

The decisions of the English Courts in *Shaw* and *Knuller* cases, were very controversial and highly criticized by jurists and legal scholars on grounds:

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[30] Smith & Hogan, *Criminal Law: Cases and Material*, 10th Edn, (Ed) David Oronerod (Oxford University Press, 2009) p. 569.

[31] *Ibid*.

[32] Herring J, *Criminal Law: Texts, Cases and Materials* (Oxford University Press, 2004) p. 10.

[33] *op. cit.* p. 787. Note that the former common law offence of conspiracy to outrage public decency is now a statutory offence under section 5(3) of the obscene publications Act, 1977.

[34] Jefferson, M. *Criminal Law*, 8th Edn, (Pearson Longman, 2007) p. 407. See also, Martin J. and Storey T, *Unlocking Criminal Law*, 2nd Edn (Hodder Education Publishers Ltd, UK, 2011) p. 11.

[35] Section 6 of the constitution of the Federal Republic of Nigeria, 1999 (as amended) vests the judicial powers of the Federation in the courts while section 4 thereof, vests the legislative powers in the National Assembly of the Federation. There is also the doctrine of "separation of powers" under which the judiciary cannot exercise legislative powers and/or functions and vice versa.

(a) That it was nothing but a naked usurpation of legislative powers and functions to make laws by the court which is constitutionally created to interpret and not to make laws as the decision constituted a judicial legislation.[36]
(b) That morality is not the proper object or within the province of the criminal law as the concept of "sin" or "immorality" exists within the realm of religion,[37]
(c) There is also the "harm principle" on the basis of which an act may be criminalized if and only if, it is harmful to the society at large.

The "harm principle" is the brain child of John Stuart Mill. He had opined that "people should be free to do what they like so long as they don't harm others, it being assumed, of course, that harming others is morally objectionable" He maintained that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[38]

5. THE WOLFENDEN COMMITTEE REPORT

Whether an act ought to be criminalized on grounds of immorality per se was the subject of a rigorous debate generated by the decision in the *Shaw's* case coupled with the view and report of the Wolfenden Committee in response to the decision in the *Knuller's* case. The committee was set up in 1957 to consider the moral effect of homosexuality and prostitution on the society under the chairmanship of Sir John Wolfenden. Though the report of the Committee includes some general observations on law and moral, it specifically drew a dividing line between them as to their functions and spheres of influence. According to Committee:

> The function of the Criminal Law is to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or state of special physical, official or economic dependence….unless a deliberate attempt is to be made by society, acting through the agency of the law, there must remain a realm of private morality and immorality, which is, in brief and crude terms, not the law's business."[39]

The committee ended up by pointing out in clear terms that it was not within the province of the criminal law to interfere with homosexual behaviour between consenting adults in the privacy of their homes.[40] The relationship between law and morality has become increasingly relevant in recent times as social liberals advance issues like homosexual marriage and abortion rights. The refrain has repeatedly been that "we cannot legislates immorality "and one variant is that: "No nation in the history of the world has ever been saved from moral bankruptcy by enacting laws". Another variant is that laws are simply a "lagging indicator" of

[36] Hart, H.L.A *Punishment and Responsibility* (Essays in the Philosophy of Law) 2nd Edn (Oxford University Press, 2008) p. 6. *op. cit* at p. 2.
[37] By virtue of section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed, and protected.
[38] Harris, J.W. *Legal Philosophies*, 2nd Edn, (London Butterworths, 1997) pp. 23, 130-131.
[39] The Reports of the Committee on Homosexual Offences and Prostitution (Cmnd 247, 1957).
[40] See paragraphs 12 and 61 of the Report.

moral reforms and the common element in the refrain and all its variants is that laws will not lead to the moral reformation of a society.[41]

6. THE GREAT DEBATE (LORD DEVLIN AGAINST PROF HART)

The decisions in the *Shaw* and *Knuller* cases which were followed by the report of the Wolfenden Committee gave rise to an exciting and thought provoking debate between two great jurists which contributed immensely to the development of this area of the law. Lord Devlin disagreed with the Wolfenden Committee's Report and in reaction, raised the following issues:

(a) Does the society have the locus standi or power to enforce morals?
(b) If the above is answered in the affirmative, must the society use the instrumentality of the criminal law to do so?
(c) If this is also answered in the affirmative, is it all aspects or in some aspects, that the criminal law should be applied?[42]

Lord Devlin conclusively opined that there is a public morality which binds all of us together in a society and that as it is with the offecnes of treason and sedition, society, has a right to use all its coercive weapons to prevent internal disruptions. A legal scholar and jurist of note, Professor Hart, wrote a reply to Lord Devlin's criticisms of the Wolfenden Committee's Report. According to him, immorality is just one of the factors to be considered by the legislature in deciding whether an act should be criminalized. The other factors, according to him, are enforceability and the harm caused to the society by such acts.[43] Professor Hart concluded by relying on the works of John Mills[44] to the effect that the only proper purpose for which power maybe used against an individual in the society is to prevent "harm" to others.

The obligations and purposes of law and government are to protect public wealth, safety, morals and to advance the general welfare-including, pre-eminently, protecting peoples fundamental rights and liberties. At first blush, this classic formulation seems to grant vast and sweeping powers to public authority. Yet, in truth, the general welfare (the common good), requires that government be limited. Government's responsibility is primary when the questions involve defending the nation from attack and subversion, protecting people from physical assaults and various other forms of depredation, and maintaining public order. Ultimately, the role of government is subsidiary, i.e. to support the work of the families, religious communities, and other institutions of civil society that shoulder the primary burden of forming upright and decent citizens, caring for those in need, encouraging people to meet their responsibilities to one another while also discouraging them from harming themselves or others by imposing sanctions on antisocial conducts.[45]

A pertinent question or issue is as to where to draw a dividing line between immorality and the criminal law. In answering this question, it is obvious that two fundamental societal interests run into contrast, first, the interest of the individual to do what he wants to do in the privacy of his home without let or hindrance from the law. Second, the integrity of the society itself which may be eroded by the use of the criminal law to cause harm to other members of the same society.

Nonetheless, it will be readily accepted that even if we try to separate what is criminal from what is immoral, such a separation cannot be water-tight as both law and morality fashion a society towards greater security and contentment for "the absolute divorce of the law from

[41] Resize, A.A.A, The Relationship between Law and Morality, available at www.redstate.com/kipling/2012/06/07accessed15/11/2013
[42] Devlin P. The Enforcement of Morals (Oxford University Press Ltd, London, 1965) p. 36.
[43] Hart, H.L.A, *Law, Liberty and Morality* (London Butterwroths, 1983) p. 11.
[44] Mills J.S, *On Liberty, Utilitarianism and Representative Government* (London Butterworths, 1983) p. 136.
[45] George R.P. Law and Moral Purpose, available at www.firsthings.com/article/2007/12,Accessed 15/11/012.

morality would be of fatal consequence."[46] At the same time, morality or immorality cannot be the sole basis for criminality. First, morals are mostly subjective value judgments and do not only vary from place to place, but also change from time to time. Second, the question as to whose morality or immorality stems from the fact that there is no common or universally acceptable yardstick for gauging what is morally right and morally wrong.[47] Ultimately the marriage between the criminal law and morals is beneficial to the society and therefore not counter-productive. Criminal laws reflect the moral and ethical beliefs of the society. Murder, for instance is considered to be morally wrong and most persons would not murder other human beings even if it were not forbidden by penal statutes. Murder, then, is forbidden not only by the criminal law but also by the moral law.[48] Thus, commenting on the Biblical injunction, "thou shall not kill" Dickson said:

> The sanctity of life must be guarded in order to maintain social well being. If there is no regard for human life, then a society has digressed into social chaos. This commandment does not refer to capital punishment that was later given as a discipline for society to rid itself of those who give up their right to cohabit with the society. Jesus' quotation of this commandment from the Greek Septuagint is a commentary on what is here meant, "You will not murder".[49]

It would seem that moral and ethical principles work in harmony with the criminal law to ensure the maintenance of social well being and this ethical or moral commitment to the law is known as the "law behind the law', the importance of which lies in the fact that it compels most of the people in the society to conform to standards necessary for public order regardless of whether a police officer is watching them or not. The standard set by moral laws is generally higher than those set by criminal laws. Moral laws attempt to perfect personal character while criminal law, in general, is aimed at particular misbehaviours which fall substantially below the norms of the community. Criminal law alone cannot bring all conducts into conformity with the standards expected by the community while the society uses many sanctions besides criminal law to encourage and coerce persons to behave properly. Nonetheless, criminal codes do not include, all the general moral concepts of the society. This is so, since the issue of which moral concepts, should be embodied in a penal statute is primarily a political question, though the courts may override the law makers when constitutional issues are involved.[50]

In primitive societies, the influence of religion on law was obvious, but it is not so obvious in modern societies. In primitive communities, religion, morals and law were indistinguishably mixed together. This, intermingling is typical of all early communities. The severance of the three ideas, i.e. of law from morality, and of religion from law, belongs very distinctly to the later stages of mental progress. This severance has gone a great way. Many people now think that religion and law have nothing in common. The law, they say, governs our dealings with our fellow human beings, whereas religion concerns our dealings with God. Likewise, they hold that law has nothing to do with morality as the former lays down rigid rules which must be obeyed without questioning whether they are right or wrong. Its function is to keep order, and not to do justice.

Nonetheless, it would seem that the severance has gone much too far. Although religion, law and morals can be separated, they are nevertheless, still very much dependent on

[46] Per Lord Coleridee in *R. v. Dudley and Stephan* (1884)14 QBD. 273.
[47] Chukkol, K.S, *The Law of Crime in Nigeria*, Rvsd Edn, (Zaria, ABU Press Ltd, 2010) pp. 4-6.
[48] See, The Holy Bible, the Book of Exodus chapter 20, verse 31.
[49] Dickson, R.E, Dickson Teacher's Bible, International King James Version (USA, African International Missions, Hutchinson, 2011) p. 97.
[50] Gardner T.J. & *Manian v. Criminal Law*: *Principles, Cases and Readings*, 2nd Edn, (West Publishing Co. St. Paul, New York 1980) pp. 9-10.

each other for without religion there can be no morality and without morality, there can be no law.[51] A conflict between the two, may arise from the fact that the law may make activities criminal which it is morally important to promote and the suppression of these may be quite unjustifiable. This is so because, the immediate aim of criminal legislation cannot be any of the things which are usually mentioned as justifying punishment for until it is settled what conduct is to be legally denounced and discouraged, we have not settled from what we are to defer people, or who are to be considered criminals from whom we are to exact retribution, or on whom we are to wreak vengeance, or whom we are to reform. Even those who look upon human law as a mere instrument for enforcing "morality as such" (which is conceived as the law of God or nature) and who at the stage of justifying punishment wish to appeal not to socially beneficial consequences but simply to the intrinsic value of inflicting suffering on wrongdoers who have disturbed, by their conducts, the moral order, would not deny that the aim of criminal legislation is to set up types of behaviour (i.e. conformity with a pre-existing moral law) as legal standard of behaviour and to secure conformity with them. No doubt, in all communities, certain moral offences, such as, killing will always be selected for suppression as crimes and it is conceivable that this may be done not to protect human beings from being killed but to save the potential murderer from sin. Paradoxically, the law would be seen as not designed to discourage murder (even if conceived as sin rather than harm) but simply to extract penalty from the murderer.[52]

7. THE NIGERIAN POSITION

It would seem that the courts in Nigeria, align themselves with the condemnation of the decisions of the English Courts in the *Shaw* and *Knuller* cases. In other words, the Nigerian courts seem to agree with the report of the Wolfenden committee and the position taken by the great jurist, Professor Hart in the great debate, earlier disused. One thing is to subscribe to a principle or policy while another is to apply it properly in deserving circumstances, taking into consideration the facts of the relevant cases and applicable laws (statutory and common laws). The Supreme Court of Nigeria failed to do in the case of *James Biruwa v. The State*[53] and therefore came to a wrong decision. In fact, the decision in this case was reached *per incuriam* by the apex court. In that case, the wife of the appellant deserted him and went to live with another man, the deceased. After a period of over one month, the deceased saw the appellant in the bush, the deceased alighted from his bicycle, raised his cutlass and started running away. The appellant pursued him and shot an arrow at him. The arrow hit the deceased and stuck to his neck. He died five days later in the hospital as a result of injuries he sustained from the act of the appellant. The appellant was charged at the Yola High Court with the offence of culpable homicide punishable with death contrary to section 221 (a) of the Penal Code, in Chukkol Village in the then Gongola state Judicial Division, he shot Kiliyobas Jabo (the deceased) with an arrow on the neck with intention of causing his death and did cause his death on or about the 26th day of March, 1980. In his extra-judicial confession, the appellant said "I shot him with it (arrow) on his neck---the reason why I shot him with arrow is that there was a time he took my wife alone with him for 46 days" the accused then raised the defence of "provocation" at his trial, which was debunked by the trial court that convicted him as charged. The Court of Appeal and later the Supreme Court of Nigeria affirmed his conviction for the murder of the deceased. As to whether the appellant is entitled to the defence of provocation which he raised, the Supreme Court held that:

[51] Lord Denning. *The Changing Law* (New Delhi-India Universal Law Publishgin Co. Pvt. Ltd, , 2010) p. 112. *op. cit.* at p. 99.
[52] Hart, H.L.A. *Punishment and Responsibility* (Essays in the Philosophy of Law) 2nd Edn (Oxford University Press, 2008) p. 6 *op. cit*. at p. 8.
[53] (1992)1 SCNJ 121.

> Provocation which will reduce murder to manslaughter or culpable homicide not punishable with death, must be of such a nature as will arouse resentment, deprive self-control and obscure reason which will likely, without time to cool, evoke violence dictated by passion, rather than judgment. The main issue in this appeal is whether the defence is available to the appellant.[54]

The court held that the defence of provocation as herein defined could not avail the appellant in the circumstances of his case. As to whether the conduct of the deceased by enticing or seducing the wife of the appellant is legally or morally condemnable so as to provoke the appellant into taking the life of the deceased, the Supreme Court held that:

> Seducing another person's wife is a sinful act, not a criminal act. The husband has no moral, societal or legal right to kill the seducer indeed, the state cannot inflict corporal punishment for a sinful act which has not been made a crime by statute. Only providence can.[55]

8. RELEVANT STATUTORY PROVISIONS IN NIGERIA

It is not true, as claimed by the apex court, that the conduct of the deceased, whereby he took away and cohabited with the appellant's wife for a period of time is not statutorily condemned. This is so because, section 389 of the Penal Act,[56] provides:

> Whoever takes or entices away a woman, who is and whom he knows or has reason to believe to be the wife of any other man, from that man or from a person having the care of her on behalf of that man with intent that she may have illicit intercourse with a person or conceals or detains with that intent any such woman, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

There was credible evidence before the court to effect that the deceased took and/or enticed appellant's wife. Accordingly:

> Testifying for the accused, DW1, Ibrahim Hammanjuoda, a Christian preacher, gave evidence to the effect that the accused complained to him sometime in February, 1980, that the deceased had "seized his wife". DW3, Ladde Barjobo, also stated that the accused informed him that the deceased had taken away his wife. DW3, in fact saw the wife of the accused in the house of the deceased for about a month.[57]

It is therefore, wrong, with due respect to the justices of the apex court, to hold that he conduct of the deceased amounted to a "sin" and not a crime for which only "providence" could inflict corporal punishment rather than the court and this distinguishes the *Shaw* and *Knuller* cases from this Nigerian case.[58] The situation here is made more complex and legally questionable by the fact that a presumption (even if rebutable) exists that "enticement" as a

[54] Page 123 of the Report.
[55] Page 129 of the Report.
[56] (Cap. 532)LFN (Abuja) 1990.
[57] Page 124 of the Report.
[58] *Biruwa v. The State* (*Supra*).

legal concept involves illicit sexual intercourse and this calls into focus, Section 387 of the Penal Code Act which provides that:

> Whoever, being a man subject to any customary law in which extra-marital sexual intercourse is recognized as a criminal offence, has sexual intercourse with a person who is not and whom he knows or has reason to believe is not his wife, such sexual intercourse not amounting to the offence rape, is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extend two years or with fine or with both.

According to all social systems, since the beginning of history to date, there is unanimity of views that the act of *Zina* (adultery or fornication) is religiously sinful, morally wicked, socially evil and objectionable. It is a social crime against the institution of the family and an offence against public morality which is punishable. This sexual freedom is completely unknown to all the sacred laws. All laws: Islamic, Christian, Jewish etc, forbid all types of sexual relations outside marriage. The differences between these laws appear in what are considered unlawful and punishable sexual relations, and the punishments prescribed for the prohibited practices.[59] The punishment for *Zina* varies depending on whether the act of *Zina* is adultery or fornication. If it is fornication, the punishment is 100 lashes as stated in the Holy Qur'an, plus one year in exile which is added by the Holy Prophet (S.A.W):

> The woman and the man guilty of adultery or fornication, is flogged with a hundred stripes: let no compassion move you in their case, in a matter prescribed by Allah, if you believe in Allah and the Last Day: and let a party of believers witness their punishment.[60]

It is this Islamic religious practice that is statutorily captured in sections 387, 388 and 389 of the Penal Code Act and, with due respect to the apex court, it is unfortunate that the court failed, refused and/or neglected to be influenced by these statutory provisions in its judgment in the *Biruwa* case.

9. CONCLUDING REMARKS

In order to hold a person individually responsible for his crime, so as to be liable to punishment, it is necessary that he should have a guilty mind. This requirement is first found in St. Augustine's sermons where it is said that you are not guilty of perjury unless you have a guilty mind. Thence, it found its place in the laws of Henry I when it was laid down as law that *reum non facit nisi mens rea*, that is, there is no guilt unless there is a guilty mind. That has been the rule of English Law from that time to this. In order that an act should be punishable, it must be morally blameworthy. It must be a sin.[61] We thank the English master of Rolls, Lord Denning, for laying this solid foundation for the legislative mind. Nonetheless, the legislative mind must proceed therefrom to specifically and statutorily draw a dividing line between conducts that are morally wrong and only punishable by providence and those conducts that violate existing penal statutes and accordingly punishable as crime. All crimes are morally blamable but not all immoral conducts (sin) are criminally blamable or punishable. We commend religion and morals for playing significant roles in the growth and sustenance of the

[59] Bambale Y.Y., *Crimes and Punishments Under Islamic Law* (Malthouse Press Ltd, Lagos, 2003) p. 8.
[60] Bambale, *op. cit* at p. 33. See also Chapt. 24 verse 2 of the Holy Qur'an.
[61] Lord Denning (The Changing Law (New Delhi-India, Universal Law Publishing Co. Pvt. Ltd, 2010) p. 112. *Ibid*.

criminal law, but statutes have taken over from where these ingredients stopped. A crime is therefore whatever penal statutes say it is, and nothing more.

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