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## THE RELATIONSHIP OF LAW AND MORALITY: DICHOTOMY OR COMPLEMENTARITY\*

### Introduction

The relationship of law and morality has always provoked keen and enduring controversy. Annexed to this problem is the proper delimitation of the jurisdictional competence of the institutional custodians of law and morality, *viz*: the State and the Church. When this question was put to our Lord Jesus Christ in the Bible, His injunction was “to render to Caesar the things that are Caesar’s and to God the things that are God’s.”<sup>1</sup> This response, emanating from Our Lord Jesus Christ, the Supreme Intelligence, appears to be the beacon that guides the relationship between the law and the society on the one hand, and religion and morality on the other hand. Faithful adherence to this injunction, it would appear, constitutes the panacea for the avoidance or resolution of conflicts between these two institutions of church and the State and the social norms of law and morality. Put to the test of human application in modern societies, with their complex and multi-faceted domains of activity, it becomes apparent that a hermetic compartmentalization of the spheres of law and morality is not feasible. This is because legal regulations imposed by the State and moral/religious injunction emanating from the church have a common addressee, namely, man composed of body and soul and having material aspirations as well as spiritual yearnings.

This common domain of competence of the State and the Church generates conflicts. This is graphically illustrated by Hooker:

Suppose that tomorrow the power that hath domain in justice requires thee at court; that which in war, at the field; which in religion, at the temple; all have equal authority over thee, and impossible it is, that thou wilt obey, certain thou art for thy disobedience to incur the displeasure of the other two.<sup>2</sup>

The State is sovereign and the instrument at its disposal for the manifestation of its will and effectuation of its objectives is the law. After this brief introduction, we shall now proceed to examine this topic under the following rubrics:

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<sup>1</sup> Luke 20:25.

<sup>2</sup> Hooker, *Ecclesiastical Polity*, VIII, ii, 18.

## The Relationship of Law and Morality: Dichotomy or Complementarity

B.O. Okere

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1. The Notion of Law and Morality.
2. The Church as the Guarantor of Morals and the Catholic Conception of Morality.
3. Legal Enforcement of Morals.
4. The Moral Content of our Laws.
5. Secularism and Moral Neutrality.
6. Conclusion.

### 1. The Notion of Law and Morality

#### a. The Notion of Law

The definition of law is not free from controversy. The various scholars of jurisprudence define law differently. The positivists define law as command backed by sanction. A leading exponent of this school, John Austin, defines 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.

The sovereign punishes his subjects for violation of his law. For St. Thomas Aquinas, "Law is nothing else than a rational ordering of things which concern the common good; promulgated by whoever is charged with the care of the community." For Plato and Aristotle, "Law is the voice of reason."

Von Savigny of the historical school defines law as "the expression of the common consciousness of a people." For him, law is formed by custom and popular faith, "by internal, silently operating powers, not by the arbitrary will of a law-giver."

The sociological school, as expounded by Von Ihering, conceives of Law as "the sum of the conditions of social life as secured by the power of the state through the means of external compulsion." For the American Realist Movement, law consists of the rules recognized and acted upon by the courts of justice. In the words of Oliver Wendell Holmes: "The rules which the courts will follow; the prophecies of what the courts will do in fact and nothing more pretentious are what I mean by law."

For Karl Marx, "Law is a superstructure upon an economic base." It is an instrument at the disposal of the dominant class (the bourgeoisie) to protect their position and possessions at the expense of the oppressed and exploited masses (the proletariat).

It is as a result of this multiplicity of definitions that Professor Lloyd has lamented that much juristic ink has flown in an endeavour to provide a universally acceptable definition of law, but with little sign of attaining that objective.<sup>3</sup> The weakness of most definitions of law lies in their particularism in that they emphasize one aspect or characteristic of law with scanty or no regard for the other aspects. As Professor Bodenheimer has rightly pointed out:

The law is a large mansion with many halls, rooms, nooks and corners. It is extremely hard to illuminate with a searchlight every room, nook and corner at the same time, and this is especially true when the system of illumination, because of limitations of technological knowledge and experience, is inadequate, at least imperfect.<sup>4</sup>

A meaningful and acceptable definition of law has to include the essential ingredients of law distilled from the various schools of jurisprudence such as the certainty of source and coercive character as emphasized by the positivists; the social relevance and acceptance as advocated by the historicists and sociological exponents, and the purposiveness of law (i.e. justice inherent rationality and satisfaction of the common good) which the naturalists claim is the decisive element of law. The Black's Law Dictionary defines law as the regime that orders human activities and relations through systematic application of force of politically organized society, or through social pressure, backed by force, in such a society. It consists in the aggregate of legislation, judicial precedents, accepted legal principles and customary law. The highest law of the land is the constitution which, as an embodiment of the collective will and social contract of the people, governs all persons and institutions in the state. It is the supreme law which imparts validity to all other laws. Any law that is inconsistent with it is, to the extent of the inconsistency, null and void.

#### **b. The Notion of Morality**

Morality is a value-impregnated concept relating to certain normative patterns which aim at the augmentation of good and

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<sup>3</sup> Lloyd, *Introduction to Jurisprudence*.

<sup>4</sup> Bodenheimer, *Jurisprudence* (Harvard University Press, 1974) p.163.

reduction of evil in individual and social life.<sup>5</sup> Morality simpliciter, like ethics, deals with the absolute ideal or the universal good. Its first principle, according to Aristotle, is *bonum faciendum malumque vitandum*, or “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.

According to Immanuel Kant,<sup>6</sup> the distinction between law and morals 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 Kantian theory postulates that law requires external compliance with existing rules and regulations, regardless of the underlying motive, while morality appeals to the conscience of man. The moral imperative demands that men act from praiseworthy intentions, above all from a sense of ethical duty, and that they strive after good for its own sake. Law, on the other hand, demands an absolute subjection to its rules and commands, whether a particular individual approves of them or not, and is characterized by the fact that it always applies the threat of physical compulsion. Morality, according to this theory is autonomous (coming from within man’s soul) while the law is heteronomous (being imposed upon man from without). The Kantian theory finds support in the advocacy of the Hungarian jurist, Julius Moor, who asserts:

The norms of morality do not threaten the application of external means of compulsion; no external guaranties for the enforcement of their postulates are of avail to them. The guaranty of their enforcement rests exclusively within the soul of the individual concerned. Their only authority is grounded on the insight that they indicate the right way of acting. Not outward physical compulsion and threats, but the inner conviction of their inherent rightness will bring about the realization of moral norms. Thus, the moral command appeals to our inner attitude, to our conscience.<sup>7</sup>

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<sup>5</sup> Bodenheimer, *op. cit.*, p. 290.

<sup>6</sup> Immanuel Kant, *The Metaphysical Aspects of Justice*, (Transl. J. Ladd, Indianapolis, 1965), pp.13 – 14, 19 – 21.

<sup>7</sup> Julius Moor, *Macht, Recht, Moral*, Szeged, 1922, pp. 15 – 16. Quoted in Bodenheimer, *op. cit.*, pp. 291 – 292.

## 2. The Church as the Guarantor of Morals and the Catholic Conception of Morality

The role of the Church is perceived as that of the custodian of morals. Morality is the quality attributable to human action by reason of its conformity or lack of conformity to standards or rules according to which it should be regulated. This supposes on the one hand that human actions are voluntary and responsible, and on the other, that there are standards and rules by which human conduct should be measured.

Christian writers agree that there are proper and binding norms of conduct and that morality in the strict sense is found in man's rational choices and is, however, the paramount aspects of human acts. They distinguish the physical from the moral aspect of Christian writers agree that there are proper and binding norms of conduct and that morality in the strict sense is found in man's rational choices and is, however, the paramount aspects of human acts. They distinguish the physical from the moral aspect of act, saying that the former refers to its physiological existence and that the latter is the relation of the act, and of the whole man, to the value of man, since this is his supreme good of its agent. Perhaps the greatest exponent of Christian teaching in support to law and morality is St. Thomas Aquinas. First he identifies the source of all authority and delimits the confines of that authority. He asserts that God is the source of all authority and thus that acts of human authority are Divinely ordained so long as they are performed within their proper limits. For this proposition he cites St. Paul:

Every soul must be submissive to its lawful superiors; authority comes from God only, and all authorities that hold sway are of his ordinance.<sup>8</sup>

He saw both law and Divine grace playing their own roles in the guidance of human action.<sup>9</sup> Aquinas defines law as:

Nothing but an ordinance of reason made and promulgated for the good of the community by the person to whom its care is entrusted (*"nihil, est aliud quam quaedam rationis ordination ad bonum coone ab eo qui curam communitatis habet, promulgatol*).<sup>10</sup>

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<sup>8</sup> *Summa Theologica*, la 2ae, 96:4, quoting St. Paul's epistle to the Romans 13: 1.

<sup>9</sup> "Principium, uteum exterius movens ad bomum est Deus, qui et nos insturit per legume et juvat per gratium" – *Summa Theologica*, In 2ae, de lege.

<sup>10</sup> *Ibid.*, la 12ae, 90: 4.



Thus, for him, true law-making consists of three basic elements, rational aim for the common good (*bonum commune*) enactment by authority; and promulgation. The idea of law as an ordinance of reason includes all rules of reason, while according primacy to Divine will which is the highest reason. Law is thus seen as a rational phenomenon, one which derives its moral stature from concordance with the highest reason, the will of God, which is also the highest “law”. This highest law, which Aquinas calls Eternal Law (“*lex eternal*”) is the will of God governing the motions of the universe and is “law” in its widest significance comprising “natural laws” as understood by the scientist (“laws of physics”) as well as the various usages of the term by lawyers and philosophers (“normative laws”). This Eternal law is “the plan of government in the Chief governor.” It is the divine reason and wisdom directing all movements and actions in the universe. All things subject to Divine providence are ruled and measured by the eternal law. In its entirety it is known only to God.

Even though being is capable of knowing it as it is (except perhaps “the blessed who sees God in His essence”) he can have a partial notion of it by means of the faculty of reason with which God has endowed him (Natural law or “*lex naturalis*”) or have a partial insight to it through scriptural revelation (Divine law or “*lex divina*”).

Natural law directs the activities of man by means of certain general precepts. The most fundamental of these precepts is that good is to be done and evil to be avoided. St. Thomas Aquinas is convinced that the voice of reason in us (which enables us to obtain a glimpse of the eternal law) makes it possible for us to distinguish between morally good and bad actions. According to his theory, those things for which man has a natural inclination must be regarded as forming part of the natural law. First, there is the natural human instinct of self-preservation, of which the law must take cognisance. Second, there exists the attraction between the sexes and the desire to rear and educate children. Third, man has a natural desire to know the truth about God, an inclination which drives him to shun ignorance. Fourth, man wishes to live in society, and it is therefore natural for him to avoid harming those among whom he has to live. While Aquinas considers the basic precepts of natural law immutable, he admits the possibility of changing the secondary precepts (which are certain conclusions derived from the first principles under certain circumstances).

Divine law supplements the rather general and abstract principles of natural law. Divine law is revealed by God through

the Holy Scriptures as recorded in the Old and New Testaments. Human positive law (“*lex humana*”) is made by man but derives its moral authority from concordance with Eternal law as from time to time revealed or perceptible to mankind through Divine or natural law. In order that a governmental mandate may have the quality of law, it needs to comply with some postulate of reason. An unjust and unreasonable law, and one which is repugnant to the law of nature, is not law but a perversion of law.

In the Thomist system, the Church was seen as the interpreter of God’s will on earth and thus able to condemn human laws which conflicted with Eternal law and to release their subjects from the moral obligation of obedience. Aquinas concluded that as all authority comes from God, the proper use of it must accord with the Divine will and any human ordinance in conflict with the higher law could not be binding in conscience.

It is within this theological enunciation of Catholic morality that one can appreciate and evaluate the directives and injunctions of the church over moral issues. The relationship between law and morality is delicate and problematical in any modern society and particularly moreso in a pluralistic society such as ours in which large group of citizens sincerely differ, theologically and philosophically, about the morality of many activities and institutions and about the proper public policy of the State concerning them.

Despite their shared reverence for the sanctity of human life, for the sacredness of the marriage institution, for the dignity of the children, the fact is that there are divergent views over civil laws and public policy respecting marriage and divorce, monogamy and polygamy, adultery and fornication, prostitution and homosexuality, artificial insemination and in vitro fertilization, abortion and sterilization, birth control and contraceptives, surrogate motherhood and adoption of children, sex education and pornography, suicide and euthanasia, drugs and capital punishment, and even the question of blood transfusion or medical aid to sick or dying children. These are social problems with profound moral dimensions calling for legal regulation. What principles should inform decisions in such issues: libertarianism, utilitarianism, morality, tradition or expediency? This dilemma is very well illustrated by the Lord Devlin – Professor Hart debate over the 1957 Report of the Wolfenden Committee on

Homosexual Offences and Prostitution, and legal enforcement of morals.<sup>11</sup>

### 3. Legal Enforcement of Morals

Is morality a validating criterion of law? Should morality be enforced through the instrument of coercive legislation? The first question was addressed in the famous debate between Professor Herbert Hart and Lon Fuller, while the second engaged the polemics of Professor Hart and Lord Devlin.

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<sup>11</sup> Lord Devlin, *The Enforcement of Morals* (Oxford, 1968); H.L.A. Hart, *Law, Liberty and Morality* (Oxford, 1968).

### The Hart-Fuller Debate

In 1944, a woman who had personal grudge against her husband and probably wanted to get rid of him, denounced him for making insulting remarks about Hitler. The husband was sentenced to death. That sentence was later commuted to service in the Russian war front. In 1949, the wife was prosecuted for the offences of illegally depriving a person of his liberty. The wife's defence was that her action was legal, since the husband's action had contravened a law which was valid at the time of the denunciation. The court found her guilty, stating that the law under which her husband had been sentenced and which authorized spouses to spy on and denounce each other was "contrary to the sound conscience and sense of justice of all decent human beings" and was therefore held to be invalid for being devoid of justice and morality, i.e. *lex injusta non est lex*.

Hart contended that the iniquitous nature of a rule which might disentitle it to obedience does not necessarily entail its invalidity. As a positivist, Hart excludes morality as a necessary ingredient of law, for he says that positivists are concerned to promote:

Clarity and honesty in the formulation of the theoretically and moral issues raised by the existence of particular laws which were morally iniquitous but were enacted in proper form, clear in meaning, and satisfied all the acknowledged criteria of a system.

To subject law to moral validation, according to Hart, would oppose the danger of anarchy. He insists that the law is the law if it satisfies the formal criteria of validity. Moreover, punishing the grudge informant who relied on the Nazi law in denouncing the husband would pose a "moral quandary."

It may be conceded that the German informers, who for selfish ends procured the punishment of others under monstrous laws, did what morality forbade; yet morality may also demand that the state should punish only those who, in doing evil did what the state at the time forbade. This is the principle of *nulla poena sine lege*.<sup>12</sup>

Objectionable as this might be, his suggestion to circumvent this moral dilemma posed by grudge informers and Nazi collaborators

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<sup>12</sup> Hart, *Concept of Law* (Oxford: University Press, 1961) p. 207.

is the expedience of a retrospective criminal legislation to criminalise the various morally iniquitous acts committed by them during the war as the legal basis for their trials and punishments. As a positivist, Hart defends the positivistic axiom that the duty of “Fidelity to Law” embraces all rules which are valid by the formal tests by a legal system, although some of them may be decisively repugnant to the moral sense of the community.

On the contrary, Professor Fuller insists that the attitude of the German post-war court was absolutely correct, and that Professor Hart was in error. His argument is that law has and must possess “internal morality” and certain characteristics of it are to be classified correctly as “law”.<sup>13</sup> Fuller argues that a legal system is the purposive human enterprise of subjecting human conduct to the guidance and control of general rules. Whatever its substantive purpose, a legal system is bound to comply with certain procedural standards or *desiderata*. These are: generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy and congruence between declared rule and official action. In the absence of compliance with these eight desiderata, what passes for a legal system is merely the exercise of state coercion.

### **The Hart-Devlin Debate**

The Wolfenden Committee had recommended the decriminalization of homosexual acts between consenting adults in private. Its justification was that:

The importance which society and the law ought to give to individual freedom of choice and action is matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality which is, in brief and crude terms, not the law’s business.

The Wolfenden Committee endorsed Mill’s statement that “the only purpose for which power can be rightfully exercised about any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral is

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<sup>13</sup> “Positivism and Fidelity to Law – A Reply to Professor Hart”, *Harvard Law Review*, 1958.

not a sufficient warrant.<sup>14</sup> The Wolfenden Committee had said that the function of criminal law:

Is to preserve public order and decency to protect the citizens from what is offensive or injurious and to provide sufficient safeguards against exploitation and aggravation of others, particularly those who are vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence. It is not in our view, the function of the law to intervene in the private lives of citizens.”

Although he initially expressed sympathy for the Wolfenden Report’s insistence on a “realm of private morality” and favour for law reform in the case of homosexuality, Lord Devlin (Sir Patrick Devlin as he then was) disagreed with the Wolfenden approach as a general guide to the legal enforcement of morals.<sup>15</sup> He posed three questions:

1. Has society the right to pass judgement at all on matters of morals? Ought there, in other words, to be a public morality or are morals always a matter for private judgement?
2. If society has the right to pass judgement, has it also the right to use the weapon of the law to enforce it?
3. If so, ought it to use that weapon in all cases or only in some? On what principles should it distinguish?

To the above questions, Lord Devlin answered as follows:

- a. Society does not have the right to pass judgement on morals. What makes a number of individuals into a “society” is precisely a “shared morality”. “If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate .”
- b. Society does have the right to use the law to enforce morality “in the same way as it uses it to safeguard anything also that is essential in its existence.” Thus, “the suppression of vice is as much the law’s business as the suppression of subversive activities.”
- c. But society should only use the law in some cases.

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<sup>14</sup> John Stuart Mill, *On Liberty* (1959).

<sup>15</sup> See “The Hart-Devlin Debate” in Simon Lee, *Law and Morals* (Oxford: Oxford University Press, 1986) pp. 26 – 30.

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Lord Devlin suggests four guidelines, all of which are principles of restraint in the way society should use the law to enforce morals:

- i. “Nothing should be punished by the law that does not lie beyond the limits of tolerance.” That tolerance should extend to the maximum individual freedom consistent with integrity of society. The limits of tolerance are reached at a “real feeling of revulsion” not merely as a “dislike” of a practice.
- ii. “The extent to which society will tolerate – I mean tolerate, not approve – departures from moral standards varies from generation to generation.”
- iii. “As far as possible privacy should be respected.”
- iv. “The law is concerned with a minimum and not with a maximum standard of behavior.”

Professor Hart adopts a contrary view and asks:

Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such?

He accuses Devlin of “legal moralism” and urges the need to draw a distinction between “critical” morality (i.e. ideal morality) and “positive” morality (accepted and shared by society). Otherwise, there is a danger of entrenching society’s prejudices under the banner of morality.

In our African society, the issue of homosexuality, in our estimate, poses no moral dilemma. It is not only repugnant to natural law (i.e. natural order or things) and African customary sexual relations but also repulsive to the sensibilities of most Africans. Above all, it is against biblical injunction.

There are other moral issues that pose a greater dilemma because of their profound social significance. The use of contraceptives and in vitro fertilization are quite illustrative. In the *Encyclical Humanae Vitae* of Pope Paul VI, published in August 1968, the church claims the right to “interpret moral natural law” and asserts that “marriage and conjugal love are by nature designed for the procreation and education of children.”<sup>16</sup> Since the church considers married couples as mere instruments of God in the act of procreation, it is opposed to birth control which

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<sup>16</sup> My translation from the French text: “...le mariage et l’amour conjugal sont par nature destinés à la procréation et l’éducation des enfants.” *Concile Vatican II Constitution pastorale sur l’Eglise et le Monde d’aujourd’hui*, No. 50.

violates natural law. This raises many problems and confronts the church with the dilemma of how to reconcile prohibition of birth control otherwise than “naturally” with population explosion in the face of diminishing resources especially in third world countries.<sup>17</sup> The problem of contraceptives, especially the use of condoms, has assumed a critical dimension with the widespread scourge of AIDS (acquired immune deficiency syndrome) with its attendant fatalities. Human cloning and stem-cell research are the latest scientific innovations that pose great moral dilemma to the church and political society.

#### 4. The Moral Content of Nigerian Laws

The view that law relates exclusively to external conduct, while morality is interested in inner motivation cannot be accepted as a generally valid explanation of the relation between these two agencies of social control. This relation is more complex and fluid than is suggested by the Kantian policy. No modern legal system can isolate law and morality within watertight compartments. An eminent English jurist of the positivist school of jurisprudence admits the influence of morality on law and reminds us that:

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 law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process.<sup>18</sup>

Morality has had and continues to have to have a refining influence on positive law as will be vindicated by a cursory review of the following branches of the Nigeria law.

##### a. Equity

The doctrines of Equity sprang up from the felt necessity of an appeal to the court of conscience- the conscience of the Chancellor who was an ecclesiastic and the keeper of the King's conscience. Redress was sought and offered where it was otherwise not available under the formalism of the common law writs. It is true that these doctrines of equity sooner acquired the same rigidity and technicality of the common law, but its influence in attenuating the rigid formalism of the common law

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<sup>17</sup> In its encyclical, *Sollicitudo Rei Socialis* the Vatican recognizes and criticizes the worsening gulf between the rich industrialized nation and the poor developing third world countries.

<sup>18</sup> H. L. A. Hart., *The Concept of Law*, 2<sup>nd</sup> ed, (Oxford: Clarendon Press, 1994), pp. 203-204.



subsists especially in the enlightened application of the maxims of equity, eg:

- Equity will not suffer a wrong to be without a remedy.
- He who seeks Equity will do Equity.
- He who comes into Equity will come with clean hand.
- Delay defeats Equity.
- Equality is Equity.
- Equity looks to the intent rather than to the form.
- Equity looks on that as done which ought to be done.
- Equity imputes an intention to fulfil an obligation.
- Equity acts in *personam*.

**b. Law of Contract**

- *nudum pactum* (absence of obligation in the absence of consideration).
- *Quantum meruit*
- *Consensus ad idem* (reality of consent)
- Invalidity of contracts secured under duress
- *Force majeure* and act of God
- *Ex turpe cause oritur non actio*
- *High Tree* case

**c. Sale of Goods**

- Shift in emphasis from *laissez-faire* doctrine of *caveat emptor* to decent dealing.

**d. Insurance Law**

- Contract *uberrimae fidei* (of utmost good faith) importing duty of utmost disclosure of material facts that may influence the underwriter's opinion.
- Concealment of a material fact avoids the policy.

**e. Law of Agency**

- Shift from mere authority to fiduciary obligations.

**f. Law of Property**

- Roman conception of ownership (right to own, use and destroy) now being progressively modified in the sense of shift from power to social duties.

**g. Criminal Law**

- *Actus non facit reum mens sit rea*: (In most cases mere overt acts do not constitute an offence unless accompanied by a guilty mind – See s. 24 of Criminal Code).
- *Qui Facit per alium facit per se*: (He who procures an agents to commit an offence is deemed to have committed the offence himself. See section 7 of the Criminal Code).
- Offences against morality Unnatural offence (“against the order of nature”) – homosexuality, bestiality – section 214 – 233, Criminal Code.

**h. Customary Law**

- Invalidity of native law and custom that is repugnant to natural justice, equity and good conscience.

**i. Administrative Law**

- Concept of natural justice
- *Nemo iudex in causa sua*
- *Audi alteram partem*

**j. Law of Tort**

- Enlarging the ambit of the duty of care: see *Denoghue v Stevenson*<sup>19</sup>

**k. Evidence and procedure**

- Presumption of innocence of the accused until guilt is proved.
- Character evidence.
- Presumption affecting non production of documents and withholding of evidence.

**l. Constitutional Law**

- Separation of powers to check tyranny.
- Fundamental Human Rights provisions.

Following on the trail blazed by the American Constitution, most modern constitutions have now enshrined the idea that natural rights could be subject of legal guarantees and that these could be adjudicated upon. Furthermore, because these rights are embodied in the constitution, they enjoy a special priority enabling the

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<sup>19</sup> [1932] AC 562.

courts to treat them as superior to and so superseding any legislation or other legal rule which conflicted with them. The humanizing and moralizing wind of natural law has also blown through international organizations, inspiring their collective actions for the benefit of citizens of the member States.

**a. The United Nations**

- i. The Universal Declaration of Human Rights, 1948 (a practical reaction to and revulsion against widespread violation of human rights during World War II).
- ii. International Covenant on Economic, Social and Cultural Rights, 1966.
- iii. International Covenant on Civil and Political Rights, 1966.
- iv. International Convention on the Elimination of All Forms of Racial Discrimination, 1966.
- v. The Vienna Convention on the Law of Treaties, 1969 which introduced the idea of *jus cogens*.

It is not every norm of morality that forms part of our *corpus juris*. The law does not set out to legislate against sin. This is because there are no uniform moral standards and between the extremes of maximum and minimum morality, the pendulum of the law hovers at the *via media*. In the words of St. Thomas Aquinas:

Law is laid down for a great number of people of which the great majority has no high standard of morality, therefore, it does not forbid all the vices from which upright men can keep away but only those grave ones which the average man can avoid and chiefly those who do harm to others and have to be stopped if human society is to be maintained such as murder, theft, and so forth.<sup>20</sup>

Thus, moral norms which add greatly to the quality of life and the establishment of closely knit bonds among men, but which demand more of human beings than is regarded as necessary for the preservation of the essential conditions of social existence do not form part of our legal system and impose no legal obligations. The values of generosity, benevolence, charity, unselfishness, and loving kindness belong to this category. The second category consists of tenets of moral rightness which are considered basic and imperative for the social co-existence and are endowed in

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<sup>20</sup> Thomas Aquinas, *Summa Theologica*, 1a 2ac, qu. 96 Art. 2

Nigeria and indeed all societies with obligatory character of law. This category includes the prohibition of murder, rape, robbery, and physical assaults, the ordering of relations between the sexes, the interdiction of fraud and bad faith in the conclusion and performance of consensual agreements.

In the delimitation of the frontiers of the rights and obligations of the citizens, the law is concerned not so much with the maximum morality of doing good (*bonum facere*), in the image of the good Samaritan, but with the minimum morality of avoiding evil (*malum vitare*), the typical *homo juridicus*. As Lord Atkin aptly remarked, the Bible (moral code) enjoins us to “love your neighbour” but the law imposes the limited obligation of “Do no harm to your neighbour”.<sup>21</sup> From the above *tour d’ horizon*, it is clear that our law does not consist exclusively of positive commands devoid of ethical content. The refining influence of morality is all too evident. It is an “ethico-imperative co-ordination”.<sup>22</sup>

### 5. Secularism and Moral Neutrality

The 1999 Constitution of Nigeria prescribes secularism. Section 10 of the Constitution stipulates that: “The Government of the Federation or of a State shall not adopt any religion as State religion.” Secularism does not mean atheism and the Nigeria Constitution, laws and practices, recognize and acknowledge God. The Preamble to the 1999 Constitution proclaims Nigeria as “one indivisible and indissoluble sovereign nation under God”. It guarantees “freedom of thought, conscience, and religion”. It prescribes the taking of oaths of office for the President and other designated public office holders, which end with the words “so help me God.” It prescribes for the giving of evidence on oath, which is accorded more weight that evidence not on oath. It provides for the observance of holidays of obligation for the two major religions. The government provides financial aid to religious bodies either directly through grants or subventions for pilgrimages or indirectly through tax exemption. The Criminal Code (sections 210-213) punishes offences against religion.

Even in the United States where strict religious neutrality or what Thomas Jefferson called “a wall of separation between Church and State” is maintained in conformity with the

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<sup>21</sup> *Donoghue v Stevensons (supra)*, p. 579.

<sup>22</sup> N. S. Timashef, *An Introduction to the Sociology of Law*, (Cambridge: Mass, 1939), pp. 245-248.

Constitution which enjoins the State to “make no law respecting the establishment of religion”, the Supreme Court was able to say that:

We are religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any group and that let each flourish according to the zeal of its adherents and the appeal of its dogma. When the State encourages religious instruction or co-operates with religious authorities by adjusting the schedule of public events to sectarian needs. It follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the Government show a callous indifference to religious groups. That would be preferring those who believe in no religion to those who do believe.

American secularism is one of State neutrality in the sense of non involvement in religious affairs. It is a constitutionally imposed obligation of religious impartiality which is equidistant from the two opposite poles of religious favouritism and religious hostility.

Nigerian secularism should be comprehended in the same sense. Secularism under the Nigerian constitution does not mean moral neutrality but religious neutrality. Our laws recognize and integrate norms of morality which are distilled more from the moral imperative of social co-existence (which may be coincidental with the moral norms of native law and custom and Christian or Islamic moral injunctions) rather than predicated on any religion as such.

## **6. Conclusion**

For a multi-ethnic, multi-cultural and multi-religious State like Nigeria, secularism is not only a dictate of reason and a *sine qua non* for social harmony and political stability, but also a legal imperative. Even though this secular status is consecrated by the Constitution, attempts - from the subtle to the brazen - are made by the ruling elite, to subvert this religious neutrality. Furtherance of this objective and attempts to resist the encroachment has often eventuated in violent conflicts. Resulting from this socio-cultural and religious heterogeneity, evolution of common moral values has not been an easy enterprise. The Penal Code of Islamic

inspiration operates in the Northern State of Nigeria, while the Criminal Code operates in the South.

Is it possible then to distil certain common moral denominators consistent with natural law and respect for the rights of others (if not love of the neighbour) which can promote social harmony? As we have seen from a panoramic review of the Nigeria *corpus juris*, a strong strand of morality runs through all the branches of Nigerian law. The State and the Church have a complementary role to play in the regulation of the citizen who, as a human being, is composed of body and soul and has material aspirations as well as spiritual yearnings. Morality is a necessary ally of the law and fosters its efficiency. As Bodenheimer observes:

Tenets of social morality are devised in order to curb intra-group aggressiveness, reduce predatory and unconscionable practices, cultivate concern for one's fellow men and thereby increase the possibilities of a harmonious co-existence.<sup>23</sup>

Even an avowed positivist like Professor Herbert Hart recognizes that:

The certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demand must in the end be submitted to a moral scrutiny.<sup>24</sup>

He also acknowledges that statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles.<sup>25</sup> This function of filling in the gaps in the law is performed by the judge who is a member of the society and a product of its cultural synthesis. In his interpretative and adjudicatory function, he calls in aid and draws inspiration from the general spirit of the legal system, certain basic premises or clearly discernible trends of the social and economic order and, above all, from received ideals of justice and certain moral conception of his society in interpreting the bare words of the law. Mere positive injunctions, devoid of justice and morality would subject the legal system to such stresses and strains that it would collapse. Its temporary survival would be at an exorbitant policing cost. For obedience to the law proceeds more from inner morality

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<sup>23</sup> Bodenheimer, *Jurisprudence*, (Harvard: University Press, Cambridge, Mass, 1974), p. 293.

<sup>24</sup> H. L. A. Hart., *op. cit.*, p. 206.

<sup>25</sup> *Ibid.*, p. 199.

or moral habituation than from fear of the State's apparatus of coercion. That was why the French agnostic, Voltaire said: *Si Dieu n' existait pas il faudrait L'inventer*" ("If God did not exist, it would be necessary to invent Him").<sup>26</sup> Thus, we have seen that the relationship of law and morality in Nigeria is not one of dichotomy but of complementarity. It integrates and reconciles legal imperatives with moral desiderata. It is an "ethico-imperative co-ordination."

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<sup>26</sup> N. H. Timashef., *op. cit.*, p. 245-248.