THE CONCEPT OF LAW AND MORALITY IN LEGAL JURISPRUDENCE

BY

DR. ALFRED ABHULIMHEN-IYOHA

CHIEF MAGISTRATE, EDO STATE JUDICIARY , HIGH COURT COMPLEX, BENIN CITY, NIGERIA.

PhD LAW, PhD INTERNATIONAL RELATIONS (STRATEGIC STUDIES), MPA PUBLIC ADMINISTRATION, LLM LAW, PGD EDUCATION, PGD LAW, BL, LLB HONS LAW, +2348055968440.

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Introduction

Law, in a most general and comprehensive sense, means any rule of action that includes any standard or pattern to which actions are, or ought to be conformed to. In its judicial sense, “law " means a body of rules of conduct, action or behaviour of persons, made and enforced by the state. It expresses a rule of human action.

Morality is a value-impregnated concept relating to certain normative patterns which aim at the augmentation of good and reduction of evil in individual and social life. Morality, simpliciter, like ethics, deals with the absolute ideal or the universal good.

This discourse borders on the relationship between law and morality, by reviewing the definitions of both terms by different scholars and jurists. Also, review of theories of law and morality, bordering on their similarities and differences by a few scholars.

Concept of Law and Morality

Law, in a most general and comprehensive sense, means any rule of action that includes any standard or pattern to which actions are, or ought to be conformed to. In its judicial sense, “law " means a body of rules of conduct, action or behaviour of persons, made and enforced by the state. It expresses a rule of human action. As Holland puts it, “the term 'law’ is employed in jurisprudence not in the sense of the abstract idea or order but in that of the abstract idea of rules of conduct”.[1]

According to Blackstone, “law, in its most general and comprehensive sense, is that rule of action which is prescribed by some superior and which the inferior is bound to obey.”[2] Civil law, he defined as “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.” In Blackstone's definitions there are two main concepts: the concept of a superior, and the concept of a command.[3]

A working definition of law can be said to be ‘the binding rules of conduct meant to enforce justice and prescribe duty or obligation, and derived largely from custom or formal enactment

[1] Holland, Thomas Erskine, *Jurisprudence*. (13lh Ed), Oxford; Clarendon, 1880. P.21
[2] Blackstone, William, 1723-1780. *Commentaries on the Laws of England*. Boston: Beacon Press, 1962.
[3] These two concepts, though worded differently, are the basis of Austin's definition: "Positive law is set by a monarch or sovereign member, to a person or persons in a state of subjection to its author", as can be found in his book, province of jurisprudence determined, p. 2.

by a ruler or legislature.' Law derives its legitimacy ultimately from universally accepted principles such as the essential justness of the rules, or the sovereign power of a parliament to enact them.[4]

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."[5]

For St. Thomas Aquinas, a law is "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[6] Law is an ordinance of reason because it must be reasonable, or based in reason and not merely in the will of the legislator.[7] It is for the common good because the end of law is the good of the community it binds, and not merely the good of the lawmaker or a special interest group. It is made by the proper authority who has "care of the community", and not arbitrarily imposed by outsiders. It is promulgated so that the law can be known.[8]

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."[9]

The sociological school, as expounded by Von Ihering[10], 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

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[4] http://www.businessdictionary.com/definition/law.html

[5] Austin, John, 1832, The Province of Jurisprudence Determined, W. Rumble (ed.), Cambridge: Cambridge University Press, 1995.

[6] Thomas, Aquinas, Saint, (1225-1274), *Treatise on law, ("Summa Theologica").* London: Burns, Oates & Washburne, ltd.,

[7] J. Budziszewski, Commentary on Treatise on Law Archived 2013-12-19 at the Wayback Machine, accessed Dec-19-2013.

[8] The Logic of Natural Law in Aquinas's "Treatise on Law" Archived 2013-10-16 at the Wayback Machine James Fieser.

[9] "Savigny, Friedrich Karl von (1779-1862)". Encyclopaedia Britannica. 25 (11 ed.). Cambridge: Cambridge U.P.

[10] Rudolf von Jhering, (1818-1892), German legal scholar, and the founder of a modern sociological and historical school of law.

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."[11]

It is as a result of this multiplicity of definitions that Professor Lloyd has lamented that much juristic ink has flown in an endeavor to provide a universally acceptable definition of law, but with little sign of attaining that objective.[12] 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.

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.[13]

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.

Morality is a value-impregnated concept relating to certain normative patterns which aim at the augmentation of good and reduction of evil in individual and social life.[14] Morality simpliciter, like ethics, deals with the absolute ideal or the universal good.

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, 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.[15] The Kantian theory postulates that law requires external compliance with existing

[11] Holmes, Oliver Wendell Jr. (1881). The Common Law. I. Boston: Little, Brown and Company.
[12] Prof Lloyd, *Introduction to Jurisprudence.* 9th Edition, Sweet & Maxwell, 2014.
[13] Black's Law Dictionary 435 (9th ed. 2009).
[14] Bodenheimer, Jurisprudence (Harvard University Press, 1974) p.163.
[15] Immanuel Kant, The Metaphysical Aspects of Justice, (Transl. J. Ladd, Indianapolis, 1965), pp.13 – 14.

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).

Relationship between Law and Morality

In the modern world, morality and law are almost universally held to be unrelated fields and, where the term "legal ethics" is used, it is taken to refer to the professional honesty of lawyers or judges, but has nothing to do with the possible "rightness" or "wrongness" of particular laws themselves.

This is a consequence of the loss of the sense of any "truth" about man, and of the banishment of the idea of the natural law. It undermines any sense of true human rights, leaves the individual defenseless against unjust laws, and opens the way to different forms of totalitarianism. This should be easy enough to see for a person open to the truth; but many people's minds have set into superficial ways of thinking, and they will not react unless they have been led on, step by step, to deeper reflection and awareness.

The relations between law and morality are the most obvious and prominent. There has always been a debate on whether law should legislate morality and views are varied on what is likely to be the consequences of legislating some people's morality as morality of everybody. Thus, issues of homosexuality, gay marriage, lesbianism, etc have attracted various comments especially as they relate to the reasons why the law cannot be used as a weapon to stop such practices.

There is no doubt about it: there is a nexus between law and morality. The laws prohibiting stealing and murder, among several others, are hinged on morality. It is therefore morally wrong to steal just as it is morally wrong to kill. But we need to be aware of the fact that the relations between law and morality are not as always clear-cut as these examples. For instance, while it is legally and morally wrong to kill, it is not legally wrong to watch a person drown in a

swimming pool, even though the same act may be morally wrong. It is also not legally wrong to refuse to help an accident victim, even though this also will be morally wrong.

There is also the argument that there should be a limit to the extent the law will interfere in the private lives of the citizens. Cases made against criminalizing homosexuality, lesbianism, gay marriage and prostitution are based on this ground.

It has been argued that whatever people in this category do, are done in the privacy of their rooms; hence, since they do not constitute threat to the people around them or the public at large, it will be going too far for the law to poke-nose into their private lives. But, what about where a homosexual decided to practise the act on a young boy? Or, what about where he influences such a boy to be his partner in such a practice?

There are equally distinctions of substance between morals and law. The two do not altogether coincide and that there is a field of positive law that is not deducible from any pre-existing system of natural law. One of the tenets of positivists is that positive law is quite distinct from, and its validity in no way dependent upon morals. However, a measure of coincidence between them may be essential to the working of human society.

Kant believes that laws prescribe for external conduct whereas morals prescribe internal conduct. This means that morals alone are concerned with subjective factors, such as motive. Law on the other hand, is concerned with the external manifestations of motive. Many lawyers believe that the characteristic element of law is sanctions which differentiates law from morals. Nevertheless, morals are not without sanctions such as incurring societal condemnation or the condemnation of peers. Law, however, has a regularized and specific sanctions.

Law is an enactment made by the state. It is backed by physical coercion. Its breach is punishable by the courts. It represents the will of the state and realizes its purpose. Laws reflect the political, social and economic relationships in the society. It determines rights and duties of the citizens towards one another and towards the state. It is through law that the government fulfils its promises to the people. It reflects the sociological need of society.

Law and morality are intimately related to each other. Laws are generally based on the moral principles of society. Both regulate the conduct of the individual in society.

They influence each other to a great extent. Laws, to be effective, must represent the moral ideas of the people. But good laws sometimes serve to rouse the moral conscience of the people and create and maintain such conditions as may encourage the growth of morality. Laws regarding prohibition and spread of primary education are examples of this nature.

Morality cannot, as a matter of fact, be divorced from politics. The ultimate end of a state is the promotion of general welfare and moral perfection of man. It is the duty of the state to formulate such laws as will elevate the moral standard of the people. The laws of a state thus conform to the prevailing standard of morality. Earlier writers on Political Science never made any distinction between law and morality.

Plato's Republic is as good a treatise on politics as on ethics. Law, it is pointed out, is not merely the command of the sovereign, it represents the idea of right or wrong based on the prevalent morality of the people.

Moreover, obedience to law depends upon the active support of the moral sentiments of the people. Laws which are not supported by the moral conscience of the people are liable to become dead letters.

Although law and morality arc interdependent yet they differ from each other in their content, definiteness and sanction.[16]

Some points of distinction between law and morality may be brought out as follows:

LAW:

The Oxford English Dictionary defines the law as: 'the body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects.'[17]

That this should be regarded as the definition of law for the English language is evidence of the influence legal positivism has upon the philosophy of law in our culture. The central themes of positivism are the contentions: firstly, that the existence of law rests upon identifiable social facts and, secondly, that it is necessary to maintain a conceptual distinction between law and

[16] http://www.legalservicesindia.com/article/1931/Theory-of-Relationship-between-Law-and-Morality.html
[17] Oxford English Dictionary. Oxford: Clarendon Press, 1989.

morality. There is a positivist assertion that law is identifiable independently of morality, with a particular focus on the theory of H.L.A Hart.[18]

1. Law regulates and controls the external human conduct. It is not concerned with inner motives. A person may be having an evil intention in his or her mind but law does not care for it. Law will move into action only when this evil intention is translated into action and some harm is actually done to another person.

2. Law is universal in a particular society. All the individuals are equally subjected to it. It does not change from man to man.

3. Political laws are precise and definite as there is a regular organ in every state for the formulation of laws.

4. Law is framed and enforced by a determinate political author-ity. It enjoys the sanction of the state. Disobedience of law is generally followed by physical punishment. The fear of punishment acts as a deterrent to the breach of political law.

5. Law falls within the purview of a subject known as Jurisprudence.

MORALITY:

1. Morality regulates and controls both the inner motives and the external actions. It is concerned with the whole life of man. The province of law is thus limited as compared with that of morality because law is simply concerned with external actions and does not take into its fold the inner motives. Morality condemns a person if he or she has some evil intentions but laws are not applicable unless these intentions are manifested externally.

2. Morality is variable. It changes from man to man and from age to age. Every man has his own moral principles.

3. Moral laws lack precision and definiteness as there is no author-ity to make and enforce them.

4. Morality is neither framed nor enforced by any political author-ity. It does not enjoy the support of the state. Breach of moral principles is not accompanied by any physical punishment.

[18] HLA Hart was formerly Professor of Jurisprudence at Oxford University, Principal of Brasenose College, and Fellow of University College

The only check against the breach of morality is social condemnation or individual conscience. 'Moral actions are a matter of choice of inner conscience of the individual, laws are a matter of compulsion'.

5. Morality is studied under a separate branch of knowledge known as Ethics.[19]

In the words of Gilchrist, "The individual moral life manifests itself in manifold ways. The state is the supreme condition of the individual moral life, for without the state no moral life is possible. The state, therefore, regulates other organizations in the common interest. The state, however, has a direct function in relation to morality."[20]

Therefore, from the above discussion, focusing on the HLA Hart theory, Laws may be defined as external rules of human conduct backed by the sovereign political authority.

Conclusion

Law and morality are intimately related to each other. Laws are generally based on the moral principles of a particular society. Laws regulate external human conduct whereas morality mainly regulates internal conduct. Laws are universal; morality is variable. Laws are definite and precise while morality is variable. Laws are upheld by the coercive power of the state; morality simply enjoys the support of public opinion or individual conscience. Laws are studied under Jurisprudence but morality is studied under Ethics.

In as much as there are differences between law and morality, most of our laws have a stem of morality in them, such as the stealing and murder laws. However, there are some laws that are immoral in some places while they are termed illegal in other places. In Nigeria, for example, Adultery is only illegal in the North under the Sharia laws, while in the South, it is simply immoral.

[19] Hart, HLA (1961) *Concept of Law*. Oxford: Clarendon Press, p. 84.
[20] Gilchrist, Gregory M., Iowa Law Review, Vol. 101, 2016; University of Toledo Legal Studies Research Paper No. 2014-20.