

## **CONCEPT OF CRIME IN THE ADMINISTRATION OF PENAL JUSTICE IN NIGERIA: AN APPRAISAL<sup>1</sup>**

### **Abstract**

*There are various definitions of crime from the perspectives of moralists, libertarians, positivists, etc. This research covers Criminal Code, Penal Code as well as Shariah Penal Code. The doctrinal method of research was adopted to analytically study the concept of crime. It was found that the moralist sees crime from the perspectives of morality. The libertarian views crime from the perspective of any act that restricts the liberty of citizen. On the other hand, the positivist holds the view that crime is whatever act or omission the ruler of the day prescribed by a threat of penal consequences. It was found that the view of the libertarians, also called the utilitarian view, dominated western jurisprudence while the positivist views pervade modern thinking in both the domestic and international arena. It was finally discovered that the uniqueness of the different views is that crimes must attract punishment for its breach. It is submitted that crime is a human conduct that is proscribed with penal consequences that may give rise to criminal proceedings and criminal punishment<sup>2</sup>.*

**Keywords:** Analysis, Appraisal, Crimes, Libertarian, Moralism, Positivism

### **1. Introduction**

Crimes have been assigned different meanings by different schools of thought as expressed by different authors but there has not been a singular acceptable definition of crimes. Crime is a legal wrong for which the offender is punished at the instance of the state. Crime is an act or omission involving the breach of a duty punishable by indictment, in the public interest. Under the law of England, crime is a legal wrong that can be followed by criminal proceeding which may result in punishment. A crime is a human conduct which the state decides to prevent by threat of punishment and through legal proceeding of a special kind. It can be deduced from the above that punishment is present in all the attempts on definition of crimes. This seems to indicate that crime is a human conduct that is proscribed with penal consequences that may give rise to criminal proceedings and criminal punishment<sup>3</sup>. There are views associating crime with a normal phenomenon of society, the natural and inevitable product of collective life and social evolution. This paper seeks to appraise the different thoughts on crimes with the aim of adopting a definition for crimes.

### **2. Analysis of the Concept of Crime**

There are varying views on the word 'crimes.' For instance, Cross and Jones<sup>4</sup> expressed the views that crime is a legal wrong for which the offender is punished at the instance of the state. It is the view of Russell<sup>5</sup> that crime is an act or omission involving the breach of a duty punishable by indictment, in the public interest under the law of England. According to William,<sup>6</sup> crime is a legal wrong that can be followed by criminal proceeding which may result in punishment. Gledhill<sup>7</sup> referred to a crime as a human conduct which the state decides to prevent by threat of punishment and through legal proceeding

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<sup>1</sup>By **A. A. ISIAKA, PhD**, Lecturer, Department of Private and Business Law, Faculty of Law, Usmanu Danfodiyo University, Sokoto. Email: isiakaaminu96@gmail.com. Phone: 08037024474; and

\***Ejike Francis OKAPHOR, LLM, BL**, Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka Anambra State, Nigeria.

<sup>2</sup>M. Jefferson, *Criminal Law*, Pearson, Education Limited Essex(2007) 8<sup>th</sup> ed. pp. 12-13

<sup>3</sup> *Ibid*

<sup>4</sup> R. Ross and R. A. Jones, *An Introduction to Criminal Law*, Butterworths, London (1972) p. 35

<sup>5</sup> 11<sup>th</sup> Edition p. 1

<sup>6</sup> G. William *Op Cit* p. 27

<sup>7</sup>A. Gledhill, *The Penal Code of Northern Nigeria and the Sudan* London (1963)

of a special kind. There are views associating crime with a normal phenomenon of society, the natural and inevitable product of collective life and social evolution. Durkheim<sup>8</sup> is of the view that the collective conscience of a people defines crime. In other words, crimes could be determined from what is collectively considered to be morally wrong or not. Durkheim further expressed the view that all the discussions on crime bear on the point of determining what the punishment must be in order to fulfill their role of remedy. Some views acknowledged the purpose and purport of defining crime in legal terms but considered such definitions as too restrictive and argued that crime is a violation of cultural norms which is sometimes beyond mere violation of law per se.<sup>9</sup> It was suggested that criminology should concern itself broadly with all anti-social conduct injurious to society in the general study of human behavior.

Crime is an intentional act in violation of criminal law, which is committed without defence or excuse and penalized by the state as a felony or misdemeanor<sup>10</sup>. It was observed that the juristic orientation provides the only precise and administrative applicable definition and that sociologist may strive to perfect measures for more complete and accurate ascertainment of offenders<sup>11</sup>. Therefore, crime was simply described as the 'breach of the legal norms which attracts a penal sanctions and the violator or the criminal is the individual that committed such act of breach'<sup>12</sup> Many jurists have made efforts to give crime a definition. Accordingly, Blackstone, one of the leading eighteen century commentators of English law define crime is violation of the public rights and duties that is due to the whole community considered as a community and that any act or omission may constitute a crime on violating public law forbidding or commanding it'.<sup>13</sup> It was commended t that the specific reference to public wrongs is because public wrongs or crimes or misdemeanor constitute breach and violation of the public right and duties due to the whole community or considered as a community in its aggregate capacity.<sup>14</sup>

*In Salisu v Odumade*<sup>15</sup> community was defined to mean 'All the people living in a particular area when talked about as a group. It also means people having common rights etc, a body of persons in the same locality'. Blackstone was aware of the defect in his definition when he argued that every public offence is also a private wrong and that both individual and the community are affected by the injury<sup>16</sup>. Clark like Blackstone in his contribution equates 'crime' with public wrongs and suggested that crimes, are best defined by the procedure with which they are practically treated and the end or purpose with which that procedure is employed<sup>17</sup>. He, however thought that a definition by their naturally injurious tendency alone, is not enough<sup>18</sup> but agreed that it is beyond a doubt, the belief of a community or its authorities as to the degree and extent of that tendency, which leads to the special treatment of certain conduct as criminal.<sup>19</sup>

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<sup>8</sup> E. Durkheim, *Rules of Sociological Method*, The Free Press, Illinois (1958) pp. 65-23.

<sup>9</sup> T. Sellin, *Culture, Conflict and Crime*, New York Social Science Research Council Bulletin 41(1938). pp. 19-32

<sup>10</sup> P. Tapper, 'Who is the Criminal' *American Sociological Review* (1948) pp. 96-102

<sup>11</sup> *Ibid*

<sup>12</sup> *Ibid*.

<sup>13</sup> Jefferson, *Op.cit*

<sup>14</sup> *Commentaries on the view of England, Book 4 p. 5*

<sup>15</sup> (2010) All FWLR (pt.514) 15 @ 26 par. A

<sup>16</sup> *Ibid* p. 6

<sup>17</sup> Clark, *Analysis of Criminal Liability* (1880) p. 2

<sup>18</sup> *Ibid* p. 2

<sup>19</sup> *Ibid* p. 2

Clark's definition agrees to a very large extent with the proponents of material definition though the element of publicness and morality are lacking in his definition. It is therefore obvious that Clark was not aware of the moral quality of crime. Stephen<sup>20</sup> clearly indicated that there is a difference between popular and legal meaning of crime and pointed out that people generally understand criminal to mean not only person liable to punishment but one who ought to be punished because he has done something wicked and injurious to the commonest interest of society. Crime was defined in its strict legal connotations as 'an act or omission penalized by law'<sup>21</sup> The fault in Stephen's definition lies in its inadequacy. Although he clearly recognized the two (popular and legal) obvious aspects of the meaning of crime and that most crimes contain moral elements for their definition, he was content with the legal meaning for his definition.

### **3. Nature of Crime under Some Nigeria Laws**

The meaning of crimes in Nigerian law appears to be in conformity with the pattern of the general observation made by the different juristic efforts in defining 'crime'. The word 'offence' has been used in both the Criminal Code and the Penal Code. Section 2 of the Criminal Code<sup>22</sup> defines offence as 'An act or omission which renders the person doing the act or making the omission liable to punishment under the Code or under any Act or Law'. Section 4(2) Penal Code<sup>23</sup> and the Sharia Penal Code<sup>24</sup> provide that whereby any provision of any law of the state the doing of an act, or the making of any omission made an offence, then such acts or omission becomes crime. The Sharia jurisprudence especially the Maliki School views crime from the perspective of belief in the revelation contained in the Qur'an (Muslims Holy Book) and the Sunnah (saying and practice) of Prophet Muhammad (S.A.W) embodying basic rules and commands<sup>25</sup>.

Crime is defined under the Islamic law or Sharia to consist of legal prohibition imposed by Allah for which punishment is prescribed by Him for the infringement<sup>26</sup>. Crime under Islamic law is either a public wrong or a moral wrong. Crimes also have some characteristics that generally infringe on the private right as well as having harmful effects on the public which cannot be relieved by compensating the injured party alone. In such cases, crime becomes a state crime. An act may be morally wrong and become crime because Islamic criminal law relies on Holy Quran that enjoins moral virtues and the doing of good<sup>27</sup>. Crimes are usually classified into three, based on the quantum of punishment provided under Shariah criminal system. The three classes are hudud, qisas and ta'azir. Hudud are crimes for which kind and quantum of punishment has been fixed by the Qur'an or Sunnah of the Prophet (S.A.W) as a right of God. These punishments can neither be increased nor decreased nor altered. Some of these crimes are adultery and fornication, false accusation of zina, theft, highway robbery, alcohol consumption and apostasy.<sup>28</sup> Qisa and diyat punishments for some crimes have been provided by way of retaliation or blood money. Those punishments have been prescribed as rights of the individuals which can be remitted or altered by the victim or his legal heirs. The offences for which qisas and diyat are provided include intentional murder, hurts etc<sup>29</sup>. Crimes other than those liable to Hudud and Qisas are the crimes for which punishments have not been fixed by the Qur'an or Sunnah of the Prophet

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<sup>20</sup>F. Stephen, *History of the Criminal Law of England* (1883) Vol. 2 p. 76

<sup>21</sup> *Ibid* p. 76

<sup>22</sup>Cap. C38, Laws of the Federation of Nigeria 2004

<sup>23</sup> Cap. 89 Laws of Northern Nigeria 1963 (as applicable and amended)

<sup>24</sup> Law No. 4 of Kaduna-State, 2002

<sup>25</sup> M. S. El-Awa, *Punishments in Islamic Law*, American Trust Publication Indianapolis(1998) P. XI

<sup>26</sup>Anwarullah *The Criminal Law of Islam* Kitab Bhavan,(2006) New Delhi P. VII

<sup>27</sup>*Ibid* pp.3-4

<sup>28</sup> *Ibid* p. 47

<sup>29</sup> *Ibid*

(S.A.W) and their punishment have been left to the discretion of the legislator or judge to prescribe them in accordance with the circumstances. These crimes are immutable and are called Ta'azir.<sup>30</sup>

An analysis has shown that the Sharia Penal Code in Nigeria has not clearly defined crimes in line with the classical Sharia definition but adopted the definition of offence in the Penal Code of Northern Nigeria and award punishment according to the provision of the Sharia Penal Code.

#### 4. Crime as Public Wrong

Crimes are generally acts which have a particularly harmful effect on the public and do more than interfering with mere private rights. The public nature of crimes is evidenced by the contrast between the rules of civil and criminal procedures. As a general rule, in the absence of some provisions to the contrary, any of the citizens can bring a criminal prosecution<sup>31</sup> whether or not he has suffered any special harm over and above other members of the public but has an interest in the enforcement of the criminal law. In practice, the vast majority of prosecutions are conducted by the state or its agencies and these agencies do not have personal interest in the outcome of such prosecution and the victim of the offence cannot prevent the prosecution of the offender save for the compoundable offences<sup>32</sup> in view of the fact that a crime affects the public and civil law affects individual. It has been contended that the above position cannot be an effective determinant of differentiating crime from civil matters. For example a fight between two people in a cafeteria or car park may lead to injuries such as cuts, bruises etc. These injuries constitute one or more non-fatal offences. It cannot be said that the whole public is affected. However, an oil spillage will affect many more people than a punch-up in a car park despite its being a tort<sup>33</sup>. The distinction to be drawn then on 'publicness' of wrong between crimes and civil wrongs is on the degree to which it affects the community in which it occurs as it would bring a distinction in kind. The task of distinguishing between the two types of wrongs would on this criterion, be reduced to that of drawing a line between the different degrees to which the community is affected by different wrongs.<sup>34</sup> However, even a universal condemnation of an act cannot make it a crime. It requires the endorsement of the legislature or historically, a decision of a court to make it so.<sup>35</sup>

#### 5. Crime as Moral Wrong

##### Moralist view

In the past, most acts punishable as crimes were generally regarded as immoral but today there is a tendency to add to the list of crimes, acts which are anti-social rather than immoral acts<sup>36</sup>. However, from the point of view of its being a moral wrong, crimes are essentially immoral acts deserving of punishment<sup>37</sup>. Lord Devlin argued that there is a public morality which is an essential part of the bondage which keeps society together, and that society may use the criminal law to preserve morality in the same way it is used to preserve anything else that is essential to its existence<sup>38</sup>. This view is supported by other moralists such as Lord Denning. The moralist views crimes as essentially sins and immoral acts and the entire field of criminal law could be seen at its best when it sticks closely to the

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<sup>30</sup> *Ibid*

<sup>31</sup> See section 143(b) Criminal Procedure Codes( applicable in some Northern states of Nigeria)

<sup>32</sup>J. C. Smith, *Smith and Hogan Criminal Law* (2007)10<sup>th</sup> Editions Butterworth, Bath p.4

<sup>33</sup> Jefferson, *Op cit.* p. 15

<sup>34</sup> *Ibid* p. 11

<sup>35</sup> Smith., *op cit.* P. 17

<sup>36</sup>A. Aguda and I. Ohagbue, *Principles of Criminal Liability in Nigerian Laws*. Heinemann Education Books, Ibadan(1990) 2<sup>nd</sup> edition P.5

<sup>37</sup> Smith, *Op cit* p .17

<sup>38</sup> *Ibid* p. 18

notion of sin<sup>39</sup>. In *R v. Dudley & Stephen*<sup>40</sup> four men were adrift in a boat. After some days without food and water,<sup>41</sup> Two of them, said prayer and killed the weakest, Parker, the cabin boy. After a reference to a court of five judges, the accused were found guilty of murder. The sentence was however, commuted to six months imprisonment. Lord Colebridge, noted that ‘The weakest had been selected for being killed, and he said that in circumstances such as this people were under a duty to sacrifice their lives. He further went on to say that ‘the absolute divorce of law from morality would be of fatal consequences’<sup>42</sup>. The moralists believe that criminal law can be seen as an embodiment or reflection of a society’s morals. If a particular activity is regarded as morally offensive within a particular society, it may be prohibited, even in statistical terms, there may be only a very small number of individuals who would want to engage in that activity e.g. incest. For most of society members such laws will simply be reaffirmation of their beliefs<sup>43</sup>.

The argument of the moralist (sometimes referred to as the authoritarian approach<sup>44</sup>) can be summed up in the view of Lord Devlin to the effect that there are acts so gross and outrageous that they must be prevented at all cost and that the suppression of vice is as much as the law’s business as the suppression of subversive activities<sup>45</sup>. In *Director of Public Prosecution v. Shaw*<sup>46</sup> it was held: ‘There remains in the court of law a residual power to enforce the supreme and fundamental purpose of the law, the concern not only the safety and order but also the moral welfare of the state’.

### **Libertarian view**

In opposition to the moralist position on crimes, the libertarians put forward another view that self-protection and prevention of harms to others is the only justification for interfering with the liberty of others<sup>47</sup>. Lord Wolfenden’s Report on the Committee on Homosexual Offences and Prostitution broadly agreed with this view. Wolfenden’s report thought that the function of the law was to preserve public order and decency, to protect the citizen from that which is offensive or injurious and corruptible to others, particularly those who are especially vulnerable<sup>48</sup>. In summary, the Committee’s view was that there remains a realm of private morality and immorality with which the criminal law ought not to concern itself<sup>49</sup>. This view of the libertarians, also called the utilitarian view, dominated western jurisprudence. One of its proponents argued that the law should not intervene in matters that relate essentially to personal morality<sup>50</sup> and that no Penal sanction can be justified when meted to someone whose conduct was not directed and injurious to a particular victim<sup>51</sup>. It is the view of this paper that the arguments as well as the recommendation of the Wolfenden’s Committee are defective for not realizing that private anti-social (immoral) behaviour may ultimately result in substantial damage to the fabric that holds the society together. For instance, the prevalence of HIV/AIDS infection is greatly associated with uncontrolled sexual or homosexual relationships; likewise non-marital sex poses a

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<sup>39</sup> K. S. Chukkol, *The Law of Crimes in Nigeria*, ABU Press Ltd Zaria-(1988) p .3

<sup>40</sup> (1884) 14 Q B D 273

<sup>41</sup> *Ibid* p. 76

<sup>42</sup> *ibid*

<sup>43</sup> M. T. Molan, *Criminal Law*, Old Bailey Press, London (2001) 3<sup>rd</sup> edition. p. 4

<sup>44</sup> M. Molan *et al*, *Bloy; 7 Parry’s Principles of Criminal Law*, Cavendish Publishing Limited, London (2000) p.7

<sup>45</sup> P. Delin, *The Enforcement of Morals*, Oxford University Press, Oxford.(1965) Pp. 13-14

<sup>46</sup> (1962) A.C. 220

<sup>47</sup> M. Molan, *Op cit* p. 7

<sup>48</sup> *Ibid*

<sup>49</sup> *Ibid*

<sup>50</sup> H. L. A., Hart, *Law, Liberty and Morality* Oxford University Press, Oxford.(1963)

<sup>51</sup> *Ibid*

serious damage to the institutions of marriage and proper upbringing of children, which must, of necessity, be the concern of the state.

**Positivist view**

The final view on this issue is put forward by the positivists, to whom a ‘crime is whatever act or omission the ruler of the day prescribed by a threat of penal consequences’<sup>52</sup>. This is the view that pervades modern thinking in both the domestic and international arena.

**6. Conclusion**

The different definitions of crimes show that the common feature of crime is conduct affecting the public as a whole and in a harmful way wherein the deserving punishment is undertaken by the authority. This paper finds that crime may be any act or conduct that is injuriously or harmful to public, whether moral or immoral but deserves punishment to be effected by the public authority. It is the view of the paper that the concept of socially injurious conduct does not define what is injurious or sets standard and does not discriminate cases, but merely invites the subjective value judgments of the investigator. Until it is structurally embodied with distinct criteria or norms as is now the case in the legal system, the notion of anti-social conduct is untenable for purposes of defining crimes.

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<sup>52</sup> Chukkol, *Op cit.* p. 5