# ROLE OF MORALITY IN CRIMINALISATION OF HUMAN ACTS: A COMPARATIVE STUDY OF NIGERIA, CANADA, AND INDIA*

**Abstract**
*Criminalisation of human conduct remains an intricate procedure that is often controlled by various factors, including political, moral, economic, social and cultural considerations. Among these, morality which is deeply embedded in cultural, religious, and societal norms plays a substantial role in determining which actions are deemed criminal. This paper therefore examined the intricate interplay between morality and the criminalisation of human acts with a focus on Nigeria, Canada, and India. By comparing these jurisdictions, the paper highlighted the diverse ways in which moral values influence the criminalisation process, examining judicial interpretations, legal frameworks and practices obtainable in these jurisdictions' criminal justice system and societal attitudes. By analyzing the similarities and differences in their approaches, this paper underscored the dynamic interface between morality and law, providing an informed understanding of how different societies navigate the complex terrain of criminalisation.*

**Keywords:** Morality, Criminalisation of Human Acts, Comparative Study, Nigeria, Canada, India.

## 1. Introduction

Human intellect deems certain acts as morally good and praiseworthy because it recognizes they are aligned with their true purpose, appropriate for a rational being, and conducive to human perfection. Conversely, it views other acts as morally bad and deserving of blame because they deviate from their true purpose, are unfit for a rational being, and degrade rather than enhance human nature.[1] The intersection of law and morality has long been a topic of heated and ongoing debate.[2] This stems from the intrinsic link between morality and law in the development of criminal justice systems. While the primary function of law is to regulate behaviour and maintain social order, morality often provides the foundational values that inform what is considered acceptable or unacceptable conduct. This paper explores the role of morality in the criminalisation of human acts in three countries with distinct legal traditions: Nigeria, Canada, and India. Nigeria, with its pluralistic legal system, reflects a confluence of indigenous, Islamic, and English common law traditions. Canada, rooted in a common law framework represents a Western liberal democratic approach. India, with its vast and diverse population, operates under a legal system influenced by British common law, colonial history, and deep-seated cultural and religious norms. The research methodology is doctrinal and involves a comparative legal analysis, utilizing both primary and secondary sources to explore how Nigeria, Canada, and India incorporate moral values into their criminal laws and the consequent implications for their legal systems.

## 2. Morality and Criminal Law

The question, 'What is a crime?' has garnered various answers and has evolved over time. A crime is considered an offence against the state, as well as against individuals, and is a public wrong. Although crimes can be committed against individuals, they are wrongs that attract state sanctions. Not all wrongs are criminal; what makes an act or omission a crime is the fact that law designates it as such and imposes penalties on those who commit it.[3] 'Although crime is sometimes viewed as the equivalent of antisocial, immoral and sinful behaviour or as a violation of any important group standard, no act is legally a crime unless prohibited by law'.[4] Morality in turn is concerned with 'conformity with recognized rules of correct conduct', 'the character of being virtuous, especially in sexual matters'.[5]

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[1] OO Ambrose *et al*, 'The Importance of Morality in Human Action in The Nigerian Contemporary Society' [2021] (3) (4), *Sapientia Foundation Journal of Education, Sciences and Gender Studies*, 209. <https://www.sfjesgs.com/index.php/SFJESGS/article/viewFile/242/246> accessed 10 June 2024.

[2] BO Okere, 'The Relationship of Law and Morality: Dichotomy or Complementarity' [2002-2010] (9) *Nigerian Juridical Review*, 1 <https://law.unn.edu.ng/wp-content/uploads/sites/12/2016/08/1.-The-Relationship-of-Law-and-Morality-B.O.-Okere.pdf> accessed 9 June 2024.

[3] AE Arimoro, 'Interrogating the Criminalisation of Same-Sex Sexual Activity: A Study of Commonwealth Africa' [2021] (42), *Liverpool Law Rev,* 381. <https://link.springer.com/content/pdf/10.1007/s10991-021-09280-5.pdf> accessed 12 June 2024.

[4] K Spencer & JW Mohr, 'Crime' [2019] para 3. <https://search.proquest.com/docview/2316655701?accountid=14693&rfr_id=info%3Axri%2Fsid%3Aprimo> cited by AE Arimoro, 381.

[5] BA Garner (ed), *Black's Law Dictionary* (9th edn, USA: West Publishing Co, 2009) p 1100.

Though criminal law seeks to prevent harm by 'communicating the wrongfulness' and 'moral' culpability of the actions it prohibits,[6] the relationship between morality and criminal law has remained under debate.[7] The central question revolves around whether the law should enforce moral values and, if so, to what extent. Two prominent theoretical perspectives provide contrasting views on this issue: legal moralism and legal positivism. Legal moralism is a theory that asserts that a government or legal system ought to enforce moral norms. Hence, the immorality of conduct is a sufficient reason for its criminalisation.[8] Proponents argue that certain moral standards are essential for maintaining social cohesion and that the law must uphold these standards. This perspective is often associated with the work of philosophers like Devlin. Devlin argued that any widely accepted public prejudice could justify criminalization and that any shift in common morality conceptually represented a 'disintegration' of social order.[9] Thus, society has a right to protect itself against behaviours that threaten its moral fabric.

Conversely, legal positivism espoused by scholars such as Hart posits that the validity of legal rules stems solely from their enactment by a recognised political authority or accepted as binding in a given society, not because they are grounded in morality.[10] As well noted, the positivist school asserts that law should be precise, value-free, and objective. In its most extreme form, it dismisses any moral considerations when determining what the law should be. To support this assertion, it replaces morally charged terms such as malice with more morally neutral concepts like foresight and intention.[11] Despite the controversies between morality and criminal law, it is accepted that 'crimes are essentially immoral acts deserving of punishment'.[12]

## 3. Historical Role of Morality in Criminalizing Human Acts in Nigeria

### Culture

Nigeria's legal system is significantly influenced by its rich cultural heritage. Before the colonial era, the indigenous peoples of Nigeria had their own complex criminal legal systems, often rooted in their customs. Custom is a practice that has been adhered to in a given locality under circumstances that warrant its acceptance as part of the law of that locality. For it to be recognized as customary law, such a practice must be reasonable in nature and must have been continuously followed, and as if it was a right, since the beginning of legal memory.[13] Conduct is therefore said to be customary if done 'according to custom or usage; founded on, or growing out of, or dependent on, a custom'.[14] Since customary law is locally dependent, it therefore follows that it varies across ethnic groups and regions. Hence, customary law in Nigeria is deeply rooted in the moral and cultural values of various ethnic groups. These laws reflect communal beliefs and practices, and their enforcement often aims to uphold social harmony and moral order. For example, acts considered immoral or taboo are often criminalised under customary law, with penalties designed to restore community balance.

### Religion

According to Richardson,[15] the Penal Code was borne out of the efforts of an International Panel of Jurists, which advised the then government of Northern Nigeria on legal and judicial reforms in 1958. The Panel chaired by the

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[6] IKE Oraegbunam & CLD Umezinwa 'Artificial Intelligence Entities, Criminal Responsibility and Nigerian Legal Justice System' [2020] (1) *International Journal of Law and Clinical Legal Education*, 8 <https://www.nigerianjournalsonline.com/index.php/IJOLACLE/article/download/2159/2108>.

[7] BO Okere, *op cit*, p 1

[8] BA Garner, *op cit,* p 978.

[9] N Lacey, 'Patrick Devlin's The Enforcement of Morals Revisited: Absolutism and Ambivalence' (2022) (1) *LSE Law, Society and Economy Working Papers*, 6.
<https://eprints.lse.ac.uk/114320/3/Lacey_enforcement_of_morals_revisited_published.pdf> accessed 9 June 2024.

[10] BA Garner, *op cit,* p 978.

[11] IKE Oraegbunam & JNK Chukwukelu, 'Section 24 of the Criminal Code and its Effect on Criminal Liability in Nigeria' [2015] (3) (1) *Journal of Law and Criminal Justice*, 130 <http://dx.doi.org/10.15640/jlcj.v.3nla10> accessed 11 June 2024.

[12] JC Smith, *Smith and Hogan Criminal Law* (10th edn, Bath; Butterworth, 2007) p 17 (cited by AA Isiaka and EF Okaphor 'Concept of Crime in the Administration of Penal Justice in Nigeria: An Appraisal' [2018] (9) (1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* 249. <https://www.ajol.info/index.php/naujilj/article/download/168824/158290> accessed 11 June 2024.)

[13] EA Martin (ed), *Oxford Dictionary of Law* (5th edn, USA: Oxford University Press, 2002) p 132.

[14] HC Black, *Black's Dictionary of Law* (2nd edn, USA: West Publishing Co, 1910) p 310.

[15] SS Richardson, an Australian citizen born in England in 1919, was called to the English Bar at Lincoln's Inn in 1958. From 1946 to 1954, he served in the Sudan Political Service. In December 1954, he came to Nigeria as a member of Her Majesty's Overseas Civil Service and later became Secretary of the International Panel of Jurists, which advised the Government of Northern Nigeria on legal and judicial reforms in 1958. In that same year, he was appointed to the Attorney General's Chambers in Kaduna, where he was responsible for introducing the Penal Code and Criminal Procedure Code to the region's 753 native and customary courts. See the Biography page, SS Richardson, *Notes on the Penal Code Law* (4th edn, Zaria: Ahmadu Bello University Press, 1987).

then Chief Justice of Sudan included a retired Judge of the Supreme Court of Pakistan which primarily recommended the establishment of a criminal law system in the Northern Region that would gain international acceptance, be uniformly applied to all residents, be non-discriminatory, and generally acceptable throughout the Region. Given the predominantly Muslim population, the new system needed to align with the Holy Qur'an and Sunna.[16] In January 1959, a committee of Muslim jurists, led by Malam Junaidu, the Waziri of Sokoto, reviewed the draft Bill and recommended several amendments.[17] It was designated as Cap 89 in the Laws of Northern Nigeria, 1963, and came into effect on 30th September 1960 by Penal Code Law, 1959 (Commencement) Notice, 1960 (NRLN 96 of 1960).[18] Richardson disclosed that the arrangement established in the Northern Region in 1959-60 aimed to minimize discrimination in the culturally diverse society. The Penal Code ensured that criminal law would be acceptable and uniform to all communities in the region, while also protecting individuals' rights to settle their personal and family matters in accordance with native law and custom, including, when applicable, Muslim Law.[19] The foregoing shows that the Penal Code took cognisance of the Islamic religion which by default is embellished with moral norms.

## 4. Some Nigerian Criminal Provisions Reflecting Morality

### Criminal Code

Sections 214 to 233A of the Criminal Code[20] is dedicated to a category of offences known as 'Offenses against Morality.' This includes unnatural offences,[21] indecent treatment of boys under fourteen and indecent practices between males[22], defilement of girls under thirteen and householder permitting defilement of young girls on his premises, defilement of girls under sixteen and above thirteen, and of idiots; indecent treatment of girls under sixteen,[23] attempts to procure abortion, attempt to procure own miscarriage, supplying drugs or instruments to procure abortion [24]and indecent acts generally.[25]

### Same Sex Marriage (Prohibition) Act

It is often said that many Africans view homosexuality as an immoral Western import, and the continent is rife with harsh homophobic laws. This perspective is said to be rooted in the idea that African societal values and notions of propriety are heavily influenced by religious ideologies of morality, shaping attitudes and laws regarding sex and gender.[26] Abrahamic faiths and colonial law have also been alleged to be the driving force behind the criminalization of homosexual activity in most Commonwealth states in Africa.[27] However, the aversion to same-sex relationships is not unique to African or Abrahamic cultures. In fact, most cultures and religions denounce same-sex relations. For instance, gay sex has been illegal in Nigeria since British colonial rule. Section 214(1) of the CCA and 284 of the PC which laws were largely influenced by non-Nigerians prohibit same-sex relationships under the broad terms 'carnal intercourse/knowledge' 'against the order of nature'. The criminalisation of same-sex relationships in Nigeria highlights the role of morality in shaping criminal law. Same Sex Marriage (Prohibition) Act 2013 criminalises same-sex marriage and public displays of same sex relationships. This law reflects the prevailing moral and cultural values in Nigeria, where homosexuality is widely considered immoral and against religious teachings.

### Cybercrimes (Prohibition, Prevention, etc) Act

Section 23 of the Cybercrimes (Prohibition, Prevention, Etc) Act 2015[28] prohibits child pornography and related offenses. This includes intentionally using a computer to produce, offer, make available, distribute, transmit, or procure child pornography for oneself or another person, punishable by imprisonment terms of up to 10 or 5 years, depending on the case. Sub-s 2 prohibits knowingly making or sending other pornographic images to another computer through unsolicited distribution. Subsection 3 prohibits intentionally proposing, grooming, or soliciting to meet a child through a computer for the purpose of engaging in sexual activities with the child. It also

[16] SS Richardson, *loc cit,* p 1.
[17] SS Richardson, *loc cit*, p 2.
[18] SS Richardson, *loc* cit, p 25.
[19] SS Richardson, *loc cit,* p 8.
[20] CC Cap C39 LFN 2004, ss 214 – 233A.
[21] CC 2004, s 214.
[22] CC 2004, ss 216 and 217.
[23] CC 2004, ss 218 and 219, 221, 222.
[24] CC 2004, ss 228, 229 and 230.
[25] CC 2004, s 231.
[26] M Omilusi, 'Between Local Acceptability and International Opprobrium: On Nigeria's Anti-Same Sex Marriage Law; Is Western Voice a Human Rights Advocacy or Cultural Imperialism?' [2021] (17) (3), Cross-Cultural Communication, pp 49 and 52.
<http://www.cscanada.net/index.php/css/article/download/j.css.1923669720130903.1160/4843> accessed 11 June 2024.
[27] AE Arimoro, *op cit* p 379.
[28] CPPA 2015, s 23.

criminalizes engaging in sexual activities with a child by abusing a recognized position of trust, authority, or influence over the child, including within the family, or exploiting a particularly vulnerable situation of the child, such as mental or physical disability or dependence. Section 24(a) of the CPPA originally criminalizes the act of knowingly or intentionally sending a message or other content via computer that is grossly offensive, pornographic, or of an 'indecent, obscene,' or menacing, or causing such content to be sent. Following the recent amendment of the CPPA,[29] the terms 'indecent,' 'obscene,' 'grossly offensive,' and 'menacing' were removed, leaving only 'pornographic.' Without disputing the rationale for removing certain terms from section 24(a) of the CPPA, it is important to note that 'indecent'[30] and 'obscene'[31] are deeply rooted in morality and could have been retained. In contrast, 'grossly offensive' and 'menacing' are more prone to misuse in ways that could suppress free speech and were rightly deleted. Furthermore, the terms 'indecent' and 'obscene' are well established in various provisions of Nigerian criminal law, including sections 170 and 233B of the CCA which criminalize the knowing publication of indecent or obscene articles. With the deletion of these morality-based terms from the CPPA, there is concern that it might create a loophole allowing the unchecked online publication of indecent and obscene materials, potentially undermining the nation's moral fabric.

**Armed Forces Act**

The Armed Forces Act Cap A20 LFN 2004[32] also prohibits sexual relations with the spouse of fellow service personnel, an offence that can result in imprisonment for up to five years.[33] Other morality-related offences, such as sodomy, bestiality, and acts of gross indecency, are also addressed and penalized under the Act.[34]

**5. Morality and Criminal Laws in Canada**

In Canada, the influence of morality on criminal law is evident in several areas, particularly those involving sexual conduct and public decency. However, Canadian laws and judicial decisions also emphasize the protection of individual rights, leading to a more restrained approach to criminalising morally contentious acts. The Canadian Criminal Code 1985[35] was first created in 1892 which applies all across the country. The law is being updated regularly to reflect changes in society.[36] Between Nov 25, 2002 and Jan 13 2004, there were about 126 older versions of the CC.[37] The rationale for some of the amendments was to update the provisions to be more liberal and less moralistic, as demonstrated in the selected case studies below:

**Abortion**

In *R v Morgentaler,*[38] the Appellants, all duly qualified medical practitioners, set up a clinic to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited hospital as required by the then s 251(4) of the Criminal Code (CC).[39] The doctors had made public statements questioning the wisdom of the abortion laws in Canada and asserting that a woman has an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances. Charges were preferred against the appellants alleging that they conspired with each other with intent to procure abortions contrary to then ss 423(1)(d) and 251(1) of the CC. Counsel for the appellants moved to quash the indictment or to stay the proceedings before pleas were entered on the grounds that s 251 of the CC was *ultra vires* the Parliament of Canada, in that it infringed sections 2(a), 7 and 12 of the Charter, and was inconsistent with s. 1(b) of the Canadian Bill of Rights. The trial judge dismissed the motion, and the Ontario Court of Appeal dismissed an appeal from that decision. The trial proceeded before a judge sitting with a jury, and the three accused were acquitted. The Crown appealed the acquittal and the appellants filed a cross-appeal. The Court of Appeal allowed the appeal, set aside the acquittal and ordered a new trial. In restoring their acquittal, the Supreme Court noted that while the CC outlined procedures in section 251 for accessing therapeutic abortions, the defence provided by these procedures was deemed illusory due to the stringent measures requiring approval from a 'therapeutic abortion committee' of an 'accredited or approved hospital.' Additionally, the Court observed that the requirement in section 251(4) for at least four

[29] Cybercrimes (Prohibition, Prevention, Etc) (Amendment) Act 2024.
[30] Indecent publications are such that are 'offensive to modesty and delicacy; obscene; lewd; tending to the corruption of morals.' HC Black, *op cit*, p 615.
[31] The word 'obscene' means 'extremely or deeply offensive according to contemporary community standards of morality or decency.' See LP Wood (ed) *Merriam-Webster's Dictionary of Law* (Massachusetts: Merriam-Webster Incorporated, 2011).
[32] AFA 2004.
[33] AFA 2004, s 79.
[34] AFA 2004, s 81.
[35] CC 1985.
[36] Department of Justice Canada, 'The Criminal Code of Canada '<https://www.justice.gc.ca/eng/csj-sjc/ccc/index.html> accessed 11 June 2024.
[37]<https://www.canlii.org/en/#search/text=criminal%20code&searchId=2024-06-12T22%3A06%3A55%3A181%2Fe67bde1e074e4f788ac797fa4885a8a1> accessed 12 June 2024.
[38] *R v Morgentaler* [1988] Can LII 90 (SCC) <https://canlii.ca/t/1ftjt>, accessed 11 June 2024.
[39] CC 1985, s 251(4) <https://laws.justice.gc.ca/PDF/C-46.pdf> accessed 11 June 2024.

physicians to be available at the hospital to authorize and perform abortions effectively made abortions inaccessible in many hospitals.[40]

Hence, it was held that:

> Section 251 clearly interferes with a woman's physical and bodily integrity. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person.[41]

The Court further held that:

> The deprivation of the s. 7 right in this case offends freedom of conscience guaranteed in s. 2(*a*) of the Charter. The decision whether or not to terminate a pregnancy is essentially a moral decision and in a free and democratic society the conscience of the individual must be paramount to that of the state.[42]

Despite the good intentions behind the Court's decision to unconditionally legalize women's inherent right to control their own bodies, it seems the Court overlooked the moral consideration of the unborn child's inherent right to life. This ruling has the potential to open the floodgates for abortion on demand in the jurisdiction, leading to possible health consequences and the erosion of society's moral fabric. Instead of Parliament adopting a middle-ground approach to significantly relax and re-enact the strict provisions on therapeutic abortion as outlined in the CC, it relied on the Supreme Court's decision to repeal section 251 of the Code thereby fully legalizing abortion in Canada.[43]

**Assisted Dying**

Before 2021, section 241(b) of the CC provided that 'everyone who aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.'[44] In *Rodriguez v British Columbia (Attorney General)*,[45] the appellant was suffering from an ailment which was rapidly deteriorating her condition. Her life expectancy was between 2 and 14 months. Though she wishes to live as long as she can still enjoy life, she however wanted physician to set up technological means so that she can end her life by her own hand when she can no longer enjoy life. She applied to the Supreme Court of British Columbia for an order declaring that section 241(b) of the CC, which prohibited assisting in suicide, is invalid because it violated her rights under sections 7, 12, and 15(1) of the Charter. She argued that, to the extent it prevented a terminally ill person from committing 'physician-assisted' suicide, it should be declared invalid by section 52(1) of the Constitution Act 1982. In dismissing her application, the court noted that while Canada has great sympathy for those who wish to end their lives to avoid significant suffering, it has not been willing to condone the active assistance of a third party in this process, even for the terminally ill. The refusal is based on two primary reasons: first, 'the active participation by one individual in the death of another is intrinsically morally and legally wrong.' Despite the above decision based on moral grounds, in the latter case of *Carter v Canada (Attorney General)*,[46] the plaintiffs challenged the CC provisions prohibiting physician-assisted dying relying on the Canadian Charter of Rights and Freedoms. The Supreme Court of British Columbia upheld the plaintiff's arguments holding that the provisions unjustifiably infringe the equality rights, the rights to life, liberty and security of the plaintiffs. Following the new trend in *Carter*'s case, section 241 of the CC was amended in 2021 to decriminalize Medical Assistance in Dying (MAiD). The new section 241.1 of the CC defines MAiD as:

> (a) the administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death; or
>
> (b) the prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death as the administering by a medical/nurse practitioner of a substance to a person, at their request, that causes their death; or the prescribing or providing by a medical/nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death.

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[40] *R v Morgentaler supra* p 33.
[41] *R v Morgentaler supra* pp 32 -33.
[42] *R v Morgentaler* supra pp 37.
[43] See, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make Consequential Amendments to other Acts (S.C. 2019, c. 25) <https://laws.justice.gc.ca/eng/AnnualStatutes/2019_25/FullText.html>, accessed 12 June 2024.
[44] C Waite, 'Amendments to medical assistance in dying laws in Canada' <https://www.lexology.com/library/detail.aspx?g=add053e1-737e-49e3-a131-51345ed51b49>, accessed 12 June 2024.
[45] *Rodriguez v British Columbia (Attorney General)*, 1993 Can LII 75 (SCC), [1993] 3 SCR 519, <https://canlii.ca/t/1frz0>, accessed 12 June 2024.
[46] *Carter v Canada (Attorney General)* [2012] Can LII 886 (BCSC) <https://canlii.ca/t/frpws>, accessed 12 June 2024.

Section 241.2 (1) provides for eligibility for medical assistance in dying which includes that eligible persons must be at least 18 years of age and capable of making decisions with respect to their health; have a grievous and irremediable medical condition; made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

**Prostitution**

The criminalisation of prostitution in Canada has been a contentious issue, reflecting the complex interplay between morality and individual rights. Historically, prostitution-related activities were criminalised based on moral objections and concerns about public order. However, on-going legal reforms in Canada's legal system have been shifting the focus on morality. One such landmark case is *Canada (Attorney General) v Bedford*.[47] In the case, B, L, and S, who are current or former prostitutes, applied for declarations that three provisions of the CC which criminalize various activities related to prostitution, infringe their rights under section 7 of the Charter. Section 210 of the CC makes it an offence to keep or be in a bawdy house; section 212(1)(j) prohibits living on the avails of prostitution; and section 213(1)(c) prohibits communicating in public for the purposes of prostitution. They argued that these restrictions endanger the safety and lives of prostitutes by preventing them from implementing safety measures such as hiring security guards or screening potential clients to protect themselves from violence. B, L, and S also claimed that section 213(1)(c) infringes the freedom of expression guarantee under section 2(b) of the Charter and that none of the provisions are justified under section 1. Ultimately, the Supreme Court declared that section 210 (as it relates to prostitution), 212(1) (j), and 213(1)(c) of the CC are inconsistent with the Charter. The Court also struck the word 'prostitution' from the definition of 'common bawdy-house' in section 197(1) of the CC as it applies to section 210.

**Incest**

Incest is criminalised under section 155 of the CC. The Code provides that everyone commits incest who, 'knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.' Subsection 4 defines *brother* and *sister* to include half-brother and half-sister. In *Regina v MS*,[48] the appellant was found guilty of incest with his adult daughter and sentenced to five years' imprisonment. Hence, he appeals against both conviction and sentence questioning the constitutional validity of the prohibition of incest in section 155 of the CC. The appellant raised several issues in the appeal which include whether section 155 does not infringe the appellant's freedom of association guaranteed by section 2(d) of the Canadian Charter of Rights and Freedoms by restricting his freedom to associate with his adult daughter in a sexual relationship? Whether section 155 does not discriminate on the basis of sexual orientation contrary to section 15 of the Charter? Whether the law does not infringe on the appellant's freedom of conscience and religion guaranteed by section 2(a) of the Charter by reason that it is 'secular enforcement of a divine law'? The appellant contended that freedom of religion also encompasses freedom from religion, stating his choice not to adhere to any religious belief. He argued that the prohibition against incest is rooted in religious doctrine and that section 155 enforces a Judeo-Christian principle to which he does not subscribe, thereby infringing on his freedom not to believe. He referenced judicial decisions to support the argument that the Canadian courts are 'concerned with justice not morals'.[49]

In dismissing the appeal, the court held that the appellant has not demonstrated that his intimate relationship with his daughter is the type of association the Charter is intended to protect. No discrimination occurred in prosecuting the appellant for incest as his choice of sexual partner was criminalized on a rational basis being the prevention of harm to both the individual and the community. It was also held that freedom of conscience and religion is no more implicated by section 155 than by any other crime, as 'virtually all criminal proscriptions can be traced back to a religiously based moral system'[50] and that:

> The criminal law fundamentally deals with right and wrong. The Criminal Code gives expression to our society's moral principles. Section 155 seeks to prevent the harm to individuals and to the community caused by incest. The fact that the offence is rooted in a moral principle developed within a religious tradition cannot support a claim for interference with the freedom to believe or not to believe under the Charter.[51]

[47] *Canada (Attorney General) v Bedford* [2013] Can LII 72 (SCC) <https://canlii.ca/t/g2f56>, accessed 12 June 2024.
[48] *Regina v MS* [1996] Can LII 17945 (BC CA), <https://canlii.ca/t/hvg29>, accessed 12 June 2024.
[49] *Regina v MS* (*supra*) paras 53 and 54.
[50] *Regina v MS* (*supra*) para 5.
[51] *Regina v MS* (*supra*) para 55.

In *R v RPF,*[52] the appellants were found guilty of incest under section 155 of the CC. They appealed the decision, arguing that their rights to life, liberty, and security of the person, as guaranteed by section 7 of the Canadian Charter of Rights and Freedoms, had been infringed. The Crown submitted that section 155 of the CC is not merely an example of the government 'legislating morality', but is designed to discourage conduct that 'is destructive of the moral fibre of society.' In dismissing the appeal, the court held that 'there are some activities which cannot be allowed, even with consent of the participants, for example, assault causing bodily harm assisted suicide**,** sexual exploitation of a young person, and obscene performances and that Incest is one of those offences.

**6. Morality and Criminal Laws in India**

Morality plays a significant role in Indian criminal law, particularly in areas related to family, sexuality, and public order. Indian law often seeks to uphold traditional values, though recent legal developments indicate a shift towards greater individual rights and freedoms. The Indian legal framework, particularly the Indian Penal Code (1960), includes provisions influenced by morality. Section 292 prohibits the sale of obscene[53] materials, defining such materials as those that are lascivious, appeal to prurient interests, or have a corrupting and depraving effect on individuals likely to read, see, or hear them, considering all relevant circumstances. Sections 372 and 373 address the offenses of selling or buying minors for purposes of prostitution, illicit intercourse, or any unlawful and immoral activities. Section 377 prohibits unnatural offenses, stating that anyone who voluntarily engages in carnal intercourse against the order of nature with a man, woman, or animal shall be punished with life imprisonment or imprisonment for up to ten years, and may also be liable to a fine. A lone case study of same sex relationship will be used highlight the travail of morality in its role in criminalization of human conduct in India.

**Same Sex Relationship**

Naz Foundation,[54] a Non-Governmental Organisation (NGO), filed a Public Interest Litigation challenging the constitutional validity of section 377 of the Indian Penal Code 1860.[55] This s criminalizes what is described as 'unnatural offences' to the extent that it penalizes consensual sexual acts between adults in private. The challenge was based on the argument that section 377 of the IPC infringes upon the fundamental rights guaranteed under Articles 14, 15, 19, and 21 of the Constitution of India.

The petitioners argued that section 377 of the IPC should only apply to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. They contended that section 377 of the IPC is based on traditional Judeo-Christian moral and ethical standards, which view sex solely for procreation, and thus any non-procreative sexual activity is considered 'against the order of nature'. They argued that criminalizing consensual oral and anal sex is outdated and inappropriate in modern society. The Union of India, in response, relied on reports from the Law Commission of India regarding whether to retain s 377 of the IPC. They referenced the 42nd report of the Commission, which noted that Indian society largely disapproved of homosexuality, justifying its criminalization even in private among adults. The Union argued that law should reflect societal perceptions and that section 377 of the IPC was initially enacted in line with the values and morals of the time in Indian society.

In its decision, the Delhi High Court acknowledged, in line with domestic and international studies and case laws that criminal laws like section 377 disproportionately impact gay men, targeting not just conduct but human identity, and essentially criminalizing all homosexual men. The Court held that criminalizing consensual homosexual conduct violated the rights to life and liberty, equality before the law, and non-discrimination on grounds of 'sex' (including sexual orientation) as guaranteed by the Indian Constitution. The Court emphasized that popular morality or public disapproval is not a valid justification for restricting fundamental rights under Article 21. 'Constitutional morality', derived from constitutional values, must take precedence over public morality, which is based on shifting notions of right and wrong. The Constitution of India recognizes, protects, and celebrates diversity, and stigmatizing or criminalizing individuals based on their sexual orientation is against constitutional morality. Thus, the Court allowed the petition and declared section 377 unconstitutional insofar as it criminalizes consensual sexual conduct between adults in private, while maintaining the provision to criminalize non-consensual non-vaginal intercourse and intercourse with minors, thereby protecting the rights of victims of sexual assault.[56]

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[52] *R v RPF* [1996] Can LII 5590 (NS CA) <https://canlii.ca/t/1mpv4>, accessed 12 June 2024.

[53] Obscenity is the characteristic or state of being morally abhorrent or socially taboo. A thing is considered obscene if it is ''extremely offensive under contemporary community standards of morality and decency; grossly repugnant to the generally accepted notions of what is appropriate.'' A material is legally considered obscene if, when taken as a whole, it appeals to the prurient interest in sex, as judged by the average person using contemporary community standards, or if it depicts sexual conduct in a patently offensive manner as specifically defined by the applicable state law. See, BA Garner, *op cit*, p 1182.

[54] *Naz Foundation v Government of NCT of Delhi and Others* [2009] 160 (DLT) 277 <https://indiankanoon.org/doc/100472805/> accessed 12 June 2024.

[55] IPC 1860, s 377.

[56] *Naz Foundation v Government of NCT of Delhi & Others* (supra) paras 79, 80, 86, 132.

The verdict in the Naz Foundation's case decriminalized homosexual acts between consenting adults in India, was short-lived, as it was later overturned by the Supreme Court of India in *Suresh Kumar Koushal & Anr v Naz Foundation & Ors*.[57] In this case, a two- judge bench reinstated section 377 of the IPC. The Additional Solicitor General argued for the retention of the s citing strong 'societal disapproval' of such conduct stating that the legislature, representing the will of the people, had decided not to delete the s. He contended that it was not for the Court to 'import the extra-ordinary moral values and thrust the same upon the society' by declaring the provision unconstitutional.

The Supreme Court observed that while section 19 of the Indian Constitution[58] protects certain rights, subsections (2) and (4) permit making laws that impose reasonable restrictions on these rights in the interests of 'public order, decency or morality'. It further noted that every legislation enacted by Parliament carries with it a presumption of constitutionality founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution. It further noted that while reading down section 377 IPC, the High Court overlooked that a 'miniscule fraction' of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted for committing offence under section 377 IPC and this cannot be made sound basis for declaring that section *ultra vires* the Constitution. Consequently, it held that section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable.[59] But in 2018 a five-judge Bench in *Navtej Singh Johar v Union of India Ministry of Law and Justice*[60] unanimously read down section 377 of the IPC, overruling the decision in *Suresh Kumar Koushal* (*supra*). The petitioners had reopened of the High Court's position on ''constitutional morality'' arguing that even if the majority disapproved the sexual orientation or choices of LGBT persons, the Court as the final arbiter of constitutional rights, should uphold constitutional morality over social morality. In its decision, the court held that constitutional morality encompasses more than just the core principles of constitutionalism. It includes the virtues of fostering a pluralistic and inclusive society, adhering to constitutional principles which permeate the state apparatus for the betterment of every citizen. It added that, as the final arbiter of the Constitution is must uphold its principles without being influenced by 'majoritarian view or popular perception' by being guided by the conception of constitutional morality not by the 'societal morality'. More so, that section 377 IPC, insofar as it penalizes any consensual sexual relationship between two adults, whether homosexuals, heterosexuals or lesbians is unconstitutional and that consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality. It however maintained that section 377 IPC remains in force and constitutional against those engaging in any kind of sexual activity with an animal.[61] In his concurrent judgement, Justice Chandrachud stated that by penalising sexual conduct between consenting adults, section 377 imposes 'moral notions' on a constitutional order. He warned against allowing 'morality to dictate the terms of criminal law' as a single, homogenous morality will marginalise the 'morality of minorities'. Lastly, he pointed out that the LGBTQ community has been victimised by the 'Victorian morality' at the time the IPC was enacted. Therefore, it is 'constitutional morality, and not mainstream views about sexual morality', that should guide the validity of section 377.[62]

The above illustrates how India has been reducing the influence of traditional morality in its legal interpretations by adopting concepts such as constitutional morality, foreign practices, and the notion of consensual sexual practices in private. This shift aims to ensure a western version of democratic framework governed by the rule of law, where liberty, autonomy and wild pursuit of happiness reigns. It also goes without saying that this reading down of section 377 of the IPC invariably endorses adultery officially. With this trend, it is hoped that bestiality will not be tolerated by the jurisdiction, especially if done in private.

## 7. Comparative Analysis

### Evolving Legal Standards

The degree to which morality influences criminal law varies significantly. Nigeria, with its pluralistic legal system, shows a strong influence of moral and religious values. Most, if not all, of the morality-related criminal law provisions in Nigeria have remained unchanged. Nigerian society generally holds conservative views on sexual morality, with strong opposition to same-sex relationships. These attitudes are reflected in the country's stringent

[57] *Suresh Kumar Koushal & Anr v Naz Foundation & Ors* [2014] SCC (1) <https://indiankanoon.org/doc/58730926/> accessed 12 June 2024.
[58] <https://lddashboard.legislative.gov.in/sites/default/files/COI...pdf> accessed 12 June 2024.
[59] *Suresh Kumar Koushal & Anr v Naz Foundation & Ors* (*supra*) pp 28, 43, 54.
[60] *Navtej Singh Johar v Union of India Ministry of Law & Justice* [2018] 10 SCC (1). <https://indiankanoon.org/doc/168671544/> accessed 12 June 2024.
[61] *Navtej Singh Johar v Union of India Ministry of Law & Justice* (*supra*) pp 119, 252, 253 per Nariman J.
[62] *Navtej Singh Johar v Union of India Ministry of Law & Justice* (*supra*) pp 67 and 137 per Chandrachud J.

laws and harsh penalties for sexual offences. The enactment of the Same Sex Marriage (Prohibition) Act, despite strong opposition from the Western world, particularly the USA, demonstrates that Nigeria is not inclined to modify its criminal laws to align with legal liberalism, which favours neutrality or the abolition of morality-based criminal provisions. Canada and India in turn demonstrates an evolving approach to morality in criminal law, with recent legal reforms reflecting changing societal attitudes. Examples include the decriminalisation of same sex relationships in India, the legalisation of MAiD among others.

Canada in particular appears to be on a fast lane towards decriminalising of its morality-related criminal legal provisions. In *Rodriguez*[63] decided in 1993, the court expressed its unwillingness to condone MAiD even for the terminally ill, reasoning that the active participation by one individual in the death of another is 'intrinsically morally and legally wrong.' However, 19 years later, in *Carter,*[64] the court upheld MAiD, ruling that the CC provisions against it unjustifiably infringed on the plaintiffs' equality rights, and their rights to life, liberty, and security. Nine years after this decision, section 241 of the Criminal Code was amended to decriminalize MAiD. This brazen drop in moral content implies that MAiD is now intrinsically morally and legally acceptable in Canada.

**Public Attitudes**

Public attitudes towards morality and criminalization differ among the three countries, shaping legal developments. In Nigeria, strong public support for traditional moral values persists, whereas Canada and India are increasingly embracing liberal individual rights and freedoms. While moral non-conformists in Nigeria seem reluctant to challenge the status quo by seeking recognition of their unconventional behaviour through lawsuits, NGOs, rights groups, and non-conforming individuals persistently litigate against criminal provisions they perceive as infringing on their asserted right to deviate in Canada and India.

**8. Conclusion**

The role of morality in the criminalisation of human acts is a complex and dynamic aspect of legal systems. In Nigeria, Canada, and India, moral values significantly influence the development and enforcement of criminal laws, though the degree and manner of this influence vary widely. Nigeria's pluralistic legal system reflects a strong interplay between moral, cultural, and religious values. Canada's liberal democratic framework balances moral considerations with individual rights. India's evolving legal landscape shows a shift towards greater individual freedoms while still reflecting some traditional moral values. By comparing Nigeria, Canada, and India, this paper highlighted the diverse ways in which moral values shape legal norms and the implications for criminal justice systems. The ongoing evolution of legal standards in response to changing societal attitudes underscores the dynamic nature of the relationship between morality and law. From the case studies, it remains a matter of controversy to what extent the criminal law should, or does, prohibit immoral conduct on the ground of its immorality.[65] Nevertheless, judgment, and punishment remain deeply moral undertakings as they involve determining what is right and what is wrong.[66]

[63] *Rodriguez v British Columbia (Attorney General)* (*supra*).
[64] *Carter v Canada (Attorney General)* (*supra*).
[65] EA Martin, *op cit*, p 114.
[66] IKE Oraegbunam & JNK Chukwukelu, *op cit*, p 130.