

## ARTICLE

# John Austin’s Idea of Law: Towards a Philosophical Reconsideration of Sharia Law in The Nigerian Constitution

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### Abstract

This paper employs the utilitarian stance of John Austin to interrogate the inclusion of sharia law in the Nigerian constitution. With John Austin’s separatist paradigm, which distinguishes positive law from morality, this paper argues that sharia law signifies nothing other than religio-moral principles that would not be suitable for a secular country like Nigeria. Thus, this study’s thesis is to inquire the possibility of separating sharia law from the Nigerian constitution, and, in turn, propose that sharia law should be administered by Islamic religious institutions. The philosophical tools of conceptual and critical analyses are the methodology of this study.

**Keywords:** Law; Sharia Law; Nigerian constitution; John Austin

## 1. Introduction

This paper aims to philosophically examine the inclusion of sharia law in the Nigerian constitution. Sharia law has a long history in Nigeria, which this study will not discuss in detail because of limited space. However, it is worthy to note that before 1999, sharia law was under the jurisdiction of the customary court (or “Area courts” as they are referred to in the North) that tries criminal cases in Northern Nigeria. Nevertheless, with the emergence of the 1999 Nigerian constitution, it was extended to criminal matters with the full re-introduction of the sharia Penal Codes and Criminal Procedure Codes. Consequently, Bauchi, Borno, Jigawa, Kano, Katsina, Kebbi, Sokoto, Yobe, Zamfara, Kaduna, Niger, and Gombe adopted sharia penal codes and criminal Procedure codes, although with some variations.

However, this inclusion of sharia law in the Nigerian constitution has been hotly debated by scholars across disciplines. Some scholars argue that sharia law would promote spirituality and social justice in Nigeria (Adetoro 2005, Ajayi 2005). Yet, others argue that sharia law would Islamize the nation because of its rigid religious principles and doctrines (Momoh 2005, Okoro 2005). Furthermore, these scholars fear that such inclusion of religious embedded law in a multi-religious and pluralistic Nigeria will divide the country into bipolar lines. This study goes beyond these positions to argue, utilizing John Austin's separation paradigm, that the inclusion of sharia law into the Nigerian constitution blurs the distinction between law and religion. A significant departure of this paper from the extant literature on sharia law in Nigeria is that it employs Austin's separation paradigm in the critical analysis of the inclusion of sharia law in the Nigerian constitution. This paper, therefore, is different from previous studies because it explores how Austin's separation paradigm could be used to motivate the possibility of separating sharia law from the Nigerian constitution. Additionally, it proposes that Islamic religious institutions should administer sharia law.

To achieve the above aim, this paper has two parts. The first part of this paper discusses Austin's conception of law. Doing so will offer insights into Austin's separation paradigm. The final part employs Austin's separation paradigm to explore the possibility of separating sharia law from the Nigerian constitution.

## 2. An Overview of Law in John Austin's Thought

To better understand Austin's conception of law, it is important to bring a brief sketch of natural law to the limelight. Its essence lies in broadening our knowledge of the problem that led to Austin's conception of law. Natural law, using innatism, posits that there are universally innate moral laws knowable by men through reason and insists that human-made laws must conform to them. These moral laws are put in nature by God. This normative understanding of the law is purely evident in Thomas Aquinas, Immanuel Kant, William Paley, William Blackstone, and others. These philosophers claim that laws must conform with natural norms. For example, Blackstone has argued in his *Commentaries* that all other laws are inferior in obligation to the superior laws of God. He further argues that the laws of God are what validate other laws, and, therefore, human laws derive their force from the Divine laws and are not to be allowed to contradict them (see Blackstone 1893). For these scholars, a natural universal law that is discernable through reason, which legislative law enactment must abide by, governs the human community. Thus, any human-made law that contradicts this natural universal law is invalid.

From Austin's perspective, this theory implies that "no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law *is a law ....*" (Austin 1954, 185). For him, this theory had blurred the vital but straightforward distinction of law as it is, from the law as it ought to be (see Hart 1983, 50). Austin concurs to this when he explicitly states that:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume (Austin 1954, 184).

The failure of natural law theorists to make this distinction, according to him, prevented them from critically considering and engaging with issues posed by bad moral laws. He then aims to separate the analysis of what laws are good or bad ("ought") from analysis about what laws exist ("is"). According

to Hart, Austin's "... prime reason for this insistence was to enable men to see steadily the precise issues posed by the existence of morally bad laws and to understand the specific character of the authority of a legal order" (Hart 1983, 53). To map out this distinction, he proposes investigating the conceptual analysis of law, which is to clearly define and distinguish what law is from what law ought to be (Austin 1832, viii). Through this distinction, Austin fostered the theoretical separation of law and morality. Thus, Austin's separation paradigm involves distinguishing what law is from what it ought to be, which natural law theorists had obscured with their injection of morality as a sufficient condition for law.

In *The Province of Jurisprudence Determined* (1832), Austin insists that the question of what law is must be prior to all other philosophical approaches to law. With this question, he brings forth an analytic method of enquiry into law. The analytic method is the piecemeal analysis of basic concepts, including law. In this light, Austin begins by distinguishing two types of law properly so called, namely, natural law and positive law (see Wacks 2006, 22-23). He understands natural law, or as he calls it: Divine/God made laws, as a law made by God for human creatures. Natural law can be either revealed laws or unrevealed laws. According to Austin, the revealed laws are commands of God communicated directly or indirectly to his servant through a *human language*. These laws embed *religious duties*, which their violation is seen as a sin against God. This *sin* attracts *religious sanction* here on earth or in the hereafter. While unrevealed laws are commands concealed or unexpressed with the human language set for those excluded from revealed laws by God (Austin 1832, xvi; 1954, 2-4). For Austin, it is through human *feelings* that men can adequately deduce unrevealed laws.

Following Jeremy Bentham's utilitarian tradition, Austin claims that the ultimate aim of unrevealed laws is to flourish the greatest happiness for all his creatures (Austin 1954, 44). That is to say, the principle of general utility is the index to divine commands. This means that "human actions are guided by moral sentiments associated with rules that emanate from God and adjustable to the principle of general utility" (Austin 1954, 51). However, Austin conceives positive law as a rule made by humans for humans. Thus, an essential part of positive law is that it must be a rule, which Austin construes as species of command, made by a political authority with sovereign power, that political inferiors in an independent state must obey. Positive law then becomes the proper province of jurisprudence (Austin 1954,1-3).

The central structure of the positive law is that law is a command issued by a sovereign. In the spirit of maintaining the sharp distinction between law and morality, he defined law purely as a command of the sovereign. Implicatively, anything that is not a command is not law. Austin's approach to law forms part of what is as known command theory/imperative theory of law—an approach that, according to Andrei Marmor, assumes, on the one hand, that laws consist of instructions or directives issued by some people in order to direct the conduct of others. On the other hand, the political sovereign's instructions or commands are what we call law (Marmor 2011, 36). For Austin, a command is an expression or intimation of a wish from one person to another to either do or forebear an act in which noncompliance will inflict harm or pain on the other. This is what he means when he writes thus:

A command, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire. Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or lie under a duty to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes (Austin 1954, 7).

In other words, a command must be a sovereign desire backed with a sanction put in place to guide people in an independent political society. Austin understands independent society as consti-

tuting inferior subjects characterized by habitual obedience to the desires, wishes, or intimations of an individual or a group of individuals known as the sovereign or superior. Such a command must be obeyed by the people of independent political society, for failure to do so would attract stipulated repercussion to the offender. He, in turn, defines a sovereign as an individual with the superior power of afflicting others with evil or pain and forcing them with sanction to do his wishes.

He further emphasizes that sanction and obligation are a correlate of command. A sanction is a notion fundamental to Austin's positive law, which he defines as "the evil which will probably be incurred in case a command is disobeyed or... in case a duty is broken... Or the duty is said to be sanctioned or enforced by chance of incurring evil" (Austin 1954, 8). A sanction makes a command by a sovereign different from other desires expressed by some other authority. Because of this sanction, the subjects have a duty or an obligation to always obey the sovereign's command. Thus, punishment patiently awaits anyone that disobeys.

As a diehard disciple of sanction, Austin disapproves of every form of reward as a tool for compliance to the command. He insists that reward will attract people who want to fulfil their egoistic desires to obey the law. That is, people will obey the law because of the goodies they will receive afterwards. What reward confers on the people is a right, and not the obligation, to obey the law. It is only through sanction that people have obligations towards the law, as Austin argues, "it is only by the chance of incurring evil, that I am bound or obliged to compliance. It is only by conditional evil that duties are sanctioned or enforced. It is the power and purpose of inflicting eventual evil, and not the power and purpose of imparting eventual good, which gives to the expression of a wish the name of a command" (Austin 1954, 10-12).

However, Austin sets an exception to this conception of law. He maintains that there are laws that belong to jurisprudence but are devoid of command, such as the legislatures' declarations. This is because legislative declarations, although they involve sanction, are specifically determined Acts enjoined by the people rather than generally Acts or forbearances enjoined by the people as in the case of a command. He adds that commands lack imperatives such as laws that repel or release subjects from duties imposed by other laws and imperfect laws (or laws of imperfect obligations) that declare certain acts as crimes without sanctions. Austin buttresses further that judicial lawmaking, as in the case of customary law, is permitted since its imperatives are not objected to by the sovereign.

In essence, the crux of Austin's argument is "... in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law" (Austin 1954, 57). In other words, it does not follow that every useful action is the object of a divine injunction and every pernicious action is the object of divine prohibition. Austin, however, believes that law can be evaluated with moral terms, but his take is that law should be identified purely on moral neutral ground. Hence, Austin's claim is based on three basic assumptions: First, the separation of law and morality is necessary for understanding the distinctive nature of law. Secondly, an analytic analysis of jurisprudential concepts is an intriguing step in showing this distinctiveness. Finally, law is fundamentally a command.

However, Austin's position has been variously criticized (see Kelsen 1941, Harris 1977, Hart 1958, 1983, Dworkin 1986, Altman 2001). Here, my primary reference point will be H. L. Hart, who has been one of his fervent critics. While sympathizing with Austin's position, Hart argues that his command theory will fend well in a monarchical government system in which monarchies rule for a long time and create a fertile ground for the populace's behavioural development. Aside from this, law as a command is greatly jettisoned. However, he claims that Austin's position is quite inadequate because there is much in the legal system that will be distorted if laws are merely commands. Hart further argues that Austin's position amounts to a gunman who uses punishment to demand compliance from his victim to submit his money. He claims that the only difference is that the gunman scenario is specific action directed towards his victim, whereas Austin's concept of

law is general action enjoined by many people habitually obedient to it. Finally, he maintains that law certainly is not the “gunman situation writ large,” and legal order is certainly not command (Hart 1958, 602–603; 1983, 58–59).

While I agree with Hart that the notion of command might be problematic, I argue that Hart’s sociological conception of law does not fare better either. In his attempt to maintain the sociology of law against Austin’s command concept of law, Hart uses backhand to accept Austin’s position that the sovereign makes law and not the citizens. In this regard, C. J. Groudine avers that, for Hart, “there appears to be a kind of “superior–subordinate” relationship between officials who issue directives and ordinary citizens. ... officials or courts possess “authoritative” superiority... to generate obligations to obey the rules of the system, to justify criticism of deviations from fulfilling these obligations, and even to justify the application of sanctions against those who violate the system rules” (Groudine 1980, 280). Considering this point from Fitzpatrick’s tenets further illuminate that Hart “reaffirms the positivist equation of law with official authority...” and living the citizens in “a state of Austinian inertness” (as cited in Lacey 2004, 201). In spite of Hart’s claim that ordinary citizens hold in abeyance his critical faculties to choose among alternatives, Hartean citizens hold no greater position than Austinean citizens, for both do not determine the validity of the law. Therefore, it is intuitive to say that officials have the power to make rules that regulate ordinary citizens’ conduct and actions, which is similar to Austin’s position that the sovereign has the power to make laws for his citizens.

In the next section, I will attempt a comprehensive assessment of sharia law from the Austinean perspective. Also, I will employ Austinean separation paradigm to argue that sharia law includes religio-moral principles that contradict the Nigerian law. I will then distinguish sharia law from the Nigerian constitution. Finally, I will propose that sharia law should be administered by Islamic religious institutions

### 3. Sharia Law in the Nigerian Constitution: An Austinean Evaluation

Before carrying out an Austinean evaluation of sharia law in the Nigerian constitution, it will be pertinent to give a terse exposition of the substance of sharia law. Sharia law is a “religious and moral code of Islam, which controls the different aspects of a Muslim’s life such as prayer habits, nutritional obligations, and the type of business Muslims can partake in and how they interact with others” (Okekeocha and Ewoh 2014, 18). Rotimi Williams describes it in a simple term as “the body of Divine Law in the Religion of Islam that governs the religions and secular life of Muslims” (Williams 2002, 2). This law is evident in the *Qur’an* and *Hadith* and also supplemented by Arabic traditions and early Islamic scholars. Sharia law is based on Allah’s (God) dictates and, in turn, seen as been sacrosanct and unalterable by humans, which validates and legitimates human-made laws. Hence, sharia law is defined in this paper as a divine command codified in the *Qur’an* (creeds of Islam), *Hadith* and *Sunnah* (words of prophet Muhammad), *ijma* (consensus of opinion of well-respected Islamic jurists and scholars) and *qiyas* (analogical deduction from Islamic laws), which was interpreted into the legal system by Islamic legislatures to regulate the affairs of the state and its subjects.

There have been various provisions of the sharia law as customary law in the Nigerian constitution ever since constitutional development in Nigeria (Ostein and Dekker 2010). However, in 1999, and also in 2000, this development was heightened. Governor Ahmad Sani Yerima engineered the extension of sharia law to criminal law. He justified this new development on the ground that the 1999 Federal Republic Constitution of Nigeria gives room for sharia criminal law. In this regard, he instituted “(a) Sharia Court (Administration of Justice and Certain Consequential Changes) Law No. 5, 1999; (b) Sharia Court of Appeal (Amendment) Law No. 6, 2000; (c) Area Courts (Repeal) Law No. 13, 2000; (d) Sharia Penal Code Law 1999; (e) Sharia Criminal Procedure Code Law No. 18, 2000” (Oraegbunam 2011, 191). Several states adopted these laws in Nigeria, like Bauchi, Kebbi, Jigawa, Kano, Zamfara, Yobe, Sokoto, and Niger.

However, many works have pointed out the good, bad and ugly outcome (s) accruing from the inclusion of sharia law in Nigerian constitution. On the good aspect of sharia law, S. A. Adetoro writes, “sharia appears to be wider in scope than any known concept of law in that it provides positive guidance, and it is not just concerned with determining and punishing offenders. It provides preventive as well as curative measures. This means that it gives code of life that helps to prevent crime” (Adetoro 2005, 41). Adetoro’s position entails that, aside from the law aspect of sharia, it also embodies moral education that builds Muslims’ character for social utility. This moral kernel is rooted in the Islamic religion, which is the strong basis of sharia law (Ajayi 2005, 340). Islamic law promotes spirituality, morality, stability, security, prosperity, and social justice. Thus, Islamic law for Muslims is the actualization of their religious obligation.

On the other end, the bad and ugly sides of sharia law have been that the introduction of sharia law will Islamize the country, which will be contrary to section 10 of the constitution (Kendhammer 2013, 291-311), and marginalize human rights, especially women’s right (Okekeocha and Ewoh 2014, 15-28). To these points, Hakeem Harunah added that sharia law involves internal contradictions. These contradictions, in part, are embedded in the application of sharia law in a Western-oriented democratic country like Nigeria. Western-oriented democracy has its root in a Judeo-Christian culture that stands contrary to the Arab-Islamic culture that birthed sharia law. The Arab-Islamic culture recognizes Islamic theocracy. This ensures the union between the Islamic religion and Islamic law (Harunah 2005, 282-3).

However, this present study goes beyond this literature in arguing that sharia law contradicts the Nigerian constitution both in principle and practice. At the principle level, contrary to the Nigerian constitution, any offence stated in the Quran but not captured in the Nigerian Sharia Penal Code, is also a crime that sharia law would consider. To establish this point, let us take an excursion into both the Nigerian constitution and sharia law. According to section 36 (12) of the Nigerian constitution:

Subject as otherwise provided by this constitution, a person not be convicted of a criminal offence unless that offence is defined a penalty... in a written law; and in this subsection, a law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law (*Federal Republic of Nigeria Constitution* (as amended) 2011, 36).

This quotation means that a criminal offender should only be tried on a criminal offence that is well documented and endorsed by either the National Assembly or the law of the state. Consequentially, a criminal offender will not be tried on unspecified offences not written down in the constitution.

Contrarily, sharia law includes unspecified offence (those actions that are considered as offences in the *Qur’an*, *Sunnah*, *qiyas*, *ijma* and other sources of the Maliki school of thought) as part of criminal offences that an offender can be tried on. Under the section titled “General Offences,” Sharia law writes:

*Any act or omission which is not specifically mentioned in this Sharia Penal Code but is otherwise declared to be an offence under the Qur’an, Sunnah, and ijthihad of the Maliki school of Islamic thought, shall be an offence under this code and such act or omission shall be punishable: (a) with imprisonment for a term which may extend to five years, or (b) with caning which may extend to 50 lashes, or (c) with a fine which may extend to N5,000.00... or with any two of the above punishments (Harmonized Sharia Penal Code Law 2002, footnote 118).*

The above-emphasized sentence means that offences not documented in the Sharia Penal Code but written in Islamic Holy Books can be well incorporated as offences punishable under sharia law. Here, the contradiction is clear: while offences absent in the Nigerian constitution clearly do

not count as generally binding, sharia law considers all offences in the Islamic doctrine as generally binding and enforceable, whether the Nigerian constitution acknowledges or not.

At the practical level, the matter of evidence required for a trial varies in both laws. On the one hand, the Nigeria “Evidence Act” does not specify the number of eyewitnesses allowed to validate a claim during a trial and does not emphasize the appearance of these witnesses in the court in order to secure a conviction. On the other hand, sharia law emphasizes the number of eyewitnesses required for a trial and their presence for a successful court proceeding. For instance, the Kano Sharia Penal Code demands a confession or testimony of two to four witnesses during a trial. Only those witnesses available during the trial would be counted as authentic. Besides, sharia law places more weight on male eyewitnesses than female witnesses. For example, Niger Sharia Penal Code allows for six female or four male eyewitnesses during a trial to validate a claim.

Sharia law protagonists might be quick to object that the Nigerian constitution, since its development, well accommodates and recognizes the establishment of sharia law. No doubt, the establishment, jurisdiction, and appointment and removal of sharia judges are well spelt out in the 1999 constitution. One of the justifications for this has been quoted above. Aside from Section 277, references are being made to Sections 6, 84, 244, 260–264, 275–279, and 292 of the Nigerian Constitution. For example, Section 6 (5f g) recognizes the Sharia court as one of Nigeria’s superior courts of record. Section 84 (24) adds that the salaries, remuneration and allowances of judges (or Grand Kadi and Kadi) of the sharia court should be paid from the Consolidated Revenue Fund of the Federation.

Well noted by the sharia protagonists is that whereas the constitution explicitly and boldly delineated the jurisprudence of sharia law to civil matters and Islamic personal laws such as marriage, family, guardianship, *wakf*, gift, enforcement of a deceased will. It implicitly implies that sharia law can go above these matters to criminal matters, as evident in Section 277, which added that the state has the power to extend the jurisdiction of sharia law.

But the inclusion of sharia law, explicitly or implicitly, in the constitution does not stipulate that such a law should be inconsistent with the principles and practices of the Nigerian constitution. Section 1 (3) of the constitution made this point very clear: “if any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void” [*Federal Republic of Nigeria Constitution (as amended) 2011, xxi*]. However, a further explanation of the null and void of such a law will greatly dig another issue beyond the present paper’s scope. For our main focus here is the religious embodiment of sharia law. Thus, the essence of this inconsistency between the Nigerian constitution and sharia law lies in fostering the argument of this paper that sharia law should be administered by Islamic religious institutions.

Sharia law, in all its ramifications, has a strong religious edifice. Sharia law, as already discussed, is based on the revelations of *Allah* to Prophet Muhammad, which is a form of revealed divine laws from Austinean stand. This law imposes religious duties on its practitioners. Obedience to these duties attracts reward here/hereafter, and violation of these duties attracts religious sanctions. This law’s sacredness entails that it is obtainable at all times and all places, or as Austin called it: *jus gentium* or *jus omnium gentium*, making it rigid and unamendable.

From the preceding, it is clear that sharia law applies only to Muslims or other Nigerians who wished to be judged by it, not to all Nigerians. According to the Sharia Penal Code; “[E]very person who is a Muslim and/or every other person who voluntarily consents to the exercise of the jurisdiction of any of the Sharia Courts established under the Sharia Courts Law... shall be liable to punishment under this law for every act or omission contrary to the provisions thereof of which he shall be guilty within the State” (*Harmonized Sharia Penal Code Law 2002, 45*). With this, sharia law recognizes that Nigeria is a multicultural, multilingual, and multi-religious society comprising three major ethnic groups (Igbo, Hausa, and Yoruba) with three major religions (namely, Christianity, Islam, and Traditional Religion). Moreover, constitutional development in Nigeria has been an

attempt to unite and solidify the nation. As the 1999 constitution of the Federal Republic of Nigeria succinctly pointed out:

We the people of the Federal Republic of Nigeria, having firmly and solemnly resolve, to live in unity and harmony as one indivisible and indissoluble sovereign Nation under God, dedicated to the promotion of inter-African solidarity, world peace, international co-operation and understanding, and to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country, on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people; do hereby make, enact and give to ourselves the constitution.

At this point, it is important to invoke the main point of this paper: to argue for the possibility of separating sharia law from the Nigerian constitution. Just like Austin had argued, revealed laws, like sharia law, should be left within the confine of those people it was communicated to and not being made a binding law in the civil polity. For sharia law is based on religious revelations which specify just an aspect of the Divine duties.

In this light, this paper proposes that sharia law, as the law regulating the actions and conducts of Muslims, should be enforced by the Islamic religious institutions and not the state or its legal systems. Just like Christian or traditional religious laws are enforced by religious bodies, sharia law should be left within the jurisprudence of Islamic religious bodies, which would make the true letter of section 10 of Nigerian constitution that states, “the government of the federation of the state shall not adopt any religion as state religion” (*Federal Republic of Nigeria Constitution*, as amended 2011, 14), to be genuinely actualized. For it would be absurd to state, on the one hand, there is no state religion, and, on the other hand, there is a state religious law or sharia law. It would be like a person who intentionally enters the mud and still believes that he would not be stained.

#### 4. Conclusion

Using the utilitarian stance of Austin, this paper has interrogated the inclusion of sharia law in the Nigerian constitution. It based its argument on two grounds: firstly, that sharia law is religiously underpinned with negative implications for the precedence of Nigerian constitution. Secondly, that sharia law is an Islamic principle applicable only to a fraction of the country, i.e. the North, and that the whole idea of sharia law depreciates as it becomes embedded in religio-moral principles. Therefore, it maintained that sharia law signifies religio-moral principles, and its inclusion in Nigerian constitution leads to contradictions both in principle and practice. With Austin’s separatism paradigm, it clearly differentiates sharia law from the Nigerian constitution. It then recommends that sharia law should be administered by Islamic religious institutions, where it would keep up with its practitioners’ moral development.

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