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Section 24 of the Criminal Code and its Effect on Criminal Liability in Nigeria

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Abstract

Great debates have ensued in many a jurisdiction as to what level of mental state an accused person must possess for him/her to be held criminally responsible for his/her act or omission. Is culpability a function of purpose, knowledge, recklessness or negligence? Or would one ever be considered strictly liable for an act or omission *dehors*any of these mental states? This issue, no doubt, boarders on the relevance of the English common law doctrine of *mensrea*. However, in Nigeria, section 24 together with section 25 seems to cover the field of the *mensrea* requirement and a lot more. Yet, it is discovered that lack of comprehensive study and understanding of the Criminal Code provision had led to much judicial misapplication. Often in relevant cases, the purport of the sections is jettisoned and a voyage taken to *mensrea* in utter defiance to the rule which states that once local enactments are in situ, resort can no longer be made to foreign laws. This anomaly has led to many *per incuriam* decisions in Nigeria. This paper seeks to do an exegesis of the provision of section 24 of the Code with a view to unearthing its implications for criminal liability.

Keywords: Criminal Liability, Criminal Code, *Mens Rea,* Jurisprudence, Nigeria

1. Introduction

It does seem that section 24[3] of the Criminal Code[4] was framed to obviate the confusion generated by the interpretation of the common law doctrine of *mensrea*.

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[3]This is together with section 25.Section 25 provides for the defence of mistake of fact (*errorem factie xcusat*). This is an instance of the law's recognition that objective knowledge exists. While a mistake of fact is a defence (*errorem factie xcusat*), ignorance of the law is no defence (*ignorantia juris nemine mexcusat*). However, it is not always easy to delineate in certain circumstances what is law from what is fact. Be that as it may, one immediately notes that section 25 together with section 24 performs the function of mensrea. Just like section 24, the words constituting an offence may exclude its operation (S. 233 Criminal Code negates the operation of this defence). However, for this section to operate, the belief must be both honest and reasonable (*R* v *Gould* [1960] Qd. R. 283). An honest mistake means a sincere one. There is hardly any person who would argue that a 'dishonest' mistake should be a defence. However, it is with the second requirement namely – that the mistake be reasonable that some problems arise. An act is reasonable in law when it is such as a reasonable man would do under similar circumstances. To require that the mistake be reasonable means that if the defendant is to have a defence, he must have acted up to the standard of the reasonable man, whether the defendant is himself such a man or not. This is the application of an outer standard to the individual. If the defendant, being mistaken as to material facts, is to be punished because his mistake is one which the reasonable man would not

Section 24 together with section 25 of the Code, it does appear, performs the same function as the common law doctrine of *mensrea* without harboring its characteristic complexities. The draftsman, as it were, wanted by these sections to free Nigerian criminal justice from the 'bewitchment'[5] of the *mensrea* doctrine. In *Widgee Shire Council* v *Bonney,*[6] Sir Samuel Griffith said of the Queensland Criminal Code on which the Nigerian Criminal Code was patterned that: "…under the Criminal Law of Queensland as defined in the Criminal Code, it is never necessary to have recourse to the old doctrine of *mensrea*, the exact meaning of which has been the subject of much discussion. The test now to beapplied is whether the prohibited act was or was not done accidentally or independently of the will of the accused person". Supporting this claim, Cooper CJ and Lukin J. in *Thomas* v *McEather*[7] went even further to observe that:It seems to us that the Queensland legislature have, by the express provisions of sections 23 – 25 laid down in clear terms what the law in future should be in regard to the very much debated, very much misunderstood, and very much confused doctrine of what is referred to as *mensrea* and directed that the courts should not in future be guided by the conflicting and irreconcilable decisions of various courts on this question, but should be guided in determining the criminal responsibility of a person charged by reference to the tests prescribed by the language of those sections. It is clear that sections 24 and 25 intend to do to *mensrea* what section 4 of Evidence Act[8] has done to the doctrine of *res gestae* – namely consign it to the legal museum. More still, these sections and indeed all the provisions of Chapter 5 of the Criminal Code have a far reaching effect. They apply in relation to any offence against any legislative enactment in Nigeria and to all persons charged with any such offence.[9] However, Oraegbunam and Onunkwo have cautioned that 'the propriety of this extraterritorial effect may not in practice enjoy total acceptability given the multipartite systems of criminal justice in Nigeria today. Aside the fact that each of the 36 states has its own criminal law, the specifically later enactments of the Penal Code and recently the Sharia Penal Codes[10]may present veritable antipathy to the extraterritorial doctrine'.[11]

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make, punishment will sometimes be inflicted when the criminal mind does not exist (Hall, Jerome (1957) "Ignorance and Mistake in Criminal Law," *Indiana Law Journal*: Vol. 33: Iss. 1, Article 1. Available at: http://www.repository.law.indiana.edu/ilj/vol33/iss1/1. Accessed 27th July, 2014). Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence. Worse still, the reasonable man has sometimes been seen not as the man in the status of the defendant, but as the elitist in the status of the judge himself (AP Herbert notoriously notes that 'the reasonable man is never a woman', *Uncommon Law,* (London: Methusen, 1935), 12). The courts have held severally that belief in evil spirits and juju as unreasonable (*R v Gadam, Supra).* As Laski would say, this is an exercise in logic not life. Moreover, even when the belief is honest and reasonable, the defendant is liable to the extent his mistaken belief is taken as the case. Hence, the court would still be saddled with the task of finding whether the accused escapes liability on the facts as he saw them, that is, on the assumption that the situation was as the accused supposed it to be (*Wilson* v*Inyang*[1951] 2 K.B. 798).

[4] Cap C38, Laws of the Federation of Nigeria 2004.

[5] Bewitchment is a term used by the Austrian born English philosopher Wittgenstein to underscore the lack of clarity caused by the use of metaphysical language in philosophy.

[6](1907) 4 C.L.R.977 p. 981.

[7](1920) St R Qd. 166 p. 175.

[8] S. 4 Evidence Act, 2011 has even a wider net than the principle of *res gestae*.

[9] S. 2 (4) of Criminal Code Act. The Criminal Code with its 521 sections is only a schedule to the Act. However, it forms part of it. Ibidapo v. Lufthansa Airlines (1997) 4NWLR (pt. 498) 124, p. 162., Board of Customs & Excise v. Barau (1982) 10 SC 48.

[10] Perhaps, no legal scholar has more than IKE Oraegbunam addressed the inherent confusion the administration of Sharia Penal Code poses for Nigeria as a country. (IKE Oraegbunam, 'Sharia Criminal Law, Islam and Democracy in Nigeria Today', (2011), vol 8,*Ogirisi.,* 'A Critique of Certain Aspects of Islamic Personal Law in Nigeria: Re – examining the Jurisprudence of Women's Rights', (2013) vol 3, no. 1, *AJLC.,* 'Islamic Law, Religious Freedom and Human Rights in Nigeria', (2012), vol 2, no.1, *AJLC.,* 'Sharia Criminal Law and State Secularity Principle in Nigeria: Implications of Section 10 of 1999 Constitution (as Amended)', (2014) vol 28, *Journal of Law, Policy and Globalization).* It is quite untenable that two Criminal Codes different in both character and form should hold sway simultaneously in one country. We submit that it was a lack of political will that made the senate to allow the inauguration of Sharia. We say this not because of any religious prejudice but because of certain tenets of that law which runs against our constitution. Soyinka links the administration of Sharia with the rise of terrorism in the North, ('Religious and Political Forces Driving *Boko Haram',* This Day Newspaper, 4th February, 2012, 30). It is difficult to refute that argument because when you allow a law that says that women, half of our population, are, as it were, to be secluded and denied basic freedom, you have unwittingly given a fiat to terrorists to unleash untold horrors on school girls. We are not blind to the fact that law as the historical

Be that as it may, the thrust of this paper is the effect of section 24 on criminal liability in southern Nigeria which is the specific territorial jurisdiction in which the Code operates.

2. Exegesis of Section 24 of the Code

The opening words of section 24 provide that: Subject to the express provisions of the Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident.[12] The entire section is made subject to express provisions of the Code relating to negligent acts and omission. It simply means that the section cannot be pleaded where the forbidden conduct is done negligently.[13] However, it is important to note that an act could be negligent yet involuntary. In such a case, the exculpatory provision of section 24 is still ousted. This was the case in *R* v *Scarth*.[14] D killed three people when he fell asleep on the wheels. He was charged with manslaughter. He argued that he was not liable since he was asleep when the accident occurred. The trial judge merely directed the jury that sleep itself was no defence. On appeal, the proper direction was given. Although 'driving' while asleep was an involuntary act, D will be negligent and liable if he was drowsy and insisted on driving. Moreover, although the wordings of the above section bears 'express provisions' of the Code, it does not mean that the wordings of the offence must necessarily bear the words negligently or negligence. Okonkwo writes and we respectfully agree that it is sufficient if the offence could be committed negligently.[15] Furthermore, although the reservation as to negligent act is confined to express provision 'of this Code' relating to negligent acts and omissions it will not necessarily follow that section 24 can be pleaded to offences outside the Code of which negligence is an element. By the doctrine of implied repeal, a statute which is later in time than the Code and which creates an offence of negligence will impliedly repeal the negligence reservation in section 24 so far as that statute is concerned. Having dispensed with the above, the next question is; what is the meaning of an act and omission within the context of section 24?

2.1 The Meaning of an Act and Omission

The first limb of section 24 provides that a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will. The words appear self-explanatory but it is quite subtle.[16] An analysis of the key words is therefore needed. An act does not simply mean the physical movement alone. It is not merely a movement of the muscle. An act also connotes the surrounding circumstances in which it is done. The meaning of an act is context-dependent.

Put differently, for an act to be criminal, the awareness of D must go to all the external circumstances of the case. As Okonkwo illustrated, where the offence of selling a publication is charged, the relevant act is not merely the act of selling a publication, but selling a publication which the vendor knows is seditious.[17] For an omission to be criminal, there must be a duty imposed on the defendant to act. The defendant must be aware of the circumstance that calls for action and yet refuses to act. The law on certain occasions imposes duty on certain persons due to their position or profession. For instance, section 300 provides *inter alia* that every person charged with the duty to provide necessaries for anyone who, by reason of age, sickness, unsoundness of mind, detention is unable to provide for himself is deemed to have caused any consequence which results from his omission to carry out this duty. The duty contemplated here may arise out of a contract like when a person is contracted to work in an old peoples' home. Also sections 301 and 302 of the Code provide similar duties for the head of the family and masters. They have a duty to provide for any child below the age of fourteen and for their servants respectively.[18]

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school of Jurisprudence posits is an outcome of the spirit (*volkgeist*) of the people. However, some tenets of such law must give way to social and political considerations that come with organising a diverse country like Nigeria.

[11] Oraegbunam&Onunkwo*op cit*, p. 264.

[12] S. 24 Criminal Code.

[13] S. 24 cannot be pleaded for the offences in Section 173 (1) Criminal Code.

[14] (1945) St R. Qd. 38.

[15] *R v Young* (1969) Qd. R. 417 p.441.

[16] One common way of stating the distinction between acts and omissions is that the former are active assertions, the latter, a form of passive abstention. G Fletcher, *Rethinking the Criminal Law* (London: Little Brown, 1978), p. 421.

[17] CO Okonkwo, *op cit*, p. 84.

[18] Okonkwo raised an interesting hypothetical case. The necessaries a head of a family is expected to provide for a child includes food, clothing, shelter and medical attention. With respect to medical attention, Okonkwo asked what if a child had severe attack of malaria. The father instead of taking him to the hospital takes him to a witch doctor in the mistaken belief that the child is bewitched by enemies. The child dies. Although the father has acted with the best of intentions, Okonkwo observes that it is

Duty may also be imposed on certain class of persons because of their profession. In this regard, section 348 provides for the duty of engineers in charge of steam vessel.[19] Secondly, for duty to be imposed, there must be a capacity to discharge the duty. Where the defendant has inherently no capacity to discharge the duty, liability cannot arise. In this regard, although section 515 provides for the duty to prevent the commission of a felony, the criminal law cannot hold an unarmed man liable for taking to his heels when a gang of armed robbers invaded a bank. In Nigeria, there are no Good Samaritan laws. Thus, if A sees a baby about to get drown in a pool of water barely knee high, A has no duty and will not be liable if he refuses to go and save the baby. Moore argues that limiting criminal liability for omissions to special cases of duty derives from general retributivist principles on which Nigerian criminal law hinges. Retributive justice conditions punishment on wrongdoing and not on failure to prevent harm.[20] However, it is respectfully submitted that there is need to reevaluate this area of the law. Some jurisdictions have made it a culpable omission not to aid a person exposed to grave physical harm where such assistance can be rendered without danger or peril to the aider.[21] On another note, whether it is an act or omission, criminal liability does not arise if the act or omission is independent of the exercise of the will. The phrase 'independent of the exercise of the will' does not lend itself to any easy interpretation. However, one dares say that it means that the act or omission in question must be voluntary.[22] Even the word voluntary has caused legal theorists considerable problems. Some hold that a voluntary act is the external manifestation of the will.[23] Others argue that it is a behaviour which would have been otherwise if the individual had willed or chosen it to be otherwise.

There are those who believe that the term is indefinable, and also those who take the view that a voluntary act must be defined in terms of conditions which render an act involuntary.[24] Fagothey believes that there can be no voluntariness without knowledge and will.[25] Therefore, an intentional act is a willed act. The will must match all the circumstances of the act. Thus, in the unfortunate case of *TimbuKolian* v *The Queen*,[26] D in the dark aimed a moderate blow at his nagging wife and the blow landed on the head his baby who unknown to him, was being carried by his mother. He was acquitted of the charge of murder. Windeyer J. noted 'it was as a blow aimed at a woman not at the child'. Therefore, it follows that unconscious actions, reflex actions, actions done under the influence of hypnotism or automatism are not voluntary conducts.[27] But sometimes the defendant's actions though willed produces unexpected results. Could such results ground liability? One turns therefore to the meaning of events and the test of accident.

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probable he would be found guilty of manslaughter for an omission which caused the death of the child. S.25 will not afford him because the courts have held belief in witchcraft to be unreasonable *Gadam v R* (1945) 14 W.A.C.A. 442. Okonkwo finally suggests that liability in such a case ought to depend on the father's status in life for if he is a primitive villager who knows little about medical treatments it will be harsh to convict him of manslaughter. We accept with Okonkwo that liability should not arise in such case but we, with trepidation, reject his rather timid reasons for so holding. We argue that in such a case it is unconstitutional to hold a father liable in such circumstance. Freedom of religion is a fundamental human right. In our traditional religion, belief in the work of the enemy is not unreasonable. To hold otherwise is an exercise in logic not life. What if the child had had such attack before and that particular witch doctor cured him. IKE Oraegbunam has noted that the received English laws has a strong antipathy towards our traditional religion and laws most of which were outlawed. But in their private lives in the villages, the people hold on to these beliefs ('Crime and Punishment in Igbo Customary Law: The Challenge of Nigerian Criminal Jurisprudence,' (2010), vol 7, *Ogirisi*, 1). The glaring contrast is seen in the practice of other Western religion like Jehovah's Witness whose members object to medical treatments. *R v Blaue*[1975] 3 All E.R. 446. Have such beliefs been held as unreasonable? Is it more reasonable because they profess Christ and not *Amadioha*? What will be the prophesy of the court where a father who is a Jehovah's Witness objects to blood transfusion to his sick son on the grounds that it is against their faith? Your guess is as good as mine.

[19] See also s. 303 Criminal Code.

[20] MS Moore, *Act and Crime,* (Oxford: Oxford University Press, 2010), p. 38.

[21] Vermont and Belgian Penal Codes are few of such examples.

[22] *Voluntas, (*from where the English word volition is derived) is a Latin word which means will.

[23] MS Moore, *op cit,* p. 69.

[24] B Wootton, *Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist.*(2nd edn, London: Stevens & Sons, 1981), p. 14.

[25] A Fagothey, *Right and Reason: Ethics in Theory and Practice*, (Missouri: C.V. Mosby Company, 1985), p. 16.

[26](1968) 119 C.L.R. 47.

[27] Our Criminal Code is very suspicious of enlarging the field of involuntary actions. Apart from insanity and insane delusion, it does appear that the Code has no other type of defence bordering on psycho – cognitive deficiencies of the defendant. In the

2.2 The Meaning of Event and the Test of Accident

The second limb of section 24 could be roughly put this way: 'Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for …an event which occurs by accident'. Analysis of the key words of this excerpt: event and accident is salient. An event within the context of section 24 is a result or consequence of human act. It is immaterial that the act in question was willed. The view in *Mamote Kulangof Tamagot* v *R*[28] that an event is the intervention of some happening of an accidental nature is very wrong. The view in that case was that an event was something in mode of a *novusactusinterveniens.* But Windeyer J. stated the correct position of the law thus: "an event in this context refers to the outcome of some action or conduct of the accused, for a man cannot be responsible for an event in which he had no part at all, and it would be unnecessary to say so".[29] A few points should be noted when considering event as a result of an act under section 24. Firstly, it is the substance of the charge that determines whether it is the first limb or the second limb that should be applied. Where the substance of the charge is the consequence of the defendant's act, like death as in Timbu Kolian, then it should always be treated as an event. Secondly, in any case in which the act charged as an offence is the act directly done by the defendant, and no more, then we should be concerned with the first limb.

The question here is whether the act was independent of the exercise of the will. Thirdly, where the defendant has achieved the full operation of his act and something else aggravates or occurs – directly or indirectly which forms part of the charge, the second limb applies. An event is accidental if it is not intended, not foreseen by the defendant and not reasonably foreseeable. Black's Law Dictionary defines accident as 'an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated.[30] In *Agbo* v *State*,[31] accident was seen as 'an event without apparent cause, unexpected, unforeseen course of events, unintentional act, chance, fortune.' Perhaps, the most complete definition of accidental event is that given in Stephen's Digest of the Criminal Law. It defines an accidental event thus: An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.[32] Therefore, an accident must pass two tests: the subjective and the objective.

As Kitto J. illustrated; …it seems to me that 'by chance' is an expression which, Janus-like, faces both inwards and outwards, describing an event as having been both unexpected by the doer of the act and not reasonably to be expected by an ordinary person, so that it was at once a surprise to the doer and in itself a surprising thing.[33] Ola and Ola attempt to add to the meaning of accident within the context of section 24. They argue that accident under section 24 could mean an event with no relevant casual connection. First, there is the case in which the real question is whether the conduct of the accused had any relevant causal connection with event under consideration, as where several women with whom a man has lived with are found dead in their baths, and he contends that in each case they met their death accidentally, i.e not as a result of any conduct of his.[34] With deference, one holds that this illustration stems from a misconception of the true meaning of accident within the context of section 24. The test of accident is not premised on causal connection but on subjective and objective expectation of outcome. The judge is not, as the learned authors tend to portray, some Newtonian scientist looking for causal connections. Thus, even if there is found in the example above some casual connection between the man's act and the death of the women, the question will still be asked; was death a reasonable consequence of his act? In *Timbu Kolian*, there was a causal connection between the strike and the death of the child. Yet it was correctly ruled as an accident. The learned authors seem to be confusing the layman's meaning of accidental event with the law's technical and restrictive meaning.

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course of this study, we searched fruitlessly for cases where the defences of hypnotism or brain washing or automatism were canvassed. It is suggested that the court should take a study of these defences and anticipate them. With onslaught of terrorists' attacks in the country recently, it will not be surprising if some arrested suspects plead that they were brainwashed or hypnotized. Justice should not be denied merely because the court was caught off guard.

[28](1954) 37 A.L.J.R. 516.

[29]Timbu Kolian v The Queen, Supra, p.66.

[30] B.A. Garner (ed), Black's Law Dictionary, (7th edn, Minnesota: West Group, 1999), p.15.

[31][2004]7 NWLR (pt 837) 546, 560.

[32] LF Sturge (ed) Stephen's Digest of the Criminal Law, (9thedn, London: Sweet & Maxwell, 1985) p. 260.

[33]Vallence v The Queen (1961) 108 C.L.R. 56.

[34] CS Ola & OA Ola, Mensrea in Statutory Offences in Nigeria, (Lagos: Malthouse Press Limited, 1990), p.30.

2.3 Unlawfulness of an Act

The unlawfulness of an act has no bearing on whether its consequence will be held as an accident. It is immaterial that the act which occasioned the consequence was a grave moral wrong, repulsive and disgusting. The test of accident is not a moral but a legal question that is to be answered from facts of the case. The private bias of the judge and his subjective morality should have nothing to do with it.[35] In *R* v *Martyr*[36], Townley J. succinctly puts it this way: I cannot, however, subscribe to the opinion that criminal responsibility for an event should be judged solely by the lawfulness or unlawfulness of the act which occasions that event. One may not, in my opinion, simply say, "The act was unlawful and therefore the event was also unlawful. Secondly, it is immaterial that the consequence was a direct result of a deliberate action. Put differently, an accident could be a result of an action that was painstakingly planned, carefully deliberated upon and coldly executed. This legal meaning of accident is understandably jarring to the layman who can hardly countenance that the result of a deliberate act could be accidental.[37] But law, as a technical and creative field of study does not take its entire cue from language and lay opinions. But the worse insult for the layman is the effect a successful plea of section 24 has on the liability of the defendant. To this much misapplied area, we now turn.

3. Critique of Section 24

3.1 The Problem of Meaning

One of the perennial problems of jurisprudence is that of meaning. How do words mean what they purport to mean? Wittgenstein offers what is accepted as the closest solution to this problem. He argues that to find the meaning of a word is to inquire how the word is used within a 'language game', within a language community that uses that word. Put simply, meaning is use. It does appear that the way the legal community uses a word is sometimes different from what the same word means for the larger society.[38] Worse still, sometimes even jurists are not in agreement with the actual legal meaning of a word. For instance, with regard to voluntary acts, some jurists believe that voluntary acts are nothing but the external manifestation of the will. Others contend that it is a behaviour which would have been otherwise if the individual had willed or chosen it to be otherwise. Fagothey believes that knowledge and volition are the distinct characteristics of voluntary acts.[39] Wootton, on her part, believes it is indefinable.[40]

This ambiguity extends to the words used to denote *mensrea* under the Code. As Fletcher notes, One of the persistent tensions in legal terminology runs between the descriptive and normative uses of the same terms. Witness the struggle over the concept of malice. The term has a high moral content, and when it came into the law as the benchmark of murder, it was presumably used normatively and judgmentally. Yet … English jurists have sought to reduce the concepts of malice to the specific mental states of intending and knowing.[41] The word 'intent', for instance, could refer to either a state of intending (regardless of blame) or it may refer to intent or act under circumstances that render an act properly subject to blame. This problem of meaning is made most acute because the Criminal Code unlike the American Model Penal Code does not give the definition of terms like intent, knowingly, willfully, purposefully, which were freely used in the Code[42].

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[35] We do not intend by this statement to question the thesis of the Realist school of Jurisprudence. While that school of thought has its many pitfalls, such examination is outside the scope of this study.

[36](1961) 108 C.L.R. 56.

[37] For instance, in Igbo traditional criminal jurisprudence and even language, an accident cannot mean the result of a deliberate immoral act. The Igbo will say of a criminal '*o filiasaan'anya wee meeya'* (literally, He rubbed his hands on his eyes before he did the act).

[38] IKE Oraegbunam has observed the myriad problems caused by the employment and interpretation of legal words, 'Perspective on Legal Language and Reasoning in Nigeria Today: A Jurisprudential Approach', (2011), vol 8, no. 1, *ULJ,* 38.

[39] A Fagothey, Right and Reason: Ethics in Theory and Practice, (Missouri: C.V. Mosby Company, U.S.A, 1985), p. 16.

[40] B Wootton, *Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist*. (2nd edn, London: Stevens & Sons, 1981), p. 14.

[41]G Fletcher, *Rethinking the Criminal Law* (London: Little Brown, 1978), p. 397.

[42] 'A principal difficulty in this branch of the law is the chaotic terminology, whether in judgments, academic writings or statutes. Will, volition, motive, purpose, object, intent…. such terms, which do indeed overlap in certain contexts seem frequently to be

Most times the judge is left to use the unreliable standard of the reasonable man. Yet, it had been seen in the previous chapter under the defence of mistake of fact that the reasonable man is most times the elitist in the mind of the judge. It is suggested that the Code should follow the example of the MPC in defining each mental state as far as possible. This is because *mensrea* is not merely a fault element of a crime. *Mensrea* performs a communicative role. It informs the citizen of the instances when the force of the state will be applied to him. It is therefore worthwhile that the citizen should have clearly in mind what type of action the law wishes to prevent.

3.2 Section 24 and the Conflict from Motive and Fairness

Section 24 provides that motive except in few instances where the law so requires is irrelevant to the question of criminal liability. There is no doubt that this is an effect of the English positivist jurisprudence from whence the Code was derived. The positivist school makes the ambitious claim that law should be made precise, value free and objective. In its extreme, it rejects any moral considerations in the deciding what the law should be. To succeed in its claim, it rejects moral - laden terms like malice for concepts more morally neutral like foresight and intention. But is this claim possible? Law, judgment and punishment are intensely moral exercise. It involves deciding between what is right and what is wrong. The attempt of the law to separate the questions of *mensrea* from broader issues of motive and morality is artificial and unfair to many. Take the case of Steane,[43] for instance, the truth was that the court had to look at his motive which was to save his wife and children and decided to acquit him. The argument will be better appreciated with this illustration. A is trapped in a building which is on fire with his two daughters. To escape, he threw the elder daughter aged 5 out of the building. He then carried the younger one aged 3 and jumped himself. He knew that there was a substantial risk that the elder daughter would die from the jump. Under present Nigerian laws, A would be guilty of murder. To apply section 24 will not save him. The throw was his voluntary act and it was not an accident. At least, a reasonable man would expect that throwing a young girl from a building will occasion her death. The man may have the defence of extra - ordinary emergency but it is known that that defence is limited in application.[44] It applies subject to the defences of provocation, compulsion, and self-defence. Therefore, to do justice in an unfortunate case as this, the court necessarily will, no matter how subtly, have regard to the motive of A. Fletcher surmmarises it this way: Descriptive theorists seek to minimise the normative content of the criminal law in order to render it, in their view, precise and free from the passions of subjective moral judgment… the reality of judgment, blame and punishment generates the contrary pressure and insures that the quest for a value free science of law cannot succeed.[45] Norrie takes the issue further. In his view the desire to exclude 'subjective moral judgment really results from the desire in the past to safeguard a criminal code based on the protection of a particular social order.

He observes that: … if one examines the historical development of the criminal law, one finds that a legal code designed to establish an order based on private property and individual right was legitimated by reference to the dangers of subjective anarchy. This argument was ideological window – dressing justifying the profound institutional changes taking place.[46] Thus, he considers that the apparently impartial language used to describe *mensrea* is actually very partial and unfair to many. It ignores the substantive moral differences that exist between individuals as they are located across different social classes and according to other relevant divisions such as culture and gender.[47]

4. Effect of Section 24 on Criminal Liability

At the pain of repetition, one wishes to state again that, in spite of the above critique, section 24 has the widest exculpatory powers under Nigerian criminal jurisprudence. Not only that it applies to all laws and enactments, its successful application results in complete acquittal. Such is its magic; such is its power; such is its 'injustice'. Once section 24 is allowed, the prisoner must go home free. It does not call for a substitution of charge nor does it allow for a reduced sentence like the defence of provocation.[48] No! *Nequaquam!* Section 24 is a complete defence to any charge. It means the defendant is innocent of the charge.

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used interchangeably without definition, and regardless that in some cases the legal usage of a term differs from popular usage' per Lord Simon, *DPP for Northern Ireland v Lynch* [1975] AC 653 p. 688.

[43]Steane, a Briton, made broadcast during the Second World War which aided the Nazi army. He did that because the safety of his wife and children was threatened.

[44]S. 26 Criminal Code.

[45]Fletcher, *op cit,* p. 401.

[46] A Norrie, 'After Woollin', (1999) *Criminal Law Review.*

[47]*Ibid.*

[48]S. 283 Criminal Code. *RvNwanjoku*(1937) 3 W.A.C.A. 208.

It is therefore a category mistake to hold that the plea of section 24 was successful and yet give the defendant a reduced sentence. Can one be innocent and guilty at the same time? Where does motive fall within the context of section 24 and indeed in the entire field of criminal liability? Is it a totally worthless concept? Or does it have any implication for the guilt of the defendant? Let us briefly examine this.

4.1 The Place of Motive in Section 24

Motive is not the same thing as intention. Both concepts are similar and on occasions could mean the same thing. However, there is a perceptible difference between them. Motive is from the Latin word *motivus* meaning 'to move'. It is the compelling reason that fuelled an action. It may be seen sometimes as the 'why' of an action. It is most times extra-legal. For instance, the motive of A in killing B could be because he wanted to inherit B's wealth, (financial motive), or to take over his girlfriend (amorous motive) or because B is his political opponent (political motive). Section 24 provides with regard to motive thus: Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or in part, by an act or omission, the result intended to be caused by an act or omission is immaterial. Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.[49]
There is a reading of the above excerpt which tends to contradict our earlier interpretation that criminal intent must go to all the material elements of an offence. But this is not the case. The passage merely decrees that where a particular intended consequence is not specified as part of the definition of the offence, then it is not to be taken into account. This can aptly be illustrated with offence of perjury.[50] Once the defendant knowingly gave false information, then it is immaterial what he intended to achieve by such information. The prosecution is not invited to prove his motive unless such motive is made relevant by the Code. This interpretation is confirmed by the latter part of that excerpt. Be it as it may, one dares to say that motive is not totally irrelevant in criminal adjudication. Where motive is proved, it 'strengthens the case for the Crown and becomes part of it'.[51] Motive therefore helps to disprove or prove criminal intent. But it cannot be said that once there is a possible motive, then there is a criminal intent on the part of the defendant. It is only a pointer; an inconclusive one at that, to the existence of criminal intent. Moreover, motive becomes very important at sentencing of the defendant. A plea that the motive of the defendant in a charge of stealing was to use the stolen money in procuring food for his child may evoke a lenient sentence.

5. Section 24 and the Nigerian Courts

It may be apt to heed the advice of the Realist school, namely, to 'go to the court and see what the judges are doing'. In *Iromatu* v *State*,[52] the deceased gripped the gun of A. In an attempt to recover it from the deceased, A incidentally touched the trigger. The gun went off, killing the deceased. The Supreme Court held that the prosecution failed to prove that the firing was voluntary or that the circumstance disclosed a reckless disregard for the lives of others. This was all that was said about the section. The Supreme Court did not make explicit which arm it relied on and had taken up the section *suomotu*. In *Thomas* v *State*,[53] the deceased's car accidentally hit the A's motor -cycle causing A's little daughter to fall into the gutter. The deceased alighted from his car to apologise and A gave him a slap. He fell and died. The main question was whether death was accidental. The Court held that death was not accidental. The reason for reaching this conclusion showed a misconception on the part of their Lordships. Belgore JSC said that A had acted rashly in slapping the deceased. He noted that 'slapping to my mind is not an accident and in this case it was intentional'. Onu JSC agreed in an even more detailed judgment. He held that: It having been established at the trial that the appellant's act of slapping the deceased did not occur by chance or accident but rather that it was willed, deliberate and intentional, the defence of accident is unavailing to him…. An accused person as in the instant case cannot take refuge on a defence of accident for a deliberate act even if he did not intend the eventual result.[54] With respect, the unlawful or deliberateness of an act has nothing to do with its outcome being accidental.

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[49]S. 24 Criminal Code.
[50]S. 117 Criminal Code.
[51]Adetola v R (1960) W.R.N.L.R 5. Also s. 6 (1) Evidence Act, 2011 provides that any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
[52](1964) 1 All N.L.R. 311 S.C.
[53](1994) 5 KLR 144 SC.
[54]Supra, p. 157.

The correct question the court should have asked was whether death arising from a slap as in the instant case was surprising or not. The seed of confusion as to meaning of accident appeared to have been sown in *Adelumola* v *State*.[55] In that case, after a fight between A and the deceased's brother, A threw a burning stove at the deceased. She caught fire and died subsequently. A's conviction for murder was upheld by the court. The Supreme Court appeared to have held that the deceased death was foreseeable and therefore not an accident. Strangely, this decision has been relied on to hold that a deliberate willed act negates the defence of accident.[56] But this is not so. Oputa JSC drawing inspiration from the Stephen Digest of Criminal Law gave the correct meaning of accident as a surprise both to the doer and the reasonable man. It is baffling how this case is cited by the courts without Oputa's sagacious analysis being considered. Another source of confusion as to the meaning of accident is seen from the reliance on the case of *Aliu Bello* v *A.G of Oyo State*. In that case, Karibe – Whyte had upheld the view that an 'accident is the result of an unwilled act and means an event without the fault of the person alleged to have caused it'.[57] But this case is concerned with a civil matter and not strictly on section 24. It is humble view of this researcher that reliance should no longer be had on this case. Accident should be tested based on reasonable foresight and not on the fault of the defendant. However, the mark of true scholarship is to show both sides of the coin. The courts have not always interpreted section 24 wrongly. In many cases, the court especially recently have considered correctly the provisions of section 24. In *Nwali*v *State*,[58] the appellant was convicted of murder. He had inflicted machete cuts on his girlfriend because of the refusal by the mother of the deceased to allow the appellant bring the customary palm wine on the ground that their affair was not yet known to members of the family.

Counsel for the appellant urged the court that the prosecution had not proved malice which is an element of the charge. Dismissing the very poor arguments, Olatawura JSC noted:What is relevant in our criminal law when a person is charged with murder is that the act of the accused person resulting in death of the deceased is unlawful. It is no longer necessary to look for the common law ingredients of *mensrea* or malice aforethought. In *Uzoka* v *State*,[59] D and his colleague, two policemen stationed at the toll gate, pursued a vehicle driven by V which has just passed the toll gate. They caught up with the vehicle and in the course of the verbal exchange between them, the gun held by D went off. One view was that D shot V deliberately. The other view was that the gun went off when it hit the bonnet of V's vehicle. D was given the benefit of the doubt. His conviction for murder was quashed and a conviction for manslaughter substituted on the grounds that although firing of the gun was not D's intentional act, he was grossly negligent. It is submitted that the judgment is correct since section 24 is subject to negligent acts and omissions. Finally, in *Umoru* v *State*,[60] the appellant challenged the deceased for parking his car where he did. The deceased ignored him. The appellant then walked up to him and slapped him. The deceased fell, hitting his head on the tarred road and died. The High Court convicted him of manslaughter, taking the view that section 24 did not apply to deliberate acts. However, the Court of Appeal reversed this decision. The Court noted that it was even surprising that the deceased fell down in the first place. The Court therefore held that the second limb exonerated the accused.

6. Conclusion

Let one briefly summarise the conclusions from the analysis of section 24. Section 24 has the widest exculpatory powers. Its effect is not domiciled only in the Code. Secondly, the section has two limbs. The first limb discusses questions of the voluntariness of acts and omissions. The second limb is concerned with whether the consequence of the act was an event which occurred by accident. Both limbs work independent of the other and have the same effect if successfully pleaded. But they should not be misapplied. Where the substance of the charge is about the act of the defendant and no more, the first limb applies. Where it is the consequence of such act, the second limb applies. Again, the defendant must stipulate and the judge must record which limb is being relied on. Where the second limb is relied on, the only question to be asked is; was the consequence surprising to the defendant and to a reasonable man? The answer to both arms of the question must be in the affirmative; otherwise, the defence must fail. Finally, the consequence of an unlawful, repulsive, immoral, deliberate act may well be accidental. Given a comprehensive grasp of the interpretation of the provision of section 24 and other related sections of the Code, one need not and should not travel to import foreign laws which at best would only have persuasive effects in Nigeria.

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[55](1988) 1 [NWLR] (pt 73) 683 SC.
[56]Adekunle v. State [2006] 14 NWLR (pt. 1000) 717; Uwagboe v. State [2008] 12 NWLR (pt. 1102) 621; Uwaekweghinya v. State [2005] 9 NWLR (pt. 930) 227; Nwokearu v. State [2010] 15 NWLR (pt. 1215) 1.
[57][1986] 5 NWLR (pt. 45) 828.
[58] [1991] 3NWLR (pt. 182) 66 SC., Okon v State [1991] 8 NWLR (pt. 210) 424 CA.,Jideonwo v State [1997] 1 NWLR (pt. 480) 209.
[59][1990] 6 NWLR (pt. 159) 680 CA.
[60][1990] 3NWLR (pt. 133) 363.