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MENS REA PRINCIPLE AND CRIMINAL JURISPRUDENCE IN NIGERIA

By

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INTRODUCTION

The doctrine of *mens rea* is a central distinguishing feature of criminal justice system in old common law traditions. Yet it is one very controversial principle which suffers from an untold degree of confusion in its meaning. This problem of fluidity in denotation becomes all the more manifest when the courts are faced with the task of determining the guilt or criminal liability of a suspect. Under English criminal law, this hermeneutical problem had been a result of sundry causes. First and foremost, there are two distinct though interconnected levels of meaning attributable to the expression *mens rea*, namely, the narrow and the broad. While the former signifies the specific mental element that is required to be defined and proved in respect of a particular offence, the latter refers to a general principle of criminal responsibility which demands proof of a guilty mind against the accused. In other words, while in the narrow sense, one can talk of the *mens rea* of, for instance, receiving stolen property, or of forgery, or of assault, the use of *mens rea* in the broad sense connotes, until the contrary is proved, the general presumption by the courts, of an accused's criminal intent when considering any offence. This is what is normally called the doctrine or the principle of *mens rea*.[1]

Secondly, in many a jurisdiction, great debates have ensued as to the particular point from which to start calibrating the levels of blameworthiness or culpability of an accused. Is it from the point of view of purpose, knowledge, recklessness or negligence upwards in that order, or can one ever be held strictly liable for an offence committed outside any of the above mental states? There are yet other sundry controversies surrounding the application of *mens rea* which may be implicated in the course of our study.

Be that as it may, Nigerian criminal jurisprudence does not in practice paint a different picture. It seems that the confusion that is attendant to the application or misapplication of *mens rea* in Anglo-Saxon enclaves is transmuted partly, if not wholesale, to Nigeria *via* the colonial process. Thus, in spite of the clear wordings of sections 24 and 25 of the Criminal Code[2] on which the doctrine of *mens rea* can be said to gravitate, there are still conflicting judicial attitudes based on interpretations. Some court and legal practitioners do not even advert their minds to the provisions of these sections and in cases where they do, they merely gloss over the provisions. The reason for this is not far-fetched. For one thing, until very recently, our judges quickly resort to English law in an attempt to

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1 C.O. Okonkwo, Criminal Law in Nigeria, Second Edition, Spectrum Books Ltd., Ibadan, 2002, p. 49.

2 Cap C38 Laws of the Federation of Nigeria 2004.

interpret the provisions of the Code[3], not withstanding the fact that English law and English case law on the subject are not binding on Nigerian courts. For another, Nigerian pioneer practitioners whose legal practice precipitated the early judicial precedents were basically trained in English law.

In the light of the above observations, this paper focuses on the applicability or otherwise of the doctrine of *mens rea* in Nigerian criminal justice system. The study seeks to examine those conditions that make a person's act or omission sufficiently blameworthy to merit the condemnation of criminal conviction. Therefore, this research is not so much concerned with the consideration of the various *mentes reae* of individual offences as with the critical analyses of the general principles by which a guilty mind prior to conviction is deciphered. We shall *inter alia*, be guided by the following questions: What are the implications of *mens rea* to the principle of "no liability without fault"? Has the doctrine of *mens rea* any relevance in the old southern Nigerian in which the provisions of the Criminal Code are applicable particularly? In other words, are the provisions of the Code not after all sufficient for the consideration of the criminal intent of an accused? What are the true tests of criminal responsibility given the provisions of sections 24 and 25 of the Code? In Nigerian criminal justice dispensation, how are the levels of blame attributable to a suspect calculated? Can any relationship exist between motive and principle of *mens rea*? Is there any justification for the creation of offences of strict liability under the Code or any other law? Does the idea of causation relate to the question of *mens rea*? What of the doctrine of vicarious liability? Is it relevant to Nigerian criminal law in relation to the principle of *mens rea*. The scope of our study is restricted to the implications of the Criminal Code with regard to our subject matter. Jurisprudence of the issue will form the base of our discourse.

DEVELOPMENT OF THE DOCTRINE OF *MENS REA*

Mens rea principle is a product of the historical development of criminal law. It may be surprising to learn that criminal law did not always require *mens rea* for liability. Robinson observes that early Germanic tribes imposed liability upon the causing of an injury without regard to culpability".[4] No doubt, this was the practice in those tribes when tort and crime were regarded as one and the same. It seems it was when the distinction between the two emerged, together with the idea of compensating victims as distinct from imposing penalty, that the requirement of *mens rea* took on increasing importance.[5]

The expression *mens rea* is of foreign origin deriving from two Latin words '*mens – méntis*' (mental) and '*res-rei*' (thing). Therefore, *mens rea* literally means "the mental

3 This trend occurs mostly in the consideration of whether the unlawfulness of the act of the accused is such as to vitiate the defence of accident encapsulated in section 24 of the Code. Yet we have in Nigeria a criminal code which is meant to be complete and exhaustive, see Bairamian, J. in *Ogbuagu v. Police* (1953) 20NLR 139 at 141, and same must be applied without any reluctance borne of a knowledge of what the law once was. See Windeyer J. in *Vallance v. R* (1961-62) 35 ALJR 182 at 193.

4 P. H. Robinson, *Mens Rea*, 1999, p.2. Available on http://www.law.uppen.edu/fac/phrobins/mensreaentry.pdf. Accessed on 15/6/10.

5 *Ibid.*

thing".[6] However, Robinson notes that the phrase *mens rea* appears in the Leges Henrici[7] description of perjury – *reum non facit nisi mens rea* (the offence (perjury) is not committed without the mental thing) – which expression was taken from a sermon by St. Augustine concerning that same crime. The sermon is also thought to be the source of the similar maxim in Coke's Third Institutes, the first major study of English Criminal law: "*actus non facit reum nisi mens sit rea*" (the act is not guilty unless the mind is guilty). It indeed seems from the foregoing that the church exercised a no mean influence on the development of this aspect of English law.[8] Nonetheless, replete are views which hold that even though Christian thought on *mens rea* had a dominant influence over its development in English law; similar concepts are found in nearly all criminal laws often without a history of Christian tinge. It appears that the cross-cultural presence of *mens rea*-like concepts provides some evidence that the notion of ethico-legal blame-worthiness expressed by the wide conception of *mens rea* arises from shared human intuitions or sense of justice and would have developed irrespective of the spread of Christian thought.[9] No wonder it is claimed that "the *mens rea* concept originated in England in the early 17th century"[10] based, as it were, "on the idea that it is morally wrong to punish a person for harm done to society innocently and unwittingly.[11] Hence, in order to be guilty, the criminal must have committed his act in a culpable mental state. As soon as this idea was clarified and adopted as a basic principle of criminal law, the legal meaning of *mens rea* continued to evolve.

In English law, the early stages of the development of *mens rea* are illustrated by the decision in *Regina v. Prince.*[12] In this case, the defendant took an under age girl 'out of the possession' of her father, reasonably believing she was over the age of consent. For Lord Bramwell, the fact that the defendant's conduct was generally immoral was sufficient to find that the defendant had the *mens rea* necessary for criminal liability. However, Lord Brett would require that the defendant would at least have intended to do something criminal, not just immoral. But in *Regina v. Faulkner,*[13] a somewhat more demanding requirement is stated. Thus, in the process of stealing rum from the hold of a ship, a sailor named Faulkner accidentally set the ship ablaze destroying it. Building upon

[6] Cf. D.P. Simpson, *Cassell's New Latin-English English-Latin Dictionary*, (Cassell, London, 1962) pp. 368 & 517.

[7] This is a book anonymously written between 1114 and 1118 containing Anglo-Saxon and Norman law. Full title is Leges Henrici Primi. Cf B.A Garner (ed.), *Black's Law Dictionary*, (7th Ed., West Group, Minnesota, 1999) p. 909.

[8] This assertion is for so many reasons. First, the church preached the importance of spiritual values and mental states to a wide audience. Physical misconduct was significant only because it manifested spiritual failure; it was the inner weakness that was the essence of moral wrong. For example, "whoever looketh on a woman to lust after her hath committed adultery with her already in his heart" (Mtt 5: 27-28). Second, clerics were influential in the administration of government and governmental policy, both because they were among the few who could read and write and because of the church's own political power. And third, the church had its own courts for trying the clergy. In these courts, the new offences were developed that put the new ideas of the importance of mental states into criminal law form. (See P. H. Robinson, *Op. cit*, p. 3).

[9] *Ibid.*

[10] (No Author), *Mens Rea*. Available on http://www.mojolaw.com/info/clo45. Accessed on 30/7/10.

[11] *Ibid.*

[12] (1875) L.R.2 C.C.R.154.

[13] Ibid., p.4.

Lord Brett's conception of a more specific and demanding *mens rea*, Lords Fitzgerald and Palles conclude that the *mens rea* requirement means that Faulkner must have at least intended to do something criminal that might reasonably have been expected to have led to the actual harm for which he is charged. For their Lordships, Faulkner ought not be liable for the offence of burning a ship when he intended only to steal rum from it, which conduct in the normal course of things does not lead one to reasonably foresee that a ship will be destroyed.

The above paradigm shift in the notion of *mens rea* smacks of a significant quintessential or qualitative change. Far from the existence of a single *mens rea* requirement, either immoral, or later, criminal intent, for all offences, each offence now has a different *mens rea* requirement. Liability now demands that a person intend to do something that might reasonably be expected to lead to harm of the particular offence charged. No wonder the common law grouped offences according to the type of culpability that the offence required.[14]

Yet in the United States of America (USA), a further development has occurred in the idea of *mens rea*. Wikipedia, the free Encyclopedia notes that prior to the 1960s; the concept of *mens rea* in the USA was a very slippery, vague and confused one.[15] It was however thanks to the American Law Institutes Model Penal Code (MPC)[16] that the *mens rea* concept was further refined. Section 2.02 (1) of the Code requires the proof of culpability "with respect to each material element of the offence". The Code hence inaugurates a further shift from offence analysis to element analysis in such a way that culpability is now required as to each element of an offence. The implication is that the level of culpability required for one element may be different from that for the other of the same offence. This provision of the Code has been held to be comprehensive, and of immense help to the legislatures to reclaim from the courts the authority to define the conditions of criminal liability for an offence.[17] Yet, we observe that by this provision even the courts are saved from the problem of groping in the dark in an attempt to discover the *mens rea* in view of imputation of criminal liability on an offender.

Furthermore, another novelty introduced by the MPC is the fusion of the offence culpability requirement and the defences of mistake. Section 2.04 (1) (a) provides that "mistake is a defence if it negates an offence culpability requirement". Sometimes called

[14] The classification of common law offences includes general intent offences, specific intent offences, and offences of strict liability (Cf P. H. Robinson, *Op. cit.*, p. 5). Specific intent crime is one in which the defendant must not only intend the act charged but also intend to violate law (US v. Birkenstock, C.A. Wis., 823F. 2d 1026, 1028). It is one in which a particular intent is a necessary element of the crime itself. (Russell v. State, Fla. App.373 So. 2d 97, 98). See generally "Mens Rea" in Wikipedia, the free Encyclopedia, 2010. Available on http://en.wikipedia.org/wiki/mensrea. Accessed on 30/7/10. One example under the Criminal Code of an offence of specific intent relates to the offence of murder defined in S.316 of the Code and punished in section 319(1). Where there is absence of proof of specific intent, the court cannot find the accused guilty of murder. See Ogunwumiju, JCA in *Nwokearu v. State* (2010) 15 NWLR (part 1215) 1 at 37.

[15] *Ibid.*

[16] M.R. Dubber, Criminal Law: Model Penal Code (Foundation Press, 2002) pp. 60-80.

[17] P. H. Robinson, *Op. cit.*, pp. 5-6.

the rule of "logical relevance", this provision makes a person's mistake relevant to the determination of criminal liability if the mistake is inconsistent with the existence of an offence culpability requirement. In this connection, Robinson observes that "to say that negligence is required as to the victims age in statutory rape is the same as saying that only a reasonable mistake as to age will provide a mistake defence".[18] Again, "to say that recklessness is required as to 'another person's property' in theft is the same as saying that only a reasonable or a negligent mistake will provide a mistake defence".[19] It may be helpful to note that in contradistinction to this fusion, common law conceptualizes an independent 'law of mistake' which is regarded as supplementing the culpability requirements of theft by intentionally taking someone else's property, yet have a defence if the law of mistake allowed a defence in the situation, such as when the defendant reasonably believed the property was his. Therefore, under the common law framework, offence culpability requirements and the law of mistake governing when a mistake provides a defence are separate and independent doctrines. Besides, in order to circumvent the common law vagueness and uncertainty attendant to the imputation of criminal guilt, the MPC is poignant and exhaustive in defining four levels of culpability, namely, 'purposely', 'knowingly', 'recklessly' and 'negligently'. Ideally, all offences are defined by designating one of these four levels of culpability as to each objective element. Further explications on this and related issues will be made later.

Suffice it to conclude this section by noting that the variegated notion of *mens rea* has developed along with the development of criminal law in various jurisdictions and traditions. But it seems that the role played by the MPC is enormous in spite of the fact that being a mere guide, not all the federating states have adopted the Code. In Nigeria, the English common law practice appears to dictate the tune of the application of what is akin to *mens rea* requirement in criminal adjudicatory process. In what follows, this study will examine in relative details the judicial attitude to the concept of *mens rea* in Nigeria criminal justice system.

THE PRINCIPLE OF *MENS REA* AND NIGERIAN CRIMINAL JURISPRUDENCE

In most if not all legal systems, the doctrine of *mens rea* is encapsulated in the criminal law principle of "no liability without fault". According to this principle, no one should be convicted of a crime unless some measure of subjective fault is attributable to him. Nigerian criminal law, accusatorial as it were, shares in this ethico-legal approach. In *Abeke v. State*[20], *mens rea* was defined simply as a guilty mind. It is the state of mind that the accused person must possess at the time of performing whatever conduct requirements that are stated in the *actus reus*. This could connote a state of mind with which a person acts or of a failure to comply with a standard of conduct or even partly of such a state of mind and partly of such a failure[21]. In relation to the offence of murder, for instance, *mens rea* can be likened to malice aforethought, which has been defined in

[18] Ibid. p.6.
[19] Ibid.
[20] (2007) 9 NWLR (part 1040) 411 at 429-430.
[21] B.E. Ewulum, Applicability of the Doctrine of *Mens Rea* under the Nigeria Criminal Jurisprudence, A PhD Seminar Paper, Faculty of Law, Nnamdi Azikiwe University, Awka, 2010, p. 8.

Ibikunle v. State[22] as a predetermination to commit an act without legal justification or excuse. It is the intentional doing of an unlawful act which was determined upon before it was executed; it is an intent at the time of killing, willfully to act in a callous and wanton disregard of the consequences to human life.

However, under the Criminal Code, although some offences are defined in terms of, for instance, intention and knowledge, the drafting of some other offences is vested with ambiguity in such a manner that it is unclear whether or not the prosecution is expected to prove any particular state of mind against the accused. The domino effect is that the defence may wish to invoke a general doctrine that a mental element is required thus casting the burden of proof on the prosecution. However, this does not derogate from the existence of the *mens rea*-like principle in Southern Nigeria which is the jurisdiction under discussion. Nonetheless, the justice system needs to be examined in the light of its interpretation of the relevant Criminal Code provisions and the inevitable influence on it of the English criminal law. In this discourse, this paper would toe the line of discerning two momentous approaches to the issue. Hence, the English law and the Criminal Code as sources of application of the *mens rea* principle in Nigeria would be discussed one after the other.

THE EFFECT OF ENGLISH LAW ON *MENS REA* NOTION IN NIGERIA

It has been strongly argued that any discussion on *mens rea* should not involve any foreign law particularly now that there is an autochthonous legislation that provides for an idea of a 'guilty mind' in Nigerian criminal justice system. Yet, Okonkwo had, for instance, noted that Nigerian courts have employed the English practice in a number of cases.[23] By virtue of this, English criminal law seems to be a source of our *mens rea* application whether or not it is improper.

Okonkwo observes that in English law, the scope of the principle of *mens rea* differs according to whether a particular crime is a common law offence, or contained in a statute.[24] This differentiation certainly occasions varieties of judicial attitudes. At common law, proof of a guilty mind is a demand before practically every common law offence,[25] which attitude is greeted with irrebuttable presumption. However, where the offence is statutory, the presumption is rebuttable on proof that the wording of the offence or the intention of the legislature excludes it. It is good to note at this juncture, that the common law – statutory categorization of offences under English law does not apply in Nigeria since all offences have been made statutory by the Constitution.[26] The

[22] (2005) 1 NWLR (part 907) 387 at 409-410.
[23] For example *Clegg v. C.O.P.* (1949) 12 W.A.C.A. 479; *Mandilas & Karaberis Ltd v. I.G.P.* (1958) 3 F.S.C. 20. See Okonkwo., *Op. cit.*, p. 67.
[24] Okonkwo, *Op. cit.*, p. 67.
[25] Ibid.
[26] Cf. Section 36 (12) of the Constitution of the Federal Republic of Nigeria 1999 – "Subject as otherwise provided by this constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law..." See now cap C23 Laws of the Federation of Nigeria 2004.

implication is that there is always no irrebuttable presumption of *mens rea* in Nigerian criminal justice system[27].

Be that as it may, the Privy Council in *Sherras v. de Rutzen*, accepted as correct the classic statement of the doctrine of *mens rea*:[28]

...There is a presumption that *mens rea*, or evil intention or knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject matter with which it deals, and both must be considered.

This *mens rea* presumption received a blessing from the House of Lords in *Sweet v. Parsley*.[29] Thus, in cases in which a section of statutes is silent as to *mens rea*, Lord Reid held:

> "In such cases there has for centuries been a presumption that parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of parliament we must read in words appropriate to require *mens rea*."

It therefore goes without saying that once the words or objects of the statute expressly displace the requirement of *mens rea*, then liability is strict as the presumption will not avail the accused. The above presumption was relied on in *Clegg v C.O.P.*[30] in which the accused was charged with willfully delivering a letter to a person other than the person to whom it was addressed. The respondent argued that it was sufficient, in establishing guilt, to show that the act of delivery was willful. It was however held by the court that the word "willfully" must periscope the entire definition of the offence and that although the accused was conscious of the act of delivery, he was unaware that he was delivering to the wrong person, and must therefore be acquitted.

However that may be, it would be pretentious to maintain that the application of *mens rea* doctrine in English law as source of Nigerian criminal law works as clearly as that. The niceties of interpretation to which the application may lead are quite illustrated in some English cases. In *R v. Hilbert*,[31] the interpretation and application of section 55 of the Offences against the Person Act 1861, which defines the offence of taking any unmarried

[27] But see section 2 (4) of the Criminal Code Act which invests chapter 2, 4 and 5 of the Code with extra territorial operations. The Code provisions in those chapters shall therefore apply to all criminal offences whether they are constituted in the Code or under some other statutes unless the language of the provisions expressly or by necessary implication excludes the application of those chapters. By the firs limb of section 24 of the Code, which is contained in chapter 5, the act or omission constituting an offence must be known to be willful for liability to arise. In default, the act becomes an unwilled act for which criminal liability would not arise .Therefore, by virtue of section 24 (first limb), proof of *mens rea* is imputed to every offence unless the wordings of penal provision are such as to exclude it.

[28] (1895) 1 Q. B. 918.

[29] (1970) A.C. 132.

[30] (1949) 12 W.A.C.A. 479.

[31] (1869) L.R.I C.C.R. 184.

girl under the age of 16 out of the possession and against the will of her father, were in issue. Accordingly, the court quashed the conviction of a man who apparently knew that the girl in the case was under age but who did not know that she had a father. But the same court affirmed in *R v. Prince*[32] the conviction of a man who took the girl knowingly out of the possession and against the will of her father, but who reasonably believed her to be over 16. These are not isolated cases. Under section 57 of the same statute, the offence of bigamy is said to be committed by "whosoever, being married, shall marry any other person during the life of the former husband or wife". In *R v. Tolson*,[33] a reasonable belief that her first husband was dead when she married again was a complete defence to the accused against a charge of bigamy. But surprisingly in *R v. Wheat and Stocks*,[34] a reasonable belief that he was divorced from his first wife when he married again was not at all a defence to the accused against the same charge of bigamy. Although *Wheat and Stocks* was later overruled by *R v. Gould*,[35] it seems that the jurisprudence that informed the distinguishing might have perhaps been based on the idea of the existence of common law reasonable presumption of death in *Tolson vis-à-vis* the possibility of verification of divorce in Wheat and Stocks. Be that as it may, we wish to observe that the reasonable mistake in the former is of no less quality than that in the latter. No wonder the overruling in *R v. Gould*. Again, the unsettling nature of the *mens rea* concept was further manifest in the offences connected with trading in liquor. In *Curdy v. Lecocq*,[36] a publican was held guilty of selling liquor to a person who was drunk not knowing the latter's condition. But in *Sherras v. De Rutzen*[37], the conviction was quashed of a publican who sold liquor to a police constable on duty, because he reasonably believed the latter that was in plain clothes, to be off duty.

The above illustrations serve to indicate that the application of *mens rea* doctrine was far from uniform even in matters involving same or similar facts or offences. The differences in interpretation were coterminous with the varieties of the psycho-judicial idiosyncrasies and behaviours of the courts. Even though on deeper and more recondite reflections, it may be possible to reconcile these cases, yet that effort would be spent at the expense of the lucidity and clarity of the law. However, as noted above, the presumption of *mens rea* is a legal not necessarily a moral one. It can never make any sense to invoke it for the purpose of defending one who has committed a crime with the requisite intention knowledge or recklessness, but whose mind is not morally guilty. In our jurisprudence there exists a caesura between law and morality. Besides, in common law tradition, the rule that motive is irrelevant stands tall and firm.[38] In the Privy Council case of *Bank of*

[32] (1875) L.R. 2 C.C.R. 154

[33] (1889) 23 Q.B.D. 168 (by 9 Judges to 6).

[34] (1921) 2 K. B. 119 (5 Judges to Nil). Not followed by the High court of Australia in *Thomas v. R* (1937) 59 C.L.R. 279 (3 Judges to 2). Wheat and Stocks was distinguished by the Court of Criminal Appeal in *R. v. King* (1964) 1 Q.B 285 on the ground that the accused's belief was that the previous marriage was invalid.

[35] (1968) 2 Q.B. 65.

[36] (1884) 13 Q. B. D. 207.

[37] (1895) 1Q.B.918.

[38] Cf the second paragraph of section 24 of the Criminal Code. Where motive is proved, it strengthens the prosecution's case. See Ogbuagu JSC in *Adekunle v. State* (2006) 14NWLR (part 1000) 717 at 747. See also *Nwali v. State* (1991) 3NWLR (part 182)663.

Webber J. had earlier in *R v. Efana*[52] presented this remedy:

...in all enactments, the question whether the absence of *mens rea* or the positive proof of bona fides is an excuse or defence to the acts prohibited is a question of the construction of each particular enactment.

Ordinarily, one might think that the *mens rea* presumption should be dislodged only by clear and express words such as "liability for this offence shall be strict", or "it is immaterial that a person charged with this offence is not shown to have guilty knowledge or intention in respect of it". But this has come not to be immediately so as the courts have often shown to be disposed to invoking strict liability in cases where the enacting language is not clear. It is therefore apt to examine some of the factors that influence the application of *mens rea*.

Foremost among these is the language of the definition of an offence. The problem here hinges on whether or not the verb denoting the forbidden conduct is modified by the addition of such adverbial words as "willfully", "unlawfully" or "knowingly". Generally, once these or similar words are used, the need for the consideration of *mens rea* is automatically imported into the offence. But on the contrary, the problem of *mens rea* becomes veritably difficult. This is because the fact of the non-use of the modifying words does not *ipso facto* eliminate the possibility of *mens rea*. Surely, some unmodified verbs are so strong that they contain within them some idea of *mens rea*. Take for instance the verb "has in his possession" or "possesses" as used in the definition of many a crime in Nigeria. Although this verb is not qualified in relation to the relevant legislative usages, yet the courts seem to be strongly urged to believe that one cannot be said to possess something until one knows that one possesses it and also is aware of its true features[53]. Hence, in *R v Onuoha*[54] the court held that the appellant "does not possess what has been "planted" on his premises without his knowledge". This was also the decision in *R v. Agu*[55] in which the court held that the appellant "does not possess forging materials contained in an unopened parcel of whose contents he was unaware".

There is also the need to check the statutory context of the offence as affecting interpretation for *mens rea*. Certainly, an oft-used method for deciphering whether *mens rea* is or is not an ingredient of an offence is to examine other sections and phrases in the same statute. In *R v. Efana*[56] Webber J., in construing a particular section of the Customs

[52] (1927) 8 N.L.R. 81 at 85.

[53] Possession in criminal law means factual possession. A person cannot be said to be in possession of a thing unless shown by evidence that he had dominion over it and knew that he had it. Willful conduct must therefore be proved . See *Alajawo v. C.O.P* (1971)1UILR (part 1)166 at 170. See also *Etaluku v.N.B.C. Plc* (2004) 15 NWLR(part 896)370 at 394-395, *Anyabunsi v. Ugwunze* (1995) 5NWLR (part 401)255, *Nitel Plc v Rock Onoh Property Co. Ltd*(1995)2NWLR (Part378)473. Where D is charged with possession and evidence indicates that D was merely in constructive possession, D must have willed that unlawful possession in another over whom he has control. In default D is not liable.

[54] (1936) 3 W.A.C.A 88.

[55] (1949) 12 W.A.C.A. 486.

[56] *Supra*.

Ordinance as imposing strict liability, pointed out that it could be contrasted from other sections in the Ordinance which expressly allowed a defence of absence of *mens rea*. This method was also conversely used in *Arabs Transport v. Police*[57] in which Hubbard J. read *mens rea* into a section of the Road Traffic Regulations: "As the law has expressly provided for the liability of a master in certain cases, it is to be presumed that it is excluded in other cases".

There is no doubt that the above approach is based on the canon of statutory interpretation, "*expressio unus est exclusio alteris*" (express mention of one thing is the exclusion of another). However this rule does not have the final words. There is yet another rule, "*noscitur a sociis*" (a thing is known by its allies), according to which if an offence is found "embedded amongst others requiring guilty knowledge[58]", then it ought, in the absence of clear language to the contrary to be read as having similar requirements. After all, it is possible that whereas the draftsman may wish to make the aim of the statute clear in certain sections, he may presume that, in some other sections, the notion of *mens rea* is obvious requiring no further mention. These opposing hermeneutical methodologies seem to be quite germane to the construction of the offence of sedition in section 51 (1) of the Criminal Code:
Any person who –

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;
(b) utters any seditious words;
(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;
(d) imports any seditious publication, unless he has no reason to believe that it is seditious, is guilty of an offence...

It is observed that while paragraphs (a) and (d) respectively contain the expressions, "with a seditious intention" and "unless he has no reason to believe that it is seditious", and which expressions betray the need to consider *mens rea*, paragraphs (b) and (c) do not contain such modifying words. The implication would certainly be that while *expressio unus* approach would consider paragraphs (a) and (d) as requiring *mens rea* to the utter exclusion of paragraphs (b) and (c) to which it would impute strict and absolute liability, the *noscitur a sociis* modality would presume the requirement of *mens rea* notion for all the paragraphs. Be that as it may, it is now firmly established that the fact that other sections of the Act expressly require *mens rea*, for example, because they contain the word "knowingly", is not in itself and by itself sufficient to justify a decision that a section which is silent as to *mens rea* creates an absolute offence".[59]

Furthermore, the gravity of an offence should be considered. Surely, gravity of an offence influences a number of legal acts. It touches on the mode of arrest, touches on the bail processes, relates to sentencing and severity of punishment, and can form a reason for

[57] (1952) 20 N.L.R. 65.

[58] Per Wright J. in *Derbyshire v. Houliston*, 66 L. J. Q.B. at 572.

[59] Per Lord Reid in *Sweet v. Parsley* (1970) A.C. 132 at 149.

new legislation. The gravity of a particular offence can also affect its interpretation as to the necessity of *mens rea*. In *Clegg v. C.O.P.*,[60] Verity C.J. said:

The offence created by the section is one of extreme gravity. A felony is the gravest type of an offence... and does involve, in our own view, a degree of criminality in which *mens rea* is an essential ingredient.

Arguable though it is that every felony must contain the germ of *mens rea* requirement as tended to emanate from Verity's finding, yet it suggests that the courts should be extremely hesitant in holding an accused strictly liable for a serious offence. This point was equally emphasized by Lord Reid in *Sweet v. Parsely*[61] to the effect that in dealing with cases of a truly criminal nature where stigma attaches, *mens rea* should not lightly be dispensed with for in cases of such gravity it cannot be the intention of the legislator to prevent an innocent person from proving his innocence in order that fewer guilty men may escape. In the instant case, Miss Sweet, a tenant of a farm-house, ceased to dwell there and let rooms in it save one which she retained for herself, to sub- tenants, and only visited the house occasionally to collect letters and receive rents. She rarely stayed overnight. She was charged with being concerned in the management of premises used for smoking cannabis which was a serious offence under section 5(b) of the English Dangerous Drugs Act 1965. But the court adjudged her not guilty and held that "publication of any manifestly unjust conviction in these circumstances" tends to injure the body politic by undermining public confidence in the justice of the law and of its enforcement".[62]

The opposite consequence of the above principle is that the doctrine of *mens rea* may be more easily jettisoned if the offence in question is a minor one. The result would be strict liability crimes in which the accused is held liable for an offence even if *mens rea* is absent. This is found in some states of the United States where the vast majority of strict liability crimes are less serious offences consisting of minor infractions and misdemeanours even as they may attract heavy fines or up to one year jail term. Instances of such minor offences include parking violations, speeding unknowingly, selling alcohol to minors, and employing people under the age of fourteen.[63]

However, the fact that the above taxonomic approach is not a straight-jacket is evidenced by the existence of a few strict liability crimes which do qualify as felonies in some jurisdictions. In the United States, statutory rape is one such crime. Another is sexual congress between a minor and a legal adult which can be visited with very heavy penalties such as decades in prison, even if the activity was completely consensual and the adult had every reason to believe that he had been with another legal adult.[64] In Nigeria, the other-than-first-and-second-degree-murder provisions of section 316 of the Criminal Code can be understood as dispensing with *mens rea* which detailed discussion

[60] *Supra*.
[61] *Supra*.
[62] *Sweet v. Parsley* (Supra)
[63] (No Author), Strict Liability. Available on http://www.mojolaw.com/info/cl045. Accessed on 30/7/10.
[64] *Ibid*.

a joint contributor to this paper had undertaken elsewhere[65]. It nonetheless remains to tackle in this discourse the jurisprudential problem of the justification of strict liability principle vis-à-vis culpability.

Finally, the intention of the legislature is yet another factor that can tell of whether or not *mens rea* is implicated in the definition of an offence. In Lecocq, Prince and Amofa where strict liability was inferred from the wording of a statutory offence, it was often stated that such liability was intended to be imposed by the legislature. Yet it is often difficult looking merely at the wordings of the statute to see how the conclusion about the legislature's policy is arrived at. For instance, in *Adjei v. R*,[66] it was implied that it was the policy to make sedition a strict liability offence since it was an offence against the safety of the state. But one would ask: why does the same philosophy not underpin the offence of treason which is a much more serious crime against the safety of the state and yet does require proof of mens rea? Nor, as Okonkwo puts it, "is strict liability to be applied always to misdemeanours against the safety of the state, for a man cannot be guilty of publishing false news likely to cause public fear and alarm, as provided in section 59 of the Criminal Code, without knowing or having reason to believe the statement false."[67]

More still, the Privy Council in Lim Chin Aik's case[68] declared that the gravity of the social evil is not enough to justify the imposition of strict liability. The court must enquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. There must be something which the accused could do to promote observance of the regulations.

Again, it is often maintained that strict liability is intended to be the policy in offences which affect public welfare.[69] However, this is not a rule at least in Nigeria where there is not always consistency of policy about public welfare offences. For instance in chapter 23 of the Code which contains offences against public health, the offences of selling or intending to sell things unfit for food or drink in section 243 (1), and dealing in diseased meat as contained in section 244(1) require proof of guilty knowledge.

From the above study, it peters out that the application of the principle of *mens rea* under English criminal law and, *a fortiori*, Nigerian criminal law as influenced by the former is not pigeonholed into a monolith. Hence, the application is quite complex and does not enjoy any unanimity. Apart from where there is an express wording, the courts have always oscillated their judicial *pendula* from one corner to the other in fixing or not fixing the requirement of *mens rea* in particular criminal cases. It would have been safer in the absence of clear wording to assume that *mens rea* was intended to be presumed as a component of the offence.

[65] I.K.E. Oraegbunam, Death Penalty and Criminal Jurisprudence in Nigerian: A Critical Consideration, LL.M Thesis, Nnamdi Azikiwe University, Awka, Nigeria, 2009, pp.320-335.
[66] (1951) 13 W.A.C.A. 253.
[67] Okonkwo, Op. cit., p. 79
[68] *Supra*.
[69] *Lim Chin Aik v. R.* (1963) A.C. 160.

THE NIGERIAN CRIMINAL CODE AND THE PRINCIPLE OF *MENS REA*

The immediate thrust of this section of the study is to critically examine the relationship between the Criminal Code and the English doctrine of *mens rea*. Are not the relevant provisions of the Code so comprehensive as to obviate any need to allude to the principle of *mens rea* just as section 7 of the Evidence Act[70] has done in the case of the common law doctrine of *res gestae*? The similar question when asked about the Queensland (Australian) code after which the Nigerian Criminal Code was modelled was certainly answered in the affirmative by Sir Samuel Griffith:

...under the criminal law of Queensland as defined in the criminal code, it is never necessary to have recourse to the old doctrine of *mens rea*, the exact meaning of which has been the subject of much discussion. The test now to be applied is whether the prohibited act was or was not done accidentally or independently of the will of the accused person.[71]

This dictum has been cited with approval in a long line of Queensland cases[72] wherein the courts have rejected the suggestion that the doctrine of *mens rea* is part of the criminal law of Queensland.

Is the above practice not also applicable in at least Southern Nigeria today? It is observed that the Nigerian Criminal Code in its Chapter 5 deals comprehensively with the issue of criminal responsibility. Although the Code contains specific instances of the general defences on the grounds of "no liability without fault" (insanity, immaturity, intoxication etc), the most crucial provisions which harbour the statement of the general principle of "no liability without fault" are contained in sections 24 and 25 on which our present discussion would be based. But before analyzing the implications of the provisions on the doctrine of *mens rea*, it may be appropriate to advert to the interpretation that just as the doctrine of *mens rea* extends throughout English criminal law, both to common law and statutory crimes, sections 24 and 25 as part of chapter 5 of the Nigerian Criminal Code apply in relation to any offence against any legislative enactment in Nigeria and to all persons charged with any such offence.[73] It is worthy to note however that the propriety of this extra-territorial 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[74] and recently the Sharia Penal Codes[75] may present veritable antipathy to the extra-

[70] The Section is even wider than the principle of *res gestae*. The section states that "facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places". See section 7 of the Evidence Act, Cap E 14, Laws of the Federation of Nigeria 2004. The principle of *res gestae* is restricted to facts that occurred at the same time and place.

[71] See *Widgee Shire Council v. Bonney* (1907) 4 C.L.R. 977, cited by Okonkwo, *Op.cit.* p. 79.

[72] See for example *Thomas v. McEather* (1920) St. R. Qd. 166 at 175; *Anderson v. Nystrom* (1941) St. R. Qd. 56; *Brimblecombe v. Duncan* (1958) Qd. R. at 19; *Hunt v. Maloney* (1959) Qd. R. 164.

[73] See section 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. See *Ibidapo v. Lufthansa Airlines* (1997) 4NWLR (part 498) 124 at 162; *Board of Customs & Excise v. Barau* (1982) 10 SC 48.

[74] Cap 89, Laws of Northern Nigeria, 1963.

[75] See for example Sharia Penal Code Law, 1999 of Zamfara State.

territorial doctrine. It is reminisced that time was when the Criminal Code was, apart from the creation of particular offences littered in many other statutes, the one major repertoire of criminal regime governing the entire federation. That was surely the time when the extra-territorial principle was created and became federally regnant. Yet it can be argued that the extra-territorial law is extant and has not changed. While the Criminal Code Act is a federal enactment, the Penal Code laws and Sharia Penal Code laws were made by the relevant state Houses of Assembly. Therefore, the spiral or spillover consequences of chapter 5 of the Code is still preserved by section 4 (5) of the 1999 Constitution which states that" if any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void". Besides, the chapter 5 of the criminal code can be said to have covered the field of the entire federation without prejudice to the principle of popular federalism.

Let us now go into the kernel of our discourse with an analysis of the relevant part of section 24. Section 24 of the Criminal Code provides in its first paragraph:

Subject to the express provision of this 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.

It may be apt to note from the onset that the interpretation of this paragraph had been diverse. The key points in issue are formulated in the questions: to what extent is the provision subject to negligent acts or omissions? What is the meaning of will? What characterizes an unwilled act? What does it mean to say that an event has occurred by accident? What is the difference between acts and omission, on the one hand, and on the other between these and events?

In a recent study, Etudaiye observes that the idea of free will is not lacking in Nigerian penal statutes. The notion is directly or indirectly portrayed in the terms 'knowingly', 'negligently', 'willfully', 'intentionally', 'dishonestly', 'voluntarily', and 'fraudulently' amongst a few others.[76] Besides, it seems that the entire concept of responsibility connotes both the will and the intellect. Responsibility is rendered in Latin language as *'rationem reddere'* meaning "to give a rational account of..." One is only responsible or liable for an act or omission when one knowingly and intentionally performs the act or omission. No doubt, the activity of willing or unwilling is quite pivotal in the construction of section 24 even as the meaning of will and willing belongs to an abstract field of philosophical ethics and metaphysics. Fagothey notes that there is a difference between 'not willing' and 'willing not to do something'. In the former, there is no act of the will and therefore no voluntariness. In the latter, there is an act of the will, an act of diligent omission or referral, and this is quite voluntary.[77] This is true as voluntariness

[76] M. A. Etudaiye, "Free Will. The Farcical Jurisprudence of Criminal Justice in Nigeria", Akungba Law Journal (Vol. 1, No. 3, January 2009), p. 96.

[77] A. Fagothey, Right and Reason: Ethics in Theory and Practice (C.V. Mosby Company, U.S.A, 1985), p. 34.

derives from the Latin word '*voluntas*' which means "will". Hence, voluntariness can be positive or negative according as one wills to do something or omits to do some thing, both of which kinds are different from a state of non-voluntariness, which is the absence of willing.

Section 24 within the tenets of the provision exculpates one from criminal responsibility only when the act or the omission occurs "independently of one's exercise of one's will" and not necessarily against one's will. Thus, this expression includes both "non-voluntary" and "involuntary". According to the implication of the language of the section, no act or omission which is unintentional can be criminal unless it is as a result of negligence and wherein the Code in spite of the negligence still creates that act or omission an offence. Okonkwo maintains that although section 24 is expressly subjected to provision relating to negligence only within the Code, yet by ordinary rules of statutory interpretation, a statute coming later in time and imposing liability for negligence will clearly exclude the operation of section 24 by necessary implication.[78] Section 24 therefore negatives liability in those cases where the act of the accused was involuntary and unconscious and was not due to insanity (automatism). Again, since the section is expressly made subject to the express provisions of the Code relating to negligent acts or omission, it implies that generally speaking an act or omission which is merely negligent is an act or omission independent of the exercise of the will. The result is that section 24 generally relieves of criminal liability for negligent acts unless the Code clothes the act or omission with liability despite the negligence. Okonkwo notes that the use of the words 'negligent', 'negligence' or 'negligently' is not required in order to constitute a provision an express provision relating to negligent acts and omission. It is sufficient to fairly gather the idea from the terms of a section.[79] However, the reservation as to negligent acts does not exclude a defence of 'unconsciousness' or involuntariness' under section 24 in respect of prosecutions for crimes of negligence, because a successful plea of this defence will be evidence that the accused was not negligent.[80] It is good to observe that the section also provides a general presumption against vicarious liability, as the act or omission of someone else is usually independent of the exercise of one's own will.

It is further submitted that the word 'will' in the first paragraph of section 24 in respect of the act or omission and its surrounding circumstances includes not only intention to do the act or make the omission but also awareness of all the material circumstances.[81] This is particularly trite as no man can be said to be fully exercising his will as to a particular element of an offence unless he is aware of it. It seems that if the draftsman had intended to refer only to intentionality, he would have simply used the word "unintentionally" instead of "independently of the exercise of will".

[78] Okonkwo, *Op. cit.*, p. 81.
[79] *Ibid.*, pp. 81-82.
[80] *Ibid.*, p. 82.
[81] *Ibid.*, p. 83.

Apart from the issue of whether or not one exercised one's will before an act or omission as contained in the first limb of the first paragraph of section 24, the result or consequence of an event as alluded to in the second limb is also an issue for discussion. Section 24 has two limbs that apply to exclude criminal liability altogether and are not dependent one on the other. They apply in different situations and the test to determine liability for an act or omission in the first limb differ from the test to determine liability or otherwise for the consequences of the act under the second limb; and here lies the confusion which progressively assailed Nigerian courts till the present day. Reported decisions of the Supreme Court and Court of Appeal have continuously depicted this predisposition. Nigerian courts have consistently and variously propounded the theory that a willed, deliberate and intentional act negatives the defence of accident, that for an event to qualify as an accident that such every must be the result of an unwilled act, that the section does not deal with an act but an event, that the act leading to the accident must be a lawful act done in a lawful manner[82].

We submit with profound respect and humility that these propositions are wrong and do not represent the correct legal position. That the act of D is a willed, deliberate and intentional act is relevant in negativing the first limb of section 24 where the substance of the charge focuses on D's act. The effect is that the act did not occur independently of the exercise of D's will. But where the substance of the charge against D focuses on the consequence that eventuated on D's act, whether willed or unwilled, a different consideration applies. The consideration of the first limb of section 24 abates. The second limb comes into focus immediately. If though D willed the initiating act but the consequence that eventuated was neither subjectively intended nor subjectively foreseen nor objectively foreseeable, then that consequence amounts to an accidental event within the meaning of section 24 of the Criminal Code[83]. The event will not cease to be an accidental event merely because the act done by D was willed and deliberate. No! By no means! *Nequaquam*! If the consequence or outcome of the act would at one and the same time be a surprise to the doer and itself a surprising thing, then such outcome qualifies as an accidental event for which the second limb of section 24 operates to absolve the doer

[82] See cases such as *Thomas v. State* (1994) 4 NWLR (part 337) 129 (a decision of the Supreme Court which blazed this ugly trail); *Adekunle v. State* (2006) 14NWLR (part 1000) 717; *Uwaghoe v. State* (2008) 12 NWLR (part 1102) 621; *Uwaekweghinya v. State* (2005) 9 NWLR (part 930) 227; *Nwokoro v. State* (2010) 15 NWLR (part 1215) 1. In Queensland, it is settled law that lawfulness or unlawfulness of an original act is not a criterion of criminal responsibility for its accidental result. See Philip. J. in *R v. Martyr* (1962) Qd.R.398; *R v. Callaghan* (1942) St.R.Qd 40 at 50; *Timbu Kolian v. R* (1968) 119 C.L.R.47; *R v.Tralka* (1965) Q.d.R225 at 232. Lawfulness or unlawfulness of the original act does not deprive D of the benefit of section 24. This is also the position under the Nigerian Criminal Code operating in Southern Nigeria. Under the Penal Code operating in the northern part of Nigeria, section 48 of the Penal Code requires that the act leading to the accident must be a lawful act done in a lawful manner by lawful means. See *Maiyaki v. State* (2008)15 NWLR (part 109)173.

[83] See the correct interpretation of the section in the majority decision of the Court of Appeal (Enugu division) in *Umoru v. State* 1990) 3NWLR(part 136) 363 and the decision of the same court in *Nnamah v. State* (2005) 9NWLR (part 929) 147. See Stephens Digest of Criminal Law, 9th Ed., p.260. See also Oputa JSC in *Adelumola v. State* (1998)1 NWLR (part 73) 683 at 692-693. But accident is ruled out where D subjectively foresees an event which no reasonable man would have foreseen. See Philip J. in *R v. Knutsen* (1963) Qd. R 157at 166.

of criminal liability[84]. Therefore, the consideration of whether the outcome of an act is accidental or not is two pronged. It is approached from a subjective and objective standpoint. The consideration, like Janus of ancient Greek Mythology, is two faced. It faces both inwards and outwards[85]. Where the results of the consideration reveal that D did not intend the consequence and did not foresee it, and it is such that a reasonable man would also not have foreseen the same, then D is entitled to an acquittal.

Be that as it may, the question of determining whether or not an act or omission is accidental pivots around the events of a man's act or omissions. The 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" [86]. In *Agbo v. State*[87], accident was seen as "an event without apparent cause, unexpected, unforeseen course of events, unintentional act, chance, fortune". Yet, these definitions present some difficulty. Does accident mean an event that is unforeseeable (subjective test), or unforeseeable (objective test), or indirect? At any event, it seems the Code refers to "accidental events of willed acts".[88] The implication is that even where an act or omission is intentional, there will be no liability under the section for any accidental event of that act if for example, according to Okonkwo, X having lit a cigarette deliberately throws the match away and, through no fault of his, the smouldering match sets alight a hidden piece of paper and starts a great fire.[89]

The above picture relates to accidental events of lawful acts such as lighting a cigarette. But can one also plead section 24 as a defence to accidental events of unlawful acts? For example, if X fires a gun at Y (an unlawful act), misses and hits Z, who unknown to anybody was hiding behind a bush, is X liable for the accidental injuries to Z? In our own view, section 24 does not discriminate between lawful and unlawful acts. Hence, unlawfulness of an act is immaterial to the question of liability for its accidental result. It appears that if the draftsman had intended to exclude unlawful acts from the circumspection or coverage of the subject matter, he would have done so in clear terms. Besides, a long line of decided cases[90] are quite indicative of this rule. Therefore, generally there is no doctrine of transferred intent under the Code[91]. It follows that when anyone does an act, no matter whether it is lawful or unlawful, and he is prosecuted for an event of that act, the only question for consideration and determination is whether the event did in fact occur by accident. This nonetheless does not preclude the fact that in the second scenario above, X would be guilty of an attempted offence against Y.

[84] See Kitto J. in *Vallence v. Queen* (1961) 108 C.L.R.56 where he construed section 13(1) of the Tasmanian Criminal Code which exempts D from liability for an "event which occurs by chance". The expression" by chance" was held to be equivalent to "by accident" in *Timbu Kolian v. R* (1968) 119 C.L.R 47at 51, per Barwick C.J.

[85] *Ibid* at 65.

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

[87] (2004)7 NWLR (pt 837) 546, 560.

[88] *Ibid*. p. 81.

[89] *Ibid*., p. 82.

[90] *R. v. Martyr Supra*; *Timbu Kolian v. The Queen Supra*; *R. v. Tralka Supra*.

[91] Save for the definition of murder in section 316 in which there is a specific incorporation of that doctrine.

Section 25 is yet another provision of the code that can be considered vis-à-vis the principle of *mens rea*. The section provides:

A person who does or omits to do an act under an honest and reasonable, but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

By pleading the mistake of fact, the accused is simply claiming that he was not aware of the facts bringing him within the definition of an offence, and consequently, that he thought otherwise than by the real state of things. At common law, the operation of mistake is excluded once the act done was unlawful. Section 25, however, does not seem to habour such exclusion. Be that as it may, for this defence to be available to the accused, the mistake must be that of fact and not that of law since according to section 22 of the Code, ignorance of the law is not an excuse. Again, the mistake must not only be honest but also reasonable[92] and which test is subjective. However, even if the mistake is honest, reasonable and is that of fact and not of law, liability would still be to no greater extent than if the mistaken fact were true. 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.

Nonetheless, it may be appropriate to note that the definition of an offence may exclude the defence of mistake. Thus, section 233 of the Criminal Code expressly provides that in the case of any sexual offence committed against a girl under a specific age, it is generally immaterial that the accused did not know that she was under that age, or believed that she was above it.

If the above analyses are anything to go by, then sections 24 and 25 *inter alia* perform a function akin to that of the principle of *mens rea*. For even if the verb with which an offence is created is unqualified or unmodified as to expressly implicate the requirement of criminal intent, still the *prima facie* presumption is that the prosecution must establish *mens rea* unless the definition of the offence dispenses with it. Therefore, section 24 provides a presumption against strict liability. But a further problem may arise: will the negligence of an accused forestall him from relying on section 24? It seems that the position would be the effect of the combined reading and application of sections 24 and 25 to a particular circumstance. Certainly, sections 24 and 25 together with the entire provisions of chapter 5 of the Code must be read into the definition of every offence unless excluded by that definition. If the definition of the offence contains some qualifying expressions such as 'wilfully', 'knowingly', with intent', and so on, then section 24 would only have a surplusage effect. If there is no such effect then whether the definition of the offence contains any qualifying word or not, *prima facie*, section 24, section 25, or any other sections apply. If in such a case, the act of the accused was a purely unconscious act, then no question of negligence arises. If his act was conscious but

[92] See *Atguokhan v. State* (2004) 7NWLR, (pt 873) 584. But see also the critique of the decision in this case in I.K.E. Oraegbunam & C.B. Udezo, "Criminal Justice, Spiritualism and Judicial Attitudes in Nigeria", *2 Nigerian Journal of African Law*, 2008, pp. 65-66.

negligent, then in spite of being an act independent of the exercise of his will, it may also be an act done under a mistaken belief in the existence of a state of things. And if it is, then the mistake must have been reasonable under the rules in section 25. If the accused's belief was not reasonable, it was negligent and the application of section 24 is precluded because section 25 is an express provision of the Code relating to negligent acts or omissions. Okonkwo notes that in a case where a man sells a newspaper containing a seditious article not knowing of the article or not knowing that it was seditious, the court at first presumes under section 24 that the act of selling a seditious newspaper was an act independent of the exercise of his will. If however the prosecution can show that the man's ignorance was unreasonable, which would be a question of fact in the circumstances, and that his ignorance constitutes a mistaken belief in the state of things for the purpose of section 25, then section 24 is excluded by section 25.[93] Thus, for Okonkwo, while unreasonableness connotes quite a high degree of negligence, a mistake may be careless and yet reasonable in all the circumstances.[94] This does not remove the possibility of exclusion of sections 24 and 25 by the definition of an offence by imposing strict liability in spite of the fact that the accused made a reasonable mistake.

However that may be, one cannot do justice to the interpretation of Section 24 without adverting to the difficulty posed by the second paragraph of the section which states:

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.

There is no doubt that a shallow reading of this provision would dispense with the fundamental presumption of the requirement of criminal intent which interpretation would be directly opposed to all that the first paragraph stands for, namely, importation of the requirement of awareness into all elements of an offence. Okonkwo therefore pontificates that "the second paragraph enacts merely that where a particular intended consequence is not mentioned as part of the definition of the offence, then it is not to be taken into account".[95] Hence, where an offence is defined only in terms of knowledge, for instance, the offence of knowingly giving false testimony in a judicial proceeding which expression defines perjury under section 117 of the Code, there is no need for the prosecution to prove what the accused intended to achieve by knowingly making such a statement. It appears that all that the paragraph intends to provide for is the fact of irrelevance of motive in the consideration of whether or not one has committed a crime. This is further made clearer in the last sentence of section 24: "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". Nonetheless, we make bold to hold that the irrelevance of motive in determining criminal liability does not obviate the possibility of the role of motive in influencing trial. For if the accused admits to having a motive consistent with the element of foresight and desire, this will add to the level of probability that the actual outcome was intended and thus makes the

[93] Okonkwo, *Op. cit.*, p. 85.
[94] *Ibid.*
[95] *Ibid.*

prosecution's case more credible. But if there is clear evidence that the accused had a different motive, this may decrease the probability that he or she desired the actual outcome and hence may become subjective evidence that the accused did not intend, but was reckless or willfully blind.[96] Be that as it may, motive cannot in any way function as a defence. If motive has any relevance, this may be addressed in the *allocutus* or the sentencing part of the trial when the court considers what punishment, if any, is appropriate. Therefore, to hold that the second paragraph of section 24 excludes any presumption akin to the doctrine of *mens rea* is to hold, *inter alia*, that the general principle of no liability without fault (*nulla poena sine culpa*) is not applicable in Nigeria criminal justice system.

Furthermore, it may be apt to enquire into the relationship between causation and the question of liability as implicated in the first sentence of the second paragraph of Section 24: "unless the intention to cause a particular result is expressly declared to be..." There is no doubt that in some offences under the Code (mostly homicide), it is the result of a man's conduct that constitutes the *actus reus* of the offence rather than the conduct *per se*. Hence, to what extent does the causative link between the act and the result go to influence liability? We agree with Okonkwo that the effect of causation or a cause only goes to the *actus reus* of an offence. For even if the accused has caused the *actus reus*, it still remains for the courts to determine whether or not he is liable for it.[97] Therefore, the questions of causation and liability are essentially different from each other. While the former involves an objective process of examining the circumstances of the case, the latter is usually a subjective process of examining the mind of the accused as well as the defences he may raise[98]. Thus, the public hangman causes death, but he is not liable for it because he has a defence[99]. Again, a man may cause a consequence, and yet not be liable for it if it is "an event occurring by accident".

CONCLUSION AND RECOMMENDATIONS

The presumption of the requirement of guilty intent cuts across the length and breadth of the process of criminal justice system in common law cultures if not beyond. We have however limited ourselves in this discussion to the applicability or otherwise of the principle in Nigerian jurisprudence. Relevant fundamental question are raised as guides and quite a number of discoveries result from the study. First and foremost, the principle of no liability without fault has been confused in Nigerian law by the court's introduction of the complex English doctrine of *mens rea* and by their failure to consider the relevant code provisions. Although the *mens rea* notion also encapsulates the no-fault-no-liability principle, yet the relevant provisions of the Code introduced nuances particularly applicable to Nigerian criminal justice process. Surely, the failure to adhere to this peculiarity had led to court decisions that might have otherwise been different if the

[96] "Relevance of Motive" in Wikipedia, the free Encyclopedia, 2010, available on http://en.wikipedia.org/wiki/mensrea. Accessed on 30/7/10.
[97] Okonkwo, *Op. cit.*, p.48.
[98] Criminal intent may be inferred from the commission of similar offences. See *Amachree v Nigerian Army* (2003) 3NWLR, (part 807) 262, or from the nature of the object used in the commission of the crime, see *Uwagboe v State* (2007) 6 NWLR (pt 1031) 610).
[99] See section 254 of the Code. The killing is authorized by law, section 306 of the Code. Consequently not being unlawful, it is not such *actus reus* as is forbidden by Criminal Law.

correct law had been applied. Hence, the English application of the doctrine of *mens rea* and the cases based on it are irrelevant today in southern Nigeria where the Criminal Code and its domestication by the states are applicable. The true tests of criminal responsibility are to be sourced from chapter 5 of the Code.

Secondly, it is also found that the provisions of chapter 5 particularly sections 24 and 25, *prima facie*, apply to the definition of every offence by virtue of the extra-territorial doctrine. However, this presumption is by no means irrebutable in Nigeria. Any provision contained in chapter 5 can be excluded and strict liability (which includes vicarious liability) imposed by a specific section in the Code. This is in accordance with the principle of "*specialia generalibus derogat*" (special provision derogates from the general provision). The entirety of the chapter or any part thereof can also be circumvented by the same enacting authority *via* a subsequent statute which either expressly or by necessary implication excludes it in line with another principle: "*leges posteriores contrarias abrogant*" (subsequent laws repeal prior conflicting ones).

Be that as it may, in the interest of the right administration of criminal justice for the development of any nation like Nigeria, we make the following suggestions towards the reform of criminal justice system and administration. Firstly, there is an urgent need for real indigenization of Nigerian criminal laws. This is all the more necessary and desirable as Nigeria has long since attained independence. It can be reminisced that the present Criminal Code on which our study of criminal law is based was enacted in 1904 after the Tasmanian model and there has not been any substantial amendment. The review of our criminal laws in line with Nigerian autochthonous needs and sensibilities is a serious demand before the legislatures. For instance, to the Nigerian mind, it makes no sense to single out tame pigeon from among other tame animals and regard it as not capable of being stolen[100]. Surely, the worth of pigeon in Australia (Queensland) may not be the same in Nigeria; yet the law is that way copied wholesale for Nigeria. Thus, many of the provisions in the Code affecting the principle of no liability without fault may not be immune to similar uncritical and uncensored importation.

Similarly, there should be adequate indigenization of legal education, training and practice in Nigeria. Surely, the legal profession is constituted by both the bar and the bench. Most members of the bench were members of the bar. The type of legal education received by these influence the administration of justice. There is no doubt that the confusion created in the application of the English doctrine of *mens rea* into the system in spite of the code provisions is partly as a result of cargo-cult mentality and the exotic English legal training received by our pioneer legal practitioners. Hence the legal training in Nigeria today has to be structured in such a way that the trainees and practitioners alike should learn to appreciate the provisions of the local statutes on a matter. This does not however jettison the importance of fruits of cross-cultural studies like the orchestrated emphasis on clinical legal education today. Certainly, every good thing diffuses itself. Whatever is good in other jurisdictions should be adopted, of course, *via* a due process; but that should not uncritically and *prima facie* displace what we have. It seems voyage

[100] See section 382 of the Code.

to other jurisdictions would be undertaken only when there is no local enactment on a subject matter.

Moreover, there is a necessity for proper law making. It cannot be overstated that some of the Nigerian legislators are not diligent in their task of making laws. Offences should be clearly defined[101] setting out the elements, and which effort should be a result of proper parliamentary process and procedure. This study suggests also the abolition of strict liability in the definition of every offence in Nigeria. That also goes for vicarious liability for according to Niki Tobi (as he then was), "criminal responsibility is personal and cannot be transferred"[102]. No one ought to be held guilty of any offence, minor or major, of which he had no intention to commit. This is in accord with the provisions of section 24 of the Code.

Adequate law reporting is also indispensable. No justice system based on *stare decisis* can thrive without proper law reporting. It is indeed improper or insufficient law reporting that takes some practitioners to other jurisdictions and eventually leads to importation of foreign concepts and principles into Nigerian justice system. At times, even the available law reports are not affordable. There is therefore the urgent need for the government to either subsidize or fund the production of law reports to enable practitioners access the correct and current position of the law.

Finally, criminal justice is not to be toyed with. The crime rate in any polity influences its developmental indices. It follows that genuine administration of criminal justice is a *sine qua non*. But such administration will be adequate if only guilt is correctly deciphered and found. It is only then that commensurate sentence and punishment will inure on the guilt deriving from the commission of a crime. It is also only then that the deterrent and other values of punishment will manifest.

[101] For example, such qualifying expressions in England like 'direct intention', 'oblique intention', 'knowingly', 'recklessly', 'negligently', or in United States, 'purposefully', 'knowingly', 'recklessly', 'negligently', etc are properly utilized and the meaning adequately set out in the definition of offences thereby eliminating all ambiguities (Cf. E.G. Scott, *Mens Rea: The Mental Element of Criminal Law*, 2009. Available on http://www.associatedcontent.com/article/1886858/ mens_rea_the_mental_element-of-_criminal.html? Cat =17. Accessed on 30/7/10; See also Wikipedia, the free Encyclopedias cited above.

[102] *A.C.B. v. Okonkwo* (1997) 1 N.W.L.R., (part. 480) 196.