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MURDER AS A CAPITAL OFFENCE: A CRITIQUE OF SECTION 316 OF THE CRIMINAL CODE*

1. Introduction

Murder is a capital offence under the Criminal Code[1] and the Criminal Code Laws of all States in Southern Nigeria. However, this does not mean that it is only in these legislations that the unlawful killing of a human being attracts the death penalty in Nigeria. Certainly, unlawful killing in circumstances amounting to murder under the code also constitutes capital offences under various penal laws operating in Northern Nigeria. Yet, in those other laws, the term "murder" is not used, notwithstanding the fact that the elements of those other offences may be coterminous with those of murder. Murder can therefore be said to be a different capital offence from them. This paper seeks to critically examine the Criminal Code provisions on murder with a view to limiting the circumstances under which the offence can be committed. This is the result of our observation that some subsections of section 316 should not appropriately constitute murder and consequently should not attract the death penalty. This paper finally recommends a legislative review of section 316 of the Code.

2. A Critical Analysis

Before indulging in the exegesis of the Criminal Code provisions on murder, it may be *apropos* to distinguish murder from manslaughter. Both murder and manslaughter are species of the genus, unlawful killing[2]. They constitute very serious homicidal offences under the Criminal Code[3]. By section 315 of the Code, any person who unlawfully kills another is guilty of an offence which is either murder or manslaughter according to the circumstances of the case. The effect of this provision is that the circumstance in which an unlawful killing is executed is the determining factor whether such unlawful killing is murder or manslaughter. It therefore constitutes a crucial and fundamental criterion for the ascription of criminal liability either for murder or manslaughter[4].

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1 Cap C 38, Laws of the Federation of Nigeria, 2004.

2 By section 306 of the Criminal Code, the killing of a human being is unlawful unless it is authorized or justified or excused by law. Where the killing is lawful, no offence is committed and thus no criminal liability attaches.

3 Homicidal offences involve the killing of a human being. They include infanticide (section 327A), aiding suicide (section 321), and concealment of birth (section 329). Killing of an unborn child which is an offence under section 328 is not homicidal. In law, a person becomes a human being capable of being killed in circumstances shown in section 307. The child killed in section 328 was not born alive and the killing would not therefore constitute a homicidal offence.

4 Section 317 of the Code underscores this fact. The Code makes it clear in that provision that any person who unlawfully kills another in circumstances as not to constitute murder is guilty of manslaughter.

Those circumstances are explicit in the Code. They were designated with sufficient exactitude a particularity and are six in number. Section 316 deals with those circumstances. Any unlaw killing would therefore constitute the offence of murder in those circumstances. We shall so delineate and discuss them. To succeed in a charge of murder, the prosecution must prove t following ingredients beyond reasonable doubt:

a. the death of the deceased,
b. the act or omission of the accused which caused the death, and
c. that the act or omission of the accused was intentional with knowledge that death or grievo bodily harm was its probable consequence.[5]

Any unlawful killing which occurs outside the circumstances designated for murder is by t provisions of section 317, manslaughter. It must be noted that whereas murder as a specie unlawful killing, is denoted in six circumstances, which have been enacted with sufficient clari particularity and exactitude in section 316 of the Code, the definition of manslaughter is vague a imprecise. From the provisions of section 317 of the Code, manslaughter is a remnant, a residuu The circumstances of an unlawful killing, as it were, are subjected to a filtration or distillati exercise. Those circumstances that constitute murder are distilled and separated from those falli outside of it. Those falling outside it are not subjected to any further filtration exercise based on t existence of any known parameters to sufficiently and particularly identify and designate the They are considered as a residue and consequently branded 'manslaughter'. The definition manslaughter is thus expressed in the negative.

Murder is defined in section 316 of the Criminal Code thus:

> Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:
> (1) If the offender intends to cause the death of the person killed, or that of some other person;
> (2) If the offender intends to do to the person killed or to some other person some grievous harm;
> (3) If death is caused by means of an act done in prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
> (4) If the offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence;

5 See *Chukwu v State* (2007) 13 NWLR (Part 1052) 430; *Nkebisi v State* (2010) 5 NWLR (Part 1188) 471; *Ndukwe v St* (2009)7 NWLR (Part 1139) 43; *Musa v State* (2009) 11NWLR (Part 1045) 202; *Isah v State* (2007) 12 NWLR (Part 1049) 5 *Jua v State* (2010) 4NWLR(Part 1184) 217; *Uwagboe v State* (2007) 6NWLR (Part 1031) 606; *Mohammed v State*(2007) NWLR (Part 1050) 186; *Ubani v State* (2003) 18 NWLR (Part 851) 224; *Ogba v State* (1992) NWLR (Part 222)164.

(5) If death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid;
(6) If death is caused by willfully stopping the breath of any person for either of such purposes;
is guilty of murder.
In the second case it is immaterial that the offender did not intend to hurt the particular person who is killed.
In the third case it is immaterial that the offender did not intend to hurt any person.
In the last three cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

While section 316 of the Code defines murder, it is section 319 of the Code that creates murder as an offence. Under the Code, for murder to be committed, D *inter alia*, must either intend to kill the deceased or to cause him some grievous bodily harm[6]. The intent need not relate to the particular person who is killed. If D intended to kill X or to do X some grievous bodily harm and he ends up doing grievous bodily harm to Y, who dies in consequence, that intent on his part will automatically be transferred to Y and D would be guilty of murder[7]. It must be pointed out that whereas intent to kill or to cause grievous bodily harm which results in death would constitute murder in criminal law, where the charge against D is merely an attempt to commit murder, the prosecution must prove intent to kill. Intent to cause grievous bodily harm would not sustain a charge of attempted murder[8].

A careful look at the entirety of section 316 would show that apart from subsection (1), all other subsections exclude the defence enacted in section 24 of the Code. Thus, in the relevant circumstances, it is immaterial that the offender did not intend to hurt the particular person, who is killed, or to hurt any person or to cause death[9]. Under the Code, section 316 is quite exhaustive of situations in which one can be said to have committed murder and outside of which one may be guilty of other homicidal offences or not guilty at all even when death has occurred.

6 For the meaning of 'grievous harm', see section 1 of the Code. The definition of murder in section 316(1) & (2) is such as to specifically incorporate the doctrine of transferred malice or intent. Generally, the Code leans against the doctrine of transferred malice except in cases where the doctrine is expressly incorporated. The definition of murder affords an apt example of such a case in that regard. It is immaterial that D who is charged with the murder of Y neither intended to kill him nor to do him some grievous bodily harm from which death resulted, provided D had any of those intents with respect to some other person.

7 *Nungu v R* (1953) 14 W.A.C.A 379.

8 See section 320 of the Code.

9 See the proviso to section 316. Involuntary manslaughter covers cases of unlawful killing in consequence of negligence ,see *Akerele v R*.(1941)7 W.A.C.A.56, and cases where D causes death by doing an unlawful and dangerous act which involves a risk of harm and in circumstances that are such as to exclude the defence encapsulated in section 24 of the Code. See section 325 of the Code. Voluntary manslaughter covers cases of killing on provocation. See section 318 of the Code. Provocation itself is defined in section 283 of the Code. Both sections 283 and 318 must be read together, see *Chukwu Obaji v State*(1965)1All N.L.R.269, as both give a comprehensive meaning of the term. Resort to common law to supplement the meaning of killing on provocation as exemplified in some earlier cases is now unnecessary.

Thus, murder is distinct from other forms of unlawful killing as manslaughter (voluntary and involuntary), infanticide[10], aiding suicide[11], concealment of birth[12], and generally from cases of lawful killing as killing in execution of sentence[13], killing in self-defence[14], killing in defence of dwelling houses[15], causing death by misadventure, causing death in the course of lawful arrest[16], preventing escape or rescue after arrest[17], suppression of riot[18], and so on. Under the Criminal Code, murder is a capital offence by virtue of section 319 of the Code. It is punishable with the sentence of death. This is also the penalty stipulated in the relevant sections of the Criminal Code Laws of various states in Southern Nigeria.

Scarcely can anyone dispute the seriousness or heinousness of murder. But it may be helpful to ask the pertinent question: in what does murder consist? The Black's Law Dictionary defines murder as "the killing of a human being with malice aforethought".[19] The Dictionary further notes that at common law, the crime of murder was not subdivided, but came subsequently to be classified according to nature and degree by some statutes. Hence, there came to be three degrees of murder. The first degree murder is that which is willful, deliberate, or premeditated, or that which is committed in the course of another serious felony often limited to rape, kidnapping, robbery, burglary or arson. All murder perpetrated by poisoning or by lying in wait is also considered first degree murder.

10 See section 327[4]. This is a specie of unlawful killing where D caused the death of her child being a child under twelve months but at the time of doing the act or making the omission that caused death, D's mind was affected either as a result of her not having fully recovered from the effect of child birth, or as a result of the effect of lactation consequent upon the birth of the child. The circumstances of the unlawful killing clearly depict the circumstances for murder. If section 327A had not been enacted, D would have been guilty of murder. But because of certain circumstances surrounding the killing, the law does not view it as murder. It views it as if D was guilty of manslaughter. But before the provision can apply, D must be a person of the feminine gender. It follows that infanticide cannot be committed by a man. If a man causes the death of his child, being a child under twelve months, in circumstances falling under section 316 of the Code, the man is guilty of murder. It is also impossible for a man to suffer from the effects depicted in the provision as the cause of the unlawful killing, because a man cannot himself give birth to a child. D must also have killed her own biological child; not an adopted child. Further, the child must be under twelve months and the unlawful killing of the child must proceed from the effects depicted in the provision. If any of these circumstances that would constitute the unlawful killing, infanticide, is absent, D would be guilty of murder. Killing an unborn child is not a homicidal offence because the child was not born alive and as such not capable of being killed. See section 307 of the Code.

11 See section 326 (3) of the Code.

12 See section 329 of the Code. But to constitute a homicidal offence, the child must have been born alive and then died. If the child died before its birth or at its birth in circumstances showing that it did not completely proceed in a living state from the body of its mother, then it is not a human being under the Code and *a fortiori*, cannot be killed. See again, section 307. But to conceal its birth is nevertheless an offence whether it was born alive or not. However, if it was not born alive, it cannot be said that D concealed the birth of a human being.

13 See section 254 of the Code.

14 See sections 286, 287 and 288 of the Code.

15 See section 282 of the Code. See also *R v Mbui Ebi(1936)3W.A.C.A.36*.

16 See section 271 of the Code. But here D must be a peace officer or police officer or a third party assisting them. For the meaning of peace officer and police officer, see section 1 of the Code.

17 See section 273 of the Code. D cannot use force which is intended or is likely to cause death or grievous bodily harm where the offence committed by the person who has been lawfully arrested and who D seeks to prevent his escape or rescue, is such that the offender can only be arrested with a warrant. Offences in respect of which an offender can only be arrested with a warrant are offences which are not felonies. They are minor offences. The fact that an offence falls within the definition of a felony imports the idea that an offender may be arrested without a warrant. See section 5 of the Code. For the meaning of grievous harm, see section 1 of the Code.

18 See section 276-280 of the Code. These sections do not say that killing in the course of suppressing a riot is immediately excusable. Whether it is or is not depends on the danger presented and the use of force reasonably proportioned to overcome it.

19 B. A. Garner (ed.), *Black's Law Dictionary*, 7th Edition, West Group, Minnesota, 1999, 1038.

The second degree murder is that which is not aggravated by any of the circumstances of first degree murder, that is to say, the type which does not result from willful, deliberate and premeditated killing. While a good number of statutes classify all murders in the above two degrees, a few statutes have added to their murder provisions the third degree which consists in the wrong that led to death of a person without of course amounting to manslaughter, which is quite a different offence. As a matter of fact, third degree murder, which concept is not clearly understood, does not constitute murder at common law.[20]

Murder has also been classified as "felony murder", otherwise called "constructive murder", which occurs during the commission of a felony, or as a "depraved-heart murder", which is one resulting from an act so careless and reckless of the safety of others that it demonstrates the perpetrator's complete lack of regard for human life. There is also both "willful murder", defined as unlawful and intentional killing of another without excuse or mitigating circumstances and "murder by torture", which consists in that preceded by the intentional infliction of pain and suffering on the victim.[21] It is observed that both felony, depraved-heart, willful and torture types of murder can well fit into the classification by degree as we noted above. So for the purpose of this analysis, let us restrict ourselves to the first, second and third degrees of murder.

Under the Code, first and second degrees of murder are represented without clear and distinct categorization. Be that as it may, what becomes a serious task before us is an enquiry into whether the six ways by which murder can be committed under the Code sufficiently qualify one to be convicted of the capital offence of murder if found guilty, thereby rendering one liable to suffer the death penalty.

It is good to point out that both subsections (1) and (2) can fit into the taxonomy of first degree murder but only to an extent, since there is in the perpetrator an initial intention to cause death or do grievous harm to a person, and which intention constitutes the *mens rea* of the offence of murder. By way of this, the Code understands that the offence of murder is complete once that *mens rea* is co-joined to the physical act of killing, that is, the *actus reus*. However, it may also be quite helpful to observe that the Criminal Code harbours in subsections (1) & (2) the principle of "transferred malice or intent", which principle is quite unusual in the consideration of criminal liability. Hence, murder by way of the two subsections contemplates not only the killing of or the doing of grievous harm to the person for whom it is intended but also covers the situation in which the death of some other person, not intended, is caused. Thus, if X intending to strike Y aims a blow at him but strikes and wounds Z accidentally, then it is said that X is guilty of maliciously wounding Z, since although he did not intend to strike Z, his intent against Y must be transferred to the case involving Z.[22]

20 *Ibid.*
21 *Ibid.*
22 C. O. Okonkwo, *Criminal Law in Nigeria*, Spectrum Books Ltd., Ibadan, 2002, 52-53; *R v. Latimer* (1886) 17 Q.B.D. 359. However, the rule does not apply where the kind of harm done is different from the kind of harm intended ,see, *R .v. Cunningham* (1957) 2 Q. B. 396; *R .v. Faulker* (1877) 13 Cox 550; *R.v. Pembliton* (1874) L.R. 2.C.C.R. 119.

Besides, the application of the principle is given an added fillip or emphasis when in referring to subsection (2), the first proviso of section 316 of the Code states that it is immaterial that the offender did not intend to hurt the particular person who is killed.

While the doctrine of transferred malice or intent is a common law rule that does not, as a general rule, exist in the Code as a result of section 24, its application in the case of the Code's provision for murder is rather bizarre. It raises a very serious exception to the law of criminal responsibility. Be that as it may, the statutory incorporation of the common law doctrine of transferred malice into the murder provision of the Criminal Code may, after all, be indicative of the sanctity of and respect for human life. However, some scholars who are favourable to the mitigation or outright abolition of death penalty have argued against the application of the principle under the Criminal Code using the implication of the provision of section 24 of the Code as their Archimedean standpoint. It could be reminisced that section 24 provides, *inter alia*, that "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". The effect of the section is that in the example given above, X would not be guilty of any crime in respect of Z based on the intention with regard to Y though he might be guilty of criminal negligence if he ought reasonably to have foreseen the injury to Z. However, he would be pretty guilty of an attempted offence against Y. Thus, Okonkwo regards this effect of section 24 as more amenable to commonsense and disapproves of the doctrine of transferred malice or intent when he calls it an "illogical fiction".[23]

Nevertheless, it is trite law that section 24 may be excluded by the definition of an offence, as applicable in the offence of strict liability in which lack of *scienta* cannot be pleaded as a defence. It is this exclusion that is applied in subsections (3) to (6) of section 316 of the Criminal Code. However, given the ascendancy of contemporary antipathy to the notion of strict liability, it seems that the effect of section 24 of the Code ought to diminish if not obliterate criminal responsibility in the case of murder. Be that as it may, Okonkwo argues that in the light of the exclusion, section 316 (1) and (2) of the Code is still clear that a man is guilty of murder if he caused death, whether he intended to kill or cause some grievous harm to that particular person or some other person.[24] But in a recent debate on the death penalty in Nigeria, Okonkwo contended that out of the six ingredients of murder, only the first one should attract the death penalty.[25] Whether or not the present researchers agree with Okonkwo's later view is dependent on the future critique of the rest of the subsections.

Furthermore, subsection (3) which provides that murder is also committed when the accused causes death by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life, merits some treatment.

23 *Ibid.*
24 *Ibid.*
25 C. O. Okonkwo, *Criminal Law in Nigeria*, Spectrum Books Ltd., Ibadan, 2002, 52-53; *R v. Latimer* (1886) 17 Q.B.D. 359. However, the rule does not apply where the kind of harm done is different from the kind of harm intended ,see, *R .v. Cunningham* (1957) 2 Q. B. 396; *R .v. Faulker* (1877) 13 Cox 550; *R.v. Pembliton* (1874) L.R. 2.C.C.R. 119.

Under section 316 (3) of the Code, liability for murder would arise where D causes the death of another by means of an act done in the prosecution of an unlawful purpose[26] which act is of such a nature as to be likely to endanger human life. The act done in prosecution of an unlawful purpose must therefore qualify as an intrinsically dangerous act. It is settled law that the dangerous act causing death and the unlawful purpose being prosecuted must be two different things[27]. Where they are one and the same thing, section 316(3) would not apply. For example, where D in a bid to procure abortion[28] of a woman introduced into her vagina a noxious substance produced from a mixture of glycerine, dettol and surf and the same caused a necrosis of the uterine wall from which death eventuated, D was convicted for murder on the basis of section 316(3) of the Code[29]. Clearly, the unlawful purpose here was procuring the abortion of the deceased and the dangerous act done in prosecution thereof was the introduction of a noxious substance into her private part. The unlawful purpose and the dangerous act causing death were thus two different things. The same result would be achieved where D in having forcible carnal knowledge of a woman or girl without her consent[30], knowingly throttles or asphyxiates her for a considerable length of time so as to muffle her screams and the victim dies in consequence. Here again, the unlawful purpose being prosecuted is the rape of the victim and the dangerous act causing death is throttling or asphyxiating her. Section 316(3) would therefore apply in those circumstances.

It is submitted with profound respect that the imposition of liability for murder on the basis of section 316 (3) of the Code is very harsh. A thorough examination of the subsection reveals that the liability imposed is one for recklessness. And recklessness is something completely different from malice aforethought. It is a state of mind which ought to constitute an unlawful killing as manslaughter only. Under the provision, it is no defence for D to plead that he never intended to hurt anybody. The effect of such declaration is that the defence of accident, which ought to apply in a situation where D was prosecuting an unlawful purpose but quite fortuitously caused death, is effectively excluded. Yet, in causing death, D may not have subjectively intended or foreseen it and death may not have been reasonably foreseeable[31]. The criminal liability which the provision has elevated to the status of murder is in actual fact liability which, at most, ought to be for recklessness, and gross recklessness under the Code would attract liability for manslaughter and not murder. There is therefore no reasonable justification for the draftsman of the Code to elevate to the pedestal of murder, liability which ought to be for manslaughter.

26 The clause 'in the prosecution of an unlawful purpose' has been interpreted by the Supreme Court in *Aga v State* (1976) 7 S.C. 173, to mean 'in furtherance of an unlawful purpose'. Anything done to further, advance or perpetuate the course of a purpose which is unlawful is deemed to be done in prosecution thereof.

27 See *R v Nichols* (1958) Qd. W.N. 46; *R v Hughes* (1952) 84 C.L.R. 170; *R v Gould* (1960) Qd.R. 283.

28 An offence under section 228 of the Code and thus qualifies as an unlawful purpose.

29 See *R v Gould, supra.*

30 This act would amount to the offence of rape under section 358 of the Code as defined in section 357. It would therefore constitute an unlawful purpose.

31 A classic example of this type of situation is where D who is escaping from the *locus criminis* and is hotly pursued, fires a shot overhead into the air to scare away his pursuers but the bullet unknown to him, hits and kills a technician on a ladder repairing a telephone cable. Clearly, under these circumstances, D neither willed nor intended harm or death to anybody and death occurring in consequence of shooting overhead into the air is not objectively foreseeable. Yet by virtue of section 316(3), D is guilty of murder.

Moreover, there is the problem of whether the unlawful purpose in relation to section 316 (3) of the Code should be criminal or civil, and whether the act done should be different from the unlawful purpose seem to have been settled after a lot of hermeneutical disputes in courts. Hence, the position is not only that the unlawful purpose covers both the criminal and civil aspects[32] but also that for section 316 (3) to apply, the unlawful purpose must be distinct from the act done in prosecution thereof, which act caused the death of the deceased.[33]

Be that as it may, the problem that is persistent and which is more congenial to our discourse is that of the test to be applied in determining the nature of an act likely to endanger human life together with the implication of the exclusion of section 24 as contained in the second proviso to section 316. It will be recalled that the said proviso provides that "in the third case it is immaterial that the offender did not intend to hurt any person". By this, it dispenses with whatever defence that might arise as a result of section 24 of the Code. But it appears that this exclusion uproots the entire structure on which the meaning of the subsection is built. Let alone, the provision of the subsection would have been more reasonable in combining both the subjective and the objective test for the purpose of determining what is likely to endanger human life, which constitutes the jurisprudential rationale for regarding such act as murderous if it leads to death. That is perhaps why Okonkwo argues:

> In order to decide whether an act is likely to endanger human life, the test is, what would a reasonable man expect? If the act is likely to endanger human life then the expectation of the accused becomes material. It must be shown that he realized that his act would be likely to endanger human life.[34]

This view which covers the necessity of both the objective and subjective tests is also in accord with the dictum of Verity C.J. (as he then was) in *R. v. Idiong*:[35]

> While it might appear...that the intention or expectation of the offender is immaterial... we are of the opinion that this is not so if effect is given to the precise terms of the section in regard to the nature of the act. It is to be observed that the act must be one of such a nature as to be "likely to endanger human life", and we think that an act cannot be said to be likely to have a certain result if a reasonable man would not expect it to have such a result, even though in the event that result ensued.

32 *Aga v. State, supra; R. v. Stuart and Finch* (1974) Qd. R. 297.

33 *R. v. Hughes, supra; R. v. Nichols, supra;* But in *R. v. Gould, supra*, the situation was distinguished.

34 C.O. Okonkwo, *Op. Cit.*, 238.

35 (1950) 13 WACA, 30 at 33.

However, with the retention of the proviso, which in effect excludes section 24, section 316 (3) is rendered very wide and unrestricted with the effect that a killing by negligence occurring in the prosecution of an unlawful purpose that would rightly amount to manslaughter may be treated as murder under the subsection. It is therefore strongly suggested that either the entire subsection be repealed as its implications are based on the doctrine of constructive malice which has long since been abolished in England by the Homicide Act 1957, or at least that the proviso be deleted in order to still give effect to the gamut of the defence of accident as provided in section 24 of the Code. This will certainly limit the cases of conviction for murder sequel to the literal interpretation of the subsection.

More still, subsection 4, 5 and 6, though very straightforward, raise some problems also with regard to the exclusion of section 24 of the Code in determining criminal responsibility. The subsections cover the situation where any of the acts specified in them (that is, doing grievous harm, administering stupefying or overpowering things, or stopping another's breath) is done for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence. It should be noted that the third proviso, which covers the three subsections, states, "it is immaterial that the offender did not intend to cause death or did not know that death was likely to result". No doubt, the reason for introducing the proviso is to give effect to the common law presumption that 'a man intends the natural consequences of his act". By virtue of this, one cannot be heard to argue that he did not intend to cause death but intended only to facilitate his flight by any of the stipulated acts in the subsections. Be that as it may, this is a presumption that, by no stretch of imagination, is not irrebuttable.

Human experience shows that it is difficult to prove the intention of man. Bryan C.J. observed that "the devil himself knoweth not the intention of a man".[36] Also in a 19th century case,[37] Bowen L.J. held that "the state of a man's mind is as much a fact as the state of his digestion". These *dicta* are reconciled to the effect that it is only the man himself that knows what his intentions are in any given circumstance. Therefore, the case of the "reasonable man" or "natural consequences" tests should at most be guides to discovering what the real intention or foresight of the accused was. Often times, the presumption that a man intends the natural consequence of his acts may be rebutted or negatived by direct evidence. Hence, in spite of the fact that this presumption was expressly enacted into the law of sedition in section 50 (3)[38] of the Criminal Code, the Federal Supreme Court in *D.P.P v. Obi*[39] held that any such presumption from the nature of a seditious article could be rebutted by evidence of the accused's actual intention.

36 *Nungu v. R*, supra.
37 *Edginton v. Fitzmaurice* (1885) 29 Ch. D. 459 at 488.
38 The subsection provides thus: "In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself".
39 (1961) 1 All N.L.R 186 at 195.

Therefore, it is strongly suggested that either the courts adopt the same interpretative approach in respect of the three subsections in charges of murder as done in that of sedition in *D.P.P. v. Obi* by calling for direct evidence for the purpose of establishing the actual intention of the accused, or that the proviso that excludes section 24 of the Code in the three cases under discussion be deleted. Yet, another option is to amend the law. This latter approach had long since been adopted in English criminal law as a redress in its jurisdiction of what is still the position under the Nigerian Criminal Code provision on murder. Thus, section 8 of the English Criminal Justice Act 1967 provides as follows:

> A court or jury in determining whether a person has committed an offence,
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reasons only of its being a natural and probable consequence of those actions; but
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inferences from the evidence as appear proper in the circumstances.

No doubt, this provision runs counter to the proviso in the Criminal Code that "it is immaterial that the offender did not intend to cause death or did not know that death was likely to result", which proviso is but another way of articulating the "natural consequence" presumption. There is therefore the need for the Legislature to effect necessary amendments in the light of the indispensability of *mens rea* (intention) in establishing guilt and responsibility for any offence. It is equally, *a fortiori*, suggested that all cases of offences of strict liability under the Code be amended to effect the inclusion of the ingredients of *mens rea* and *scienta* in determining liability thereof.

So much for the analysis, what then is the result? This research has no problem in aligning with the Criminal Code in creating the offence of murder out of the provisions of section 316 (1) & (2). This is because these provisions are consistent with our considered view that to impute criminal liability on any accused, the actual intention of the accused to commit that crime must be a necessary precondition. In section 316 (1) where the offender intends to cause the death of the person killed or that of some other person, both the *mens rea* and the *actus reus* of murder are present, thereby capable enough to ground conviction on a murder charge. The subsection contemplates a malice aforethought (*malicia precogitata*), which is realized and carried out in the physical act of killing. Hence, we agree with the Code that the offence of murder is complete by way of the subsection. In the same vein, section 316 (2) can also sustain the charge of murder unto conviction because of the actual intention to do either to the person killed or to some other person some grievous harm. Section 1 of the Code defines grievous harm as "any harm which amounts to a maim or dangerous harm, or which seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, member, or sense". Thus, for the purpose of our consideration, the difference

between the intention to kill and the intention to do grievous harm is only a thin line. For it often arises that grievous harm such as shooting a person with a gun on certain vital organs or giving him a deep cut with a matchet is not easily distinguished from the actual intention to kill him. We posit that the issue of the concept of "grievous harm" arises only when the victim does not die immediately. But if subsequently the victim dies, of course, within a year and a day by virtue of section 314 of the Code and as a result of the grievous harm, hardly can the offender be exculpated or exonerated from liability for murder. Therefore, unlike Okonkwo who recently maintains that it is only section 316 (1) that can amount to murder, we respectfully agree with the Criminal Code that section 316 (2) can equally do so. This is particularly so as there is nothing in the subsection or in the proviso that refers to it, that excludes the implication of section 24 of the Code. The intention of the offender is still circumspect irrespective of whether it is directed to the person killed, or to some other person by way of transferred intent. Hence, the subsection contemplates the offender's malice aforethought, though indirectly. However, it is our view that insofar as subsections 3, 4, 5 and 6 of section 316 are retained the way they are in the Code, they ought not to be sufficient for grounding conviction of an accused on a charge of murder. This is because the implications of their relevant provisos tantamount to the exclusion of section 24 of the Code, thereby consigning them to the taxonomy of second degree murder. We do not subscribe to their amounting to murder not only because the distinction between such a so-called murder and manslaughter is blurred if the specified acts are recklessly and carelessly done, but also because the relevant provisos preclude pleading the defence in section 24 of the Code. An alternative would be to delete the provisos, but in that event, it would then be unnecessary to retain the subsections since they can now easily be resolved into subsection (2), whereby the specified acts of administering stupefying or overpowering things or willfully stopping the breath of a person can be regarded as a 'grievous harm' in the same sense as employed in subsection (2).

3. Conclusions

Our present discussion capitulates to the fact that murder under section 316 of the Code ought to be confined only to the first and second subsections rather than extend to other subsections that dispenses with the very important defences of accident and of unwilled acts that are enshrined in section 24 of the Code. We are, nonetheless, not unaware that under section 300 of the Code, murder can also be committed by omission to perform a duty to provide necessaries. Hence, where there is a willful neglect by a person on whom the duty lies, for instance, to provide food for another person, and he fails in that duty with the intention to cause the death of that other person, the offence of murder would certainly arise. Both the *actus reus,* namely, the omission and the *mens rea*, namely, the intention, are all present. Hence, it is suggested that for clarity, the provisions of section 300 and section 316 (1) and (2) should be collated under one section creating the offence of murder.

However that may be, it is good to indicate that arguing that the offence of murder is created under

the Criminal Code does not in any way imply that the Criminal Code enjoys the monopoly of creating crimes of intentional homicidal nature. Both the Penal Code and the Sharia Penal Code respectively create what can be described as equivalents of murder. Hence, while the former provides for the offence of "culpable homicide punishable with death", the latter creates the offence of "intentional homicide". This research prefers to treat these capital crimes differently from the offence of murder not only because of the nuances in the definition of these offences but also due to the terminological differences in the naming of the offences. Perhaps, the use of the term "intentional" by the two statutes to describe the homicide committed is much more a welcome approach employed to obviate and circumvent the complexities of the Criminal Code definition of murder. Albeit, the use of "intentional" by the Penal Code, for instance, preserves the room for the invocation by the accused of the defence of accident or other mitigating defences as contained in section 222 of the Penal Code. Again, under the Penal Code, it is upon the contemplation of the possibility of lack of intention, or the presence of certain specified emotional factors that gave vent to the creation of the lesser offence of "culpable homicide not punishable with death".