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AN APPRAISAL OF LEGAL PLURALISM IN THE ADMINISTRATION OF PENAL AND CRIMINAL CODES IN NIGERIA: A CALL FOR HARMONISATION

By

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Introduction

The Nigerian society is made up of people with diverse cultures, behaviours and ways of life. In the pre-colonial Nigeria, there were in existence some plural criminal justice systems which regulated the standard of behaviour of the people. In the North, for instance, the predominantly Muslim community had a highly developed criminal justice system with different Schools, the most prominent being the Maliki school of jurisprudence.[1] In the South, there were in existence, in each of the settlements, some customary criminal laws which were generally unwritten.[2]With the coming of the British, the English common law system was introduced in the Lagos colony.[3] In 1904, Lord Lugard, then the Governor General, introduced the Queensland Criminal Code in the North which incidentally was made applicable to the whole of Nigeria in 1916, after amalgamation of the Northern and Southern Protectorates in 1914.[4]

However, this wholesome introduction of the English Criminal Laws without due consideration for the cultural differences of the local people made the Code unsuitable for the country. To ensure peaceful co-existence, the colonialists, devised ways of accommodating the inherent differences in the cultures of the North and South by ultimately creating two distinct legal systems, the Penal Code System[5] (for the North) and the Criminal Code system[6] (for the South). The Criminal Procedure Code and

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[1]Karibi-Whyte, A. G. (2005). History and Sources of Nigerian Criminal Law; Spectrum Books Limited, Ibadan, p.124

[2] Adebayo, A. M. (2012). Administration of Criminal Justice System in Nigeria, Princeton Publishing Company, Lagos, pp.3-4

[3] This was made possible by Ordinance No.3 of 1863

[4]Chukkol, K S. (2010). The Law of Crimes in Nigeria, Ahmadu Bello University Press Ltd., Zaria, p.14

[5] Now Cap. P3 LFN 2004

[6] Now Cap. C38 LFN 2004

the Criminal Procedure Act were also introduced. The Colonialist believed that there was the need to respect and retain the people's diverse culture, religions and ways of life. This ultimately led to legal pluralism in the administration of criminal justice in Nigeria.

All these set of legislation (i.e. the penal and the Criminal Codes, the Criminal Procedure Code (CPC) and the Criminal Procedure Act (CPA), have gone through several changes and modifications. There are, however, disparities in the codes, from the method of commencement to procedural nature and the various punishments prescribed. Interestingly, a careful perusal of these legislation would reveal that despite their inherent differences due to cultural backgrounds and beliefs, the offences have similarities in definitions, ingredients and sometimes even the punishments.

The problem, however, is that the colonial heritage of dual criminal justice system has been one of the bane that had perpetuated the dichotomy of North and South in Critical national discourse. This has created a disparity in the development of criminal laws in Nigeria.

This paper, therefore, appraises the plural nature of the criminal laws in Nigeria. It also discusses the prospect of harmonization of Penal and Criminal Codes, analyses some of the provisions of the Codes that can be harmonized and highlights some that cannot be harmonized due to over specific nature of the offences contained therein.

Brief History of the Penal and Criminal Codes, Criminal Procedure Code and Criminal Procedure Act

Towards the end of the 20th century and right at the heels of the new millennium, the body of criminal laws in Nigeria have assumed the dimensions of separated and disjointed legislation variously enacted by the federal and state governments, most of which appeared to be duplicated and overlapping in structure and context.[7]By 1899, the colony of Lagos and the Southern provinces of Nigeria made effort to enact a Criminal Code which culminated in Criminal Code Bill of 1899. The content of the Bill, which was seen to be verbose coupled with the foreign language,

[7]Ocheme, P. (2006). The Nigerian Criminal Law, Liberty Publications Ltd, Kaduna, p.15

gathered opposition against it. Essentially, the Criminal Code, which was first introduced into the Northern Protectorate in 1904, became of general application to all part of the amalgamated Nigeria in 1916.[8] It continued its comprehensive application until the 30th day of September, 1960 when the Penal Code law was passed into law by the Northern Regional Assembly, thus giving force to the application of the Penal Code, and its corresponding procedural law, the criminal procedure code, in the Northern Region.[9]

It must be pointed out that the criminal Procedure Ordinance, now known as the Criminal Procedure Act, was enacted as Ordinance No. 42 of 1945. It was to govern the law of Criminal Procedure for the whole country. However, because of the heterogeneous nature of the country, complications were discovered in Northern Region which necessitated a comprehensive review.[10] The late Premier of Northern Region, Sir Ahmadu Bello set up a high powered panel of jurists with the following terms of reference:

> To consider the system of law at present in force in the Northern Region, that is English law as modified by Nigerian legislation, Islamic law and Customary law, and the organization of the courts and judiciary enforcing the system; and
>
> Whether it is possible, and how far it is desirable, to avoid any conflicts which exist between the present systems of law, and to make recommendations as to the means by which this object may be accomplished as regards the re-organization of the courts and the judiciary in so far as this may be desirable.[11]

Consequently, the Criminal Procedure Code was passed into law in July, 1960 and became effective on the 1st October, 1960.

Generally, the Penal Code, which is considered to be a hybrid or an admixture of Islamic and English Common Law, was modeled after the Sudanese Penal Code, a country whose ethnic and religious complexities are in many respects similar to that of Northern Nigeria.[12] Like the Sudan, the dominant religion in Northern Nigeria is Islam. It was also meant to make local modifications to reflect the

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[8]Ibid., p.16

[9] Ibid.

[10]Olakanmi, O. (2004). Cases and Materials on Criminal Procedure Code,Lawlords Publications, Abuja, p.8

[11]Ibid.

[12]Karibi Whyte, A. G. Op.cit.,n.1, p.193

peculiarities of the Northern Region and to make provision for the strong but numerically inferior non-Muslim groups, whose influence was equally entrenched.[13] The Code was, perhaps, meant to be a compromise between the traditionalists and the reformers. The Code has been in operation since its introduction in 1960. As noted earlier, conflicts arose between the Islamic and the customary laws and the imported procedure rules. In response to this and in order to facilitate the application of the provisions of the Penal Code effectively, a new criminal procedure code, also based on the Sudanese Penal Code Procedure, was enacted in 1960.[14] The two new Codes were to be applied mutatis mutandis by courts which hitherto were familiar only with Islamic Criminal Jurisprudence and Islamic Criminal Procedure.

The Southern Nigeria adopted the Criminal Code (inspired by the English Common Law and legal practice) because of its early exposure to the English legal System. They also adopted the Criminal Procedure Act.[15]

It is a paradox that by 1904, a Criminal Code built on the Queensland model of 1899 was enacted for the Northern Province. Following the amalgamation of both Northern and Southern Provinces in 1914, the Criminal Code which was enacted for only the Northern Province became operative throughout Nigeria. It is still a paradox that while the Northern states, the original users of the Code, has long discarded it alongside with the procedure, the Southern states still use the 1899 enactment with all its deficiencies. Although the Code has been variously amended by the Southern states, it is indeed a paradox that it is still applicable by these states.

It is interesting to note that both the former Northern and Southern Regions have now been split into various states. Yet they continue to observe and apply the provisions of the penal and Criminal Codes, as amended variously by each state legislature.[16] This perhaps, explains why Abuja which was carved out of the territories of the Northern States as a new Federal Capital Territory, was

[13]Ibid.
[14]Ibid., p.195
[15] Cap. C38 LFN 2004
[16]Ocheme, P. Op.cit.,n.7, p.16

conferred with the jurisdiction of the Penal Code. Before the shift of the current Federal Capital to Abuja, it was the Criminal Code that was applicable to Lagos.

Harmonisation of Penal and Criminal Codes

The idea of a unified criminal law in Nigeria has been raised and mooted in several fora owing to the many challenges that arise from an attempt to carry out such exercise. The most glaring challenge of harmonizing Penal and Criminal Codes arise from the fact that all states in the Federation are constitutionally empowered to enact applicable criminal laws.[17] Although States have not departed significantly from the two codes, a careful perusal of the laws reveals that some States are more advanced and proactive in the review of their criminal laws and punishment.[18] In this researcher's view, a dedicated attempt by the States to review their criminal laws regularly may just be the solution to eradicating the disparity in the development of criminal laws in Nigeria as a whole.

Another major challenge for unification that follows closely the first is the difference in some accepted values such as, at what age a child becomes an adult or should intoxication in all ramifications be regarded as a crime? Better still, should adultery be regarded as a crime in both jurisdictions?

Another challenge has to do with some issues which such exercise may generate. One of such issues is its ability to challenge the nation's federal status. Some observers noted that a cardinal characteristics of federalism lies in the existence of diversity. They argued that a unified criminal law system will no doubt challenge the people's existing belief system and life style.[19]

Notwithstanding these challenges, it has become imperative, in recent times, that these two codes (Penal and Criminal Codes) should be unified. It was argued that their harmonization will help the government foster national

[17] See Residuary Legislative List, Part II, Second Schedule of The 1999 CFRN (as amended).

[18] See for example the provisions of the criminal laws of Lagos State of 2011.

[19] Adebisi, O. et al (2014). Should the Criminal Law be merged? The nation Newspaper; retrieved from www.thenationonlineng.net/news on 10/5/2015

unity because the continuous application of the two codes dealing with criminal matters has been one of the mechanisms that had perpetuated the concepts of North and South dichotomy in critical national issues.[20] It would aid in pushing to the fore, the ideas and ideals that Nigeria as a nation holds dear while relegating to the background cultural differences which even though remain significant but nevertheless should not be the focal point.

It is submitted that the harmonization of penal and Criminal Codes would, no doubt, be a welcomed development to lawyers and even members of the general public. It would not only enhance the ease with which the legal profession is practiced but also provide a platform for members of the general public to be well aware of offences that are applicable in all jurisdictions in Nigeria. As noted by the former Attorney-General of the Federation and Minister for Justice (Mohammed Bello Adoke (SAN)), the unification of the two sets of law would help the government foster national unity since a crime in Kano would also be seen as a crime in Lagos.[21]

In addition to the needs to address this issue through a bold attempt at harmonization, there is an equal imperative to review both codes, modernize them and keep them relevant to the yearnings and aspirations of the Nigerian society.

Some observers are unsure whether the government's objective of enhancing the nation's unity with mere unification of laws is desirable now. They contend that the government should focus its attention on addressing other major challenges bed-eviling the criminal justice system with a view to ensuring social justice and secured society where the law is supreme.[22] To them, the federal government should give priority to addressing the defects in the laws to ensure that they operate better to serve the purpose for which criminal justice system exists in every society.

[20]Ibid.
[21]Ibid.
[22]Ibid.

Consideration of Some Provisions of Both Penal and Criminal Codes that Can be Harmonized

This segment aims at highlighting certain areas of both Penal and Criminal Codes that can possibly be harmonized. It does not serve as an exhaustive discussion of the defences and offences under both codes. The segment starts with defences negating criminal intent such as mistake, accident, compulsion, necessity, intoxication and insanity, among others. It also discusses offences against person such as Assault, Homicide and manslaughter. It equally discusses offences against property such as theft/stealing, robbery, forgery and cheating, and offences against the state such as unlawful assembly and breach of peace, among others.

Defences Negating Criminal Intent

It is trite that the Nigerian criminal justice system operates on the foundation that there is no criminal liability unless there is criminal intent. Thus, except in cases of strict liability where the accused's criminal intent is not material, the guilty mind or criminal intent must exist at the time the offence is alleged to have been committed.

However, both Penal and Criminal Codes contain certain provisions which, if relied upon by an accused, can negate criminal intent and reduce criminal liability.[23] The defences that negate criminal intent under both codes include, but not limited to, mistake, accident, compulsion, necessity, immaturity, intoxication and insanity, among others.

A brief analysis of each of the above is provided below.

i. The Defence of Mistake of Fact

Even though ignorance of the law is not an excuse to criminal liability,[24] mistake of fact may be an exception to this general rule. The defence of mistake of fact which is provided under both Penal and Criminal Codes[25] is based on the premise that there is no liability without fault. It is available to an accused who can show that he committed the

[23] This may be based on the fact that at the time of the commission of the offence, the accused lacked the necessary criminal mind.
[24] Section 45 of the Penal Code, and section 22 of the Criminal Code
[25] Ibid.

offence without the necessary guilty intent. There seems to be unanimity among scholars that the defence lays down a subjective test.[26]

The general ingredients of this defence under both codes are that, first, the accused must show that even though he committed the offence, he lacked the requisite guilty intent as a result of a mistaken belief in a set of facts; and second, the facts must, at the same time, have been held in good faith by the accused. The phrase "good faith", according to section 37 of the Penal Code, means an act done with "due care and attention.

It is submitted that the definition of mistake of fact under the Criminal Code should be adopted as it accords with the true concept of criminal responsibility, i.e. what the accused knows and not what he is presumed to know.

ii. The Defence of Accident

The defence of accident is also recognized under both Penal and Criminal Codes.[27] An accident is something which happens outside the ordinary course of events. An effect may therefore be regarded as accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence is so unexpected that a person of ordinary prudence would not be expected to take reasonable precautions against such occurrence.[28]For the defence of accident to avail an accused person the act which would have amounted to an offence must have been done by accident or results from an accident.

The Penal Code, unlike the Criminal Code, provides further requirement to the effect that the act leading to the accident must have occurred in the course of a lawful purpose and carried out in a lawful manner. Thus in the case of Abdulbaki v. Katsina Native Authority,[29] a person was killed while engaged in an unlawful fight. The High Court held on appeal that the defence of accident was

[26]Chukkol, K S. Op.cit.,n.3, pp.88-89. See also Ocheme, P. Op.cit., n.7, pp.106-107.
[27] See section 48 of the Penal Code and Section 24 of the Criminal Code respectively.
[28] Richardson, S.5 (1987) Notes on the Penal Code Law, Ahmadu Bello University Press, Zaria , p.48
[29] (1961) N.N.C.N, p.12

not open to the appellant unless he could show that he acted in the lawful exercise of his right of private defence.

The Penal Code also requires that the act from which the harm arises must be one in which the accused had exercised due care and caution. In other words, the act leading to the accident must have been done in good faith.

Conversely, section 24 of the Criminal Code provides unequivocally that motive is immaterial in the application of this defence. Thus, in Richard Igago v. The State[30] it was held that for an event to qualify as an accident under section 24 of the Criminal Code, it must be a surprise to the ordinary man of prudence, and that is a surprise to all sober and reasonable people.

It is suggested that the provisions of the Penal Code on what amounts to an accident is to be preferred because it requires the accident to have resulted from doing "a lawful act in a lawful manner." This enables the defence to be available only to persons who carried out legitimate acts.

iii. The Defence of Compulsion

The defence of compulsion, as provided under both penal and Criminal Code,[31] is one which negatives criminal intent. The reason is that the accused has no intent of committing the offence but for the act or influence of another party in the form of threat or injury to the person of the accused.

For the defence of compulsion to succeed, the accused must establish that although he committed the offence he has done so in order to save himself from threat of instant death. The Criminal Code, unlike the Penal Code, recognizes the threat of grievous harm.[32] Again, the threat of death or grievous harm, as the case may be, must be by some person actually present.[33] Likewise, the person issuing the threat must be capable of executing it and the accused must reasonably believe that should he fail to do the desired act, the harm threatened would befalls him.[34]

[30] 28 (1999) 14 NWLR (pt 637) 1 at 24

[31] See Section 57 of the Penal Code and Section 32(3) of the Criminal Code respectively

[32] Ibid.

[33] Ibid.

[34] Ibid.

One important thing to note is that all other forms of threat, aside from death or grievous harm are not covered under this defence. Equally important here is that the threat which compel the accused to commit the offence must be directed at him and not to a third party. Thus where the accused commits the offence as a result of a threat to his wife or child the defence would not avail him.

The above position seems somewhat unfair, considering the value which the Nigerian society places on family relationships. It is submitted that the defence should be made to extend to offences committed to save members of the accused's immediate family.[35]

It is interesting to note that the defence of compulsion is not available if the offence which the accused is threatened to commit is homicide (murder) or grievous harm. Similarly, the defence is not available where the accused deliberately put himself in a situation where he will be subjected to threats.

It is submitted that the exclusion of the threat of grievous harm to the offender by the Penal Code is somewhat perplexing and puzzling, considering that threat of grievous harm can in reality by considered as potent as a threat to death.[36] It is, therefore, suggested that the provision of the Criminal Code in this regard is to be preferred.

It is further suggested that the provisions of both codes which prevent reliance on the defence in case where the threat is to a third party (i.e. close relations to the accused such as his mother, father, wife or even his children) should be reconsidered.[37] This is in view of the fact that threat to loved ones can, in most cases, be even more compelling than a threat to the accused himself.

iv. The Defence of Necessity

The defence of necessity has been recognized in Nigerian criminal justice system.[38] To rely on the defence, the accused must show that the act done was to prevent further harm or injury to his person or other persons, or

[35] See the proposed Unification of Criminal Laws of Nigeria, retrieved from www.nials.org, on 10/5/2015 at 8:31 pm.
[36]Ibid., see also Chukkol, K S. Op.cit., n.3, p.255
[37]Ibid. pp.253-254
[38] Section 49 of the Penal Code and Section 26 of the Criminal Code

property. Similarly, the accused must show that the course of action embarked upon by him was reasonable and that he acted in good faith.[39] The action of the accused is thus measured against the reaction of an ordinary person in the same circumstances. In other words, the test adopted by the Codes is objective one.

Interestingly, the Penal Code provides explicitly that where the action requires care and skill, the accused must have exercised the required care and skill. This, it is submitted, appears to be unnecessary, in view of the fact that the preceding provision makes "reasonableness in carrying out the act" a factor.

Again, whereas under the Penal Code the defence of necessity can only be pleaded where the offence is not punishable with death, under the Criminal Code the defence covers both capital and lesser offences.

It is submitted that the provisions of both codes as regards the defence of necessity is somewhat vague and not properly defined[40]. In providing for harmonization of this defence, it is suggested that the provisions of both codes need to be more definite.

v. The Defence of Intoxication

This defence is designed to negate the existence of criminal intent on the part of the accused, on the grounds that as a result of the intoxication, the requisite criminal mind for the offence was absent.

Under both penal and Criminal Codes, intoxication as a general rule, is not regarded as a defence to a criminal liability, except under the circumstances specifically provided for.[41] Both codes, however, recognize involuntary intoxication as a defence to a criminal charge.

For the defence of intoxication to succeed, the person charged must not know that what he was doing was wrong or contrary to law, and that the state of intoxication was caused without his consent by the malicious or negligent act of another.

Interestingly, the Criminal Code further provides for a situation where the accused himself causes the intoxication but mistakenly, and that he became temporarily

[39]Chukkol, K.S. Op.cit., n.3, p.265

[40] See the proposed Unification of Criminal Laws of Nigeria, Op.cit., n.34

[41] Section 44 of the Penal Code and Section 29 of the Criminal Code

insane by reason of the intoxication. Where the accused fail to establish the loss of his capacities under the Criminal Code, the defence of intoxication will fail.

Ostensibly, the Penal Code provides that a person who voluntarily became intoxicated is presumed to have the same knowledge as he would have had if he had not been intoxicated. This provision, which is irrebutable, appears to negate the possibility of the accused to rely on the defences of mistake or provocation. It is, therefore, suggested that the Criminal Code provision is to be preferred.

vi. The Defence of Insanity

A plea of insanity under both penal and Criminal Codes is relevant as a defence at a time the offence was committed.[42] Generally, there is a presumption of sanity in favour of every person unless the contrary is proved.

To raise the plea of insanity under the Penal Code, the accused must show that at the time of committing the offence he was suffering from unsoundness of the mind rendering him incapable of knowing the nature of his act, or that his act is wrong or contrary to law.

Under the Criminal Code, the accused must show, in order to successfully raise the plea of insanity, that at the time of doing the act he is suffering from mental disease or natural mental infirmity which deprives him of capacity to understand what he is doing or that he lacks the capacity to control his actions or to know that he ought not to do the act or make the omission.

It is submitted that the provision of the Penal Code as regards the defence of insanity is wider than the provision of the Criminal Code. This is because unlike the Criminal Code, it covers such circumstances like obsession, frustration, depression, nervous breakdown etc.[43]It is, therefore, suggested that the provision of the Penal Code as regards the defence of insanity is to be preferred.

vii. The Defence of Provocation

Man has a natural instinct to react to situations which may annoy or anger him. Hence, the defence of provocation is recognized in almost all jurisdictions. The

[42]Ibid., Section 51, P.C. and Sec. 28, C.C.
[43]Ibid., Section Ochiemo, P. Op.cit., n.7, p.115

defence is associated with the laws of passion and of human weakness, in circumstances where an offence is committed due to loss of self-control.[44] The defence of provocation is significantly relevant in the consideration of offences against person. In Nigeria, the defence is provided for under various sections in both Penal and Criminal Codes.[45]

Unlike the Penal Code[46] which fails to define the meaning of provocation but merely states consequences of a successful plea, the Criminal Code provides for a comprehensive definition.[47] Under the Criminal Code, provocation is an absolute defence to the offence of assault[48] and reduces the offence of murder to manslaughter.[49] The Penal Code does not recognize the defence as an absolute defence to assault[50] although, like the Criminal Code, it reduces culpable homicide punishable with death (murder) to culpable homicide not punishable with death (manslaughter).[51]

From the various sections of the codes, in other to rely on the defence of provocation, the accused must show the following cumulative ingredients:

a. The victim offered a wrongful act or insult to the accused or any person in a special relationship with the accused;
b. The wrongful act or insult to the accused is one capable of making a reasonable man to lose his self-control;
c. The accused, in fact, lost his self-control;
d. The accused must have acted suddenly and before his passion cooled; and
e. The retaliation must be proportionate to wrongful act or insult. Thus were the force used by the accused is disproportionate to the provocation

[44] Ibid., p.130
[45] Sections 283, 284, 285 and 318 of the Criminal Code. See also sections 222(1) and 266 of the Penal Code.
[46] Section 222(1) of the Penal Code
[47] Section 283 of the Criminal Code
[48] Ibid., section 284
[49] Ibid., section 318
[50] Section 266 of the Penal Code
[51] Ibid., section 222(1)

offered, the defence will fail as was decided in the case of Shande v. The State.[52]

It is submitted that the element of proportionality contradicts the essence of the defence as a person who has lost his self-control as the degree of response to wrongful acts varies from person to person. It is, therefore, suggested that less prominence should be given to this ingredient by expunging it from the law.

It is recommended that the provision of the Criminal Code on provocation is to be preferred. This is because apart from the fact that the Criminal Code provides for a definition of provocation, the elements of the defence closely follow the section containing the elements of the defence.

viii. The Defence of Consent

Consent as a defence occurs where the victim permits the doing to him of the act subsequently complained of. The Penal Code provides copiously for the defence in sections 53 and 55 in contrast to the marginal provision in relation to the defence in Criminal Code regarding some specific offences such as rape in section 258, sexual assault in section 261 and cases of assisted death in section 203. Thus, the Criminal Code does not contain elaborate provisions on this defence.

To rely on the defence, the accused must show that the act, injury or hurt to the victim occurs after the victim has voluntarily given consent to the act. The consent may be expressed or implied.[53] The Penal Code makes it very clear that the defence does not avail the accused in relation to acts likely to cause death or grievous harm or other injuries that occur independent of that which the victim consented to.[54]

Section 54 of the Penal Code, like section 203 of the Criminal Code prohibits reliance on the defence in cases of euthanasia.

It must be stressed that that consent, under the Penal Code, is only valid when it is not given under fear of injury,

[52] (2005) 6 SCNJ 124, pp.131-132. See also Obaji v. The State (1985) 1 ALL NLR 269

[53] Section 53(1) of the Penal Code

[54] Ibid., section 53(2)

misconception, intoxication or unsoundness of mind on the part of the person consenting.[55] In other words, the consent must be freely given. The Penal Code further provides that a person under fourteen cannot validly give consent.[56]

The Penal Code goes further to imply consent as a defence in cases not (amounting to grievous hurt) where a parent or guardian corrects a child or ward under the age of eighteen; a school teacher corrects a pupil under the age of eighteen; a master corrects an apprentice under the age of eighteen and a husband who corrects his wife where such husband and wife are subject to any native law and custom in which such correction is recognized as lawful.[57]

It is recommended, therefore, that the provisions of the Penal Code which provides specifically for the defence should be adopted. However, it is suggested that the age of consent under section 39 of the Penal Code should be increased to eighteen so as to accommodate the issue of consent of persons above the age of fourteen but less than eighteen.

ix. Act of Public Officers

It is trite that acts done by public officers in the course of their duty and in good faith are not normally questioned in a court of law. Both the Penal and Criminal Codes provide for protection of public officers such as the police and judicial officers in the exercise of their lawful duty.[58]

The main distinction between the provisions of the Penal Code and the Criminal Code in providing for justification or excuse for officers carrying out their function is the requirement under the Penal code that the exercise may be with the belief in good faith that he has such a power. This aids the protection of officers who in an attempt to genuinely carry out their functions fall foul of the law.

It is recommended that this requirement be included in the Criminal Code in all sections relating to public officers.

[55]Ibid., section 39
[56]Ibid.
[57]Ibid., section 55(1)(a)-(d)
[58]Ibid., section 46. See also section 31 of the Criminal Code.

Offences Against Person

The criminal justice system in Nigeria provides for the general classification of offences against persons. These offences refer to those acts which cause injury to persons or even death. The offences include, but not limited to, assault, homicide (murder) and manslaughter, among others.

i. Assault

An assault is any intentional act carried out by the offender which causes the complainant to believe violence against his person.[59] The essential ingredient of the offence of assault is the act which causes apprehension such as pointing a gun or raising a stick and the use of menacing words which indicate that the accused intends to attack the complainant.

Whereas the Penal Code distinguishes between assault and battery,[60] the Criminal Code does not expressly distinguish assault and battery. The approach of the Criminal Code in the general definition of assault is to be preferred. This is because assault is usually followed by battery and the term is used commonly to cover both assault and battery. It is suggested that the distinction between "assault" and battery should be reflected in the punishment as contained in the Criminal Code.

Both the penal and Criminal Codes have various categories of assault which, in our opinion, should be maintained. Of particular interest is the provision of the Penal Code on assault or criminal force to prevent public servants from discharging their duties. Whereas the provision of the Penal Code refers to public servants, the Criminal Code refers to serious-assault to protect persons from the execution of their lawful duties.[61] Apparently, the provision of the Criminal Code, in this respect, is wider as it seeks to protect persons in the course of their lawful duties, whether they are public servants or not. It is suggested that an amendment of the Penal Code to include such persons is to be preferred to the rather over-elaborated provisions of the Criminal Code.

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[59] See the proposed unification of criminal laws in Nigeria, op.cit. see also Chukkol, K.S. Op.cit.,n.3, p.315

[60] See section 262 and 264 of the Penal Code respectively

[61] See section 172 of the Criminal Code law of Lagos State, 2011.

ii. Homicide (Murder)

Homicide is the unlawful killing of one person by another.[62] It consists of murder or manslaughter, according to the circumstances of the case.[63]

In all jurisdictions, the offence of murder is regarded as a very serious offence[64]. In Nigeria, both the penal and Criminal Codes provide copiously for this offence, although it is referred to as "culpable homicide punishable with death" under the Penal Code.

The Criminal Code provides for an elaborate definition of the offence, as opposed to the rather straight forward and less confusing definition under the Penal Code.[65]

The major ingredients of the offence of murder under Criminal Code is causing death with the intention to cause death, or causing death with the intention to cause grievous bodily harm to the deceased.[66]

It is submitted that the provisions of the Penal Code appear to be more apt in providing for the offence of culpable homicide punishable with death, as the ingredients of the offence are better presented. Under the Penal Code,[67] culpable homicide is committed if the doer of the act knows or has reason to know that death would be the probable and not a likely consequence of his act. Both the words "probable" and "likely" represent degrees of chances, with "probable" having a higher chance of occurring than "likely".[68] It is submitted that the words adopted by the Penal Code are more appropriate and should be preferred.

The Criminal Code provides for the offence of conspiracy to commit murder which is not provided for under the Penal Code. It is therefore, suggested that this offence be included in the Penal Code.

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[62] Garner, B. H. (2009) Black's Law Dictionary, Ninth edition, west Publishing Company, p.802

[63] Ibid.

[64] Owoade, M. A. (1985) Law of Homicide in Nigeria, O.A.U Press Ltd, Ife, p.11

[65] See Section 22 of the Penal Code.

[66] Section 316(a) and (b) of the Criminal Code

[67] Section 221 of the Penal Code

[68] Chukkol, K S. Op.cit., n.3, p.300

iii. Manslaughter (Culpable Homicide not Punishable with Death)

Manslaughter is the unlawful killing of a human being without malice aforethought.[69] The offence can be conveniently classified into voluntary and involuntary manslaughter.

Voluntary manslaughter occurs when the accused though has the requisite mental and physical act to be convicted for the offence of murder, but for the fact that his conduct is excused by law in particular circumstances.[70] For instance, killing as a result of grave and sudden provocation is regarded as voluntary manslaughter.[71] Similarly, killing as a result of the use of excessive force in private defence is voluntary manslaughter.[72] The same thing applies to the killing of a consenting victim.[73]

It is submitted that the Penal Code has provided a more simplistic definition of the offence of voluntary manslaughter by provocation than that provided for in the Criminal Code. It is, therefore, suggested that the provision of the Penal Code should be adopted in this regard.

Involuntary manslaughter, on the other hand, occurs where the accused causes death in circumstances where he did not foresee death as a probable consequence of his act, but due to some blame worthiness on his part, death of the victim ensues. It could be termed killing as a result of negligent or rash act.[74]

The ingredient of the offence of involuntary manslaughter consists of an unlawful act which creates the risk of physical harm and gross negligence or recklessness as to the risk of such harm.

The Penal Code[75] provides for the offence of infanticide which is the intentional killing by a woman of her own child under the age of twelve months due to

[69] Garner, B. A. Op.cit., n.61, p.1049
[70] See proposed unification of Nigerian Criminal Laws, Op.cit., n.34
[71] See Section 222 (1) of the Penal Code and Section 223 of Lagos State Criminal Code Law of 2011
[72] Section 222(2) of the Penal Code and Section 225 of the Lagos State Criminal Code, Law, 2011
[73] Section 222 (5) of the Penal Code and Section 224 of Lagos State Criminal Code Law, 2011
[74] Ocheme P., Op.cit., n.7, p.210
[75] Section 222(6) of the Penal Code

disturbance of the mind resulting from child birth. But for this provision the unlawful killing would have amounted to culpable homicide punishable with death.

The Criminal Code[76] also provides for the offence of manslaughter under diminished responsibility. This has been submitted to adequately cover the offence of infanticide. It is suggested that the provision of the Criminal Code should be adopted in this respect.

Offences Against Property

Property can be described as anything that is of value to man. It is, perhaps, the most important possession, apart from the life of a man in this world.[77] It is, therefore, not surprising that criminal interference with either possession or ownership of property is often declared punishable in almost all legal systems in the world.

The undue interference with property belonging to another is declared punishable under both penal and Criminal Codes. Such undue interference with property under both codes includes, but not limited to, theft/stealing, forgery and cheating, among others. A brief analysis of these offences is provided below.

i. Theft/Stealing

The offence of theft/stealing, which are similar in nature are provided for under both penal and Criminal Codes.[78] While the Penal Code uses the word "dishonestly", the Criminal Code employs the use of the word "fraudulently".

The main ingredient of the offence of theft under the Penal Code is the intention to dishonestly take or move the property of another without his consent. The general ingredients of the offence of stealing under the Criminal Code are, first fraudulent taking of another's property which is capable of being stolen, and second, fraudulent conversion for use of another's property capable of being stolen. In all these, there must be the existence of an intention to permanently deprive the owner of the property stolen.

[76] Section 226 of Lagos State Criminal Code Law
[77] Chukkol, K S. Op.cit., n.3, p.336
[78] Section 286 of the Penal Code and Section 383 of the Criminal Code.

It is submitted that the Criminal Code is not only more elaborate but differs from the Penal Code in one respect. Under the Criminal Code the fraudulent intent must be to deprive the owner permanently. Paradoxically, even a temporary deprivation of the owner will amount to theft under the Penal Code.[79] It is, therefore suggested that the provision of the Criminal Code should be adopted. This is because, in our view, the phrase "intention to permanently deprive the owner of the property" adopted by the Criminal Code, should be the important element of the offence of theft/stealing.

ii. Forgery

The offence of forgery is provided for under both penal and Criminal Codes.[80] The offence relates to the fraudulent making, sealing or execution of a document, with the intention of causing it to be believed that the document was legitimately created, sealed or executed by the appropriate authority.

It should be noted that the offence of forgery is closely related to the offence of cheating. As one scholar rightly observed,[81] both offences contain oral and written deception, caused or intended to be caused by false representations.

The ingredients of the offence of forgery under section 363 of the Penal Code consist of making a false document or a part of document with any of the following intents:

a. To cause damage or injury to the public or to any person;
b. To support any claim of title;
c. To cause any person to part with property or enter into any express or implied contract; and
d. To commit fraud or that fraud may be committed.

Unlike the Penal Code, the ingredients of the offence under section 465 of the Criminal Code consist of making of false document through its contents, counterfeit seal, mark, or representation on a document, knowing such

[79]Chukkol, K S. Op.cit., n.3, p.345
[80] See Section 363 of the Penal Code and Section 465 of the Criminal Code
[81]Chukkol, K S. Op.cit., n.3

to be counterfeit. The doing of any of the above must be with the intention to cause the thing so made to be used in any way or acted upon as genuine.

It is submitted that the provisions of the Penal Code with respect to the offence of forgery is more comprehensive and, therefore, should be adopted.

iii. Cheating

Cheating is the fraudulent obtaining of another's property by means of a false symbol or token, or by other illegal practices.[82] The offence of cheating is provided for under both penal and Criminal Codes.[83] Whereas the Penal Code appears to be more elaborate on the offence of cheating and other related specie, the Criminal Code provides for both definition and punishment of the offence of cheating.[84]

Under both Codes, the ingredients of the offence of cheating include fraudulent or dishonest representation by words, writing, or conduct. The person making the representation must know that such words, writing or conduct are not true. In addition, the representation must induce a person to deliver or give consent to retain any property to another person or pay a higher price for property than he would have paid but for the representation.

A careful perusal of the provisions of the codes would reveal that the Penal Code provides for an additional ingredient which is inducement that causes a person to do or omit to act in such a way he wouldn't have acted had he not been deceived. Such act or omission must cause or is likely to cause damage to that person in mind, body, reputation or property.

It is submitted that the definition of the offence of cheating under the Penal Code is preferable. This is because it covers not only the offence as it relates to obtaining goods but acts or omissions generally.

Offences Against Public Order/Peace

To maintain peace and order in Government, respect for constituted authority is fundamental. The

[82] Garner, B. A. Op.cit.,n.61, p.268
[83] Section 320 of the Penal Code and Section 421 of the Criminal Code
[84]Ibid.

offences against public order/peace are of two types, namely:

a. Offences under the penal and Criminal Codes which are under the legislative competence of the states such as unlawful assembly and riot; and
b. Other offences against public order such as treason, treasonable felonies and sedition which are matters within the exclusive competence of the federal government.[85]

Further discussions will be limited to offences against public order/peace as provided by the penal and Criminal Codes of the states.

i. Unlawful Assemblies and Breach of Peace

An unlawful Assembly is a gathering of people who conduct themselves in such a manner as to cause persons in the neighbourhood to fear that the persons so gathered will turbulently disturb the peace.[86] Such people must be at least five or more according to the Penal Code,[87] or three or more persons according to the Criminal Code[88].

It is submitted that the Penal Code provision on the offence of unlawful Assembly is more elaborate than its corresponding provision of the Criminal Code. The provisions of both codes as regards the general offence of riot can easily be harmonized as they are practically the same. However, the Penal Code provides for specific offences relating to riots such as rioting armed with deadly weapon[89] and joining an unlawful assembly that has been asked to disperse[90] which are not provided for under the Criminal Code.

Offences that cannot be Harmonized

Certain property offences under both Penal and Criminal Codes cannot be harmonized. This is as a result of the absence of similar provisions in both Codes or the over specific nature of such offences. A brief appraisal of this is provided below.

[85] See exclusive legislative list of the CFRN, 1999
[86] Chukkol, K S. Op.cit., n.3, p.409
[87] Section 100 of the Penal Code
[88] Section 69 of the Criminal Code
[89] Section 107 of the Penal Code
[90] Ibid., Section 110

A. Offences in the Penal Code but are not Contained in the Criminal Code

Offences provided for in the Penal Code but which cannot be found in the Criminal Code include, but not limited to, the following:

i. Brigandage

Brigandage is provided for in the Penal Code[91] as an offence of robbery or attempted robbery committed by five or more persons. The Criminal Code does not provide for this offence. The reason is that, under the Criminal Code, whoever commits, aids, counsels or procures the commission of an offence is treated as the principal offender.[92] It is submitted that the existence of the offence of brigandage under the Penal Code can be justified for the purposes of severity of punishment.

ii. Criminal Trespass

The classification of offences relating to criminal trespass under offences against property by the Penal Code[93] is questioned. This is in view of the fact that, traditionally, trespass is a tort and is only criminalized if it involves breach of peace.

B. Offences in the Criminal Code but not in the Penal Code

The following are some of the offences provided for in the Criminal Code which cannot be found in the Penal Code. The list is by no means exhaustive.

i. Impersonation;[94]
ii. Fraudulent debtors;[95]
iii. Electronic data offences;[96]
iv. Cruelty to animals;[97] and
v. Offences relating to ferries and jetties[98]

Conclusion

[91]Ibid., Section 297
[92] Section 342 of the Criminal Code
[93] Section 342 of the Penal Code
[94] Section 378-383 of the Criminal Code
[95]Ibid., Section 384
[96]Ibid., Sections 385-389
[97]Ibid., Section 392
[98]Ibid., Sections 397-400

From the foregoing, it is clear that legal pluralism in criminal justice system in Nigeria owes its origin to the indigenous system of administration of criminal justice prior to the period of colonization. In the North, for instance, the Islamic criminal law of the Maliki School applied. In the South, however, the customary criminal laws of the various communities applied.

When the British came, the colonial government understood the differences in the lives of the people of Northern and Southern Nigeria. To ensure peaceful co-existence, the colonialists devised ways of accommodating these inherent differences. The colonialists created two distinct criminal legal systems - the Penal Code System (for the North) and the Criminal Code System (for the South). They believed that there was the need to respect and retain the people's diverse culture, religions and belief systems.

Notwithstanding the above, a careful perusal of both codes would reveal that it has become imperative that the two codes should be harmonized. It was observed that this will foster national unity. This is so because the colonial heritage of plural legal systems dealing with criminal matters has been one of the mechanisms that had perpetuated the concept of North and South in critical national discourse.

Undoubtedly, both penal and Criminal Codes bear some similarities and differences which have been identified and clarified in this research. For instance, the Criminal Code usually employs mode of classification of offences which is related to the degree of punishment attached to the offences. The same cannot be said of the Penal Code which leaves the severity of the offence to be determined by the punishment attached to it. On the whole, the rigid classification of offences by the Criminal Code is unnecessary and the approach of the Penal Code, in most of its provisions, is preferred and should be adopted.