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The Future of the Defence of Provocation in Nigerian Criminal Law

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1.0 Introduction:

Provocation as a defence is subjected to a considerable degree of criticism especially in the countries where the abolition of capital punishment has taken place and in those of common Law jurisdiction. In these countries there has been an argument on the future of provocation as a line of a partial defence. This is because there are some problems associated with the reasonable relation rule and the question of objectivity in the defence of provocation.

In Nigeria, the defence of provocation is a partial defence and the law on provocation needs urgent attention. The doctrine of provocation, however, raises a number of problems for the law students, judges and the practicing lawyers. In the first place, there is the important question as to whether the provocation, in its application to homicide, is defined by the codes themselves or by reference to common law, however, the common law has continued to be a guide in the interpretation of the codes' provisions. To this extent the law of provocation in Nigeria is supplemented by common law principles. For example, the proportionality rule, though not found in Nigerian codes, is frequently incorporated by the courts in their decisions. Provocation is, therefore, only a mitigating factor so that men will exercise some rational judgment in dealing with each other.

The plea of provocation is founded on loss of self-control both actual and reasonable. There is a combination of subjective and objective elements in the plea. Apart from the fact that the accused has received grave and sudden provocation, he must also have been provoked. The objective element in provocation emanates from the reasonable man test and includes the proportionality rule.

The second problem in the plea of provocation is the applicability of the objective test in Nigeria and elsewhere. Since the Nigerian legal system is influenced by the Islamic law, reference also will be made to the Maliki School of jurisprudence in the non-recognition of the plea of provocation by its doctrines.

Provocation as a defence has given rise to many conceptual difficulties and no easy solution presents itself. It is therefore aimed that this article will examine some aspects of the plea of provocation in an attempt to put it in more rational basis reflecting the basic realities in the Nigerian society of today.

1.1 The Definition and Meaning of the Defence of Provocation in Nigeria:

Black's Law Dictionary defined provocation as something (such as words or actions) that arouses anger or animosity in another, causing that person to respond in the heat of passion.[1] The Shorter Oxford English Dictionary defines provocation to mean the following:

(i) The action of calling, invitation, Summons.
(ii) The action of inciting impulse, instigation, an incentive, a stimulus.
(iii) The action or an act of exciting anger, resentment or irritation.
(iv) Cause of anger, resentment, or irritation.

Here we may observe that the word "provocation" in the above mentioned literal meanings, that the common words among all is anger, stimulus, irritation and resentment. In the real sense the word provocation means all of the above.

[1]. Bryan A. Garner, Black's Law Dictionary Seventh Edition (U. S. A West Group 1999) at p. 1241.

In the case of **Gambo Musa V. The State**[1] the Supreme Court of Nigeria defined provocation to mean as follows:

> Provocation is the act of inciting another to do a particular deed. It is that which arouses, moves, calls forth, causes or occasions. It is such conduct or action on the part of one person towards another which tends to arouse rage, resentment or fury in the latter against the former and thereby causes him to do some illegal act against or in relation to the person offering the provocation. It is some act or series of acts which would cause in a reasonable person and actually does cause in the accused, a sudden and temporary loss of self-control rendering him so subject to passion as to make him for the moment not master of the mind. Provocation which will reduce killing to manslaughter must be of such character as will, in the mind of the an average reasonable man, stir resentment likely to cause violence, obscure reason and lead to action from passion rather than judgment. There must be a state of passion without time to cool placing the defendant beyond control of his reason. Provocation carries with it the idea of some physical aggression or some assault which suddenly arouses heat of passion in the person assaulted.

The word "provocation" is mentioned in section 222(1) of the Northern Nigeria Penal Code.[2] The section provides as follows:

> Culpable homicide is not punishable with death if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

Here we may observe that the above mentioned section does not define provocation but showed us what provocation does. A writer[3] commenting on the Penal Codes' provision said:

> The Penal Code of the Northern states of Nigeria does not attempt to define what provocation is but merely tell us what provocation does.

Section 283 of the Criminal Code applicable in the Southern states of Nigeria defines provocation generally.[4] The section provides:

> The term "provocation", used with reference to an offence of which an assault is an element, includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.

Here we may observe that section 283 of the Criminal Code also falls short of giving an exhaustive definition of provocation. The short-coming of the section is that it defines provocation as including any wrongful act or insult. The use of the word "wrongful" act is not a legal term in the sense that an act may be wrongful even though it does not give rise to any criminal or civil liability. Not only that but the section failed to define provocation in cases of homicide. Eventhough cases of homicide entail the element of assault.

Section 283 of the Criminal Code scored a credit over section 222(1) of the Penal Code in recognizing provocation offered to relatives and even to servants. The said section has taken into consideration the African realities that the context of a family is not only a husband and a wife but also the extended family.[5] It is also further observed that section 283 of the Criminal Code inserted a limitation that the person who is supposed to be

[1]. [2009] 15 NWLR pt. 1165 at P. 475
[2] CAP. 89 Laws of Northern Nigeria 1963; Northern States Federal Provisions Act CAP. 345 Laws of the Federation of Nigeria 1990.
[3]. Kharisu S. Chukkol, Defences to Criminal Liability in Nigerian Law: A Critical Appraisal at P. 78.
[4]. See Criminal Code Act (CAP. 77) Laws of the Federation of Nigeria 1990.
[5] Yahaya Abubakar Muhammad, Student Handbook on the Defence of Provocation in the Nigerian Criminal Law (Maiduguri; Ed-Linform Services 1996) at p. 5

provoked by a wrongful act or insult done to his relations, must be present when the wrongful act or insult occurred.

Section 283 of the Criminal Code defines the term "provocation" eventhough the definition is not an exhaustive one, but it gives instance of what can amount to provocation. The said section has widened its scope by the use of the word "includes". It is submitted that "includes" in section 283 of the Criminal Code is meant to provide a clear definition of provocation, for it is hard to imagine what other meaning provocation could have except as defined in this section.

Section 318 of the Criminal Code is meant for cases of murder.[1] This section provides:

> When a person who unlawfully kills another in circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by grave and sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.

Here we observe that the above mentioned section 318 of the Criminal Code is found in Chapter 27 of the Code. This section neither defines provocation nor incorporates the proportionality rule in its provisions. It is further observed that both sections 283 and 284 of the Criminal Code are found in chapter 25 of the Criminal Code. Chapter 25 of theCriminal Code is meant for cases of assaults and violence. The two sections (i.e. 283 and 284 of the Criminal Code) apply to assault and violent cases but not to homicide, because not all homicide cases involve elements of assault.[2]

A question arises as to whether courts should read section 318, subject to section 283, which defines provocation or to read each section independently. The other question is whether the courts read section 318 of the Criminal Code subject to section 284 in order to help section 318 in incorporating the proportionality rule or read each separately, since section 318 stands in a separate chapter, which deals with homicide and not cases of assault or violence.

Section 284 of the Criminal Code provides:

> A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self control, and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely, to cause death or grievous harm.

Section 284 of the Criminal Code provides a complete defence for a person who made an assault on basis of provocation offered to him or to his relatives. Thus section 284 of the Criminal Code introduce an important element into the law of provocation in Nigeria. This section is a departure from the common law position that provocation is not a complete defence to a criminal charge.

In the case of **Ogbonna v. The State**[3] the Supreme Court of Nigeria has given a conclusive answers to the above questions and a clear cut guidelines for the Courts to follow in dealing with the defence of provocation. The Apex Court ruled as follows:

> Provocation for the purpose of section 318 of the Criminal Code includes any wrongful act or insult of such a nature when done to an ordinary person as is likely:
>
> (a) To deprive him of the power of self-control and
> (b) To induce him to assault the person by whom the act or insult is done or offered.

In the case of **Emmanuel Ogar v. The State**[4] The Supreme Court of Nigeria ruled as follows:

> Where a defence of provocation is raised in a charge of murder, section 318 of the Criminal Code must be read together with section 283 of the Code which defines provocation, and for the purpose of section 318, provocation includes any wrongful act

[1]. Criminal Code Act, Supra.
[2]. Yahaya Abubakar Muhammad, op cit at P. 20.
[3]. (1985) 3 N. W. L. R. 444
[4]. [2015] 9 N. W. L. R. pt. 1465 at P. 466.

> or insult of such a nature when done to an ordinary person as is likely to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered. To avail himself of the defence in a charge of murder under section 318 of the Criminal Code, the accused must have done the act for which he is charged:
>
> (a) In the heat of passion;
> (b) This must have been caused by sudden provocation; and
> (c) The act must have been committed before there was time for his passion to cool.
>
> The attitude of the Nigerian Courts has been to interprete sections 283 and 318 of the Criminal Code as impliedly including the mode of resentment or, in other words, that the retaliation must be proportionate to the provocation offered.[1]

Here, we observed that the Supreme Court of Nigeria has filled in the gap left by the legislature as to the different rules and tests governing the defence of provocation in Nigeria.

1.2 The Historical Background of the Doctrine of Provocation in Nigeria:

The historical records show that, long before the nineteenth century in what is now Nigeria, justice was administered. We find in the North, writern Moslem Law of Maliki School of jurisprudence was administered in the native courts.[2] In the South, we find unwrittern customary law was also administered through the customary courts.[3]

Tracing the history of the doctrine of provocation in the Northern part of Nigeria, it is pertinent to examine the position of provocation in Islamic Law. In Islamic Law provocation is not at all a mitigating factor.[4] According to the teaching of the Holy Quran and the Sunnah of the Prophet Muhammad (Peace be upon him), we find verses and Hadiths telling and exhorting a Moslem to control himself if he gets angry. In the Holy Quran Allah says:

> The recompense of an injury is an injury thereto, but if a person forgives and makes reconciliation his reward is due from Allah.[5]

The concept of anger in Islam is related to the devil (i.e. Shytan). The devil instigates people to commit crimes, especially when they obey him. Allah says:

> Did I not charge you, O ye son of Adam, that ye worship not the devil Lo He is your open foe![6]

In the above verse, to worship the devil means to obey him. Allah says:

> Lo! The devil is an enemy for you, so treat him as an enemy. He only Summoneth his faction to be owners of the flaming fir.[7]

The Prophet of Islam said:

> The strong person is not the one who wins in the wrestling. But the one who controls himself during anger.[8]

In a Hadith, it was narrated that a person came to the Prophet of Islam asking his advice. The Prophet repeated three times: “Do not be angry.”[1] According to the Muslim tradition, a Muslim should not give way to his temper under any circumstances.

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[1]. Ibid.
[2]. Yahaya Abubakar Muhammad, op cit at p. 7
[3]. Ibid.
[4]. Ibid.
[5]. Ibid at P. 8.
[6]. The Holy Qur’an Surah: Yasin verse No. 60.
[7]. The Holy Qur’an Surah: The Angels verse No. 6.
[8]. Yahaya Abubakar Muhammad, op cit. at P. 8.

The Prophet of Islam said:

> Anger is from the Satan (Devil) and the Satan is created out of fire. Whosoever gets angry let him perform ablution to cool his anger.[2]

Here we observed that Islam caters for both world and the controlling of human behavior. That is why the Prophet of Islam prescribed a medicine in addition to the performance of blution during anger. He said:

> If any one of you gets angry while he is standing, he should sit down and by doing so if the anger is still with him, he should lie down.[3]

In the above mentioned Hadith, the wisdom behind the standing person if he gets angry he should sit down in order not to revenge immediately. Revenge or retaliation during anger is easier for the standing person. But for the person sitting down or lying down, he is far from revenge and retaliation.

From the above mentioned Islamic authorities, no amount of provocative insult or act can justify a person for killing another person and then plead for the defence of provocation. In this respect Islamic Law has not given a concession to human frailty because anger is forbidden in Islam.[4]

The history of the defence of provocation in Nigeria can be dated correctly is after the advent of the colonial rule to Nigeria. According to the unwritten customary Law applied in the Southern part of Nigeria, historical records show that nobody can ascertain authoritatively whether provocation was pleaded as a defence in the customary courts.[5] As to the Northern part of Nigeria before the advent of the colonial rule Islamic Law based on the Maliki School of jurisprudence was in full force.

1.3 The Proportionality Rule:

The mode of resentment must bear a reasonable relation to the provocation. Thus, for a plea of provocation to succeed, the English Courts adopted a rule that the retaliation for the provocation offered should be proportionate.[6] That is the mode of resentment must bear a reasonable relationship to the provocation offered. In **R v. Duffy**[7]**,** Devlin said:

> Fists might be answered with fists, but not with a deadly weapon.

The proportionality rule in Nigeria is specifically mentioned in section 284 of the Criminal Code i.e. "…..provided that the force used is not disproportionate to the provocation". This proportionality in section 284 of the Criminal Code is required for cases of provocation in which an assault is an element. Here it is worthy mentioning that neither section 222(1) of the Penal Code nor section 318 of the Criminal Code has incorporated the proportionality rule for homicide cases. But in Nigeria, the Federal Supreme Court of Nigeria has filled in the gap left by the legislature in the absence of the proportionality rule in sections 222(1) and 318 of the Penal Code and Criminal Code respectively. The Apex Court in the case of **Chukwu Obaji v. The State**[8]**,** ruled as follows:

(i) The duty of the Courts in Nigeria is to interprete the Criminal Code free from interpolation and refrain from propounding the Common Law of England.

(ii) Whilst the Court agrees that the first part of section 284 of the Criminal Code is limited to cases of assault specifically, it feels that in reading any section of the Criminal Code, any other section of the Criminal Code, any other section which is relevant to the section under consideration cannot be disregarded.

(iii) Reading section 283 and section 318 of the Criminal Code together (and in the view of the Court, they should be read together) makes it difficult to accept the view that "proportionality" must be excluded.

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1. Ibid.
2. Ibid.
3. Ibid at P. 9.
4. Ibid.
5. Ibid at P. 10.
6. Ibid at P. 33
7. (1949) IALL. E. R. 932.
8. (1965) N. M. L. R. 417.

(iv) The correct direction in Nigerian Law is that in relation to murder "provocation" in section 318 of the Criminal Code requires consideration of the nature of the weapon or force used as a mode of resentment bearing some reasonable relation to the provocation received, the disproportion being a factor for the jury to consider in determining whether the accused had completely lost control of himself or was acting for reason other than complete loss of self-control caused by sudden provocation.

(v) In applying the doctrine of "proportionality" the background of the accused and the circumstances of his locality are relevant facts for the jury to decide.

From the above Supreme Court decision, we observed the following:

(a) In reading section 318 of the Criminal Code in case of homicide where the plea of provocation is raised, any section under the code relevant to it cannot be disregarded.
(b) The proportionality rule remains a part of the Nigerian Law. For example, to exclude it, a slight provocation might avail the accused of the benefit of the mitigating sentence, and this will be contrary to public policy.
(c) The proportionality rule will not be the sole determinant but of evidentiary value in determining whether the accused completely lost control of himself or was acting from other ulterior motives.

The Supreme Court of Nigeria in the case of **Mbanengen Shande v. The State**[1]**,** put down the basics requirements for the defence of provocation that can avail an accused person as follows:

(a) He has done the act for which he is charged with in the heat of passion;
(b) The act must have been caused by sudden provocation;
(c) The act must have been committed before there was time for passion to cool;
(d) The mode of resentment must be proportionate to the provocation offered.

These four requirements must co-exist before the defence of provocation can succeed.

In the case of **Emmanuel Ogar v. The State**[2]**,** the Supreme Court of Nigeria laid down basic consideration as follows:

> In considering the defence of provocation, there are two things to which the law attaches great importance. The first of them is whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind. That is why most acts of provocation are cases of sudden quarrels, sudden blows inflicted with an implement already in the hand, perhaps being used, or being picked up, where there has been no time for reflection. Secondly, in considering whether provocation has or has not been made out, one must consider the retaliation in provocation, that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists might be answered with fists, but not with a deadly weapon, and that is a factor that must be borne in mind when one is considering the question of provocation.

The nature of the weapon or force used and mode of resentment bearing reasonable relationship to provocation received must also be considered. The danger is that the courts have tended to place undue emphasis on the nature of that act itself. Consequently, where "B" who is provoked by "A" kills him by hitting one blow on the head, the courts, may hold that this is manslaughter. But where "B" after the blow struck many other blows and then hacked "A" to pieces with a knife, the court, may consider this to be murder because the mode of resentment was disproportionate to the provocation without considering whether "A" died of the first blow only or the other blows and the mutilation were done in a single minute. In fact, one may question the relevance of the subsequent retaliatory acts after initial fatal blow.[3] In **R v. Bassey**[4] where appellant was attacked by three persons of whom the deceased was one. The appellant inflicted four blows on the deceased and she died. The trial judge, found that the sudden attack on the appellant would cause a reasonable person of the appellant's standing in life considerable anger and cause him to strike the deceased once but that it did not excuse his

[1]. (2005) 12 N. W. L. R. pt. 939 at P. 305
[2]. Supra at P. 467.
[3]. Okonkwo and Naish, Criminal Law in Nigeria Second Edition (London, Sweet and Maxwell (1980) at P. 249.
[4]. (1963) I All N. L. R. at P. 280.

continuing to deal death blows on the deceased then incapacitated, for the second, third and fourth times in quick succession. The Federal Supreme Court of Nigeria disagreeing and finding provocation proved, pointed out that the finding of the trial judge implied that there was time for the appellant's passion to cool between the infliction of the first and other injuries. The Apex Court ruled as follows:

> We are unable to agree. All four blows were delivered within a matter of seconds of each other and if the first blow was, as the learned judge found, given in the heat of passion caused by sudden provocation we cannot see how the other blows can be treated differently.[1]

The reasonable relationship rule has been developed on the assumption that loss of self-control is not absolute. But a number of cases on provocation revealed that frequently the defendant does not remember what happened exactly during loss of self-control.[2] Also the degree of response to a stress situation varies considerably from one individual to another. It would be perverse for the Law to ignore these teachings of science and absurd for it to doubt their validity.[3] After all loss of self-control does not indicate what has been done. These criticisms stem from the assumption of the law that a reasonable man continues to be reasonable even after loss of self-control. It is a misconception to compare the retaliatory acts which followed. In Hume's word:

> Reason is the slace of passion and can never pretend to any other office than to serve and obey them[4]

The reasonable relationship rule is to a large extent inconsistent with established physiological and psychological notions of the behaviour of an individual. It is even thought to be illogical and contrary to common sense. From the foregoing, it is evident that the mode of resentment should be proportionate to the provocation received needs urgent attention for Law reform.

1.4 The Reasonable Man Rule:

It is the accepted Law in most jurisdictions including Nigeria that not every provocation will modify the nature of an offence. To have this effect, the provocation must be such as to cause a reasonable person to lose his power of self-control. The test is the effect which it did actually have on the accused. Thus a reasonable man is a person having the power of self-control of an ordinary person but otherwise having the characteristics of the offender.

In the case of **Gambo Musa v. The state,**[5] the Supreme Court of Nigeria ruled on the test to be applied where the defence of provocation is raised as follows:

> Where a defence of provocation is raised, the test to be applied is that of the effect the provocation would have had on a reasonable man. In that circumstance, it is of particular importance to take into account the instrument with which the homicide was effected. In the instant case, the mode of resentment did not bear a reasonable relationship to the provocation alleged by the appellant.

In the case of **Emmanuel Ogar v. The State**[6] the supreme Court of Nigeria ruled on what accused must show in raising defence of provocation as follows:

> In order to set up provocation as a defence, it is not enough to show that the accused was provoked into losing self-control. It must be shown that the provocation was such as would in the circumstances have caused a reasonable man to lose his control. For his purpose the reasonable man means an ordinary person of either sex, not exceptionally excitable or pugnacious but possessed of such powers of self control as everyone is entitled to expect that his fellow citizens will exercise in society. In addition that the provocation must be sudden, done in the heat of passion and before there is time for

[1]. Ibid at P. 284.
[2]. See **Bedder v. D. P. P.** (1954) 1 W. L. R. 1119.
[3]. Peter Brett, "The Physiology of provocation" (1970) Criminal Law Review at P. 637.
[4]. A treaties on human nature (1888) at P. 415.
[5]. (2009) 15 N. W. L R. pt. 1165 at P. 476.
[6]. Supra at P. 467.

> passion to cool under the provisions of sections 283 and 318 of the Criminal Code, the nature of retaliation by the accused must also be proportionate to the nature of the provocation offered.

Provocation is a concession to human frailty. Therefore, Brett suggested that the reasonable man rule in provocation should be abolished since the rule is purely a judicial creation.[1] Also worth mentioning is that the objectivity inherent in the reasonable man has attracted a great deal of criticism from academic writers. There are two main lines of criticisms in this regard. The first is the bad-tempered man argument. This arises from comparison between individuals and their feelings of justice. It is unjust to have same standard of reasonableness in a society where there are bad-tempered persons. In such cases, the scale of reasonableness weighs against the bad-tempered persons. The second argument is that although provocation is based on purely subjective consideration, the test is the objective effect on a reasonable man. The objective standard of provocation deals unfairly with those persons who are congenitally incapable of attaining the reasonable level of self-control. The defence of provocation is thus reproached with a cruel inconsistency being a concession to human weakness and yet applying the same standard to persons of unequal capacity.[2] It must be noted that the codes in Nigeria lay down subjective test for provocation but the courts seem to have imported the objective standard.[3]

1.5 Drunkenness and Provocation:

Drunkenness might impair a man's powers of self-control so that he more readily gives way to provocation than if he were sober. In the Nigerian case of **Chutuwa v. R.**,[4] the West African Court of Appeal, in considering the effect of section 29(4) of the Criminal Code on section 318 of the Criminal Code, adopted the views expressed by the Court of Appeal in the case of **R. v. Mc Carthy,**[5] where it was laid down that:

> Apart from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner in which no reasonable man would do, cannot assist to make out a defence of provocation….

In **Sudan Government v. Mohammed Saad Suleiman,**[6] Cummings C. J. remarked:

> In assessing whether the accused suffered grave provocation, it is, I think, settled that we follow India in not taking the drunkenness into account. The provocation to be grave must be such as would so upset a normal reasonable man.

Voluntary intoxication is not regarded as a mitigating factor in cases of provocation. In the words of Professor Hall:

> The Law does not grant any indulgence to a person who had taken the quantity of liquor requiste to make him a savage.[7]

Evidence of drunkenness, which merely establishes that, owing to his state of intoxication, the accused himself would more readily give way to some violent passion cannot be relied upon is so far as provocation is concerned.[8]

The fact that drunkenness made a man more negligent or more mistaken than otherwise he would have been is irrelevant to the question of provocation. Provocation must be such as to deprive a reasonable man, not a drunken man or tempered man of self-control and must in fact deprive the accused of self-control.[9]

In **R. v. Newell,**[1] the appellant, who lost his woman, killed his drinking friend after he made some disparaging remaks about the woman. He raised the defence of provocation but the defence was rejected.

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[1]. See Peter Brett, op cit at P. 638.
[2]. A. J. Ashworth, 'The doctrine of provocation' (1976) Cambridge Law Journal Vol. 35, 292 at P. 311.
[3]. See Generally Krishna Vasdev, The Lawof Homicide in the Sudan (London Butterworths 1978) at P. 222.
[4]. (1952) 14 W. A. C. A. 59.
[5]. (1954) 2 W. L. R. 1044; (1954) 2Q. B. 105.
[6]. Yahaya Abubakar Muhammad, op cit at P. 64.
[7]. Ibid.
[8]. Ibid.
[9]. Ibid.

However, the plea of provocation which may be raised by a drunken person would not be considered by the court, but only evidence of drunkenness which renders the accused incapable of forming the specific intention may be taken into consideration.[2]

1.6 Finding in Adultery and Provocation:

The Common Law, however had traditionally been kind to the husband who discovers his wife committing adultery and kills either her or her lover or even both. This early lenient attitude of the Common Law to the husband in such a situation was coloured by the idea that adultery constituted an infringement of the husband's proprietary interests in his wife. Hence the leniency of the law was confined to situations in which a strickly legal marital tie existed between the offender and the woman he killed.[3] What does the finding means? Does it mean to find the wife and the adulterer in flagrante delictor?, or does it mean to find them in circumstances that suggest adultery? In the East African case of **Chacha S/O Wamburu v. R,**[4] the court held that it is not necessary that the wife and the adulterer should be caught during the actual period of intercourse, but if they are found together in circumstances from which immediate recent intercourse is and can safely and correctly be inferred, they may be said to be found in the act of adultery within the meaning of the rule. In this connection professor Chukkol observes:

> When it is said that one's finding his wife committing adultery constitute provocation sufficient to reduce a conviction of murder to manslaughter it is not thereby implied that one must meet his wife and the male intruder belly-to-belly (i.e. in the actual act of intercourse).[5]

In the case of **Matthew Ahungur v. The state,**[6] the Nigerian Court of Appeal, on when provocation will not constitute defence in murder cases ruled as follows:

> Where a husband already has knowledge of the unfaithfulness and sexual immorality of his wife with another man and she has indeed deserted him, seemingly exercising her right as to whom to associate with, which is a matter of conscience and principles, and he kills that other man subsequently, provocation as a defence is not available to him. His act would be brutal murder because there would be nothing sudden in the provocation to deprive him of self-control. In the instant case, the defence of provocation set-up by the appellant failed and the prosecution established a case of murder against the appellant.

Both English and Nigerian Law regard finding a mistress in an act of adultery and confession of adultery by a mistress as not justifying the verdict of manslaughter. In **King v. Palmer,**[7] the court held that a similar confession of illicit intercourse by a woman who was not the prisoner's wife but only engaged to be married to him cannot, if he kills her in consequence, justify such verdict (i.e. manslaughter).

In Islamic Law, in case of finding in adultery the husband is supposed to bring four witnesses to adduce conclusive evidence that they have seen both the wife and the adulterer in the actual act of intercourse i.e. in flagrante delicto.[8] If he discharges this burden of proof, his wife will be punished according to Sharia law (i.e. by stoning to death). But in case he kills her by himself, it will be regarded as intentional killing because the defence of provocation is not a recognized defence in Islamic Law.

Dr. Aguda suggested that Nigerian courts in applying the code should take the view that the discovery of another man in the act of sexual intimacy with one's wife, fiancée or mistress should equally be regarded as sufficient provocation.[9] A Sudanese judge shared Aguda's suggestion in the case of **Sudan Government v. El.**

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1. (1980) C. L. R. at P. 576.
2. See Allan Gledhill, The Penal Codes of Northern Nigeria and the Sudan (London Sweet and Maxwell 1963) at p. 127.
3. **King v. Palmer** (1913) 2 K. B. 29
4. Yahaya Abubakar Muhammad, op cit at P. 31.
5. Kharisu S. Chukkol, op cit at P. 82.
6. (2012) 12 N. W. L. R. pt. 1313 at P. 194
7. Supra.
8. Muwatta Imam Malik, Trans-Prof. Muhammad Rahimuddin at P. 318.
9. T. Akinola Aguda, Principles of Criminal liability in Nigerian Law (Ibadan Heinemann Educational Books Nigeria Plc 1990) 2nd Edition at P. 402.

Amin Karama,[1] where he held that the question of provocation is purely a psychological one and that questions of social morality are irrelevant.

Here we beg to disagree with Dr. Aguda and the Sudanese judge. Law and morality overlap a part from the normative language which is common to both. These norms (i.e. Law and morality) derive strength and efficacy from each other. For instance, the Criminal Law, for its effectiveness, depends upon the rules of morality, which provides a cement of any human society and the law, especially the Criminal Law, should regard this as its primary function to maintain public morality.

If the Law avails the accused person, the benefit from the plea of provocation in finding his mistress in the act of adultery, this will help in the degeneration of the social morals. And any person may raise a plea of provocation even for a common prostitute claiming to be his mistress. The Law should enforce social morals and not to care for every human frailty. The Law should play its active role in the society by changing behaviour and call for a high standard of social morals and self-control.[2]

1.7 Provocation and Witchcraft:

Mary Douglas said:

> The term witchcraft is used to cover all forms of belief in spell binding, fascination of evil, and bewitching. In contemporary literature, sometimes the expression is used to refer exclusively to internal psychic power to harm. Sorcery is used to indicate bewitching by spells, charms or potions.[3]

An interpretation has been given to section 283 of the Criminal Code that the section failed to bring within its provisions acts brought by witchcraft to constitute provocation. A writer said:

> When section 283 of the Criminal Code mentions acts and insults in its definition of provocation, it can hardly have been envisaged by its framers that an 'act' in the Nigerian or even African context need not be an event that can be easily discerned by the traditional senses or hearing and seeing. An event brought about by witchcraft may not be as tangible as a slap on the face. Can situations springing from the belief in and the practice of witchcraft or other supernatural powers be brought within the ambit of provocation?.[4]

One could say that acts brought about by witchcraft sometimes are more provocative than the slap on the face or whatever insult can be imagined. It is the very realistic direction that in African communities acts brought about by witchcraft should be regarded as constituting grave and sudden provocation, especially when the witch is found performing his superpowers. In the case of **Konkomba v. The Queen,**[5] the appellant killed the deceased because he feared that the deceased who had killed one of his brothers by witchcraft was in the process of killing another, who at that time was sick. There was evidence that the deceased was asked to relieve the patient but he replied by saying that he has no medicine for relief. The appellant struck him dead with an axe and relied on provocation.

The trial court referred briefly to the issue and ruled as follows:

> In murder cases a defence (of provocation) founded on witchcraft has always been rejected except in cases where the accused himself had been put in such fear of immediate danger to his own life that the defence of grave provocation has been proved.[6]

[1]. (1961) S. L. J. R at. P. 95.
[2]. See Patrick Devlin, The Enforcement of Morals (London Oxford University Press 1965) at P. 19.
[3]. Kharisu S. Chukkol, op cit at P. 83.
[4]. Kharisu Sufiyan Chukkol, The Law of Crimes in Nigeria at P. 125.
[5]. (1952) 14 W. A. C. A. 236.
[6]. Ibid at P. 237

In the case of **Sunday Njokwu v. The State,**[1] the Supreme Court of Nigeria on whether plea of provocation founded on witchcraft ruled as follows:

> A plea of provocation founded upon witchcraft cannot stand. In the instant case the incident of dropping a charm or juju at the residence of the appellant which was allegedly linked with the death of the two year old son of the appellant did not quality as an incident of provocation. It does not matter that appellant might have honestly believed that there was a connection between the two events, which belief was obviously founded on witchcraft simpliciter.

In the same vein in the case of **Goodluck Oviefus v. The State,**[2] this Court per Oputa, JSC (as he then was) observed in relation to the defence the appellant asserted on the basis of witchcraft at page 26, 262 and 264 of the report thus-

> No man's belief is on trial in a murder case…what is on trial is the act or omission of the accused. Whether or not the accused believed in witchcraft seems quite irrelevant to the inquiry … Therefore a defence founded on belief in witchcraft or juju is a defence founded on the subjective belief of the accused rather than on the objective requirements of the law relating to the particular relevant defence. Such defence are untenable. But if the belief in witchcraft or juju produces a state of insanity or delusion then the criminal responsibility of the accused will be measured not by the tenets of his belief but by the objective standard of the law relating to such defence-viz insanity, delusion or provocation as the case may be. Belief in witchcraft or juju per se is no defence – whether or not such belief is superstitious, primitive or civilized is totally irrelevant. What is important is the effect of such belief on the person accused, his conduct resulting
>
> from such belief and whether or not the law offers protection to or with regard to such conduct as an excuse thus offering him a defence.[3]

In the same vein in the case of **Godwin Josiah v. The State**[4] the Supreme Court of Nigeria further reiterated that courts should be very slow in accepting facile defences that are in the main as subjective of a man's belief which has no objective standard against which it may be judged.[5]

Here we observed that the rejection of the plea of provocation on basis of witchcraft or juju is illogical and contrary to the principles of natural justice. As we are aware that the act of juju or witchcraft is a criminal offence under sections 210 and 216 of the Criminal Code applicable in the Southern part of Nigeria and the Penal Code applicable in the Northern part of Nigeria respectively. To say the act of witchcraft is a criminal offence and then not to avail those who are affected by it when they have reacted upon a grave provocation to the act of witchcraft is unjust. It is on consonance with the basic tenents of justice if the defence of provocation be recognized in cases of witchcraft after satisfying the Nigerian codes requirements.

1.8 Conclusion:

The defence of provocation in Nigeria must be considered under the Nigerian Codes. Although the defence of provocation under the Nigerian codes is substantially the same as the Common Law doctrine of provocation. Nigerian Courts should apply the defence from the stand point of the Criminal and Penal Codes. We should desist from assuming that the law of provocation in Nigeria is a restatement of the English Common Law doctrine. This does not mean that English decisions would no longer be resorted to in interpreting the Codes.

English decisions should be of persuasive nature to our courts and not binding. In other words, our courts should be guided by the English and any other decisions from any country of Common Law jurisdiction. For example, Nigerian Courts should be guided by the West African Court of Appeal in the case of **Konkomba**

[1]. (2013) 9 N. W. L. R. pt. 1360 at P. 423.
[2]. Ibid at P. 424.
[3]. Ibid at P. 425
[4]. (1985) 1 N. W. L. R (pt. 1) 125 at 141
[5]. Ibid.

v. The Queen,[1] as regards provocation founded on the accused's belief in witchcraft. Nigerian courts if guided by the above decision can easily dispose of witchcraft cases.

In the area of the reasonable man, the Nigerian Courts should adopt the decision of the House of Lords in **D. P. P. v. Camplin,**[2] where it was held that the jury should b directed that the reasonable man:

> Is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing each of the accused's characteristics as they think would affect the gravity of the provocation to him.[3]

The courts in Nigeria will have to make up their minds whether to accept the purely subjective test or the test of a reasonable man of the same locality as the accused. There is almost universal outcry against the reasonable man test,[4] which is contrary to the letter and spirit of section 222(1) of the Northern Nigerian Penal Code and section 318 of the Southern Nigerian Criminal Code.

The proportion rule of retaliation works unfairly to the detriment of the accused. Under it, the accused is expected to make an impossible choice of weapon, for instance, at the time provocation is given to him, he happens to be armed with a sword, a dagger and spear. When punched on the face with great force, he would not normally stop to think whether to use any of his fists in retaliation or to use any of the several weapons at his disposal. Therefore, the proportionality rule in Nigerian should be modified and not be excluded. For to exclude it will mean that a slight provocation might earn the mitigated sentence and this will be contrary to public policy.

The law seems to have been applied liberally in favour of aggrieved husbands who kill their wives upon the slightest suspicion of adultery. The law should have recognized in flagrante delicto cases of adultery and not cases of mere suspicion.

Since the defence of provocation is the sole concession to loss of self-control by persons who are not classified as mentally disordered, one would suggest that not every human frailty or weakness should be taken into account. The law should aim to regulate human behavior and demand a high standard of self-control. In considering the defence of provocation, the evolution of society must be considered; social habits and feelings have to be taken into account.

The Courts in Nigeria should interpret the Criminal Code and the Penal Code free from external interpolations, and should refrain from propounding the Common Law of England. Also the legislature has to look into the inadequacies of drafting and irregularity of sections in the Criminal Code concerning the defence of provocation (i.e. section 283, 284 and 318).

Since the defence of provocation is full of contradictions, pertaining to the reasonable man as a newly judicial creation and the proportion rule in retaliation (you should lose your power of self-control but your retaliation should be proportionate), it is difficult to weigh and comprehend in practical situations.

The writer is of the strong opinion that the Law should not give any concession to human weakness, especially in cases of provocation. It is high time that the law set a high standard of self-control. One also sees no harm in adopting the position of the Maliki School of jurisprudence in the non-recognition of the defence of provocation for the benefit of mankind so as to reduce the chances of mischief done by man to his fellow man.

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[1]. Supra.
[2]. (1978) 2 ALL E. R. at P. 168.
[3]. Ibid.
[4]. Russel in Crime, vol. 1 (12th Edition) (1964) by Turner at p. 535; Smith and Hogan, Criminal Law, (1965) at p. 215; Williams, (1954) Criminal Law Review at P. 740.