



AN INSIGHT ON CRIMINAL RESPONSIBILITY IN YORUBA JURISPRUDENCE

By

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Abstract

Legal principles and doctrines are lubricants in the wheels of justice administration across legal cultures. Contrary to belief and attitude of many, who hold that law and jurisprudence do not exist in Africa, dispute adjudication and criminal trial in Africa and Yoruba Jurisprudence in particular are driven by relevant doctrines and principles that underlay our judicial process. The main thrust of this work is an examination of the principle of criminal responsibility in Yoruba Jurisprudence, with particular focus on the doctrine of mensrea as a major determinant of criminal liability. Through an excursion into Yoruba legal history and exploration of her Jurisprudence, likely defences to criminal responsibility were discussed in juxtaposition with the doctrine of mensrea in English Law as practised in Nigeria. On the whole, it was found that man, wherever he is and whatever his race, reacts the same way to similar circumstances. Hence, approach to criminal responsibility is the same in many legal systems. The paper adopts qualitative methodology involving doctrinal approach to the investigation and analysis of both primary and secondary sources of relevant materials. The paper recommends that African legal culture should be promoted by African scholars across African universities.

Keywords: Criminal, Insight, Jurisprudence, modernity.

1.0 INTRODUCTION

Crime is a natural phenomenon in any human society. Mechanism for investigation and prosecution of crime is also intrinsic to every community. Human communities, whether traditional or modern, have mechanisms for the regulation of human behaviour, around which the element of sanction is usually woven. Crimes had always been committed in African traditional societies and had always been prosecuted through indigenous mechanism inherent in African

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society. Centuries before colonialism, African Kingdom and Empires flourished across the continent of Africa. These include Ghana, Songhai, Oyo, and Mali empires in the west, Kingdom of Congo in the Central, the Zulu Empire in South Africa and the ancient Bunyoro Empire and Buganda Kingdom in the East, to mention a few. These Empires and Kingdoms, as well as non-centralised African societies such as the Nuer of Sudan and the Igbo of Eastern Nigeria, had judicial institutions through which sundry disputes were adjudicated and crimes were prosecuted.¹ For instance, the Poro and Sande associations of the Mende of Sierra Leone oversee crime investigation and dispute adjudication in general.² Among the Yoruba of South-western Nigeria, the age-grade association and Palace guards participate in crime investigation and prosecution,³ while people found guilty of certain offences were made to serve their terms as servants in Palace administration.⁴

In modern time, the dynamics of African Jurisprudence have been employed to facilitate prosecution of crimes. According to Idi Tuzinde,⁵ at least 120,000 detainees are in prisons around Rwanda on account of the 1994 genocide, the vast majority of who were accused of participation in the genocide. At the present rate, it is estimated that it would take between two to four centuries to try all those in detention. The Rwandan government has developed a new procedure called “gacaca,” which are lower-level tribunals that attempt to blend traditional and contemporary mechanisms to expedite the process of prosecution. It could therefore be distilled from the foregoing, that the existence of law is not limited to one continent in the globe, neither is its exercise an exclusive practice of a race. Despite the truism of the above fact, there are dissenting opinions which harbour some misconceptions about African Law and Jurisprudence. While some argue that Africa does not have a means of social control that can be referred to as law, others posit that there is no African jurisprudence.

A cursory look at the Austinian definition of law as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him,

¹ T O Elias *The Nature of African Customary Law* (1956, Manchester University Press) at 8-9

² K A Opoku *West African Traditional Religion* (1978, Fep International Ltd) at 179

³ A.T Oyewo and O.B Olaoba *A survey of African Law and Custom with Particular reference to Yoruba speaking People of south-western Nigeria* (1999, Jator Publishing Company).

⁴ G O I Olomola *Pre-colonial Patterns of Inter-state Relation in Eastern Yorubaland* (1977, PhD thesis, University of Ife).

⁵ Idi T G *Justice and Social Reconstruction in the aftermath of genocide in Rwanda: An evaluation of the possible role of the gacaca tribunals*. (2000, LL M Dissertation, Faculty of Law University of Pretoria).



could be taken as including the legal system of African societies with advanced communities and loyalty to a political superior, usually the paramount chief or the king-in-Council. However, a further study of John Austin's work reveals that the reputed exponent of the analytical theory of law does not consider the legal system of any African society as law properly so called, be it a community with centralized political authority or the one with decentralized authority. Austin was primarily concerned about western legal system, and in particular the English system, where the King-in-Parliament is the final legal authority.⁶

Similarly, J.F. Holleman in his book *Issues in African Law*, posited that there is no African Jurisprudence.⁷ While writing about the Nuer of Sudan, Professor Evans – Pritchard stated as follows:

In a strict sense Nuer has no law. There are conventional compensations for damage, adultery, loss of limb, and so forth, but there is no authority with power to adjudicate on such matters or to enforce a verdict.⁸

The above is just a fleeting glimpse of the opinion of some scholars about African Law. If Professor Evans-Pritchard, an anthropologist, could have stated the above, then, there is a compelling need to portray African jurisprudence in the appropriate light, especially when some African scholars, lawyers and jurists also share in the misconceptions about African law. It is noteworthy however, that part of the reasons for the misconception about African law in general, is the weakness of the indigenous legal system inherent in its unwritten nature. This weakness is so obvious that it was observed by Allott, one of the most sympathetic authorities on African Law when he was reported to have said that:

There is no pondering over legal principles, no juristic analysis, no criticism or refurbishing of old precedents, all of which depend on written texts, which the justice may scrutinise at leisure. Hence, no jurisprudence in (the English and continental sense), no creative conscious evolution of legal principles and doctrines, no writing process in the courts.⁹

⁶ JAustin *The Philosophy of Positive Law* (1885, Vol. I, John Murray) in T O Eliasnote 1 at 37-39.

⁷ JFHolleman *Issues in African Law* (1974 The Hague) at 13.

⁸ E EEvans – Pritchard *The Nuer* (1940, Oxford University Press) at 162 in T O Eliasnote 1 at 31

⁹ Albidapo-Obe *A synthesis of African Law* (2005, Concept Publication Limited) at 100.



It is in view of this that Dr. Kwame Nkrumah on the occasion of the commissioning of the Ghanaian Law School made a clarion call when he said *interalia* that:

African Lawyers will have to do effective research into the basic concepts of African law, clothe such concepts with living reality and the African legal standard upon which legal history in its various compartment could be hopefully built.¹⁰

The purpose of this paper therefore, is to espouse some legal dynamics that underlay criminal responsibility in Yoruba Jurisprudence, and compare the principles involved with those applicable in English Law. In tandem with the clarion call of Dr. Nkrumah *supra*, this paper does not only seek to discuss the dynamics of criminal liability in Yoruba legal thought, but also to cloth some of the legal issues involved with living realities inherent in Yoruba legal history and juristic thought.

Confirming the existence of gaps in the available literature on Yoruba Jurisprudence, a foremost scholar of Jurisprudence, Ademola Popoola has the following to say:-

Perhaps no other single African people have commanded as much attention of scholars of all disciplines as the Yoruba. Their physical environment, their history and mythology, their language, artistic traditions, thought systems, social and political institution, their religious, moral and aesthetic values, their economic and medical systems and conditions in Africa and the Diaspora, have been and are continuing to be of great attraction to scholars and researchers. The same cannot be said however, of Yoruba Jurisprudence and Philosophy of law. Yet, the Yorubas have been in the forefront of Law and the Legal Profession in Nigeria, a field in which they could boast of a historically significant number of firsts.¹¹

¹⁰ K Nkrumah Law in African, *Journal of African Law*(1962) Vol.6 at 103.

¹¹ A O Popoola *Yoruba Jurisprudence: Contents, Lessons and Challenges*(2006, 12th Odunjo J F Memorial Lecture at the University of Ibadan) at 5.



This paper therefore seeks to fill some of the gaps, especially with respect to the concept of criminal responsibility in Yoruba Jurisprudence. While many aspects of the Yoruba life had been exhaustively discussed by many scholars, same cannot be said of Yoruba Jurisprudence. We acknowledge the works of great scholars with profound gratitude and reverence, their efforts are nothing but pillars of strength and spring of inspiration for budding scholars. These scholars include: Ajisafe,¹² Elias,¹³ Adewoye,¹⁴ Olaoba,¹⁵ Oyewo,¹⁶ Ibidapo Obe,¹⁷ Popoola,¹⁸ and Fadipe¹⁹ among others. Their works constitute the fulcrum of research into Yoruba Jurisprudence; they slake our thirst with their fountains of knowledge, but fire our appetite for further research into Yoruba Legal thought as they left some navigable waters of knowledge for future research.

2.0 CONCEPTUAL CLARIFICATIONS

2.1 Who are the Yoruba?

It is difficult to define who the Yorubas are. However, consideration of the following criteria could ease the task; common language, traditions of origin, socio- political institutions and organizational patterns, religion, morals and the geographical contiguity of different groups. Going by the above, the Yoruba country lies roughly between latitudes 6° and 9° North and longitude 2°3' and 6° 3' East. It covers about 181, 300 square kilometers.²⁰ Thus, Yoruba land is peopled by those who share in common all the criteria mentioned above, especially ancestral lineage, traceable to Oduduwa in Ile-Ife.

Today, the bulk of the Yoruba people are found in the south western part of modern Nigeria, where they form one of the major ethnic groups. The Yoruba culture covers the present day Oyo, Osun, Ogun, Ondo, Ekiti and Lagos States entirely, and a good part of Kwara and Kogi States. There is also a substantial number of Yoruba race in south-eastern part of the Republic of Benin which is

¹² A K Ajisafe *Law and custom of the Yoruba People* (1924, Routledge).

¹³ T O Elias note 1 above.

¹⁴ O Adewoye "Proverbs as Vehicle of Juristic Thought among the Yoruba" (1987) Nos 3 & 4 *Obafemi Awolowo University law journal*.

¹⁵ O B Olaoba *Yoruba Legal Culture* (2008, New Age Publishers Ltd).

¹⁶ A T Oyewo and O B Olaoba *A Survey of African law and Custom with particular Reference to the Yoruba speaking peoples of South-Western Nigeria* (1999, Jator Publishing Company).

¹⁷ A Ibidapo-Obe note 9 above.

¹⁸ A O Popoola note 11 above

¹⁹ N A Fadipe, *The sociology of the Yoruba*, Ibadan: (1970, Ibadan University Press)

²⁰ A O Popoola note 11 above.



contiguous with Yoruba land in Nigeria. Similarly, there are pockets of Yoruba population in some other West Africa countries and also across the Atlantic as far as the Carribean and South America, particularly in Cuba and Brazil.²¹

2.2 What is Jurisprudence?

Much juristic ink had flowed in a bid to provide a universally accepted definition of the term “Jurisprudence”. However, none appears to have captured its whole essence, as definition varies in tandem with the number of scholars and their ideological inclination. According to Adaramola,²² definition of Jurisprudence is difficult for two reasons. The first is that it intimately touches and concerns law, which itself is infinitely difficult to define. Jurisprudence thus shares in this difficulty. Secondly, it can be used in two different but parallel senses. Literally, Jurisprudence means “knowledge of law” or “skill in law”, whereas in its technical sense it denotes the restricted or specialized field of study, designed for the training of undergraduates in the L.L.B degree programme and also at the postgraduate levels in the Universities.²³ Aside this, different jurisprudential schools define jurisprudence in consonance with their own approach to legal philosophizing. These ideological factors are too often implicit, rather than openly expressed. Perhaps, this implicit nature of the ideological factors has informed their description by Holmes²⁴ as “inarticulate major premises”.

Despite the seeming definitional polemics in which “jurisprudence” is shrouded, however, imperfect, definitions are necessary as working premises and for the avoidance of total dispute. According to Salmond,²⁵ jurisprudence is “the name given to a certain type of investigation of an abstract, general and theoretical nature which seeks to lay bare, the essential principles of law and legal system. To Julius Stone,²⁶ Jurisprudence is “the lawyer's extraversion, the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in discipline other than law” To Adaramola²⁷ Jurisprudence is not a typical subject in the law degree curriculum, it is a unique law based social science subject which in relation to the other subjects in that curriculum is comparable to a sea into which all rivers flow.

²¹ Ibid

²² FAdaramola *Jurisprudence* (2008, Lexis NexisButterworths) at 1.

²³ Ibid

²⁴ Lloyd of Hampstead and M D A Freeman *Lloyd Introduction to Jurisprudence* (5th ed, 1985, Stevens & Sons) at 1.

²⁵ J Salmond *Jurisprudence* (1937, Sweet and Maxwell).

²⁶ FAdaramola note 22 at 2.

²⁷ FAdaramola note 22 at 1.



John Austin, the arch analytical legal positivist defines Jurisprudence as “the science concerned with the exposition of the principles, notions and distinctions which are common to system of law in developed societies.”²⁸ This reference to “system of law in developed societies” is in tandem with Holleman's assertion that there is no African jurisprudence.²⁹ Adewoye³⁰ however posits that there is an African philosophy of society, based on “a believe in the continuity of life, and a community of interest between the living, the dead and the generation yet unborn”. According to him, there is no distinct articulation of a philosophy of law, but African jurisprudence is woven into the largest texture of the philosophy of society.

The position of Lord Radcliffe lends credence to the existence of African Jurisprudence when he agrees with Adewoye that the study of law involves the study of the philosophy of life of a people, as we cannot learn law by learning law.³¹ Lord Radcliffe stated further:

"You will not mistake my meaning or suppose that I depreciate one of the great humane studies if I say that we cannot learn law by learning law. If it is to be anything more than just a technique, it is to be so much more than itself: a part of history, a part of economics and sociology, a part of ethics and a philosophy of life".³²

It could be deduced from the above, that jurisprudence cannot be studied in a vacuum, it must be studied amidst the body of knowledge from other walks of life, most especially, the philosophy of life and legal history of a people whose jurisprudence is in question. Thus, Adaramola, a sociological jurist describes jurisprudence as “the amalgamation of the art, science, psychology, sociology and epistemology of law.”³³ According to him jurisprudence may also be seen as:

"The scientific investigation and systematic analysis, synthesis and presentation of certain abstract, general and theoretical ideas about law and legal

²⁸ JAustin note 6 above.

²⁹ J FHollema note 7 at 13.

³⁰ O Adewoye note 14 above.

³¹ Lord Radcliffe *The Law and its Compass*(1961) in Lloyd of Hampstead and M D A Freeman note 24 above at 1

³² Ibid

³³ Fadaramola note 22 at 2.



system, carried out with a view to discovering those ultimate truths and principles that are common to human societies, which might possibly lead to replacing and reforming those principles or improving upon their functioning. It is a chemical built up from subject molecules, external to, but not entirely alien to law".³⁴

If jurisprudence is the scientific investigation geared towards the discovery of ultimate truths and principles that are common to human societies, the Austinian and Hollemanian denial of African Law and Jurisprudence is feeble and cannot stand the test of time. Popoola³⁵ defines Jurisprudence as "the body of general theories about law which have been put forth, accepted and carried forward as part of the cultural tradition". With this definition, it could be inferred that, the jurisprudence of a people is rooted in their legal history and juristic tradition. Therefore, African Jurisprudence, and indeed, Yoruba Jurisprudence are inherent in the legal history, juristic thought and philosophy of life of the people.

To finally settle the definitional polemics that has characterized the subject of jurisprudence, Professor Aboyade's observation about the definition of poverty is very useful, when he stated as follows:

"Poverty like an elephant is more easily recognized than defined, and it is debatable whether an unspoken recognition of an object or a situation based on common experience or group consensus does not constitute more useful knowledge than research for linguistic elegance and analytical precision. In other words, why search for elusive definition when we all know or think we know in our minds, what we are talking about".³⁶

Although, the observation is made in relation to the definition of poverty, it applies with the same magnitude of relevance, to the study of law and definition of jurisprudence, especially when jurisprudence itself is an amalgamation of

³⁴ Ibid

³⁵ A O Popoola note 11 above at 18.

³⁶ Oaboyade "On the need for an operational specification of poverty In the Nigerian



knowledge from various fields. The import of Professor Aboyade's observation in relation to the definition of jurisprudence is that, while attempts to formulate definitions are not all together, semantic escapism or academic obscurantism, unspoken recognition of a subject like jurisprudence based on common experience and group consensus may constitute more useful knowledge than a search for linguistic elegance and analytical precision, with which attempts at formulating definitions are replete. It follows therefore, that the Africans or the Yoruba cannot be denied a system of law or jurisprudence, based on definitional yardstick outside their legal culture. The duo is inherent in the legal history, philosophy of life, unspoken common experience of the people and group consensus.

2.3 What is Criminal Responsibility?

Across legal cultures, the kernel of criminal responsibility is the measure of subjective fault that can be attributed to an accused person. Hence, in no part of the world, and in no legal system is a person convicted of a crime without establishing the totality of his blameworthiness. Consequently, most offences are defined in terms of intention or knowledge of the accused, while defences are provided for those who cannot be said to be at fault, the insane, young people, those who acted in the state of unconsciousness or under compulsion. Therefore, a person can be said to be criminally responsible for an act or omission when his mind and act are blameworthy

In English law, there is the general doctrine of *mensrea* (guilty mind) and *actusreus* (guilty act)³⁷ and unless the mind and act of a person are both guilty, such a person cannot be said to be criminally responsible. The scope of *mensrea* in English law varies according to whether a given crime is a common law offence or contained in the statute. In Nigeria however, every offence whether contained in the code or not, is a statutory one, since every offence must be codified.³⁸ As such, the doctrine of *mensrea* is always at best a rebuttable presumption. In *Lim Chin Aik v. R.*,³⁹ a case from Singapore, the Privy Council accepted as correct, the classical statement of the doctrine of *mensrea* contained in the decision of Wright J., in *Sherras v. De Rutzen*⁴⁰ as follows:

economy”(Poverty in Nigeria, Proceedings of the Annual Conference of the Nigeria Economic Society University of Ibadan 1975) at 25.

³⁷ C O Okonkwo *Criminal Law in Nigeria* (2005, spectrum Book Ltd).

³⁸ See section 36 (12) of the constitution of the federal republic of Nigeria, 1999 as amended.

³⁹ (1963) A. C 160 (P.C)

⁴⁰ (1895) 1 Q.B 918



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

In 1970, the presumption of *mensrea* received the support of the House of Lords in *Sweet v. Parsely*.⁴¹ The doctrine of *mensrea* in criminal responsibility is so important that even when a section of the statute is silent about it, it has to be read into it. Dealing with such cases Lord Reid stated as follows:

"In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to *mensrea* there is a presumption that, in order to give effect to the will of the Parliament we must read in words appropriate to require *mensrea*"⁴²

Section 13 (1) of the Tasmanian Criminal Code has the following to say about criminal responsibility: "No person shall be criminally responsible for an act unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance".

In Nigeria, the Criminal Code provides extensively for the consideration of *mensrea* as shall be revealed in this work. For instance section 24 provides as follows:

"Subject to the express provision of this code relating to negligent acts and omission, a person is not criminally responsible for an act or omission which occurs independently of the exercise of hiswill, or for an event which occur by accident".

It could be safely concluded from the foregoing, that an accused person is only criminally responsible if what could be termed as the mathematics of crime (*menserea + actusreus* = crime) is achieved in criminal trial. Another fact that

⁴¹ (1970) A.C 132

⁴² C O Okonkwo note 68 above.



emanates from the discussion is that approach to criminal liability is similar across legal cultures. The Yoruba culture is no exception

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Approach to criminal responsibility in Yoruba legal system is the same with the perception of this subject in other legal systems in modern time. There is a clear recognition of the doctrine of *mensrea* in criminal trial in Yoruba Jurisprudence.⁴³ According to Fadipein his book *The Sociology of the Yoruba*,⁴⁴ Yoruba jurisprudence will not hold a man criminally liable, if his act is guilty and his mind is not. Fadipein stated as follows: "In deciding upon guilt or innocence the intention and motive of the accused person were taken into account, though with some qualifications".⁴⁵

Thus, in tandem with the position in other legal cultures, there is a line of distinction between guilty act (*actusreus*) and guilty mind (*mensrea*). The practicability of the doctrine of *mensrea* in Yoruba Jurisprudence is apparent in the exceptions to criminal responsibility which Yoruba legal culture accommodates. These exceptions constitute defences against criminal responsibility in Yoruba jurisprudence. Some of such defences include; *Ibinu* (provocation), *Ode Ori* (insanity), *Eesi* (accident) and *Eedi* (automatism). All these as inherent in Yoruba legal history and culture are discussed below.

3.1 *Ibinu* (provocation)

Provocation known as *ibinu* among the Yoruba is an act of inciting another to engage in an action, especially to commit a crime impulsively, having lost self-control or reasoning. It is a defence in murder charge which when successfully pleaded, is capable of commuting a murder charge to manslaughter. In this connection, provocation can be defined to denote some acts or series of acts (or utterances) done or said by the deceased to the accused person, which caused the accused person a sudden and temporary loss of self-control, rendering him so subject to passion as to make him for a moment not a master of his mind. When the person involved becomes conscious of his action he is full of regret. It is in recognition of this fact that it is often said among the Yoruba that "*ibinu kò mọpè olòwò òhun kò lèsẹ̀ nìlẹ̀*" i.e. anger does not know that its principal actor is weak.

⁴³ L A Adeleke Dispute Adjudication Through the Television Medium Among the Yoruba in South-western Nigeria (2014, Phd Thesis University of Ibadan Nigeria.) at 99-108.

⁴⁴ N A Fadipein note 19 above at 233.

⁴⁵ *ibid*



In Yoruba Jurisprudence, it is also believed that words of mouth can constitute provocation hence, it is said that; *orolonyo obi lapo oro asi maa yo of ninu apo* i. e. Words of mouth when pleasant, can earn the speaker a gift of kola nut and when unpleasant, can make the speaker to suffer injury. This is in consonance with the Supreme Court decision in *Musa v. State*⁴⁶ when it was held thus:

"Words can constitute provocation but such words must themselves be provocative in nature as to incite a reasonable man of the accused standing in life and education to lose his self control".

In Yoruba legal system, provocation is a recognised defence against the charge of murder. A relevant example is the story revolving around the founder of present-day Ogbomoso town, in Oyo State. The man known as Soun Ogunlola was a powerful warrior. His wife owed an Ijesha man an amount of money. The Ijeshaman came to request for his money, but used abusive language and rained curses on the woman and his husband (the warrior), who also pleaded on behalf of his wife. This provoked the warrior who engaged the man in a fight and killed him. The matter got to *Olugbon*, the Chief in whose jurisdiction the incident occurred, but because the matter involved human life, and a chief had no jurisdiction over such matter, *Olugbon* of *Orile-Igbon* referred the matter to the *Alafin* of Oyo, the king of Oyo kingdom. The accused was sent to *Alafin* with security guards and an *aroko* (symbolic message) in his hand. The *aroko* was made up of *eèpoàpé* (the bark of *apé* tree), indicating that the man deserved to live long. *Igi Ogbó* (a piece of wood from *Ogbó* tree) indicating same, and *Idà* (a sword) indicating that the accused may be executed. The message was obviously that of manslaughter and the man deserved to die because he killed a human being, but he should be allowed to live because his action was due to provocation and was not deliberate. Instead of executing the accused, *Alafin* allowed him on his request, to go through the ordeal of fighting a man-monster (*Elémòshó*) who was unleashing terror on the people of Oyo and its environment. The warrior conquered the monster and he was not only discharged and acquitted, but was also given a place to settle which became present-day Ogbomoso town in Oyo State.

The warrior was allowed the option of an ordeal instead of execution, because his case fell under the category of unintentional murder, which is referred to as manslaughter in modern legal system, because the act of killing the Ijesha man was due to provocation, which is a defence in murder charge. In the 1946 edition

⁴⁶ (2009) 172 LRCN p. 1 @ 40 para U-Z



of Ajisafe's *Laws and Customs of the Yoruba People*,⁴⁷ the pioneer Scholar of Yoruba Jurisprudence stated that taking laws into one's hands in form of retaliation of an alleged wrong attracts heavy fine, imprisonment, or execution in case the retaliation involves loss of life. He however posits that provocation in some circumstances is an exception to this rule. He stated as follows:

"It is permissible to beat, flog, or wound a man found committing adultery or attempting to entice one's own wife or the wife of one's own relative or intimate friend to commit adultery. It is immaterial whether the man is acting on his own behalf or on behalf of others."⁴⁸

The above is an indication that Yoruba Jurisprudence frowns at self-help, but an act done out of provocation could earn a man who is provoked by certain circumstances a lesser punishment. This is in consonance with the provision of sections 283, 284, 285 and 318 of the Criminal Code, Cap 38 Laws of the Federation of Nigeria 2004. Section 283 defines provocation thus:

"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 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, filia or fraternal relation, or in the relation of master and 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".

From the above provision of the criminal code, it could be inferred that the insult to Ogunlola's wife in his presence and the one to him in the presence of his wife could lead to provocation as defined in the section. About criminal responsibility in times of provocation, section 284 of the criminal code provides as follows:

⁴⁷ A K Ajisafe *Law and custom of the Yoruba People* (1946, 2nd ed, Kash&Kllare Bookshop) at.33

⁴⁸ Ibid



"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".

Also, section 318 provides that:

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

This is similar to section 294 of the Ceylon Penal Code which provides thus:

"Culpable homicide is not murder 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".

This provision was upheld in *Attorney-General for Ceylon v. Don John Perera*.⁴⁹ The above provisions apply perfectly to the charge of manslaughter against Ogunlola, as if it were levied under the present modern legal system. It is pertinent to consider the essentials of provocation according to the interpretation of the criminal code by legal scholars and the court, in order to properly distil the issues involved.

3.1.1 Essentials of provocation

For provocation to reduce a murder charge to manslaughter, the following elements must be established:

(1) **The reasonable man test:** This standard applies in both common law and Nigerian law, it serves to determine whether wrongful act or insult is

⁴⁹ 1953. AC 2001



sufficient to have caused the accused to lose his self-control, or whether the act or insult would have made a reasonable man behave the way the accused did. In *R. v. Adekanmi*,⁵⁰ it was held that the test to apply to the accused is the effect it (the provocation act) would be expected to have on a reasonable man of the accused's standing in life. Similarly, in *State v. Abba Mohammed*⁵¹ it was held that the retaliation offered was not disproportionate to the provocation (stabbing to death in retaliation for a slap) because the accused is a Kanuri man from Bornu and the Kanuri wear daggers on their arms as ornament. From the above, it could be inferred that the provocation of Ogunlola by the abuses and curses of the Ijeshaman was that of a reasonable man of Ogunlola's standing in life, as warriors are ordinarily powerful and could be easily angered by the wrongful act of a common citizen.

(2) **Loss of self-control:** It must be shown that the act of provocation actually deprived the accused of his self-control as it was held in *R v. Nwajoku*.⁵² See also *Galadima v. State*.⁵³ In Ogunlola's case it is obvious that he lost self-control as a result of the abuses and curses of the Ijeshaman.

(3) **No cooling off period:** Defence of provocation applies when the retaliatory act is done on the spot and does not involve the fetching of weapon from a long distance. For instance, in *R. v. Green*,⁵⁴ a period of about four hours was involved between the provocative act and retaliation; the plea of provocation was rejected. This decision is in line with the provision of section 24 of the criminal code earlier quoted. In Ogunlola's case, he fought the victim in the heat of passion as warriors do not need to go far to fetch weapons or charms.

(4) **Provocative act need not have been directed at the accused:** The law provides that the accused can avail himself of the defence of provocation not only when he is the target of the provocative act but also where the act is directed against a third party to whom he has a special relationship or who is in his immediate care. This is the provision of section 283 of the criminal code earlier alluded to. In the case of Ogunlola, the provocative act was first directed at his wife, before his intervention triggered further provocation.

⁵⁰ (1944) 17 NLR 99

⁵¹ (1969) NMLR 296

⁵² (1937) 3 WACA 208

⁵³ (2013) 217 LRCN 58 at 79

⁵⁴ (1955) 15 WACA 73



(5) Force used should not be disproportionate to the provocation:

According to section 284 of the criminal code, the force used by the accused must not be disproportionate to the provocation. Based on human imagination, one blow of a warrior cannot be proportionate to that of an ordinary citizen. If this factor is something to go by, Ogunlola would still have been guilty of murder. But because this factor was not considered reasonable in Yoruba jurisprudence when juxtaposed with loss of self-control occasioned by provocation, his offence remained manslaughter. That is why it is common among the Yorubas to say that: "ìbìnú kò mòpè olòwò òhun kò lèsè nìlè" i.e. anger does not know that its principal actor is weak. This factor has also been criticised by both the English court and modern legal scholars as not being worthy of belonging to the group of essentials of provocation. In Southgate's case,⁵⁵ the court of Criminal Appeal held inter alia that: "The test of reasonableness does not apply to the accused's conduct after the loss of self-control, this is logical for a man cannot both lose his self-control and nicely proportion the ferocity of his reaction to its cause".

In the same vein, Aremu⁵⁶ opines that the rule of proportionality is illogical and unfair, because its application poses a double test of reasonableness for the accused. From the above, it is clear that court decisions in Yoruba legal system are based on clearly defined indigenous legal principles. In view of the foregoing, one cannot but agree with Allot in his conclusion on African law when he stated that:

"The somewhat paradoxical conclusion emerges that African law therefore resemble each other, but, in that wherein they resemble each other, they also resemble the law of non-African peoples, not only is the brotherhood of Africans exemplified thereby, but this is never too trite to need restatement- the brotherhood of the whole human race. Man, wherever he is and whatever his race, tends to react in similar ways to similar circumstances".⁵⁷

⁵⁵ 1963 Crim. L.R 570

⁵⁶ L O Aremu *Criminal Responsibility in Homicide and Supernatural Beliefs and a Rhapsody of Essays on Nigerian law* (2007, Book Builders)

⁵⁷ A N Allot *Essay in African Law*. (1960, Butterworth & Co Publisher Ltd) 63.



In sum, the relationship between the case of Soun Ogunlola (the founder Ogbomoso town in Oyo state) and provisions of the criminal code analysed above, and decisions of Nigerian and foreign courts do not only establish the universality of fundamental principles of criminal responsibility, but also reveal that law, 'properly so called' with all its inherent fundamental principles and reasonable exceptions, is present in African jurisprudence in general and Yoruba juristic thought in particular.

3.2 *Ọ̀dẹ̀ orí* (insanity)

Insanity, which is known as *ọ̀dẹ̀ orí* among the Yoruba implies any mental disorder severe enough to prevent a person from having legal capacity and excuses the person from having criminal or civil responsibility.⁵⁸ To medical professionals, such mental disorder is called mental illness, psychosis or neurosis. It could be said, therefore, that insanity is a legal term and not a medical standard.

Justice being a universal phenomenon, Yoruba jurisprudence, like many other African legal systems, recognises insanity as a defence against murder charge.⁵⁹ If an insane person kills, he is considered innocent but his family as a corporate body is made to pay compensation to the deceased family and pay for ritual cleansing that is usually done by the chief priest. While affirming that insanity constitutes defence in African law, Ibidapo-Obe states that: 'insanity was a recognised defence in homicide or any other crime. The offender himself was not held responsible but his family'.⁶⁰ Corroborating insanity as a defence to criminal responsibility in Yoruba Jurisprudence, Fadipe states as follows:

"Murder by an idiot or insane person was followed by the relations being ordered to chain him up or otherwise keep him in confinement. They were also reprimanded if they had known him to have homicidal tendencies".⁶¹

The rationale for holding the family of an insane person responsible for his crime is that an insane person is not criminally responsible and this is inherent in a Yoruba proverb, which goes thus: *Ówuw èrè kòru igbáa rẹ̀ wọ́jà, àwọ̀nará iléé rẹ̀ níkií jẹ́* (the madman would like to carry his tray (of junk) to the market, only his relatives (whose reputation is also at stake) will not allow him to do so).⁶² The

⁵⁸ H C Black *Black Law Dictionary with Pronunciations*(1979, Nok Publishers) at 810.

⁵⁹ Ibidapo-Obe note 9 at 143.

⁶⁰ *ibid*

⁶¹ NAFadipe note 19 at 234.



reasoning in the above proverb is that the family must not be negligent and must be dutiful enough to recognise the state of mental health of the offender and provide appropriate medical assistance, before he drags the family's name in the mud, because he lacks capacity to choose between right and wrong. In support of the facts that a madman lacks the capacity to choose between right and wrong, and cannot be criminally responsible, another proverb states: *Tí abá ní káfi okú ìyá wèrè sílè fúnwèrè ólèè sun únjẹ* (if the corpse of a madman's mother is left to him; he may roast it for a meal).

The import of this proverb is to further show the degree of mental incapacity of an insane person and the reason why he cannot be criminally responsible, since responsibility is the essence of criminal law and capacity is the essence of responsibility. The M'naughten's case of 1843⁶³ in England appears to be the *locus classicus* that establishes insanity as a defence against criminal liability in English law. The resultant rules known as the M'naughten rules were formulated with the belief that responsibility is the essence of the criminal law and that capacity to choose between right and wrong is the essence of responsibility. Therefore, whoever lacks the capacity to choose between right and wrong also lacks criminal responsibility. Similarly, in *Durham v. U.S.*⁶⁴ it was held that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. The defence of insanity under the Nigerian criminal law is governed by

Sections 27 and 28 of the Criminal Code which provide as follows;

Section 27:

"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question until the contrary is proved".

Section 28:

"A person is not criminally responsible for a nact or omission if at the time of doing the act or making the omission, he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is

⁶² OAdewoye note 14 above

⁶³ 10 C L&F. 200

⁶⁴ (1954) 214 F. 2d 862



against criminal responsibility is covered by the provision of section 24 of the Criminal Code⁶⁶ which reads thus:

"Subject to the express provision of this code relating to negligent acts and omission, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident".

From the above, it is clear, that the defence of accident is pivoted on the incompleteness of the legal element of an offence, i.e. *actusreus* (guilty act) and *mensrea* (guilty mind). If there is a guilty act but guilty mind cannot be established, an offence has not been committed because the legal elements are incomplete. In such a case, the defence of accident is valid, both in Yoruba Jurisprudence and English law. The case of *Timbu Kolian v. R*⁶⁷ is quite illustrative of a typical case of an accident and the wording of section 24 of the criminal code. During a domestic quarrel with his wife, the accused, tired of the verbal exchanges, went outside and continued to berate him. He picked up a light stick and as it was dark, he aimed a moderate blow in the direction of the voice. Unknown to the accused, his wife was then carrying their baby in her arms. The blow struck the baby on the head and killed it. The trial judge convicted him of manslaughter. On appeal it was held that the accused was exonerated by section 23 of the Queensland code which is an equivalence of section 24 of the Criminal Code Cap C38 Laws of the Federation of Nigeria 2004. Barwick C J held that he was exculpated by the first limb of the section ("act which occurs independently of the exercise of his will"). While Owen J held that he was exculpated by the second limb ("event which occurs by accident").

3.4 *Eèdì* (automatism)

Eèdì (automatism) literally means an action occurring without will, purpose or reasoned intention, such as sleepwalking. It can also be described as the state of a person who though capable of action, is not conscious of his or her action. *Eèdì* (automatism) is a well-recognised phenomenon in Yoruba society. However, it is associated with hypnotic influences referred to as *eèdì*. *Eèdì* (automatism) in Yoruba belief is capable of making a man to engage in an action without will,

⁶⁶ Cap C38 Laws of the Federation of Nigeria 2004

⁶⁷ (1968) 42 A. L. J. R 295



purpose and reasoned intention. The action so engaged is, therefore, not an offence, because the doer, though capable of the action, is not conscious of his action as *mensrea* is absent. In Yoruba society, a person under the influence of automatism can steal, assault others, rape or even kill, only to be conscious after committing the crime. Yoruba jurisprudence recognises the absence of *mensrea*, in such case. It is thus said that “èèdì lódìí,” i.e. he suffered the influence of automatism. In such case, the accused is apologetic and full of regret.

The Yoruba legal system does not punish an accused who commits a crime while under the influence of automatism, except it could be established that the accused feigned automatism. In the former case, the accused and his family are made to pay compensation to the victim of his action or his family, as the case may be. Ritual cleansing is done for the accused and sacrifice and prayers are offered to prevent future occurrence. What is important to note from all the above is that automatism is a defence in charges of crimes in Yoruba jurisprudence, especially in a murder charges.

In English law, when a man acts in a state of unconsciousness, he is said to have a defence of automatism. In the English case of *Bratty v. Attorney General for Northern Ireland*,⁶⁸ the term "automatism" is defined as unconscious, involuntary action which does not result from a disease of the mind (insanity) and which is a defence because the mind does not go with what is being done. Here again, the defence of automatism is based on the recognition of the absence of *mensrea*, an essential element of an offence. Before an offence or a crime is established, *actusreus* and *mensrea* must co-exist. Automatism is therefore a defence, because the mind does not go with what is being done. Automatism is not mentioned in the Nigerian Criminal Code, but it is a convenient term to describe the sorts of unconscious involuntary action covered by section 24 of the Code.⁶⁹

On the whole, the foregoing analysis is a confirmation of Adaramola's assertion (supra) that Jurisprudence is the synthesis and presentation of certain theoretical ideas about law and legal system, carried out with a view to discovering those ultimate truths and principles that are common to human societies. Some of the ultimate truths and principles that are common to human race are critical issues that underlie criminal responsibility in Yoruba Jurisprudence as discussed above. Lending credence to this is the opinion of Gluckman about African Law as quoted

⁶⁸ 1961 3 ALLER 523 at 532

⁶⁹ Okonkwo C O note 37 above at 145



below:

"I have studied the work of African Courts in Zululand and Rhodesia, and found that they use the same basic doctrines as our courts do. African legal systems are founded on principles of the reasonable man, responsibility, negligence, direct and circumstantial and hearsay evidence etc. African judges and laymen apply these principles skilfully and logically to a variety of situations in order to achieve justice".⁷⁰

Similarly, Meek's opinion captures the universal application of some legal principles when he stated thus:

"The mentality of 'primitive' people does not differ essentially from our own, as any European knows who has lived at close quarters with 'natives'. It is not to be expected, therefore that their norms of conduct should diverge very profoundly from ours. And so what are crimes or torts to us are for the most part crimes or torts to them. We may even go further and say that their 'gentlemen' are ours and ours are theirs".⁷¹

One cannot but agree with Gluckman and Meek that legal principles and doctrines are universal, as espoused in this paper with particular reference to Yoruba Jurisprudence.

4.0 CONCLUSION

Just like oxygen is a necessary atmosphere for combustion, legal principles are essential apparatus of justice in every legal system, they may be expressed through different socio-cultural context, yet, they constitute the kernel of justice in every legal decision in any human society. Hence, this work discussed the significance of legal principles in African jurisprudence, with particular reference to Yoruba legal thought. The main concern of the work is the analysis of legal principles that underlie criminal responsibility in Yoruba Jurisprudence. It is established in this work, that like all legal systems the world over, judicial

⁷⁰ T O Elias note 1 above at 33.

⁷¹ C K Meek *Law and Authority in a Nigerian Tribe*, (1937, Oxford University Press) at xiii



decisions in Yoruba jurisprudence are based on clearly defined legal principles, especially with respect to criminal responsibility, both in Yoruba history and juristic thought. The discussion herein constitutes food for thought for Scholars, Jurists, Lawyers and Students who harbour one misconception or the other about African Law and Yoruba Jurisprudence and for those who are willing to contribute to its growth.

5.0 RECOMMENDATION

Furthermore, it is being humbly recommended that indigenous law should be taught as a separate course at both undergraduate and postgraduate levels, instead of being sandwiched under other courses as it is presently practised in our law faculties across the country. This will promote African legal heritage and enhance its significance and continued relevance in no small measure. It will also make lawyers to have better understanding of the African legal thought and reduce misconception about it. It is when our indigenous law is so studied, as independent discipline at various levels of our legal education that it will grow to be part and parcel of the legal training of lawyers and judges and will no longer be proved in the courts like foreign law.

Another recommendation that cannot escape mentioning is the involvement of indigenous jurisprudence in the moot and mock trials that are organised by our faculties of Law. This practice will implant the knowledge of African law in the minds of young lawyers and preserve it in their minds.

It is an irony that the study of African legal system as a body of knowledge started outside the continent of African. The School of Oriental and African studies, University of London, sets the pace in this respect. The school has produced scholars and researchers who are versed in African law. It has also organised seminars and symposia which have advanced the course of study in African jurisprudence. In the same vein, Oxford University Press in London and Manchester University Press has continuously published works on African law with the aim of promoting African legal Culture. Nigerian Universities, especially the faculties of law must emulate this effort from outside the African shores.

We appreciate the fact that the discipline of law alone cannot provide an adequate platform for a meaningful study and teaching of African law. Owing to its multi-



disciplinary nature, there is the need to involve scholars from cognate disciplines, such as History, Philosophy, Sociology, Anthropology, Linguistics, African Languages and Literature. Therefore, it is recommended the establishment of an Institute of African Legal Studies in Nigeria. This will provide a full complement of scholars for proper teaching and research into African jurisprudence.