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Need for Unification of Criminal Law in Nigeria

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This paper argues that Nigeria's fragmented criminal law framework is long overdue for a reset. With the Criminal Code operating in the South, the Penal Code in the North, and a patchwork of federal statutes layered on top, the system generates inconsistent definitions of offences, uneven sentencing practices, and messy jurisdictional overlaps that weaken both accountability and public trust. The paper contends that this fragmentation undermines constitutional commitments to equality before the law and creates avoidable barriers to national coherence in criminal justice, especially in an era shaped by rapidly evolving security threats, digital crimes, and human-rights-centred governance demands. Drawing on comparative insights from jurisdictions that have successfully consolidated their criminal law, the study evaluates pathways for harmonising Nigeria's codes without erasing legitimate regional sensitivities. It highlights the potential of a unified criminal law to streamline enforcement, modernise substantive offences, strengthen due process guarantees, and support a more coordinated federal/state response to crime. The paper ultimately positions unification not as a technocratic exercise but as a necessary governance reform capable of enhancing legal certainty, promoting fairness, and aligning Nigeria's justice system with contemporary global standards.

Keywords: criminal law unification, legal fragmentation, criminal justice reform

Introduction

Nigeria's criminal law landscape is basically running on two operating systems at once, and the friction shows. With the Criminal Code in the South and the Penal Code in the North, plus a growing pile of federal offences, the system struggles with coherence, predictability, and fairness (Idris, 2017). This split made historical sense, but in today's hyper-connected, insecurity-prone environment, it slows down reform, complicates enforcement, and leaves citizens navigating uneven protections (Lawal, 2025). This introduction sets the stage for arguing that a unified criminal law is not just a tidy governance fix but a structural upgrade that could boost legitimacy, streamline justice delivery, and strengthen Nigeria's legal order.

Meaning of Crime

Many definitions have been proffered as to the true meaning of crime. It is imperative to state that it is difficult to define a crime to indicate from the nature of the act precisely what constitutes or does not constitute a crime. Any definition of a crime based on the intrinsic quality of an act is bound to fail. This is because a conduct may at once be both a crime and a civil wrong, for instance, stealing and assault (Duff & Marshall, 2019).

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Consequently, the legal definition of an offence is essentially a definition in terms of procedure. Thus, as far as the courts are concerned, it is criminal procedure which marks off a crime from a civil wrong.

The course of a criminal trial is accusatorial in nature and results in a finding of guilt, or a finding of not guilty leads to an acquittal. The passing of a sentence by the court may lead to punishment. Thus, the Criminal Code in Section 2 defines offences as acts or omissions which render the person doing the act or making the omission liable to punishment under the code.[1] From the above explanation, it is obvious that there are no special intrinsic characteristics of criminal conduct distinguishing it from non-criminal conduct. It would seem, however, as Lord Atkin[2] declared that:

> … the domain of Criminal Jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

Thus, we can only say that an act is a crime if, after first having enquired whether it is prohibited by law, it is also attended by the requisite legal consequences, such as punishment.

From the above assertions, it could be deduced that there is no way of defining what constitutes a crime or not. Indeed, a crime could at the same time be a civil wrong, and even what constitutes a crime in one area might not be regarded as a crime in another area. For example, the consumption of alcohol in the northern part of Nigeria is regarded as a crime, but in the South, it does not constitute a crime. Any definition of crime must be carefully examined to get a succinct meaning of the subject matter. This brings us to an examination of the history and sources of Nigerian Criminal Law and the Codes.

History and Sources of Nigerian Criminal Law

The Criminal and Penal Codes in Nigeria contain the bulk of the applicable rules of criminal law in the Southern and Northern parts of the country, respectively. Before the colonial rule, several strains of customary criminal laws existed in the various linguistic groups which occupied the geographical area now known as Nigeria. In the South existed simple systems of social organisations based on numerous units: the family, village, or group of villages. In the north, there also existed the highly systematised and sophisticated Muslim law of crime.

There also existed in the North, the pagan communities, which had, in varying degrees, retained their own criminal laws or even blended them with Islamic law. It should be pointed out here that the most outstanding feature of all customary criminal law, apart from Islamic law, was its unwritten nature. The criminal law could be found in the actual customs of the people with respect to the South, while in the North, Islamic Criminal laws were firmly entrenched, and the advent of the British did not alter this situation much at the very inception.

English criminal laws were introduced into the country in 1863 when the common law crimes were introduced into the colony of Lagos. Although outside Lagos, it was customary criminal law, which, directly or indirectly, still obtained in varying forms. Since the common law of crime was unsuitable because it was

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[1] S.3(1) of the Penal Code Laws also defines crime in like manner.
[2] Per Lord Atkin (1931) A.C. 310 at 3214.

relatively complicated and not easily ascertainable, the need was felt by the British administration for a clearly worded, concise, and unified set of criminal principles to be applied in British-style courts.

Lord Lugard, the Governor-General of Northern Nigeria, introduced the Queen;s Land Criminal Code into Nigeria in 1901, which, as its preamble stated, was to declare, consolidate, and amend the Criminal law. This code was extended to the whole country in 1916 after the amalgamation of Southern and Northern Nigeria in 1914. It is pertinent to point out here that this wholesome transplant of English criminal laws without due consideration for the cultural and religious peculiarities of the local populace made the code unsuitable for the country.

The application of the Northern Criminal Code was at first strictly limited; thus, the Proclamation[3] expressly exempted 'Native tribunals' from its operations, and it was this that dealt with the bulk of criminal cases. This exemption was preserved when the code was extended in 1916. Thus after 1916 most criminal cases in Nigeria were still governed not by the code but by "native law and custom", Islamic law for these purposes is not regarded as a distinct system, but merely as a special variety of native law and custom.[4] It is also necessary to point out that the code that was introduced into the country in its original form was the English draft criminal code, authored by Sir Fitzjamee Stephen; though it was never adopted in England, it was to become the Prototype Code for several of her colonies.

This situation, in which there were two or more systems of criminal law existing in the same geographical area, became increasingly difficult to manage. The British administration was in a fix as to what to do, especially as regards the North, which has a predominantly Muslim population. This challenge was exacerbated by the conflicts between the established tenets of the Maliki school of Islamic law and the principles of English criminal law. The Maliki law contained many rules which were not acceptable to those trained in English law, a very important disparity being the concept of provocation, which is recognised by the criminal code as capable of reducing murder to manslaughter,[5] but which was not admitted in Maliki Law. This was always a frequent cause of friction between the two laws.

Thus, it could therefore literally be a matter of life and death, according to whether an accused who killed under gross provocation was tried under Maliki law, where the finding would be murder, whereas under the Code, the maximum punishment would be imprisonment for life.[6] On the other hand, Maliki law was part of the Muslim way of life, and as legislative reforms[7] and decisions of the courts, especially in *Gubba v Gwandu N.A.*,[8] made inroads into the application of customary criminal law; the Criminal Code, which was not designed for a Muslim community, came to be regarded with increasing disfavour in the North. Thus, the need to have a code which could incorporate some of the Penal tenets of Islamic law led to the appointment of Penal Jurists in 1958 to examine the relationship between the two systems of law.

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[3] The Code was originally contained in a proclamation. In 1916 it became the schedule to the Criminal Code ordinance. Since the 1961 Designation of Ordinances this later must now be called the Criminal Code Act, but the Act is limited to a few sections, and the Code is still contained

[4] The Future of Law in Africa (ed. Alloh) Chap. 2.

[5] S.318.

[6] S.325.

[7] Native Courts Ordinance 1933, 1948; Native Courts (Amendment) Ordinance 1951.

[8] (1917) 12 W.A.C.A. 1l41, *Maizabo v Sokoto N.A*. (1957) N.R.N, L.R. 113.

The Penal Code was based on the Sudanese Code, which was designed for a Muslim community. The Sudanese Code was, in turn, modelled on the 1838 Indian Penal Code, which was drafted by Lord Macaulay between 1834 and 1838. This Code has been described as a fine blend of English jurisprudence and Islamic thought. Thus, in criminalising the drinking of alcohol and adultery, the Penal Code substantially accommodated Islamic law. In allowing the defence of provocation to find its way into the code, the traditionalists compromised since the defence of provocation was not sufficient to reduce the offence of murder to manslaughter under the Islamic law of the Maliki school. It could therefore be said that the Penal Code was meant to be a compromise between the traditionalists and the reformers. As a result of the compromise, by 1957, after the leading case of *Maizabo v Sokoto N.A.*,[9] it was settled that the correct law was that native or customary courts were empowered to apply customary criminal law, even if there was a provision in the criminal code on the subject, but the sentence passed should not exceed the maximum punishment that could have been imposed if the case had been tried under the Criminal Code. It is important to note, as the Federal Supreme Court pointed out in the *Maizabo's* case, that the unsatisfactory result of the above decision was that cases in native courts would require an examination of two different sets of law—first being native law and custom, to ascertain guilt, and the Code to ascertain sentence. These were all reasons that led to the re-examination of the criminal law, at least in the North and the setting up of the panel in 1958.

Having sketched the history and development of the criminal law in Nigeria, it may be mentioned that the Penal Code did not entirely exclude reference to native law and custom because drinking alcohol is only criminal when committed by Muslims,[10] and adultery only if committed by anyone subject to any native law or custom in which extra-marital intercourse is regarded as a criminal offence.[11]

Traditional criminal law was much less entrenched in the other parts of Nigeria than in the North, and the decision was taken at the 1958 Constitutional Conference to abolish Customary Criminal Law. This led to the abolition of Customary Criminal law in Nigeria altogether and the insertion of the following section into the 1959 Bill of Rights:[12] "No person shall be convicted of a Criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law…[13]

In the North, this abolition of Customary Criminal law was made clear by Section 3(2) of the Penal Code law, which precisely put it thus: "No person is to be liable to punishment under any native law or custom".

The dual system of Customary and Statute Criminal law is therefore now replaced by a dual code system. Thus, it was held in the case of *Aoko v Fagbemi*,[14] that a woman cannot be convicted on charges of adultery since it was not recognised as an offence under any written law in Nigeria.[15] In this case, the accused was convicted of adultery in a customary Court. On appeal to the High Court, the conviction was quashed because it violated the appellant's Constitutional right since she had not violated any written law…[16]

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[9] (1957) N.R.N.L.R. 133 (P.S.c.).
[10] S.403 Penal Code.
[11] SS.387-388 Penal Code.
[12] And became Section 22(10) of the 1963 Constitution.
[13] Also, in S.35(11) of 1989 Constitution (as amended).
[14] (1961) 1 All NLR 400.
[15] Ibid.
[16] Similar provision is also contained in S.33(12) of 1979 Constitution.

It may, however, be mentioned that the two codes are not the only sources of Criminal law in Nigeria, for there are numerous other laws which create offences and, in some cases, set out applicable defences. The Road Traffic Act 1947 and other road traffic laws, which create road traffic offences, and the Indian Hemp Act[17] and the Exchange Control (Anti Sabotage) Act[18] are some of the instances of offences not covered by the Codes but regarded as sources of the Nigerian Criminal law. In essence, it is right to state that the codes are the only sources of the law concerning matters of death within them.[19]

Contents of the Criminal Law

It is important to discuss under this sub-heading why the content of any system of criminal law is what it is. This issue is proposed to be discussed here briefly under three different angles, thus the attitude of the lawmakers when it creates offences, or the attitude of the law enforcement agents and that of the courts which interpret it.

The Legislature and the Content of the Criminal Law

Crimes are usually created by the legislative authority in any community. Whatever the legal machinery used for making a certain type of conduct criminal, most acts which have become crimes are prohibited because they are considered by those with power to be injurious either to society generally or to some of its individual members. It is argued that a public morality is essential to the stability and continuance of society and that to permit private acts of gross immorality undermines the foundations of that society (Adegboyega, 2020). Another view states that society ought to be able to tolerate acts which are harmful only to the individual who commits them, however outrageous they may appear to the rest of the community.

Whichever of these two views is thought to be correct, social attitudes underlying the criminal law are in a constant process of change. The most that can be said of the reason why crime is punished is that it is punished because it was thought to be a serious threat to society at the time when the legislation was passed. Thus, this is a situation where public opinion might be said to be in advance of the law, but there is also a situation where the legislature may be in advance of public opinion to educate it.[20]

Principle of No Liability Without Fault

Every criminal law system provides various offences and defences. While some offences are strict liability offences, because they fail to give recognition to criminal defences, the majority of the offences, either expressly or by implication, embrace the principle of no liability without fault. Thus, the Nigerian legal system also recognises this basic principle, which is expressed in the Latin maxim: *actus non Facit reum, nisi mens sit rea*, which simply means that the act itself does not constitute guilt unless done with a guilty intent.

Most offences are defined in terms of intention or knowledge. In the Penal Code, offences are defined in terms of some mental element. This leaves one with no option but to ask if there is any provision in the Criminal Code which states that ‘”no one is to be liable without fault”, which is of general application to any crime unless excluded by the definition of that crime itself. It is pertinent to state here that in answer to the question posed

[17] The Nigerian Indian Hemp Act (or Decree No. 19 of 1966).
[18] The Exchange Control (Anti Sabotage) Act Cap 114 LFN 1990 (or Decree No. 57 of 1977).
[19] S.2(1) Criminal Code Act, S.2 Penal Code Laws.
[20] An instance being the abolition of Customary Criminal Law.

above, it is of relevance to note that there are two sources for the answer: the English law provisions and the Criminal Code and hence a discussion of it will be streamlined towards these two sources.

Some General Defences

By virtue of the provisions of S.24 of the Criminal Code Act, the defences under the chapter of the Criminal Code can be raised in any criminal trial since that chapter applies to offences contained in any written enactment. If these defences are established with respect to an offence, there can be either no liability or liability will be reduced. Both the Criminal Code and the Penal Code contain these well-settled provisions relating to the application of these doctrines of the criminal law. It will be appropriate and expedient to discuss some of these defences here.

Accident

S.24 of the Criminal Code provides that a person is not criminally responsible for an event which occurs by accident, and that under the Code it is probable that an accused is not held liable for any accidental event simply because it results from an unlawful act committed by him. Under S.18 of the Penal Code, it is stated that an accused is not liable where the accident occurs because of a lawful act done legally.

The exact meaning of the expression in the accident may give rise to difficulty; thus, in the case of *R v Martyr*,[21] M struck a blow at S, who subsequently died from a haemorrhage. The medical evidence was that such a blow could not cause death and that S had a peculiar weakness. The Court of Criminal Appeal, however, upheld the conviction for unlawful killing. They reasoned that the section would apply where the result was caused by a subsequent unforeseeable happening. It is argued that the above decision is wrong. C. J. Mansfield, in his judgment, quoted, without comment, the following passage from Stephens Digest of the Criminal Law.[22]

> An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.

It is submitted that the above quotation provides a more accurate interpretation of Section 24. This perspective appears to address situations where an event arises due to an inherent weakness that could not reasonably have been foreseen of the victim, as well as those where it is due to supervising unforeseeable occurrences, for as it was stated in the case of *Umoru v State*[23] with regards to what amounts to an accidental act under Section 2 of the Criminal Code to be categorised, it must be a surprise to the ordinary man of prudence, that is a surprise to all sober and reasonable people. The test is always objective. In the same vein, it was stated that Section 2l of the Code does not deal with an act, but an event[24] within the meaning of that section is what apparently follows from an act.

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[21] (1962) ad. R.398 (C.C.A.).
[22] 9th edn. 260.
[23] (1990) 3N.W.L.R. 258-391, 363.
[24] See Section 2l.

It should be noted that J. C. A. Oguntade while dissenting in this case contended that the appellant should have been discharged since the lower courts recognised that the event was unintended, and thus a criminal offence has not been committed and by implication the court has applied to the benefit of the accused person, the provisions of Section 24, of the Criminal Code since it was able to influence their judgment to reduce the offence from murder to manslaughter; it should also avail him of manslaughter of which he was ultimately convicted.

It is also noteworthy to state the view of the Court in *Uzoka v State*[25]. They were of the view that under our criminal law, it is an offence to do a lawful act poorly to harm others. Thus, negligence negates the defence of accident provided for under Section 24 of the Criminal Code and killing a person by negligent act would constitute manslaughter.

It is to be noted that the adoption of the objective reasonable foresight does not mean that a man escapes liability if he causes an event which he foresaw but which the reasonable man would not.

Thus, if X gives Y a slight cut knowing that Y is a *haemophiliac and* may bleed to death, he cannot raise any defence under Section 2l4, for an event is only an accident if the accused could not reasonably have foreseen it and did not in fact foresee it. It is important at this point to note that Nigerian Courts have merely applied Section 24 in a few cases without proper discussion.

Thus, in *Iromantu v State*,[26] it was held that the section applied to avail an appellant who accidentally touched the trigger of his gun in an attempt to recover it from the deceased who died as a result of the shot from the gun.[27]

Compulsion

Section 57 of the Penal Code and Section 32(3) (4) of the Criminal Code provide a defence for a person compelled by threats or imminent apprehension of death to himself to commit an offence. The bottom line of this defence is that the harm threatened must be death or grievous harm. This is because if the harm threatened is not immediate, it is presumed that the person threatened has time to seek. This defence also protects authorities and requires that the harm must have been intended to be inflicted upon the person threatened. The defence does not seem to extend to the case where the threat is to be carried out against a person in his custody, for example, his son or wife. There is equally a requirement that the threat must have been made by some person actually present and in a position to execute the threat.[28] Furthermore, there is the belief that the person threatened has no way of escaping the execution of the threat other than committing the act.

The Criminal Code provision also states that the defence does not extend to the commission of offences punishable with death or in which grievous harm or intention to cause such harm is an element.[29] This defence does not also extend to a person who has, by entering into an unlawful association or conspiracy, rendered himself liable to have such threats made to him.[30]

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[25] (1964) All N.L.R. 311.
[26] See also *Umoru v State* (1990) 3N.W.L.R. 258-391, 363 and *Uzoka v State* (1990) NWLR 6l3-772, 680.
[27] *R v Pickard* (1959) QD. R. 475.
[28] Ibid.
[29] *Obodo v R* (1959) 4 F.S.C 1.
[30] Ibid, also S.57 of the Penal Code.

By the provisions of Section 33 of the Criminal Code, the fact that a wife commits an offence in the presence of her husband does not automatically raise a presumption that he forced her to do it. However, the wife of a Christian marriage is not criminally responsible for an offence which she is compelled by her husband to commit in his presence, provided that the offence is not of the serious type. It is surprising, however, that this exception does not apply to wives of non-Christian marriages, and it is submitted that this rule should have applied to all.

From the foregoing, it will be expedient to state here that the stringent limits set to the defence of compulsion in the Criminal Code provide an instance of the strict and rigid approach of the old common law to questions of responsibility. It would have been more in line with ordinary human attitudes to ensure that there should be a defence in cases where, for instance, the accused could not reasonably be expected to have acted in a way other than she did, taking into account the amount of force threatened and also the nature of the offence to be committed. The defences discussed above provide an insight into some of the defences as contained under the Criminal Law of Nigeria.

Comparison of Some Specific Offences Under the Criminal and Penal Codes

As indicated earlier, the Nigerian Criminal Code is derived from the English Common Law. It is also important to mention that three principal systems of law were fused to produce the Penal Code, namely, Islamic criminal law, Indian penal and customary criminal law. This was to ensure international acceptance, apply uniformity within their jurisdiction, and at the same time work harmoniously with the predominant Islamic religion. It was directed towards reconciling the apparently irreconcilable systems of criminal jurisprudence. Hence, the similarities in the Criminal Code and the Penal Code considerably outweigh the differences.

The Penal Code is indeed a direct line descendant of the Indian Penal Code, which has been described as "the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars…" (Stephen, 2025, p. 300). However, it is different from the Indian Penal Code in important respects. It will be observed that the differences do not lie in the basis of criminal responsibility but only in the essential ingredients in respect of certain offences. Thus, some specific offences will be discussed in this section to point out their areas of difference:

Rape

The offence of rape is provided for under Section 357 of the Criminal Code and Section 282 of the Penal Code. The punishment for the offender is also provided. Thus, by virtue of Section 358 of the Criminal Code and Section 283 of the Penal Code, the punishment for the offence of rape is life imprisonment. This offence is defined as the unlawful nonconsensual carnal knowledge of a woman by a man. In the case of the Penal Code, the somewhat quaint term "carnal knowledge" is avoided in favour of the more modern expression sexual intercourse.[31] The offence of rape is a classic example of a gender-oriented crime in that it can only be committed by a male upon a female. Formerly, the offence of rape required the emission of semen, but today, penetration, no matter how slight, is sufficient to constitute the offence (Aguda, 1982, Para. 1772), and neither ejaculation

[31] Section of Section 282 Penal Code.

nor the rupture of the hymen[32] is necessary, yet the archaic qualifications upon the sex of the offender remain intact.

The most prominent difference between the provisions of the two codes on the offence of rape lies in the exemption contained in the Criminal Code, but which is absent in the Penal Code. Under the Criminal Code, two classes of persons are exempted from the operation of the provisions on rape. The first of these categories embraces boys below the age of 12 years.[33]

The justification for this exemption rests on the assumption that before the age of puberty, a young boy is physically incapable of having sexual intercourse. This presumption is one of law and cannot be controverted by showing evidence to the contrary. It should be noted that this rule does not exist under the Penal Code. The rule is clearly absurd and capable of producing injustice. It is the ability to produce semen and not the ability to have an erection that heralds the onset of puberty. Since rape only requires penetration and not fertilisation, it is difficult to understand why puberty is considered so crucial to the offence of rape. In any case, since it is proposed that rape should be defined in terms beyond vaginal penetration, there is no reason why anybody of any age should be excluded from the operation of the provisions on rape.

The second category of exempted persons embraces the husbands of the victims concerned. Unlawful carnal knowledge is defined in Section 6 of the Criminal Code as carnal connexion which takes place otherwise between husband and wife. Since unlawful carnal knowledge is an element of the offence of rape, it follows that sexual intercourse between a husband and wife cannot constitute rape.

The Penal Code simply provides that sexual intercourse between a husband and wife is not rape if she has attained puberty. The above provisions of the Penal Code may be questioned if the wife has not attained the age of puberty; can the husband be convicted of rape? One would have thought that he would be charged with the offence of indecent assault or defilement. It should be noted that the justification for this exemption as provided under the Criminal Code rests on the belief that, when a woman enters into a marriage contract, she thereby gives her consent to all future acts of intercourse which she cannot subsequently revoke.[34] However, if a husband uses force or violence to exercise his marital rights, he may be guilty of assault or wounding.[35]

Under the Criminal Code, consent is vitiated when it is obtained by force or by means of threats or intimidation of any kind. The Penal Code, on the other hand, only recognises that consent has been vitiated where it is obtained by fear of death or hurt.[36] It is thus suggested that the Criminal Code provision is rather too wide, and thus that of the Penal Code is preferred. It could lead to the result, for instance, that where consent to sexual intercourse is obtained by a threat to cause economic loss or social injury, this would amount to rape. It is here argued that threats or intimidation should only be regarded as vitiating consent where the victim's sexual choice is eliminated. In most cases where violence is threatened, for instance, the perpetrator means to have sexual intercourse with the victim, whatever the outcome.

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[32] *R v Marsden* (1891) QB 149.
[33] Section 30 of the Criminal Code. In circumstances of rape however such person may be convicted of indecent assault. See *R v Williams* 1893 I. Q. B. 320.
[34] Per Hawkins J. in *R v Clarance* (18.89) 22 Q.B.D 23 at 51. 7.
[35] *R v Miller* (1974) 1B. 282 8.
[36] Section 1(c) of the Penal Code.

It is pertinent at this juncture to point out that the above discussion of rape is in no way exhaustive, but only stands to point out the essential differences in the provisions of the two codes and then a possible way of unification. It is suggested that the provisions of the Criminal Code and the Penal Code concerning the offence of rape should be made uniform. It is also suggested that the more modern and legal term "sexual intercourse", as in the Penal Code, should be used to replace the term "Carnal knowledge" as found in the Criminal Code. Thus under the suggested uniform Code for the country, the offence of rape should be made to read as "Any person who has unlawful Sexual Intercourse with a woman or girl, without her consent, or with her consent, if the consent is obtained by fear of death or hurt or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by representing her husband, is guilty of an offence which is called rape".

Moreover, life imprisonment for any guilty offender seems too strict. Thus, life imprisonment should be reserved for those who have themselves deprived their victims of life. It is a medium-term baseline punishment adopted for rape *simpliciter*; then the punishment could be graded according to the ancillary harm (other than the physical act of penetration) that the victim suffers, so that a sexual assault could carry higher maximum penalties where grievous bodily harm or wounding occurs.[37]

In the Nigerian case of *State v. Bolivia Osigbembe*[38], two girls arrived at Auchi at Night, and the accused offered to give them a lift to a relation's house in the town. He, however, drove into the bush, stopped his Pick-up van, and brought out a gun. He raped the girls one after another and repeated this action in another outskirt of the town. As he was driving them to have a possible third round, the girls jumped off the moving vehicle and sustained injuries while the accused disappeared with their luggage still in his van. After convicting him under Section 357 of the Criminal Code, the court imposed only a few years' imprisonment with an option of a fine. With due respect, this decision is not commensurate with the offence, having regard to the special circumstances of the case. One would have thought that a stiffer punishment would have been imposed.

Murder

Murder, in almost every jurisdiction, is regarded as the most serious offence. In Nigeria, both the Criminal Code and the Penal Code have, in their respective sections, defined what constitutes the offence of murder. Thus, the Criminal Code in Section 316 provides an elaborate definition of murder. Section 315 of the Criminal Code defines unlawful homicide thus: "Any person who unlawfully kills another is guilty of an offence which is called murder or manslaughter, according to the circumstances of the case".

The provisions of the Criminal Code in Section 316(1-6) provide a more detailed definition of the offence of murder. By virtue of Section 316(2):

Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say: if the offender intends to do to the person killed or to some other persons some grievous harm, is guilty of murder.

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[37] I. Okagbue, Senior Research Fellow, Nigerian Institute of Advanced Legal Studies in a paper titled: "Unification and Reform of Sexual and Other Allied Offences in Nigeria Criminal Law".

[38] H.A.G. 10 (79, unreported).

In the second case, it is immaterial that the offender did not intend to hurt the person who was killed. In the third case, it is immaterial that the offender did not intend to hurt any person. In the last three cases, it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.[39]

There seems to be no problems with Sub-sections 1 and 2 of Section 316, since it merely codifies the most important mental element for the offence-intention to cause death or grievous bodily harm, though, in the process, it incorporates the common law doctrine of transferred malice. The advantage of Sub-sections 4-6 lies in restating or overstating the requirements as the mental elements in murder, or otherwise, Section 316(1-2) and an amended version of Sub-section 3 would have conveniently done the job.

Unlike the Criminal Code, Section 221(8) of the Penal Code provides that: Homicide punishable with death includes homicide committed with the intention of causing death; and Section 221(b) states that homicide is punishable with death, if the doer of the act causing the death knew or had reason to know that death would be the probable and not only a likely consequence of his act or of any bodily injury which the act was intended to cause.

It is submitted that the Penal Code provision appears tidier, although it seems to leave too much room for judicial discretion. Its general intent, like that of the common law is to identify intention and recklessness to cause death as the basis of the punishment for murder; Section 221(a) as in 316(1) directly tackles the issue of intention to cause death; 221(b) tacitly codified "reckless murder" and without specifically saying so incorporates the concept of "grievous bodily harm". For if death arises from grievous bodily harm, murder in such a case would almost invariably have been probable and not merely likely under Section 221(b).

An interesting feature of Section 221(b) is its seeming attempt to codify a subjectively objective test of recklessness. A careful judicial reflection on the interpretation of this provision might bridge the gap which, for instance, exists at present under the common law. In other words, while recklessness may be ascertained by a "subjective" investigation into the mind of the defendant, the inquiry can be made by studying the reaction of the reasonable man to the consequence of the accused's action.

Interestingly, while Section 316(1 and 2) of the Criminal Code is as straightforward as Section 221(a) of the Penal Code, one tends to prefer the draft in Section 221(b) of the Penal Code to the totality of Section 316(3-6) of the Criminal Code. Consequently, a new draft for the mental element of murder might either adopt a combination of Sections 316 (1 and 2) of the Criminal Code and 221(b) of the Penal Code or the entire provisions of Section 221 of the Penal Code.

Defilement

By virtue of the combined effects of the provisions of Sections 221 and 222 of the Criminal Code, it is an offence for any person, whether or not related to the child in question, to indulge in sexual intercourse or indecent acts with young girls below the age of 13 or to indecently treat young boys below the age of 14.[40] Furthermore, in Section 218 of the Criminal Code, the defilement of a girl under the age of 11 years attracts life imprisonment, while the defilement of a girl between the ages of 11 and 13 years attracts a maximum of 12 years imprisonment.[41] Section 222 of the Criminal Code also punishes the indecent treatment of girls under 13 years with a two-year

[39] Section 316 of the Criminal Code.
[40] Section 216 of the Criminal Code.
[41] Section 221(1).

imprisonment term. After the age of thirteen years, sexual intercourse with a girl only amounts to an offence if done without her consent.

The Penal Code, on the other hand, adopts an entirely different approach. Thus, Section 39 of the Penal Code states that consent given by any person under the age of fourteen is not considered a valid consent in any transaction for which consent is required. Thus, sexual intercourse with a girl under 14 years, whether or not she consented, amounts to rape.

Abduction and Kidnapping

The provisions of the two codes on abduction and kidnapping differ to a great extent. Section 225 of the Criminal Code makes it an offence punishable with two years' imprisonment for any person to take a young girl below the age of eight years out of the custody of her parents with the intent that she be carnally known by any man (presumably someone other than the abductor). Furthermore, Section 361 of the Criminal Code makes it an offence punishable with seven years' imprisonment for any person to take or detain a female of any age against her will with the intent that she be married or carnally known either by the abductor or any other person. The provisions of Section 362 make it an offence punishable with two years' imprisonment to take an unmarried girl below the age of 16 from the lawful custody of her parents. Kidnapping is defined as an offence under Section 364 of the Criminal Code in terms of the unlawful imprisonment of any person. Section 371 also defines the offence of child stealing.

The Penal Code, on the other hand, avoids this confusing state of affairs by avoiding multiplicity of provisions. Section 272 thereof defines abduction as making a person go from any place by force or deceit. Kidnapping, however, is defined in terms of the taking of young persons out of the lawful custody of their parents.[42] Both abduction and kidnapping are punishable by 10 years' imprisonment.[43] Thus, we have a position where the same conduct amounts to different offences under the two codes and is subject to different punishments. It is herein suggested that for the purpose of streamlining these provisions, the offence of abduction be limited to cases of detention or taking with the intention of committing a sexual assault. Kidnapping should then cover all cases of the taking of young persons out of the lawful custody of their parents, as well as the unlawful imprisonment of any person.

Defences

Defences to criminal liability explain circumstances in which an accused person, despite committing the actus reus, is not held legally culpable. They reflect limits of punishment by recognising human frailty, moral blameworthiness, and constitutional values, operating to excuse, justify, or negate responsibility within the criminal justice system in modern legal systems.

Insanity

The Criminal Code presumes every person to be sane and to be responsible for the commission of the offences charged.[44] In both codes, the insane are regarded as incapable of committing an offence. The defence

[42] Section 271 of the Penal Code.
[43] Section 273 of the Penal Code.
[44] Section 27 Criminal Code. There is no similar section in the Penal Code.

of insanity is available to the offender if he can establish that he was labouring under such a defect of reason arising from disease of the mind as not to know the nature and quality of the act or as not to know that what he was doing was wrong.[45] Thus, the mere mental aberration described as insanity is not enough to exculpate a person from criminal liability. It must be shown that the offender described as insane is incapable of entertaining a criminal intention. This was shown in the case of *R v Tabigen.*[46]

It is interesting to observe that whereas Section 51 of the Penal Code uses the expression "unsoundness of mind" to describe the mental state of the insane, the Criminal Code in Section 28 uses the expression "mental disease or natural mental infirmity". However, the second paragraph of Section 28 of the Criminal Code, which deals with delusions, is not in Section 51 of the Penal Code. The expression "unsoundness of mind" in Section 51 has been construed to cover cases of "mental disease or natural mental infirmity" in Section 28(2).[47] This is because "unsoundness of mind" may result from disease or other causes.

There are, however, two important differences in the application of the doctrine of insanity to responsibility for criminal offences in the two codes. Whereas both Codes acknowledge the defect in the accused of his capacity to understand what he is doing, and that it is wrong so to do, the Penal Code adds that he may be excused if he knows the act to be contrary to law.[48] This expression covers the expression in the Criminal Code that he should know that he ought not to do the act or make the omission. However, Section 28 of the Criminal Code provides for the situation where the person who is in such a state of mental disease or natural mental infirmity lacks the capacity to control his actions, and consequently commits an offence. This was the position in the case of *R v Echem*,[49] where the defence was allowed based on the medical evidence of the doctor who said that although the accused might know what he was doing and that he was doing wrong, yet when he had one of these attacks, he was unable to control his actions. It is also important to point out that this defence is referred to as irresistible impulse. There is no similar defence in Section 51 of the Penal Code. Moreover, the defence of delusion provided for in S.28 is absent in Section 51 of the Penal Code. In respect of this defence, the offender is not insane within the meaning of Section 28, but is affected by delusions on a specific matter or matters to the extent that he will only be criminally responsible for the act if the real state of things had been such as he was induced by the delusions to believe.[50]

Mistakes

The provisions of Section 25 of the Criminal Code and Section 25 of the Penal Code are to the effect that a mistake of law is not a defence to an offence. They, however, recognise that a mistake of fact is a complete defence. There are certain differences in the formulation of this defence in the two codes. Section 3 of the Penal Code provides for the presumption of knowledge of a material fact if such fact is a matter of common knowledge. Thus, a person cannot plead ignorance of a matter of fact of common knowledge. Furthermore, the mistake of fact relied upon must be one made in good faith, and which the offender believes himself

[45] *R v Omoni* (1949) 12 W.A.C.A. 5113.
[46] (1960) 5 FSC 9.
[47] *R v Yaro Bizi Bat* (19) NNLR 45.
[48] Ibid.
[49] (1952) 1 W.A.C.A58 160.
[50] *R v Ashigifnwo* ([18]8) 12 W.A.C.A 389; *R v Iwuanyanwu* (1975) All NLR; 413.

justified in law in doing.[51]

Section 25 of the Criminal Code requires the mistake to be honest and reasonable, and should be such that if the fact were as was believed, it would not have resulted in the commission of the offence.[52] The Criminal Code added that this defence could be excluded by the express or implied provision of the law creating the offence.

Although a mistake of law is not a defence, it has been constituted as a complete defence where an offence is committed relating to property, and the offender believed that he was exercising a claim of right with respect to his property.[53] As long as this claim is *bona fide* and honest, the question of its reasonableness is immaterial.[54] Invariably, the honest claim is founded on a legal right which may be mistaken. In other words, the defence of mistake negatives the existence of the mental element requisite for the commission of the offence. Apart from the claim of bona fide right, the defence of mistake is, however, identical in the two codes.

Conclusion

It is pertinent to point out at this stage, problems inherent in the application of different criminal laws in a country which professes to be one. In the first place, where different criminal laws are allowed to operate in the same country, there is the problem of confusion in their application. An example is the drinking of alcohol, which is a crime in the North but not in the South. Where a Southerner drinks alcohol in the North, he will be subjected to a different set of rules, which are not recognised in his own jurisdiction but which are regarded as offences in that part of the country. Technically speaking, one will be afraid of moving outside one's own jurisdiction for fear of contravening a law which he does not really know exists, and more so when it is remembered that ignorance of the law is not regarded as an excuse.

While efforts are being made to explore the possibility of a Unified Criminal Code for the country, there is also the need to adhere strictly to the principles of federalism (Brown & Okogbule, 2020). It is in the light of the above that we strongly support the view that the proposed criminal code for the whole country should, in relevant areas, be only a model for states to adopt or reject, depending on their traditions, religious beliefs and culture. The validity of any law must derive from the culture, traditions, and attitudes of the people for whom it is supposed to operate. It is also suggested that serious efforts be made to pursue the unification of the Penal laws and procedures in the federation, which cuts across tribal and religious boundaries. In this direction, any provision or rule which proves sound in either the Penal or the Criminal Codes should be adopted for the entire country. In pursuance of these objectives, a Panel could be set up urgently to draft legislation on the various subjects covered for further action by the government.

Finally, it is expedient to point out that the fundamental pitfall of countries with colonial legal heritages is the absence of reforms of laws inherited from their colonial masters. Thus, while the colonialists embark on frequent law reforms, the same cannot be said of the ex-colonies. The result is that outdated laws are still in use, long after they have been discarded in their countries of origin. This perhaps explains why any effort at not only unifying, but also reforming Nigeria's Criminal Laws should be viewed with favour.

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[51] Section 43 of the nal Code.
[52] *R v Aliechem* (19 IF.S.C, 64).
[53] Section 23 of the Criminal Code.
[54] Section 25 Criminal Code.

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