Psycho-social Analysis of Elements of Provocation in Nigerian Criminal Justice: A Jurisprudential Desideratum

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ABSTRACT

Human beings across racial distributions are inherently weak by nature; this weakness is multifaceted. One of the most ruinous of these weaknesses is the inherent emotional weakness that manifests itself in the form of anger or provocation. This weakness is so common and natural that it attracts the attention of "draftsmen" of most of the Criminal Codes across criminal jurisdictions, in which it constitutes a defence to criminal charges, including those with homicidal flavour. Commendable as this concession to human frailty may be, its application in Nigerian criminal law has left much to be desired. This is partly due to occasional impreciseness of legislative language, leading to a wide spectrum of judicial discretion that constitutes secondary sources of criminal law. Given this situation, the various elements of provocation need to be subjected to a psycho-social analysis, for Nigerian courts to truly accommodate the inherent human weakness upon which the defence of provocation is pivoted. This is important because provocation is a psycho-social phenomenon and a Judge is, jurisprudentially, a conduit, who ventures forth to garner what sister disciplines have to offer regarding a question of general nature which has been thrown up in legal context. Therefore, for justice to be manifestly done in charges involving a plea of provocation, Nigerian Judges must venture far afield and plough back the ideas, techniques and insights from a neighbouring discipline like psychology, into the intellectual milieu of law. This is the jurisprudential vacuum which this paper seeks to explore.

1. INTRODUCTION

The defence of provocation in a murder charge has a chequered history. It developed in English courts in the 16th and 17th centuries[1]. During this period, the death penalty was a mandatory punishment for anybody convicted of murder. The defence of provocation was born out of the consideration that it is

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1 United Kingdom Law Commission, "Partial Defences to Murder", *Consultation Paper* No. 173, (2003), p. 6.

virtuous for a man of honour to respond with controlled violence to some forms of offensive behaviour. Overreaction of a proportionate degree was considered a natural human frailty and if death occurred, it was regarded as manslaughter rather than the offence of murder[2]. The defence of provocation can, thus, be described as a concession to human frailty, introduced by the common law to mitigate the strictness of the single penalty of death for a convict in a murder charge.

The defence of provocation is pivoted on the general doctrine of *mens rea* (guilty mind) and *actus reus* (guilty act) in English law, and unless the act and the mind of a person are both guilty, such a person cannot be said to be criminally responsible[3]. In Nigerian criminal law, the offence of murder[4] or culpable homicide[5] attracts a capital punishment, i.e., it is punishable with death. However, the Nigerian Criminal Code recognizes the doctrine of *mens rea* and *actus reus* as it does not hold a person criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurred by accident[6]. Therefore, a person who unlawfully kills another in the heat of passion occasioned by sudden provocation is guilty of manslaughter only[7].

Perhaps, more than any other defence in criminal charges with homicidal flavour, the defence of provocation has been subjected to a series of debates and has, resultantly, suffered juristic vicissitude across global criminal jurisdictions. It has been argued, for instance, that heat of passion doctrine, which is the kernel of the defence of provocation, partially excuses reactive killings that are relatively more dangerous and cruel than those that are premeditated[8]. Scholars also opine that the defence of provocation has discriminatory impact based on

2 *Ibid*.

3 C. O. Okonkwo and M. E. Naish, *Criminal Law in Nigeria*, 2nd ed., Ibadan: Spectrum Book Ltd.,(2005), p. 66.

4 Sections 316 and 319, Criminal Code Act, Cap. C38, Vol. 4, Laws of the Federation of Nigeria, 2010.

5 Sections 221 and 222, Penal Code Act, Cap. P3, Vol. 12, Laws of the Federation of Nigeria, 2010.

6 Section 24, Criminal Code Act; See Note 4, *supra*.

7 Section 318, Criminal Code Act; See Note 4, *supra*.

8 G. F. Ried, "The Wrongfulness of wrongly Interpreting Wrongfulness: Provocation Interpretational Bias and Heat of passion Homicide", 12(1) *New Criminal Law Review* (2009), p. 70.

gender[9], it leads to unreasonably light sentences[10] and it is based on uncertain conditions[11]. Similarly, the defence of provocation seems to entrench the culture of blaming the victim. As a matter of fact, the defence of provocation has been abolished in some jurisdictions. It was abolished in 2003 in Tasmania,[12] while Victoria abolished it in 2005[13].

Despite all odds, the defence of provocation managed to survive the seeming tempest of abolition in many jurisdictions. During the law reforms in the United Kingdom in 2009, the partial defence of provocation was replaced with a new partial defence of provocation tagged, "loss of control"[14]. If successfully pleaded, loss of control partial defence also results in a conviction for manslaughter instead of murder[15]. In December 2009, the Law Reform Commission of Ireland recommended that the partial defence of provocation be retained but be modified[16]. The Commission states its reasons as follows:

> **"**....the Commission accepts that the defence is in an unsatisfactory state but does not agree that abolition is the best course of action. The Commission considers there are compelling reasons for retaining the plea, primarily that the distinction between murder and manslaughter marks an important moral boundary and that this would be greatly compromised by abolition of the plea of provocation"[17].

The twists and turns to which the application of the defence of provocation has been subjected across global jurisdictions and its eventual

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9 B. Marcia, "Killing in the Heat of Passion", in C. Calhoun, (ed.), *Setting the Moral Compass: Essays by Women Philosophers,* New York, Oxford University Press, (2004), p. 353.; N. Victoria, "Passion's Progress: Modern Law Reform and the Provocation Defence", 106(5) *Yale Law Journal*, (1997) p. 106.; E. M. Deborah, "The Flame Flickers, but Burns On: Modern Judicial Application of the Ancient Heat of Passion Defence", 51 *Rutgers Law Review* (1998), p. 5.

10 B. Marcia; See Note 9, *supra*.

11 J. B. Brad and A. A. Craig, "Is it Time to Pull the Plug on the Hostile Versus Instrumental Aggression Dichotomy?", 108(1) *Psychol. Review*, (2001), p. 108.

12 Tasmania, Criminal Code Amendment (Abolition of Defence of Provocation) Act, 2003.

13 Victoria Law Reform Commission, *Defence to Homicide, Final Report*, October 2004. It was abolished in Western Australia in 2008, via Law Reform Commission of Western Australia, *Re view of the Law of Homicide Final Report*. It was abolished in 2009 in New Zealand through the Crimes (Provocation Repeal) Amendment Act, 2009.

14 Sections 54-56 of the United Kingdom Coroners and Justice Act, 2004.

15 *Ibid*.

16 Law Reform Commission of Ireland, *Defences in Criminal law*, December 2009.

17 Law Reform Commission of Ireland, *Defences in Criminal law*, December 2009.

retention in many countries, including Nigeria[18], is due to the moral boundary that exists between murder and manslaughter. Needless to stress that murder and manslaughter are not the same, and the plea of provocation does not exculpate the perpetrator of the act from blame; it is only a mitigating factor when it comes to sentencing[19]. This paper, therefore, seeks to analyze the need for Judges, especially in Nigerian courts, to give sufficient consideration to the moral boundary that exists between murder and manslaughter in the interest of justice. This is pertinent because of the impreciseness of legislative language that leaves a good deal of scope for judicial discretion in interpretation and allows for court decisions to constitute a very important secondary source of the criminal law.[20]

It is noteworthy that the defence of provocation stands on the fulcrum of human frailty[21], which in itself is a psychological state of mind, an inherent moral weakness and character flaw, intrinsic to humanity. To achieve justice, therefore, Judges must enliven the necessary partnership that exists between law and psychology, because we cannot learn law by learning law.[22] That is why jurisprudence is a law-based social science subject, which in relation to other subjects in that curriculum, is comparable to a sea into which all rivers flow[23]. Thus, there is a compelling necessity for our courts to examine the elements of provocation via a psycho-social telescope, since the accused person's personality and, indeed, human personality, flowers from nurture and nature, the twin pillars of human psychology. As a matter of fact, our legal system is saturated with psychological concerns and psychology can assist our judicial process to distil the nature, causes and effect of personality or emotional disorders leading to criminal charges against which an accused person is standing trial. While the

18 See Note 7, s*upra*.

19 *Galadima* v *The State* (2013), Vol. 217 LRCN 58, at p. 74, Para. A.

20 C. O. Okonkwo and M. E. Naish; See Note 3, *supra*, at p. 26.

21 See Note 1, *supra*.

22 This is the position of Lord Radcliffe, "The Law and its Compass" (1961), in Lloyd of Hampstead and M.D.A Freeman, *Introduction to Jurisprudence*, London, Steven & Sons, (1985), p. 1., where he stated thus: "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 so much more than itself: a part of history, a part of economics and sociology, a part of ethics and a philosophy of life."

23 F. Adaramola, *Jurisprudence*, Durban, LexisNexisButterworths, (2008), p. 1. He also described Jurisprudence as chemical built up from subject molecules, external to, but not entirely alien to law.

depth of legal knowledge of the Bar and the Bench is appreciated, an exposure to sufficient quantum of emotional literacy offered by psychology will assist the duo, in the prosecution of, and adjudication over, criminal matters in which a plea of provocation is involved.

2. ELEMENTS OF THE DEFENCE OF PROVOCATION

Before venturing into what the elements of provocation look like, it is pertinent to understand what provocation really is. For this purpose and in this context, the Nigerian Criminal Code is the best literature to consult. Section 283 of the Criminal Code Act defines provocation as follows:

> "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, filial 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."[24]

A long line of authorities stipulates the essentials of the defence of provocation which the Nigerian court will consider to determine the success or failure of plea of provocation in a murder charge.[25] It is also a requirement that these essential elements must co-exist. In *Oladipupo* v. *The State*[26] for instance, it was held that for an accused to avail himself of the plea of provocation, he must have done the act for which he is charged in the following circumstances:

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24 Section 283 Criminal Code Act, *supra*, note 4.

25 *Chukwu* v *The State* (1965) NMLR 417 at 442; *Ekpeyong* v *The State* (1993) 5 NWLR (pt. 295) 513 at 525; *Uluebeka* v *State* (2000) 7 NWLR (pt. 665) 404; *Ihuebeka* v *The State* (2000) 2 SCN QR; *Shande* v *State* (2005) All FWLR (pt. 279) 1342 at 1354 SC; *Ekang* v *The State* (2001) FWLR (pt.68) 1123 at 1152 CA; *Amala* v *The State* (2004) All FWLR. (Pt. 219) 1102 at 1147 SC; *Shalla* v *The State* (2008) Vol. 156 LRCN 34 at 85; *Uwagboe* v *The State* (2008) Vol. 163 LRCN 92 at 95; *Galadima* v *The State* (2013) Vol. 217 LRCN 58 at 62; and Njoku v *The State* (2013) Vol. 222 LRCN (pt. 2) 219 at 244.

26 (1993) 6 SCNJ 233 at 239.

(i) in the heat of passion;
(ii) the act must have been caused by sudden provocation;
(iii) the act must have been committed before there was time for passion to cool; and
(iv) the mode of resentment must be proportionate to the provocation offered.[27]

These and other requirements are broadly discussed below.

3. THE REASONABLE MAN TEST

This standard applies in both common law and Nigerian law. It serves to determine whether a wrongful act or insult is 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*[28] , it was held that the test to apply to the accused is the effect it (the provocative act) would be expected to have on a reasonable man of the accused person's standing in life. The employment of objective standards of conduct like the reasonable man's test, which does not permit an actor to excuse his conduct based on his subjective perception at the time of committing the crime, shows that law may actually be objective[29]. However, it has not sufficiently answered the question who is a reasonable man? In the English case of *R.* v. *McCarthy*[30], it was stated that:

> "No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable man, or an average man. That must be left to the collective good sense of the jury."[31]

27 *Ibid*.
28 (1944) 17 NLR 99. See, also, M. E. Naish, "Redefinition of Provocation under the Criminal Code", *Nigerian Law Journal*, (1964), Vol. 1, p. 10, at p. 14, where emphasis is on the effect of the provocative act on a hypothetical reasonable man.
29 B. Leiter, "Law and Objectivity", in J. L. Coleman, E. H. Kenneth and S. J. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford, Oxford University Press (2004), p. 5.
30 (1954) 2 Q.B. 105.
31 *Ibid*.

In Nigeria where there is no trial by Jury[32], the definition of a reasonable man is left to the discretion of individual Judges, which has led to the consideration of different factors by different Judges in defining who is a reasonable man. These factors include ethnic propensity,[33] religious belief,[34] prejudices against women,[35] and level of civilization of the accused.[36] While these variant factors are worthy of consideration, it is submitted that they do not arrive at an exhaustive description of a reasonable man. For instance, based on *R* v *Adekanmi*[37] the Nigerian courts seem to have stuck to the assumption that an illiterate and primitive person is more easily angered than an enlightened and educated person. This is, however, debatable because man, wherever he is and whatever his race or level of civilization, tends to react in similar ways to similar circumstances.[38] Hence, the level of education or civilization is not a relevant factor in determining whether or not a person is peevish in a given situation, nor can a personality with internal locus of control[39], an introverted[40] or laid back[41] personality be referred to as an unreasonable man, if he does not react violently to provocative acts or words against him as it happened in all the

32 There was trial by Jury in Lagos but it was abolished through the Trial by Jury (Abolition) Edict No. 1 of 1975 Lagos State, which came into force on 3 March 1975.

33 As in *State* v *Abba Mohammed* (1969) NMLR 296, where 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.

34 As in *Ruma* v *Daura NA* (1960) 5 FSC 93, where the Supreme Court ordered a new trial on the ground that for a woman to liken a Muslim to a dog may amount to provocation.

35 As in *R* v *Igiri* (1948) 12 WACA 377, where the court noted that in "primitive communities.... the subjugation of women is accepted as natural and proper", and, further, held that for a wife to taunt her husband with impotency and spit in his face would arouse more passion than in sophisticated societies. And *R* v *Reuben Enyijinobu* (1961) All NLR, 627- 629, where the wife caught hold of her husband's private part to prevent him from having coitus with her, the court held that the wife's act was enough to provoke a reasonable man in the husband's situation.

36 In *R* v *Adekanmi*, *supra*, note 26, the court noted that the accused is an illiterate and primitive peasant, "and it must be beyond doubt that the passions of such a type are far more readily aroused than those of a civilized and enlightened class".

37 *Ibid*. Also in *R* v *Igiri* note 33, *supra*; *R* v *Okoro* (1942) 16 NLR 63; *Obaji* v *The State* (1965) 1 All NLR 269 at 275; *R* v *Rankin* (1966) Q.W.N 10; and *Musa* v *The State* (2009) vol. 172 LRCN 5 at 40, P-Z.

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

39 An individual with internal locus of control has internal control over the reinforcement of his behaviour and attributes. See P. S Duane and E. S. Sydney, *Theories of Personality,* 10th Edition, United States of America (2013), p. 358.

40 An introverted individual is capable of deep emotion but avoids an outward expression of it, P. S Duane and E. S Sydney, *supra*, note 39, p. 95.

41 A laidback personality is relaxed in style, behaviour and character, easy going, untroubled and carefree.

aforementioned cases. Such a person is a reasonable man within the context of his personality trait, as human reaction to stimulus varies *in tandem* with the spectrum of personality traits inherent in the individual.

While all the decisions based on the reasonable man's standard are appreciated as good judgments, the question, who is a reasonable man? , is more of psychological question than legal and could be better answered if one actually knows why people behave the way they do, which answer could only be provided through the personality profile of an accused. The goal of personality profiling is to predict how an individual will truly behave in response to a given stimulus situation[42]. Generally, people's behaviour is a function of their personality trait and the environment that nurtures them, i.e., $B = f(P, E)$[43]. Raymond Cattell[44] defines traits as relatively permanent reaction tendencies that are the basic structural units of the personality. While environmental influence is general and may affect a group of people, most traits are intrinsic and personality specific. These include unique trait that distinguishes a person as an individual, constitutional traits that have biological origin, dynamic traits that underlie our motivation and drive our behaviour and temperament traits that determine our feelings and emotional tone of behaviour[45].

Arising from the above, and casting a second look at the decision in *State* v. *Abba Mohammed*[46], where it was held that stabbing to death in retaliation for a slap was not disproportionate to the provocation because the accused is a Kanuri man from Bornu and the Kanuri wear daggers on their arms as ornament, it is humbly submitted that the decision was based on the sole consideration of environmental factor to the exclusion of the personality trait of the accused. It is observed, with respect, that Kanuri men may be nurtured by the same environment; however, all Kanuri men will certainly not have the same unique, constitutional, dynamic and temperament trait and their emotional tone of behaviour may vary from one personality to the other. For instance, a Kanuri

42 P. S Duane and E. S Sydney, *supra*, note 39, at p. 212.
43 A. M. Margaret and D. B. Jonathan, "Trait Aggressiveness and Situational Provocation a Test of the Trait as Situational Sensitivities Model", 32 *Personality and Social Psychology Bulletin* (2006), p. 110.
44 *Supra*, note 39, p. 215.
45 *Ibid*.
46 *Supra*, note 31.

man with antisocial personality trait[47] may react the same way the accused in *State* v. *Abba Mohammed*[48] did, while another Kanuri man with avoidant personality trait may react in an opposite manner[49]. Although the fact of each case is a strong factor in the application of the reasonable man's test, personality clerking of an accused during investigation and trial will also play a vital role in a proper application of the test and the attainment of true justice in Nigerian courts.

4. SUDDENNESS OF PROVOCATION AND REACTION UNDER THE HEAT OF PASSION.

Suddenness of provocation and reaction under the heat of passion are interwoven elements of the defence of provocation, which an accused person must prove before a plea of provocation can avail him under the Nigerian criminal law. Section 318 of the Criminal Code provides for these elements in the following words:

> "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."[50]

The implication of the elements and the above provision is that the act of the accused which caused the death of the deceased must be done in the heat of passion caused by sudden provocation before passion cools down. Several decided cases have further established the necessity of these twin ingredients of defence of provocation. For instance, in *Musa* v *The State*[51] it was held that the

47 An individual with antisocial personality traits gets angry easily, is arrogant, aggressive and has the tendency to manipulate others.

48 *Supra*, note 31.

49 Someone with avoidant personality traits feels inferior and unappealing to others, he is socially inept, he holds back in relationship for fear of being humiliated or ridiculed. He also holds back in social situations for his feelings of inadequacy.

50 Section 318, Criminal Code Act, *supra*, note 7.

51 *Supra*, note 37, at p. 39 para Z-JJ. See, also, *Uluebeka* v *The State* (2000) 7 NWLR (pt. 665) p. 401; *Nwide* v *The State* (1985) 3 NWLR (pt.12) p. 444; *Yusuf* v *The State* (1988) 4 NWLR (pt.

person seeking to invoke the defence of provocation must satisfy the court on the following:

(a) That he killed the deceased in the heat of the passion caused by sudden provocation; and
(b) That at the time of killing, the heat of passion had not cooled. [52]

It is noteworthy, that if enough time had elapsed for passion to cool between the killing and provocative act, the plea of provocation will fail. In deciding whether or not the provocation is sudden, previous wrongful acts and insults by the deceased are not sufficient because they do not supply the requirement of suddenness[53]. Similarly, suddenness does not imply that account should be taken of some other previous acts of the victim ending with the act which finally leads the accused person to lose his self control.[54] This position has been applied in deciding many cases in Nigerian courts, including the following:

(a) In *R*. v. *Green*[55], the accused person's wife having left him went to stay with her mother where she began to accept the advances of another man. The accused tried hard to win back his wife but failed. At about 9 p.m. one evening he visited his mother-in-law and found his wife and her new suitor having sexual intercourse. He returned to his house brooding over the incidence. He returned to his mother-in-law's house at about 1 a. m. with a machete to kill his rival if he was still there. Upon hearing the man and his wife's voices in a dark room, he struck twice at the bed and killed his wife. He also killed the mother-in-law when she rushed into the room. His plea of provocation was rejected because between the provocation and the killing there was enough time for his anger to cool. If he killed the couple at 9 p. m. when he first saw them, the plea of provocation would have been good[56].

86) p. 96; *R* v *Afonja* (1955) 15 WACA 26.

52 *Ibid*.

53 C. O. Okonkwo, and M.E. Naish, *Supra*, note 3, at p. 245.

54 T. A . Aguda & I. E. Okagbue, *Principles of Criminal Liability in Nigerian Law* (2nd ed.), Heinemann Educational Books Nigeria Plc, (1990), at p. 394.

55 (1955) 15 WACA 73. A similar position was held in *R* v *Igwe* F.S.C 83/1963; *Okpozo* v *The State* (1966) N.M.L.R 1, (1965) 9 E.N.L.R 1; and *Nwango* v *R* (1963) 1 All N.L.R 330.

56 C. O. Okonkwo and M.E. Naish, *Supra*, note 3, at p. 244.

(b) In *Uwagboe* v *The State*[57] the appellant alleged that on 4 April 1994, one Asia Uwagboe, now deceased, accused him of stealing the sum of N 60.00. When the deceased and members of his family retired in the room for the night, the appellant broke into the room, in the presence of witnesses, attacked the deceased with a cutlass by severely cutting the arm of deceased resulting in the death of the deceased on 9 April 1994. The appellant, who fled his home after the incident, was not found and arrested until 3 August 1996. On conclusion of the investigation of the case, the appellant was charged and tried for the offence of murder. The trial court sitting in Benin rejected his plea of provocation, because there was enough time for passion to cool between the accusation and the attack he launched against the deceased. The appellant was found guilty as charged, convicted and sentenced to death on 5 August 2004. The appellant's appeal was dismissed at the Court of appeal and the Supreme Court.

The decisions in the above cases, and many others like them, represent the position of the Nigerian criminal law in such situations. However, it must be borne in mind that the defence of provocation has its origin in a concession to human frailty, introduced by the common law to mitigate the strictness of the single penalty of death for a convict in a murder charge[58]. Therefore, if our law must have a human face, human frailty upon which the plea of provocation is pivoted and other character flaws inherent in human nature must be considered in deciding whether a plea of provocation avails an accused person or not. Reaction to insults or provocative acts depends on the personality traits of an individual. While some people will react spontaneously to provocative acts, others may not be so spontaneous in their reaction. For instance, an individual with antisocial personality trait, who is aggressive and gets angry easily[59], or an extroverted individual who is naturally emotional,[60] will react spontaneously if they were the accused persons in the cases of *R*. v. *Green*[61] and *Uwagboe* v.

57 (2008) vol. 163 LRCN 92.
58 *Supra*, note 1.
59 *Supra*, note 45.
60 P. S. Duane and E. S. Sydney, *supra*, note 39, at p. 94.
61 *Supra*, note 55.

The State[62] stated above. On the other hand, an individual with internal locus of control[63], an introverted[64] or laidback personality[65] may behave exactly the way the accused persons did in the cases under reference. It is submitted with respect, that their cases would have been decided differently if the partnership between law and psychology had come to fruition, with respect to the consideration of the defence of provocation.

Mention must be made of the fact that cognitive distortion overwhelms such personalities in situations described in the cases under reference. Cognitive distortion is a process by which one's mind convinces him of something that is not really true. These inaccurate thoughts reinforce the accused persons' negative thinking or emotions. They tell themselves things that sound rational and accurate, but really only serve to keep them feeling bad about their misfortunes. To watch one's wife having sexual intercourse with another man, as in *R*. v. *Green*, and being falsely accused of stealing, as in *Uwagboe* v. *The State*, are situations that can plunge the accused persons into the stream of cognitive distortions. Burns David[66] made a long list of cognitive distortions; some of them that are relevant to the present discussions are listed as follows:

(i) Overgeneralization: such people see a single negative event as a never-ending pattern of defeat.

(ii) Mental filter: they filter out all positive aspects of the situation, while they pick out a single negative detail and dwell on it exclusively so that their vision of all reality becomes darkened, like the drop of ink that discolours an entire beaker of water.

(iii) Disqualifying the positive: they reject positive experiences by insisting they "don't count" for some reason or other and they maintain a negative belief that is contradicted by their everyday experiences.

(iv) Jumping to conclusions: they make a negative interpretation even though there are no definite facts that convincingly support their conclusions; jumping to conclusion also involves the fortune teller error when they

62 *Supra*, note 57.
63 *Supra*, note 39.
64 *Supra*, note 40.
65 *Supra*, note 41.
66 D. D. Burns, *The Feeling Good Handbook,* New York, William Morrow and Company, Inc., (1989).

anticipate that things will turn out badly, and they feel convinced that their prediction is an already established fact.

(v) Creating mental catastrophes: they expect disaster to strike, no matter what.

(vi) Emotional reasoning: they assume that their negative emotions necessarily reflect the way things really are[67].

These and many more negative thoughts constitute the experience of an individual who suffers from cognitive distortions. Cognitive disturbance is a psycho-social dysfunction like heat of passion. But unlike heat of passion, cognitive distortion drives its subject gradually through three stages before he violently reacts to a provocative act, viz., cognitive, arousal and behaviour[68]. After mentally creating catastrophes and expecting the worst to happen, sufferers of cognitive distortions experience arousal of anger and passion, which they finally exhibit in a violent behaviour. Sufferers of cognitive distortion experience depression as a result of provocative acts or words and such depression culminates into hostility[69], which increases their anger with the passage of time. Cognitive distortion, like heat of passion, is a product of human frailty and character flaw inherent in some personality traits; therefore, it ought to be considered in deciding whether or not a plea of provocation will succeed. It is in consideration of this fact that Reid[70] stated the following:

> "A moral dilemma remains, though, in that, whereas the heat of passion defence partially excuses killers who are deemed less reprehensible because of emotional dysfunction, no such allowance is made for killers who act, in part, out of cognitive disturbance."[71]

It is, however, gladdening to note that the apex court in Nigeria had at one time or the other considered cognitive distortion in deciding the success or failure of a plea of provocation. The case that readily comes to mind in this

67 *Ibid*.
68 R. H. J. Hornsveld, *et al*., "The Novaco Anger Scale-Provocation Inventory (1994 version) in Dutch Forensic Psychiatric Patients", 23 (4) *Psychological Assessment* (2011), pp. 937-944.
69 P. S. Duane and E. S. Sydney, *supra*, note 39, p. 376.
70 Ried, G.F. *supra*, note 8, p. 77.
71 *Ibid*.

instance is *Shande* v *The State*[72], whose facts are stated as follows:

> "Benjamin Lorumnu Shande, a civil servant, was the appellant's husband. Both Mbanengen and Benjamin Shande lived together at Achia, Benue state, where they had their matrimonial home. On account of Benjamin Shande's job, he stayed more regularly at Adagi but he came home regularly. On 8th May 1997, while at Adikpo, he learnt that his mistress Mrumum Dera (the deceased) had enquired after him. He, therefore, went to visit her at Jato-Aka where she lived. The next day, 9th May 1997, he agreed with the deceased that she should come to his home at Achia. Benjamin Shande arrived at Achia on that 9th May 1997. After taking the dinner prepared by the appellant, the deceased arrived. The deceased joined Benjamin Shande where the latter was sitting with his father and younger brother. Though she was offered food, she declined the offer as she had also brought some food along with her and which she served to the people she met at the table under the *Ate* (a thatched traditional hut). Some two hours after they had eaten, the late Mrumum Dera informed Benjamin Shande that she was feeling cold and would like to sleep; the latter instructed the appellant to prepare the room for her. *This was the only room in the compound belonging to Benjamin Shande where the deceased and the appellant used to sleep whenever she visited Benjamin Shande. The appellant had not clearly accepted the 'lovers' relationship between the deceased and her husband which started in 1995. Appellant's husband had on many occasions abandoned her and the responsibilities of the appellants for the upkeep of the family*[73]. On the 9th of May 1997, while the deceased was sleeping, the appellant attacked her with kerosene and set her ablaze. The deceased eventually died. The appellant confessed that she actually poured kerosene on the deceased and set her ablaze under provocative circumstances, which the apex court affirmed to be the cause of the deceased's death."[74]

72 (2005) ALL FWLR (pt. 279), 1342.
73 Italicized portion is for emphasis.
74 *Supra*, note 72, at p. 1353, per Ejiwunmi, JSC.

It is based on the foregoing facts, and consideration of ingredients of provocation in Nigerian criminal law, that the learned trial Judge held that the plea of provocation did not avail the appellant when he stated thus:

> "I think the provocation which will avail the accused is that offered immediately before the act complained of; while the act of the deceased may have annoyed the accused person, they certainly do not amount to provocation as defined above. There is no evidence from the accused or in exhibit 5 that when they got to the room, the deceased attempted to assault her or even said anything to her that provoked her."[75]

This decision of the trial court is in consonance with the provision of section 318 of the Criminal Code[76]and a plethora of Nigerian judicial authorities[77]. The trial court identified the absence of sudden provocation, as the deceased did nothing to provoke the appellant on the fateful night when she set her ablaze. Thus, the trial court convicted the appellant of murder, while the Court of Appeal upheld the conviction when the matter went on appeal before it. However, the Supreme Court set aside the decisions of both the trial court and the Court of Appeal; the apex court found that the defence of provocation availed the appellant. It is observed with respect that in that decision the apex court commendably considered the effect of cognitive distortions which the appellant had gone through. This effect was obvious in the content of exhibit 5, which was the confessional statement of the appellant wherein she stated as follows:

> "On the 9th May 1997, my husband arrived from Turan in the morning and deceased lady arrived around 8 p.m. she went straight and joined my husband's father at his '*Ate*' (round hut in the centre of the compound). By this time I was eating in the room with my husband and when her bag was brought to our room by the children, my husband after eating went out and joined her at '*Ate*' and I later followed my husband to '*Ate*' where I met the deceased and we greeted each other and thereafter I left. I tried to get food for her from the wife of my husband's brother but

75 *Ibid*., at p. 1354.
76 *Supra*, note 50.
77 *Supra*, notes 25, 27 and 51.

> the deceased declined to eat. I went and bath (sic) and later joined them at '*Ate*'. While we were there at about 10p.m., my husband noticed that the deceased was feeling sleepy and he touched her and asked her whether she wants to go and sleep and she replied yes. It was then that my husband asked me to go and arrange a place for her to sleep. I complied and took her to my room and arrange bed for her and she slept on the bed covering her face and body with cloth. My two children were sleeping on the other bed in the same room. *I tried to sleep with my children on the other bed but my mind could not rest because of the deceased who have caused my husband not to do my part-time N.C.E. course, not to farm for me, clothes (sic) me and take me and children for treatment when need arise. And also my husband (sic) failure to pay the debt outstanding against me in our local bank*[78]. I had in mind to cause her some bodily injuries in order to make her keep away from my husband and I took kerosene in a container poured it on her and light matches and drop it on her and her body catches (sic) fire and she waked (sic) up and started shouting and in her attempt to rushed (sic) out fire catches (sic) on the roof of the thatched house and I started using the drinking water in the pot to put it off."[79]

From the above evidence, it is clear that the appellant must have experienced various chains of cognitive distortions viz.: an acknowledged "lover" of her husband since 1995 gained free access into her matrimonial home; the appellant and her children suffered neglect on account of the deceased's relationship with her husband; the deceased was an object of pamper before the appellant's very eyes; and the appellant was made to vacate her own bed for the deceased. Perhaps her cognitive distortion got to the peak when she lost her sleep on the fateful night, and her mind wandered hither and thither, and having navigated the cognitive and arousal stages in distorted thinking, she proceeded to the third stage by putting up a violent behaviour[80]. The fact that she could not think of the harm that would come to her children when the room is set ablaze confirms her sojourn into deep distorted thinking. The twisted and distorted

78 Italicized portion is for emphasis.
79 *Supra*, note 72, at p. 1355.
80 *Supra*, note 68.

thinking of the appellant is better captured by the Supreme Court, per Ejiwunmi JSC, when it held, thus:

> "It is clear from this narrative that the appellant cannot be described as happy in all the circumstances. The question then is, whether a woman who had been the subject of neglect by PW 1, would not feel provoked towards the deceased, the lover of her husband sleeping as if nothing was happening on her own bed in her own house."[81]

What the Supreme Court has demonstrated in this case is the doctrine of cumulative provocation, where the defence of provocation can still avail an accused person who acted violently, even when it appeared that there was enough time for anger to cool down. It is also essentially an exhibition of the possible alliance that could exist between law and psychology, because an accused person cannot be said to be cumulatively provoked without experiencing cognitive distortions subject to his personality traits. In a similar vein, those who react spontaneously to provocative acts and conduct also do so in consonance with their personality traits. The doctrine of cumulative provocation pivoted on cognitive distortion is, also, recognized in English jurisdiction but under different names. In *R. v. Thornton*[82], for instance, after years of oppression, a woman went to the kitchen, took and sharpened a carving knife and returned to stab her husband who died as a result of the injury sustained. The accused pleaded provocation and argued that the court should consider events in the past years leading to her action. The defence of provocation was rejected but was upheld on appeal after the consideration of new medical evidence and the accused was convicted of manslaughter based on the doctrine of "battered women syndrome", which afforded her diminished responsibility[83]. Similarly, in *R.* v. *Ahluwalia*[84], a defence of provocation was upheld on appeal for the accused who poured petrol on her husband and set it alight. The defence was accepted based on "battered woman syndrome" and the accused was convicted for manslaughter instead of murder. In *R.* v. *Humphreys*[85], after years of abuse, the accused lost self-control and stabbed her partner. Her defence of provocation

81 *Supra*, note 72, at p. 1356, Para. C-D.
82 (1992) 1 AER 306.
83 *R* v *Thornton* (No 2) (1996) 2 AER 1023.
84 (1992) 4 AER 889.
85 (1995) 4 AER 1008.

succeeded upon consideration of a series of events over the years leading to her violent action. The accused was convicted of manslaughter based on the "final straw principle" i.e. the final straw that broke the camel's back was the final words of her partner, which triggered her anger[86].

Arising from the foregoing, it can be safely concluded that the trio of the doctrines of cumulative provocation in Nigerian criminal law, battered woman syndrome and final straw principle in English jurisdiction are pointers to the fact that the defence of provocation is truly pivoted on human weaknesses and character flaw inherent in different personalities. The doctrines are also in agreement, that for justice to be manifestly done, human frailty inherent in different personalities must be considered.

5. PROPORTIONALITY OF MODE OF RESENTMENT TO THE PROVOCATION OFFERED

Another ingredient of the defence of provocation which an accused person must prove together with those earlier discussed is that the mode of resentment was proportionate with the act of provocation offered. The only statutory authority for this rule in Nigerian criminal law can be found in section 284 of the Criminal Code, which states:

> "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"[87].

Nigerian courts have determined the fate of many pleas of defence of provocation in several decided cases based on the element of proportionality contained in the above statutory provision. In *State* v. *Mathias Ekpo*[88], the deceased caught the accused in his raffia plantation. In the altercation that

86 See also *Mehemet Ali* v *R* (1957) WALR 28, 29, where it was held, per Jackson J., that the final wrongful act or insult might, of itself, be comparatively trifling, but when taken with what had gone before, might be the last straw in a cumulative series of incidents which finally broke down the accused's self-control and caused him to act in the heat of passion.

87 Section 284 Criminal Code Act, *supra*, note 4.

88 (1975) 5 UILR (PT. 111) p. 350.

ensued, the deceased shot the accused at the thigh and the accused out of provocation shot the deceased at the neck which led to his eventual death. The court held that the defence of provocation availed the accused, since the mode of resentment was proportionate to the attack made on him. In *Njoku* v *The State,*[89] however, the defence of provocation did not avail the accused because the mode of resentment was not proportionate to the provocation offered. The Supreme Court held, further, as follows:

> "The fate of the plea of provocation in the circumstance of this case is sealed by the reaction of the Appellant in terms of the proportionality of the provocation with the force or action deployed by Appellant, which were the use of mere words by the deceased and cutlass/machete by the Appellant in reaction to the verbal provocation"[90].

The defence of provocation in criminal law has its origin in the consideration of human frailty typified by provocation or anger. This being the case, the proportionality rule places an unnatural burden on the accused person. Having lost self-control due to a provocative act (which is a requirement for the success of a plea of provocation), he is still expected to control his emotion and measure his mode of resentment. This requirement is an impossible standard of behaviour[91], considering the human weakness inherent in anger, which the defence of provocation seeks to condone in the first instance. The requirement of proportionality has no place in logic or human psychology. Raymond Cattell listed eleven *ergs*[92] (instinct or drive) as motivating traits in human personality. Anger is the first on the list of these innate energies or driving forces behind all human behaviours. It is, therefore, unnatural for someone acting in the heat of passion to correctly proportion his action when provocation is the springboard of such action. The rule of proportionality is, obviously, contradictory to human psychology and the indulgence given to human frailty by the defence

89 (2013) vol. 222 LRCN (pt.2) 219, at p. 254 Para. A – F.
90 *Ibid*.
91 G. N. K. Vukor- Quarshire, "Are the Heat of Passion Provisions of Section 318 of the Criminal Code of Nigeria as Defective as the Critics Maintain?" Jan. & July *OAU Law Journal* (1987), p. 101.
92 P. S. Duane and E. S. Sydney, *supra*, note 37, at p. 217.

of provocation.[93]

Perhaps, the requirement of proportionality might have been partly due to the ancient confusion of homicide under provocation with homicide in self-defence. This is the opinion of Kenny[94], who doubts whether the requirement could have meant that blows on either side must be equal, in which case he opined that the defence of provocation would not be needed at all[95]. This element of provocation has also been a subject of criticism across global criminal jurisdictions. For instance, in *Ng Yiu Nam* v *R.*[96] the Supreme Court of Hong Kong declared it an error to make mode of resentment proportionate to provocation a separate and distinct element from loss of self- control. This was its basis of criticizing the decision in *R*. v. *McCarthy*[97], when it held that the requirement is "a proposition not only unsupported by authority, but also illogical and contrary to common sense."[98] Similarly, in the case of *Southgate*[99], the English Court of Criminal Appeal held, thus:

> "....the test of reasonableness does not apply to the accused's conduct after the loss of self- control....this is illogical for a man cannot both lose his self control and nicely proportion the ferocity of his reaction to its cause". [100]

The above submissions lend credence to the fact that proportionality rule is not only unnatural, but also antithetical to logic and human psychology. Nigerian scholars are not left out in the criticism of the proportionality rule. While criticizing the application of this requirement in Nigerian criminal law, Professor D.A. Ijalaye[101] stated as follows:

> "It is submitted that the principle of proportionality is a dangerous and

93 Many writers share this opinion; they include: D. A. Ijalaye, "The Defence of Provocation in Murder Cases in Nigeria: A Reappraisal", Jan. & July *OAU Law Journal* (1991); S. I. Oji, Offence of Murder: A Critical Appraisal, *Justice Journal* (2011), p. 64.; D. O. Adesiyan, *An Accused Person's Right in Nigerian Criminal Law* (1st ed.), Ibadan, Heinemann Educational Books Plc, (1996).

94 C.S. Kenny, *Kenny's Outline of Criminal Law* (19th ed.), Cambridge, Cambridge University Press, (1966), pp. 173-175.

95 *Ibid*.

96 (1963) Crim. LR 850.

97 *Supra*, note 30.

98 *Supra*, note 96.

99 (1963) Crim. LR 570.

100 *Ibid*.

101 *Supra*, note 93, p. 27.

> an unreasonable concept. By this concept, a person who has lost his self-control is still expected to be able to weigh the weapon to be used by him. The moment he is able to do this, that very moment he ceases to be smarting under provocation and the defence of provocation ought not to be available to him".[102]

The simple deduction from the above position is that reason and passion are not the same; while provocation obscures reason and motivates action based on passion rather than judgment, it is only an individual who is a master of his mind who can act based on reason or measure the proportion of his reaction. Essentially, provocation amounts to temporary insanity whereby the stress of provocation impairs the mental state of the defendant and propels him to unmeasured fury.[103]In a similar vein, Okonkwo and Naish,[104] clearly stated that the principle of proportionality is not specifically provided for in Nigerian Criminal Code but was imported from English law.[105] This assertion has made one to cast a critical look at the relevant provisions of the Nigerian Criminal Code. It is, thus, observed that by dint of the implicit dichotomy in the Criminal Code in provocation cases between those involving death[106] and those of assault *simpliciter*,[107] section 284, which provides for the proportionality rule, has to be read as being limited to only cases of assault. It is obvious that there is no nexus between sections 284[108] and 318[109] as there is between sections 283[110] and 318, while section 284, itself, provides that:

> "A person is not criminally responsible for an assault... provided the force used ... is not intended, and is not such as is likely to cause death or grievous bodily harm".[111]

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102 *Ibid*.
103 *State* v *Correra*, R. L 430 A2d 1251, 1253.
104 C. O. Okonkwo and M.E. Naish, *Supra*, note 3, at p. 248.
105 *Ibid*.
106 As provided in ss. 283 and 318 of the Criminal Code, *supra*, note 4.
107 As provided in ss. 284 and 285 of the Criminal Code, *supra*, note 4.
108 *Supra*, note 87.
109 *Supra*, note 50.
110 *Supra*, note 4.
111 *Supra*, note 87.

The above position of the Criminal Code clearly indicates that the requirement of proportionality is limited to cases of provocation involving assault, and those involving killing do not have such requirement. This fact is clearer in the provision of section 318, which states as follows:

> "When a person who unlawfully kills another....does the act ....in the heat of passion caused by grave and sudden provocation.....he is guilty of manslaughter only."[112]

Section 318, which reduces the sentence of an accused from death to manslaughter, does not obviously provide for the requirement of proportionality. Hence, one cannot but align with Okonkwo and Naish, that there is no provision for the proportionality rule in the Nigerian Criminal Code. The reasoning underlining its application will never make it a provision of the Criminal Code, and all decisions based on this element must have been entered *per incuriam*. It is little wonder then that Justice L.O Aremu (as he then was),[113] an epitome of juristic ingenuity, had to render the following opinion:

> "It is my respectful submission that the courts have been wrong, either in importing the principle of proportionality wholesale into our law of provocation on the false hypothesis that our law is on all fours with English law on the subject of provocation, or in seeking to derive authority for the application of the rule of proportionality from the provisions of our Code"[114].

The learned Justice concluded as follows:

> "In any case, the rule is illogical and unfair in that its application poses a double test of reasonableness for the accused- first, in determining whether it was reasonable under the circumstances for the accused to have lost his self-control, and secondly after the accused has passed that test, in further applying the "reasonable man" standard to judge his subsequent conduct after the loss of self-control. So, after holding in a

112 *Supra*, note 50.

113 L.O. Aremu, *Criminal Responsibility in Homicide and Supernatural Beliefs & A Rhapsody of Essays on Nigerian Law*, Ibadan, Book-Builders, (2007), p. 51.

114 *Ibid*. See, also: *R* v *Nwajoku* (1937) W ACA 208, per Petrides C. J., and Butler Lloyd, J., and the decision of Ademola, C.J.N. in *Obaji* v *The State* (1965) 1 All NLR 269, where the provisions of the Code on provocation were examined.

> particular case that the wrongful act or insult was sufficient to make the accuse lose his self-control while he was in the heat of passion and when he was not master of his mind, he is expected, in that condition to still possess sufficient presence of mind to be able to control the downward fall of the hand uplifted in anger and so proportion his retaliation to the provocation given to him".[115]

The above position of the eminent jurist summarizes the whole issues about the impropriety of the proportionality rule, as it can neither be placed in logic nor human psychology. It is particularly worrisome that though the rule does not have a niche in the Nigerian Criminal Code (with respect to plea of provocation involving killing), yet many cases[116] have been determined based on it. In deciding those cases, logic, human nature and human psychology must have been sacrificed on the altar of imported legal technicality, which is not rooted in our Criminal Code. Further still, the rule is quiet unnatural; it appears to be pivoted on a denial of natural human frailty, character flaw and moral weaknesses inherent in human psychological trait, which the plea of provocation originally set out to concede.

6. CONCLUSION

The world over, human behaviour is not left to unchartered freedom. Yet, across global jurisdictions, law condones some human weaknesses and accords them the status of defence in criminal charges. As could be seen in the foregoing discussion, provocation is one of such human weaknesses that constitute defence in criminal charges. However, justice may not have a human face and may not be manifestly done if decisions on plea of provocation are solely based on legal interpretations of the Criminal Code. Nigerian courts need to do a lot more, since the Criminal Code has its own limitation and provocation is not just

115 L.O. Aremu, *supra*, note 113.

116 These include: *R* v *Nwajoku* (1937) 3 WACA 208; *Nomad* v *Bornu N.A* (1954) 21 NLR 31; *Wonaka* v *Sokoto N.A.* (1956) NRNLR 19; *R* v *Akpakpan* (1956) 1 FSC 1; *Babalola John* v *Zaria N.A* (1959) NRNLR 43; *R* v *Adelodun* (1959) WNLR 114; *Obaji* v *The State* (1965) 1 All NLR 269; *Ekang* v *The State* (2001) FWLR (pt. 68) 1123 at 1152, 1153 CA; *Usma* v *The State* (2004) All FWLR (pt. 226) 231 at p. 259 CA; *Uwaekweghinya* v *The State* (2005) All FWLR (pt. 259) 1911 at 1926 SC; and *Njoku* v *The State* (2013) vol. 222 LRCN (pt. 2) 219 at p. 245.

a legal issue, but an emotional human weakness, which has its root in human psychology. This reality does not always reflect in decisions involving the plea of provocation in Nigerian courts. Often our courts are not conscious of the fact that the defence of provocation is built on concession to human emotional weakness. Hence, the realities inherent in human psychology are usually sacrificed on the altar of legal technicalities, which are not entirely known to our law.

For the plea of provocation to succeed, for instance, an accused must have lost self-control, commit the crime in the heat of passion and, yet, must be able to measure the proportionality of his action to the provocation given. Happily enough, the need to consider the dynamics of human psychology was realized by the Supreme Court in *Shande* v. *The State,*[117] where cognitive distortion became relevant, as the apex court disregarded the existence of long period of time, during which anger must have cooled. The decision in this case confirms the need for Nigerian courts to always delve into the dynamics of human psychology before deciding cases involving the defence of provocation. This attitude must be sustained, in order to fill the jurisprudential gap created by the mastery of legal technicalities over realities inherent in human psychology.

117 2005) ALL FWLR (pt. 279), 1342.