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Undefined Fault & Uncertain Liability: Examining Sections 24 of the Criminal Code Act, 48 of the Penal Code Act and The Constitutional Requirement Under Section 36(12) of the 1999 Constitution (As Amended)

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ABSTRACT

Section 36(12) of the 1999 Constitution of the Federal Republic of Nigeria provides that no person shall be convicted of a criminal offence unless that offence and its penalty are defined in a written law. Sections 24 of the Criminal Code Act and 48 of the Penal Code Act recognize the principle of mens rea but provide only a negative definition. It states what criminal responsibility is not, rather than what it is. There is no statutory definition of intention, recklessness, or negligence in either of the codes. This article examines the current statutory and judicial treatment of these fault elements in Nigeria and assesses compliance with section 36(12).

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1.0 INTRODUCTION

The doctrine of mens rea is central to criminal liability and it ensures that punishment follows moral blameworthiness as captured in the maxim actus non facit reum nisi mens sit rea.[1] In Nigeria, criminal responsibility is governed by the Criminal Code Act operating in the South, the Penal Code Act operating in the North and the Constitution of the Federal Republic of Nigeria 199 (as amended), particularly section 36(12) which requires that offences be clearly defined and punishment prescribed by a written law.[2] The major problem we face in Nigeria is that our law does not clearly tell us what counts as a guilty mind. Sections 24 of the Criminal Code and 48 of the Penal Code recognize the principle of mens rea, but only halfway. Both sections provide that a person is not criminally responsible for acts done without a voluntary will.[3] The Codes tell us what mens rea is not but not what it is. Because the law is silent, judges have had to build and infer meaning from decided cases.[4]

2.0 THE STATUTORY FRAMEWORK FOR *MENS REA* IN NIGERIA

2.1 Section 8 and Section 24 of the Criminal Code Act

Nigeria operates two Codes; The Criminal Code Act which applies in the South and the Penal Code Act which applies in the North. Section 8 of the Criminal Code Act provides that a person is not criminally responsible for an act unless it is done intentionally, with foresight of probability, or negligently.[5]This section recognizes intention, recklessness as foresight of probability, and negligence. Section 24 on the other hand provides a presumption that a person intends the natural and probable consequences of his action.[6]In practice, this provisions help prosecutors where direct evidence is missing, but it also risks shifting the burden to the accused where it is applied without proper factual foundation.[7]

2.2 Section 48 and Section 79 of the Penal Code Act

[1] Glanville Williams, *Textbook of Criminal Law* (2nd edn, Stevens 1983) 2
[2] Constitution of the Federal Republic on Nigeria 1999 (as amended), s 36(12)
[3] Criminal Code Act, Cap C38 Laws of the Federation of Nigeria 2004,s 24; Penal Code Act, Cap P3 Laws of the Federation of Nigeria 2004, s 48
[4] Akinola Aguda,*The Laws of Homicide in Nigeria* (1st edn, Sweet & Maxwell 1985) 45
[5] Criminal Code Act, s 8
[6] *Ibid,* s 24
[7] *Woolmington v DPP* (1935) AC 462

The Penal Code Act applies only in the North and section 48 of the Act excludes involuntary acts, while Section 79 on the other hand provides that liability arises only where an act is done with intention or with knowledge.[8] Negligence is not expressly listed in the Penal Code Act as an independent basis of liability. Gross negligence leading to death can be manslaughter in Lagos under the Criminal Code Act, but may not even be an offence in Kano under the Penal Code Act.[9]

Both Codes allow strict liability offences in regulatory statutes without clearly stating so, contrary to the presumption in *Sweet v* Parsley that provides that mens rea must be required unless excluded by clear words.[10]

3.0 JUDICIAL TREATMENT OF INTENTION, RECKLESSNESS AND NEGLIGENCE

3.1 Intention

This is the most relied upon fault element in serious crimes. In *Abiodun Adekoya v The State*, the Supreme Court looked at the facts, the weapon used and the body part attacked to infer intention.[11] In *Aderemi v The State*, the Court held that intention can be gathered from surrounding circumstances.[12] Nigerian courts have borrowed the test from *R v Nedrick* which provides that if the result of an action was certain and the accused appreciated that fact, the jury may find intention.[13] Presumption of intention from natural consequences, if applied loosely, may shift the burden to the accused to prove lack of intent.[14]

3.2 Recklessness

Recklessness asks what the accused actually foresaw. Nigerian courts follow the subjective test from the case of *R v Cunningham* which was later reinforced in the case of *R v G* in determining whether an act was reckless or not. In determining recklessness, the prosecution must prove that the accused actually foresaw the risk and still went ahead.[15]

3.3 Negligence

Negligence is the least used fault element and it is applied very strictly. Negligence asks what the accused ought to have foreseen.[16]It is not enough that the accused was careless, the negligence must also be gross. The test for Negligence comes from the case of *R v Bateman* which provides that the conduct must be so bad that it shows disregard for life and the safety of others. It was later restated in *R v Adomako* with a four part test which include; duty, breach, causation, and criminality of breach.[17]Courts sometimes use an objective test for negligence and call it recklessness.

4.0 THE CONSTITUTIONAL REQUIREMENT UNDER SECTION 36(12)

Section 36(12) of the 1999 Constitution states that “A person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law."[18]While this provision does not mention *mens rea* directly, it embodies the principle of legality and fair labeling.[19] If the mental element of murder keeps changing depending on the judge on the bench, then the offence is not really defined in written law. This provision also weakens the presumption of innocence. As Horder argues, the 1916 and 1959 Codes were not designed for corporate fraud, cyber crimes, or Tech related offences.[20]

CONCLUSION AND RECOMMENDATIONS

This paper finds that Nigerian law recognizes *mens rea* in principle but has failed to define its content in statute. Sections 24 of the Criminal Code Act and 48 of the Penal Code Act offer only negative definitions. Courts have been forced to fill the gap with English authorities, therefore leading to inconsistent application of the elements. To comply with Section 36(12) of the 1999 Constitution, the following recommendations are made:

1. Statutory Definition of Fault Elements borrowing from Ghana's Criminal Offences Act 1960, s.11(1) and South Africa's distinction between *dolus* and *culpa*.[21]

[8] Penal Code Act, ss 48, 79
[9] Olu Adeyemi, ‘Constructive Liability in Nigerian Criminal Law’ (2008) 12 ABU Law Journal 112
[10] *Sweet v Parsley* (1970) AC 132
[11] *Abiodun Adekoya v The State* (2017) 5 NWLR Pt 1558 321 (SC)
[12] *Aderemi v The State* (2012) 6 NWLR Pt 1296 245 (SC)
[13] *R v Nedrick* (1986) 1 WLR 1025
[14] *Woolmington* (n 7); *Aderemi* (n 13)
[15] *R v Cunningham* (1957) 2 QB 396; *R v G* (2003) UKHL 50
[16] John Smith, ‘Subjective and Objective Tests in Criminal Law’ (1974) 34 Cambridge Law Journal 35
[17] *R v Bateman* (1925) 19 Cr App R 8; *R v Adomako* (1994) 3 WLR 288
[18] CFRN 1999 (as amended), s 36(12)
[19] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (10th edn, OUP 2022) 67
[20] Jeremy Horder, ‘Rethinking Non-Fatal Offences against the Person’ (1994) 14 Oxford Journal of Legal Studies 335
[21] Criminal Offences Act 1960 (Ghana), s 11(1); CR Snyman, *Criminal Law* (6th edn, LexisNexis 2014)

2. Harmonization of the Criminal and Penal Codes into a single code as recommended by the Nigerian Law Reform Commission.[22]
3. Limiting Presumptions under Section 24 of the Criminal Code Act.

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NIGERIAN CASES

Abiodun Adekoya v The State (2017) 5 NWLR Pt 1558 321 (SC)
Aderemi v The State (2012) 6 NWLR Pt 1296 245 (SC)

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R v Adomako (1994) 3 WLR 288
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TABLE OF STATUTES

NIGERIAN STATUTES

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