CRIMINAL LAW

A comparative analysis of the defence of provocation under statutory and Islamic law

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Introduction

The defence of provocation, as with other defences to criminal liability, is of common law origin as a result of Nigeria history as a British colony.[1] It is based on the law's compassion for human weakness, as it has been recognised that human beings are prone to losing control under extreme anger.[2] Hence, if they react spontaneously in a violent manner, justice demands that the cause of their spontaneous reaction be taken into consideration when inflicting punishment.[3] Provocation has received legislative and judicial recognition over time and is contained in both the Penal Code Act and the Criminal Code Act, applicable in the Northern and Southern parts of Nigeria respectively.[4] Although the Penal Code merely describes its legal consequence, the Criminal Code gives a lucid and comprehensive definition of provocation and its scope. However, unlike the Criminal Code, the Penal Code does not recognise provocation as an absolute defence to the crime of assault.[5] Both Acts are *ad idem* on the fact that provocation as a legal defence to criminal responsibility does not exonerate completely; rather if successfully proved and accepted by the court, it will merely reduce the finding of murder to manslaughter.[6] The test of what constitutes provocation is not settled, as what may be taken as extreme rage varies from person to person and even from society to society. This is why it is based on the objectivity test as, what might inflame an individual in certain circumstances might not have such an effect on others.

This article analyses the nature and essential elements of the defence of provocation in Nigeria. It also examines how the courts have interpreted some salient principles of the defence and found that provocation ameliorates but never eliminates criminal liability under statutory law. The article further analyses the defence of provocation under Islamic law and reveals that while the defence of provocation is admissible under statutory law, controversy surrounds its admissibility under Islamic law. This is because both the Qur'an and the Hadith, which are the main sources of Islamic law, do not specifically provide for the defence. The article makes a case for the admissibility of the defence of provocation under Islamic law since there is no clear textual basis for its exclusion.

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1 See generally Kharisu Sufiyan Chukkol, The Law of Crimes in Nigeria, (2010) Ahmadu Bello University Press, 69-281; Cyprian Okechukwu Okonkwo, Okonkwo and Naish: Criminal Law in Nigeria, (1980) Spectrum Books Limited, 97-155.

2 Adeleke L. A. 'Psycho-social Analysis of Elements of Provocation in Nigerian Criminal Justice: A Jurisprudential Desideratum' (2014) University of Bostwana Law Journal, 18 & 19: 28; Hart H. L. A., 'Prolegomenon to the Principles of Punishment' (1991) Feinberg, Joel, Gross, Hyman, (eds.) Philosophy of Law, Wadsworth publishing: 662; Clarkson C. M. V., Understanding Criminal Law, (1995) 2nd ed., Fontana Press :73.

3 Chukkol, note 1, 202.

4Adeleke, note 2, 27-28; 6ixthform, 'Reforms - provocation' <http://sixthformlaw.info/01_modules/mod3a/3_70_reforms/13_provocation.htm> accessed on 24th July, 2019.See Section 222 of the Penal Code Act, Cap. P. 17 Laws of the Federation of Nigeria 2004 and section 318 of Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004.

5 Chukkol, note 1, 202.

6 Fitzpatrick B. & Reed A., 'Provocation: A Controlled Response' (2000) 12 Transnational Lawyer 393; Hart, note 2, 73-74; Adeleke note 2, 28; Clarkson, note 2, 73.

The nature of provocation

Provocation is any act or word that may make another person to whom it is directed angry.[7] It is an intentional causing of annoyance or anger to another person that makes them react violently.[8] Provocation has also been defined as something (such as words or action) that arouses anger or animosity in another, causing that person to respond in the heat of passion.[9] It is a defence based on common law concession to human weakness to certain words or action in the heat of passion.[10]

Sections 318 and 222 of Criminal and Penal Code Acts respectively provides for provocation.

Section 318 of Criminal Code provides as follows:

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

Also, section 222 of Penal Code provides that:

> Culpable homicide is not punishable with death if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of a person who gave the provocation or causes the death of any other person by mistake or accident.[11]

The above provisions are similar to the position under English criminal law.[12] The Supreme Court of Nigeria defined provocation as act(s) done by the victim to the defendant, which causes the defendant a sudden and temporary loss of self-control, thereby making him for that period not master of his mind.[13] Hence, provocation includes acts, words and insults that cause loss of self-restraint on a reasonable person causing them to assault the person who propelled it.[14] The exact nature of words or conduct that amount to provocation is not settled, and there are disparate opinions of scholars and jurists on the subject. The former position of the common law, that words alone are not sufficient to constitute provocation, was modified in the case of *Holmes v DPP*,[15] where it was held that words alone could amount to provocation in circumstance of a most extreme and exceptional character. This position was approved in *R v Adekanmi,*[16] where the trial judge held that words alone could constitute provocation to reduce the offence of murder to manslaughter. Also in *Ejelofu Edache v Queen,*[17] the Federal Supreme Court held that insulting words might amount to provocation pursuant to s.222 of the Penal Code. In *Abubakar Dan Shallah v The State,*[18] the Supreme Court stated that words alone can amount to provocation in certain circumstances, depending on the actual words used and the effect of such words on a reasonable person having a similar background to the defendant. The court further held that where the exact words said or uttered by the deceased are not known, heard or disclosed, as in the instant

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[7] Longman Dictionary of Contemporary English (1995) 3rd edition, Persons Education Ltd, 1138; Adeleke note 2, 28.
[8] John Koni Ifeolu, *Appreciating Criminal Law in Nigeria* (2012) Iqra Books Nigeria Limited, 117-118.
[9] Black's Law Dictionary (1999) 8th edition, Bryan A. Garner West Crown Publishing Company, 1262; Adeleke, note 2, 28; Ifeolu , note 8, 118.
[10] Adeleke, note 2, 28.
[11] See also s.283 of the Criminal Code Act.
[12] See s.3 Homicide Act 1957.
[13] See *Ekeozor v State* (2019) 17 NWLR (Pt.1654) 5I3 at 534-535; *Azuogu v State* (2018) 16 NWLR (Pt.1644) 46, 57.
[14] See s.283 of the Criminal Procedure Code; Chukkol, note 1, 203.
[15] *Holmes v D.P.P.* [1946] A.C. 588.
[16] (1944) 17 N.L.R. 99 at 101.
[17] (1962) 1 ALL NLR 22.
[18] *Abubakar Dan Shallah v The State* (2007) 18 NWLR (Pt.1066) 240, at 273, 282.

case, it will be difficult and impossible to determine whether the defence of provocation is available and open to the defendant.

As noted earlier, the defence of provocation is not a complete defence that exonerates the accused; rather it only reduces the charge and punishment;[19] if it is accepted by the court, it simply reduce punishment to manslaughter instead of murder. Hence, discovering a wife committing adultery may be sufficient provocation to reduce an offence of murder to manslaughter; while a mere confession of adultery may not be accepted as provocative, depending on all the circumstances. In *Holmes v DPP*,[20] the wife's act of calling her husband impotent and informing him of her sexual escapade with another man was held to be sufficient provocation. Also in *R v Adekanmi,*[21] it was held that the abusive remarks of a pregnant and nursing mother, referring to her husband as a fool because the latter demanded to know who was responsible for her five-month old pregnancy, were sufficient to constitute provocation. For a woman to taunt her husband with impotence and then spit in his face might in certain circumstance reduce murder to manslaughter in local communities. On the other hand, a wife's refusal to prepare food for her husband has been held to be insufficient for this purpose.[22]

Dicta in certain cases tend to suggest that the defence of provocation will not be available when actual intent to kill or inflict grievous bodily harm exists. This view has been discredited as archaic and anachronistic because provocation might well arise where a person actually intends to inflict grievous bodily harm or kill, if such intention was as a result of sudden loss of self-control occasioned by provocation [23] Devlin LJ[24] affirmed this position, and further stated that if it was the law that whenever provocation excites any sort of intention to kill or cause grievous bodily harm the offence is murder, then provocation would not exist as a defence in criminal jurisprudence. However, in *Musa Yaro v The State*,[25] the appellant and five other persons alleged that the deceased insulted the prophet Muhammed (S.A.W.) with certain derogatory words and comments, although the exact words that were claimed to be insulting, derogatory and provocative were not given in evidence. The appellant and others had killed the deceased, purportedly in accordance with the provision of the Holy Qur'an. They were tried and sentenced to death by the trial judge. The decision was affirmed by the Court of Appeal and on a final appeal to the Supreme Court it was held that there was plainly no evidence on record to enable the court to consider the defence of provocation or any other defences. This is because the appellant failed to call any evidence to show how the exact words or acts that provoked the appellant and other accused persons to justify the killing.[26]

Elements of provocation

There are certain elements that an accused person must prove in order to succeed in their defence of provocation. These elements will determine the admission or otherwise of the defence. The Nigerian courts appear to be inconsistent with respect to these elements. For example, in *Abubakar Dan Shallah v The State*,[27] the Supreme Court, following its earlier decisions,[28] held the elements of provocation were: the act of provocation must be sudden and grave; the accused must have reasonably lost his self-control in the heat of passion; and the degree of retaliation by the accused must be proportionate to the provocation in question.[29] This has always been the approach of the Supreme Court and other

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[19] *Ekeozor v The State*, supra, note 13.
[20] *Holmes v D.P*.P. note 15.
21 R v Adekanmi (1944) 17 N.L.R. 99 at 101.
22 Oladiran v The State (1986)1 NWLR (Pt. 14)75.
23 Lord Goddard C.J in A G of Ceylon v Perera [1953] A.C 200, 206
24 Lee Chun Chuen v R [1962] 3 WLR 1461.
25 Musa Yaro v The State (2007) 18 NWLR (Pt.1066) 215.
26 Ibid, 234.
27 Abubakar Dan Shallah v The State note 18 at 272-273, 281-2812, 291-292.
28 See the cases of Amala v The State (2004) 12 NWLR (Pt. 888) 520; Shande v The State (2005) 12 NWLR (Pt 939) 301; Onyia v State (2006) 11 NWLR (Pt 991) 267; *Ahmed v The State* (1999) 7 NWLR (Pt, 612) 641.
[29] *Abubakar Dan Shallah v The State* note 18, 272-273, 281-282.

subordinate courts in Nigeria. However, the Supreme Court appears to have altered its position slightly in the more recent cases of *Eze v The State,*[30] *Ndubisi v The State,*[31] and *Azuogu v The State.*[32] In these cases, it has held that an accused person will only be entitled to the defence if it is shown that: there was an act of provocation from the deceased; that such provocation caused his loss of self-control, actual and reasonable; that he killed the deceased in the heat of passion; and at the time of killing the heat of passion had not waned."

While the sudden and grave act of provocation and loss of self-control resulting in the killing are paramount considerations in both the earlier,[33] and recent[34] cases, the Supreme Court did not consider the fact that the degree of retaliation by the accused must be reasonably proportionate to the provocation in question in the cases of *Eze v The State,*[35] *Ndubisi v The State,*[36] and *Azuogu v The State*[37] as laid down in the earlier cases.[38] In order words, the element that the mode of resentment must bear a reasonable relationship to the provocation was left out as an element in the latter cases. [39] Although the court in the three later cases,[40] did not rely on the former cases of *Musa Yaro v The State*[41] and *Abubakar Dan Shallah v The State,*[42] it did not in any way overrule the decisions on the basis of being erroneous. In fact, the court heavily relied and cited with approval all the earlier decisions of the Supreme Court, the Federal Supreme Court and West Africa Court of Appeal relied upon in the *Yaro* and *Shallah's* cases. The basis for the court's silence on this element is not clear and could be simply an inadvertence of the panel of justices that heard the cases and legal practitioners involved in the cases. Nevertheless, our discussion of the basic elements of provocation is based on the following: the act of provocation is grave and sudden; the accused must have lost self-control actual and reasonable in the heat of passion; and the mode of resentment must bear a reasonable relationship to the provocation This captures the former and recent decisions of the Supreme Court in the cases analysed above and must co-exist before the defence can succeed.[43]

Firstly, provocation must be such that cause a reasonable man to lose his self-control. The test is that of a reasonable man and not necessarily the accused person. A question that readily comes to mind is who is that reasonable man who is to be so reasonably provoked? It is submitted that a reasonable man in this context is a man in the accused person's state in life who will most likely do the same thing like the accused person in such circumstance.[44] The court however seems to assume that an illiterate and primitive person is more easily provoked than an educated and enlightened person. In *R v Adekanmi,*[45] Francis J was of the view that reasonable men are men of education and civilization, who have the attributes of sobriety, who are not hot-tempered and cannot be easily aroused. He thus attributed aggression and high passion to illiterates and primitive people. This view is speculative, imaginary and baseless in that there is no scientific and empirical evidence to prove the same. In response, Okonkwo

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[30] (2018)16 NWLR (Pt.1644) 1, at 20.
[31] (2018)16 NWLR (Pt. 1644) 24, at 41-42.
[32] (2018) 16 NWLR (Pt.1644) 46, at 62, 65.
33Amala v The State note 28, Shande v The State note 28, Onyia v State note 28, Abubakar Dan Shallah v The State note 18, Ahmed v. The State, note 28.
34 Eze v The State note 30, Ndubisi v The State note 31, Azuogu v The State note 32.
35 Note 30.
36 Note 31.
37 Note 32.
38 See the cases of Ahmed v The State note 28, Abubakar Dan Shallah v The State, note 18, Amala v The State, note 28.
39 Eze v The State note 30; Ndubisi v The State note 31 and Azuogu v The State, note 32.
40 Eze v The State note 30; Ndubisi v The State note 31 and Azuogu v The State, note 32.
41 Musa Yaro v The State note 25.
42 Abubakar Dan Shallah *v The State* note 18.
[43] *Shade v The State* note 28, *Onia v State* note 28.
[44] See Adesola M.A, 'Provocation; A Ruck in the Texture of justice in' (1997) *The Jurist*, 3:56; Chukka, note 1, 230-232.
[45] *R v Adekanmi note 21.*

argued that the assertion is fallacious and debatable because whether a person is peevish or not has nothing to do with his standard of education or civilization.[46] It is submitted that the question of a reasonable man is subjective and confined to the discretion of the court, bearing in mind the facts and circumstance of each case as well as the status of the accused in life.[47]

Another important element is that the act that causes the sudden provocation resulting in the death must be done in the heat of passion. If there is any "cooling time" between the provocation and the retaliation, then the defence of provocation will fail. In *R v Green,*[48] the period of waiting (about four hours) negated the defence of sudden provocation because in the opinion of the court the accused had more than enough time for reflection. The facts of the case were that the accused's wife abandoned him and went to her mother's house. The husband tried in vain to win her back, and one day, at approximately 9 p.m., the husband went to see his wife in his mother-in-law's house and found his wife and another man having sexual intercourse. The husband returned home immediately, and came back at about 1 a.m. with a machete to see if the man was still there. He found his mother-in-law snoring and heard the voice of his wife and the man talking in a dark room. He killed the wife and her mother with the machete. His plea of provocation was rejected on the ground that between the provocation and the killing, there was enough time for his passion to cool. Clearly if he had killed the pair at 9 p.m. when he first saw them, the plea would have been good.[49]

It can be noted that provocation by one person is no excuse for killing another person who does not offer any provocation to the accused. In *R v Ebor,*[50] the accused met four women, one of whom was his ex-wife who had married another man on a farmland. He demanded the cloth she was wearing and as she was untying it in the presence of another woman he stabbed her. It was held that even if he (the accused) lost his self-control as a result of the provocation given by his ex-wife, he was nevertheless guilty of murder because the second woman did not provoke him in anyway. However, provocation given by a group of persons acting in concert or unison might be successfully pleaded where the person so provoked kills a member of such a group.[51]

Lastly, the mode of resentment or retaliation must be commensurate and reasonably proportionate to the provocation offered.[52] This is known as the principle of proportionality. Provocation which may cause a reasonable man to retaliate against a slap on the face may not reduce murder to manslaughter where the accused savagely batters the offender to death with a deadly weapon. For example, if a man who is provoked retaliates with a blow with his fist on another grown man, a jury may well likely consider that there was nothing excessive in the retaliation even though the blow might cause the man to fall and fracture his skull, for the provocation may well merit a blow with a fist. It would be quite another thing if the person provoked struck the man and continue to rain blows upon him or hit his head against the ground.

In *R v Adelodun,*[53] A was provoked by an abusive song against his family. He lost his self-control and killed one of the singers with a machete. The plea of provocation failed because the injury inflicted on the deceased was so severe and the weapon used (a machete) was held not to be proportionate to what the deceased said or did to him. The courts, however, seem to be inconsistent in addressing this important element. For example, in *The State v Mohammed*,[54] the court took into account the fact that

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[46] Okonkwo, note 1, 242.
[47] *Oladiran v The State*, note 22, 83.
[48] (1955) 15 WACA 73. See also the recent decision in *Onyia v The State*, note 28 at 298.
[49] However, see *Phillip v the Queen* [1969] 2 AC 130.
[50] (1950) 19 NLR 84.
[51] See the cases of *R v Dummemi* (1955) 15 WACA 75; 76; R v Hall 24 App, Rep, 48. See Also the Unreported decision of the Nigerian Supreme Court in the case of *The State v Onoko,* Appeal no SC72/I969 cited in Peter Ocheme, The Nigerian Criminal Law, (2006) Liberty Publications Ltd, 134.
[52] *Abubakar Dan Shallah v The State,* note 18, 272-273, 281.
[53] (1959) NN R 144. See also *R v Bassey* (1963) 1 All NLR 280.
[54] (1969) 1 WNLR 296.

the dagger used by the accused, who is a kanuri man, is usually worn by his tribe as an ornament and therefore held that the defence of provocation availed him. With respect to the court, one wonders if this reasoning is relevant to the dispensation of justice. Thus, a kanuri man can use a dagger to retaliate against a mere abusive word simply because he has a dagger which he wears as an ornament? Should this form part of the consideration at all? This remains a question in need of urgent answer. Also in *R v Philip,*[55] where the accused used a deadly weapon on the deceased, one finds it difficult to reconcile the use of a deadly weapon to retaliate against abusive words on his mother (the deceased), yet the plea of provocation succeeded and mitigated his punishment. The reasoning behind the court's decision in first case was that it is not every slight provocation that justifies retaliation with a lethal object or weapon. However, in the latter two cases, the courts are of the view that it will be illogical to expect someone who is no longer master of his mind as a result of provocation to be mindful of the object used while reacting to the provocation from his victim.

The defence of provocation under Islamic law

There is disagreement between traditional and contemporary Islamic law scholars on the exact position of the defence of provocation under Islamic law. While the traditional Islamic scholars rely mostly on the primary sources of Islamic law to justify their positions that provocation is not recognised as a defence under Islamic law, contemporary scholars appear to rely on secondary sources such as *ijtihad* and *maslaha al mursala* to argue that the defence of provocation should be recognised and applicable under Islamic law. This controversy necessitates an examination of the defence of provocation under Islamic law of crime.

Islamic law makes no provision for the defence of provocation. A sane and adult Muslim is responsible and answerable for all his deeds or misdeeds.[56] Islam cherishes and adores human life and thus forbids unlawful killing in whatever guise, thereby making provocation alien and unknown to Islamic law. The Qur'an has several verses that prohibits unlawful killing. In *Surat al-An'Am,*[57] it provides that: "Take not life which Allah Hath made sacred, except by way of Justice and Law."

The Prophet (SAW) has also said that the first action to be judged on the Day of Judgment is the spilling of blood.[58] He also said that God has forbidden Muslims from three things: to spill the blood of another or deprive him of his life, to deprive him of his property, and to deprive him of his honour or integrity.[59] Thus, unlawful termination of human life is a capital offence under Islamic criminal jurisprudence.[60] The heirs of a deceased may, however, decide indemnify for the murder of their deceased family members.[61]Allah says in the Glorious Quran thus:

> O you who believe! *Al-Qisas* is prescribed for you in case of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or relatives) of the killed against blood money, then adhering to it with fairness and payment of the blood money to the heir should be made in fairness.[62]

Jurists have, however, divided this offence into several categories for the purpose of determining the appropriate punishment for each type. These include deliberate homicide (*Qatl amd*), quasi-deliberate

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[55] [1969] AC 130. 281.
[55] (1959) NN R 144. See also *R v Bassey* (1963) 1 All NLR 280.
[55] (1969) 1 WNLR 296.
[56] Jawahir Al-Ilkhil, Sharh Mukhtasar Al-Khalil 8, 70; Hashiyatul Adawi, 2, 290; *Shalla v The State*, note 45, 271-285.
[57] Qur'an 6:151.
[58] Bulugh Al-Maram Min Adillatil Ahkam by Asqalani, 244.
[59] Forty Traditions of Imam An-Nanawi.
[60] Homicide in Islam, 14; Karim M.F; Mishkat-ul-Masabih,Law Publishing Co, Lahore. Pakistan, 11: 508.
[61] Muhammad M.A; Al-Fiqhul-Muyassaru (2004) Dar al-Manarah, Egypt, 952.
[62] Quran 2:178.

homicide (*Shibh al 'amd*), and killing by mistake (*Khata'*).[63] For there to be murder, the *mens rea (al qasd al jinai')* and *actus reus (al fi'l al Mubashir)* must be established.[64] However, intention is difficult to determine since it is a thing of the mind of the accused at the material time. The Qur'an considering the sanctity of life says:

> If a person kills a believer intentionally, his recompense is hell to abide therein (forever) and the wrath and the curse of God are upon him.[65]

In another verse on murder, the Qur'an stated thus:

> And slay not the life which Allah has made sacred, save in the course of justice. This, He has commanded you, in order that you may discern.[66]

It is evident from the above authorities that where an individual willfully kills another, he is guilty of murder and liable to the requisite punishment i.e. *Qisas.* However, it becomes more complex when the element of willfulness is removed. Without doubt, the punishment cannot remain the same because intention is a crucial element of every crime under Islamic law; the absence of which creates doubt regarding the validity of the action and whether it can be excused totally or partially.[67] Thus, where the killing was clearly unintentional, as when a person kills another lurking in the bush and whom he did not see while hunting for animals, then payment of *Diyah* is sufficient as expiation for the same.[68]

A very complex middle ground between intentional and unintentional homicide is the quasi-intentional homicide, which although recognised by the majority of scholars, is absolutely rejected under the *Maliki* school of thought.[69] This category of homicide implies that although murder has occurred through a willful act, the accused had not intended the result of his actions.[70] It occupies a position between willful offence and accident or mistake, and the degree of accountability it entails is lesser than willful offence.[71] A good example is where a person hits another person with a stick or pushes him and he dies while playing. It is trite that the accused while hitting or pushing the deceased to death as the case may be did not mean to kill the deceased, but to hurt him. This implies that there is a doubt over the intention behind the killing as it occurred as a result of accident which may affect and reduce the penalty for the offence from murder to manslaughter. Similarly, where an individual throws a stone hitting another in the head in the course of a quarrel and injures him, he shall be guilty of the crime of quasi-willfully causing bodily hurt and shall incur a penalty lighter than one who is willfully guilty.[72] This is because while the act of throwing an object at an opponent during a quarrel is usually intended, the resultant effect, whether grievous bodily hurt or death is not always intended.[73] It is therefore, submitted that if doubt as to the intention of a crime and accident are admissible defences under Islamic law, provocation can as well conveniently come under defences to criminal responsibility to mitigate punishment as obtainable under common law and penal states in Nigeria.

The prophet was reported to have decided a case whereby two women from *Hudhayl* fought each other, and one of them flung a stone which hit and killed the other woman and the child in her womb. He had ordered the *Diyah* of both the victim and the foetus.[74] This hadith is very illustrative. It not only

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[63] al Tashri' al jinai' al islami, 450-452.
[64] Anwarullah; *The Criminal Law of Islam*, 21-24.
[65] Quran 4: 93.
[66] Quran 6: 151.
[67] Khan T. M. *Criminal Law in Islam* (2007) Pentagon Press, India, 139.
[68] 4:92.
[69] Anwarullah; *The Criminal Law of Islam* (2006) Kitab Bhavan, New Delhi, 55.
[70] Ibn Manzur: Lisan al 'Arab (2011) Dar Sadir, Beirut, 504.
[71] Khan note 67 :155-56
[72] Ibid, 156.
[73] Ibid
[74] Sahih al Bukhari: Kitab al-Diyat, 4: 40-46.

confirms the punishment for quasi-intentional murder as payment of *Diyat* and not *Qisas,* but also seems to have taken into consideration the fact that the killing occurred during a fight as a result of anger and loss of self-control. Of course, this is the central idea of provocation.[75] It was also reported that a man who confessed to a killing was brought before the prophet by the deceased's brother. The man accepted responsibility but pleaded provocation saying; 'He insulted me and I got angry and hit him with my hatchet'. The prophet then requested the heirs of the deceased to pardon the killer.[76] The combined effects of all these authorities are that it gives credence to provocation as a possible defence under Islamic law. The prophet's lenient involvement in reducing the crime of murder to a lesser degree of punishment implies that provocation suffices as a defence which ought to be admissible under Islamic criminal jurisprudence.

Admissibility of the defence of provocation under Islamic criminal law

Traditional jurists claim that the defence of provocation is not recognized under Islamic law. This has not, however, ruled out the debate as to its legal status and its applicability to the Islamic criminal justice system. Modern scholars see provocation as a form of human infirmity and argue that provocation like other human weaknesses such as mistake, accident, forgetfulness, insanity and duress is recognised as a valid reason to mitigate criminal liability.[77] Indeed, there is no reason why the *Fuqaha* should interpret forgetfulness to include forgetting to pray and exclude someone who loses his self-control as a result of extreme rage.[78] Scholars are unanimous on the principle of Islamic law that in cases of doubt with regard to culpability, *hudood* punishment should be suspended rather than executed.[79] *Hudood* is the penalty prescribed by the Islamic law not only for specific designated crimes involving *Qisas* and *Diyah*.[80] Doubt exists where there is a strong suspicion and or allegation of commission of crime without substantial evidence to prove it.[81]

A good example is where there is uncertainty brought about by absence of proof, backing out of witnesses, and stealing and larceny of unprotected properties that have little significance such as wood or straw.[82] The Hanafi jurists classify doubt into two categories:[83] the doubt involved in the act and the one involved in the place.[84] The first category of doubt is relevant in that the act in question is ambiguous and the doubt inherent therein is termed as doubt of affinity.[85] A doubt such as this is involved in an act about whose legitimacy or illegitimacy the perpetrator of the action is uncertain of because there is no traditional proof of its legitimacy.[86] Clearly, provocation can be situated here in that the accused person is not denying his criminal liability, but claiming it was as a result of loss of self-restraint at the material time.

All three *imams*[87] regard the intention of the accused in cases of homicide as the sign of distinction between them.[88] The popular hadith that says actions shall be judged according to intention supports this point. However, intention is a mental activity and as such cannot be ascertained except by external

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[75] Muhammad ibn Abi Bakr ibn Qayyim al-Jawziyyah: Zad al-Mu'ad (1979) 5 Muassisat al-Risalah, Beirut, 9-10.
[76] Sahih al-Muslim, Kitab al-Qasamah, 5, 109-110.
[77]Nyazee Imran Ahsan Khan, 'Grave and Sudden Provocation in Islamic Law' www.nyazee.org/islaw/exercises/ex3.pdf accessed on 16 June 2019.
[78] Ibid.
[79] AbdulQadir Oudah, *Criminal Law of Islam* (2005) Kitab Bhavan, India 252-62.
[80] Ibid. p253.
[81] Proof here includes not only proof of an act but also the proof of an injunction.
[82] Oudah, note 79: 254-58.
[83] Ibid, 259.
[84] Muhammad Ash Shawkani; Sharh Fathul Qadeer (Dar al-Fikr, Lebanon) 4 :140-141
[85] Sharh Fathul Qadeer, 140-141.
[86] Ibid.
[87] Imams Shafi'ee, Ahmad and Abu Hanifah
[88] Oudah, note 79, l5:35.

evidence, and this confirms that intention is a matter of doubt. Provocation affects the clear intention of the accused at the time when he hit the victim. Thus these scholars differ with regards to external evidence.[89] Imam Shafi'ee and Ahmad opine that homicidal intention should be proven by external evidence as obtainable under conventional criminal justice system by witnesses' testimony or confession of the accused. On the other hand, Imam Abu Hanifa is of the view that due consideration should be given to external evidence in this regard as homicidal intent could prove by conventional means of establishing offence through testimony of witnesses, confession of the accused and by consideration of the weapon used in killing.[90]

Imam Maliki's, however, does not believe in provocation as a defence because to him murder can only be willful or inadvertent and there is no middle ground.[91] He opines that it is enough to establish if the act had been committed transgressively.[92] Of course, this opinion is against the possibility of viewing murder committed in the heat of passion as a defence. Even though, it is usual that the accused who is provoked will grab just about any available implement to strike his victim, the *Malikites* vehemently oppose any line of distinction between an implement that always kills and one which seldom kills. To him, all cases of transgressive murder are willful homicide and should be meted out with *Qisas,* as the prophet (p.b.u.h) has said the punishment for willful murder is retaliation.[93]

In contrast, Imam Abu Hanifa says that in as much as the punishment for willful murder is severe to the highest degree, it requires that the criminal intent required to ground the penalty should be correspondingly high, intense, and clear beyond doubt.[94] He considers the mode of killing or weapon used as of high importance. He opines that even in a case where the victim was subjected to incessant blows by the accused, which resulted in death, the accused can only by guilty of quasi-intentional homicide because it is unusual for a person to intend killing with blows.[95] He further contends that since it is unusual for a person to intend killing with blows and/or that blows are generally unlikely to result in death, the doubt arising from such probability should be in favour of an accused and thus restrict the penalty of *Qisas.*[96]

From the above, it is clear that Abu Hanifa constantly tilt towards the principle that any iota of doubt must necessarily affect the application of the penalty of *Qisas* in murder cases**.** This, of course, is not a general opinion, but finds support under a category of doubt the *Shafii'tes* classify as formal doubt, which basically has to do with the legitimacy or illegitimacy of an act springing from disagreement among the jurists.[97] Thus, whenever jurists differ over the legitimacy or illegitimacy of any act the relevant *Hud* will be removed. A number of effects follow from the implementation of this doubt principle. Sometimes, the relevant *Hud* is totally nullified and the accused is acquitted as when, for instance, there are no witnesses to prove *Zina.* While at other times, the *Hud* is replaced by a penal punishment, as when murder is proved to be quasi-intentional by way of provocation and where the punishment of *Qisas* is replaced by *Diyat.*

It is thus submitted that even though murder cannot be justified with the defence of provocation under Islamic law, nevertheless provocation can be a cause for the reduction of punishment from a death penalty to life imprisonment because of the doubt as to the intention of the act that results in the death.[98] This by no means is intended to exculpate criminal liability, but to reduce the punishment ordinarily due based on the twin principles that it is better to err in forgiving than in punishing, and that every

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[89] Ibid, 36.
[90] Ibid, 35-36.
[91] Ibid.
[92] Ibid
[93] Ibid
[94] Ibid, 36
[95] Ibid, 7
[96] Ibid
[97] Oudah, note 79, 258-59
[98] Khan, note 67, 306-307

doubt invalidates *Hud* inclusive of Qisas and *Diyat.*[99] Thus, the defence of provocation is not acceptable to the maliki school of thought based on Qur'anic authorities on sanctity of life,[100] and the outright prohibition of any form of unlawful killing. Hence, inadvertent killing shall only be punishable by *Diyat* as a means of compensating the heirs for the loss of their loved relative under Islamic Criminal Justice. However, all other classical scholars; Imam Ahmad, Imam Shafi'ee and Imam Hanafi, agreed on a third category of murder i.e. the quasi-intention murder which is the middle ground between intentional and unintentional murders. Therefore, the defence of provocation can conveniently fit as a defence admissible under the Islamic law and killing pursuant to the same shall be regarded as quasi-intentional to mitigate, not to exculpate, an accused person of criminal liability, but to reduce or mitigate punishment as obtainable under common law.

Indeed, no amount of provocation can serve as an excuse to justify murder, but considering the twin principles of criminal justice mentioned earlier, it is more close to justice that the intention of the accused be considered and elements of doubt carefully considered. This is in line with the position under statutory law and the criminal/penal code**.**

A comparative analysis of the defence of provocation under statutory and Islamic law

The general belief in every society is that most accused persons are deliberate offenders. This is not always so as some of them are inadvertent offenders whose crimes for one reason or another are not regarded as highly culpable as the former class. Crime under Islamic law and statutory law is generally the same. It also involves an act or omission contrary to a law for which punishment is stipulated. The elements of crime being the same, the concept of *mens rea* is a key factor in the determination of culpability. Thus, a defendant who kills another under provocation under the Nigerian statutory law is guilty of only manslaughter. The defence of provocation originally emerged as a recognition of human weaknesses. Its primary purpose was to ensure that a culpable person who committed murder in the heat of passion would not be given the mandatory death penalty**.**

Under statutory law, a successful plea of provocation reduces the punishment from the death penalty to life imprisonment. This is also the position of other Islamic jurists apart from Imam Maliki. The rationale for the reduction of the punishment is entirely based on the absence of *mens rea* which creates doubt as to the state of mind of the accused as at the time of commission of the criminal act. Conversely, the punishment due to the accused under Nigerian law after the successful plea of provocation is discretionary in that it gives the judges the liberty to decide whether or not to give the maximum sentence of life imprisonment. Islamic law does not give room for such discretion and this can lead to a miscarriage of justice. Where it is proven that an accused committed the crime under provocation, the judge is bound to administer the fixed penalty under Islamic law. Hence, the accused shall be liable to pay the heavy *Diyat* and a judge has no discretion to reduce it.

Conclusions and recommendations

This article has analysed the nature and elements of the defence of provocation under statutory and Islamic law and reveals that successful proof of provocation is not a total exculpation of liability but will only reduce the punishment stipulated for the offence of murder to manslaughter. This is because as the victim is entitled to his life, the murderer must be accountable for his act. Under statutory law, provocation is based on its effect on a reasonable man and the objective test. The objective test is not required under Islamic because of the belief that individuals do not have the perception even for the same sets of facts. It is therefore important to look beyond specific individuals and to a reasonable man. This is perhaps the reason why some scholars oppose the defence of provocation under Islamic criminal law. It is submitted that even though the application of provocation under Islamic criminal appears not to be settled, it could be admissible as a valid defence.

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[99] Oudah,, note 79, 252-53
[100] Quran17:33.

Accordingly, it is hereby recommended that:

1. The court should in determining whether there has been enough cooling time, take into account the degree of provocation offered; the more serious the provocation, the longer the time required for passion to cool.

2. The court should in applying the reasonable man test take into account everything including the physical peculiarities of the accused such as his status in life, age, sex, physical and mental disabilities as well as their emotional condition. The court should also note that the "reasonable man" is a person having the power of self-control expected of an ordinary person of the same sex, age and status of the accused person.

3. The silence of Islamic law on reasonable man/objectivity test should be adopted under the statutory law so that a provoked accused will be judged on what he felt and his reaction to it, not anyone else's.

4. Further, the statutory law on provocation should take into consideration factors such as the sex, age, condition, marital status, residence etc. of the accused, yet, genetics is left out. Scientifically of course, this has a great role to play in feeling and reactions to the same. That a person be judged on what another individual in his situation would have felt, and done is skewed and untenable.

5. Nigerian penal law should be amended to contain a provision where a murderer can pay compensation to the family or heirs of the deceased at their own request. This would be in line with the Islamic law principle of the payment of diyat, which gives them a feeling of actively taking a decision that purges them of hurt and hatred for the accused. More often than not, the heirs during or after the payment of the blood money dismiss, albeit gradually, their thirst for revenge and any grudge therein since the killer has shown remorse by paying them compensation for killing their relative. A situation where the family of the deceased have no say or choice such matter exclusively left in the hand of the state is not fair, just and effective, because the jail imposed or execution may not benefit the family of the victim and the accused person.

6. The focus of the Nigerian Criminal law jurisprudence on punitive punishment rather than deterrence should be revisited and the position should be shifted basically on deterrence, which is the focus of the Islamic law. The Islamic law progresses from deterrence to retribution through Qisas. This allows for the desired reformation of the individual and other members of the society. The conventional statutory system places undue focus on the restoration of social order in the state or society rather than the people who indeed, make up the state. This is why, given the findings that provocation serves a partial defence to murder under Islamic law, the accused is liable only to pay diyat, but under the statutory law, he still has to serve a jail term.