THE PLEA OF INSANITY IN NIGERIAN LAW

BY

OLUGBENGA ABOABA OMOTESHO
LL.B(HONS) IFE. B.L.

A dissertation submitted to the Postgraduate School, Ahmadu Bello University, Zaria. in partial fulfillment of the requirements for the degree of: MASTER OF LAWS (LL.M.).

DEPARTMENT OF: PUBLIC LAW

FACULTY OF : LAW

AHMADU BELLO UNIVERSITY, ZARIA.

OCTOBER, 1986.

COPYRIGHT;

NO PART OF THIS DISSERTATION MAY BE REPRODUCED IN ANY FORM WITHOUT PRIOR PERMISSION.

D E C L A R A T I O N

I hereby declare that this dissertation has been written by me and that it is a record of may own research work. It has not been presented in any previous application for a higher degree. All quotations and references are indicated with specific acknowledgements.

E.H. Ofori-Amankwa LLB, Zaria
LLM, Public Law
SUPERVISOR Nov 21. 1986. O.A. OMOTESHO

DEAN OF POSTGRADUATE SCHOOL

A B S T R A C T

"The misery of the insane more thoroughly excites our pity than any other suffering to which humanity is subject* but it is necessary that the madness should be acknowledged to be madness before the pity can be felt"1.

Basically, two principles may be said to underlie the general exceptions to criminal responsibility. Firstly, the circumstances surrounding the commission of the act may amount to a legal justification for its commission. Secondly, the circumstances may be incompatible with the existence of mens rea. The plea of insanity falls within the latter category. The plea expresses the principle that one who has lost his "reason" should not be criminally condemned.

The insanity plea is a focal point on which many different policy questions converge. Some of these questions are:

(a) what is the most efficient way of protecting society from those whose state of mind leads them to do social harm?

1. Trollope. "He knew he was Right" Cited by Williams, G. (1978) Textbook of Criminal Law stevenS, London. F. 587. '

(b) what is the role of medical expert in the inquiry into insanity?

(c) should the prosecution have the right tc introduce the plea, even against the wishes of the accused?

(d) in the disposal of the insanity cases, how best can the individual's right be reconciled with the need to rehabilitate him and the protection of the Community?

These are complex problems and are all interwined.

The plea of insanity and the controversies generated by it justify their significance, in part, on the fact that in those cases in which the plea is invoked, fundamental principles of justice and morality are at stake. The availability of the plea expresses albeit, symbolically, the concern of the law with citizens as rational creatures.

The plea of insanity, like other general defences to criminal responsibility, is open to an ad person in all criminal proceedings although it is often pleaded only to the more serious offences carrying the death Penalty. In other words, the more serious the charge, the greater is the necessity to examine the accused',". :.ental state. This need is rather imperative in Homicide cases. The insanity plea is raised either alone or with similar defence ;.

The expression "insanity is capable of covering both insanity at the time of trial and insanity at the time of the offence. It is with the latter sense that the greater part of the literature on the subject is predicated. This distinction must be kept in focus for a thorough appreciation of the subject.

Organisational Structure.

The dissertation is divided into seven chapters. Chapter I which is the introductory chapter, traces generally the origin of the Penal as well as the Criminal Codes, the relationship between the two Codes, and the relationship between the Nigerian Codes and other Legal Systems.

Chapter II deals generally with the problem of definition of insanity and the rationale for the plea of insanity. It also traces the genesis Of the concept, its various metamorphosis, culminating in the M'Naghten ilejs. The Chapti ith an i ;ion of the main limitations of the English rules.

Chapter III discusses the insanity defence in Nigerian Law vizs the exposition of the Salient features of the nal Code and Criminal Code Provisions on 'the insanity defence.

Chapter IV examines the defence of insanity as found in other jurisdictions. Particular attention is paid to the concept of insanity under customary and islamic law and. insanity in some Common Law jurisdictions such as Ghana, Sudan and America.

Chapter V treats the evidence and procedure of proving insanity viz: the trial of the issue of insanity, the burden and quantum of proof and the methods of proving insanity.

Chapter VI examines some issues related to insanity defence. Examples of such are automatism, intoxication (delirium Tremens) and infanticide (the effect of lactation).

Chapter VIII the concluding Chapter, is a summary of the dissertation and the conclusions drawn there from. It also includes the researcher's recommendations for reform. All these are humbly made with a view to curing some of the patent defects now existing in the Law.

P R E F A C E

The decision to embark on a dissertation in this area of the law stems from the researcher's experience as a state counsel in the Kwara State Ministry of Justice.

The dissertation is an exposition of the various salient features of the insanity plea including the prominent problems and controversies surrounding the subject. The style adopted is that of a critical appraisal of the invocation of the plea in Criminal Cases by the Courts.

Review of Existing Literature

The main source of literature on the subject is decided cases of the Nigerian Courts and other Common Law jurisdictions. The Contributions of eminent jurists also constitute a vital source of literature on the subject.

A cursory look at the existing literature on the subject, shows that most writers regard the subject as one of the most controversial and complex test for delimiting Criminal responsibility. The Complexity gives the subject contemporary relevance. According to Professor Okonkwo, the subject is complex "partly because attitudes to the responsibility of the mentally disturbed

are so confused; partly because knowledge about insanity and its causes is limited and because psychiatric theories sometimes conflict; and partly because the lawyer is not sure how to treat the evidence of the medical expert"[1].

In the same vain Professor Weihofen remarked thus: "probably no branch of criminal law has been the subject of so much criticism and controversy as the defence of insanity"[2].

Among the current controversies on the subject is the role of medical experts in the trial or iniquiry into insanity. Insanity is essentially a medico-legal question and ought to be approached from a multi-disciplinary point of view. Regrettably however, the courts by some judicial pronouncements, discuss the issue as if it were their reserved domain, thus, creating the impression that expert testiminny could be completely dispensed with. A classic example of such judicial prononcement is the dictum of Fatai-Williams J. (as he then was) in Attorney-General Western Nigeria vs. Philip Upetiye.[3]

---

1. Criminal Law in Nigeria (1964) Sweet and Maxwell, London. P. 129.
2. Mental disorder as a Criminal defence (1954) Buffalo, New York. P. 214
3. (1964) N.M.L.R. 25.

The learned judge remarked, inter alia:

> "It is my responsibility sitting as a judge and jury not that of the doctor to decide whether the accused was sane or insane in the legal sense at the time the deceased was killed"[4].

However, current thinking among jurists seems to favour giving a prime place to expert testimony. Some writers, have even, come out boldly to suggest that Courts should be bound by expert evidence where such evidence is uncontradicted or unchallenged.[5]

Another controversy on the subject relates to the attitude of Nigerian Courts in general towards belief in the supernatural or witches. In the area of insanity, the Courts reject mental abnormalities founded upon an ardent belief in the supernaturals. In such cases, regard is usually not had to the effect of such belief on the mind of the particular accused. Some efforts have been made to justify the practice of the courts on the ground that such belief will unduly place an accused who so believes at an advantage over a non-believer in witchcraft.

---

4. Ibid at P. 28
5. Iguda, A.A. (1974) Law of Evidence in Nigeria, Sweet and Maxwell, London. P. 88.

Despite the contributions of the various jurists on the subject, it is our considered view that the subject is not adequately treated by most jurists and particularly by Nigerian Courts as regards the following:

(i) the disposal of persons acquitted on grounds of insanity to be detained pending the Governor's pleasure;

(ii) the law relating to insanity induced by drunkenness (delirium Tremens); and

(iii) the problems associated with inadequate psychiatry in the Country.

The object of the dissertation therefore, is to present a comprehensive restatement of the law and expose the shortcomings of the defence of insanity. Recommendations for reform will be proffered where the need for it is felt.

A C K N O W L E D G E M E N T S

I am inestimably grateful to my supervisor Dr. E.H. Ofori-Amankwah for his kindness and assistance which contributed not only in making this dissertation a reality, but also, in broadening my intellectual horizon.

An immeasurable depth of appreciation is also due to Hon. Justice Saka Yusuf (Kano State High Court), Hon. Justice Fola Gbadeyan (Kwara State High Court), Mr. S.B.A. La'aro (Director of Civil Litigations, Ministry of Justice , Ilorin), Dr. O.O. Olayemi (Former Consultant Psychiatrist University of Ilorin, Teaching Hospital), Professor & Dr(Mrs) P.B. Addo (A.B.U. Zaria), Mr. & Mrs. R.A. Ogundare (N.A.P.R.I, A.B.U., Zaria), Mr & Mrs. P.S. Ogundare (I.A.R. A.B.U., Zaria), Miss Shade Frank (A.T.C., A.B.U., Zaria), Mrs Hadiza Obaze (A.B.U., Zaria) and Mr. S.O. Owoyele (Faculty of Law, A.B.U., Zaria), for their massive support and encouragement.

Finally, I hereby register my many thanks to Mr. Godwin Michael Odiba(Faculty of Law, A.B.U., Zaria) for typing this dissertation.

May I add in conclusion, however, that whatever erroneous conclusions herein contained are wholly mine.

O.A. OYEDEJI.

OCTOBER, 1986.

D E D I C A T I O N

I dedicate this dissertation to my loving parents, my brothers and sisters(Yomi, Muyiwa, Dola, Yinka and Foluke.)

TABLE OF CONTENTS

		PAGE
Title Page	" " "	i
Declaration	" " "	ii
Abstract	" " "	iii
Preface	" " "	vii
Acknowledgements	" "	xi
Dedication	" " "	xii
Table of Contents	" "	xiii
Table of Cases	" " "	xv
Table of Statutes	" "	xx
Abbreviations	" " "	xxi

CHAPTER I

INTRODUCTION

(1) Origin of the Criminal and Penal Codes.	"	1
(2) Relationship between the two Codes.	"	5
(3) Relationship between the Codes and other Legal Systems.	"	8

CHAPTER II

HISTORY OF THE INSANITY PLEA.

(1) Definition of Insanity	" -	13
(2) Reasons for the Insanity plea	-	14
(3) Genesis of the Insanity Plea.	-	16
(4) The M'naghten Rules	" -	21
(5) Limitations of M'Naghten Rules.	-	30

CHAPTER III

INSANITY IN NIGERIAN LAW

PAGE

(1) The Criminal Code Provision. " " 37

(2) The Penal Code Provision. " " 55

CHAPTER IV

INSANITY IN OTHER JURISDICTIONS

(1) Insanity under Customary and Islamic Law 65

(2) Insanity in other Common Law Jurisdictions 68

CHAPTER V.

PROOF OF INSANITY: EVIDENCE AND PROCEDURE

(1) Trial of the issue of insanity " 82

(2) Burden of Proof " " 90

(3) Quantum of Proof " " 98

(4) Methods of Proof. " " 190.

CHAPTER VI

INSANITY AND COGNATE ISSUES

(1) Automatism " " " 112

(2) Intoxication " " " 122

(3) Infanticide: Problem of Lactation. 128

CHAPTER VII

CONCLUSION AND RECOMMENDATIONS.

(1) Conclusion " " " 131

(2) Recommendations " " " 140

References: " " " 142

T A B L E O F C A S E S

	PAGE
Akanbi v. State (1982) 6 S.C. 71	92
Akhidenor v. State (1966)N.M.L.R 136	96
Aoko v. Fagbemi (1961) All N.L.R 400	4
Ashrudin Ahmed v. King (1949) A.I.R Cal 112.	61
Attorney-General v. Gallagher [1920] A.C. 479.	126
Attorney-General v. Philip Upetire (1964) N.M.L.R. 25	98,110
Ayinde v. State (1963) 1 All. N.L.R. 393	119
Babalola Ogunsuyi v. State (1983) 1 S.C.7	101
Bajirao v. Emperor (1949) ..I.R Nag. 66	63,64
Bank of England v. Vagliano Brothers[1891] A.C. 107.	12
Baswantrao v. Emperor (1949) A.I.R Nag. 66.	59
Bhagwatti v. Emperor (1924) A.I.R. Oud.190	59
Bratty v. Attorney-General N. Ireland[1963] A.C. 386.	24,112,113
Cooper v. Mckenna [1960] Qd. R 406	119
Deorari v. Emperor (1946) A.I.R Nag. 312.	64
D.P.P v. Beard [1920] A.C. 479.	125
Durham v. U.S. 45 A.L.R. 2d 1430.	78
Egbe Nkanu v. State (1980) 3-4 S.C. 1	92,93,127
Enaholo v. State (1982) 6 S.C. 76.	92
Fowler v. Paget (1798) 7 T.R. 509.	15
Friday Ijewerewen v. State (1983) 3 S.C. 239.	84
Geron Ali v. Emperor(1941) A.I.R. Cal. 129.	61
Hill v. Baxter [1958] 2 W.L.R 76.	113, 120
Iyana v. State (1972) 8-9 S.C. 283	92

	PAGE
James Anyim v. State [1983] 1 S.C.N.L.R 370.	38,53,96,106
John v. Zaria N.A. (1959) N.R.N.L.R. 43.	10
Kay v. Butterworth (1945) 61 T.L.R. 452.	120
Kayode Adams v. D.P.P. (1966) N.M.L.R. 111.	48,88,135
King v. Creighton (1908) 14 Can.Crim.Cases 349.	32
Kuvawa Takida v. State (1969) 1 All N.L.R 270	131
Leland v. State of Oregon (1952) 343 U.S. 790.	77
Maizabo v. Sokoto N.A. (1957) N.R.N.L.R 133.	3
Makosa V. State (1969) 1 All N.L.R. 363.	87,100,101.
Ngene Arum v. State (1979) 11 S.C. 91	42,51,86,88,134
Nwanguwa v. State (1966) E.N.L.R 95.	48
Obaji v. State (1965) N.M.L.R. 417.	10
Obadara v. President Ibadan District Council N.M.L.R. 39	12
Odu v. State (1965) N.M.L.R. 129.	12
Ogbuagu v. (1955) 20 N.L.R 139.	12
Oghenevweta v. State (1982) 1 - 2 S.C. 130	92
Oghome v. State (1982) 10 S.C. 36	92
Okpokoro v. State (unreported) S.C. 35/1968.	98
Okunnu v. State (1977) 3 S.C. 51	92
Onyeama v. State (1975) 12 S.C. 27	89
Orshior Kuse v. State (1969) N.M.L.R. 153.	83
Oviefus v. State (Unreported) S.C. 74/1983.	87
Patrick Njovens v. State (1973) S.C. 17.	7
Paul Eledan v. State (1964) 1 All N.L.R 146	84

PAGE

People v. Schmidt (1915) 216 N.Y. 324 28

P.P. v. Davasikamini (1928) A.I.R Mad. 196. 62

Queen v. Adeyefa (1962) W.N.L.R. 235. 103

Queen v. Madugba (1958) 3 F.S.C 1 83,110

R v. Alice Eriyamremu (1959) W.R.N.L.R 270. 42,54,126

R v. Arnolds (1724) 16 St. 695. 18

R v. Ashigifuwo (1948) 12 W.A.C.A 389 92,102,104

R v. Ayaaba Kusasi (1958) 3 W.A.F.L.R. 376. 71

R v. Bryne (1960) 44 C.A.R 246. 34

R v. Beverly (1604) 4 Co. Report 123b. 17

R v. Carr-Briant 29 C.A.R. 96. 98,102

R v. Charlson [1955] 1 W.L.R. 317. 24,116

R v. Chima (1944) 10 W.A.C.A 223. 129

R v. Codere (1936) 12 C.A.R. 21 25,27, 58

R v. Daniel M'Naghten (1843) 8 E.R 718. 20

R v. Dim (1952) 14 W.A.C.A 154 92,103

R v. Echem (1952) 14 W.A.C.A 158. 47,92,98

R v. Edgal (1938) 3 W.A.C.A 133 9

R v. Frafra (1959) G.L.R. 44 72

R v. Fryer 24 Cox C.C. 403. 39

R v. Grumah (1957) 2 W. Afr. L.R. 255. 49,71

R v. Hadfield (1800) 27 St. Tr. 1281. 18

R v. Harner (1964) L.L.R. 36 121

R v. Haynes (1859) 175 E.R. 898. 31

R v. Holmes [1953] 2 All E.R. 342 29

R v. Inyang (1946) 12 W.A.C.A 5 92,102,104

R v. Joseph Edwards (1926) 19 C.A.R 144 32

R v. Kemp (1957) 1 Q.B. 399 23,24,43,116

R v. Kopsch (1925) 19 C.A.R 50 32,47

	PAGE
R v. Moshie (1959) G.L.R. 34	72
R v. Nasamu (1940) 6 W.A.C.A. 74	39,92,93,98
R v. Nwajoku (1938) 3 W.A.C.A 208	10
R v. Ogor (1961) 1 All N.L.R 70	83
R v. Omoni (1949) 12 W.A.C.A 511	40,92
R v. Onakpoya (1959) 4 F.S.C 150	98
R v. Osoba (1961) 1 All N.L.R. 1	6
R v. Owarey 5 W.A.C.A 66	126
R v. Podola [1960] 1 Q.B. 325	83
R v. Quick [1973] Q.B. 910.	117
R v. Rivett (1950) 34 C.A.R. 87	109
R v. Scarth [1945] St. R. Qd. 38	120
R v. Sergeant Bodie (1964) G.L.R 40	72
R v. Sodeman [1936] All E.R. 1138	32,98
R v. Steane [1947] K.B. 997.	102
R v. Tabigen (1960) 5 F.S.C 8.	41
R v. Thamu Guyuk (1953) 14 W.A.C.A 374	50
R v. Wangara (1944) 10 W.A.C.A 236.	98
R v. Windle [1952] 2 Q.B. 826	27,60
R v. Yaro Biu (1964) N.N.L.R. 45.	92,98
R v. Yayiye Kadi-Kadi (1957) N.R.N.L.R 207	39,64,92
Rafiu Salako v. Attorney-General (1965) NMLR 107	102
Reninger v. Fagossa 75 E.R. 1	123
Richard Omoni v. State (1978) 5 F.C.A 28	98,101
Richard Willie v. State (1968) N.M.L.R. 213	44,54,87,96.

	PAGE
State v. Kure (unreported) KWS/LO/3c/81.	96
State v. Raimi Omoniyi (1971) N.M.L.R. 296.	93
State v. Yusuf Idowu (1971) N.N.L.R. 45	97
Sudan Govt. v. Dafalla (1961) S.L.J.R. 199	76
Sudan Govt. v. Mousa Ishag Adams (1958) S.L.J.R. 1	74,76,87,109
Sukni Chamain v. Emperor(1936) A.I.R. Pat. 245.	62
Sunday Okoro v. Attorney-General(1966) N.M.L.R. 13.	6,7
Ukadike v. State (1973) 6 S.C. 17	103
U.S. v. Blocker (1961) 288 2nd 608.	35
U.S. v. Hinckley (Unreported)	79
Uzoyare v. State (Unreported) S.C. 118/1984.	96
Wallace-Johnson v. R [1940] A.C. 231	12
Watmore v. Jenkins [1962] 2 Q.B. 572	113,120
Widgee-Shire Coy v. Bonney (1904) 4 C.L.R 977.	11
Woolmington v. D.P.P.[1935] A.C. 462.	91.
Robert Egbadon v. State (1983) 8 S.C. 5	94
Robert Ughiaka v. State (1983) 6 S.C. 17	92,102
Sanusi v. State (Unreported S.C. 49/1983)	94.102
Shorunke v. R [1946] A.C. 316	
Singh v. the Rajah of Faridkote [1894]A.C. 670.	5
Schwartz v. State (1902) 65 Nebraska 196(Sc)	26
Stapleton v. Queen [1952] 86 C.L.R. 358.	28,60
State v. Akinbamiwa (1967) N.M.L.R. 355	94,102
State v. Babakebe (1975-78) K.L.R. 5	95
State v. Clement Iwuanyanwu (1964) 1 All N.L.R 413	44,52
State v. Hamsat Shittu (Unreported) KWS/1c/84.	60,89,111

TABLE OF STATUTES

Constitution of the Federation 1979
S. 33(5)

Criminal Code (Cap. 42)
S.12
S.27
S.28

Criminal Procedure Act (Cap. 43)
S.S 222-230

Criminal Procedure Code (Cap. 30)
SS 320-325

Criminal Lunatics Act 1800 (England).

Customs and Excise Management Act (1958)
Evidence Act (Cap. 62).
S. 137
S. 140

Exchange Control (Anti-sabotage Decree) 1984
Ghana Criminal Code Act 29 (1960).

Indian Hemp Act No. 19 of 1966

Indian Penal Code
S. 84.

Mental Health Act, 1958 (Newsouthwales)
S.23(4)

Model Penal Code, 1962 (American Law Institute)
S. 4.01.

Miscellaneous offences (Decree No. 20) 1984.

Penal Code Law (Cap. 89)

S.4
44
51
52

Robbery and Firearms (Decree No. 5) 1984.

Sudan Penal Code
S. 50.

A B B R E V I A T I O N S

A.C.	...	Appeal Cases
A.I.R Cal.	...	All Indian Reporter Calcutta.
A.I.R. Mad.	...	All Indian Reporter Madrass
A.I.R. Nag.	...	All Indian Report Nagpur
A.I.R. Oud.	...	All Indian Reporter Oudh.
A.L.J.	...	Australian Law Journal
All. E.R.	...	All England Law Report
All. N.L.R	...	All Nigeria Law Report
C.L.J.	...	Cambrige Law Journal
C.L.R	...	Commonwealth Law Report
C.O.Report	...	Coke's Report (1572-1616)
C.A.R.	...	Criminal Appeal Report
COX C.C.	...	Cox Criminal Cases.
E.N.L.R	...	Easten Nigeria Law Report
E.R.	...	English Report
F.C.A	...	Federal Court of Appeal
F.S.C	...	Federal Supreme Court
G.L.R.	...	Ghana Law Report
I.C.L.Q.	...	International & Comparative Law Quarterly.
K.B.	...	Law Report (Kings Bench)
KW.L.R.	...	Kwara Law Report
L.L.R	...	High Court of Lagos Law Report.

L.Q.R.	...	Law Quarterly Review
M.L.R.	...	Modern Law Review
N.L.R	...	Nigeria Law Report
N.M.L.R.	...	Nigeria Monthly Law Report
N.N.L.R.	...	Northern Nigeria Law Report
N.R.N.L.R.	...	Northern Region of Nigeria Law Report.
Q.B.	...	Law Report (Queens Bench)
Qd. R	...	Queensland Law Reports.
S.C.	...	Selected Judgments of the Supreme Court of Nigeria.
S.C.N.L.R.	...	Supreme Court of Nigeria Law Report
S.L.J.R.	...	Sudan Law Journal and Report.
St. R. Qd.	...	State reports of Queensland
St. Tr.	...	State Trials (1163-1820)
T.L.R.	...	Time Law Report
Univ. of P.L.R.	...	University of Pennyslavania Law Review.
W.Af.L.R.	...	West African Law Reports.
W.L.R.	...	Weekly Law Reports.
W.R.N.L.R	...	Western Region of Nigeria Law Report.

CHAPTER I
I N T R O D U C T I O N

The importance of a legal treatise of this nature cannot be over emphasised. The bulk of substantive criminal law of Nigeria can be found in the Criminal Code[1] and the Penal Code[2]. Apart from the two Codes, there are a number of other enactments creating offences. They include ordinances, Acts, Laws, Regulations, Edicts and Decrees which impose penalties for their violation and ipso facto are sources of criminal legislation[3]

1. Origin of the Criminal Code and Penal Code.

The advent of the British in Colonial Africa brought about the policy of systematic introduction of English notions of justice and morality. The need for this became very urgent when the colonialists were confronted with a number of the so-called "barbarous" practices of the natives such as human sacrifices and OSU Custom - to mention

---

1. Cap. 42 Laws of the Federation and Lagos 1958.
2. Cap. 89 Laws of Northern Nigeria 1963.
3. Examples of these are:
   (a) The Customs and Excise (Management) Act 1958,
   (b) The Indian Hemp Decree No. 19 of 1966.
   (c) The Robbery and Tirearms (special provisions)Decree, 1984.
   (d) Exchange Control (Anti-Sabotage) Decree 1984.
   (e) Miscellaneous offences Decree No. 20 of 1984.

.../2

a few which were considered despicable[4].

The law of crimes was introduced, firstly, to regulate the lives of the natives in the areas of the trading posts along the coast before it was eventually extended into the hinterland. In 1904, Lord Lugard introduced the Queensland Criminal Code drafted by Sir James Fitzstephen in 1878, into Northern Nigeria. The Code was to co-exist with the highly systematized islamic jurisprudence of the Maliki school which had already taken firm root in the place.

The amalgamation of the Northern and Southern protectorates in 1914 was remarkable for the development of criminal law in Nigera. Consequent upon the amalgamation, the Criminal Code of 1904 was made applicable to the entire Country in 1916. That Code is the precursor of the present Criminal Code passed in 1960 and which is applicable in all the Southern half of Nigeria.

---

4. For detailed discussion on the subject, see the following:

   (a) Gledhill, A.(1963)The Penal Codes of Northern Nigeria and the Sudan, African Universities Press, Lagos PP 15 - 20.
   (b) Okonkwo, C.O. and Naish, M.E.(1964) Criminal Law in Nigeria, African Universities Press, Lagos PP. 3-19
   (c) Aguda, A.A. Principles of Criminal liability in Nigeria (1965) caxton Press, Ibadan.
   (d) Ofori-Amankwah, E.H. (1986) Criminal Law in the Northern States of Nigeria, Gaskiya Corporation Ltd, PP. 52 - 58.

.../3

For the North, the situation in which there were two or more firmly established systems of Criminal justice co-existing in the same geographical area brought about conflict and discontent[5]. This state of affairs arose in part from the fact that under the Islamic Law of Crimes, whether a person accused of homicide should be hanged or not depended largely on the wishes of the relations of the deceased. On the other hand, no such discretion exists under the English Law.

Secondly, certain defences recognised in English Law were completely ignored in Islamic Law. A typical example is the defence of provocation. An accused, therefore, risked the danger of being condemned if he is tried under Islamic Law whereas his counterpart being tried under English law would receive a faier deal.

Also, the system of Haddi lashing, which is an islamic sanction was fast becoming odious in view of the consciousness that was developing among the rising muslim middle-class. This situation was to continue right up to about 1958 when the Northern Region Government set up a Panel of Jurists under the chairmanship of Sir

---

5. Maizabo v. Sokoto N.A. (1957) N.R.N.L.R. 133. See also: Ofori-Amankwah, E.H. (1979) "Penal Code and Criminal Code - origin and differences". Vol. 7, Journal of Islamic and Comparative Law P. 49.

.../4

Abu Rannat (the then Chief Justice of the Sudan) to re-organise the legal and judicial systems of Northern Region. The Panel recommended the introduction of a Penal Code modelled on the Sudanese Code, itself an offspring of the Indian Penal Code. The latter was a product of Sir Macaulay's efforts in India during the first half of the 19th Century.

Apart from the general elegant drafting, the Penal Code in addition has some reflections of Islamic jurisprudence. The Islamic offence of Zina[6] is preserved even though adultery is not an offence under the Criminal Code.[7] Drinking of alcohol by muslim is equally an offence under the Penal Code[8]. It is remarkable that there is no such provision in the Criminal Code. The Penal Code, therefore, represents to a large extent, a compromise between the reformers and the traditionablists[9].

---

6. Sections 387 and 388 Penal Code.
7. Aoko v. Fagbemi (1961) 1 All N.L.R.400.
8. Section 403 Penal Code.
9. See Okonkwo and Naish Op.Cit at Page 10.

.../5

2. Relationship between the two Codes.

One important feature peculiar to the two Codes is that each covers offences committed within the territory to which it applies to the exclusion of the other.

As a general principle of Criminal Law, territoriality is the basis of jurisdiction. It follows therefore, that a person can only be tried in a state if he commits an offence within that state, against the state law. Thus, if X commits homicide in Lagos. he cannot be tried for that offence in Kaduna.

On the principle of territoriality of the Criminal Law, Lord Selbourne made the following pertinent observation in the case of Singh v. The Rajah of Faridkote:[10]

> "Territorial jurisdiction attaches upon all persons either permanently or temporarily resident within the territory while they are in it. It does not follow them when they have withdrawn from it and are living in another state".

---

10. [1894] A.C. 670.

.../6

The relationship between the two Codes is governed by section 4 of the Penal Code Law and section 12[A] of the Criminal Code. Both sections are mutatis mutandis. Any reference to one hereafter, should be construed as applying to the other.

By virtue of section 4(1) of the Penal Code Law, the Criminal liability of a person in respect of any act or omission which is an offence under any law of Northern Nigeria is clearly defined. Problems could arise, however, where an offence comprises several elements, some of which take place within the territory covered by a Code, and others outside the territory.

Section 4(2)(a) of the Penal Code Law makes an offender liable under the Code if the offender Commits in Northern Nigeria the act which constitutes the intial element of the offence. In R v. Osoba[11], the accused despatched a telegram from Lagos by means of which an innocent agent in London was procurred to convert money to the use of the accused person. It was held that the Lagos High Court had jurisdiction to try the accused on a charge of stealing. It is submitted that the position

---

11. (1961) 1 All N.L.R.I. see also: Sunday Oxoro v. Attorney-General Western Nigeria (1966) N.M.L.R. 13.

.../7

as between states interse is not different from that of a state in Nigeria and an external territory.

Section 4(2)(b) of the Penal Code is relevant where the initial element of the offence is committed outside the region but the offender subsequently enters Northern Nigeria. There are two conflicting decisions of the Supreme Court on the Construction of this sub-section. In Sunday Okoro v. Attorney-General Western Nigeria[12], Brett J.S.C. Said, inter alia:

> "sub-section 2(b) (of section 12[A]) only applies where the defendant has come into the region voluntarily"13.

However in Patrick Njovens v. State[14], Coker J.S.C delivering the judgement of the Court said, inter alia:

> "we are satisfied that to construe the word 'enter' in the subsection as meaning 'voluntary entry' would be ridiculous, since in those circumstances, no criminal will ever enter a state when he knows that such an entry may make him liable by the laws of the state"15.

---

12. Supra.
13. Ibid at P. 15
14. (1973) 5.S.C. 17.
15. Ibid at P. 47

.../8

The decision in Njoven's Case is, no doubt, preferable to that in Okoro's Case on the grounds of Common sense and public policy. To hold otherwise, it is submitted, will be tantamount to rendering the whole purport of the section nugatory.

The above provisions will however, not apply where the accused person did not intend that his act should have effect in Northern Nigeria[16] or where the only material event occuring in Northern Nigeria is the death of a person, whose death is caused by an act Committed outside the region at a time when that person was himself outside[17]. Thus if Y who is wounded by Z in a fight at Ogbomosho (in Oyo State) is carried accross the border to Ilorin (in Kwara State) where he dies, Z will be triable under the appropriate Law of Oyo State.

3. Relationship between the Nigerian Codes and other Legal Systems.

The relationship of the Nigerian Codes and other Legal Systems needs to be stressed because in the area of insanity, which is the subject of this dissertation, at least, the Indian, Australian, as well as Sudanese approaches are relevant in the interpretation of the Nigerian Penal Code.

---

16. Section 4(3) Penal Code Law.
17. Section 4(4) Penal Code Law.

.../9

Furthermore, even the Criminal Code which appears to adopt a more settled interpretation according to the English Common Law, may now be meaningfully influenced by other legal systems such as the American.[18]

Although the general cannon of statutory interpretation is that words should be given their literal or plain meaning, this principle is however capable of exceptions. Firstly, in interpreting local statutes, Nigerian Courts are free to make use of the principles enunciated in these other jurisdictions where our local statutes do not contain relevant definitions. For instance, the decisions of Indian as well as Sudanese Courts a fortiori, will guide Nigerian Courts in interpreting the provisions of our Penal Code which is an adaptation of the Sudanese Code, itself fashioned on the Indian Penal Code. This point was specifically taken in R v. Edgal,[19] where the West African Court of Appeal held that it may be necessary to import English Common Law rules to assist in the interpretation of the local statutes.

Secondly, Common Law may be made use of in bridging any gap that may exist in the provision of a local statute.

---

18. American Law Institute Model Penal Code, 1962.
19. (1938) 3 W.A.C.A. 133.

.../10

In Shorunke v. R[20], the privy Council held that there existed side by side with the local ordinances and rules, in appropriate Cases, the English Common Law right of subpoeana,

However, one unhappy consequence of the application of foreign rules to assist in interpreting local statutes is the practice of not fully considering the implication of the provision of our statutes before treating such as incomprehensive and thereby justifying the importation of foreign rules. For instance, in R v. Nwajoku[21], the Court held that section 318 of the Criminal Code imported the English law of provocation into Nigeria. A contrary ruling in Obaji v. the state[22] was to the effect that section 283 of the Criminal Code, defines the defence of provocation for the purposes of section 318 of the Criminal Code.

Equally condemnable is the practise of ignoring the provisions of local statutes altogether whilst importing foreign concepts in interpreting local statutes.

---

20. /1946/ A.C. 316.
21. (1938) 3 W.A.C.A 208.
22. (1965) N.M.L.R 417 See also, John v. Zaria N.A. (1959) N.R.N.L.R. 43.

.../11

For instance, Section 24 of the Criminal Code has never been judicially interpreted. Instead, Nigerian Courts continue to import the Common Law doctrine of mens rea. One is tempted to question the relevance of mens rea to the Criminal Code Penal Code in the light of the pronouncement of the draftsman of the Queensland Code (which is the precursor of the Nigerian Criminal Code. The draftsman remarked thus:

> "Under the Criminal Law of Queensland as defined in the Criminal Code, it is never necessary to have recourse to the old doctrine of mensrea, the exact meaning of which has been the subject of controversy. The test now to be applied is whether the prohibited act was not done accidentally or independently of the will of the accused".23

Perhaps, the solution to the present confusion is for Nigerian Courts to discontinue the application of foreign concepts holus bolos on any given issue. Rather, proper consideration should be given to local enactments before deciding whether such enactments are meant to supplant or merely supplement foreign concepts.

---

23. See Widgeeshire Coy v. Bonney /1904/ 4 C.L.R 977 at 981 - 2

.../12

This suggestion has the tacit support of A.E.W. Park, who wrote that the rules created by the Nigerian Codes must be derived from their own terms and where those terms are clear, their effect cannot be altered by arguements which point out that English Law is different[24].

---

24. Park, A.E.W (1963) Sources of Nigerian Law, African Universities press, Lagos. See also the following: Lord Herschell in Bank of England v. Vagliano Brothers /1891/ A.C. 107 at 144-5; Wallace-Johnson v R /1940/ A.C 231; Ogbuagu v. R (1953) 20 N.L.R. 139; Odu v. [illegible] (1965) N.M.L.R. 129; Obadara v. President Ibadan [illegible]

.../13

CHAPTER II

HISTORY OF THE INSANITY PLEA

1. Definition of Insanity:

The expression "insanity" is a very nebulous concept. The expression defies any uniform or precise definition valid for all purposes.[1] A cursory look at the existing law dictionaries reveals that the authors are content with giving a description rather than any formal definition of the expression. For example, Jowitts Dictionary of English Law describes insanity thus: "this is not, strictly speaking a legal term, but it is commonly used to denote that state of mind which prevents a person from knowing right from wrong"[2]. In Black's Law Dictionary, the expression is described as "a social and legal term rather than a medical one used to denote that degree of mental illness which negates the individuals legal responsibility or capacity"[3].

Interestingly, learned jurists are unanimous on the complexity of the concept as a test for delimiting criminal responsibility.

---

1. Goldstein, A. (1967) The Insanity defence, Yale University Press. P. 87.
2. 2nd Edition (Edited by Burke) P. 982.
3. 5th Edition (1979) West publishing Coy. P. 714.

.../14

For instance, the learned members of the American Law institute remarked thus:

> "No problem in the drafting of a Penal Code presents larger intrinsic difficulty than that of determining when individuals whose conduct would otherwise be Criminal, ought to be exculpated on the grounds that they were suffering from mental disease or defect when they acted as they did"[4].

Professor J.W.C. Turner, Similarly remarked:

> "The difficulty which we have seen the Courts encounter infinding a test by which to decide the time between insanity and liability in Criminal Law was greater in the Case of persons whose minds are affected by disease, whether in the form of temporeny delirium or of a permanent insanity"[5].

2. Reasons for the insanity plea.

The rationale for the insanity plea canbe said to be incorporated explicitly into its meaning namely: a claim that a person who is not a responsible agent should not be the object of punishment.[6]

---

4. American Law Institute Model Penal Code (1962)P. 1[illegible].
5. Turner, J.W.C (1966) Kenny's outlines on Criminal Law, London. P. 75.
6. Fingarette, H. (1972) The meaning of Criminal insanity, California Press. P. 131.

As early as the 15th Century, Common Law Lawyers had propounded the maxim actus non facit reum nisi mens sit rea (no act entails Criminal Liability unless done with a Criminal State of mind.)[7] This time-honoured maxim assumes fundamental importance in the plea of insanity because an insane person lacks sufficient intelligence and understanding to appreciate things properly. A person in such a state of mind should not be held criminally responsible. This state of affairs can be said to preclude the existence of mens rea.

It should be noted however, that the absence of mens rea in insanity is of a more profound or radical kind than in the Common sense of absence of mens rea (the mental state required by the definition of a particular crime)[8]. Where the plea of insanity is raised, neither actus reus or the mens rea is actually denied. The consideration is that the law does not want to punish the particular mens rea for reasons of mental disorder.

---

7. See the dictum of Lord Kenyon L.C.J. in Fowler v. paget (1798) 7 T.R. 509 at 514.
8. Goldstein, A. Op. Cit. at p.131.

.../16

> This gave him a right to a pardon. The same course was taken when the defence was killing by misadventure or in self-defence"9.

It would appear that attention was drawn to the subject in the famous Berverly Case[10] where Sir Edward Coke, propounded what became known as "the wild beast" test. Sir Edward Coke identified four different kinds of persons non compos mentis[11]. Whilst Commenting on insanity and its status in Criminal Law, Sir Mathew Hale, made the following pertinent remark:

> "Such a person as labouring under melancholy distempers hath yet ordinarily as great understanding as a child of fourteen year hath, is such a person as may be guilty of treason or felony"12.

It is thus explicit that Sir Mathew Hale (like Sir Coke), regarded insanity as a disturbance of reason and intellect, and it was clear that in order to be excused of one's offence, the disturbance had to be severe.

---

9. Stephen, F.J. (1883) History of Criminal Law Vol II p. 151. See also Pollock, F. and Maitland, F.W. History of English (1952) Vol. II Cambridge University Press. P. 478.
10. (1604) 4. Co. Report 123b.
11. Ibid.
12. Hale, M. (1736) Pleas of the Crown P. 34.

.../18

In his direction to the jury in The Arnorlds Case[13], Justice Tracey, Commented on the insanity plea thus:

> "It is not every kind of frantic humour or something unaccountable in a man's action that points him out to be such a madman as is exempted from punishment. It must be a man that is totally deprived of his understanding and memory and doth not know what he is doing more than a brute, or a wild beast. Such a one is never the object of punishment"[14].

Thus, the old position at common law was that to claim the benefit of this defence, an accused person must show that he was totally deprived of his memory and understanding and must be comparable with "an infant, a waild beast or a brute". It is needless, to say, that the standard was not only dehumanising and therefore immoral, but also, required an extra-ordinarily high standard of proof, which deprived many accused persons the benefit of the defence.

The decision in R v. Hadfield[15] marked a great advance in the Common Law concept of insanity. In that case, the accused shot at king George III under an insane belief that he was required to sacrific his life to save the world.

---

13. (1724) 16 St. Trials P. 695.
14. Underling is mine
15. (1800) 27 St. Trials P. 1281.

.../19

As he did not wish to commit the sin of suicide, it was ordained that he should carry out an act for which he would be hanged. At the trial, evidence was led to show that the accused suffered from hallucinations. The jury returned a verdict of not guilty. What is particularly remarkable about the case is the direction of Lord Kenyon C.J., to the jury, thus:

> "With regard to the law, as has been laid down, there can be no doubt upon earth; to be sure, if a man is in a deranged state of mind at the time, he is not Criminally answerable for his acts; but the material part of his case is whether at the time when the act was committed, this man was sane".

One immediate consequence of Hadfield's acquittal was the introduction and passing of the Criminal Lunatics Act, 1800 in England[16]. The Act sought to regulate the disposal of persons found insane on arraignment or not guilty of the offence on ground of insanity. Such persons were to be kept in strict custody at Her Majesty's pleasure.

---

16. Whitlock, (1963) Criminal Responsibility and Mental illness, London, P. 27.

.../20

The landmark case of Daniel M'Naghten[17] in 1843, was the ultimate turning point in the Common Law concept of insanity. In that case, the acquittal of the accused on ground of insanity, shocked the English Public. The accused who was believed to be suffering from "persecutory psychosis", which resulted in a serious delusion that the Tories were responsible for his misfortunes, shot and killed one Mr. Drummond apparently mistaking him for the British Prime Minister, Sir Robert Peel. The resultant public outcry led the House of Lords to formulate a set of hypothetical questions, which they sent to the judges who decided the case for answers regarding the plea of insanity. The answers are now generally referred to as the M'Naghten Rules.

In a learned Commentary, Dr. H. Barnes noted thus:

> "In point of law, the rules had to binding authority; they were opinions, not judgments. In the course of time, they had attained authority, through reference being constantly made to them, through being stated to juries in important trials, and through the tremendous influence they have had whenever the English Law is consulted." 18

---

17. (1843) 4 St. Trials; 8. E.R. 718.
18. Barnes, H. (1942-44)"A century of the M'Naghten Rules" Vol. 8 Cambridge Law Journal pp. 300 - 325.

.../21

4. The M'Naghten Rules

The legal basis for the defence of insanity under English Law is as set out in the M'Naghten rules formulated by judges in 1843[19]. It is important to note that the answers to the abstract questions formulated by the House of Lords. were not meant to be new rules as such but rather, a statement of what the rules at common law were supposed to have been[20].

The rules may be briefly summarized thus:

(a) Every person is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his Crimes, until the Contrary is proved.

(b) To establish a defence on the ground of insanity it must be clearly proved, that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.

---

19. Smith, J.C. and Hogan, B. (1973) Criminal Law Butterworths London P. 134.

20. Aguda, A.A (1965) Principles of Criminal Liability in Nigeria, Caxton Press, Ibadan P. 263.

.../22

(c) If a person commits an offence under an insane delusion, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.

It is crystal clear from the M'Naghten Rules that the test of insanity are couched in legal rather than medical terms and these terms do not correspond with specific mental abnormalities. The main sources of difficulty with the M'Naghten Rules relate to the following phrases:

(i) Defect of reason, from disease of mind.
(ii) Nature and quality of the Act.
(iii) Knowledge that the act is wrong.

We will now focus our attention to the details of the phrases as well as the judicial interpretations put upon them.

Disease of the mind.

Professor J.W.C. Turner is of the view that the determination of the exact meaning to be given to the phrase "disease of mind" does not appear to have been judicially interpreted[21], According to the learned juris ,

---

21. Outlines on Criminal Law Op. Cit. P. 80.

.../23

the word "disease" is a recognised medical term which indicates some pathological variation in the tissues of living body whereas the word "mind" is a mere abstraction which stricto sensu cannot have any disease[22].

Professor Abraham Goldstein expressed a some what similar view when he said:

> "There has been almost no judicial definition of mental disease in cases concerned with the M'Naghten rules. The Cases are relatively silent on which disease would qualify. What is clear, however, is that to exculpate the defendant, the defect must be so severe as to deprive him of the knowledge specified in M'Naghten"[23].

In R v. Kemp[24], Lord Devlin, equally glossed over the meaning of the phrase when he stated, inter alia:

> "the only object of the inclusion of the words 'disease of mind' was to exclude defects of reason caused simply by brutish stupidity without rational power"[25].

---

22. Ibid.
23. The Insanity defence op. cit. at p. 48.
24. [1957] 1 Q.B. 399.
25. Ibid at p. 406.

.../24

The learned Judge then concluded by saying that whether a particular condition amounts to a "disease of the mind" within the M'Naghten Rules is not a medical but a legal question to be decided in accordance with the ordinary rules of interpretation[26].

The only clear indication as to the construction of the phrase "disease of mind" appears in the dictum of Lord Denning in Bratty v. Attorney-General for Northern Ireland,[27] where his Lordship stated thus:

> "The major mental diseases which doctors call psychoses, such as Schzophrenia, are clearly diseases of the mind ..... it seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of mind"[28].

The phrase "disease of mind" has equally been held applicable to physical illnesses such as arteriosclerosis or hardening of arteries[29] and brain tumour.[30] It is

---

26. Ibid at P. 407
27. [1963] A.C. 386.
28. Ibid at P. 410 - 2 (Underlining is mine).
29. R v. Kemp (Supra).
30. R v. Charlson [1955] 1 W.L.R. 317. It is a moot point whether subnormality is covered by the phrase "defect of reason from disease of mind". Professor G. Williams has argued that it will come under the rules. See Williams, G. Criminal Law: the General Part (1961) London. P. 447.

.../25

It is submitted, that "disease of mind" will cover all categories of mental illnesses recognised by psychiatry such as neurosis, schizophrenia, depression, paranoia and psychopathy. The rule of thumb here is that the "disease of mind" must have given rise to a defect of reason" in order to be a ground of exculpation. It seems that the powers of reasoning must be impaired and that a mere failure to use powers of reasoning which one has is not within the contemplation of the rules.

Nature and quality of the Act.

The case of R v. Codere[31] is regarded as the locus classicus on theinterpretation of the phrase "nature and quality of the act". In that case, the phrase was judicially interpreted to refer solely to the physical nature and not the moral or legal aspects of an act. On this interpretation, the dictum of Lord Reading C.J. is most apostate. His Lordship stated, inter alia:

> "The Court is of the opinion that in using the language nature and quality, the Judges were merely dealing with the physical character of of the act and were not intending to distinguish between the physical and moral aspects of the act".32.

---

31. (1936) 12. C.A.R. 21
32. Ibid at P. 27

.../26

Thus, if A kills B under the insane belief that he is breaking a jar, he will not be criminally responsible[33]. So also, is the case of a mad person who cuts a persons throat in the belief that the was cutting a loaf of bread[34]. It must, however, be noted that the interpretation in Codere's Case has not be universally accepted[35].

Dr. H. Barnes has suggested that the phrase "nature and quality of his act", is still capable of a further and purely physical interpretation, namely: that the person did not know he was committing an act at all, or it might mean that, although he knew exactly the act he was doing, he could not appreciate its consequences[36]. For example, he may know he is striking a plate with a hammer, yet he may not appreciate that the plate will brake. Presummably from Codere's Case, the phrase means that he must not know that he is striking a plate at all. It is respectfully submitted, that this suggestion, gives a wider interpretation to the phrase and is therefore preferable.

---

33. Stephen, Digest on Criminal Law 8th Edition P. 6
34. Outlines on Criminal Law Op. Cit. P. 76.
35. For example, in Schwartz v. State (1902) 65 Nebreaska 196(Sc), the Court adopted the rejected interpretation in Codere's Case.
36. "A century of M'Naghten Rules" Op. Cit. p. 300.

.../27

Wrongfulness of the Act.

The meaning of the phrase "knowledge that the act is wrong" generated a lot of controversy. The controversy centered round whether an accused should know whether his act is wrong either legally or morally. The Court in Codere's Case made it clear that the test was not to be the accused's own moral standard of right and wrong. The dictum of Lord Reading C.J, is very much relevant here. The learned judge stated, inter alia

> "In a case of his kind namely killing, it does not seem debatable that the appellant could have thought that the act was morally wrong, judged by the ordinary standards. When the act is punishable by law.... once it is clear that the appellant knew the act was wrong in law, then he is doing an act which he ought not to do, and as it is against the law, it was punishable by law."38

In R V. Windle[39] the accused who had been unhappily married to the deceased, killed her by administering 100 asprin tablets on her. He then gave himself up saying! "I suppose, they will hang me for this". The English Court of Criminal appeal stated emphatically that the accused was punishable if he knew that the act is wrong legally (that is contrary to law) even though

---

38. R v. Codere (Supra). at P. 27 - 8.
39. [1952] 2 Q.B. 826

.../28

he believed he was morally justified in doing it. In rejecting the medical evidence that tended to suggest insanity, Lord Goddard remarked, inter alia:

> "Courts of law can only distinguish between that which is contrary to law.... The test must be whether it is contrary to law.... In the opinion of the Court, there is no doubt that in the M'Naghten rules, 'wrong' means contrary to law and not 'wrong' according to the opinion of one man or a number of people". 40

The justification for the rejection of the moral code as a test of "wrong" in the English decisions seems to rest upon the premise that moral code changes with different times, conditions and places; very often without publicity. It would be difficult, therefore, to assess the accused's knowledge of ethics at the time he did the act. Invariably, the Courts have to fall back on common knowledge and imply that the accused must have possessed that knowledge[41].

However, the Australian High Court in Stapleton v. [illegible][42] refusing to follow the English decisions, held that "wrong" in the M'Naghten rules meant "morally wrong".

---

40. Ibid at P.P. 833-4.
41. Barnes, H. Op. Cit. at p. 326
42. [1952] 86 C.L.R. 358. See Cardozo J. in People v. Schmidt (1915) 216 N.Y. 324; "the judges expressly held that a defendant who knew nothing of this law would nevertheless be responsible if he knew that the act was wrong, by which therefore, they must have meant that if he knew that it was morally wrong".

.../29

Thus, if an accused believed his act to be right according to the ordinary standard of reasonableness, he was entitled to be acquitted even if he knew his act to be legally wrong.

By its decision in R v. Holmes,[43] the English Court of Criminal Appeal has shown that it was not perturbed by the decision in Stapleton's Case. The Court reiterated that "legally wrong" was the proper test under the M'Naghten Rules.

Insane Delusion.

The last limb of the M'Naghten Rules, deals with the defence of insane delusion. Under the rule, if a person commits an act under an insane delusion, his Criminal responsibility should be as if the facts with respect to which his delusion exists were real. The import of this concept is that if under an insane delusion a man kills another, and if the delusion was such that it would if true, justify or excuse the killing, the homicide would be justified or excused.

---

43. [1953] 2 All E.R 342.

.../30

Professor Glanville Willaims has criticized the defence of insane delusion as being too restrictive in that it does not let out people who have insane delusions not related to legal guilt[44]. If for instance, a woman believes she is the Queen of Sheba, and kills someone, she does not fall within the M'Naghten Rules because, even the Queen of Sheba is not allowed to kill. The fact that the delusion indicates a psychosis is insufficient. Professor Williams has condemned the defence as compelling a lunatic to be reasonable in his unreason, and sane in his insanity.

5. Limitations of the M'Naghten Rules.

(i) One of the most controversial questions in Criminal Law is whether an irresistible impulse produced by mental disease, should be a defence to a charge of Crime[45].

Under the M'Naghten Rules, the insanity defence is solely based on cognitive faculties. With the growth of medical knowledge over the years, it became obvious that the rules were grossly inadequate. Insanity, was shown to affect not only intellectual faculties, but also, the whole personality of the insane person, including the will and emotions[46].

---

44. Williams, G. (1978) Textbook of Criminal Law, Stevens & Sons, London, P. 599.

45. Keedy, E. "Irresistible impulse as a defence in the Criminal Law" Vol. 100 University of Penn. Law Review P. 956.

46. Stephen, F.J, (1883) History of the Criminal Law Vol. II p. 157.

.../31

For instance modern psychiatry recognises that a man may know the quality of his act or may even know that it is wrong, and may yet perform it under an impulse which he finds uncontrollable. The urgent need was therefore felt to exempt persons suffering from insane or irresistible impulse, from Criminal responsibility[47].

There was formidable opposition to the extension of the M'Naghten Rules to take cognisance of the new concept - notably from Bramwell, B. and Lord Hewart C.J. In directing the Jury in R v. Haynes[48], Bramwell, B, Said:

> "... It has been urged for the prisoner that you should acquit him on ground that it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But I must remark as to that that the circumstance of an act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own belief.

---

47. The Idea was incorporated in the statutes of several Common Law Countries. See for instance, S. 13 of the Criminal Justice Act (Northern Ireland) 1967.

48. (1859) F. & F 566; 175ER 898 Cited in Aguda, Op. Cit. at P. 274.

.../32

> But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence, the restraint of religion, the restraint of law. But if the influence itself beheld a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint - that is forbidding and punishing its perpetration'.

Whilst Commenting on the concept of irresistible impulse in R v. Kopsch[49], Lord Hewart C.J, boldly remarked:

> "It is the fantastic theory of of uncontrollable impulse, which, if it were to become part of our Criminal Law, would be merely subversive. It is not yet part of our Criminal Law, and it is to be hoped that the time is far distant when it will be made so".

It is offen stressed that there is need to tread cautiously in applying the irresistible impulse concept, because of the impossibility of drawing a line between an impulse that is irresistible and one that is unresisted.[50]

---

49. (1925) 19 C.A.R. 50. See also R v. Joseph Edward(1926) 19 C.A.R 144 and R v. Sodeman [1936/All E.R 1138.

50. See Riddel. Jin King v. Creighton 14 Can. Crim. cases 349 (1908): "the law says to men who say they are afflicted with irresistible impulse if you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help".

.../33

The objection has also been specifically taken that the defense is difficult to prove or disprove. It is respectfully submitted, that the objection is misconceived in the sense that "difficulty" which is not considered as a bar to litigation generally, should not constitute a bar to a Criminal defence.

As a result of mounting disaffection with the M'Naghten Rules, the Atkin Committee on Insanity and Crime was set up in 1923. However, the recommendations of the committee did not see the light of day[51]. In 1953, the Royal Commission on Capital punishment found the M'Naghten rules to be unacceptable and recommended that the rules be changed[52]. The British government however, rejected the proposal of the Commission to extend the insanity exemption. Rather, the government decided to extend the discretion of the Judge by allowing a defence of diminished responsibility in section 2 of the 1957 Homicide Act, which reads in part as follows:

---

51. 1923 Cmd. 2005.
52. 1953 Cmd. 8932.

.../34

> "Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing of being a party to the killing..."

It can be observed from the section that the defence is limited to homicide cases and entitles an accused person not to acquittal, but to be found guilty of manslaughter. To that extent, the defence of diminished responsibility is limited in scope than irresistible impulse. In R v. Bryne[53], the accused, suffering from violent perverted sexual desires, strangled the deceased in a hostel. The Court held that the defence under section 2 of the Homicide Act was available to the accused. Lord Parker C.J. stated, inter alia:

> "abnormality of the mind which has to be contrasted with the time honoured phrase in the M'Naghten rules 'defect of reason' means a state of mind so different from that of ordinary human being's that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects not only the perception of phsical acts.... but also the ability to exercise will power to control physical acts",

---

53. (1960) 44 C.A.R 246.

.../35

(ii) Another major limitation of the M'Naghten Rules, perhaps, centers on the use of the phrase "disease of mind" without further explanation. The phrase has introduced more confusion into the law than it purported to settle. The phrase has not only created problems for the layman but also the psychiatrist who are by no means agreed on any acceptable definition of the term - "disease".

The phrase has been decribed as "so tenuous and, indeed, dangerously vague to be a critical part of a rule of law on Criminal responsibility[54]. Furthermore, it is equally a moot-point whether the phrase is limited to purely physical ailments in the brain or whether it covers as well abnormalities (whether arrested or incomplete development of the mind) as manifested in idiocy, imbecility and feeblemindedness.[55]

Professor Williams, has however, argued vigorously, that subnormality is covered by the phrase "defect of reason for disease of the mind" in the M'Naghten Rules[56].

---

54. See Burger J. in U.S. v. Blocker (1961) 288 2D 603 - criticising the rule in Durham. cited in Okonkwo op.cit. p. 131.

55. The definition in S.4(1) of Mental Health Act 1959 is all embracing.

56. Williams, G. Criminal Law: General Part op. cit. p 494. see also Walker, N. (1968) Crime and Insanity in England, Edinburgh. P. 116.

(iii) Finally, the Psychiatric underpinning of the M'Naghten Rules (one which imagines that the several functions of the brain are each hermetically sealed from the others) is also considered a major limitation on the rules. Professor R.B. Seidman contends that the compartmentalization of the brain is epitomized by the pseudo - science of phrenology, the psychiatric currency of 1843. Phrenology conceived that there are discrete segments of the brain in which are lodged specific emotions and functions:- rationality; bestiality; aesthetics, love and the like.[57]

Perhaps, as it has been suggested, the M'Naghten Rules have lasted for too long, as a legal test, for any hope now to be held out that they might some day be modified by the courts and the likelihood of legislative action must be considered remote[58]. The M'Naghten rules have weathered the storm of criticisms by both the legal and medical professions and have remained valid in almost all common law jurisdictions.[59]

---

57. Seidman, R.B. (1964) "Insanity as a defence under the Criminal Code of Ghana" Vol.1 University of Ghana Law Journal pp. 42-51.

58. Opas, P. "certified insane by lawyers" Vol. 36 Australian Law Journal P. 11

59. Ofori-Amankwah, E.H. (1979) U.N. Standard Minimum Rules, Lahore. pp. 77-78. The learned author has advocated a fresh examination of the rules.

..../37

CHAPTER III
INSANITY IN NIGERIAN LAW

The tests of the insanity defence in Nigerian Law are laid down in two statutes namely: the Criminal Code[1] and the Penal Code[2]. However, it trite to emphasise at the outset that the M'Naghten Rules form the basis of insanity defence in all common law countries. Therefore, in order to properly analyse the insanity provisions of the Nigerian Codes, it requires that the provisions of the Codes must be silhouetted against their historical back-ground: the M'Naghten Rules. How far these differ from the English rules will be noted in their places.

1. The Criminal Code Provision.

The relevant provisions on insanity in the Criminal Code are contained in sections 27 and 28. Section 27 provides:-

> "Everyone is presumed to be of soundmind and to have been of soundmind at anytime until the Contrary is proved"3.

---

1. Cap. 42 Laws of the Federation and Lagos, 1958.
2. Cap. 89 Laws of Northern Nigeria, 1963.
3. The implication of the presumption is discussed infra under - procedure and Evidence of proving insanity - Chapter V.

.../38

The main provision on insanity is contained in section 28 which provides:

> "A person is not criminally responsibility for an act or omission if at the time of doing the act or making the omission he is in such a state of mental infirmity as to deprive him of capacity to understand what he is doing or of capacity to control his actions or of capacity to know that he ought not to do the act or make the omission.
>
> "A person whose mind, at the time of his doing or omitting to do an act is affected by delusions on some specific matters, but who is not other wise entitled to the benefit of the foregoing provisions of this section is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist".

In James Anyim v. the state[4], Aniagolu J.S.C. made the following notable comment on section 28 of the Criminal Code:

> "Under the Criminal Code, insanity has two major segments of mind affliction namely:
> (a) mental disease or natural mental infirmity; and
> (b) delusions on some specific matter or matters"[5].

---

4. [1983] 1 S.C.L.R. 370.
5. Ibid at Page 373.

.../39

That the provisions of section 28 are the lineal descendants of M'Naghten is plain enough in its division into two rules plainly analogous to M'Naghten's[6]. In R v. Nasamu[7], the west African Court of Appeal, pointed out, however, that the law in Nigeria as to the defence of insanity in a Criminal trial is slightly different from the law in England. A Cursory look at section 28 of Criminal Code shows that the legislature have not only departed from the Phraseology of M'Naghten, but have also introduced two entirely new factors namely: "natural mental infirmity" and "Capacity to control his actions".

We will now focus our attention to the analysis of the provisions section 28 Criminal Code.

---

5. Ibid at Page 372.
6. The wording of the first segment of section 28 follows closely the direction of Bray. J. in R v. Fryer(24 Cox. cases 403), but it has been pointed out that in so far as the direction admits the medical theory of uncontrollable Impulse, it conflicts with a number of cases decided. Some in English Courts of first instance and some in the English Court of Criminal Appeals.
7. (1940) 6 W.A.C.A. 74 see also R v. Dayiye Kadi Kadi (1957) N.R.N.L.R. 207.

.../40

Firstly, it would appear that there is not much difference in the etymological meaning of the phrase "mental disease" appearing in section 28 and "disease of mind" found in the M'Naghten Rules. Perhaps, the phrase "mental disease" was unwittingly introduced in section 28 in an attempt to break away from the English rules.[8] It is submitted that both phrases will cover all forms of serious mental afflictions recognised in medical parlance as psychoses examples of which are schizpphrenia, depressions and cerebral arteriosis.[9]

Secondly, whereas the M'Naghten test is limited solely to "defect of reason from disease of mind", section 28 has introduced an entirely new factor namely: "natural mental infirmity". In R v. Omoni,[10] the accused who had killed to avenge the death of his mother, put up the defence of insanity at his trial which was rejected. On appeal, the West African Court of Appeal attempted the definition of the phrase "natural mental infirmity". Verity C.J. said, inter alia:

---

8. Ofori-Ansankwah, E.H. "origin of the Penal and Criminal Codes" Op. Cit; has submitted that the two phrases are perilously close.
9. Williams, G. Textbook of Criminal Law P. 592
10. (1958) 12 W.A.C.A 511.

.../41

> "The words 'natural mental infirmity' mean, therefore, in our opinion, a defect in mental power neither produced by his (accused's) own def default nor the result of disease of mind. That is a considerable extension of the law of England"[11].

In Queen v. Tabigen[12], the Federal Supreme Court advanced further the definition of the phrase by referring to the provisions of the repealed English mental defiiency Act, 1938. Section 5 of the repealed Act defines the phrase as:

> "a condition of arrested or incomplete development of the mind existing before the age of 18 years whether arising from in herent cause or induced by disease or injury"[13].

It has been suggested that interpretation of the phrase in these cases, imposes a high standard of proof.[14] It is however, submitted, that subnormality, whether congenital or supervening in childhood, is covered by the phrase "natural mental infirmity".

---

11. Ibid at P. 512
12. (1960) 5 F.S.C. 8
13. Repealed by the Mental Health Act, 1959.
14. Ofori-Amankwah, Criminal Law in the Northern States of Nigeria P. 220

.../42

It would appear clear from the provisions of section 28 of the Criminal Code that the legislature intended the phrases "mental disease" and "natural mental infirmity" to be used as alternatives since they are expressed disjunctively. For instance, the supreme court in Ngene Arum v. the State[15], adopting with approval the dictum in R. v. Omoni, said

> "In order to establish the defence (of insanity), the defence must first prove that at the relevent time, the prisoner was suffering from either mental disees or natural informity".

In R v. Alice Eriyamremu[16], the phrase "natural mental infirmity" was construed narrowly to exclude a self-induced state of insanity. In that case, the accused who had killed her albino grand daughter, ascribed her conduct to the dictates of her confederates in witchcraft. She painted the picture of the killing and the disposal of the weapon of murder very vividly. The defence put forward was one of insanity. In rejecting the defence of insanity raised by the accused, the learned trial Judge, Morgan J. Said, inter alia:

> "In my view, her defence of insanity must, therefore, fail, because mental infirmity which is self-induced is not natural and is not a defence to insanity under the provisions of section 28 ofthe Criminal Code".

---

15. (1979) 11 S.C. 91. See also: Aguda, A.A. Principles of Criminal lability in Nigeria. Page 268
16. (1959) W.R.N.L.R. 270.

.../43

The decision has been subjected to severe critcisms in that it seems to suggest that the law is interested not only how, but also where the accused got his mania from[17]. This is clearly anomalous to the dictum of Lord Devlin J. in R v. Kemp[18] that:

> "It does not matter for the purposes of the law whether the defect of reason is due to a degeneration of the brain or some other forms of mental derangement. That may be of importance medically but it is of no importance to the law which merely considers the state of mind in which the accused now is, not how he got there".

Dr. Aguda has, rightly in our view, suggested that what to look for in cases of this nature is whether the belief in witchcraft has impaired the mental faculty of the accused to such an extent as to amount to a mental defect either of a temporary or of a permanent nature, and then to see if as a result of such a defect, the accused was deprived of his capacity to understand what he was doing at the time of the act in question[19].

---

17. Chukkol, K.S. Defences to Criminal Liability in Nigerian Law (1980) A.B.U. Press, Zaria P. 34.
18. [1957] 1 Q. B 399.
19. Aguda A. Op. Cit p. 268.

.../44

The decision of the Supreme Court in Richard Villie v. State[20] is another example of the narrow construction of the phrase "natural mental infirmity". The consequence of this was the rejection of a plea of insanity not founded on natural causes as narrowly defined by the Courts. In that case, the accused murdered his mother whilst labouring under an impression that she had poisoned him through witchcraft. His defence of insanity was rejected by the Court. It is evident that the court did not consider witchcraft as capable of bringing about such mental abnormality so as to bring the accused within the contemplation of section 28 of the Criminal Code. This attitude of the Court is clearly not in accord with current scientific finding which indicate that there is some correlation between superstitious beliefs and mental inbalance[21].

Having established that at the time of committing the Crime, the accused was in a state either of mental disease or natural mental infirmity, the defence, in order to escape liability, must show that it was such to deprive the accused any of the following capacities:-

---

20. (1968) N.M.L.R. 213 see also State v. Clement Iwuanyanwu (1964) 1 All N.L.R. where the Court rejected the defence of insanity based on a profound belief in witchcraft.

21. Lambo, A. (1950) "The role of cultural factors in Paranoid Psychosis among Yoruba tribe" Vol. 10, Journal of mental science pp. 239 - 247

.../45

(a) Capacity to understand what he was doing;

(b) Capacity to know that he ought not to do the act or make the omission; and

(c) Capacity to control his actions We shall now consider these other aspects of section 28 of the Criminal Code.

Capacity to understand what he is doing.

This phrase has not been judicially interpreted in any case that one is aware of. It is perhaps significant that the term used is "understand" rather then "know" as under the English rules. Professor Okonkwo has argued that the term "understand" has a wider connotation than "know" because a man may know that he is cutting-off another man's head but may, due to his insanity, be unable to understand the full implications of his act. For instance, he may be unable to appreciate that a man whose head has been Cut-Off is no longer alive[22].

The question is, what precisely is the additional characteristic of the substituted term over and above "know"? It is humbly submitted, that the substituted term "understand" is too elastic and it does not assist us in understanding the insanity test any better.

---

22. Okonkwo and Naish Op. Cit. P. 137.

.../46

As far as we can see, the new language is an improvement over the M'Naghten because, being quite vague, it gives the Judge a free hand to make his own intuitive judgment as to insanity and then to claim that he has applied the legal test.

Capacity to know that he ought not to do the act or make the omission.

The phrase provides a defence for one whose mental disease or mental infirmity prevents him from appreciating the import of his conduct. The phrase "ought not to" is rather ambiguous and there is no reported decision where it has been judicially interpreted. The problem here is whether the accused should know whether the act is one forbidden by law or one that he ought not to do according to moral standards. Although on this point as far as the Criminal Code is concerned, it is suggested that the approach of the Australian High Court in Stapleton's Case would be followed by Courts in Nigeria[23]. That approach is a more liberal one than the English approach as epitomized in Windle's Case[24].

---

23. Note that the Penal Code is liberally drafted to incorporate both the English and Australian interpretations of "wrongfulness" of the Act.

24. Fingaretle, H. Op. Cit. p. 156. The author has submitted that both the English as well as Australian approaches are not suitable critical legal tests for assessing the veliality of a plea of insanity.

.../47

Capacity to Control his action

A very remarkable difference between the Criminal Code and the M'Naghten Rules is the introduction of the phrase "capacity to control his action" in section 28 of the Criminal Code. This concept is not recognised under the M'Naghten Rules even though modern psychiatry recognises that a person may know the quality of his act or may even know that it is wrong, yet perform it under an impulse that he finds uncontrollable. Nothing could emphasise more pointedly the disparity between the English Law and the Criminal Code in this respect than the dictum of Lord Hervart C.J. R v. Kospch[25].

It should be stressed however, that the defence does not mean mere inability to master one's actions, but must be attributable to either "mental disease" or "natural infirmity". In R v. Echem[26], the accused who was charged with murder was found to be legal insane on the evidence of a medical doctor that the accused had sustained a head injury previously which was likely to affect his mental balance thus, rendering him unable to control his actions.

---

25. See (infra) Chapter II.
26. (1952) 14 W.A.C.A 158.

.../48

Commarmond Ag. C.J. said; inter alia:

> "The defence (of uncontrollable impulse) although not accepted in England, is a good defence in Nigeria by virtue of section 28 of the Criminal Code".27

Similarly, in Kayode Adams v. D.P.P for the Federation[28], the accused who stabbed Professor Saburi Biobaku, the then Vice-Chancellor of the University of Lagos on 8th August, 1965, with intent to kill him, was held legally insane because he committed the act whilst suffering from some uncontrollable impulse.

On the whole, credit for foresight in the area of medical advancement goes to the draftsman of the Criminal Code for taking cognisance of the defence of inresistible impulse.

Insane Delusion . .

The second segment or mind affliction under section 28 of the Criminal Code deals with cases of delusions. The provision is a codification of that portion of the M'Naghten Rules dealing with delusions. Generally, where an accused is unable to claim protection under the first segment of section 28 of the Criminal Code, he may still be able to raise some defence under the second segment of

---

27. Ibid at P. 160.
28. (1966) N.M.L.R. 111 see also Patrick Nwanguwa v. State (1965) 6 E.N.L.R. 96.

that section provided he can show that he had some affliction of mind or delusion on some specific matter or matters[29] In R v. Grumah[30], the West African Court of Appeal defined delusion as "a symptom of mental disturbance and a false belief which is unshakable by facts".

Under the second limb of section 28 of the Criminal Code, an accused is Criminally liable for his act or omission to the sane extent as if the real state of things had been such as he was induced by the delusion to believe to be true. In other words, the defence of delusion under section 28 of the Cfiminal Code is a question of law namely: would the imagined facts, if true, constitute a defence in Law?

Consequently, where an accused is unable to show that he was deprived of any of the capacities named in the first segment to section 28, he will be liable on the facts as he though them to be. The possibility of revenge must however, be totaly excluded.

---

29. Owoade, M.A. "Law of Homicide in Nigeria" Unpublished Ph.D. dissertation, University of Ife, 1985.
30. (1957) 2 W.A.L.R. 255.

.../50

There is a striking similarity between the concept of delusion and the defence of mistake of fact under section 25 of the criminal code. However, whereas a mistake is expected to be honest and reasonable in order to be a ground for exculpation, a delusion is usually unreasonable except if construed subjectively.

In Thamu Guyuk v. R[31], the West African Court of Appeal accepted that the appellant who had been convicted of murder, was suffering from delusions. The appellants deluded belief was that the deceased had been following his wife and had promised to snatch her away. Inspite of this finding, the Court upheld the appellants conviction for murder on the ground that he knew that he was doing what was wrong.

It is submitted, that the ratio in Thamu's Case, manifests patently, a misunderstanding of the provision of section 28 of the Criminal Code and a confusion of its two separate segments.

---

31. (1953) 14 W.A.C.A 372.

.../51

Whilst Commenting on the decision in Thamu's Case,

Okonkwo and Naish, rightly observed thus:

> "The first paragraph of (section 28 of the Criminal Code) offers a complete defence if the accused can establish the requisite lack of capacity. But even if he can not establish this much, yet the Court must go on to consider the more limited defence in the second paragraph. And if they accept as they did in Thamu's case, that the accused was suffering under a genuine delusion, then they can only hold him liable on the facts as he thought them to be".

The learned authors then concluded thus:

> "Therefore, the finding in Thamu's Case that the accused knew he was doing wrong should not have been conclusive of the case. For if Thamu's delusion had been true - that the deceased was after his wife - he would clearly have believed himself to be suffering some sort of provocation"[32].

As to what the standard of provocation in this case would be, it is respectfully submitted, that it is that of a deluded person of the accused's standing in life.

The Supreme Court in Ngene Arum v. State[33] succintly reitereated the position of the law in respect of the

---

32. Okonkwo and Naish Op.Cit. P. 140.
33. (1979) 11, S.C. 91.

.../52

the defence of delusion thus:

> "For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take his life, and he kills that man as he supposes in self-defence, he would be exempted from punishment. If his delusion is that the deceased had inflicted serious injury to his character and fortune and he killed him in revenge for such supposed injury, he would be liable to punishment".

In Clement Iwuanyanwu v. State[34], the question that fell to be decided was whether a deluded belief held by the appellant that the deceased intended to kill him through witchcraft, would entitle the appellant to claim protection under section 28 of the Criminal Code, for his pre-emptive strike. His defence of insanity was rejected. Onyeama J.S.C said, inter alia:

> "It is clear from the evidence that the appellant, believing that the deceased and others were going to kill him by witchcraft, killed the deceased first... At the time the appellant killed the deceased, the deceased was not attacking him; and the whole purpose of the murderous attack on the deceased was to prevent his own death in the future to be caused by juju. On the assumption of the delusions, he was not acting in self-defence at the moment that he stabbed and is not exenorated under the second paragraph of section 28".

---

34. (1964) 1 All N.L.R 413.

.../53

In James Anyim v. State[35], the facts of which are akin to Iwuanyanwu's Case, the Supreme Court rejected the defence of insanity under the Second Segment of section 28, founded on a pre-emptive attack. The facts of the case are as follows: The appellant in that case was a head labourer in his place of work and was interested in a young girl who came there to sell wares. However, the girl did not seem to reciprocate his interest. He bought her gifts which she refused to accept. This led to taunting and teasing from his co-workers. He was pretty unhappy about this and became introspect and morose. He then conceived the idea that his co-workers and others - including his landlady - were planning to kill him. He took a matchet and went on rampage killing at least two people including his landlady.

Perhaps, it should be noted that the concept of delusion has not escaped severe criticisms from jurists as well as medical writers. Isaac Ray, made some scathing remarks on the concept thus:

> "This mental delusion concepts is virtually saying to a man: you are allowed to be insane but have a care how you manifest your madness.

---

35. [1983] 1 S.C.N.L.R 370.

.../54

> Having once adopted your delusions, all subsequent steps connected with it must conform to the strictest requirements of reason. In short, having become fairly enveloped in clouds of mental disorder, the law expects you to more as discretly as possible as if the undimmed light of reason were shining upon your face..."36.

Perhaps, it is equally pertinent to note here, that one of the major controversies on the subject of insanity, relates to the attitudd of Nigerian Court towards belief in the supernaturals or witchcraft. The Courts have come under withering criticisms from learned jurists chiefly, for rejecting mental abnormalities founded upon an ardent belief in supernaturals (such as persons under delusions that they are obeying a divine command)[37], without considering the possible effect of such a belief on the mind of the particular accused[38]. In such cases, it would appear that no regard whatsoever, is had to the fact that such beliefs could possibly qualify as delusions under the second segment of section 28 of the Criminal Code.

---

36. Ray, I (1961) Medical Jurisprudence New York, P. 46.
37. See the ratio in R. v Eriyamremu (1959) W.R.N.L.R. 270 and also Willie v. State (1968) N.M.L.R. 213.
38. Aremu, L.O. "Criminal responsibility for homicide and supernatural beliefs" (1980) Int. and Comparative Quarterly P. 113. and also: Chukkol, K.S. (1981) Supernatural beliefs and the Criminal Law in Nigeria. A.B.U. Press Zaria.

.../55

Professor Turner has argued strongly in support of such a practice. The learned author's suggestion is better quoted in extenso!

> "It would be more satisfactory if the instances of fantastic superstitious beliefs should be approached as insane delusions and treated in accordance with the rules applicable thereto"[39].

It is respectfully submitted, that this is a better approach than the tendency among Nigerian Courts to reject altogether the defence of insanity founded upon a belief in supernaturals or witchcraft.

(2) The Penal Code Provision.

Section 51 of the Penal Code provides:

> "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contary to law".

Perhaps, it is pertiment to point out that the section is parii passu with section 84 of the Indian Penal Code. Section 51 ofthe Penal Code has also not been subjected to much judicial interpretation by our Courts. Thus, in this dissertation, we have to fall back on the decisions of the Indian Courts to guide in the interpretation of Section 51.

---

39. Kenny's Outlines on Criminal Law, Op.Cit. at p. 54.

.../56

It should be observed however, that the word "guide" is used deliberately. This is to emphasise that one is not oblivious to the fact that in interpreting our local statutes, what should be borne in mind essentially, are Nigerian Conditions, for, though wordings of statutes of other countries may be similar to ours, it does not follow ipso facto that the judicial approach must be the same.

Apart from the simiplicity and clarity of language of section 51 Penal Code, the brevity of the section significantly sets it apart from both the M'Naghten Rules and section 28 of the Criminal Code.

It should be pointed out at the outset that the presumption of sanity as enshrined in both the M'Naghten test as well as section 27 of the Criminal Code, has no express equivalent under the Penal Code. In spite of this omission, however, it has been rightly submitted, that the presumption applies under the Penal Code being a basic Common Law principle as laid down in M'Naghten Rules.[40] We will now examine some of the salient features of the provision of section 51 of the Penal Code.

---

4. Criminal Law in Northern Nigeria Op.Cit. p. 221. Note equally, the presumption of knowledge in S.43 of p. Code.

.../57

unsoundness of mind.

Section 51 of the Penal Code uses the phrase "unsoundness of mind" which does not appear either in the basic English test or section 28 of the Criminal Code. Professor Gledhill, has submitted that the phrase is wider in scope than the term "insanity" or "mental disease"[41]. Ratanlal and Thahore have described the phrase thus:

> "Whether the want of capacity is temporany or permanent, natural or supervening, whether it arises from disease or exists from the time of birth, it is included in this expression. Thus an idiot, who is without understanding from birth (with lucid intervals) and a person who is mad or delirious, are all persons of unsoundmind"[42].

There can be no doubt therefore, that the phrase "unsoundness of mind", is broad enough to cover all forms of mental abnormalities arising from" mental disease" or "disease of mind" as well as subnormalties.

---

41. The Penal Codes of Northern Nigeria and the Sudan (1963) Sweet and Maxwell, London. P. 91.

42. Law of Crimes (1956) Bombay 19 Edition P. 158 discussing section 84 of the Indian Penal Code.

..../58

Under the Penal Code, for a person to escape criminal liability, he must have been, at the time of the act (by reason of unsoundness of mind), incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

Nature of the Act.

The phrase "nature of the act" can be compared with "nature and quality of the Act" under the M'Naghten Rules. In R v. Codere[43], the latter phrase was judicially interpreted as being synonymous and connote failure to understand the implications of a person's physcial act. However, Professor Gledhill has submitted that the word "act" appearing in section 51, means the actus reus and not physical act.[44] It follows from this that if A kills B thinking that he is acting in self-defence, he does not know the nature of his act. In the two Indian cases discussed below, the court found that the accused persons did not know the nature of their acts.

---

43. (Supra).
44. Gledhill, A. Op.Cit. P. 93.

.../59

In Baswantrao v. Emperor[45], the accused was so violent that he had been kept in chains for two weeks preceding the incident for which he was charged. He had been released for a short period during which he attacked his mother, so he was again chained; he do not sleep, threw his food to the dogs and developed the delusion that his relations intended to kill him. On the day of the incident, he escaped and fatally speared his uncle who was affectionate to him. It was held that he did not know the nature of his act and therefore not guilty on grounds of insanity.

In Bhagwatti v. Emperor[46], the accused committed murder for which there was apparently no motive. After the offence, he made no attempt to disappear or to offer and explanation in extenuation. In answer to police interrogation he said: "arrest me, I have shed blood", He took no interest in the pretrial inquiry and was certified medically insane. The Court held that he did not know the nature of his act and therefore, was legally insane.

---

45. A.I.R [1949] Nag. 66
46. A.I.R [1947] Oud. 190

.../60

In a recent decision of the Kwara State High Court, State v. Shittu[47], the accused person killed his mother by hitting her with a shovel several times on the head, apparently to make her follow the path of Islam. The trial Judge, Gbadeyan J, found the accused not guilty on ground of insanity and remarked, inter alia:

> "If in his lunancy the accused thought he was reciprocating the faithfulness of his loving mother or was correcting her by using a shovel to hit her several times believing uptil his trial that she was living, then it is crystal clear that he was denied by the unsoundness of mind the capacity to understand the nature of his act".

Wrong or Contrary to Law.

By adopting the phrase "wrong or contrary to law", section 51 of the Penal Code, has really blended both the English approach[48] as well as the Australian interpretation[49] of the word "wrong". The section has thus, avoided the controversy which seems to have thrown the Common Law Jurisdictions into two separate camps as to whether "wrong" means "Contrary to Law" or "morally wrong".

---

47. (Unreported) suit No. KWS/1^{C}/84 delivered on Feburary 26, 1985,

48. R v. Windle (Supra),

49. Stapleton v. Queen (Supra).

.../61

Under section 51 of the Penal Code, a person will benefit from the defence of insanity if his unsoundness of mind was such that rendered him in capable of knowing either the morality of his act or its illegality[50]. The following decisions of the Indian Courts will assist us in understanding this distinction dearly.

In Geron Ali v. Emperor,[51] the court emphasised that whether an act is wrong is to be judged by the standard of a reasonable man. In that case, the accused, who was a disciple of a pir, was told by the pir's mistress that he would go to heaven if he offered a human head as sacrifice. The accused Cut-Off the heads of two people (one of whom was his daughter) and brought them to the Pir saying: "Father you asked for one head; I bring you two". The Court held that insane as he was, he clearly was not aware of the wrongfulness of his action, irrespective of whether he knew that killing was forbidden by Indian law.

In Ashiruddin Ahmed v. King,[52], the accused killed his child attributing it to a heavenly message he received in his dream ordering him to sacrifice his son.

---

50. Ofori-Amankwah, E.H. Op. Cit. P. 223.
51. A.I.R. /T941/ Cal. 129.
52. A.I.R. /T949/ Cal. 112.

..../62

He later went to his uncle's house and found him with a policeman. The accused called his Uncle aside and told him of his deed. His conviction was set aside on appeal on the ground that even though he might have known of the illegality of his act, he did not know that it was wrong. He was found to be entitled to the defence of insanity under section 84 of the Indian Penal Code.

But in Chamain v. Emperor[53] where the accused killed another person and pleaded that she did so because she was possessed by an evil spirit which had threatened to kill her unless she killed the other person, it was held that she was not in a position to say that she did not know she was doing what was wrong or contrary to law.

Similarly, in P.P. v. Devasikamini[54], the accused took a torch from his Kitchen, set ablaze the thatched roofs of a number of buildings, and then ran away: At his trial, it was shown that the accused smoked "ganja" and that he behaved abnormally before the act. It was held that the fact that he ran away after setting the buidings ablaze indicated that he knew he was doing wrong and was therefore, not entitled to the benefit of section 84 of the Indian Penal Code.

---

53. A.I.R. [1936] Pat. 245.
54. A.I.R. [1928] Mad. 196.

.../63

On this point, it can be said, therefore, that the Penal Code provision makes the defence of insanity wider than the M'Naghten Rules.

Insane Delusion

The Penal Code has not specifically codified the concept of insane delusion in section 51. However, it has been held under section 84 of the Indian Penal Code, that if a person commits an offence under partial delusion, he would be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real[55]. This decision can be said to equate the law under the Penal Code to that under the Criminal Code on this points[56].

Notwithstanding the Indian position, it is respectfully submitted, that the concept of delusion could still be imported by the courts within the Scope of the insanity rules in section 51 of the Penal Code, since the Code is founded on English jurisprudence.

---

55. Bajirao v. Emperor A.I.R. [1949] Nag. 66.
56. Aguda, A.A Principles of Criminal Liability in Nigerian Law (1965) Caxton Press, Ibadan. P. 273.

.../64

Irresistible impulse

It is important to also mention that there is no specific provision on irresistible impulse under section 51 of the Penal Code. This equates therefore, the position under the Penal Code to M'Naghten Rules - under which the concept is not recognised as a defence. It is interesting to note that the Indian Courts in Bajirao's Case[57] as well as in Deorari v. Emperor[58], have specifically held that the concept of irresistible impulse is not a defence under section 84 of Penal Code of India. In Nigeria, it is a moot-point whether the decision of Reed C.J, in R v. Yayiye Kadikadi[59] (decided under section 28 of the Criminal Code which then applied to the Northern Region) can be said to import the concept of irresistible impulse valid for the purpose of section 51 of the Penal Code.

On the whole, it is submitted that the approach of the Criminal Code accords with current realities in psychiatry and is therefore more humane than the formulations in the Penal Code.

---

57. Supra.
58. A.I.R. /1946/ Nag. 312.
59. (1957) N.R.N.L.R 207.

.../65

C H A P T E R I V

INSANITY IN OTHER JURISDICTIONS

1. Insanity under customary and Islamic Law.

The existing treatise on comparative African jurisprudence and Culture shows that the concept of insanity was recognised under the indegenous African Law. The concept is discernible in varying degrees in the early laws and customs of different African societies.

In cases of insanity among the Yoruba speaking people, the family of the madman are usually held responsible for all his crimes, the rationale for this being that if he was so out of his mind as not to know what he was doing at the time of committing the offence in question, his family should have given him all necessary medical attention, or, at least, kept him in confinement so that he should not go about injuring other people. Should they fail in their duty, they would be liable for any offence he might commit whilst at large[1].

Among the Ashantis of Ghana, insanity was considered a palliative circumstance in mitigation of crime[2]. Under the Ashanti tradition, it is believed that once upon a time, the affliction of madness was not regarded as a sufficient excuse for murder. This situation was said

---

1. Elias, T.O. (1956) Nature of African Customary Law, Oxford University Press, London. P. 130.
2. Murray, R.S (1929) Ashanti, Law and Constitution, Oxford P. 294.

to have been brought about on account of the story narrated below:

> "Before the reign of Osei Yao, madness was regarded as an excuse for murder. King Osei Yao made a test to find the Justice or otherwise of this exemption from consequences of an act. He caused a drunkard and a madman to be placed in a house which was set on fire. The madman soon began to scream - 'they are burning me', and ran outside; the drunkard lay still and was burnt to death"3.

Insanity is one of the prominent factors which negative responsibility under Islamic Jurisprudence. However, the status of insanity under Islamic Law is quite intrincate.

Under Islamic Law, criminal responsibility is vacated in the case of a totally insane person, if such a person commits a crime for which he should otherwise be held responsible[4]. Examples of such crimes are adultery, false accusation, theft and drinking of alcoholic beverage. Interestingly, a killing by an insane person was not considered as excusable homicide but as an accidental homicide for which compensation was payable[5].

---

3. Ibid

4. Bahnassi, A.F: "Criminal responsibility in Islamic Law "in Bassiouni M. Cherrif (1982) The Islamic Criminal Justice System, Oceana Publication incorporation, Cairo pp. 171-187.

5. Anderson, J.N.D. Islamic Law in Africa. (1970) Cass & Co. Ltd, London. P. 203.

.../67

Insanity will, however, not vacate responsibility where the insanity occurs before a verdict. The Hanbali and Shafi'i School believe that insanity subsequent to a crime is not a good ground for dismissing the case or suspending trial. Contrastingly, the Maliki and Hanafi Schools believe that insanity prior to averdict is a good ground for suspending the trial until the person recovers from his insanity. This is so because a person must possess legal capacity at the time of the trial.

Criminal responsibility will also not be vacated under Islamic Law where the insanity occurs after verdict. Here, the Hanbali and Shafi'i Schools believe that insanity subsequent to the verdict is not a good ground for suspending its execution if the crime has been proved by confession, the verdict, is suspended due to the accused's insanity. This is because a person convicted of a legally punishable crime has the right to retract his confession at the time the verdict is executed but may be prevented from retracting his confession by reason of insanity. The Maliki School, however, views insanity as a ground for suspending the execution of a verdict unless the punishment is retribution.

.../68

According to a leading Islamic Scholar, ABu Hanifa, legal punishment is not administered in cases of interrupted insanity because, if the witnesses are disqualified after the testimony and before the execution of the verdict, punishment is not administered because it is fraught with doubt that might vacate legal punishment. It is therefore, more reasonable that if the person to be punished is disqualified as far as his legal capacity is concerned, that punishment should not be administered[6].

2. Insanity in other common law jurisdiction.

The basis of the defence of insanity in all common law jurisdictions is the M'Naghten Rules. It should be noted however, that differences do exist in the scope and phraseology of the insanity provisions from one country to another. We will now examine the statutory provisions on insanity defence in Ghana, Sudan and the United States of America.

The Ghana Criminal Code 1960, Act 29 is modelled on the draft Code of Sir James Stephen of 1879[7]. Section 27 of the Code admits the verdict of guilty but insane in the following circumstances:

---

6. Cited by Bahnassi; A.F. Op. Cit. p. 187.

7. "Read, J.S., Criminal Law in Africa of today and Tomorrow" (1963) Journal of African Law P.5.

..../69

(i) If the accused is prevented by reason of idiocy, imbecility or any mental derangement affecting the mind, from knowing the nature or consequences of the act in respect of which he is accused; or

(ii) If he did the act in respect of which he is accused under the influence of an insane delusion of such a nature as to render him, in the opinion of the jury or the court, an unfit subject of punishment of any kind in respect of such an act[8].

A cursory look at section 27 of the Ghana Code, shows that it differs from the M'Naghten Rules in two respects. Firstly, whereas the M'Naghten rules are limited to infirmities arising from "disease of mind" only; section 27(1) includes imbecility and idiocy as well. These additional terms will be covered by the phrase "natural mental infirmity" appearing in section 28 of the Criminal Code (Nigeria). This equates section 27 with the Nigerian Criminal Code provision in this respect.

Secondly, under the M'Naghten Rules, there are two tests of in capacity, both dependent upon cognition. The test are:

---

8. Seidman, R.B. Op.Cit. pp.. 42-51

.../70

"nature and quality" as well as "right-wrong". Section 27(1) of the Ghana Criminal Code has significantly substituted a single test namely: was the defendant prevented from knowing the nature or consequences of his act? This is equally an improvement on section 28 of the Criminal Code (Nigeria).

The phrase "nature and consequence" suggests that the test of Criminal responsibility under the Ghana Criminal Code, is capacity to foresee the result of ones conduct. Knowledge of the nature and consequence of an act simply means, therefore, the capacity to make relevant choices which a sane adult would make between various possible courses.

Section 27(2) of the Ghana Criminal Code, is a remarkable improvement on the M'Naghten Rules and section 28 of the Nigerian Criminal Code; which makes the defence of delusion a question of law namely: would the imagined facts, if true, constitute a defence in law? Section 27(2) of the Ghana Criminal Code poses a factual issue namely: Is the accused unfit for punishment? To determine this fact, the judge must look at the delusion to assess if the accused is unfit for punishment and not make superficial assumptions as in the M'Naghten Rules and section 28 of the Nigerian Criminal Code.

.../71

The following decisions of the Ghana Courts on Section 27(2) of Ghana Criminal Code, puts the matter beyond dispute.

In R v. Grumah[9], the Court held that on the facts of the case, there was an insane delusion. The editorial note appended to the report reads thus:

> "It would appear that this ordinance is concerned principally with whether or not the insanity is of such a nature as to make the punishment pointless: it is not concerned with the form the delusion takes. Thus, A kills B while under the insane delusion that B would kill him, and A kills B while under the insane delusion that B is his brother: the section is equally applicable in each case"[10]

Perhaps, it is needless to emphasise that only the first example will exculpate under the M'Naghten Rules and section 28 of the Nigerian Criminal Code.

In R v. Ayaaba, Kusasi[11], the accused had an insane delusion that his father had ill-treated his mother; that he himself had been the victim of similar ill-treatment; that his father was never satisfied with accused's work on the family farm, and had always refused to give him money

---

9. (1957) 2 W.A.L.R. 255.
10. Ibid
11. (1958) 3 W.A.L.R. 376.

.../72

when he asked for it. He therefore thought it fit to kill his father and his uncle. His conviction was reversed by the Court of Appeal on the authority of Grumah's Case.

In R v. Moshie [12], the Court of Appeal made the defence of delusion wholly explicit when it said:

> "... section 27(2) of the Criminal Code is concerned principally with whether or not the insanity is of such a nature as to render punishment pointless; it is not concerned with the form the delusion takes".

It would appear that section 27(1) and (2) permit the defence of irresistible because the ultimate question under both subsections is whether the accused lacked the capacity for self-control. It is significant that Section 27 of the Ghana Criminal Code (like section 28 of Nigerian Criminal Code) measures responsibility against an accused's capacity for self-control and not merely his capacity for cognition as under the English rules.

---

12. [1959] G.L.R. 43. See also R v. Fra-Fra (1959) G.L.R 442 and R v. Sergeant Bodie (1964) G.L.R 1.

.../73

Professor Seidman has rightly in our riew, concluded that section 27 of the Criminal Code of Ghana, on its face, seems fairly drafted to meet most of the criticisms which have been levelled at the M'Naghten Rules. It abandons their limitation to disability arising out of mental disease. It permits the Court to determine the validity of the defence as a matter of fact, not of law and finally, it treats the personality as unitary, not split [13].

The rules on the defence insanity in the Criminal Law of the Sudan are laid down in section 50 of the Sudan Penal Code, 1925. Although the Indian Penal Code is the precursor of the Sudanese Code, the draftsman of the Sudan Penal Code adopted a completely different phraseology in section 50 which provides as follows:

> "No act is an offence which is done by a person who at the time of doing it did not possess the powers of, appreciating the nature of his act, or controlling them by reason of permanent or temporary insanity or mental infirmity".

We will now examine the Salient features of this provision.

---

11. Seidman, R.B. Op. Cit. P. 48

.../74

According to professor Alan Gledhill, the phrase "permanent or temporary insanity or mental infirmity" covers every form of mental illness or unsoundness of mind from whatever cause, defect or disease[14]. The abnormality of the mind, should have prevented the accused from either appreciating the nature of his acts or controlling his act, in order to excuse the act under section 50 of the Sudan Penal Code.

In interpreting the phrase "appreciating the nature of the act", the Sudanese courts have been expressly warned not to whittle down the scope of the phrase by restricting its interpretation solely to the physical nature of the act as the case is under the M'Naghten rules[15]. The same Caveat was sounded by Abu Rannat C.J. in Sudan Govt. v. Mousa[16] when he said:

> "Our law is different from Indian and England in detail although the result may be the same. For example, we donot recognise the English and Indian test of lack of knowledge that the act is wrong or contrary to law". 17

---

14. Gledhill, A (1963) The Penal Codes of Northern Nigeria and the Sudan, Sweet and Maxwell, London, P. 99. See also: Krishna Vasdev (1978) Law of Homicide in the Sudan Butterworths; London P, 85 and Tatai, E.A. (1966) "Insanity and Criminal responsibility" SLJR P. 238.
15. Criminal Circular No. 21, reissued on June 15, 1952.
16. (1958) S.L.J.R. 1
17. Ibid at P. 2.

.../75

In Mousa's Case, the phrase was interpreted to mean incapacity of "appreciating the elementary principles which make up the heinous and shocking character of the result" [18].

In Sudan Govt. v. Mohamoud Shaibo[19], the accused was an eccentric recluse, a student of the Quoran, living on charity and generally regarded as mentally retarded. He barked at night and exhibited other forms of abnormality. On the day of the Crime, a gang of boys came to his house and threw dust at him. He killed one of them by smashing his head with a stick. When arrested, he said: "Is it of any moment to have killed the son of a muslim no bigger than a bird?" He was able to understand proceedings at his trial but the court held that he had killed the deceased while of unsoundmind; so he was not criminally responsible.

It would appear that cases of delusions are covered by the phrase "appreciating the nature of the act". For example, a person owing to temporary insanity may believe that a determined attack is being made on his life by armed men and thereupon kills a defenceless man by stabbing him.

---

18. Vasdev, K. Op. Cit P. 122.

19. Unreported Case before major Court, Kordofan, Sudan, 1939. Cited by Allan Gledhill at P. 100.

.../76

Although such a person may clearly appreciate the physical nature of his act, he does not appreciate the shocking quality of his act. For example, in Sudan Govt v. Gabra Dafalla[20], the accused was bitten by a snake. As a result of the incident he became terribly sick and thereafter at frequent intervals, had paranoiac delusions that enemies wished to beat and kill him. Possessed by such delusions, he killed a man and wounded others. It was held that he was not guilty by reason of insanity.

The phrase "did not have the power of controlling his acts" imports expressly the defence of irresistible impulse into section 50 of the Sudan Code. In Sudan Govt. v. Mousa,[21] the accused who suffered from delusions that his co-vilagers wanted to kill him, wandered about until he got to another village where he set fire to a hut. When accosted, he stabbed to death a man before he was over powered. It was held that the accused acted under uncontrollable impulse and was thus not responsible for his act.

By importing the concept of irresistible impulse, the Sudan Penal Code provision on insanity is an advancement on the M'Naghten Rules as well as section 51 of the Nigerian Penal Code.

---

20. (1961) S.L.J.R. 32
21. Supra.

.../77

In the United States of America, majority of the states adopted the M'Naghten test as the basis of the defence of insanity. Over the years, however, many of the states adopted the irresistible test as an additional reason for absolving an accused from criminal responsibility. Despite the formidable assault upon them, it would appear that the M'Naghten Rules have been firmly established in the United States. This fact was noted by the United States Supreme Court in Leland v. State of Oregon[22], when it declared:

> "the science of Psychiatry has made tremendous strides since that test was laid down in M'Naghten's case; but the progress of science has not reached a point where its learning would compel us to require states to eliminate the right - wrong test from their Criminal law. Moreover, the choice of a test of legal sanity involves not only scientific knowledge, but questions of basic policy as to the extent" [23].

Apparently undeterred by the pronouncement of the Supreme Court, some new rules have been formulated either by case law (as the Durham rule in the district of Columbia) or by statutes (as in vermont and Illinios). In this, dissertation, only the Durham rule and the rule formulated by the American law institute model Penal will be examined.

---

22. 343 U.S 790 (1952).
23. Ibid at P. 800.

.../78

On July 1, 1954, the Court of Appeal of the District of Columbia, unanimously and unequivocally repudiated the classic M'Naghten test in U.S v. Durham [24]. The English test was rejected on the ground that:

> "It does not take sufficient account of psychic realities and scientific knowledge and is based upon one symptom and so cannot validly be applied in all circumstances". 25

The Court also noted that:

> "Medico - legal writers in large numbers present convincing evidence that the right-wrong test is based on an entirely obsolete and misleading concept of the nature of insanity". 26

The Durham rule simply provides thus:

> "A man is not criminally responsible if his unlawful act was the product of mental disease or mental defect".

This new formulation broadened the grounds of the insanity plea and has been wryly referred to as the great romance between law and psychiatry. Although the new formulation caused a stir in the United States, several states have refused to accept it as a substitute for the M'Naghten test.

---

24. 214 F. 2d 862 (1954); 45 A.L.R 2d 1430.
25. Ibid.
26. Ibid at P. 1441 see Opas P. Op.Cit p. 11 See also "Lay M'Naghten's Ghost" Vol. 29 Australian Law Journal P. 3.

.../79

The Durham rule has been criticized chiefly for creating a legal morass as psychiatrists dominate trials with conflicting evidence as to what will constitute a "mental disease" or "mental defect" under the rules.[27] Thus, it may be taken that the valiant attempt of the Judges in Durham's Case to upset the M'Naghten Rules has failed.

The American Federal Court recently applied the modern fusion of the M'Naghten and irresistible impulse test in the Hinckley Case[28]. On the trial of John Hinckley Jnr. for attempted assassination of President Ronald Reagan of the United States, the facts showed that the accused shot the president apparently to impress his delusional love object a teenage film star. Psychiatrist testimony showed that the accused suffered from "process schizophrenia". Thus, he knew that shooting the president was illegal, but he was unable to appreciate what he was doing. The Court held that he was not guilty by reason of insanity.

The model Penal Code which was approved by the American law institute in 1961 and subsequently enacted into legislation in the states of Vermont and Illinios, provide new legal standards by which Criminal responsibility can be ascertained

---

27. Newsweek international magazine May 24, 1982.
28. See the following issues of the Newsweek international: April 13, 1981; April, 5 1982; May 24, 1982; July 5, 1982 and September 20, 1982.

.../80

one notable feature of the Code is that it departs substantially from the traditional English formulation which influenced the draftsmen of the Nigerian Criminal and Penal Codes.

Section 4.01 of the model Penal Code provides:

> "1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
>
> 2. The term 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct".

Apart from the elegant drafting, the Code specifically excludes abnormality manifested by only anti-social conduct from the meaning of "disease or defect". Unlike the Durham rule, it has provided with certainty, the legal standards by which legal insanity can be ascertained.

The model Penal Code clearly avoids the controversy surrounding the concept of irresistible impulse by using the phrase "capacity to conform his conduct to the requirement of the Law". The model Penal Code provision is more humane than

.../81

both the M'Naghten Rules and the Nigerian Codes as it only mentions "lack of substandtial capacity" and not total incapacity. The use of the term "appreciate" also affords a broader scope for expert testimony than what obtains under the M'Naghten Rules "Know" and "understand" as reflected in section 28 of the Nigerian Criminal Code.

On the whole, the model Penal Code can be said to be a manifestation of the direction in which judicial and legislative thoughts are currently directed.

.../82

C H A P T E R V

PROOF OF INSANITY: EVIDENCE AND PROCEDURE

1. Trial of the issue of insanity.

In Criminal Procedings, the question of insanity of an accused may come up at two stages, namely:-
(a) at the time of the commission of the offence charged; or
(b) at the time of trial (that is, on arraignment). The distinction between the between the two must therefore be borne in mind and kept in view for thorough appreciation of the subject.

Insanity upon arraignment.

This relates to the fitness of an accused person to understand the charge against him and enter a plea thereto or to conduct his defence in a rational manner, or even to brief connsel to argue his case. It is important to note that the matter here is more in the real of Criminal Procedure than substantive criminal law. The procedure to be followed in investigating the unsoundness of mind of an accused person on arraignment is governed by sections 320 - 325 of the Criminal Procedure Code[1] which provisions are identical with section 222 - 230 of the Criminal Procedure Act.[2]

---

1. Cap. 30 Laws of the Northern Region of Nigeria, 1963
2. Cap. 43 Laws of the Federation and Lagos, 1958.

.../83

Upon arraignment, the question of the accused's unsoundness of mind can be introduced either by the prosecution or the defence. Also, the Court could Suo moto infer unsoundness of mind from the appearance and conduct in Court of an accused brought before it[3]. For example, in Orshior Kuse v. State,[4] the accused at his trial for culpable homicide punishable with death, had merely stated in his defence: "I cannot remember everything that happened on that day except the killing". The issue that fell to be decided on his appeal against conviction, was whether or not the trial Judge should have investigated the unsoundness of mind of the accused. The Supreme Court held that the appellant's statement was not sufficient to require the trial Judge to carry out an investigation under section 320 of the Criminal Procedure Code.

It should be noted also that the issue of an accused's unsoundness of mind upon arraignment is a matter of fact to be ascertained by the Court and here, the certificate of a medical officer can be received as evidence[5]. The Court is however not bound by such certificate[6].

---

3. See Section 223 C.P.A and Section 320 C.P.C.
4. (1969) N.M.L.R. 153.
5. R v. Ogor (1961) 1 All N.L.R 70 following the English decision in R v. Podola [1960] 1 Q. B. 325
6. Queen v. Madugba (1958) 3 F.S.C 1.

.../84

In Ijewerewen v. State[7], the accused at his trial for murder was examined by a psychatrist after the close of the prosecution's case. The defence opened without a report from the psychiatrist as to the fitness of the accused to stand trial. On appeal, the conviction of the accused was affirmed on the ground that the irregularity did not occasion any miscarriage of Justice. However, the supreme court reiterated that the proper procedure to be followed in investigating the facts of the unsoundness of mind of an accused, is the mandatory provision of section 223 of the Criminal Procedure Act.

The investigation of unsoundness of mind at the time of trial includes also the examination of even persons who are not insane in the legal sense, but who by reason of some physical or mental condition, cannot follow the proceedings and thus, are unable to make a proper defence. In Paul Eledan v. State[8] the accused was medically certified fit to stand trial. The accused also showed by his conduct in court that he could distinguish between giving evidence on oath and making an unsworn statement although his statement appeared incoherent.

---

7. (1983) 3 S.C. 239.
8. (1964) 1 All N.L.R 146.

.../85

The trial Judge, however, ruled that the accused was feigning incoherence. On appeal, it was hold that the trial judge acted rightly in declining to follow the procedure laid down in section 223 of the Criminal Procedure Act in relation to insanity.

Where the Court finds as a fact that the accused is of unsoundmind, the court shall suspend the trial until such a time when the accused is fit to continue with the proceedings. If the offence charged is bailable, the Judge may order the release on bail of such an accused person upon sufficient security being given that he would be properly taken care of and will be available at any subsequent date fixed for hearing. In all other cases, especially where a verdict of not guilt by reason of insanity is entered, the judge shall report the case to the Governor who after considering the report, may in his discretion order that the accused be confined in an asylum or other suitable place of custody[9].

---

9. Section 225 of the Criminal Procedure Act.

.../86

Insanity at the time of the Commission of the offence

This is the sense in which the greater part of the literature on the subject is predicated. The plea in this sense is recognised at common law and codified in section 28 as well as section 51 of the Criminal and Penal Codes respectively.

In this usual sense, the plea of insanity is to the effect that as a result of unsoundness of mind from which the accused suffered at the time of commission of the offence charged, he was unable to understand the nature of his act and therefore is not criminally responsible[10].

It is important to note that in order to establish a defence of insanity under section 28 as well as section 51 of the Criminal and Penal Codes respectively, it is the state of mind of the accused at the time the offence was committed that is relevant[11].

Generally, it is immaterial if the accused was of unsoundmind before or after the act charged although such evidence may corroborate the fact that the accused was probably insane at the time of commission of the offence.

---

10. See Chapters 2 & 3 for detailed discussion on the subjection.

11. Ngene Arum v. State (1979) 11 S.C. 91

.../87

For instance in Richard Willie v. State[12], the accused apparently under a deluded belief that his mother had poisoned him with witchcraft, attacked and killed her. His defence was insanity. Medical evidence showed that the accused was quite normal on observation after the deed although he showed traits of abnormality at the time of his trial. It was held that to avail himself of the defence of insanity, it is not sufficient for the accused to establish that he was mentally abnormal at the time of his trial, he must go further to show that at the time of doing the act complained of, he was of unsoundmind within the meaning of section 28 of the Criminal Code.

Where the defence of insanity succeeds under both section 28 of the Criminal Code and Section 51 of Penal Code, it Creates a general immunity from responsibility in respect of the offence charged[13]. The Court shall record its finding that the accused did the act charged, but that he was at the time of doing it of unsoundmind and, therefore, not criminally responsible[14].

---

12. (1968) N.M.L.R. 213. See also Sudan Govt'. v. Adams (1958) S.L.J.R 2

13. Makosa v. State (1969) 1 All N.L.R 363. See also Oviefus v. State (Unreported) S.C. 74/1983 delivered on October 19, 1984

14. See Section 229 C.P.A and Section 327 C.P.C.

.../88

The proper verdict to enter is, "not guilty by reason of unsoundness of mind" and the appropriate order to make is that the accused should be confined at a place considered fit or desirable at the Governor's pleasure[15].

In Kayode Adams v. D.P.P for the Federation,[16] on a charge of attempting to kill Professor Biobaku, the the Vice-Chancellor of the University of Lagos, the trial court found that the accused committed the act whilst insane. The issue that fell to be decided on appeal was the interpretation of the words - "a person is not criminally responsible" - in section 28 of the Criminal Code. The Supreme Court construed the words as connoting that the accused was not guilty of the offence charged and must therefore be acquitted. The Court, however, reiterated that section 28 of the Criminal Code must be read with section 229 of the Criminal Procedure Act which enjoins the Court upon such acquittal, to state whether the accused committed the act charged or not. If he committed the act, it was necessary to confine him.

---

15. Ngene Arum v. State (supra). see also section 230 C.P.A and Section 328 C.P.C.
16. (1966) N.M.L.R. 111.

.../89

Similarly, in State v. Shittu[17], the trial court presided over by Gbadeyan J. of the Ilorin High Court, found the accused who had killed his mother, not guilty on grounds of insanity under section 51 of the Penal Code. The Judge, however, ordered that the accused should be confined at Aro Psychiatric Hospital, Abeokuta, at the Kwara State Governor's Pleasure. The Court also directed the Hospital authorities to furnish the Governor with regular report on the patient at six months interval.

It would appear that the justification for confining a person acquitted on grounds of insanity lies in the need to safeguard the public from an insane person's criminal propensities. Such a person is, therefore, sent to hospital where he can be suitably looked after[18]. However, it is respectfully submitted, that this method of disposal of persons found to be unsoundmind is quite illogical. We have seen for instance, that an accused person must be sane in order to stand trial. It follows, therefore, that at the beginning of his trial, the accused was of soundmind, regardless of his condition at the time of committing the offence for which he has been acquitted on grounds of insanity.

---

17. (Unreported) Suit No. KWS/6c/84 delivered on Feburary 26, 1985.
18. See generally Onyeama v. State (1975) S.C. 27.

.../90

The pertinent question therefore is this: If an accused is of soundmind at the end of trial, why should he be regarded as too dangerous to be set free? Put differently, what is the justification in incarcerating the accused simply because at some time in the past, he was found not to be responsible for his act?

On the whole, the consequence of an acquittal on the ground of insanity tends to remind us that we still have a long way to go in our handling of problems of treatment of persons regarded as insane.

2. The burden of Proof.

The presumption of innocence is a fundamental aspect of all acquisitorial systems of justice in all common law Countries (including Nigeria). This presumption of innocence in favour of the accused person, therefore, places the burden of proof in Criminal Cases on the prosecution to prove the guilt of an accused person beyond reasonable doubt. The presumption of innocence is entrenched in section 33(5) of the 1979 constitution of the Federal Republic of Nigeria and it provides thus:

.../91

> "Every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty.
>
> Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any person the burden of proving particular facts".

The burden of proof in Criminal Cases is specifically provided for in section 140 of the Evidence Act[19]. This section appears to have codified the much-quoted dictum of Lord Sankey L.C. in Woolmington v. D.P.P.[20] to the effect that:

> "... throughout the web of English Criminal Law, one golden thread is always to be seen, that is, the duty of the prosecution to prove the prisoner's guilt. If at the end of and on the whole of the case there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner, then the prosecution has not made out the case. No matter what the charge, or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law and no attempt to whittle it down can be entertained"21.

---

19. Cap. 62 Laws of the Federation and Lagos, 1945
20. [1935] A.C. 462.
21. Ibid at P. 481.

.../92

One conspicuous exception to the general rule enunciated in Woolmington's case as well as in our codified Evidence Act is the rebuttable presumption of sanity contained in section 27 of the Criminal Code. The presumption of sanity, in effect, places the legal onus on the accused to satisfy the Court on credible evidence that he was insane at the time he committed the offence charged. This is codified in section 140(3)(c) of the Evidence Act and is also settled in a plethora of judicial decisions[22]. For the case of reference, section 140(3)(c) of the Evidence Act is reproduced below:

> "Nothing in section 137 shall affect the burden of proof placed on accused person to prove a defence of intoxication or insanity".

---

22. See the following cases on Onus of Proof in insanity cases:- R v. Nasamu 6 W.A.C.A 74; R v. Inyang 12 W.A.C.A 5; R. v. Omoni 12 W.A.C.A 511; R v. Ashigifuwo 12 W.A.C.A 389; R v. Echem 14 W.A.C.A 158; R v. Dim 14 W.A.C.A 154; R v. Yayiye Kadi-Kadi (1957) N.R.N.L.R 207; R v. Yaro Biu (1964) N.N.L.R. 45; Iyang v. State (1972) 8-9 S.C. 283; Okunnu v. State (1977 3 S.C. 51, Nkanu v. State (1980) 3-4 S.C. 1: Oghome v. State (1982) 105 C. 36; Oghenevweta v. State (1982) 1-2 S.C. 130; Akanbi v. State (1982) 6 S.C. 71; Enaholo v. State (1982) 6. S.C. 76; Ughiaka v. State (1984)

.../93

Perhaps, we should note here that the Penal Code does not specifically provide for the presumption of sanity like section 27 of the Criminal Code. However, it is humbly submitted, that the presumption equally applies under the Penal Code by virtue of the provision of the Evidence Act.[23]

Since the defence of insanity invariably involves an acceptance of responsibility for the act complained of, the Onus of proof is not discharged merely by a denial of knowledge or by mere mention of the word[24]. In all cases where legal insanity is set up as a defence, it is material to consider the circumstances which preceded, attended or followed the Crime charged[25]. For instance, in State v. Akpa Omoniyi[26], the accused went beserk and killed his wife. Evidence adduced at his trial indicated that he was found to be non compos mentis at the time he was arrested after the killing. The Court held that on the evidence showing that the accused was found to be insane immediately after the commission of the offence, and upon the whole evidence before the Court, there was no other conclusion but that the accused was most probably insane at the time he committed the offence.

---

23. Criminal Law in N. States of Nigeria op. cit. P. 221.
24. Nkanu v. State (1980) 3-4 S.C. 1
25. R v. Nasamu 6 W.A.C.A 74
26. (1971) N.M.L.R. 269.

.../94

Similarly, in State v. Akinbamiwa[27], the accused was charged with theft of a child. She pleaded insanity. Rejecting her plea, it was held that for the plea of insanity to prevail, the accused must be shown to have been in the state decribed in section 28 of the Criminal Code at the time of doing the act, although, in order to arrive at a finding of the state of mind of the accused at that time, evidence of her previous, contemporaneous and subsequent acts and behaviour were relevant. As to the meaning of "contemporaneous", it is submitted, that the word must be construed widely to cover acts done immediately after the act charged and not merely acts that are simultaneous with the act constituting the offence charged.

It has been held that mere vague suggestions of abnormal behaviour on the part of the accused some years before the date of the alleged offence will not satisfy the requirements of the law[28]. Also, where there is evidence of premeditation on the part of the accused, the defence of insanity will not avail such an accused. This principles is clearly exemplified in Robert Egbedon v. State[29] where the accused in furtherance of expressing his

---

27. (1967) N.M.L.R. 355.
28. Sanusi v. State (Unreported) S.C. 49/1983 delivered on October 19, 1984.
29. (1983) 8 S.C. 5

.../95

grievance that the family had given him a bad wife, way-laid his uncle-in-law and stabbed him to death. He pleaded insanity. Rejecting the plea, the Court held that insanity defence is not available to an accused in a case of premeditated murder.

Similarly in State v. Babakebe[30], the accused who was childless, was a junior wife to the deceased's father, who on the day of the incident had a bitter quarrel with the deceased's mother. She went to the street to wait for the six year old deceased who was returning from school. The accused led the deceased all along, having motherly discussions with the deceased, who carried the accused's bag containing the knife later used in stabbing the deceased. They both took a taxi to a destination some kilometres away from the town and, in the bush, the accused stabbed the child leaving her there to groan and die. The accused tried to conceal the crime and at her trial, set up the defence of insanity. The trial Judge, Ekundayo J, held that the defence of insanity will not avail the accused since there was evidence of pre-meditation on the part ofthe accused.

---

30. (1975 - 78) KW, L.R 5.

.../96

Also, in State v. Yakubu Kure[31], a plea of insanity was rejected because the court found that the accused acted with pre-meditation. The accused in the case, was charged with culpable homicide punishable with death. The evidence led was that the accused had quarrelled with the deceased's father and sometime later, he took a stick and hit the deceased on the head, as a result of which death ensued. The accused was convicted of the offence charged.

The defence of insanity will equally not avail a person who acted in revenge[32]. For instance, in Akhidenor v. State[33], the accused, apparently obsessed with the thought that his mother and brother were responsible for his impotence through witchcraft, shot and killed the brother. He pleaded insanity which was examined and rejected by the trial court. His appeal was dismissed and the Supreme Court noted that there was no doubt that he was obsessed by his importence, and it may be that his mind was in some measure affected by this obsession; but there was not evidence on which the trial judge could have found that the appellant was insane within section 28 of the Criminal Code.

---

31. (Unreported) Case No. KWS/LO/3C/81 delivered on Feburary, 2 1983.
32. Uzoyare v. State (Unreported) S.C. 118/1984 delivered October 18, 1984.
33. (1966) N.M.L.R 136. See also, Willie v. State (supra) and Anyim v. State (supra).

.../97

It is submitted that this case was correctly decided, for it smack of revenge, in which case, the normal rules on private defence and mistake must apply.

The presumption of sanity applies with equal force to a person who is shown to have lucid intervals. The law presumes the offence committed by such a person, to have been so committed during his lucid moments, unless it is patently clear that he acted whilst in a deranged state of mind. In State v. Yusuf Idown[34], the accused killed one Jimoh because he feared that the deceased would report him for stealing maize. At his trial, the accused admitted the killing but pleaded insanity. Two medical reports tendered as evidence indicated that the accused was of an abnormal disposition although according to one of the reports, he was prone to having lucid intervals. The report failed to express whether the accused at the time he committed the offence charged, was in one of such lucid intervals. The Court found the accused guilty as the report was not helpful in sustaining his plea.

---

34. (1971) N.N.L.R. 93.

.../98

3. Quantum of Proof.

We now come to the vexed question of quantum of proof where the defence of insanity is raised. Again, a long time of judicial authorities relating to the issue of insanity hold that the quantum of proof is not higher than that which rests upon a plaintiff or a defendant in Civil Proceedings[35]. In other words, the standard of proof is not as high as that cast on the prosecution. It is not proof beyond reasonable doubt, but it is proof of reasonable probability, proof sufficient to create a doubt in the mind of a fair-minded judge as to the insanity of the accused[36]. It should be noted also, that where insanity is being established by the prosecution rather than the defence - for whatever reason - the quantum of proof is beyond reasonable doubt.

In Richard Omoniyi v. State[37], the accused at his trial for murder admitted killing the deceased but pleaded insanity which the trial court examined and rejected.

---

35. See generally: R v. Carr-Briant [1943] K.B. 607; R v. Sodeman [1936] 2 All. E.R. 1138; R v. Nasamu 6 W.A.C.A 74, R v. Wangara 10 W.A.C.A 236; R v. Echem 14 W.A.C.A 150, R v. Yaro Biu (1964) N.N.L.R 45.

36. See also: Attorney-General v. Upetire 1964 N.M.L.R. 13; R. v. Onakapoya (1959) 4 F.S.C. 150; Okpokoro v. State (Unreported) S.C. 35/1968 delivered on 5 July, 1968.

37. (1978) 5 F.C.A. 28.

.../99

His conviction was affirmed on appeal, and the Court of appeal per Nnaeweka - Agu J.C.A' succintly reiterated the position on standard of Proof in insanity cases thus:

> "In the present state of our law not only is a person presumed sane until the contrary is proved but also, when a person puts a defence of insanity, the Onus of proof is clearly on him. Although the burden of proof is discharged not on proof beyond reasonable doubt but, on proof that the accused was probably insane at the time of the commission of the offence".

The learned judge then concluded thus:

> "We think that even this lower burden of proof was not discharged in this case and cannot, indeed be discharged by the appellants unsupported statements and evidence in court to the effect that he was mad at the time material to the case..."38

The following pertinent question may be asked: is his lower burden of proof placed on the accused discharged if there is evidence from the prosecution's case suggesting the accused's mental abnormality? On this question,

---

38. Ibid at P. 33

..../100

the dictum of Coker J.S.C in Makosa v. State[39] is quite germane. His Lordship said, inter alia:

> "It may well be, as the learned trial judge stated, that section 140(3)(c) of the Evidence Act places the Onus of establishing insanity on the accused person. That however does not mean that an accused must necessarily call evidence to do so for it is not infrequently possible for an accused person to extract from the prosecution witnesses such evidence as would be sufficient to discharge the Onus which the law has placed on him in his respect"[40].

4. Methods of Proving Insanity.

As we have seen from the preceding discussion, pleading insanity is quite a different thing from proving it. In order to discharge the burden of proof with which it is saddled by section 140(3)(c) of the Evidence Act, the accused who raises the defence of insanity may employ the following methods, namely:

(a) Lack of Motive;

(b) The testimony of parents and relations of the accused; and

(c) Expert opinion.

---

39. (1969) 1 All N.L.R 363.
40. Ibid at P. 366.

.../101

Before examining each of these methods, it is important to note at the outset that the courts have held in a number of judicial decisions that the question of insanity of an accused person ought not to be determined on the evidence of the accused person himself. As a matter of fact, the probative value attached to such evidence by the Court, is rather low[41]. For instance in Babalola Ogunsuji v. State[42], the accused led the deceased who was blind into the bush and without cause, inflicted mortal matchet wounds on his neck as a result of which he died. The accused raised the defence of insanity which the trial judge examined and rejected. On appeal to the Supreme Court, it was held that the trial judge rightly rejected the plea as there was no other evidence of mental illness adduced by the defence apart from the statement of the accused ipse dixit that he thought he was cutting a deer at the time he committed the dastardly act. We will now examine each of the methods of proving insanity mentioned earlier on.

---

41. See generally Makosa v. State (Supra).
42. (1983) 1 S.C. 7, Also see: Richard Omoniyi v. State (Supra).

.../102

Lack of Motive.

Generally, there is a tendency among some counsel to be casual in presenting a case of insanity on behalf of accused persons. Some tend to treat the matter as if all that was required to establish the defence of insanity, was to allude to insanity as the accused's defence and then proceed to show how unreasonable and motiveless the action of the accused had been. The Court is, therefore, left with the task of infering that anyone guilty of such behaviour as the accused could not, but be insane.[43] It is respectfully submitted, that such approach to the defence of insanity is patently wrong and ignores the fact that motive is usually immaterial in determining criminal responsibility unless otherwise expressly declared.

The Principle that absence of motive is not a sufficient ground upon which mania can be inferred has been crystallized in a plethora of judicial decisions where the courts have consistently maintained that insanity is not to be inferred from the motivelessness or unreasonableness of the action of the accused[44].

---

43. See the dictum of Aniagolu J.S.C. in Sanusi v. State (Unreported) S.C. 49/1983 delivered on 19 October, 84.

44. See generally: R v. Carr-Briant 29 C.A.R. 76; R v. Steane /1947/K.B. 997; R v. Inyang 12 W.A.C.A 5; R v. Ashigifuwo 12 W.A.C.A 389; Rafiu Salako v. A - General (1965) N.M.L.R. 107; State v. Akinbamiwa(1967) N.M.L.R. 355; Ughiaka v. State (1984) 2 S.C. 1.

.../103

The justification for this is that absence of motive can hardly furnish a safe, much less a legal, basis to support a claim of insanity. For example, in Philip Dim v. Queen[45], the accused left his room in the early hours of the morning and went over to his wife's room where he inflicted severe injuries on her with a pick axe-head. The wife subsequently died from the injuries. At his trial for murder, his defence was that he suffered from a "black-out" at the time of the offence. Jibowu S.P.J. made the following pertinent remark as regards the issue of motive:

> "We agree that the apparent absence of motive was not necessarily an indication of insanity in the appellant as there might have been, infact, a strong motive for the murder known only to the appellant"[46].

However, where there is evidence indicative of insanity, the absence of motive may become relevant to the point at issue and material to it[47]. For instance, in Queen v. Gabriel Adeyefa[48], the accused struck a ten month old boy with a matchet killing him for no apparent motive. At his trial, he pleaded insanity which was upheld on the ground that there was sufficient evidence on which the defence of insanity could be set up.

---

45. (1952) 14 W.A.C.A 154.
46. Ibid at P, 157
47. Ukadike v. State (1973) 6 S.C. 17
48. (1962) W.N.L.R. 235.

.../104

The testimony of parents and relations of the accused.

Where a killing is shown to be motiveless, the testimony of the parents or relations or even other persons who know the antecedents of the accused may be accepted to depict the change that has come upon the accused, and thus, assist the trial judge to come to an appropriate conclusion that the burden of proof of insanity placed by the statute, has been discharged. In R v. Edem Udo Inyang[49]. evidence of relations of the accused that he behaved abnofmally before or after the killing weighed heavily on the mind of the judge in finding him not guilty on ground of insanity. The Court held, per curiam, that the evidence of insanity of ancestors or blood relations of accused is equally admissible.

Similarly, in R v. Ashigifuwo[50] where the accused struck at an old woman with an axe killing her, the relations of the accused testified that prior to the killing, the accused never ate his food or slept in his compound. There was also evidence from the warder of the prison where the accused was detained that the accused laughed irregularly. It is of course needless

---

49. (1946) 12 W.A.C.A 5
50. (1948) 12 W.A.C.A 389

.../105

to emphasise that the testimony of parents and relations of the accused should be received with care as such evidence of "madness" may infact be manufactured to serve their ends namely: Preventing the accused from paying the ultimate price for committing a capital offence.

Expert Opinion.

It is trite knowledge that opinions of third persons as to the existence or non-existence of a fact in issue or relevant fact is inadmissible in evidence because, a witness is only allowed to testify to facts known to him.[51] However, one of the recognised exceptions to this general rule is that opinions of experts may be relevant and admissible in evidence by virtue of section 56 of the Evidence Act. One can, therefore, commence on the premise that the fact that the evidence of psychiatrist is receivable in the inquiry into insanity is beyond question because it is expert opinion. The problem that has occupied the time of the court, however, relates to the weight to be attached to such psychiatrist testimony.

---

51. Aguda, A.A. (1978) Law of Evidence in Nigeria Sweet and maxwell, London. P. 86.

.../106

Even though psychiatrist evidence is quite desirable in an inquiry into insanity, the dearth of trained experts in the field of psychiatry makes the task quite ardious. For example, it is practically impossible for the fity - six trained psychiatrists in Nigeria to deal with all cases involving insanity in such a large country as Nigeria with a teeming population of about 100 million people.[52] And since insanity is a question of fact, it is not uncommon to see courts hold that psychiatrist testimony is not necessarily essential.[53]

Aside from this, there has also been along standing tension between law and psychiatry on the following vexed questions:

(a) Is insanity a medical or legal concept?

(b) Is it possible to have a demarcation of duties between law and psychiatry in the inquiry into insanity?

---

52. The Health Minister, Professor Ransome-Kuti in an address at the graduation ceremony of the School of psychiatry Nursing Aro, Abeokuta, decried this state of affair. See Vanguard 18th Feburary, 1985.

53. James Anyim v. State [1983] 1 S.C.N.L.R. 370

.../107

(c) What is the proper role of a psychiatrist in trials involving insanity?

The confusion as to whether insanity is a legal or medical concept is clearly exemplified in the following statement of a renowned psychiatrist:

> "When lawyers ask me whether the defendant in the dock is in my opinion insane, I must candidly state, if I am to remain true to my Oath first, that I do not under stand the question, and second, that since I don't understand the question, I do not know whether the defendant is insane or not".54

Thus, it is quite understandable why psychiatrists called upon to express opinion as to the mental state of an accused at the time he committed the offence, see themselves acting outside their scientific function and a pawn in a legally sponsored morality play[55].

At any rate, it is crystal clear that English as well as Nigerian Courts have treated insanity as a legal concept. For example, the test of insanity in our Penal Statutes are couched in legal rather than medical terms. Thus, to exempt

---

54. Zilborg (1943) Mind Medicine and man P. 272 See also: Guttermacher, "The Psychiatrist as an Expert witness". 22 University of Chicago Law Review. P. 325.

55. Oppenheimer, (1909) The Criminal Responsibility of lunatics, London. P. 241.

..../108

from criminal responsibility under our Penal Statutes, not only must the accused show that he was suffering from a mental abnormality, but he must also show that such abnormality prevented him from understanding the nature of his conduct.

Writing on the dilemma in the partnership of law and psychiatry in the inquiry into insanity, Sir Fitz James Stephen said:

> "It appears to me that the line which ought to be drawn between the departments of law and medicine in this matter is theoretical, and ought to be in practice, perfectly clear. The question 'what are the mental elements of responsibility?' is, and must be, a legal question. It cannot be anything else, for the meaning of responsibility is liability to punishment; and if criminal law does not determine who are to be punished under given circumstances it determines nothing".

He then concludes thus:

> "I see no reason why under the law as it stands, this division of labour could not be fully carried out"56.

---

56. History of Criminal Law of England (1883) vol. II Page 182.

.../109

A some what similar view was expressed by another Psychiatrist thus:

> "I think it would be a calamity if the deposition of criminal cases would be taken out of the hands of judges and given into the hands of Psychiatric and other experts"57.

On the whole, it would appear that a demarcation of the duties between lawyers and Psychiatrists seems quite desirable to avoid confusion. For instance, it is not uncommon to see a Psychiatrist come to the conclusion after examining an accused, that he is insane, instead of explaining the mental illness and whether or not the accused appreciated or controlled his acts at the time of the offence[58]. Perhaps, this type of situation accounts for some judicial dicta of English as well as Nigerian Judges which pointedly remark that it is their exclusive preserve to pronounce on the issue of responsibility. For instance, in R v. Rivett[59] and English judge said:

---

57. Wertham, "A psychiatrist look at psychiatry and the Law" (1953) 3 Buffalo Law Review P. 41 at 48.

58. Sudan Gov't v. Ishag (1958) S.L.J.R 1.

59. (1950) 34 C.A.R 87.

.../110

> "In considering whether a person is to be excused from the consequences of a crime on the ground of insanity, the question is not merely whether he was suffering from a defect of reason due to disease of the mind but whether the defect was such as to render him not responsible for his action. This issue is one to be determined by a jury and not by medical men of whatever pre-eminence"[60].

Writing on the danger in over-emphasising the role of the judge in the inquiry into insanity, Allan Milner has cautioned thus:

> "By insisting too possessively on their right to be the final arbiters of fact, the courts often run the risk of undermining the significance of psychiatrist testimony, reducing expert knowledge to the status of simiple opinion, and injecting the rational appreciation of events into an inherently irrational situation".[61]

In conclusion, it could be surmised that the interest of the Public will be better served by a co-operative attitude among the two professions in solving the issue of insanity. Dr. Aguda has rightly in our view, suggested

---

60. Ibid at P. 94. See also: De lestang Ag. F.S.F. in Madugba v. Queen (1958) 3 F.S.C 1 at 2 and Fatai-Williams J. in Attorney-General Werstern Nigeria v. Philip Upetire (1964) N.M.L.R. 13.

61. "M'Naghten and the witchdoctors; Psychiatry and Crime in Africa". Vol. 104 University of Penn. Law Review P. 1114.

.../111

that where there is expert evidence, which is unchallenged and uncontradicted by any other evidence, the court is bound to accept such expert evidence and act on it. On the other hand, where there is conflict in the opinions of experts, it is the duty of the court to come to a conclusion in the case by resolving such conflict, and can do so by rejecting the opinion of one or the other of such experts.[62] It is respectfully submitted therefore, that the ultimate solution seems to be in a multi-disciplinary approach involving the legal as well as the medical professions.

In this regard, it is therefore a welcome development to hear a judge pronounce thus:

> "For the defence of insanity to be available... the accused must establish that he is of unsoundmind, and here, medical evidence is of utmost relevance"[63].

---

62. Law of Evidence in Nigeria Op. Cit. p. 88.

63. Gbadeyan J. in State v. Shittu (unreported) Suit No. KWS/6c/84 delivered on 26 Feburary, 1985.

.../112

C H A P T E R VI

INSANITY AND COGNATE ISSUES

There are certain issues of responsibility which, stricto Sensu, do not come within the provisions of the insanity rules but are related to them in some respect with regard to the mental condition of the accused at the time of the Crime. We will now examine some of the notable issues namely: Automatism, Intoxication and the effect of lactation (Infanticide).

1. Automatism

The most prominent instances of mental abnormality negativing mens rea yet not amounting to insanity are those that are sometimes called involuntary acts but now more frequently go by the name: automatism or more fully, non-insane automatism.[1] Generally, it is a defence that the act or omission with which the accused is charged was involuntary. Where an act or omission to act is beyond the control of that person's mind, the situation is known as one of automatism[2], covering a wide range of unconsciousness, such as sleepwalking or somnambulism, coma, epileptic fit and hallucinations not amounting to insanity[3].

---

1. Williams, G. (1978) Textbook of Criminal Law, London,
2. Cross, J. and Jones, P.A. (1980 Introduction to Criminal Law, London..P. 92.
3. Bratty v. A - General for N. Ireland [1963] AC 386.

.../113

In Watmore v. Jenkins,[4] Winns J. described automatism thus:

> "This expression is no more than a modern catch - phrase which the courts have not accepted as connoting any wider or looser concept than involuntary movement of the body or limb of a person"[5].

In Bratty v. Attorney-General for Northern Ireland, Lord Kilmuir accepted the definition of automatism as connoting the state of a person who, though capable of action, is not conscious of what he is doing and it is a defence because the mind does not go with what is being done[6].

A cursory look at Judicial decisions on automatism, shows pointedly that the distinction between insanity and non - insane automatism is rather blurred and a times, confusing. This fact was alluded to by Lord Goddard C.J. in Hill v. Baxter[7] when he said:

> "it is obvious that such a defence is in effect, saying that the accused did not know or appreciate the nature and quality of his actions, it is getting near a defence of insanity"[8].

---

4. [1962] 2 Q B 572
5. Ibid at P. 576
6. Supra at P. 401
7. [1958] 2 W.L.R. 76
8. Ibid at P. 80

.../114

In distinguishing between insane and non-insane automatism, Professor Rupert Cross noted that the distinction between the two concepts has meant in effect, the difference between being kept in custody at the sovereign's pleasure and being allowed to go completely free[9]. This is so because a finding of insanity empowers the court to protect the society by securing the person of the accused eventhough he is acquitted of the offence charged. In the case of non - insane automatism, however, if the accused is able to show that his affliction is not associated with any formof mental abnormality, he is acquitted and the society is powerless against him The consequence of this is that a potentially dangerous patient is let loose on the community.

The distinction between insane and non-insane automatism was exhanstively treated in Bratty's Case. The accused in that case was convicted for the murder of a young girl. His defence was 'black-out. There was medical evidence that the accused suffered from psychomotor epilepsy. On appeal to the House of Lords, it was held that his affliction was caused by a disease of mind and as such his case wasone of insane automatism.

---

9. Cross, R "Reflections on Bratty's Case" Vol. 78 L.Q. Review 236.

.../115

The question may be posed have, is it right that someone who has been acquitted on ground of non-insane automatism should inevitably go free? Lord Denning in a much - quoted dictum in Bratty's case, answered the question thus:

> "It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of mind. At any rate, it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified privilege".

It is respectfully submitted, that a better way of tackling the problem would be to give judges power in all cases of successful plea of automatism , to order medical examination and treatment of the accused. One unfortunate consequence of the present practice is that most accused persons would naturally be reluctant to plead automatism ofthe insane variety.

The question, then arises, namely should the prosecution have a right to introduced evidence of an accused's insanity even against his wish? This question has been answered differently by jurists.

.../116

In R v. Charlson[10], Barry J. rejected the suggestion that the prosecution could introduce evidence of the accused's insanity against his wish. In that case, the accused was acquitted on various charges of causing grievous bodily grievous bodily hurt to his son because he had acted in a state of automatism due to a cerebral tumour. The trial Judge specifically directed the Jury that the case did not involve the defence of insanity since that defence had not been raised by the accused who was alone competent to do so.

At the other extreme are those who reject the approach of Barry J. in Charlson's Case. Professor Turner holds the view that the prosecution can bring evidence of insanity of an accused even where this is not specifically raised by his defence[11]. It has now become settled law in England that the issue of insanity can be raised by the prosecution or the judge where the accused person pleads automatism. This trend would appear quite laudable on grounds of policy. For instance, in R v. Kemp[12] where the accused was charged with inflicting grievous hurt on his wife at a time when he was unconscious caused by the effect of arteriosclerosis on his brain. The defence (relying apparently on the

---

10. [1957] 1 W.L.R. 317.
11. Kenny's Outlines on Criminal Law Op. Cit.
12. [1957] 1 Q.B. 399.

.../117

direction in Charlson's Case), asked for an acquittal on the ground that question of insanity was not raised by the defence of the accused. It was held that arteriosclerosis is a disease of mind and Devlin J. directed the jury to consider the question of insanity.

It is remarkable that the House of Lords in Bratty v. Attorney General for Northern Ireland, showed preference for the direction of Devlin J. in Kemps' Case. Lord Denning in his characteristic teleological manner, reasoned thus:

> "When it is asserted that an involuntary act is a state of automatism, the old notion that only the defence can raise a defence of insanity has now gone. The prosecution are entitled to raise it and it is their duty to do so rather than allow a dangerous person to be at large" [13]

The state of affair contemplated by Lord Denning raises the issue of the perennial conflict between the interest of the Community in protecting itself against the risk of repetitious violence and the interest in giving adequate treatment to persons who have been acquitted of crime. It would appear, that if pursued too vigorously, the view is capable of bringing about absurd consequences. The English Court of Criminal Appeal drew attention to this fact in R v. Quick[14] when it remarked thus:

---

13. Supra at P. 411.
14. /1973/ Q.B 910

.../118

> "Common sense is affronted by the prospect of a diabetic being sent to hospital when in most cases the disordered mental condition can be rectified by pushing a lump of sugar into the patient's mouth"15.

Perhaps, the proper course to follow in this type of situation, is for the accused to be medically examined along the line already cavassed above rather than detain a person acquitted of an offence, indefinitely at the Governor's pleasure.

Another important distinction between insane and non-insane automatism relates to the issue burden of proof. It is interesting to note that there is a remarkable disparity between the two concepts with regard to the question of burden of proof. In the case of insane automatism, the burden of proof (on balance of probabilities) is on the accused person, apparently, because of the rebuttable presumption of sanity under the law. However, in the case of non-insane automatism, the prosecution is saddled with the onerous duty of disproving automatism, although the evidential burden of introducing evidence of automatism lies on the accused person.

---

15. Ibid

.../119

This is akin to what happens when an accused raises an alibi to a criminal charge. The rationale for this, seems to lie in the need to severely scrutinize the defence of automatism, since it may be feigned easily. This fact was wittily alluded to by stable J. in Cooper v. McKenna[16] thus:

> "black-out is one of the first refuge of a guilty conscience and a popular excuse".

The consequence of the distinction between insane and non-insane automatism on the issue of burden of proof is rather anomalous. What the distinction means in effect is that whereas an accused who acted in a state of automatism due to psychomotor epilepsy must prove his case on the balance of probability, another accused who suffers from concussion due to a blow, need only raise doubt in the mind of the judge. It is respectfully submitted, that the distinction is needless and that in all cases, the defence should bear the burden of proof on balance of probabilities.[17]

---

16. [1960] qd. R 406.

17. This suggestion has judicial support in the decision of Charles J. in Ayinde v. R (1963) I All N.L.R 393 which put the burden of proof as in insanity, on the defence to establish automatism as probable. See generally; Aguda, A.A. (1982) Criminal Law and Procedure London. P. 484.

.../120

The defence of automatism will not avail an accused person if his condition was the foreseeable consequence of his own previous act. This principle permeates a number of cases concerning driving offences. In Kay v. Butterworth[18] a motorist was held to have been driving without due care and attention when he went to sleep at the steering wheel of his car, which was in motion. In R v. Scarth[19], it was held that if a driver of a motor car should fall asleep at the wheel without any prior warning of his inability to keep awake, and in circumstances where a reasonably careful driver would not have been aware that he was likely to fall asleep, and as a result of his so falling asleep, personal injury or death is caused to some other persons, no Criminal liability would attach to such a driver. Interestingly, it was held in Watmore v. Jenkins[20], that adiabetic driver, who, without fault, falls into a coma when driving, was guilty of dangerous driving when he crashed into a parked vehicle on the ground that there was no such a complete destruction of voluntary control as could constitute in law, automatism.

---

18. (1945) 61 T.L.R. 452. See also: Hill v. Baxter [1958] 1 K.B. 277.
19. [1957] S.T.R. Qd. 38
20. [1962] 2 QB 572.

.../121

Nigerian Position

The expression "automatism" does not appear expressly under the Criminal and Penal Codes. However, Section 24 of the Criminal Code provides thus:

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

It is respectfully submitted, that the expression "an act or omission which occurs independently of the exercise of will" appearing in section 24 of the Criminal Code, will cover cases of automatism since a person who acts in this state of unconsciousness cannot be held responsible, because the act must have occurred independently of the exercise of his will.

According to Okonkwo and Naish, the only discoverable Nigerian case on the subject of automatism is R v. Harner[21] where the accused who was involved in motor accident resulting in death, pleaded an epileptic attack. The learned trial judge Lambo J., held that the accusedwas was not guilty of the offence since he was deprived of control of his vehicle by the attack of epilepsy.

---

21 . (1964) L.L.R. 36

.../122

It is submitted that the proper verdict should have been that of not guilty by reason of insanity in view of the fact that epilepsy has been classified as a disease of the mind in Bratty's Case.

The Judicial gloss placed upon section 24 of the Criminal Code is strangely obscure. As a matter of fact, the reported litigation over the meaning has been all but nil. For instance, in Harner's Case, Lambo J. did not refer to section 24 of the Criminal Code. Perhaps, the dearth of judicial decisions on the subject is due to the fluidity of the concept, for the defences of insanity and intoxication could easily be pleaded where infact an accused ought to have pleaded automatism[22].

The Penal Code does not contain any provision similar to section 24 of the Criminal Code. It is a moot-point whether the phrase "unsoundness of mind" appearing in section 51 of the Penal Code, is broad enough to accomodate the concept of automatism. However, it has been suggested that automatism may be pleaded under the Penal Code as a residuary legacy of the Common Law.[23]

---

22. Criminal Law in N. States of Nigeria. Op.Cit. P. 251
23. Ibid

.../123

2. Intoxication.

The issue of the responsibility of persons committing offences while intoxicated is indeed quite complex especially with regard to the delineation of the boundary between temporary insanity and non-insane drunkeness.[24] Intoxication may result not only from the consumption of alcohol, but also includes a state produced by drugs or narcotics[25]. Legally, intoxication whether produced by alcohol or narcotics (for example, delirium Tremens) is of importance to the extent that it is regarded as negativing the mental element essential to the crime charged.

In the early days of the development of Anglo - American legal history, the act of becoming intoxicated was considered morally reprehensible. Thus, it was not considered a ground for exculpation from Criminal responsibility[26]. The harshness of the prevailing view at that time is typically exemplified by the following remark made by sergeant pollard in Reninger v. Fogossa[27].

> "If a person that is drunk kills another, this shall be felony and shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but in as much as that ignorance was occasioned by his own act and folly, he shall not be privileged thereby"[28].

---

24. Williams, G. Criminal Law: the Genral Part (1961) London P. 567.
25. See section 29 (b) Criminal Code.
26. Singh, R.U. "History of the Defence of drunkenness in English Criminal Law" Vol. 49. L.Q. Review p. 528. and "insanity and drunkenness" (1962) 23 Modern Law Review p. 238,
27. 75 E.R. 1
28. Ibid.

.../124

However, in the wake of reformation as a Penal philosophy in civilized legal systems, the need was felt to change the old rule which was undoubtedly harsh and inflexible. At the same time, care had to be taken because a general defence of drunkenness was capable of bringing about anti-social consequences which would ultimately cripple the administration of justice[29]. A compromise was invariably reached as it was realised that in certain cases, evidence might be admitted to negative intention required to establish criminal responsibility.

The rules concerning the defence of intoxication in Nigeria, are contained in section 29 of the Criminal Code as well as section 52 of the Penal Code. As a general rule voluntary intoxication is not a defence to an offence under both sections. This rule is however subject to the specific provisions of the codes in which the defence may operate to mitigate Criminal responsibility. For instance, the presumption of

---

29. Ofori-Amankwah, E.H. "The Challenge of Alcoholism and Remedial Social and Legal Philosophy" (1976) Journal of Law Society A.B.U., Zaria P. 36.

.../125

knowledge under section 44 of the Penal Code, may be rebutted in circumstances specified in section 52 of the same Code.

The relationship between insanity and intoxication constitutes a major exception to the rule that voluntary intoxication is not a defence. Under section 29(2)(b) of the Criminal Code, it is a defence that at the time of commission of the offence, the accused did not fully understand the nature of his act and that he was by reason of intoxication, insane temporarily or otherwise. It is respectfully submitted, that on ground of policy, intoxication (whether voluntary or not), which deprives a person from controlling his actions or appreciating them, should excuse from criminal responsibility.

Cases where the defence of insanity induced by drunkenness have been raised are rather scanty. It is clear, however, that section 29(2)(b) of the Criminal Code enshrines substantially the third rule propounded by Lord Birkenhead in D.P.P v Beard[30]. In that case, the accused was charged

---

30. [1920] A.C. 479

.../126

with the murder of a girl of 13 years from whom he had demanded sexual intercourse. In order to prevent her from raising alarm, the accused stuffed rag into her mouth and placed his fingers on her throat. The girl died from suffocation. The sole defence of the accused was that of drunkenness. After reviewing the legal principle involved, Lord Birkenhead, stated, inter alia:

> "Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. If actual insanity supervenes, as the result of alcoholic excess, it furnishes as complete answer to the criminal charge as insanity produced by other cause"[31].

In Attorney-General for Northern Ireland v. Gallagher[32], the accused had grievance with his wife. He made up his mind to kill her and bought a knife and a bottle of whisky apparently to give him "dutch - courage" to do the deed. At the trial, the defences of insanity and drunkenness were raised but rejected. The House of Lords affirmed his conviction on appeal and Lord Denning reiterated the principle that if a man, by drinking develops a disease of mind, such as delirium tremens, so that he is temporarily insane, he had a complete defence to the charge.

---

31. Contrast the ratio in Beard's Case with the decision in R v. Eriyamremu (1959) W.R.N.L.R 270 and R v. Owarey 5 W.A.C.A 66

32. [1961] 3 All E.R. 299.

.../127

In Egbe Nkanu v. State[33], the Supreme Court of Nigeria affirmed the conviction of the appellant who had killed a 60 year old woman. The Court reviewed existing authorities on the defence of insanity induced by drunkenness and then reiterated that unless there is intoxication giving rise to temporary insanity, the defence under section 29(2)(b) of the Criminal Code is not applicable.

The provision of section 29(2)(b) of the Criminal Code has no direct parallel in the Penal Code. Does this omission in the Penal Code constitute a bar to a plea of insanity arising from intoxication? It is submitted, that the provision of section 51 of the Penal Code will cover instances of insanity induced by intoxication. Section 51 uses the phrase "unsoundness of mind" which covers all forms of mental abnormality from whatever cause. Thus, insanity either permanent or temporary (as in the case of delirium tremens), will be covered by the phrase. For the avoidance of doubt, however, the Penal Code ought to be amended to specifically provide for a similar provision as in section 29(2)(b) of the Criminal Code, in order to put the issue beyond doubt.

---

33. (1980) 3-4 S.C. 1.

.../128

Finally, it is important to emphasise that a finding of insanity induced by drunkenness carries the same consequence as in cases of insanity founded upon section 28 of the Criminal Code or section 51 of the Penal Code. This assertion is put beyond doubt by section 29(3) of the Criminal Code which specifically provides for the confinement of a person whose case is found to come under the sub-section, in accordance with section 229 and 230 of the Criminal Procedure Act.

(3) Infanticide: the effect of Lactation.

Infanticide is another issue of responsibility that is somewhat related to the insanity defence especially with regard to the mental condition of the accused at the time of commission of the offence charged. The offence of infanticide is committed where a mother due to an abnormal stress on her mind, kills her new-born baby (or perhaps, another woman's baby under 12 months old).

It is trite to note that infanticide can either be charged as the substantive offence, in the first instance, or serve as a defence to a murder charge[34]. It would appear that the justification for setting up the defence of infanticide in defence to a murder charge, lies in its

---

34. Introduction to Criminal Law. Op. Cit. P. 106.

.../129

lack of deterrence and the psychological condition of the accused[35]. Perhaps, more importantly, the significance of infanticide in relation to the insanity defence is that the accused's mental balance is disturbed due to the effect of childbirth or lactation.

The relevant provisions on infanticide in Nigerian Law are contained in section 222(6) of the Penal Code and section 327A of the Criminal Code. For ease of reference, the Penal Code provision is reproduced below. Section 222(6) provides:

> "Culpable homicide is not punishable with death where a woman intentionally causes the death of her child being under the age of twelve months but at the time of the act or omission, the balance of her mind was disturbed by reason of the effect of lactation consequent upon the birth of the child".

Perhaps, we should note here, that the language used in the sub-section is borrowed from the English infanticide Act, 1938, which repealed and re-enacted with amendments the Act of 1922.

The section allows a latitude of judicial discretion since there is no provision for mandatory sentence.

---

35. Brewster, "Punishment of homicide offenders - Exceptions to Penal Code". (1963) S.L.J.R. 229.

.../130

In severe cases, an accused, upon conviction for infanticide may be confined for medical observation in accordance with section 230 of the Criminal Procedure Act as well as section 327 of the Criminal Procedure Code[36].

There is a dearth of reported Cases on the subject in Nigeria. In R v. Chima[37], a woman shortly after giving birth to a set of twins, killed them, apparently because of a custom prevalent in her community. She was tried and convicted of murder. On appeal, it was held that the proper conviction should have been for infanticide. Okonkwo and Naish have rightly submitted, that the decision of the court of appeal is erroneous because there was no suggestion that the woman was suffering from the effects of child-birth or that her balance of mind was affected[38].

---

36. See section 178 of the Criminal Procedure Act,
37. (1944) 10 W.A.C.A 223.
38. Criminal Law in Nigeria Op, Cit. P. 256

.../131

C H A P T E R VII

CONCLUSION AND RECOMMENDATIONS

1. Conclusion

In the preceding chapters, we have examined the plea of insanity under Nigerian Law. It is demonstrably clear, that the basis of criminal responsibility is that the act of an accused must go with his mind at the time of committing the alleged offence. Thus, the plea of insanity is relevant as a general excuse for the mens rea required for the commission of the offence - the consideration being that the law does not want to punish the particular mens rea for reasons of mental abnormality.

The plea of insanity is available in all kinds of Criminal Proceeding although it assumes fundamental importance in offences carrying capital punishment. Indeed, in such cases, the Courts have a duty to consider as a matter of course, all defences which are available to an accused from the totality of the evidence adduced at the trial. Whether or not such defence is raised specifically by the accused or his counsel is immaterial in such cases[1].

---

1. Kuvawa Takida v. State 1969 1 All N.L.R. 270

.../132

The discussion in the preceding chapters also depicts that the Penal Code and Criminal Code follow the footsteps of the Celebrated M'Naghten Rules in their provisions on the defence of insanity. It is remarkable, however, that by and large, the statutory provisions are substantial improvements on the English rules; even though statutory crystallization of rules tends to create stultification. Thus, the courts are not required to go outside the rather inelastic words of the codes and examine new ideas and trends which pervade other legal systems such as the American, as exemplified in the Model Penal Code. The current American approach to the defence of insanity, is a definite departure from the traditional English test and manifest clearly the direction in which both judicial and legislative thinking is moving.

Whilst it is recognised that our codes may be influenced meaningfully by other legal systems, at least in interpreting our codes, the wholesale importation of foreign concepts must be deprecated. This is especially so where the provisions of our local statutes are not fully appreciated. For example, though Actus reus and Mens rea are familiar Common Law concepts, they have ceased to be relevent in the inter pretation of our Penal Statutes.

.../133

Thus, any reference to the concepts depicts a clear misunderstanding of the jurisprudence of both the Penal and Criminal Codes. The provision of Section 24 of the Criminal Code which defines Criminal responsibility has refrained from the use of those latin expressions. It is noteworthy that in section 24, the expressions "voluntary act" and "intention" have replaced the latin expressions as ingredients constituting an offence.

The provisions of the Criminal Code and Penal Code on the defence of insanity are far - reaching. One is, however, not oblivious to certain inadequacies which require urgent legislative interention. Credit, here, goes to the draftsman of the Penal Code for adopting a simple and strikingly clear language in section 51. This makes the section easily readable. However, the same cannot be said of section 28 of the Criminal Code which contains very difficult and indefinable phrases quite analogous to the M'Naghten Rules.

One short coming of the Penal Code provision on the defence of insanity is that it does not specifically provide for the defence of irresistible impulse as a factor for exemption from criminal responsibility.

.../134

This omission is clearly against current scientific development in the sphere of psychiatry where it is now recognised that incapacity to control one's action is a part of insanity. Perhaps, the justification for excluding the concept of irresistible impulse under the Penal Code, is based on the belief that insanity is concerned only with cognitive faculties and can, therefore, not accomodate a person who understands but cannot control his actions. Be that as it may, there is no doubt that the formulation of the Penal Code requires urgent legislative amendment to extend the provision to cover cases of irresistible impulse. It is submitted, that such an extension would not only augur well for an accused but also, have an over all advantage to the community.

One short coming of the Criminal Code on the defence of insanity is that under section 28, insanity and delusion are distinct and carry separate and distnict legal consequences.[2] This is based on the consideration that insanity is not a sine qua non to the experience of delusion. This situation is rather anomalous.

---

2. Ngene Arum v. State (1979) 11 S.C. 91

.../135

Whereas in cases of insanity, the accused does not know what he is doing; In the case of delusion, the accused knows what he is doing although he is living in an imaginary world of make belief. It is hard to believe that such a person who suffers from delusion can be said to be mentally normal. Indeed, Dr. H. Barnes seems to have put the matter succintly when he said that there is not, and there never has been, a person who labours under partial delusion only, and is not in other respects insane.[3]

It is rather unfortunate that the present state of the law creates what may be described as degrees of insanity. Under the first segment of section 28 which deals with insanity the phrase, "a person is not criminally responsible," imports that he is not guilty of the offence charged and must consequently be acquitted[4]. Cases of delusions, however, stand on a different footing. The accused is criminally responsible to the same extent as if the real state of things had been such as he was induced by the delusion to believe to exist. It is thus necessary to amend the insanity provision in section 28 in such a way that will embrace delusion cases.

---

3. "A century of the M'Naghten Rules" Op. Cit. P. 300
4. Kayode Adams v. D.P.P. (1966) N.M.L.R. 111

.../136

It would appear generally, that Nigerian Courts are reluctant to grant a plea of insanity induced by drunkenness. The attitude of the Court seems to be based on the consideration that serious evil consequences could ensue to the community if men should act on self-induced intoxication and then seek to avoid taking legal responsibility for their conduct, upon a claim that they are insane. The attitude of the Courts is quite unjustifiable as it seems to suggest that the law should be equally interested in the cause of the accused's mental abnormality at the time of commission of the offence, a factor which ought not to relevant at all.[5]

Professor J.W.C. Turner has rightly in our view, suggested that insanity induced by a profound superstitious belief should be treated as cases of delusion.[6] Regrettably, however, this suggestion is completely ignored by Nigerian Courts. The Courts have consistently maintained that a belief in witchcraft, no matter how profound, cannot be a ground for the defence of delusion because such a belief is innocuous and difficult to prove. This apprehension of the courts on the issue of proof is rather farfetched. It is submitted, that difficulty of proof should not be a ground for a denial of a defence in Criminal Proceedings.

---

6. Kenny's Outlines on Criminal Law, Op. Cit. P. 54.

.../137

Next, is it worth our while to go through the whole legal rigmarole only to make a finding of "not guilty by reason of insanity" or, should the courts be empowered to detain for treatment the criminally insane? The statutory provisions on the vexed issue of the disposal of persons acquitted on grounds of insanity, are anachronistic and require urgent legislative attention. Under the present dispensation, there appears to be a confusion between trying a person for a criminal offence and treating him for a mental illness. For instance, a successful raising of the defence of automatism leads to the accused walking out of court a free man. On the other hand, an acquittal on the ground of insanity inevitably leads to the incarceration of the person in an asylum or prison, at the Governor's pleasure. Interestingly, this latter result occurs even though such an acquitted person may not be insane in any accepted medicial sense.

Although it is recognised that setting a person acquitted on ground of insanity, free, could be dangerous in certain cases, but it is fundamental that before incarcerating an accused, he should be certified mentally ill by a medicial expert and not single-handedly, by a judge. It is suggested that the disposal of persons acquitted on ground of insanity should be based on medical

.../138

categorisation of the mental state of such persons. This suggestion is forward looking and accords with current practice in some jurisdictions. For example in New South Wales, the appropriate Act governing the disposal of persons acquitted on ground of insanity is not the Crimes Act, but the mental health Act 1958, which provides in section 23(4) thus:

> "Upon the receipt of certificates of two medical practitioners, the governor by warrant under his hand may direct that such a person be conveyed to and detained in a Mental Health hospital at Governor's pleasure".

It is clear, that this approach of disposal of insane persons in a non-criminal apparatus, is more humanistic than the practice in Nigeria where the Judge solely determines the question of disposal without necessarily being bound by medical evidence. This situation is quite anomalous because, whereas, the judge requires medical assistance to determine fitness of a person to stand trial, no such assistance is required for the disposal of persons acquitted on ground of insanity. There is the urgent need to amend the Criminal Procedure Act and Criminal Procedure Code to reflect the new approach in other jurisdictions.

.../139

A fundamental issue arising from the issue of disposal of persons acquitted on ground of insanity is the state of psychiatry in Nigeria. As a result of the dearth of psychiatrists in the Country, Courts are saddled with the duty of determining insanity often without the testimony of experts or resort to receiving evidence from general medical practitioners who lack sound knowledge in psychiatry. Furthermore, location of the three psychiatric hospitals (Aro, Useiu and Yaba) in the Southern helf of the Country, is strategically faulty. This becomes apparent where for instance, a court in Bornu State needs to send an accused person arraigned before it, to Yaba, in Lagos State for psychiatric observation in order to ascertain his fitness to stand trial. The delay inherent in such a practice is an antithesis under the current dispensation and invariably, contributes to congestion in our Courts andPrisons.

.../140

2. Recommendations.

In the context of the foregoing, the following recommendations are respectively being made in addition to those already made in preceding Chapters:

(a) there is an urgent need for the unification of the dual penal statutes in Nigeria. Duality of statutes, leads to proliferation of standards. It is remarkable that the setting up of a law Reform Commission, is a very bold step towards systematic law reform[7]. The commission should embark upon the task of producing a comprehensive and more forward looking Penal Statute to replace both the Penal and Criminal Codes. This will give our much vaunted unity in diversity a boost and simplify the administration and teaching of Criminal Law in our Courts and Universities respectively. Perhaps more importantly, the doctrine of Stare decisi will be enhanced in our Court[8].

(b) Psychological medicine should be incorporated into the undergraduate Curriculum in our Medical Schools to enhance more insight into the discipline of Psychiatry.

---

7. Decree No. 7 of 1979 (Act No. 7, 1979).

8. Similar Suggestion has been advocated by Dredola, M.A.R. "The right of Private defence in Nigerian Law" (1984) Unpublished LL.M. dissertation, A.B.U., Zaria.

.../141

The standard in the existing faculties of medicine should be alleviated; while prime place is given to Psychological medicine which deals with the function of the whole body.[9]

(c) Greater Cooperation between the legal and medical professions in solving the vexed issue of insanity is advocated. There can be no doubt, that the interest of the Public will be better served by such cooperative attitude. To achieve this goal, the issue of insanity should be approached from a multi-disciplinary point of view, with each profession playing its role in co-ordination with the other.

(d) in the disposal of persons acquitted on ground of insanity, the Courts should rely on medical evidence. In this regard, medical examination along these proposed lines is advocated:

(i) A specific statement as to whether the accused is on acquittal, suffering from a definite mental abnormality and how the conclusion is reached;

(ii) A statement of the way and degree in which the abnormality has affected the accused person; and

(iii) Whether there is any likelihood of recurrence of such a condition.

---

9. See W.H.O. Pilot Study on Schizophrenia.

.../142

REFERENCES : BOOKS

Aguda, A.A : Criminal Law and Procedure (1982) Sweet and Maxwell, London.

Aguda, A.A : Law of Evidence in Nigeria (1974) Sweet & Maxwell, London.

Aguda, A.A : Principles of Criminal Responsibility in Nigeria(1965) Caxton Press, Ibadan.

Anderson, J.N.D : Islamic Law in Africa (1970) Cass & CO. Ltd, London.

Chukkol, K.S. : Defences to Criminal Liability in Nigerian Law (1980) A.B.U. Press, Zaria.

Chukkol, K.S. : Supernatural beliefs and the Criminal Law in Nigeria: a Critical appraisal M.L.S. Press, Zaria.

Cross, R & Jones, P.A Introduction to Criminal Law (1980) Oxford, London.

Elias, T.O. : Nature of African Customary Law (1956) Oxford University Press.

Fingarette H. : The meaning of Criminal insanity (1972) University of Carlifornia Press.

Gledhill, A. : The Penal Codes of N.Nigerian and the Sudan (1963) Sweet and Maxwell, London.

Goldstein ,A. : The Insanity Defence (1967) Yale University Press.

Hale, M. : Pleas of the Crown (1936)

Morris and Howard : Studies in Criminal Law (1964) Oxford University Press.

Murray, R.S. : Ashanti Law and Constitution (1929) Oxford University Press, London

Ofori-Amanakwah, E.H. : Criminal Law in the Northern States of Nigeria. (1986) Gaskiya Corp., Zaria.

.../143

Ofori-Amankwah E.H. : United Nations Standard Minimum Rules (1979) Lahore.

Okonkwo, C.C. & Naish, M.E. : Criminal Law in Nigeria (excluding the Northern). (1964) Sweet & Maxwell, London.

Oppeinheimer, : The Criminal responsibility of Lunatics (1909), London.

Park, A.E.W. : Sources of Nigerian Law (1963) Sweet and Maxwell, London.

Pollock, E. and Mait land, F.W. : History of Enlglish Law (1952) Cambridge University Press.

Ratanlal and Thahore : Law of Crimes (1971) 22nd Edition Bombay.

Ray, I : Medical Jurisprudence.(1961) New-York

Richardon and Jones : Notes on Penal Code (1970) Gaskiya Corp. Zaria.

Smith, J.C. and Hogan,B. Criminal Law (1973) Butterworths, London.

Stephen, F.J. : History of the Criminal Law Vol. II (1883).

Turner, J.W.C : Keeny's Outlines on Criminal Law (1966) 19th Edition, London.

Vasdev, K. : Law of Homicide in the Sudan 1978) Butterworths, London.

Walker, N. : Crime and insanity in England (1968) Edinburgh.

Whitlock, : Criminal Responsibility mental illness (1963) London.

Williams, G. : Criminal Law: the general part (1961) 2nd Edition London.

Williams, G. : Textbook of Criminal Law (1978) Stevens & Sons, London.

Ziiborg : Mind Medicine and Man (1943)

.../144

REFERENCES : ARTICLES

Aremu, L.O. : "Criminal responsibility for homicide and supernatural beliefs" (1980) I.C.L.Q.P. 113.

Barnes, H. : "A century of the M'Naghten Rules" (1942-44) Vol 8 Cam. L.J. P. 300.

Brewster : "Punishment of homicide offenders - exceptions of Penal Code" (1963) S.L.J.R. 229.

Cross, R. : "Reflections on Bratty's Case" Vol. 78 L.Q.R 236.

Guttmacher : "The Psychiatrist as an expert witness" Vol. 22 Chicago Law Review 326.

Keedy, E. : "Irresistible impulse as a defence in Criminal Law" vol 100 University of Prenn. Law Review P. 956.

Lambo, A. : "The role of cultural factors in Paranoid Psychosis among Yoruba tribe" (1950) Vol 10 Journal of mental science P. 239.

Milner, A. : "M'Naghten and the witchdoctor: Psychiatry and Crime in Africa" Vol.104 University of Penn. Law Review 114.

Ofori-Amankwah, E.H. : "The Challenge of alcholism and remedial social and legal philosophy" (1976) Journal of Law Society A.B.U., Zaria. P. 36.

Ofori-Amankwah, E.H. : "Penal Code and Criminal Code - origin and difference" (1979) Vol 7 Journal of Islamic and Comparative Law. P. 39.

.../145

Opas, P. : "Certified insane by lawyers" Vol. 36 A.L.J. p. 11.

Seidman, R.B. : "Insanity as a defence under the Criminal Code of Ghana" (1964) Vol. 1 University of Ghana Law Journal PP. 42 - 51.

Singh, R.U. : "History of the defence of drunkenness in English Criminal vol. 49 L.Q.E pp. 528-546.

Tatai, E.A. : "Insanity and Criminal Responsibility" (1966) S.L.J.R. pp. 238 -264.

Wertham : "A Psychiatrist look at Psychiatry and the Law" (1953) 3 Buffalo Law Review P. 41 - 48.

Bahnassi, A.F. : "Criminal Responsibility in Islamic Law" in Bassiouni M. Cherif (1982) The Islamic Criminal Justice System. Occana. Cairo P. 171 - 187.

Read, J.S. : "Criminal Law in the Africa of today and Tomorrow" (1963) Journal of African Law. P. 5.

.../146

REFERENCES: OTHER MATERIALS

Black's Law Dictionary

Jowitts dictionery of English Law.

Newsweek international magazine April 15, 1981

Newsweek International magazine April 15, 1982

" " " May 24, 1982

" " " July 5, 1982

" " " September 20, 1983

Owoade, M.A. ; Law of Homicide in Nigeria (1985) Unpublished Ph.D. Thesis University of Ife.

Oredola, M.A.R : The right of private defence in Nigeria Law (1984) LL.M. dissertation A.B.U., Zaria.

Vanguard Newspaper : Tuesday 18, Fedburary 1986.