Extending the frontier of the Nigerian insanity defence: comparative analyses of the insanity defence in England and Scotland to offer alternative options for development.

EZE, K.U.

2022

EXTENDING THE FRONTIER OF THE NIGERIAN INSANITY DEFENCE: COMPARATIVE ANALYSES OF THE INSANITY DEFENCE IN ENGLAND AND SCOTLAND TO OFFER ALTERNATIVE OPTIONS FOR DEVELOPMENT.

KELECHI UROM EZE

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE ROBERT GORDON UNIVERSITY FOR THE DEGREE OF DOCTOR IN PHILOSOPHY

THE LAW SCHOOL

ROBERT GORDON UNIVERSITY

SUPERVISORS:

DR SARAH SIVERS

LAURA SHARP

SEPTEMBER 2022

DECLARATION

I, KELECHI U EZE, now declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work, nor any part of it has been, is being, or is to be submitted for another degree in this or any other University. I authorise the university to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

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DEDICATION

I dedicate this thesis to Rt. Justice Eze Udu, Late Mrs Augustina Eze, Millie and Owen.

Thank you for your love.

ACKNOWLEDGEMENTS

I am ultimately indebted to God for his love, grace, mercy, and companionship on this journey. I am forever grateful.

My deepest gratitude goes to my parents, Justice Eze Udu and Mrs Augustina Eze, for your support, love, patience and prayers. I also appreciate my siblings for their prayers. I thank Millie and Owen for their patience and love throughout my study period.

I express my sincere gratitude to my principal supervisor Dr Sarah Sivers and Laura Sharp for their dedication, encouragement, support, motivation and guidance throughout my research and writing of my thesis. Thank you. I am incredibly grateful to all the people who have supported me. I am grateful to Robert Gordon University Graduate School and Law School for their support and encouragement throughout my PhD journey. May God keep you all and continue to bless you.

ABSTRACT

Criminal responsibility determines whom the law will punish. A person must be criminally responsible before a court can punish them. The situation is challenging when a defendant raises insanity as a defence to criminal responsibility because not every case of insanity relieves an accused of criminal responsibility. Courts find it challenging to determine what type of insanity relieves a person of criminal responsibility. The idea underlying the insanity defence is that if a person is insane when committing a crime, courts should not hold them criminally responsible and should not try persons insane.

This study examines the insanity defence in Nigeria's Criminal Codes (Penal and Criminal Code Act and Criminal Procedure Code) to uncover gaps and ways of addressing them. According to its findings, the court's interpretations of Nigeria's Codes reflect out-of-date terminologies with no medical relevance. The court must determine the accused person's insanity on evidence for which it admits medical and circumstantial evidence. This study clarifies issues surrounding evidence, urging more reliance on the medical evidence for trial and sentencing. Moreover, the narrow disposal option affects the effectiveness of the defence. The relationship between the insanity defence and the mental health system needs strengthening.

Legal development is necessary for a society to keep pace with the complexity and dynamism of modern civilisation. It is in the Nigerian Government's long-term interests to consider the insanity defence as an evolving area of law and to review the regulations. Over the years, the government has not reviewed or amended the insanity defence law, which has been a part of the laws transplanted into the country. As part of this review, the substantive chapters compare the English and Scottish positions on the insanity defence to understand better how to resolve the identified shortcomings in Nigeria. This study justified the need to review and amend the insanity defence in Nigeria. It concluded that the current Nigerian insanity defence test does not adequately cover present and future needs.

Keywords: Insanity defence, criminal responsibility, evidence, Nigeria, England, Scotland, disposal option, interpretations, legal transplant

LIST OF ABBREVIATIONS

TOI- TRIAL OF ISSUES

TOF- TRIAL OF FACTS

UTP- UNFITNESS TO PLEAD.

UNMHDHR- United Nations Mental Health Declaration of Human Rights.

UNCRPD- United Nations Convention on the Rights of Persons with Disability.

Contents

CHAPTER ONE

1.1. INTRODUCTION

As a lawyer in Nigeria, I encountered several situations where mentally ill people had to deal with the law. During a court hearing in February 2015, an accused person charged with armed robbery exhibited abnormal behaviour after pleading not guilty to the charges against him on the last adjourned date. The accused muttered and seemed to hum a song while nodding at the music. He did not respond to the court's enquiries. The presiding judge continued the trial and dismissed the insanity raised by the defendant's counsel. He dismissed the insanity issue because the prosecutor argued that the accused was pretending, and the court was sure that the accused appeared sane when he pleaded to the charge. Lawyers expressed surprise that the police brought an accused to court from custody without conducting a check or investigating his abnormal behaviour. Instead, they claimed his behaviour in custody and on the way to court was normal. This situation raised questions about the insanity defence, the procedure, the rights of insane defendants and the obligations of law enforcement agencies.

It was also striking that I met inmates who did not look or behave lucidly on my several visits to the prison. They behaved abnormally, from shouting to banging on the cell doors and the wall. After several visits, the circumstances I witnessed in the prisons and the apparent lack of medical care raised some questions. First, why were these individuals in prison, not in the hospital/psychiatric facilities? How did they come to be incarcerated, and when did their mental health deteriorate? What care measures or treatment options were available? These questions inspired me to examine the legal regulations on insanity and the disposal options. Apart from the previously stated reasons, this study will allow the review of case law and statutory provisions highlighting the requirement to revise the insanity defence.

Section 1 of the Nigerian Criminal Code defines criminal responsibility as a liability to punishment for an offence.[1] Criminal responsibility means that a person is answerable to the criminal law for

[1] See the Criminal Code LFN 2004 (CC) Chapter 5 and the Criminal Law of Lagos State 2011 (CLL).

what they do. An offence comprises physical (*actus reus*) and mental elements (*men's rea*).[2] The two components must be present before the court can find an accused guilty.[3]

However, several conditions can negate a crime or mitigate its punishment under criminal law. Common-law countries, including Nigeria, agree that they should not hold some criminal defendants responsible for their crimes because of certain factors.[4] These factors are "defences", and the insanity defence is one. If a person is insane (mental illness), they may not be responsible for their actions. Insanity negates the *mens rea* arm of the components of a crime. Where the accused raised the insanity at the time of the offence, they admit to the crime's *actus reus*.[5] They only argue that the accused lacked the correct *mens rea* for the alleged crime.

Are those who have mental illness responsible for their criminal actions or omissions? The insanity defence draws from the question of responsibility to state that if a court finds a person insane during the trial, the trial cannot continue. Also, a court would not hold a person responsible for a crime if they were insane when it occurred and the insanity caused it. Wigwe acknowledged that in Nigeria, the insanity defence could arise because the party was insane when committing the offence. Alternatively, a person might be sane at the time of the crime's commission but insane at the time of the trial, leaving him incapable of presenting a defence.[6]

Determining the responsibility of an insane person is one of the biggest challenges in establishing responsibility in criminal proceedings. According to Okonkwo, the law relating to the insanity defence show the challenge of defining criminal responsibility.[7] He stated that drawing the line between the responsible and not responsible when the accused raises insanity is

[2] Oreoluwa Omotayo Oduniyi, 'Criminal Liability Under the Nigerian Law: An Examination of the Liability of Non-Legal Entities' (2022) Canadian Social Science 1.

[3] Unless strict liability offences.

[4] Stanley Yeo, 'The Insanity Defence in the Criminal Laws of the Commonwealth of Nations' (2008) Singapore Journal of Legal Studies 241-263.

[5] *Dolor v The State* (2020) LPELR-52445(CA).

[6] Chris Chizindu Wigwe, *Introduction to Criminal Law in Nigeria* (Mountcrest University Press, 2016) 189.

[7] Okonkwo Cyrian Okechukwa, *Criminal Law in Nigeria* (2nd Edition Sweet & Maxwell 1980) 129.

challenging.[8] Several factors come into play, like medical evidence, circumstantial evidence, human rights factors, and the tests for a court to apply the disposal option required.

Over time, governments have established tests for how criminal courts should handle those who committed crimes while suffering from mental illness. In the renowned case of M'Naghten, the English court meticulously explained the standards for evaluating the criminal liability of defendants claiming insanity at the time they committed the crime. The M'Naghten rule is the basis of Nigeria's insanity defence, which dates to the British colonisation of Nigeria. Subsequently, Nigerian law codified the insanity defence.

The Criminal Code Act 2004 and the Penal Code Act 1991 provide the Nigerian insanity defence test. However, each provides a unique insanity defence test applicable in different geographical areas or States. They are different in both words and substance. These provisions do not support each other. Notably, these provisions set the Nigerian standard for the insanity defence and have remained unchanged to date. The insanity defence is an area of criminal law for which this thesis could not pinpoint evidence of a government review. The government legislated on it over a hundred years ago. Although British officials transplanted these laws during the colonial period, the Nigerian government are yet to revise them, even considering medical advancement.

Some decided case law also raises questions about the Nigerian insanity defence practice. For example, in *Peter Jonny Loke v. State*,[9] although the evidence of the mother of the accused that she brought home her son from Lagos mad and the brother testified the accused was always in chains because he was mentally ill, the court held thus:

> "There is no evidence that on 3/5/78 when the accused chopped off the head of Kaine Dike that he was suffering from any mental illness."

The Court of Appeal declared this decision a case of apparent misdirection of law as there was abundant evidence for the accused to establish the insanity defence.[10]

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[8] Ibid.

[9] (1985) 1 NWLR 1.

[10] Adebayo Adekola, Defense Of Insanity- Non-Direction And Misdirection By Trial Judge On The Evidence Of Insanity,<**http://lawnaija.blogspot.co.uk/p/criminal-law.html**> accessed 28th December 2018.

Furthermore, despite the guidelines in *Nwoye Igweze Onyekwe v. The State*[11], the dividing line between criminal responsibility and not being responsible has been exceedingly difficult to draw in Nigeria because of several factors.[12] These factors include issues connected to transplanted laws and definitions, confusion in the attitudes of mental health patients, limited knowledge about the etymology of mental illnesses, conflicting psychiatric/medical theories, and the scepticism surrounding the acceptability/veracity of medical evidence by judges/magistrates and lawyers. According to Okonkwo, the subject is complex partly because attitudes to the responsibility of the mentally disturbed are so confused: partly because of limited knowledge of insanity and its causes and because he perceives that from time to time, the theories of psychiatrists conflict. He went further to say that it is more controversial that lawyers are unsure how to treat the medical expert's evidence.[13]

Moreover, courts always consider the role of medical experts in proving the defence of insanity. This thesis argues whether the courts can correctly determine the insanity defence without medical evidence. Several discussions and case law in Nigeria suggest courts treat the situation with expert evidence with levity. The assumption is that a medical expert's evidence is inconclusive, and judges/magistrates could dispense with applying them. For instance, in *Attorney General of Western Nigeria v. Philip Upetire*[14], Fatai-Williams J (as he then was) stated that: "It was his responsibility as a sitting judge and not that of a medical doctor to decide whether the accused person was sane or insane in the legal sense at the time the offence was committed".[15]

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[11](1988) 1 NWLR. 565.

[12] The types of evidence an accused needs to establish insanity as a defence:

a. Evidence as to the past history of the accused,
b. Evidence as to his conduct immediately preceding the killing of the deceased,
c. Evidence from Prison Warders who had custody of the accused and looked after him during his trial.
d. Evidence from Medical Officers and/or Psychiatrists who examined the accused.
e. Evidence of relatives about the general behaviour of the accused and the reputation he enjoyed for sanity or insanity in his neighbourhood.
f. Evidence showing that insanity appears in the family history of the accused.

[13] C, O, Okonkwo, *Criminal Law in Nigeria* (Sweet and Maxwell, London ,1980) 28.

[14](1964) NMLR. 25.

[15] Ibid.

Furthermore, in *Lasis Saliu v. the State*,[16] the judge stated that the judge or jury decides the fitness question. The judge may observe an accused suspected to be insane before trial, and the medical officers' certificates do not bind them.[17] Another Nigerian case explained that whether the accused was sane or insane when he committed the offence is a question of fact that a judge must decide and not by a medical expert, no matter how convincing their evidence may be.[18]

This thesis observed that not everyone supports how courts treat medical experts' evidence. For example, the court in *R. v. Madugba*[19] attached great value to the medical opinion. *In Echem v. R*[20], the court admitted the insanity defence because medical evidence showed that the accused was liable to mental disorder attacks because of previous accidental injuries. Although he knew what he was doing, sometimes he could not control himself when these attacks occurred.[21] According to Aguda, expert evidence should bind courts where such evidence is convincing, not contradicted or unchallenged.[22] Therefore, the law or courts need to settle what should be the yardstick in determining the admissibility of expert evidence.

Therefore, this thesis is concerned with the theoretical and practical aspects of the insanity defence. This study raises concerns about the time since the enactment of these legislative provisions establishing the insanity defence with no evaluation or amendment. It will evaluate these statutory provisions to show the necessity for reviews and revisions. This study argues that the language of the tests reflects an outmoded notion of human behaviour and medical knowledge.

Also, the judicial application of the insanity defence determines its functionality and efficiency. This study will further analyse the case law on the Nigerian insanity defence to help identify the gaps in applying the statutory provisions. It argues that the current application is inefficient and advocates more medical involvement in establishing the insanity defence. This study will assess

[16]1984) 15 NSCC 640

[17]Ibid.

[18]*R. v. Ogar* (1961)1 All NR 70.

[19](1958) 3 FSC 1.

[20](1952) 14 WACA 158.

[21]*Oden Ikpi v. The State* (1976) 12 S.C. 71; *James Anyim v. The State* (1983) 1 SC NLR 370 at 377.

[22] T Akinola Aguda, *Law o.f Evidence in Nigeria*, (Sweet and Maxwell, London 1974) 88.

the Nigerian disposal options available to the courts where they find an accused insane. It will identify the need to expand the options available and make it more person-centred.

The aim of government review is unnecessary to alter the legislation but to ensure that it functions as intended. The government could review the law to check if it needs improvement or change and to ensure it is in line with global demand or advancements. Jurisdictions like England and Scotland have shown some level of development towards their insanity defence position. For example, Scotland and England established committees to review their insanity defence at several intervals. These reviews incited changes like new statutory tests, changes in terms, procedures, and disposal options in their jurisdictions. The thesis shows these points by weaving together various analyses of the relationships between Nigeria, England, and Scotland. Therefore, it will examine English and Scottish criminal law positions on the insanity defence to propose possible improvements to Nigeria's insanity defence. This comparative review aims not to advise another legal transplant but to give Nigeria an informed position on the way forward, considering its social and cultural factors.

However, the defence of insanity is one difficulty in determining criminal responsibility in the Nigerian legal system. As a defence of any criminal charge, deciding on the degree of mental disorder that will remove criminal responsibility has always been challenging. When the judges/magistrates decide the disposal option in most cases, it is a challenge to reconcile the interests of the insane with those of the community.

This thesis will identify gaps in the Nigerian insanity defence by examining the statutory provisions and their application to extend the frontiers of the defence in Nigeria.

1.2. BACKGROUND OF STUDY

Society can use punishment to keep the peace and prevent anarchy; this makes punishment a powerful instrument of social control. It can facilitate a wide range of societally beneficial, long-term objectives. For instance, the punishment meted out by the State might discourage individuals from taking matters into their own hands. As a result, people may be reluctant to commit crimes for fear of repercussions (general deterrence). As a special deterrent, it might make the perpetrator reluctant to commit other crimes. The incapacitation concept of committing offenders in prisons

suggests that punishment can improve public safety by rendering offenders unable to harm others. Offenders may be "fixed" through specific rehabilitative punishments (rehabilitation principle). Some theories argue that punishment is 'intrinsically right' because it is 'deserved,' regardless of whether it has good long-term effects (positive retributivism).[23] Criminal law serves as a tool for social control.

A morally/legally reprehensible act by a responsible actor, without explanation or justification, means the actor is responsible. As a general rule of criminal law, everyone bears personal responsibility for their conduct.[24] Section 1 of the Nigerian Criminal Code defines criminal responsibility as the liability to punishment for an offence.[25] This phrase stems from a ruling by a competent court. Therefore, when criminal courts use "responsibility," they usually mean legal responsibility. Chapter V of the Nigerian Criminal Code addresses the finding of criminal responsibility. Also, this section of the Criminal Code discusses general defences, including insanity, drunkenness, immaturity, and bona fide claims of right.

An offence comprises two elements. These elements include physical (actus reus) and mental elements.[26] For proof of the insanity defence, the court emphasizes the mental component of the crime. More so, the mental aspect of a crime refers to a person's consciousness that their action is unlawful. It originated from Latin, meaning "the guilty mind".[27] The Latin phrase "*actus reus non fact rem nisi mens sit rea"*, which translates as "the act is not culpable unless the mind is guilty",

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[23] Walen Alec, "Retributive Justice", The Stanford Encyclopedia of Philosophy' (2021) <https://plato.stanford.edu/archives/sum2021/entries/justice-retributive/> accessed 02 January 2022.

[24] Michael B. Brennan, 'The Lodestar of Personal Responsibility' (2004) Marquette Law Review 366.

[25] The Criminal Code Act LFN 2004 chapter 5; The Criminal Law of Lagos State 2011 (CLL).

[26] Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law; A Comparative Law Analysis* (Springer-Verlag Berlin Heidelberg 2014) 20.

[27] Ebo Chinedu Nwachinemere, A Critical Analysis Of Section 24 Of The Criminal Code And Mens Rea, Genetic Determinism, Free Will, Artificial Intelligence, Vicarious Liability, Strict Liability In Relation To Criminal Responsibilities In Nigeria. <https://www.academia.edu/39863712/A_CRITICAL_ANALYSIS_OF_SECTION_24_OF_THE_CRIMINAL_CODE_AND_MENS_REA_GENETIC_DETERMINISM_FREE_WILL_ARTIFICIAL_INTELLIGENCE_VICARIOUS_LIABILITY_STRICT_LIABILITY_IN_RELATION_TO_CRIMINAL_RESPONSIBILITIES_IN_NIGERIA_By_Ebo_Chinedu_Nwachinemere> Accessed 20 November 2019.

represents the concept of *Actus reus* and *mens rea*.[28] Therefore, the prevailing norm is that the law cannot hold a person who performed an act without mental fault criminally liable.

Punishment is an effective tool for social control to maintain law and order in society. However, before imposing criminal responsibility and punishment on the offender, the court must determine if it is justifiable to punish the offender. Thus, criminal law permits an offender to present certain circumstances to mitigate or exempt a person from the penalty and criminal responsibility. The law refers to this situation as a "defence."

This concept stipulates that the court should punish only those responsible or at fault (culpable).[29] Writers sometimes refer to the fault principle as 'negative retributivism'. Lippke explained that:

> Negative retributivism is the view that though the primary justifying aim of legal punishment is the reduction of crime, the state's efforts to do so are subject to side-constraints that forbid punishment of the innocent and disproportionate punishment of the guilty.[30]

A negative retributivist believes that the rationale for punishment must derive entirely from the value it serves.[31] Theorists who do not subscribe to positive retributivism accept and sometimes endorse this principle.[32] The positive retributivism argument maintains that wrongdoers morally need to take responsibility for the consequences of their actions.

Before holding someone criminally responsible and punishing them for their wrongdoings, the courts must determine whether punishing them is reasonable. Sometimes, criminal law recognises mitigating or extenuating circumstances. Circumstances that make the defendant's actions less blameworthy are examples of mitigating (or extenuating) circumstances. They reduce the gravity

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[28] Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law; A Comparative Law Analysis* (Springer-Verlag Berlin Heidelberg 2014) 20; Oluwatomi A Ajayi, 'Justifying Genetics As A Possible Legal Defence to Criminal Responsibility in Nigeria' (2015) NAUJILJ.

[29] Morse S J, 'Craziness and Criminal Responsibilities' (1999) Behavioral Sciences and the Law, 17(2), 147-164, 149.

[30] Richard L Lippke, 'Some Surprising Implications of Negative Retributivism' (2013) Journal of Applied Philosophy 31(1), 49-62.

[31] Alec (n 9) 20.

[32]Ibid.

of a crime and its punishment. During a criminal trial, the accused may assert particular facts or a set of facts to exonerate him from liability. A "defence" would be the term for this type of action. Examples of defences against criminal responsibility include insanity, accident, mistake, Bona fide claim of right, necessity and extraordinary emergency, and self-defence.

The subject of "criminal responsibility" and "defences" brings this study to its theme, "the insanity defence". Nevertheless, as part of the arguments of this study, the term "insanity" is unfitting today when referring to the insanity defence and the plea in the bar, as it will show. However, this review will use the contemporary Nigerian language, 'insanity'. The motivations for using "insanity" are purely pragmatic. The word represents Nigeria's current legal system. In addition, we aim to prevent any misunderstanding if this study introduces new terms in the body of our conversation because of development in other jurisdictions. However, employing the word "insanity" does not show approval of its continuous usage as a legal vocabulary.

Most jurisdictions globally accept insanity as an adequate defence in criminal cases.[33] Common law countries, for example, Nigeria, have established that no one can be criminally liable for his acts or omissions independent of his choice.[34] Those accused persons who raise the insanity defence believe they are not to blame. This position is because the law does not consider the insane individual to recognise the nature of his deeds and is therefore not criminally liable.

While insanity could serve as a defence, does that mean that every episode of insanity allows them to escape punishment? It is never easy for a court to determine the responsibility of an insane defendant. Several questions arise once an accused pleads to insanity.

For example, what is "insanity"? Who is an insane person in criminal law? To begin with, as studies show, insanity as a legal term is yet to be defined by any known jurisdiction.[35] This position

[33] Canada, America, England and Scotlan; Rita J Simon, Heather Ahn-Redding, *The Insanity Defense the World Over (Global Perspectives on Social Issues)* (Lexington Books 2006); Rita J Simon, Heather Ahn-Redding, *The Insanity Defense the World Over (*Lexington Books 2008).

[34] Stanley Yeo, 'The Insanity Defence in the Criminal Laws of the Commonwealth of Nations' (2008) Singapore Journal of Legal Studies.

[35] Law Commission: reforming the Law, Changes to the special reasons why someone is not guilty of a crime - things to talk about July 2013 <ISL067 13 EasyRead Insanity Report (lawcom.gov.uk)> accessed 22 august 2022.

is one of this thesis's arguments that lawmakers should change the insanity defence language. Most jurisdictions established the insanity defence tests to determine who is an insane person. For this reason, jurisdictions like Nigeria, England and Scotland have developed tests to determine the insanity that absorbs criminal responsibility.

The M'Naghten Rule is the earliest test established for the insanity defence. The English House of Lords established this test in 1943. They invited the judges that sat on the M'Naghten case, and the answers to questions on the insanity defence formed the M'Naghten Rules. The application of English common law during the colonial period led to the application of it in Nigeria. The Criminal Code Act 2004 and Penal Code Act 1960 contains the current insanity defence tests.

This research will investigate the position that Nigeria has two separate criminal law jurisdictions, each with a unique set of requirements for proving insanity as a defence. This research argues that this position is unnecessary as regards the insanity defence and has less effect on its application. Therefore, Nigeria needs to have a similar test in both jurisdictions.

However, issues relating to the terms used in the Nigerian insanity defence tests in the statutes still pose a challenge. In the Nigerian Jurisdiction, this thesis argues that the words used to describe insanity in the test are obsolete and not medically known. This circumstance can undermine the effectiveness of this defence since it could be challenging to provide evidence for something that one does not comprehend. It is also difficult for the judges to decide what they do not know.

One would expect that a medical professional describes, interprets, and diagnoses a state of mind that prevents an individual from completely controlling their actions. A psychiatrist studies the human mind, and a criminologist specialises in conditions conducive to crime. These two men are the foremost authorities on these topics. Therefore, the problem of what defines insanity should be medical and psychological. Medical professionals occasionally assist judges in determining whether a defendant was insane at the time of the crime or unfit for trial. In hospitals, doctors do not use the word "insanity", yet they must explain in court the insanity. However, legislators and law enforcement organisations establish when and under what conditions insanity excuses criminal responsibility. The interaction between medical professionals and the criminal system regarding the insanity defence has been the subject of much debate. This position touches on the concerns regarding the required evidence to prove the defence successfully.

This position will take this research into the application of the insanity defence. How can the court decide the type of insanity that negates responsibility? It is one thing to identify that an accused is insane and another to determine that the insanity influenced the act. Nevertheless, when the defendant uses their mental disorder as a defence against a criminal charge, the legal question is not whether the defendant is insane but whether, because of the specific mental condition they suffer, they lacked the requisite intent for the offence charged. The question of criminal responsibility is determined not by the existence of insanity, but by its symptoms. How did the insanity affect the accused that led to the crime? This position directs the study to the proof of the insanity defence and the evidence required. This study argues that there is uncertainty about the evidence necessary and a need for more involvement of medical professionals.

Okonkwo's opinions capture the difficulties highlighted in this study, which have persisted for a century. According to Okonkwo, the insanity defence is a complicated topic because people's attitudes toward the responsibility of the mentally ill are so muddled up.[36] He stated in one part that people have limited knowledge of insanity and its causes. In another part, he believes that psychiatrists' theories occasionally contradict one another. Moreover, he emphasised that it is more contentious because lawyers are uncertain about handling the medical expert's testimony.[37]

A successful proof of the insanity defence in court offers an indefinite detention period in Nigeria's secure mental hospital. A person labelled insane also faces the stigma of social rejection. Hence, most defendants prefer not to raise the defence in court and instead choose to have a standard sentence. This position suggests the insanity defence is not protecting those it initially sought to protect; therefore, it is ineffective.

By emphasis, the relationship between the mental health jurisdiction and the criminal law will trail the arguments in this study, from the definition of terms to the required evidence for the defence application and the disposal options. This study intends to determine the limitations of the Nigerian insanity defence through an analysis of the insanity defence legislation and its implementation. It will further suggest informed ways to close the identified gaps.

[36] Okonkwo and Naish: *Criminal Law in Nigeria* (London: Sweet & Maxwel 1980) 143.

[37] Cyprian Okechukwu Okonkwo, *Criminal Law in Nigeria* (Sweet and Maxwell, London 1980).

1.3. SCOPE OF STUDY

This thesis focuses on the insanity defence in Nigeria. It will examine the Criminal Code Act, Penal Code Act, Criminal Procedure Act, and Criminal procedure code as they pertain to the insanity defence test. However, it recognises that each State has its criminal laws. Most State statutes are copies of the Criminal or Penal Code; hence, it has confined this study to the two Acts. Nevertheless, jurisdictions like Lagos and Abuja have amended their criminal law to add the Administration of Criminal Justice Act of 2015. When appropriate, this review will identify this position as a reference point throughout this research to show part development.

The insanity defence is an area of criminal law linked with mental health. This insanity defence entails that Law officials and legal practitioners consider this defence at the intersection of criminal law and mental health jurisdiction for optimal outcomes. This discourse will broaden this study to include Nigeria's mental health legislation on the insanity defence and the effect of Nigeria's mental health system on the insanity defence. In addition, this research links the challenges within the Nigerian insanity defence to socioeconomic variables, leading to a reassessment of various social attitudes concerning insanity.

Furthermore, extending the scope of this thesis to England and Scotland could help identify potential solutions to develop the Nigerian insanity defence. Comparatively, the insanity defence in English and Scottish jurisdictions represents a well-developed jurisdiction than in Nigeria. Also, both show a habit of legislative review of their insanity defence and mental health laws.

This analysis will progress from historical research to the current position of the law and finally to judicial application. This way, it will examine the literature on the origins of the insanity defence in the three jurisdictions. It will then review the laws governing the insanity defence and discuss the court's interpretation. This research determines the effectiveness of the insanity defence in Nigeria and ways to improve it.

1.4. RESEARCH AIMS

This study aims to identify gaps in the Nigerian insanity defence and seek avenues to strengthen it. It will review the theoretical and practical positions of the Nigerian insanity defence to determine its effectiveness. Also, this review will examine the insanity defence position in Scotland and England to proffer informed options for future Nigerian improvement. In one part, this study's goal is to justify that lawmakers need to review and revise the insanity defence provisions in the various laws. To do this, it will identify gaps in the insanity defence tests and their implementation. In another part, it will proffer ways to improve the insanity defence.

1.5. RESEARCH OBJECTIVES

To achieve its aim, this thesis will:

a. Analyse Nigeria's historical positions on criminal law to appreciate the complexities of its criminal justice system.
b. Examine the Nigerian history of the insanity defence and review the position in England and Scotland as comparators to evaluate its impact on the effectiveness of the current position.
c. Evaluate the regulatory frameworks for the insanity defence, referred to as insanity defence tests, across the three jurisdictions.
d. Engage in a detailed review of case law across the three jurisdictions to determine the effectiveness of the insanity defence.
e. Evaluate the disposal options to determine ways to balance the need to protect the insane from themselves and to protect other people from them.
f. Review the Nigerian mental health system and legislation to determine its impact on the insanity defence.
g. Find ways in the Nigerian legal system to balance the need to protect the interests of the insane accused, requiring protection from harming themselves while protecting the public from them.

1.6. RESEARCH METHOD

Creswell defined a research method as "a strategy or action plan that leads methods to actions".[38] Studies use their research method to gather, interpret, and draw conclusions about the data to solve a research problem.[39] The research method sections should explain how it gathered, generated, and analysed data.[40]A person on a journey of discovery systematically plans toward a specific goal. The quality and utility of most academic research rely on the ability of the researcher to collect and analyse data. A research method entails how the study will find the solutions to the problem and the researcher's steps. [41]

The research method is how a researcher systematically designs a study to ensure valid and reliable results that address the research aims and objectives.[42] This method section of this thesis explains the approach it will take to achieve its aims and objectives.

1.6.1. LEGAL RESEARCH

This study falls under legal research because it is a systematic inquiry within the law discipline.[43] Additionally, legal research must determine the law concerning a particular subject, highlight ambiguities and inadequacies, and critically assess legal provisions, principles, and doctrines to determine their consistency, coherence, and stability to suggest reforms. It allows one to use their knowledge of how the law works and comprehend the ideas that underpin the operation of the law and the legal system.[44]

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[38] John Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches, 2nd edition* (Sage, 2003) 5.

[39] Kassu Jilcha Sileyew, Research Design and Methodology <https://www.intechopen.com/chapters/68505> Accessed 22 June 2022

[40] Sacred Heart University Library (2020, January 28). Research guides: Organizing academic research papers: 6. The methodology. SHU Library Research GuidesFairfield, <https://library.sacredheart.edu/c.php?g=29803&p=185928> Accessed 22 July 2022

[41] Wayne Goddad, Stuart Melville, *Research Methodology, An Introduction* (Juta & Co 2001) 1.

[42] Derek Jansen, Kerryn Warren, What (Exactly) Is Research Methodology? <https://gradcoach.com/what-is-research-methodology/> Accessed 22 July 2022

[43] J Myron Jacobstein, Roy M Mersky, *Fundamentals of Legal Research,(*8th Ed. Foundation Press, 2002) 1.

[44]Khushal Vibhute, Filipos Aynalem, *Legal Research Methods Teaching Material* (Chilot.Wordpress 2009).

There are several methods to conduct legal research. This section will begin with a discussion of potential research designs and methods, followed by assessing research methodologies, strategies, and procedures employed in this study to solve the research problem. It will show the rationale for choosing its specific research method.

Given the legal nature of the proposed research, the method to be adopted will be the qualitative research method, divided into three parts: doctrinal research, non-doctrinal research and a comparative study of the English, Scottish and Nigerian insanity defence.

1.6.2. DOCTRINAL RESEARCH METHOD

This study is research into law and legal concepts. Legal practitioners rely heavily on doctrinal research to draw logical conclusions on various legal issues. Authors established this kind of research as the conventional source of study in law.[45] Hutchinson and Duncan argued that doctrinal research or Black letter analysis is the traditional legal method.[46] Writers also refer to this as library-based research. It is a theoretical study comprising detailed research to locate legal declaration or legal analysis with more complicated logic and depth.

Considering the above, this study will review the insanity defence through desk-based (library) research using primary and secondary sources. Specifically, a desk-based (library) study will use primary and secondary sources to gather data. Primary sources include case law, statutes, regulations, treaties, and constitutions. Secondary sources include books, academic journals, electronic sources, and legal conferences. This exercise would help determine their meanings and how they connect to the research's fundamental and declared goals and objectives.

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[45] Gawas, V.M, 'Doctrinal legal research method a guiding principle in reforming the law and legal system towards the research development'(2017) International Journal of Law 128; Hutchinson, Terry, *Researching and Writing in Law* (Second Edition. Thomas Lawbook Co, Australia, Sydney 2006) 111; Sussane Egan, the Doctrinal Approach in International Human Right Law Scholarshp, in Lee McConolle, Rhona Smith, *Research Methods in Human Rights* (Routledge 2018).

[46] Caroline Morris and Cian Murphy stated that: black letter method focuses almost entirely on the law's language of statutes and case law to make sense of the legal world. Furthermore, the internal consistency of the law is what doctrinal analysis is concerned with, and it uses particular techniques to achieve that; Caroline Morris and Cian Murphy, *Getting a PhD in law* (Oxford: Hart 2011) 30; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83.

Hence, this study will apply the doctrinal research method to examine the different statutory provisions on the insanity defence in Nigeria, England and Scotland. Examples include the Criminal and Penal Codes Act in Nigeria, Criminal Procedure (Insanity and unfitness to plead) Act 1991 and Criminal Justice and Licencing (Scotland) Act 2010. It will also include legislation on mental health concerning the insanity defence. By this approach, this study will identify the changes in legislation that have occurred to the insanity defence to criminal responsibility over time in the three jurisdictions. For example, Nigeria and Scotland's criminal law provides the insanity defence tests.

The secondary sources for conducting such a study are subject to the discipline's particularities. This thesis explored criminal law textbooks and articles. This method requires a substantial amount of documentary and secondary data collecting. Hence, this study will explore a range of criminal law books, scholarly journals and online sources to get the descriptive information for this study's fundamental frameworks.

Doctrinal research requires deep learning, getting involved with the existing data, and being a critical editor of texts.[47] This study further reflects this method in analysing academic textbooks, journals, or other online sources to define the nature of the insanity defence. In addition, it will examine government reform papers to explain why past data is still essential to the investigation of the current research topic. Also, this review will show the government's attempts to evaluate and seek potential change avenues. Therefore, the data used in this research on the insanity defence are existing and readily available.

In a doctrinal study, the researcher asks what the law is in a particular circumstance. This method involves establishing a hypothesis by analysing legal documents objectively and critically.[48] The doctrinal method involves the systematic examination of legislative provisions and legal principles involved or derived from there and the logical/rational arrangement of the legal propositions and

[47] Law M, Stewart D, Letts L, Pollock N, Bosch J, Westmorland M. Guidelines for the critical review of qualitative studies. McMaster University Occupational Therapy Evidence-Based Practice Research Group. (1998) http://www.usc.edu/hsc/ebnet/res/Guidelines.pdf. Accessed 20 September 2018.

[48] Dr. S.R. Myneni, Legal Research Methodology (2014) Allahabad Law Agency, Faridabad 40.

principles.[49] Chynoweth expressed it concerns creating legal 'doctrines' by examining legal norms.[50]

The doctrinal research method plays several vital roles in legal studies. First, doctrinal research helps establish new legal theories, principles, and doctrines.[51] Second, it allows the application of legal doctrines through analysing the authoritativeness of such laws, cases, principles, doctrines and more.[52]Also, it provides legal professionals with the authoritative evidence they need to reach the correct conclusions.[53] Furthermore, it develops theories to explain the context of implications of substantive and procedural laws on society to improve the interpretation of the law. Therefore, its sole aim is to clarify a legal position, take a specific position, give reasons for any gap and suggest remedies and solutions.[54]

Considering the above, this study will rely on a doctrinal approach. Given the normative nature of most legal research, this study will investigate the criminal law on the insanity defence in Nigeria, seeking gaps.[55] Also, the normative character of criminal law, however, causes the relevance of this study to stem from judicial authorities, previous studies and viewpoints on the current regulation. This research focuses primarily on legal theories, doctrines and academic perspectives underlying the insanity defence in criminal law and its fitness for purpose.

Critics have argued that the doctrinal research approach is nothing more than a scholarship and hence less compelling or recognised than the research methods utilised by those in the sciences

[49] Dr. Rattan Singh, 'Legal Research Methodology' (2013) Lexis Nexis 5.

[50] Paul Chynoweth, 'Legal research' in Andrew Knight, Lee Ruddock, *Advanced Research Methods in the Built Environment* (Blackwell Publishing Ltd 2008) 29.

[51] Pradeep M D, 'Legal Research- Descriptive Analysis on Doctrinal Methodology, International' (2019) Journal of Management, Technology, and Social Sciences (IJMTS) 98.

[52] Ibid 98.

[53] Ibid.

[54] R Prasannan, 'The Need For Non-Doctrinal Research In Criminal Justice Administration' (1966) Journal of the Indian Law Institute 252-256.

[55] Normative nature as used here means relating to an evaluative standard; Warren J. Samuels, 'An Essay on the Nature and Significance of the Normative Nature of Economics'(1988) Vol. 10 No.3 Journal of Post Keynesian Economics 4.

and social sciences.[56] Furthermore, it is distant from reality since it concentrates on legal sources rather than the practical use of the law. Therefore, it is excessively theoretical, incredibly technical, uncritical and conservative. It disregards the social, economic, and political implications of the legal process.[57]

Nevertheless, it is essential to have an excellent doctrinal analysis to determine the law before exploring other legal matters, especially in areas where the law is unclear or changing. The purpose of analysing data is to help extract valuable and purposeful information from a larger piece of work, whether the data is qualitative or quantitative.

1.6.3. QUALITATIVE RESEARCH

The qualitative approach concentrates on words and observations to express reality and tries to describe people and research phenomena in natural situations.[58] This method involves focus groups, unstructured or in-depth interviews, document reviews instead of surveys, structured interviews, measurements & observations, and document reviews for numerical or quantitative data.[59] It entails collecting and analysing non-numerical data (text, video, or audio) to comprehend principles, views, or experiences.[60] It contains in-depth information about an issue or develops fresh research ideas.[61] Therefore, it reduces the large amount of data often gathered from diverse sources so that people will better understand and interpret a particular subject area.

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[56]Terry Hutchinson, 'Doctrinal research: researching the jury', in Dawn Watkins, Mandy Burton, *Research Methods in Law (*Routledge 2013) 27.

[57] Research Methodology Qualitative And Doctrinal Methods In Research <http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09._research_methodology/08._qualitative_and_doctrinal_methods_in___research/et/8155_et_et.pdf> accessed 20 January 2022.

[58] Dilanthi Amaratunga, David Baldry, Marjan Sarshar, Newton Rita, 'Quantitative and qualitative research in the built environment: Application of 'mixed' research approach' (2002) Research Gate 19.

[59] Ibid 19.

[60] Pritha Bhandari, 'What is Qualitative Research? | Methods & Examples' <https://www.scribbr.com/methodology/qualitative-research/>accessed 30 April 2022; Dudwick, N., Kuehnast, K., Jones, V N and Woolcock M, 'Analyzing Social Capital in Context: A Guide to Using Qualitative Methods and Data' (2006) World Bank Institute, Washington 5.

[61] Ibid 5.

In line with the above, through qualitative data analysis, this study employs various techniques to fulfil this research's goals and objectives. It will involve taking descriptive information on the insanity defence and offering an explanation or interpretation after a careful study.[62] This study started with the descriptive part of the insanity defence, narrating the Nigerian history of criminal law and the history of the insanity defence in Nigeria, England and Scotland. It will move from the descriptive part, evidencing the history of their insanity defences, to applying the qualitative data analyses approach to interpret the insanity defence provisions.

Most qualitative research methods use secondary data, and the researcher uses data collected for a different study.[63] For example, this study reviewed the literature on the history of criminal law in Nigeria and the two other selected jurisdictions. Therefore, this study will use secondary data from a previous study to examine the history of the insanity defence.

In qualitative research methods, data collecting may be problematic and resource intensive. The author may also find monitoring the research progress and goal challenging.[64] It would be a mistake to pit quantitative and qualitative methodological methods against one another as if they were rival techniques, notwithstanding their differences.[65] However, researchers use them differently, as they serve different purposes.

1.6.4. COMPARATIVE RESEARCH

The comparative legal research method involves critical analysis of different bodies of law to examine how the outcome of a legal issue could be different under each set of laws. According to Rainer, comparative law is a sub-discipline of jurisprudence that focuses on studying various

[62] Catherine Pope, Sue Ziebland, Nicholas Mays, 'Analysing qualitative data'. (2000). *British Medical Journal*, 320: pp. 114–116. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1117368/pdf/114.pdf> accessed on 2 October 2018.

[63] Janet Heaton, Secondary analysis of qualitative data, 1998, University of Surrey http://sru.soc.surrey.ac.uk/SRU22.html accessed on 2 October 2018; Pamela S Hinds, Ralph J Vogel, Laura Clarke-Steffen, 'The possibilities and pitfalls of doing a secondary analysis of a qualitative data set', (1997) Qualitative Health Research vol. 7(3) 408-24.

[64] Pope and others (n 48).

[65] Behrooz Morvaridi, Contentious Development Issues and Transnational Networks. In: Harrison, G. (eds) *Global Encounters. International Political Economy Series*. (Palgrave Macmillan, London 2005) 3.

phenomena within the various legal systems of the globe. Also, it includes the comparative examination and analysis of these phenomena.[66] Additionally, John Bell mentioned that comparative law is a sub-branch of legal studies.[67]

For example, studies could compare different jurisdictions, such as the one undertaken in this study, between Nigeria, England, and Scotland. Therefore, it is a legal research method comparing legal systems with each other.

Comparative analysis significantly increases one's comprehension of their culture by juxtaposing its recognisable structures and routines with those of other systems.[68] This pattern helps the researcher find common grounds or determine best practices and solutions.[69]

For unifying or harmonising legislation, academics often use comparative studies to prove their point. This method helps to determine the extent to which a focus country's legal evolution or development finds parallel development in other countries. This study will discuss Scottish and English government efforts to evaluate the insanity defence and mental health, seeking potential change avenues. Also, researchers base this analysis on the interpretation and pattern recognition of existing data. Therefore, it is easier to triangulate data from several sources or with diverse data collection methods at our disposal. This method gives a good audit trail between the data collected and interpretations. The writer must consider numerous elements before deciding what action to take.

Comparing other systems, cultures' thoughts and behaviour patterns help us better understand ours.[70] For example, using the comparative technique, a researcher may better understand their jurisdiction by analysing how other jurisdictions tackle the same problem. This technique also serves as a critical analytical tool for academics who want to identify specific aspects of the law.[71]

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[66] J Michael Rainer, *Introduction to Comparative Law* (Manz 2010) 2.

[67] John Bell in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011) 157.

[68] Frank Esser, Rens Vliegenthart, 'Comparative Research Methods' (2017) The International Encyclopedia of Communication Research Methods 1.

[69] Ibid.

[70] Esser, Vliegenthar (n 59).

[71] Patrick Glenn, 'Aims of comparative law' in Jan M Smits, *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing Limited 2006) 57.

Legrand stated that when doing comparative work, the reviewer must have expert knowledge of the different jurisdictions and decide on the best way to communicate the acquired knowledge of the other jurisdiction within their legal framework.[72] Legal transplants mainly utilise comparative studies for better development. Legrand also stated that individuals would interpret legal rules differently in each legal tradition and that it would be difficult for the two systems to interpret and similarly value legal rules, facts, and rights.[73]

However, part of the criticism of this study is that the lawmakers adopted Nigerian criminal laws without proper comparative analyses of the positions. This review will establish this based on the keywords used and their interpretations. When societies vary with one another, the nature of their cultures also differs from one society to another. The comparative analyses applied in this research in Nigeria, Scotland, and England will consider their peculiar societies.

An actual Legal transplant requires lawmakers to decide and comprehensively understand the legal norms they receive. This essay contradicts Legrand's conclusion that legal transplants are impossible. However, the transplant will fail if a legal transplant happens without considering the cultural variations across countries.[74]

By looking at the legal systems of other countries, the reviewer hopes to help their legal system by making suggestions for future changes and warning of potential problems.[75] It also allows the analyst to step back from their system and look at it more critically without taking it out of the comparative study plan.[76] Therefore, the comparative analysis method adopted by this study will proffer informed ways to close any gap identified in this study on Nigeria.

As a downside, locating information from other jurisdictions might be challenging. Additionally, researchers must ensure that comparisons are meaningful to the thesis and are not just descriptive.[77]

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[72] Pierre Legrand, 'The Impossibility of a Legal Transplant' (1997) Maastricht journal of European and Comparative Law 111, 115.

[73] Legrand (n 58) 115.

[74] 24 Pierre Legrand, What Legal Transplants? (Hart Publishing, Oxford, Portland, Oregon 2001) 57-63.

[75] John W Creswell, *Qualitative Inquiry and Research Design* (Sage Publications 2013) 42 – 25

[76] Ibid.

[77] Glenn (n 57) 57.

Second, a crucial drawback of comparative empirical research is ensuring equivalence, the capacity to gather similar data across settings, and avoiding measurement, instrument, and data biases.[78]

Non-Doctrinal Research Method

Non-doctrinal research, sometimes called social-legal research, incorporates methodologies from other disciplines to gather empirical data that answers study issues.[79] For example, it might be an issue, a new policy, or a change to the present legislation.[80]

Laws affect a broader social environment, so scholars developed socio-legal methods as a framework for conducting legal research.[81] Socio-legal research is heterogeneous and includes many theoretical viewpoints because they interact with numerous dynamics.[82] Summarily, the socio-legal method encompasses disciplines and topics concerned with law as an institution of society, law's impact, legal processes, institutions, and services, and social, political, and economic variables on law and legal institutions.[83]

Therefore, this study will review the literature on people's perceptions of insanity, focusing on causes and the treatment of insanity. The chapter on the mental health system intends to establish that people's perceptions of insanity could negatively impact the insanity defence's effectiveness literature, presenting an example of socio-legal research to blame social factors for contributing negatively to the insanity defence.

This study will attempt to infer the relationship between the mental health system and the insanity defence by examining the literature on people's perceptions, exhibiting a high level of ignorance even among the educated. It will draw further conclusions on the lack of contemporary mental

[78] Esser, Vliegenthar (n 59).

[79] Salim Ibrahim Ali, Zuryati Mohamed Yusoff, Zainal Amin Ayub, 'Legal Research of Doctrinal and Non-Doctrinal' (2017) International Journal of Trend in Research and Development.

[80] Ibid.

[81] Noreen L Channels, *Social science methods in the legal process* (New Jersey: Rowman & Allenheld 1985) 17.

[82] Ibid.

[83] Patricia Ewick and Others, *Social science, social policy and the law* (New York: Russell Sage1999) 84.

health legislation against the current one posited as outdated and significantly influencing people's ignorance.

This study systematically describes and questions not just the statutory provisions of the insanity defence but its operation, application, relevance, and underlying psychological, social, moral, and political assumptions. This method determines the viability or lethargies of the current state of the mental health system.

As a result, to attain its goals and objectives, to find the impact of the mental health system on the insanity defence, this study will explore the social-legal research approach. This evaluation approach will conclude that judges and legal professionals are part of the uninformed community about insanity and that this ignorance may impact their decisions regarding the insanity defence. Also, it will conclude that the best way to develop this area is to update or review the Lunacy Act.

Utilising socio-legal research methodologies has several advantages. First, it allows legal professionals and scholars to see the law in operation. This position is quite unlikely within the domain of theological study.[84] Second, it focuses on the issue's background, the law's aim, and its actual effects. Finally, it is vital because it makes the law pragmatic and effective for achieving social, political, and economic goals.[85]

Socio-legal procedures have drawbacks. Social science findings are unstable, and socio-legal research outcomes rely on how the researchers understand the results.[86] This ambiguity reinforces lawyers' prejudice toward socio-legal procedures. Also, the socio-legal study requires much time.[87]

Quantitative research method

The Non-doctoral research method used to identify the impact of the mental health system in Nigeria on the insanity defence used the quantitative method to collect the required data. The quantitative approach is one of the most used approaches to conducting social research.

[84] Creswell (n 24)

[85] Leslie George Scarman, *Law reform: The new pattern* (London: Routledge & Keegan Pau 1968) 14.

[86] Robert Burns, *Introduction to research methods* (Melbourne: Longman Cheshire 1996).

[87] Noreen L Channels, *Social science methods in the legal process* (New Jersey: Rowman & Allenheld 1985).

Researchers root it in a robust academic belief that puts significant trust in numbers representing different opinions and concepts.[88] As a result, quantitative research emphasises quantification in collecting and analysing data.[89] According to Bryman, writers infuse the quantitative approach with positivism, an approach to studying people that commends the application of the scientific method.[90]

It relies mainly on a hypothesis derived from theory deductively; the aim is to test the theory through observation and data collection. Following analysis, the findings would either confirm or reject the theory.[91] Therefore the literature explored people's perceptions of mental illness from the causes and treatment side were qualitative studies. They reviewed the numbers of people having a high opinion on causes of insanity that are not natural and natural. They also examined the number of people that resort to the orthodox and unorthodox treatment of insanity. It used numbers representing different opinions and concepts on the causes and treatment of insanity.

This thesis used doctrinal qualitative and comparative analysis approaches to drive its aims and objectives. It also included a mixed study involving literature on social and legal studies to claim further that social factors affect the effectiveness of the insanity defence. This research aims to identify gaps in the Nigerian legal system on the insanity defence and Proffer an informed standard for improvement of the insanity defence.

1.7. THESIS STRUCTURE

After chapters one and two of this thesis, which introduce and discuss the history of criminal law in Nigeria, this thesis will take a comparative analytical approach to examine the Nigerian, English and Scottish jurisdictions in subsequent chapters. This thematic approach will compare Nigeria's positions on the insanity defence, presenting similarities and differences between the three jurisdictions. This comparative review will increase the understanding of the insanity defence, help

[88] Ibid 17.

[89] P. Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford Scholarship Online 2020) 15.

[90] Alan Bryman, *Research Methods and Organization Studies* (Taylor & Francis 2003)105.

[91] Behrooz Morvaridi, Contentious Development Issues and Transnational Networks. In: Harrison, G. (eds) *Global Encounters. International Political Economy Series*. (Palgrave Macmillan, London 2005) 2.

identify gaps and explores possible ways to close the identified gaps of the Nigerian insanity defence.

Chapter two is on the history of Nigerian criminal law. Nigeria is this thesis's focus jurisdiction. Hence, this chapter will examine the history and development of the Nigerian criminal system/legislation. Understanding Nigeria's criminal law history is essential to explain its complexity since the pre-colonial era. Thus, this chapter will demonstrate how and why Nigeria has two criminal law jurisdictions reflecting its ethnic/religious diversity and reflected in the various States. In addition, it sets the stage for the two pieces of criminal legislation on the insanity defence discussed in this study.

Chapter Two traced the origin of the Nigerian Criminal Code and the Penal Code Acts, establishing that Nigeria transplanted their criminal laws from foreign jurisdictions. Also, it demonstrated that Nigeria had begun adopting foreign legislation from the colonial era. Examining the current insanity defence traces back to these two pieces of legislation. This thesis argues that legally transplanting laws could negatively impact the legal system. It identifies some problems with the Nigerian insanity defence to transplanting laws without reviewing their effects or circumstances.

Chapter three will examine the historical background of the insanity defence and answer the question of the origin of the insanity defence in Nigeria, England and Scotland. This thesis will approach this thematic chapter by comparing the position of Nigeria, England, and Scotland. It traces the origin of the Nigerian insanity defence to the British, given the British presence in Nigeria's legal system. This historical section on the Nigerian insanity defence attributes its origin to the M'Naghten rule. Therefore, it will examine the history of the insanity defence in England as part of the history of the insanity defence in Nigeria, considering the M'Naghten rule. At the same time, the section on Scotland provides a historical analysis of legal perspectives on the insanity defence that led to their current practice. Therefore, it will provide evidence of historical legal arguments in England and Scotland that shaped their insanity defence. According to this chapter, Nigeria, as a much younger country than England or Scotland, lacks the historical background and case law analysis on the insanity defence in those jurisdictions.

Chapter four will identify the various insanity defence provisions in Nigeria, England, and Scotland and their development over time. This review aims to show that the criminal law

legislation on the Nigerian insanity defence in the Penal Code and Criminal Code Acts has remained unchanged for decades. However, this chapter will present evidence of developments in various distinctive ways and modifications in Scotland and England. The dynamism and complexity of modern society necessitate legal development as the law must reflect the realities of the ever-changing society.

Chapter Five will review the judicial interpretation of the insanity defence tests provided in the criminal laws of the three jurisdictions in focus. It will examine how courts apply the insanity defence tests and their efficiency. This chapter is where this thesis determines the insanity defence functionality in the three jurisdictions in focus. It will answer the question of the sufficiency of the Nigerian insanity defence. Also, it will evidence the substantive differences between the Penal Code and Criminal Code Acts.

To identify the gaps in the application of the insanity defence, chapter six will review the judicial application of the insanity defence. It will focus on proof and evidential burden. This review will further show if there is an impact of the two separate tests in two pieces of legislation for the insanity defence in Nigeria.

Chapter Seven will examine the impact of the mental health system on the insanity defence. One of the arguments of this thesis is that the current mental health system and legislation negatively impact the Nigerian defence of insanity. This conclusion will draw from the review showing that a high population in Nigeria understand insanity (mental disorder) differently from the conventional knowledge of insanity. Some of the judges and legal practitioners are members of this community that lacks the conventional knowledge of insanity. Therefore, a lack of understanding of insanity could affect the effectiveness of the insanity defence and make them less agreeable to it.

A significant question driving this study is whether the insanity defence as a legal framework for the mentally disordered effectively achieves its goals. Hence, this chapter analysed the insanity defence considering its relationship to the mental health system by reviewing Nigeria's legislation, including the English and Scottish mental health legislation. This review will further show that the Nigerian mental health legislation affords no assistance to the insanity defence. In contrast, the assessment of the English and Scottish mental health legislation presented how they are helpful to

the insanity defence. Additionally, It would show that mental health legislation aid in defining insanity and the appropriate disposal options. Hence it could facilitate the diversion of mentally disordered accused persons to the hospital.

1.8. THE ORIGINALITY OF THE RESEARCH AND EVIDENCE OF ORIGINAL CONTRIBUTION TO KNOWLEDGE.

This thesis seeks to discover the gaps in the Nigerian insanity defence and find ways to close them. It will establish that the statutory provision of the insanity defence in Nigeria has not changed over time, and the government has yet to review this area of law to accommodate modern medical growth. A lack of review does not make the law ineffective unless there is an obvious problem. However, on the one hand, this thesis will identify the issues that warrant changes in the insanity defence practice. Secondly, the law is dynamic. It evolves to meet the specific needs of the society in which it is operative.

This thesis will emphasise the need for a better relationship between criminal law and mental health jurisdiction on matters of the insanity defence to fill the gaps identified. It will argue that courts and lawmakers should make the issue of expert medical evidence compulsory in every aspect of the insanity defence, from the proof stage to the sentencing stage. Hence, it will justify developing the Nigerian insanity defence through its mental health framework. It will further draw this position from the comparative analysis of the position in England and Scotland on the insanity defence.

In addition, this study will provide ways to balance the interests of the insane while protecting people from them by relying heavily on a developed mental health system. This research will contribute to the body of work on criminal responsibility, literature on the insanity defence and medical evidence. It could lead to policy changes in defence of insanity, especially regarding disposal options in Nigeria. This study will strive to answer the question of the best way to protect insane persons in the criminal justice system. Furthermore, this work will contribute to Nigerian criminal law by attempting to provide a good reference point considering the hypothesis that a closer relationship between the criminal law on the insanity defence and the mental health system can lead to efficient use of the defence in Nigeria.

1.9. ETHICAL CONCERNS

The author of this study does not know if this research raises any ethical issues. All the information used in this research is available to the public.

CHAPTER TWO

THE HISTORY OF CRIMINAL LAW IN NIGERIA

2.01 INTRODUCTION

This thesis will examine the Nigerian insanity defence. It will further compare the Nigerian insanity defence position with those in England and Scotland to help address the gaps identified in the Nigerian practice.

However, after this chapter on the history of criminal law in Nigeria, the remaining chapters in this thesis will employ a thematic comparative analytic approach to examining the insanity defence in the three jurisdictions. This approach helps to identify the similarities and differences among these three jurisdictions in each chapter. This comparative review is essential for a deeper understanding of the insanity defence so that one may make better-educated decisions.

Nigeria is the focus of this thesis, and this chapter will review the history and development of Nigerian criminal laws related to the insanity defence. Insanity is a defence to criminal liability. In Nigeria, the Criminal Code Act[1] and the Penal Code Act[2] provide the legal framework for the insanity defence. To appreciate the complexity of Nigerian criminal law, one must grasp the country's history dating back to the pre-colonial period. Thus, it will explain why it has two criminal law regimes representing its ethnic and religious diversity. In addition, it will set the stage for the two different provisions of the insanity defence discussed in chapter five. This chapter review will also not discuss the insanity defence or its development directly because of the lack of information available at the time. The nineteenth century saw the beginning of major historical development activities in Nigeria.[3] This review will cover the nineteenth-century pre-colonial era to the country's independence in 1960. As a result, the pre-colonial period[4] in focus is between

[1] Nigeria Criminal Code Act, Cap C38 LFN 2004.

[2] Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960).

[3] Hatch John, *Nigeria: A History* (Penguin Random House, 1971)17; Michael Crowder, *The Story of Nigeria* (Faber & Faber 1973); like increase in trading activities and foreign visits.

[4] This is the period before the British took over control and administration of Nigeria.

1800 and 1900, before Nigeria became a part of the British empire. The colonial era discussed is between 1900 and 1960.

This review will follow the legal development of criminal justice from before Nigeria became a colony, identifying how Nigeria handled crime. It will Identify the nature, characteristics, examples and punishment for crimes in this period.

It will move to the colonial period, marking the beginning of Nigeria's statutory instruments. Thus, this review will identify the origin of the statutory instruments in Nigeria, particularly criminal laws. A key focus of this review will be Nigeria's adoption of foreign criminal law with little regard for its indigenous legal system.

2.1. CRIMINAL LAW IN THE NIGERIAN PRE-COLONIAL ERA (1800-1900).

Studies have shown that the world did not know the land mass currently called Nigeria as Nigeria before it became part of the British Empire in 1900.[5] However, as evidenced by literature on the Nigerian legal system, the world knew the expanse of Nigeria by various names, including the Royal Niger Company Territories, the Niger Empire, the Niger Sudan, Central Sudan and others.[6] The Niger River, which flows through the country, inspired the country's name.[7] In 1897, a British journalist named Flora Shaw, later married to the colonial administrator Lord Lugard gave Nigeria its name.[8]

This section discusses the nature, examples, and penalties for pre-colonial acts comparable to modern-day crimes. Given the scarcity of written documentary and oral history, writing pre-

[5] Toyin Falola and Mathew M Heaton, *A History of Nigeria* (Cambridge University Press 2008) 243; The Cenetary Project, 1851 – 1914 Birth of Nigeria <https://artsandculture.google.com/exhibit/birth-of-the-nigerian-colony-pan-atlantic-university/ARi_MKdz?hl=en> accessed 15 December 2017; Alan C Burns, *History Of Nigeria* (London George Allen & Unwin Ltd Museum Street 1929).

[6] Charles Kingsley Meek, 'The Niger and the Classics: The History of a Name' (1960) Vol 1 The Journal of African History 1.

[7] Ibid; Burns (n 5) 11.

[8] Max Siollun, *What Britain Did to Nigeria, A Short History of Conquest and Rule* (C Hurst & Co Publishers Ltd 2021).

colonial history could be challenging. Nevertheless, according to evidence, pre-colonial Nigerian societies had a formal, albeit complex, method of social control before colonialism. While there is evidence of societal control before colonisation, there is a lack of literature on the insanity defence during this period since few Nigerian history books mentioned it. What could be the position in the pre-colonial era?

While discussing persons considered uncivilised or primitive, Malinowski stated that criminal law was the law of savages.[9] He used the term "savages" to refer to societies of ancient times without civilisation or underdeveloped countries before any colonial influence.[10] Also, Ijoma noted that "the early beginnings of states and communities in Africa[11] are difficult to piece together because of many myths and legends surrounding them".[12] Like Bascom, She explained this assertion that the people did not document diverse practices[13] and the unique nature[14] of the rules in these African states.[15] This thesis notes that verifying these customs is challenging and reliant on academic literature and testimonies of Elders, Chiefs, and knowledgeable persons. Hence, this thesis will explore Nigerian literature to illustrate the nature and diversity of these customary laws across Nigeria's ethnic groups. Also, it will limit the facts to standard practices among the major ethnic groups[16] in Nigeria.

Hassan asserted that traditional societies like the Nigerian pre-colonial era controlled it via customary laws before British colonisation during a discussion of Nigeria's cultural orientations.[17]

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[9] Bronislaw Malinowski, *Crime and Custom in Savage Society* (Littlefield Adams 1985) (first edition Published 1926) 64.

[10] Ibid.

[11] Like Nigeria.

[12] J O Ijoma, 'The Evolution of the Aro Kingdom' in J O Ijoma (ed), *Building on Debris of a Great Past* (Enugu Fourth Dimension Publishers 1998)15.

[13] Tribal differences in cultural dispositions like the Igbos take some acts as a violation of their culture and such not part of the culture of Yoruba or Hausa, for instance.

[14] Like the Osu system (an outcast) oath taking, divination and blood covenant in pre-colonial times.

[15] William R Bascom, 'West Africa and the complexity of Primitive Cultures' (1948) Vol 50 New Series 18 15.

[16] Hausa, Yoruba and Igbo.

[17] Hassan Adeeb and Bonnetta Adeeb, Nigeria: *One Nation, Many Cultures (Exploring Cultures of the World)* (Benchmark Books 1996)2.

He referred to these customary laws as a body of native rules that regulated how the people lived and interacted.[18] However, studies have shown no document or code known as the Nigerian customary criminal law in the pre-colonial era. This position was because they were unwritten and different in ethnic groups.[19] Adewale shared the same opinion when he stated:

> The traditional African religion has no written legal documents showing what is legal or illegal, but traditional Africans have a code of conduct that they all know.[20]

Thus, before the British in Nigeria, customary laws predominated. These customary laws are rules or practices passed from generation to generation unwritten.[21] There is no system or organised code known as customary criminal law. Therefore, it is difficult to identify any known or written law per se.[22] It is challenging for researchers to verify these customs and depend on the testimony of Elders, leaders and those who know them.[23] To complicate matters, Nigeria has always been a heterogeneous society[24], with each ethnic group having its traditional system of social control from the pre-colonial era.[25] This thesis refers to these traditional social control systems as customary laws, focusing on Hausa, Yoruba and Igbo customs.

Egwummuo explained customary laws as "social habits and patterns of behaviour that sometimes evolve without express formulation of consciousness but which over time ossified into rules that those societies observed as binding."[26] According to Obilade, customary law consists of customs

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[18] Ibid.

[19] Customary Criminal Law in Nigeria <https://legalgoodness.wordpress.com/2017/09/06/customary-criminal-law-in-nigeria/> accessed 2 March 2021.

[20] Adewale S A, 'Crime and African Traditional Religion' (1994) Orita XXVII, 1-2: 54-66.

[21]Derek Asiedu- Akrofi, 'Judicial Recognition and Adoption of Customary Law' (1989) vol.37 American Journal of Comparative Law 572.

[22] Customary Criminal Law in Nigeria <https://legalgoodness.wordpress.com/2017/09/06/customary-criminal-law-in-nigeria/>accessed 2 March 2021

[23] Ibid 572.

[24] A society that has individuals from diverse ethnicities, cultural backgrounds.

[25] Onuh James, "The Case of Restatement of Customary Law in Nigeria" in "Women and Children- A Disempowered Group under Customary Law" in Yemi Osinbajo and Awa Kalu (Eds), *Towards a Restatement of Nigerian Customary Laws* (Lagos: Federal Ministry of Justice, 1991) 42.

[26] J N Egwummuo, *Principles and Practice of Land Law* (Academic Publishing Company 2003) 139.

accepted by community members as binding on them.[27] These definitions reveal that customary laws in the pre-colonial era had no specific characteristics.

The people give validity to a custom; hence a tradition is not a law unless its members recognise it. Asiedu- Akrofi stated that these customary laws were like a body of rules or practices passed from generation to generation with no written format.[28]

Furthermore, these customs were flexible and easily adaptable to different and changing circumstances with no change in character.[29] Put differently, Okemuyiwa claimed customary laws change over time. Therefore, their rules and regulations are flexible because they constantly adapt to the reality of the time.[30] In *Lewis V Bankole*[31], Lord Osborne appreciated this point about native law's flexibility when he stated:

> One of the most striking features of West African Native Custom……is its flexibility; it appears to have always been subject to motives of expediency and it shows unquestionable adaptability to altered circumstances without entirely losing its character.

The different ethnic groups[32] had systems that were suitable for their legal administration. For example, the Igbo communities[33] operated or functioned like a republican system.[34] Their community administration was by representation, electing the oldest family member or lineage as their representative in the community government.[35] These groups of older men in each family

[27] A O Obilade, *The Nigeria Legal System* (Spectrum Law Publishing 1998) 83.

[28]Derek Asiedu- Akrofi, 'Judicial Recognition and Adoption of Customary Law' (1989) Vol 37 American Journal of Comparative Law 572.

[29]Ibid 572; *Lewis v Bankole* [1908] 1 NLR 81, 100 -102.

[30] Adedeji Akeem Z Okemuyiwa, Native Law and Customs in a Democratic Setting: (The Nigeria Experience)

[31] [1908] 1 NLR 81, 100 -102.

[32] Igbo, Hausa, and Yoruba.

[33] They live in high concentration in Anambra, Abia, Enugu, Ebonyi and Imo states of Nigeria.

[34] Afigbo Adiele, *The Indigenous Political Systems of the Igbo* (Tarikh 4-2, Longman, Harlow 1973)12.

[35] Known as Council of elders.

formed the council of elders[36] and performed the functions of today's court (Jury).[37] The communities used the age grades to enforce the village's social justice.[38]

In his literary writing, Chinua Achebe popularly portrayed the Nigerian justice system and its characteristics during this era; *Things fall apart*.[39] Since the publication of *Things Fall Apart*[40] in 1958,[41] authors welcomed and regarded it as an influential text (literature), insightful into African culture and, more closely, Nigerian culture.[42] Academic writers recognise it as a novel that portrays the Nigerian pre-colonial culture, how people handled their affairs, and the epochal changes shaped by British colonialism.[43]

Achebe characterised Umuofia, an Igbo community, before colonisation as a "democratic, energetic, and intelligent community" with Complex culture and moral and ethical norms.[44] He showed that Umuofia had a judicial system based on their ancestors' wisdom. Village elders determined judicial proceedings, as the oldest men had the wisdom and knowledge. For example, the text found the character Okonkwo guilty of abusing his wife during the community's peace week. Therefore, the village elders punished him. Also, Okonkwo accidentally killed a man, and the people of Umuofia sent him and his family into exile without contact with the community. They also punished Okonkwo for committing suicide by burying him disgracefully with no

[36] Also known as Ndi Ichie.

[37] Emmanuel C. Onyeozili, Obi N. I. Ebbe, 'Social Control in Precolonial Igboland of Nigeria' (2012) AJCJS, Vol 6, 39.

[38] Ibid 39.

[39] Chukwudike and Eminue believed Things Fall Apart was a good illustration of depiction of the pre-colonial Igbo setting; Patrick Okpalaeke Chukwudike, Esin Okon Eminue, "Dynamics of Pre-Colonial Diplomat Practices Among the Igbo Speaking People of South-eastern Nigeria, 1800-1900: A Historical Evaluation" (2017) vol. 14 IISTE.

[40] Achebe Chinua, Things fall apart (Oxford: Heinemann Educational Publishers, 1996) 56.

[41] Among literary historians of the novel genre, Chinua Achebe's popularity is recognised[41] and known for using his novels to popularise the African culture and way of life.

[42] Purwarno, Cannibalistic Okonkwo: A Deconstructive Perspective of Chinua Achebe's Things Fall Apart

[43] From Achebe's his aptitude to use the novel to popularize the African cultures and ways of life. He broached this feat through his realistic presentation of African lifestyle.

[44] Achebe (n 40).

ceremony, according to the custom of Umuofia. Therefore, the popular punishment for a heinous offence like murder was exile or banishment from the Igbo community.

On the other hand, the Hausa and Yoruba communities had a different practice from the Igbos because they had a recognised traditional head, unlike the Igbos who did not.[45] The monarchs were their spiritual leaders or rulers who governed the Yoruba tribe and the Hausa tribe.[46] The Oba was in charge of the Yoruba communities, while the Emir was the head of the Hausa communities (called Emirates).[47]

Okonkwo argues that the pre-colonial administration was monarchical (North and South-South/West) and republican (South-East).[48] Also, Umeh referred to the government in the Nigerian pre-colonial communities as centralised and decentralised.[49] He, like Ogbu, described the Yoruba and Hausa communities as centralised because each had a recognised leader who served as the executive and legislative head. In contrast, the Igbo society had a decentralised system of government because of the absence of a recognised leader, and they distributed power at various levels.[50]

The pre-colonial Nigerian communities considered some acts more severe than others, even though they did not categorise them as civil or criminal.[51] According to Adewale, the pre-colonial era's behaviours or acts against societal norms are now considered criminal acts.[52] Likewise, Onyeozili and Ebbe explained that what is currently known as a crime, the pre-colonial era divided them into abominations (public offences) and delicts (private offences).[53] They noted that abominations included but were not limited to the following: murder, theft, adultery, rape, incest, suicide, being

[45] Osita Nnamani Ogbu, *Modern Nigerian Legal System* (CIDJAP Pres Enugu 2007) 200.

[46] Ogbu (n 43) 201.

[47] Ogbu (43) 201; Atanda, J A, 'Government of Yorubaland in the Pre-Colonial Period' (1973) vol 4 Tarikh 2.

[48] C O Okonkwo, *Introduction to Nigeria law* (London, Sweet and Maxwell 1980) 60.

[49]F E Umeh, *The Courts and Administration of Law in Nigeria* (Enugu, Fourth Dimension 1989) 39-40

[50] Ibid; Ogbu (n45) 201.

[51] O T 0 Elias, *The Nature of African Law* (Manchester: Manchester University Press, 1956) pp. 182-183; Hassan Adeeb and Bonnetta Adeeb, *Nigeria: One Nation, Many Cultures (Exploring Cultures of the World)* (Benchmark Books 1996) 3.

[52] Adewale (n 34) 54.

[53] Emmanuel C Onyeozili, Obi N I Ebbe, 'Social Control in Precolonial Igboland of Nigeria' (2012) Vol 1 AJCJS 30.

intimate with a relative or to a father's wife when the father was still alive, killing or eating domestic animals sacrificed to the gods of the land or other acts against the gods. In contrast, delicts included burglary, robbery, stealing, and fighting.[54] Oluwabi further supported the above classification when he explained that there were various levels of offences in the Igbo community ranging from "Mmehe" (negligence) through "Alu" to "Nso ani" (abomination).[55]

Igbo communities punished serious acts (abomination known as alu) by dedicating the offender to the shrine, and he became an "osu" (outcast) or pledged voluntarily to serve the oracle for safety. At the same time, the communities punished less severe acts (Mmehie) by shaming, restitution, a fine, compensation, a communion feast, or slavery.[56]

Adewale identified acts that people in pre-colonial Yoruba land classified as criminal acts, like that of the Igbo community,[57] through their traditional court system. The Yoruba communities used different sanction methods for those violating the law. These methods included killing the individual,[58] amputating body parts,[59] flogging or beating, exiling, restitution, compensation, fines, extramural labour, and corporal punishment.[60] The Oba determined these punishments based on similar past decisions by their forefathers.

Sharia law was primarily the indigenous law that governed operations and individual behaviour in the pre-colonial Hausa era.[61] Hence, there was a well-established legal system in the Northern Region. For example, the northerners, following Islamic legal administrative patterns, established

[54] Adeeb (n 51) 18

[55]Adeola A Oluwabiyi, An Overview of Similarities Between Customary Arbitration and Native Courts as Platforms of Administration Of Justice In Pre-Colonial Nigeria (2015) Vol.1 Journal of Asian and African Social Science and Humanities 129.

[56] Onyiozoli and ebbe (n 53) 6.

[57] as "adultery, breach of covenant, burglary, fornication, incest, kidnapping, irreverence and unkindness to parents, lying, murder, rape, seduction, speaking evil of rulers, swearing falsely, theft, sodomy and malice"; Adewale (n21)1.

[58] death penalty.

[59] The community punish the offender by cutting out any part of their body, to inflict pains.

[60] Chukwudike and Eminue (n 49) 1.

[61] Tauquir Mohammad khan, M H Syed, *Criminal law in Islam* (Pentagon Press 2007) 342.

local courts presided over by qualified Muslim scholars and clearly defined jurisdictions and an appeal process.[62]

Unlike the unwritten customary laws of Igbo and Yoruba, Islamic scholars laid out the rules for this Islamic law, including specific acts known as crimes in the modern world and their punishments.[63] In addition, the Quran classified offences as Hudud, which affects human existence. Hudud included but was not limited to adultery, false accusations of adultery, theft, alcohol consumption, murder, apostasy, and rebellion.[64] The Hausas regarded these offences as Allah's right, which they could not change.[65] Moreover, the nature of these acts considered today as crimes were similar despite the cultural or traditional differences.

There was no evidence that societies used any factor, including insanity, to defend against crimes in the pre-colonial era. Even if Nigeria had previously used insanity to defend crimes committed during this era, this thesis could not find any material to support this assertion.

This section demonstrated that before any influence from the Western world, Nigeria had its type of criminal law (social control or customary law). First, this section presents the reader with various customary law positions among the different tribes of Nigeria, providing a background for why Nigeria has over one criminal law jurisdiction. Second, it revealed a gap in the literature on the insanity defence in pre-colonial Nigeria. None of the analysed literature on pre-colonial criminal law contained information on the insanity defence.

On the other hand, the British involvement in Nigeria brings this study into the Nigerian colonial period. This period laid the groundwork for the M'Naghten Rule, the Nigerian insanity defence origin. It also introduced the criminal and penal codes, which serve as the insanity defence's current framework.

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[62] David Nathan Smith, 'Native courts of Northern Nigeria: Techniques for Institutional Development' (1968) Boston University Law Review 53.

[63] Ibid 342.

[64] Ibid.

[65] Khan (n 61) 342.

2.2. THE CRIMINAL LAW IN NIGERIAN COLONIAL ERA.

Nigeria becoming one of the British empires in 1884, opened a new chapter. The British introduction of laws changed the Nigerian people's traditional way of life. This section will demonstrate how the colonial period introduced statutory laws, including criminal laws relating to the insanity defence. It will further explain that Nigerian criminal law took a double approach, reflecting the two insanity defence provisions.

Colonialism introduced many English laws in Nigeria that remain today with minor amendments, including criminal law.[66]

> The laws of England shall have the same force and be administered in this settlement as in England; so far as such laws and such administration thereof can be rendered applicable to the circumstances of this settlement any English Law in force in England on 1st January 1863.[67]

This extract relates to the English colonisation of Nigeria and the Nigerian applications of English law. The colonial officers provided this law to impose the English laws on their newly occupied territory. Nigerian authors wrote about the reception of English law in Nigeria, as though Nigerians chose to adopt it.[68] However, the above extract and other literature have shown that the British administration did not give Nigerians a choice to adopt English law.[69] According to Adewoye, Nigeria received the English law as "a natural handmaiden of colonialism, a powerful administrative control tool".[70] Additionally, he argued that enacting a law was necessary to enforce

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[66] Lionel Brett and Ian McLean, *The Criminal Law and Procedure of Lagos, Eastern Nigeria and Western Nigeria*. (London: Sweet and Maxwell 1963); other laws include the evidence Act, Law of Trust, Contract law etc.

[67] Ordinance No. 3 of 1863.

[68] Benjamin Obi Nwabueze, *the Machinery of Justice in Nigeria (*London 1963) 19; Adiele E. Afigbo, *Background to Nigerian Federalism: Federal Features in the Colonial State* (Publius 1991)13–29.

[69] Wisdom Okereke Anyim, 'Research Under Nigerian Legal System: Understanding the Sources of Law for Effective Research Activities in Law Libraries' (2019) Library Philosophy and Practice (e-journal). 2383.

[70] Omoniyi Adewọye, 'Law and Social Change in Nigeria' (1973) Vol 7 Journal of the Historical Society of Nigeria,1 152.

an orderly and peaceful state of affairs and ensure cooperation between colonisers and the colonised.[71]

Before the colonial era, the communities had customary social control mechanisms, but no document referred to as Nigerian criminal law existed. The people did not codify their criminal law was not. Moreover, studies show that Nigeria's indigenous way of life changed when British Rule began in 1849[72], as indigenous laws ceased to be the primary governing laws in Nigeria. As shown below, the British administration codified criminal laws after several failed attempts.

The Nigerian literature reviewed in this section noted the British control of Nigeria and the changes in phases. The first phase started in 1849 when the British government appointed the first consul to regulate trading in the African coastal area, [73] which opened interaction with the people.[74] After that, the English Rule in Nigeria introduced English laws[75] in Lagos, while other parts of Nigeria retained their customary law.[76]

Further, in this phase, the British officials established the Supreme Court of Lagos under the Supreme Court Ordinance No. 4 of 1876[77] as a court of record.[78] This court administered the Common Law, the Doctrines of Equity, and the Statute of General Application in force on 24th

[71] Ibid 152.

[72] Antony N. Allott, 'The Common Law of Nigeria' (1965) 10 Int'l & Comp L Q Supp. Pub 31; R. Olufemi Ekundare, *An economic history of Nigeria 1860-1960* (New York: Africana Publishing Co 1973) 48; Akinwumi Ogundiran, 'Four Millennia of Cultural History in Nigeria (*ca*. 2000 B.C.–A.D. 1900): Archaeological Perspectives' (2005) Journal of Prehistory 133.

[73] The then coastal areas were Lagos, Benin, Bonny, Degema and Calabar.

[74] John Ademola Yakubu, Within and Without: The Relevance and Potency of the Law Beyond our Frontiers, An Inaugural Lecture delivered in the University of Ibadan on the 23rd of November 2006. (University of Ibadan 2006) 66.

[75] The received English law includes, the common law, the doctrines of equity, statutes of general application in force in England on January 1, 1900, statutes and subsidiary legislation on specified matters; see Yemisi Dina, John Akintayo, Funke Ekundayo, 'Guide to Nigerian Legal Information' (2005) Hauser Global Law School Program, New York University School of Law.

[76] Akintunde Olusegun Obilade, *The Nigerian Legal System* (Sweet and Maxwell 1981) 18.

[77] Like that of Her Majesty's High Court of Justice in England.

[78] Obilade (n 76) 18.

July 1884.[79] Thus, the Supreme Court Ordinance[80] became the basis of British Rule in Lagos. This Ordinance allowed the application of customary law if it was not repugnant to natural justice, equity, and good conscience, nor incompatible with the Supreme Court Ordinance.[81] Therefore, the administration of Common Laws included the M'Naghten Rule.[82] Literature refers to the M'Naghten Rule as the origin of the insanity defence in Nigeria today.[83]

Literature shows that the second phase of the colonial period saw failed attempts to enact a criminal code for all parts of Nigeria.[84] First, after the Gold Coast colony adopted a criminal code in 1874, British officials in Nigeria advocated for it but took no action.[85] Morris explained that the move for a criminal code heightened because British officials believed the Gold Coast criminal code was functioning well. However, the literature examined for this thesis could not explain this belief.[86] The British administration made further Unsuccessful attempts from 1889[87] to 1900[88] to adopt the St Lucia model of criminal code and the Gold Coast Criminal Code.[89] These attempts were unsuccessful primarily because some senior British officials[90] believed Nigeria was unprepared for a code and lacked the judiciary and bar's interpretive and administrative capacity.[91] This thesis

[79] Obilade (n 76) 18.

[80] The British officials established a new Supreme Court Ordinance for Lagos in 1886 like that of 1876.

[81] Obilade (n 76).

[82] Cypril O Okonkwo, *Okonkwo and Nash: Criminal Law in Nigeria* (London Sweet and Maxwell 1980) 4, 22.

[83] Ibid; Leigh Bienen, 'The Determination of Criminal Insanity in Western Nigeria' (1976) The Journal of Modern African Studies 220.

[84] H F Morris, 'A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935' (1974) Journal of African Law Vol. 18, No. 1, Criminal Law and Criminology 4.

[85] Ibid 4.

[86] Ibid 4.

[87] In 1889, the then Secretary of State to the West African colonies proposed that the coastal areas, including those in Nigeria, enact the St Lucia model of Criminal Code.

[88] By 1899, when Edlin resumed his position as the Queen's advisor, he supported the then Governor of Lagos to adopt the Gold Coast Code.

[89] Again, in 1898, the then Governor, supported by the then Chief Judge (T C Rayna), argued that the Criminal Code used in the Gold Coast was suitable for Lagos; Morris (n 84) 4.

[90] Like the Queen's Advocate (Nicholl).

[91] Obilade (n 76) 18.

states that the evidence to support this belief is unknown because this literature did not note it. Nonetheless, this thesis condemns these reasons as irrational and insufficient to prevent the codification of law.

In addition, Morris reported that the legislative council rejected the criminal law draft bill in 1899 on the following ground: that it would introduce new crimes and punishments unknown to the people, give officers more room for abuse of power, would violate the right of indigenes as British subjects and conflict with their native laws, not repugnant to natural justice, equity, and good conscience. However, this thesis observed that this literature did not indicate whether they verified these reasons.

The third phase was when the colonial administration declared Southern and Northern Nigeria Protectorates on 1st January 1900. Nigeria retained the English law in Lagos in the same form and content.[92] Studies show that while the Southern region struggled to adopt a criminal code, the Northern region enacted two regulations between 1876 and 1904[93]. The North modelled the Criminal Procedure Code on the Gold Coast Ordinance of 1876 and the Criminal Code Act on the Queensland Criminal Code of 1904.[94] The lawmakers modelled the criminal code Act in the Northern Region from the Queensland Criminal Code introduced in Australia in 1899.[95] The Queensland Code of Australia originated from a criminal code drafted by a British Criminal Law Attorney named Sir James Fitzstephen in 1878.[96] He proposed this code to replace the common law, but the British Parliament never enacted it.[97] This thesis is yet to find information on why British lawmakers refused to adopt this homegrown Act.

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[92] Morris (n 84) 4.

[93] Elias Oluwale Taslim, *The groundwork of Nigerian Law* (London: Routledge & Kegan Parel ltd 1954)

[94] Inioluwa Olaposi, The History and Sources of the Nigerian Criminal Laws: How we ended up with Two Codes <https://legalnaija.com/the-history-and-sources-of-the-nigerian-criminal-laws-how-we-ended-up-with-two-codes-inioluwa-olaposi/adedunmade/> accessed 20th August 2020; Victor L.K. Essien, 'The Northern Nigerian Penal Code: A Reflection of Diverse Values in Penal Legislation' (1983) .Vol 5 NYLS Journal of International and Comparative Law.

[95] Obilade (n76) 12.

[96] Ibid.

[97] Okonkwo (n 81) 5.

Applying the Criminal Procedure Act and Criminal Code Act alongside the customary Sharia law to control their criminal jurisdiction complicated the position in the northern region. Northern Nigeria thus experienced a variety of criminal law systems.[98] The indigenous courts administered customary laws. In non-Islamist communities, the term "criminal law" referred to those laws of custom that they regarded as widely binding.[99] The Magistrate and High Courts applied the Nigerian Criminal Code, adapting English criminal law. Conflicts inevitably emerged about jurisdiction, the choice of applicable law, and whether the punishment inflicted under one system could surpass the punishment permissible under the other.[100]

The British officials used legal transplants to bring these laws into Nigeria. The British officials adopted the criminal laws from foreign jurisdictions without considering the adopting jurisdiction's environment or societal factors. Watson supported this kind of legal transplant.[101] He argued that lawmakers do not make laws mainly for any jurisdiction and that laws have nothing to do with society. Therefore, he believed countries could successfully transplant laws without systematically considering societal and political factors. Freund criticised this kind of wholesale legal transplant, stating it is a coincidence if the adopted law fits the receiving country.[102] He, like Legrand, believed legal transplant is difficult, and some factors are vital. [103]

Further attempts by the British Administration to enact a criminal code for the Southern Region failed.[104] During this time, courts in the country's Southern Region administered native laws, except for Lagos, which maintained common law of crime.[105] The Native Court Ordinance of 1900 established Native courts to preside over customary issues.[106] Thus, Nigeria practised a tripartite

[98] Rabiat Akande, 'Secularizing Islam: The Colonial Encounter and the Making of a British Islamic Criminal Law in Northern Nigeria, 1903–58' (2019) Cambridge University Press.

[99] Ibid.

[100] Ibid.

[101] Alan Watson, 'Legal Transplant and Law Reforms' (1976) L Q Rev 79.

[102] Khan Freund, 'On uses and misuse of Comparative law' (1974) 37 Mod. L. Review 1.

[103] Pierre Legrand, The Impossibility of 'Legal Transplants' (1997) Sage Journals.

[104] Moris, How Nigeria Got its Criminal Code (n80) 3.

[105] The Native Court Ordinance of 1900 established Native courts to preside over customary issues.[105]

[106] Yakubu, Within and Without: The Relevance and Potency of the Law Beyond our Frontiers, An Inaugural Lecture delivered in the University of Ibadan on the 23rd of November 2006.

criminal law system; the English Criminal Law applied in Lagos, the Criminal Code in the North[107], and customary rules in the South.[108]These events trace the complexity of Nigerian criminal law.

The British extended the Northern Region's criminal code to all of Nigeria by 1916, after the Northern and Southern Protectorates merged in 1914.[109] Hence, the Northern Criminal Code applied to the Southern[110] and Northern Regions after 1916.[111] The Sharia law[112] dominated the Northern region before this time. When they introduced the Criminal Code in the North, it coexisted with the Sharia law.[113] Islamic law contains provisions not found in the criminal code.[114] For instance, in the Criminal Code Act, applicable in the Northern, murder was punishable by death. While in Islamic law death penalty extends to violent, unjustifiable assaults that result in death, even when unintentional or unlikely.[115] In Sharia law, it was a crime to drink alcohol, and

[107] Moris, 'How Nigeria Got its Criminal Code' (n80) 3.

[108] Inioluwa Olaposi, The History and Sources of the Nigerian Criminal Laws: How we ended up with Two Codes <https://legalnaija.com/the-history-and-sources-of-the-nigerian-criminal-laws-how-we-ended-up-with-two-codes-inioluwa-olaposi/adedunmade/> accessed 20 August 2020; Victor L K Essien, 'The Northern Nigerian Penal Code: A Reflection of Diverse Values in Penal Legislation' (1983) Vol 5 NYLS Journal of International and Comparative Law.

[109] Frederick Lugard, who assumed the position of high commissioner of the Protectorate of Northern Nigeria in 1900, (the model British colonial administrator).

[110] A region made of Abia, Akwa Ibom, Ebonyi, Delta, Edo, Ekiti, Ondo, Oyo, Ogun, Osun, Enugu, Rivers, Imo and Bayelsa.

[111] Obilade (n70) 12.

[112] Muslim Law as interpreted by Maliki School.

[113] Elias Oluwale Taslim, *The groundwork of Nigerian Law* (London: Routledge & Kegan Parel ltd 1954).

[114] *Gubba vs Gwandu Native Authority* [1947] WACA vol 12; *Kano Native Authority v Fagoji* [1957] NRNLR and *Tsamiya v Bauchi Native Authority* [1957] NRNLR. For instance, the Muslim law did not recognise certain English law defences like provocation, in the native Islamic system the existence of Haddi-lashing as a form of punishment, a person guilty of murder to be hanged depended on the wishes of the deceased's family.

[115] Okonkwo (n71) 5.

adultery was an offence.[116] Also, the defence of provocation recognised in the Criminal Code capable of reducing murder to manslaughter was alien to Islamic law.[117]

Additionally, the form of punishment in Muslim customary law sometimes depended on the family of the deceased or victim.[118] For example, in Hausa Islamic traditional justice, the "Diyya" was a concept that referred to compensating the victim of a crime. At the same time, Qisas's penalty was when the community punished the offender like the crime committed. Also, the victim may request payment in addition to the Qisas penalty or impose cost if the victim violates any Qisas requirements.[119]

Traditional Islamic law emphasises the victim as a central and dominant figure, a necessary precondition to modern restorative practices.[120] In Islamic customary law, other punishments include conciliation or Suluh, restitution, payment, social service work, warning, fining, and reintegration.[121]

Studies found that the conflict between the Northern Region's criminal laws led to a panel analysing the issue and reorganising Northern practices.[122] Subsequently, after their inquiry and deliberations on the conflicts and challenges, the panel recommended the introduction of a Penal

[116] Osita Nnamani Ogbu, 'Punishments in Islamic Criminal Law as Antithetical to Human Dignity: The Nigerian Experience' (2011) International Journal of Human right.

[117] Ibid.

[118] Okonkwo (n71) 6; when the practiced "Diyya" like a compensation. Diyya's provisions do not apply only to homicide; they also apply to any injury or incident resulting in bodily harm caused by another person, whether intentional or unintentional.

[119] Absar Aftab Absar, 'Restorative Justice in Islam with Special Reference to the Concept of Diyya' (2020) Journal of Victimology and Victim Justice.

[120] A paradigm that has been advocated globally since the 1970s as a means of addressing the trend of rising crime and the relative ineffectiveness of traditional retributive justice and the preventive theory of punishment; Lawrence W Sherman and Heather Strang, restorative justice: the evidence (The Smith Institute 2007).

[121]Jennifer Tyus,'Going Too Far: Extending Shari' ar: Extending Shari'a Law in Nigeria fr a Law in Nigeria from Personal to Public Law' (2005) Washington University School of Law ; Mohammad Hashim Kamali, Crime and Punishment in Islamic Law: A Fresh Interpretation (2019) Oxford Scholarship Online xv.

[122] Burns Alan, *The History of Nigeria* (London: George Allen & Unwin ltd 1958) 8.

Code modelled on the Sudanese Code (which originated from the Indian Penal Code).[123] As a result, the Northern region, dominantly Hausas, adopted the recommended Sudanese Code by 1959. It became the Penal Code Act of Nigeria for the Northern region in 1960.[124]

Despite the consultation before enacting the Penal Code, this thesis refers to it as a legal transplant. They checked how suitable the laws would be for the northern region but adopted the legislation without any adjustment. It is still a wholesale legal transplant like the Criminal Code Act.

Okonkwo asserted that the Northern region chose the code because it worked successfully in Sudan, a predominantly Muslim community.[125] On the other hand, the authors linked the Sudanese Penal Code to the British.[126] This belief was because an Englishman named Thomas Babington Macaulay developed the Indian Penal Code of 1860, adopting English laws (hereinafter referred to as IPC), which the Sudanese subsequently adopted.[127] With the IPC, the Muslim and Hindu laws were replaced by English and East Indian Company regulations, ensuring a uniform standard of justice.[128] Smith claimed the IPC and its predecessors represented an essential chapter in

[123] Okonkwo. C. O, Naish M. F, *Criminal Law in Nigeria* (AUP Lagos 1964) 18. This is because this Penal Code was the closest to accommodate Islamic relation while having similarities with the Criminal Code.

[124] Ibid; Alan (n 105) 8.

[125] Okonkwo (n71) 5.

[126] Jennifer Tyus, 'Going Too Far: Extending Shari' ar: Extending Shari'a Law in Nigeria fr a Law in Nigeria from Personal to Public Law' (2005) Washington University School of Law; Mohammad Hashim Kamali, 'Crime and Punishment in Islamic Law: A Fresh Interpretation' (2019) Oxford Scholarship Online xv.

[127] He was the legal representative to then Indian legislative council headed. The Indian Penal Code was his most notable achievements, he was responsible for drafting the British Empire's first code of criminal law; David Skuy, Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century (1998) Vol 32 Modern Asian Studies 513 – 557; Keith J M Smith, 'Macaulay's Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making' in W.M. Gordon and T.D. Fergus eds., *Legal History in the Making* (Proceedings of the Ninth British Legal History Conference, Glasgow, 1989) (London: Hambledon, 1991) 145.

[128] Cheong-Wing Chan, Barry Wright, Stanley Yeo eds, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate UK, forthcoming 2011).

developing English criminal law and 19th-century intellectual history.[129] He based this claim on the efforts of prominent English codification advocates[130] such as Macaulay, who hoped that codifying laws in the colonies would affect legal change in England.[131]

Consequently, the Criminal Code Act, which governs both the Northern and Southern regions, was repealed in the Northern region but remained applicable in the Southern region. Hence, the Nigerian Penal Code Act pertains to all persons living in Northern Nigeria, while the Criminal Code Act applies in the Southern region. Nevertheless, the criminal jurisdiction remained complex because the communities applied the customary law and the Criminal Code or the Penal Code Acts.

Studies have shown that the approach taken by lawmakers in adopting the Penal Code differed from that of the Criminal Code.[132] The lawmakers in the Northern region organised a deliberation or panel to consider the best-suited law to accommodate their Muslim background.[133] This approach is commendable, and the fact that they also identified the success of the Penal Code in Sudan, a dominantly Muslim country, also adds to its credibility.[134]

This review demonstrated that Nigeria derived its legal system from the English common law legal tradition due to colonisation and the subsequent acceptance of English law through legal transplant.[135] Accordingly, accused persons may rely on the insanity defence under the Criminal

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[129] K J M Smith, "Macaulay's Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making" in W M Gordon and T D Fergus (eds), *Legal History in the Making (Proceedings of the Ninth British Legal History Conference, Glasgow, 1989*) (London: Hambledon 1991) 145.

[130] Jeremy Bentham, James F Stephen and James Mill.

[131] Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India' (2005) Vol. 23 Law and History Review 3, 633.

[132] Obilade (n 76) 32; Okonkwo (n 71) 18; Taslim (n 93) 32.

[133] Ibid.

[134] Criminal Law and Human Rights in Sudan A Baseline Study March 2008, <https://redress.org/wp-content/uploads/2018/01/Mar-08-Criminal-Law-and-Human-Rights-in-Sudan.pdf> accessed 15th July 2020; Olaf Köndgen, *The Codification of Islamic Criminal Law in the Sudan: Penal Codes and Supreme Court Case Law under Numayrī and Bashīr* (Brill 2017) 12.

[135] Yemisi Dina, John Oluwole A and Akintayo, Funke Ekundayo, 'Guide to Nigerian Legal Information' (2005) Librarian Publications & Presentations 32.

Code[136] or Penal Code Acts[137]. The insanity defence in Nigerian criminal law provisions has remained unchanged for decades.

2.3. HISTORY OF ENGLISH CRIMINAL LAW.

Henry II (1154-1189) changed the old tribal-feudal system of law and established the common law.[138] The laws of ancient kings and their statute book referred to the early criminal laws as unwritten.[139] Scholars can hardly describe English criminal law historically from the perspective of a code. Studies reviewed there is no such series of continuous, interconnected changes in the whole system".[140] This position means there is no such document referred to as criminal code to give a complete and systematic account of the criminal law that prevailed in England in 'early times'.

It was during the Norman conquest of England in 1066 that the first indications of the contemporary division between criminal and civil trials appeared.[141] Even after the Norman Conquest, the Romans greatly influenced English law.[142] According to Stephen's account of English criminal law history, Roman laws contributed to its evolution.[143]

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[136] Criminal Code Act [Nigeria], Cap C38 LFN 2004.

[137] Penal Code (Northern States) Act - Federal Provisions CAP. P3 L F N 2004.

[138] M M Knappen, *Constitutional and Legal History Or England*,(New York: Harcourt-Brace and C 1942) 28; Pollock Frederick, Maitland F W, *The History Of English Law Before The Time of Edward I* (Cambridge: University Press, 1932) Vol. I. 427.

[139] Sir James Fitzjames Stephen, *A History Of The Criminal Law Of England* (London: Macmillan and C0 1883) 6; Frederic William Maitland, *Why the History of English Law is Not Written* (Library of Alexandriam 2020).

[140] Sir James Fitzjames Stephen, *A History Of The Criminal Law Of England* (London: Macmillan and C0 1883) 6.

[141] Pennington Kenneth, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (University of California Press 1993).

[142] The laws of Edward the Confessor were collected, as their title states, in the fourth year after the Conquest, when "William. ' ' *Fecit summoniri per" uniyersos patriae comitatus Anglos nobiles sapientes, et in lege su& " eruditos ut eorum consuetudines ab ipsis audiret."*; G C Barclay, 'Criminal Justice System In England And Wales' (1993) Britain Home Office.

[143] Stephen (n140) 4.

The sources are scanty, and most presuppose that in the early years, English judges determined what was right and wrong.[144] From the twelfth to the fourteenth centuries, judges of courts of the King's Bench created the rules for the more serious crimes known as felonies.[145] In the fourteenth century, lesser crimes known as misdemeanours evolved, a few of which were created by the judge's decisions and by the court of star chamber. The English built the Common law based on the doctrine of precedent, where a court infers rules from the decisions of a high court and appellate judges and their predecessors in reported cases.

England has a Common law legal system established by the subject matter heard in earlier cases, and so it is the law created by judges.[146] Although most of its criminal law dates back to common law, they have codified some rules to ensure certainty and facilitate prosecution. For now, murder remains a common law rather than a statutory offence. No statutes defined crimes like murder and manslaughter, but statutes provided punishment for them.[147] There were hardly any definitions of offences in the early laws. However, statutes contained provisions of one kind or another about a large part of the offences.[148]

Furthermore, every aspect of criminal law has changed over time. Since 1760, England has amended the common law criminal laws several times through Parliamentary Acts (legislative intervention) and judicial decisions (judicial activism).[149] Each area of criminal law had an independent development. Murder, theft, and rape, for example, developed individually.[150] The history of the insanity defence, for instance, illustrates the evolution of criminal law in an area.

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[144] Thorpe Benjamin (ed.), *Ancient Laws and Institutes of England: Comprising Laws Enacted Under the Anglo-Saxon Kings from Aethelbirht to Cnut, Volume 2: Containing the Ecclesiastical Laws (Cambridge Library Collection)* (London: Cambridge University Press 2012).

[145] Rupert Cross and Philip Asterley Jones, *An introduction to Criminal Law* (London Butterworths 1972) 16.

[146] Singh Ram Ugrah, 'History of the defence of drunkenness in English criminal law'(1933) LQ Rev 49 : 528.

[147] Plucknett Theodore, Frank Thomas, *A concise history of the common law* (The Lawbook Exchange, Ltd 2001)

[148] Ibid 28.

[149] Emsley Clive, *Crime and society in England: 1750-1900* (Routledge, 2013).

[150] Hamil Frederick C, 'The King's Approvers: A Chapter in the History of English Criminal Law' (1936) Speculum 238.

This thesis reviews this development in criminal law related to the insanity defence in the following chapter.

2.4. HISTORY OF THE CRIMINAL LAW IN SCOTLAND

Scots law and its institutions developed slowly throughout the Middle Ages, during the Dark Ages of Scots law.[151] From the 17th century onwards, an active period of legislative development and active judiciary. The definition of crimes originated from successive decided case law and writings of institutional writers respected and given authority by the courts. A highly talented judiciary and eminent writers and thinkers pioneered this remarkable period of Scots' law development. These writers produced systematic treatises on Scots law, including institutional works, which remain significant today.

Scholars have continuously confirmed that Scotland has no systematic analysis of its history of criminal law like the English.[152] The writings available have not followed any consistent way to provide a narrative of the history of Scottish criminal law.[153] In other words, one cannot categorize Scottish criminal law development based on any systematic historical development of a document. Gordon acknowledged the dearth of materials on the origin of Scottish criminal law.[154] Scotland cannot be said to have a code for all criminal matters.

In the sixteenth century, the introduction of Roman law largely transformed Scottish jurisprudence, which accompanied the general revival of learning in Europe. Smith acknowledged that Roman

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[151] S. H Rigby, *A Companion to Britain in the Later Middle Ages* (London: Wiley-Blackwell, 2003) 532; D. M. Barrell, *Medieval Scotland* (Cambridge: Cambridge University Press, 2000) 108.; Scotland was independent with its parliament in Edinburgh without interference from the parliament in England and Wales until 1707. They came together as a new political entity in Great Britain and both parliaments enacted legislation called Acts of the Union. However, Scottish criminal law is one of the independent areas of the Scottish legislature vis-à-vis the United Kingdom or English law; Peter Young, *Crime and Criminal Justice in Scotland* (Edinburgh: The Stationary Office 1997) 5.

[152] J H A Macdonald, *A Practical Treaties on the criminal law of Scotland* (1866); Archibold Alison, *the principles of the criminal law in Scotland* (1832).

[153] Paul Turner Riggs, *Scottish criminal law and procedure in the nineteenth century* (University of Pittsburgh ProQuest Dissertations Publishing, 1997); G H Gordon, *The Criminal Law of Scotland* (Sweet & Maxwel 1967) 3.

[154] G H Gordon, *The Criminal Law of Scotland* (Sweet & Maxwel 1967).

law was helpful in the development of Scots' criminal law.[155] Institutional writers such as Hume, Bayne, Mackenzie and Forbes referred to Scottish criminal law in their writings.[156] Hume and Mackenzie also agreed on the Roman influence in Scottish criminal law but with some divergent opinions.[157] While Mackenzie found that it was a strong influence, Hume disagreed that Roman law influenced Scottish criminal law. He noted that Scottish institutions were not comparable to those of the Romans but rather to those of France.[158] Hence he believed that the Scottish Judicial system is more similar to that of France.[159]

In some areas of Scottish criminal law, there are sometimes strong traces of the influence of developed civil law. For example, in theft, the principles are often derived from *furtum*; for fraud, the basis is *crimen falsi*.[160] Scottish crimes like theft and fraud developed based on generally applicable, simple principles.[161] Early case law referred to civil law in resolving several cases.[162] Nevertheless, the principles and requirements underlying most other serious crimes, such as murder, rape, robbery, theft and fraud, were explained by civil law judges.[163]

Most accounts of the history of criminal law in Scotland point to the common law as the origin of Scottish criminal law. Historically, Scottish judges and jurists have not hesitated to make value judgements on moral and social issues, including criminal law. Fortunately, most of their serious

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[155] T B Smith, *A Short Commentary on the Law of Scotland* (Edinburgh: W. Green & Son, Ltd. 1962) 118.

[156] William Forbes, *Institutes of the law of scotland* (1730); Alexander Bayne, *Institutions of the Criminal Law of Scotland* (1730).

[157] Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (1678). Hume, *Commentaries on the Law of Scotland respecting Crimes* (1797).

[158] Edwin R. Keedy, 'Criminal Procedure in Scotland' (1913) Volume 3 | Issue 5 Journal of Criminal Law and Criminology.

[159] Cameron (later Dunlop) 'Scottish Students at Paris University, 1466-1492' (1936) Juridical Review 228-255;

[160] Matthew G. Mchale, 'Between the Spheres of Furtum the Development of Theft from Private to Public', A thesis presented for the B.A. degree With Honors in The Department of Classical Studies University of Michigan Summer of 2012.

[161] Talk By The Honourable Lord Hunter Vrd Lld, Chairman Of The Scottish Law Commission, Historical Development Of Criminal Law in Scotland <https://www.ojp.gov/pdffiles1/Photocopy/54870NCJRS.pdf>

[162] *Andro Hendersone* 14 september 1609; *HM advocate and John Ross v Robert Forbes* 25th June 1667; *John Cross and HM Advocate v John Rea* Feb 1745; *Inglis v Martin* 19th Nov 1647.

[163] *Cheanve v Neveing* 10th Nov 1641; *Johnne Stewart of Hulreid and others* 3rd Nov 1620; *Walter Scolt* 4 Nov 1618.

crimes result from common law, judicial decisions and institutional writings. Common law crimes include murder, robbery, rape, assault, theft and fraud. The less serious crime is like a breach of peace.[164] Scotland does not have a single document as a criminal code like Nigeria. In Scotland, a crime (or "offence") is of two broad categories: Common law offences and statutory offences. Each area has developed differently in the past years. For example, the insanity defence has its roots in these academic writings to define their nature and operation.[165] Its insanity defence history in the next chapter portrays an excellent example of the development and origin of an aspect of Scottish criminal law.

2.5. CONCLUSION

This chapter discussed the history of criminal law in Nigeria. It demonstrated that the legal system in Nigeria evolved from the pre-colonial era through the colonial period and into the post-colonial era when the country achieved independence. Over these three corresponding periods, Nigeria's legal system experienced several distinct regimes. This chapter describes from when they just had cultural or customary laws to when they had cultural and statutory laws after independence.

This chapter started by showing that before the arrival of the British in Nigeria, customary laws, primarily undocumented, governed the country. Historically, a crime was any action contrary to the customary laws (which include the values and norms of the people), and they punished these types of conduct appropriately. The point noted was that they had their laws and ways of punishment before colonization. Given that Nigeria had a customary law during the pre-colonial period, this thesis expected it would correlate to the insanity defence. However, this period has a

[164] Ibid.

[165] Hume, Mackenzie and Alison; Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (1678). Hume, *Commentaries on the Law of Scotland respecting Crimes* (1797). John Burnett, *A Treatise on Various Branches of the Criminal Law of Scotland* (London George Ramsay and Company 1811): Alison, *Principles and Practice of the Criminal Law of Scotland* (1831). J H A Macdonald, N D Macdonald, *A Practical Treatise On The Criminal Law Of Scotland* (3rd ed. Edinburgh: W Green & Sons, 1894). Angus John W, Shearer, R B, *Dictionary of Crimes and Offienses* (Edinburgh 1895); A M Anderson, *Criminal Law of Scotland* (Edinburgh, Bell & Bratfute1904).

dearth of literature on the subject. It was impossible to access literature to confirm the existence in the communities as a functional equivalent to the insanity defence.

The advent of the British into Nigeria introduced statutory laws. This chapter set the stage and understanding how criminal law emerged. It traced the origin of the Criminal and Penal Codes. As a result, it demonstrated that Nigeria had begun adopting foreign legislation during the colonial period. The review demonstrated how the colonial administration adopted the Criminal Code Act and the Penal Code Act from various foreign jurisdictions. Examining the current insanity defence test traces back to these two pieces of legislation.

Importantly, it also demonstrated the complex nature of the Nigerian legal system. This section illustrated this position by explaining why the Northern region has a different code based on their religious and cultural affiliation. It also demonstrated how the customary laws struggled with the statutory provisions in place. The insanity defence reflects this position of having two criminal codes, as will be observed in the subsequent chapters.

In Scotland and England, the situation was different. This research highlighted how common law, institutional writing, and Roman Laws played a significant role in establishing their criminal law. The insanity defence is one example of how each field of criminal law has grown or developed independently in England and Scotland.

The next chapter will examine the history of the insanity defence in Nigeria. It will further compare the history of the insanity defence in England and Scotland. In addition, it will study its development in different jurisdictions since its beginning.

CHAPTER THREE

THE HISTORY OF THE INSANITY DEFENCE IN NIGERIA, ENGLAND AND SCOTLAND

3.1. INTRODUCTION

The review of the origin of criminal law in Nigeria set the foundation for the statutory provision of the insanity defence. The last chapter demonstrated that the British colonized Nigeria, and most of their legal system extended to Nigeria. The review ended when Nigeria gained its independence.

This chapter will explore the evolution of the insanity defence in Nigeria. This chapter will deal with events in Nigeria that started at the turn of the nineteenth century. While the Scottish review began in the 17th century, the English review began in the 14th century. This review started at different times because of their different ages of development. It also reflects how long the different jurisdictions have applied the insanity defence and how far it has progressed. The English and Scottish histories of the insanity defence will enrich this study because of the abundance of material on the subject. Therefore, this section will examine the history of the insanity defence in England and Scotland.

The Nigerian section will trace the origins of its insanity defence back to the M'Naghten rule. To better understand the insanity defence before the M'Naghten rule, the English section will cover the period before it. It will demonstrate that the insanity defence underwent three major stages before the M'Naghton decision. Three tests marked these stages: the "good and evil" test, the "wild beast" test, and the "right and wrong test". Finally, the review will detail the events that culminated in the insanity defence becoming a special defence and resulting in a special verdict in England.

The Scottish section will trace the evolution of its insanity defence, reflecting key authors that contributed to its development. This chapter provides an overview of the insanity defence journey of the various jurisdictions before their current insanity defence test.

3.2. THE HISTORY OF THE NIGERIAN INSANITY DEFENCE

The second chapter of this thesis examined pre-colonial Nigerian criminal law and concluded that it was complex but served the people. It explored the different acts of various ethnic groups considered crimes by the pre-colonial Nigerian community and their unwritten nature. However, the literature reviewed did not provide evidence that Nigeria applied the insanity defence to criminal responsibility before the colonial era. This thesis does not argue that the insanity defence was unknown to Nigerians during the pre-colonial era. However, it suggests a dearth of evidence supporting the insanity defence during this period.

Okonkwo and others pointed out that Nigeria inherited its law on the insanity defence from the British.[1] These writers noted that Nigeria's insanity defence originated from the M'Naghten rule.[2] They further explained that the M'Naghten Rule is English common law and that Nigeria applied it in the late nineteenth and twentieth centuries.[3]

This thesis explained in chapter two[4] that under the 1863 Ordinance, the Lagos territory of Nigeria administered English law.[5] By 1914, after the amalgamation of Southern and Northern regions, Nigeria introduced this 1863 Ordinance into every part of Nigeria through the Supreme Court Ordinance of 1914. As a result, the English common law, the principles of Equity and the Statutes

[1] Uzoka, Chikosolu Emmanuella; Okonkwo, I. Emmanuel, Defence of Insanity in Nigeria, and Present Psychological Findings: A Further evaluation; Okonkwo, Criminal Law in Nigeria<https://www.academia.edu/40875878/DEFENCE_OF_INSANITY_IN_NIGERIA_AND_PRESENT_PSYCHOLOGICAL_FINDINGS_A_FURTHER_EVALUATION>accessed 22nd May 2019.

[2] Leigh Bienen, 'The Determination of Criminal insanity in Western Nigeria' (1976) The Journal of Modem African Studies 225; F. A. Ajayi, 'The Interaction of English Law with Customary Law in Western Nigeria' (1960) Vol 4 No 1 Journal of African Law 45; Akintunde Olusegun Obilade, *The Nigerian Legal System,* (Spectrum Books Limited, 1990)34.

[3] Ibid.

[4] In Chapter Two section 2.1.

[5] Ordinance No. 3 of 1863; O Adewoye, Prelude to the Legal Profession in Lagos 1861-1880 (1970) Vol. 14 Journal of African Law, 98; Bethel Uweru, Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism (2008) African Research Review.

of General Application in force in England on 1st January 1900 applied to every part of Nigeria.[6] As a result of the colonial administration, Nigeria applied English common law, including the M'Naghten rules.[7]

Also, Nigeria started having indigenous lawyers in the mid-1960s. However, before this period, the judges and older bar members had training at the Inns Court in London. [8] Therefore, this thesis agrees with the claim that the M'Naghten Rule is the origin of the insanity defence in Nigeria.

As part of the English insanity defence section, this thesis will examine the M'Naghten Rule and its application. Daniel M'Naghten intended to kill Sir Robert Peel (The Prime minister) but shot and killed Sir Robert Peel's secretary.[9] He was tried for murder but acquitted due to insanity. Following his acquittal, there was widespread public outrage.[10] The House of Lords summoned the judges in the case to answer questions about the law governing the defence of insanity.[11] Scholars and case law report their responses as the M'Naghten Rules. Although this rule was a pronouncement by the M'Naghten judges, it was not a judicial decision but mostly assumed to be a court decision.

This rule requires that when the accused committed the offence, the accused's reasoning was defective and caused by a disease of the mind. As a result, the accused either did not know the nature and quality of his act or did not know that what he was doing was wrong.[12] Hence, this became the basis for determining criminal responsibilities for the insanity defence cases in England and most common law countries, including Nigeria, before they enacted their criminal codes.

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[6] The only constraint was that such laws and statutes could not be in conflict with any Ordinance in force in the Colony, and that they could only be applied in the administration of justice to the extent permitted by local circumstances.

[7] Obilade (n 70) 33.

[8] Ibid 225.

[9] *M'Naghten* [1843] UKHL J16.

[10] Nathalie De Fabrique, M'Naghten Rule De Fabrique N, M'Naghten Rule. In: Kreutzer J S, DeLuca J, Caplan, B (eds) *Encyclopedia of Clinical Neuropsychology* (Springer, New York, NY 2011).

[11] Alan Milner, 'M'Naghten and The Witch Doctor Psychiatry and Crime in Africa' (1966) Vol 114 University of Pennsylvania Law Review.

[12] Ibid; refer to the fourth chapter of this work for a more detailed discussion of this English Rule.

Subsequently, Nigeria legislated the insanity defence in the Criminal Code and Penal Code Acts found in the Nigerian Laws. With the introduction of the Criminal and Penal Codes, Nigeria's position on the defence of insanity moved away from the M'Naghten position, as this thesis will demonstrate in the next chapter.

However, Nigeria suffers a dearth of materials or documentation on the origin of the insanity defence aside from the constant reference by academic writers and case law to the M'Naghten rule.[13] Therefore, it is logical to state that since the M'Naghten Rule originated in England, this thesis adopts the historical development before the M'Naghten Rule in England as the background of Nigeria's insanity defence. Hence, the following section will review the literature on the history of the English insanity defence.

3.3. HISTORICAL DEVELOPMENT OF THE INSANITY DEFENCE IN ENGLAND

3.3.1. BEFORE THE M'NAGHTEN RULE

Literature acknowledges that a form of the insanity defence existed in England as far back as the medieval period.[14] Walker pointed out that accessing information from the medieval period was challenging.[15] However, he claimed that courts could find insane accused persons guilty of crimes during the English medieval period but refer them to the king for a pardon.[16] Loughnan supported

[13] Leigh Bienen, Determination of Criminal Insanity in Western Nigeria (Africa) (1976) Journal of Modern African Studies.

[14] Homer D Crotty, 'History of Insanity as a Defence to Crime in English Criminal Law' (1924) vol.12 California Law Review 110; Turner W J, 'Defining Mental Afflictions in Medieval English Administrative Records'. In: Rushton, CJ (Eds.*), Disability and Medieval Law: History, Literature, Society*, (Newcastle-upon-Tyne: Cambridge Scholars Publishing 2013) 134–156.

[15] Nigel Walker, *Crime and Insanity in England (*Vol 1 The Historical perspective Edinburgh: Edinburgh University Press 1968); 476 AD – 1492; The Middle Ages; lasted from the 5th to the 15th century.

[16] Nigel Walker, *Crime and Insanity in England (Vol 1: The Historical Perspective)* (Edinburgh: Edinburgh University Press, 1968) 25; Walker further explained this view by explaining that replacing "trial by ordeal" with "trial by Jury" in the medieval era, courts try insane individuals charged with serious offences and, if convicted, left to the royal prerogative of mercy.

this view, stating that courts usually found an insane accused guilty of the offence but exculpated from punishment.[17] Additionally, studies suggest that the courts could order an insane accused person's family to compensate the victim or the family.[18]

Before the MNaghten decision, three tests mark three stages of development for the insanity defence. Accordingly, this English section will discuss the stages in the following sequence: the "good and evil" test, the "wild beast" test, and the "right and wrong test", which also reflects their times.

3.3.2. THE GOOD AND EVIL TEST

Around 1313, the "good and evil" test first appeared in English courts.[19] They alleged it had a religious background.[20] One can assume that it is a common expression used by judges of the period. This thesis could not find literature with an interpretation of this phrase. Under this test, the court considered the insane like children incapable of "sin" because they could not choose or discern "good from evil."[21] Therefore, this rule held that a person is guilty of a crime if they can differentiate between good and evil when they did the act.[22] This "good and evil" test lasted from the fourteenth century to the sixteenth century when it was replaced in 1724 by the "wild beast test".[23]

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[17] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press 2012) 107; Wendy J. Turner, 'The Medieval Brain: Mental health' (2018) Volume 4 Special Collection.

[18] Walker (n9) 26; P King, 'Decision-Makers and Decision-Making in the English Criminal Law 1750–1800' (1984) Historical Journal 25, 27; J H Langbein, *The Origins of the Adversary Criminal Trial (*Oxford: OUP, 2003) 10–13.

[19] This case was reported in the Eyre of Kent for the year 1313: "An infant under the age of 7 years, though he be convicted of felony, shall go free of judgement, because he knoweth not of good or evil (*conisaunt de bien ne de mal*) Anthony Platt and Bernard L. Diamond, 'The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey' (1966) California Law Review 1228; Gabriel Hallevy, *The Matrix of Insanity in Modern Criminal Law* (Springer Cham 2015) 3.

[20] Deuteronomy 1:39; 2 Samuel 14:17; 1 Kings 3:9; Isiah 7:14-16; Jeremiah 4:22; Hebrews 5:14; ibid.

[21] A W G Kean, "The History of the Criminal Liability of Children," (1937) 53 L Q Rev. 364; Children under the age of seven were considered legally incompetent to commit a crime in early English law, whereas children over the age of twelve were held to the same standard of accountability as adults. If malice and discretion were proven, a child under the age of twelve but over the age of seven could be found guilty.

[22] Nigel Walker, *Crime and insanity in England* (Volume I. Edinburgh: Edinburgh University Press 1968).

[23] Michael L Perlin, 'The Jurisprudence of the Insanity Defense' (1994) Durham NC: Carolina Academic Press.

By the eighteenth century, more studies on the insanity defence emerged. For instance, the English jurist Henry de Bracton explained that the will or mind was essential for courts to establish a crime.[24] Also, Lambard evidenced the antiquity of the knowledge of good or evil tests while explaining the importance of willpower when he stated:

> If a madman or a natural fool, or a lunatic in the time of his lunacy, or a child that apparently hath no knowledge of good nor evil do kill a man, this is no felonious act, nor anything forfeited by it...for they cannot be said to have an understanding will.[25]

Bracton and Lambard argued that the will or the intellect was vital in establishing crime.[26] This thesis observed their reference to lack of will, which suggested a lack of volitional capacity because of insanity.

By the late eighteenth century, insanity became grounds to acquit an offender instead of finding them guilty and leaving them at the king's mercy.[27] Several authors gave reasons for the insane accused person not being found guilty of the offence. For instance, Hamilton narrated that the common Law punishments for felons were so severe[28] that the courts punishing persons insane would be cruel and not deter future occurrences.[29] Also, Stephen and his colleagues argued that mental capacity was a vital element of murder or other felonies. An insane person lacked the

[24] Henry De Bracton, De Legibus Et Consuetudinibus Angliae, reprinted in, F.B. Sayre, Mens Rea (1932)45 Harv. L. Rev 974, 985.

[25] William Lambard, *1 Eirenarcha: Or of the Office of The Justices of Peace 218* (Newberry & Byneman 1581) (cited in J. Biggs, JR., The Guilty Mind (Harcourt Brace 1955) 83.

[26] Jacques M. Quen, 'Insanity Defence How Far Have We Strayed' (1995) vol 5 Cornell Journal of law and Public Policy 28.

[27] Homer D. Crotty, 'The history Of Insanity as a Defence to Crime in English Criminal Law' (1924) Vol. 12 California Law Review No. 2, 105-123.

[28] Ibid 106; Clive Emsley, Tim Hitchcock and Robert Shoemaker, "Crime and Justice - Punishment Sentences at the Old Bailey", Old Bailey Proceedings Online <www.oldbaileyonline.org, version 7.0> Accessed 26 November 2019

[29] This opinion is because insane persons cannot appreciate or appreciate or understand they are serving punishment; Thomas Hamilton, *Coke upon Littleton* (London: Saunders and Benning Book sellers 1830) 247b.

required *mens rea* or mental capacity to commit murder or a felony.[30] Rushton, quoting Shakespeare, noted that insane persons were suffering, and it was enough punishment.[31](People considered madness as a mysterious affliction of divine punishment for an unknown crime[32])

There were numerous attempts by early institutional writers to explain the nature of the insanity defence in England in the 17th century, as shown in this section. Coke and Hale's writings were influential among the significant treatises defining the nature of the defence of insanity in England.[33] Coke referred to the insane as "*non-compos mentis",*[34]; a man not of "sound mind".[35] Coke classified the following four people as lacking the mental aspect or ability to commit a crime:

> The first was the idiot, who from birth suffers a lack of reasoning capacity. The second category refers to the person who loses his memory and understanding by sickness, grief, or accident. The third was called the lunatic, who may be without understanding but have his mental faculties at other times. This type of person is considered non criminally liable during the period he lacks understanding. The fourth category includes the person who deprives himself of his memory and understanding by his vicious acts, as in "the case of voluntary drunkenness.[36]

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[30] Sir James Fitzjames Stephen, *General View of the Criminal Law of England* (London and Cambridge MacMillan 1863) 75; Francis Bowes Sayre, 'The Present Significance of *Mens Rea'* (1934) The Criminal Law in Harvard Legal Essays 399; Sheldon Glueck, 'Ethics, Psychology and the Criminal Responsibility of the Insane' (1923) 14 J Cam L 208; Francis Bowes Sayre, 'Mens Rea' (1932) 45 Harvard Law Review. 974. Consistent with the Divisional Court's view that at common law insanity is a defence to any charge where *mens rea* is in issue. (ex p. K, 732c.)

[31] "Furiosussolo furere punitur"; William Lowes Rushton, *Shakespeare's Legal Maxims* (The Law book Exchange ltd 2008) p. 41

[32] Glueck (n 30) 631.

[33] Coke's Institution of the Laws of England, 1628.

[34] Non compos: mentis is of four sorts:

1. Ideota, from his birth by a perpetual infirmity. (fc)
2. He that by sickness, grief, or other accident, wholly loses his memory and understanding. (c)
3. 3. One who hath lucid intervals and is therefore non compos so long as he has not understood.
4. 4. One who, by his own intemperance, for a time deprives himself of his memory and understanding, as a drunk.

[35] Coke (n 33) 18.

[36] Coke's Institution of the Laws of England, 1628.

Furthermore, he argued that there must be "absolute madness and a total deprivation of memory" before it can be exculpatory.[37] Coke acknowledged partial insanity but reaffirmed that for insanity to be exculpatory, it must be "one who has no power of the mind whatsoever".[38] Therefore, he advocated for absolute insanity as a criminal defence.

Also, Brydall, in his *Non compos mentis or the law relating to Natural fools, mad folks and lunatic persons,* [39] shared a similar opinion with Coke on the insanity defence. This thesis concurs with Crotty's assertion that Brydall repeated Coke's opinions on Plowden[40], Staunford[41], and Bracton.[42]

Similarly, Hale contributed to the insanity defence jurisprudence in his "Pleas of the Crown" book. [43] His views on how courts should treat insane offenders were not entirely different from that of Coke. For example, Hale argued that whenever madness deprived the offender of his use of reason, the courts would have to excuse the accused from criminal responsibility.[44]

Hale categorised insanity as temporary or permanent and noted that both could absolve a person of criminal responsibility.[45] For temporary insanity, he explained that the accused person could sometimes understand things, but not all the time.[46] Additionally, his study demonstrated that insanity might be partial or total, but he claimed it was difficult to resolve the difference between the two.[47] Hale stated that:

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[37] Erskine (n 34) 6.

[38] Coke's Institute (n 21).

[39] John Brydall, *Non Compos Mentis: or, the Law Relating to Natural Fools, Mad-folks and Lunatick Persons (Classics of English legal history in the modern era*) (London: Printed by the Assigns of Richard and Edward Atkins, for Isaac Cleave 1700).

[40] Geoffrey de C. Parmiter, 'Plowden, Englefield and Sandford: I 1558–85' (2016) Cambridge University Press

[41] W Staunford, *Les Ples Del Coron* (London 1583).

[42] Crotty (n 27) 112.

[43] Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown, by Sir Matthew Hale. Pub. from the Original Manuscripts by Sollom Emlyn* (London, 1736) Ch 4.

[44] Ibid.

[45] Ibid.

[46] Hale (n 43) 30.

[47] Hale (n 43) 39.

> partial insanity is in respect to things *quod hoc illud* insane. Some persons have a competent use of reason in respect to some particular discourse, subject or application or else it is partial in respect to a degree.[48]

He argued that partial insanity was not exculpatory. The person's mind should be like a child under fourteen for the courts to exonerate them from crime.[49] In England, the law presumed that children under ten years could not distinguish right and wrong.[50]

In their shared ideas, Hale and Coke differed. In wording like Coke's, Hale asserted that the needed insanity must be complete, a total alienation of the mind. [51] Also, this study noted that while both Coke and Hale acknowledged partial insanity in their writings, neither believed it could absolve an accused person of criminal responsibility.[52]

Hale agreed with Bracton and Lambard that insanity might lead to losing volitional ability.[53] Hence, Hale acknowledged that criminal responsibility requires volitional capacity (the ability to regulate one's will) and cognitive capacity (the ability to comprehend/reason).[54]

Hale stated:

> Man is naturally endowed with these two great faculties, understanding and liberty of will…the liberty or choice of the will presupposeth the act of the understanding

[48] Hale (n 43) 39.

[49] Hale, Pleas of the Crown (n 43) 44; for example, after the killing the child hides the body or makes excuses. Although in most cases courts pardon the child; Hale further noted that where an accused under fourteen years appeared to the court to differentiate good from evil when he committed the offence, the court might convict him of the crime

[50] Thomas Crofts, 'Reforming the age of criminal responsibility' (2016) SAGE Journal 6; The *doli incapax rebuttable* presumption that applied in England and Wales and in Northern Ireland - children aged 10-13 years of age do not know the difference between right and wrong and are thus incapable of committing an offence – the law makers abolished in 1998.

[51] Hale (n 43) 33.

[52] Crofts (n 50).

[53] Hale (n 43) 34.

[54] Hale (n 43).

> to know the thing or action chosen by the will, it (therefore) follows that, where there is total defect of understanding, there is no free act of the will…[55]

Hale considers volitional capacity more important than cognitive capacity from the above extract. He regarded volitional capacity as primary importance and cognitive capacity to be secondary. While authors in the seventeenth century may have confirmed this assertion that volitional capacity is more significant than cognitive capacity, this thesis does not entirely agree with it. Contemporary research has indicated that courts encountered more accused persons who lacked cognitive capacity (thinking or comprehension).[56] Additionally, the M'Naghten Rule, the English standard for determining insanity, excludes involuntary incapacity.[57]

On the other hand, Perkins criticised dividing insanity into partial and total insanity, as identified by Hale as unnecessary. [58] Instead, he asserted that the courts should search for a condition of "unsoundness of mind (insanity) of such a kind and degree" to remove criminal or testamentary capacity. [59] However, Perkins mentioned that a person might be "partially insane" and may have a criminal capacity; it depended on his mental disorder at the time of the crime.[60]

Another famous treatise of this time on the insanity defence was Hawkins's *Pleas of the Crown*. Although, unlike Hale, a reader would not find Hawkins's treatment of insanity as a defence in one section of his treatise. He scattered his idea on insanity under various heads.[61] He argued that:

> As to the first point (in respect of their want of reason), it is to be observed that those who are under a natural disability of distinguishing between good and evil,

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[55] Hale (n 43)14.

[56] Abigail Gray, Suzie Forell and Sophie Clarke, 'Cognitive impairment, legal need and access to justice' (2009) Law and Justice Foundation.

[57] Daniel Ward, The M'Naghten Rule: 'A Re-evaluation' (1962) Marquette Law Review; Larry O. Gostin, 'Justifications for the Insanity Defence in Great Britain and the United States: The Conflicting Rationales of Morality and Compassion' (1981) Vol.9 Bulletin of the AAPL 2.

[58] Rollin M Perkins, 'Partial insanity' (1934) Vol.25 Journal of crim L and criminology 177.

[59] Ibid 178.

[60] Perkins (n43) 178

[61] William Hawkins, *A Treatise of the Pleas of the Crown, or, A System of the Principal Matters Relating to That Subject: Digested Under Their Proper Heads* (London: In the Savoy 1716-1726).

> as infants under the age of discretion, idiots and lunatics, are not punishable by any criminal prosecution whatsoever.[62]

However, Hawkins shared a similar ideology with Hale on the insanity defence. They argued that an infant under fourteen or someone lacking discretion regarding good and evil was the yardstick to determine the insanity defence. Hawkins also claimed that insanity could affect both cognition and volition. Therefore, the lack of either can exonerate the insane from criminal responsibility.[63] Furthermore, he explained that courts could not attribute guilt to someone incapable of understanding or conforming themselves not to act.[64]

Blackstone devoted a chapter of his work to persons incapable of committing crimes, idiots, and lunatics. On the insanity defence, he stated:

> The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding viz, in an idiot or a lunatic.[65]

He defined lunatic or *non-compos mentis* as someone who had an understanding, but by disease, grief, or other accident, he has lost the use of his reason.[66] Blackstone explained that courts did not charge idiots and lunatics in criminal law for their acts, not even treason, because of their deficiency in willpower. He stated thus:

> ... a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses.[67]

He acknowledged that lunatics could have lucid moments while enjoying their senses, but not often. He admitted that their mood depends upon the "change of the moon".[68] This assertion meant he shared the same view with Hale on partial insanity. However, the difference was that he

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[62] Ibid 1; Smith & Hogan (n).

[63] Hawkins (n 163) 13.

[64] Hawkins (n 163) 13.

[65] William Blackstone's *Commentaries on the Laws of England* (1765-1769) IV, ch. 2, 24, 25.

[66] Ibid 25

[67]Blackstone (n167) 25.

[68] Ibid (n4)302

acknowledged that courts could exonerate this category of people from guilt. Therefore, he accepted partial insanity as a defence.

Like Coke, Hale and Hawkins, Blackstone considered volitional capacity concerning insanity defence necessary. However, he believed that the most important thing to consider if an offender is guilty is the want or defect of will.[69]

This literature review shows that the English seventeenth and eighteenth centuries witnessed significant legal analyses on the insanity defence, contributing to the Common Law development of the insanity defence. However, considering the general ignorance of the medical/mental health system relating to insanity at this time, compared to the current state of knowledge about mental health, the above authors' efforts laid an excellent foundation for the insanity defence.

Intricate to this period was "the good and evil test" for the insanity defence. These writings had different opinions on the insanity defence and influenced its development and the minds of English courts. Notably, this kind of jurisprudence does not exist in the Nigerian context. The following section will review judicial decisions from the 18th century, reflecting the views of institutional writers on the insanity defence. According to studies of this time, the English used insanity as a defence to criminal responsibility, a "bar to trial," and could halt the execution of judgments. In other words, if the defendant became insane after the verdict, insanity would prevent the judgement from being executed.[70]

3.3.3. "THE WILD BEAST TEST"

In England, judicial precedents were instrumental in developing the insanity defence. [71] The following case law will illustrate different points on determining the insanity defence, particularly introducing the wild beast test. The "wild beast test" transformed the law on the insanity defence.

[69] Blackstone (n167) 25.

[70] Penelope Brown, 'Unfitness to plead in England and Wales: Historical development and contemporary dilemmas' (2019) Med Sci Law 188; Courts expect accused persons to answer whether they were guilty or not. Where there was no response, the court enquires if no response was malicious or visitation of gods. The first situation was when the accused willfully refused to plead if it appeared advantageous.[70] While courts do not try and punish those unable to plead because of visitation of God. In most cases, visitations of God were insanity seen as demonic or holy influences.

[71] Ibid ; R Porter, *Mind Forged Manacles: A History of Madness in England from Restoration to the Regency* (London Athlone Press 1987) 29.

Studies reveal that Old Bailey Proceedings (herein referred to as OBP) reported criminal trials in the early 18th century, including cases that raised the insanity defence. [72] This thesis noted that the OBP recorded successful pleas for the insanity defence and unsuccessful pleas.[73] However, studies suggest that the OBP is not a comprehensive transcript of court proceedings. Their decided case law on the insanity defence lacks any consistent approach to proving insanity.[74] In the OBP, the evidence for the defence of insanity came from friends, family, colleagues, and laypeople than medical men.[75] Also, this study notes that the OBP records had shown that courts did not consistently apply rigid principles for deciding the insanity defence. Nevertheless, the OBP recorded more successful cases than unsuccessful ones.[76]

Case law decided in the 18th century other than in OBP showed that proving the insanity defence was challenging, as evidenced by several unsuccessful case law. For example, in *Edward Arnold*[77], the accused's insanity plea was unsuccessful. The court agreed with the prosecution that Arnold's evidence of mental disorder was insufficient to support the insanity defence. Mr Justice Tracy to the Jury stated as follows:

> If he were under the visitation of God, and could not distinguish between good and evil, and did not know what he did, though he committed the

[72] The Proceedings of the Old Bailey, London Central Criminal Court 1674 -1913 <https://www.oldbaileyonline.org/static/Value.jsp> accessed 18th July 2020; Robert B. Shoemaker, The Old Bailey Proceedings and the Representation of Crime and Criminal Justice in Eighteenth-Century London (2008) Journal of British Studies 47(3).

[73] The case law were insanity defence was successful includes : *William Edward* (1784) (theft and burglary) t17841020-10; *William Walker* (1784) (killing/murder) t17840421-13; *Susanna Blake* (1835) (Breaking Peace and wounding) t18351214-216

[74] Alison Johnson, 15 Haunting Evidence: Quoting the Prisoner in 19th Century Old Bailey Trial Discourse. The Defences of Cooper (1842) and McNaughten (1843) in 'Arendholz, J, Bublitz, W and Kirner-Ludwig, M, (eds.) *The Pragmatics of Quoting Now and Then. Topics in English Linguistics*(De Gruyter Mouton 2015)89; Joel Peter Eigen, *Mad-doctors in the Dock: Defending the Diagnosis, 1760–1913* (Baltimore, MD: Johns Hopkins University Press 2016) 224.

[75] Nigel Walker, 'The Insanity Defence Before 1800' (1985) A A P S S 1.

[76] William Edward (1784) (theft and burglary) t17841020-10; Wiliam walker (1784) (killing/murder) t17840421-13; Susanna Blake (1835) (Breaking Peace and wonding) t18351214-216.

[77] *Arnold's Case* (1724) 16 St. Tr. 695.

> greatest offence, yet he could not be guilty of any offence against any law whatsoever: for guilt arises from the mind, and the wicked will and intention of the man…[78]

He further stated.

> "Therefore, it is not every kind of a frantic humour or something unaccountable in a man's actions, that points him out to be such a madman as is to be 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; no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment..."[79]

Justice Tracy laid two conditions for a successful insanity defence: complete lack of understanding/memory and knowledge like an infant, a brute or a wild beast.[80] Also, the term "Wild beast" originated from the Latin phrase *Brutis* (brutes) in the thirteen century.[81] The court compared the accused person's lack of cognitive capacity to a child and a wild beast that also lacks it. This case is the English foundation for the 'wild beast' test[82] in criminal law for proving the insanity defence.[83] This case law does not precisely refer to a wild beast but emphasises the lack of intellectual ability. As a result of Judge Tracy's jury instructions, courts stopped basing the insanity defence on a moral failing (good versus evil) but a cognitive failing. The wild beast test became recognised and applied in numerous reported judicial decisions.[84]

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[78] *Arnold's case* 76.

[79] Ibid 76.

[80] First reference of "wild beast test" in a case law.

[81] Henry De Bracton, *De Legibus Et Consuetudinbus Angliea* (1260); Gabriel Hallevy, *The Matrix of Insanity in Modern Criminal Law* (Springer, 2015).

[82] "It must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing; no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment".

[83] Anthony M Platt, 'The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility' (1965) Vol. 1 Social Justice/Global Options 2; Norman J Finkel, 'Historical Look at Insanity Defenses'. *In: Insanity on Trial. Perspectives in Law & Psycholog* (vol 8. Springer, Boston, MA 1988); Nigel Walker, 'The Insanity Defense before 1800' (1985) AAPSS.

[84] T B Howell, *The Trial of Edward, A Complete Collection of State Trials* (London 1816)

However, in *R v. Ferrers*[85], his insanity defence failed because he was not insane at the time of the murder, as he could distinguish between" good and evil".[86] This case showed that not all courts adopted the wild beast test. Hence, the court decided the accused had enough capacity to know he ought not to do what he did and found him guilty.

This thesis observes that the early nineteenth century in England was remarkable in the insanity defence history from three standpoints, as would be shown. One, it marked the origin of the insanity defence as a special defence and special verdict after the trial of James Hadfield in 1800. Secondly, before this time, courts allowed people acquitted because of insanity to have their freedom. Also, this period introduced a statutory way to confine persons acquitted because of insanity. Thirdly, the impression from these previously decided case law was that the defence of insanity was rarely successful, and the difficulty of proving the insanity defence at this time was significant.[87] Nonetheless, the thesis agrees with Walker that, beginning in 1800, courts' attitudes towards insane accused shifted from strictly applying the insanity defence principles to a more relaxed one.

For example, the trial of *James Hadfield*[88] in 1800 had an instructively different outcome from the Arnold case and the others earlier reviewed. In this case, the accused raised the insanity defence, and the prosecution argued that "Hadfield was not in his right mind, but he was not mindless".[89] The Attorney General did not dispute the evidence of the doctor nor Hadfield's claimed delusion but argued that the insanity needed to be absolute; and that it was not. Erskine, in defence, challenged the doctrine in Arnold's case[90] for being narrow. He argued that "total deprivation" is a complex standard to prove the defence of insanity and is not obtainable.[91] He further stated that

[85] [1760]19 HOW ST Tr 885.

[86] Ibid.

[87] Nigel Walker, 'The Insanity Defence Before 1800' (1985) Vol 477 The Annals of the American Academy of Political and Social Science 26.

[88] "Trial of Jamed Hadfield for High Treason" in Howell's State Trials, Comp. Howell, 27: 1286.

[89] Ibid

[90] "Must be incapable of distinguishing between good and evil" "must not know what they are doing ay more than an infant… a brute or a wild beast".

[91] Howell (n 88) 1312.

most madmen retain some capacity for reason or understanding.[92] Also, Erskine argued that delusion is an inseparable companion of actual insanity.[93] A doctor examined Hadfield and diagnosed him as insane because of his irrational response to the doctor's questions. Lord Chief Justice Lord Kanyon questioned if the accused was sane at the time of the act and answered that the evidence showed that he was 'deranged'. The jury found Hadfield not guilty on the ground of insanity.

Lord Kenyon believed that the suitable option was not to set Hadfield free for the sake of society and himself.[94] This opinion was because he considered him dangerous to the public and needed treatment. Therefore, he directed the jury to remand Hadfield to prison. Before this case, the law permitted courts to release or free persons acquitted because of insanity. Moreover, the criminal law had no direct control over them.[95] However, the court may order a hearing on civil commitment.[96] Two judges would order the detention of an offender as a dangerous lunatic under the vagrancy legislation of 1744, but the common law only permitted his detention until he recovered.[97] Therefore, the available system was irregular and did not confine the insane accused for an extended period.

The House of Commons' reaction to Hadfield's acquittal on account of insanity led to enacting the Criminal Lunatic Act of 1800.[98] This legislation allowed the jury to acquit the insane accused but kept in custody until His Majesty's pleasure in charge of treason, murder, or felony.[99] Hence, this law made an accused acquitted on the ground of insanity subject to automatic confinement for an indefinite period.

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[92] Ibid.

[93] Walker, Crime and Insanity in England at p.77

[94] "Trial of Jamed Hadfield for High Treason" in Howell's State Trials, Comp. Howell, 27: 1336

[95]Roger Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (Edinburgh, Edinburgh University Press 1981) 21.

[96] Ibid.

[97] Ibid.

[98]The Statute of 39 and 40 'George III c. 94 (1800); And the Treason Bill of 1800.

[99] The criminal Lunatic Act s 41.

The court retrospectively applied this new legislation to Hadfield's case.[100] This disposal option in Section One applied to treason, murder and felony offences and not misdemeanours. This gap introduced the special verdict of not guilty because of insanity for misdemeanours in the Insane Prisoners Act of 1840.[101]

Moran argued that the case of Hadfield failed to establish any legal precedent. This opinion was because the verdict suggested that the court considered the physical state of the accused as the cause of the insanity[102] and not by persuasive medical or legal argument.[103] This thesis partly disagrees with Moran's submission because the case proved that the court found Hadfield insane based on medical evidence and the defence counsel's convincing argument on the insanity test. Nevertheless, on the other hand, this thesis agrees that the court in the Hadfield case established no legal precedent on the test applied. Case law started to turn to "the right and wrong test" in the 19th century.

3.3.4. THE RIGHT AND WRONG TEST.

This thesis alleges that frequently applying the right and wrong tests observed in subsequent case law may have influenced the M'Naghten rule. For example, Collinson presented the cases of *Parker* in 1812[104] and *Bowler's case* in his text.[105] In both cases, the accused persons failed to meet the right and wrong test applied by the courts and were found guilty.[106]Also, in *Edward Oxford's* case in 1840, Chief Justice Denman stated that a man is not responsible for his crime "if he is *non-compos mentis*, or unable to distinguish between right and wrong".[107] The court acquitted and hospitalised Oxford on the ground of insanity until the Queen's pleasure was known.[108]

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[100] Nigel Walker, *Crime, and Insanity in England; The Historical Perspective* (Edinburgh, Edinburgh Press 1968).

[101] (1840) 3 & 4 Vict. C. 54.

[102] Discharged from the army because of insanity and he was a casualty of war, face and brain damaged by a bomb.

[103] Richard Moran, 'The Modern Foundation for the Insanity Defense: The Cases of James Hadfield (1800) and Daniel McNaughtan (1843)' (1985) Vol. 447 The Annals of the American Academy of Political and Social Science 41

[104] Collinson, *Law of Lunacy* (London W. Reed 1812) 447, 636, 673 (note).

[105] Collinson, Law of Lunacy, 673 (note).

[106] Ibid 508.

[107] Ibid.

[108] Ibid 171.

The popularity of courts applying the right and wrong test continued in *Billingham*[109]. Sir James Mansfield C J, while addressing the jury, stated:

> "In order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt, that at the time he committed the act, he did not consider that murder was a crime against the laws of God and nature."

Thus, the court applied the right and wrong test and found him guilty. According to the decided cases of *Oxford* and *Bellingham*, courts began applying the "right and wrong test" for the insanity defence long before its formal introduction in 1843.

This thesis contends that scientists and medical knowledge were less advanced during this period. Hence, courts decided on the insanity defence relative to the time. However, the above case law originated when people knew less of the workings of the human mind.[110] The three kinds of tests were not different, as the courts were looking for the same cognitive factor, but the authors worded them differently and with varying emphases on gravity.

Furthermore, this thesis supports Erskine's argument in James Hadfield's case that the total deprivation concept was far too severe to do justice to the claims of insanity. Watson supported this argument by noting that insanity did not have to be absolute.[111]

These English case law on the insanity defence in the eighteenth and early nineteenth centuries are interesting from two standpoints. First, they convey much about the accused's mental state and illustrate various points regarding the insanity defence's determination. Secondly, they laid the groundwork for developing the English insanity defence administration.

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[109] 1812, Reported in J CARR & PAYNE, 169.

[110] David C. Brody, James R Arker, *Criminal Law* (Jones and Bartlett Publishers Canada 2010) 162

[111] Gary Watson, 'the insanity defence', in Andrei Marmor, *The Routledge Companions to Philosophy of Law* (Abingdon: Routledge, 21 Mar 2012).

3.3.5. POST M'NAGHTEN RULE

Despite the authorities mentioned previously and their formulations on the insanity defence, studies indicated a lack of consistency in courts' application of the insanity defence test until the decision in the M'Naghten Case in 1843.[112] This case became a landmark in the history of insanity as a defence. The court charged Daniel M'Naghten with the murder of Edward Drummond, whom he had mistaken for Sir Robert Peel. M'Naghten was under an insane delusion that Sir Robert Peel and his Tories made his life miserable and wanted to kill him. Under the insane delusion, Daniel shot Edward Drummond, Peel's secretary, thinking he was the prime minister. The prosecutor relied heavily on Hale's theory of the insanity defence. He pointed out that if an accused person's delusion did not amount to his inability to distinguish right from wrong, the insanity defence should fail.[113] Further, the prosecutor rejected the argument of Erskine in Hadfield's trial and stated that it was misleading in law.[114]

Alexander Cockburn, counsel for the accused, argued that although the accused knew what he was doing was illegal[115], he could not distinguish right from wrong because of insane delusion. He presented the evidence of Dr Monro Bethlem stating that M'Naghten's illness was enough for him to lose all self-control. Cockburn tried to convince the Jury that M'Naghten was insane because he lacked self-control. He stated:

> "I trust that I have satisfied you by these authorities that the disease of partial insanity can exist - that it can lead to a partial or total aberration of the moral senses and affections, which may render the wretched patient incapable of resisting the

[112] M'Naghten [1843] UKHL J16; Stephen White, 'The Insanity Defense in England and Wales Since 1843' (1985) A N N A L S 43;

[113] ibid 72.

[114] M'Naghten (n 201)722

[115] As suggested by his statement to the police: "The Tories in my native city have compelled me to do this. They follow and persecute me wherever I go and have destroyed my peace of mind. They followed me to France, into Scotland and all over England; in fact, they follow me wherever I go ... They have accused me of crimes of which I am not guilty; in fact, they wish to murder me. It can be proved by evidence. That's all I have to say." (Walker (n197) 91.

> delusion and lead him to commit crimes for which morally he cannot be held responsible."[116]

Cockburn's defence convinced Chief Justice Tindal and the two other judges sitting with him to advise the jury to acquit M'Naghten.[117] Moreover, the jury agreed with Cockburn's argument and did not find M'Naghten guilty because of insanity.

However, the public were not pleased with the verdict, and there was a public outcry. The outcry caused the House of Lords to invite the judges who decided the M'Naghten case to debate the issue of determining the responsibility of the insane. Accordingly, they called upon fifteen judges of the Queen's Bench to clarify the legal position regarding the criminal responsibility of the mentally ill. The House of Lords put five questions to the judges as follows.[118]

1. What is the law on persons acting on delusions who know they are acting contrary to the law?
2. What are the proper questions to the jury?
3. In what terms should the question of the person's state of mind be put to the jury?
4. If a person is deluded about the facts, is he excused? And
5. can a psychiatrist who never saw the person before the trial be asked his opinion about the state of the person's mind at the time the crime was committed?

The answers given by the judges formed the M'Naghten rule. In response to the question 1 and 4 regarding delusions, the judges stated:

> [W]e think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the

[116] Walker (n 100) 94.

[117] Lawrie Leznek, *Evil or Ill, Justifying the Insanity defence* (Routledge 1997) 20.

.[118] (1) What is the law pertaining to persons acting on delusions who know they are acting contrary to the law? (2) What are the proper questions to be put to the jury? (3) In what terms should the question of the person's state of mind be put to the jury? (4) If a person is deluded as to the facts, is he thereby excused? And (5) can a psychiatrist who never saw the person prior to the trial be asked his opinion as to the state of the person's mind at the time the crime was committed?

> influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.[119]

The judges answered questions two (What are the right questions to be put to the jury?) and three (In what terms should the question of the person's state of mind be put to the jury?) as follows:

> we have to submit our opinion to be that the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.[120]

The judges answered the last question on medical evidence and its role in determining insanity:

> [W]e think the medical men, under the circumstances supposed, cannot in strictness be asked his opinion in terms above state, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible.[121]

The answer to the fifth question suggests a difference between medical insanity and legal insanity. It also points out that a psychiatrist helps decide factual matters, but the evaluative right lies with the court. This area of law is a crucial topic outside of criminal law that people commonly misunderstand. The purpose of expert testimony is to provide an expert response to specific

[119] M'Naghten [1843] UKHL J16; Walker (n 100) 96.

[120] M'Naghten [1843] UKHL J16; Walker (n 100) 120.

[121] Walker (n100)121.

questions, not to resolve a legal issue, such as the presence or absence of a legal state of insanity. Chapter six of this thesis will delve into greater detail on this subject.

For England, the M'Naghten rule still applies, but not for Nigeria. Chapter four will demonstrate how English courts apply the M'Naghten rule. This section examined the early English insanity defence literature and traced the development of the insanity defence test to the M'Naghten rule. In line with the nature of this comparative thesis, the next section will examine early Scottish literature and trace the Scottish development of the insanity defence test.

3.4. HISTORICAL DEVELOPMENT OF THE INSANITY DEFENCE IN SCOTLAND

As in England, the law in Scotland, dating back to the 18th century, accepted that insanity (mental disorder) removes criminal responsibility when successfully proven as a defence and can prevent a trial from proceeding. [122] In line with the comparative nature of this thesis, having reviewed the development of the insanity defence in Nigeria and England, this section will review the Scottish literature on the insanity defence and its development.

In Scotland, insanity as a defence to criminal responsibility originated from Scottish Common Law, independent of English Common Law. However, following the introduction of the Criminal Justice and Licensing (Scotland) Act 2010, it became a statutory defence.[123] This section reviews the literature on the insanity defence, charting its evolution from the Common Law period to the enactment of statutes. Notably, two authors mark the periods in this review, George Mackenzie and David Hume, as both stood for different periods and applied different tests to the insanity defence.

[122] Robert Allan Houston, 'Courts, doctors, and insanity defences in 18th and early 19th century Scotland' (2003) Int J Law Psychiatry 2; J Higgins, 'The Origin of Homicide the Act 1957' (1986) Journal of Medical ethics 12.

[123] Criminal Justice and Licensing (Scotland) Act 2010, s168.

3.4.1. THE SCOTTISH COMMON LAW DEVELOPMENT OF THE INSANITY DEFENCE

This review is on early literature on the insanity defence in Scotland. It notes the opinions of institutional writers like Mackenzie, Hume, Alison, and others who have all influenced the development of the defence. Also, this early period marked by these authors formed the foundation of the insanity defence in Scotland.

From the Scottish Common Law era in the seventeenth century, the law excused offenders from punishment if they were insane.[124] Studies have shown that authors used various terms to describe insanity in this era, as in England.[125] For example, writers described insane persons as furious, outrageous, fatuous, or suffering from an unsound mind. [126] From this thesis point of view, considering the era, these terms lacked any medical connotation but were used in law.

Mackenzie, a leading jurist of the 17th and 18th centuries, used these terms in his writings, such as when he wrote:

> "Furious" (insane) persons were spared punishment too, being in want of judgment and "punished by their own fury".[127]
>
> …that 'furiosity and madness' ought to be a defence to all punishment since those that suffer such have no will in the mind of the law, and "will" is what makes a crime.[128]

[124] William Forbes, *The Institutes of the Law of Scotland* (vol.2 Edinburgh John Mesman 1818)23; J H A Macdonald, *Criminal Law of Scotland* (Wm Paterson: Edinburgh 1867) 14-15.

[125] John Erskine, *An Institute of The Law of Scotland; furious may include mad men* (Edinburgh: John Baxter printer 1871) 233; J J Mcmanus, Lindsay Thomas M D, *Mental health and Scots Law in* Practice (W Green & Sons LTD 2005) 167.

[126] Court of Session Act 1868, 31 and 32 Vict. c 100 & 101.

[127] George Mackenzie, *The Laws and Customs of Scotland, in matters criminal wherein is to be seen how the civil law, and the laws and customs of other nations do agree with, and supply ours* (Edinburgh: George Swintoun, 1678) 15.

[128] Ibid 76.

Also, some studies on this era show that Scotland compared insane offenders to children or wild beasts. Their reason was that the law presumed that children under seven years[129] not criminally responsible.[130] Mackenzie also explained that insane offenders were like infants or dead men because the law considered them incapable of committing crimes.[131] He explained further that when the insane committed a crime, they were "as guilty as a stone used in building a house or as a beast".[132] His study further explained that when a stone falls from a house without human fault and kills a man, the man cannot hold the stone responsible or punish the stone. Also, when a bull in a field while playing kills the master, nobody can hold the animal responsible.[133]

Forbes also referred to the insane as furious; he had put insane offenders in the same category as "children, wild beasts and the dead", just like Mackenzie.[134] He stated, "Persons altogether furious, who have no use of their reason, are in the construction of the law incapable of committing a

[129] Macdonald (n116) 14.

"A child under seven years of age is regarded as doli incapax - in other words, the child is presumed to be unable to appreciate the real nature of the offence. In Scotland this age stands as a matter of common law, and no child under seven is brought before the juvenile court, or, as it is put in the legal text books, a child under seven years of age is not liable to punishment as a criminal." Report on Age of Criminal Responsibility (Report on a reference under section 3(1)(e) of the Law Commissions Act 1965) Laid before the Scottish Parliament by the Scottish Ministers January 2002 <Age of Criminal Responsibility Report 185 (scotlawcom.gov.uk)> access 27 November 2020; This age was raised to 8years in 1928 by the Morton Committee and currently raised to 12years.

[130] Forbes (n 121) 7; Glanville L. Williams, *The General Part* (London, 1953) 28; Russell D Covey, 'Criminal Madness: Cultural Iconography and Insanity' (2009) Stanford Law Review. Vol. 61 pp. 1375-1427; Anolt, H, *A Collection and Abridgment of Celebrated Criminal Trials in Scotland 1536-1784* (Edinburg: William Smellie 1833).

[131] George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (Vol 59 Stair Society 1674) 15; W Green, *The Juridical Review* (Vol 65 W Green & Sons, 1953)120; Henry Hunt, *An Address ... to the radical reformers of England, Ireland, & Scotland, on the measures of the Whig Ministers, since they have been in place and power, Issues 1-7*(Stanford Street 1831)80; Forbes (n 4)9.

[132] Mackenzie(n116) 15; stones from a house top that fail and killed a man or a bull in a field which gored its masters.

[133] Mackenzie(n124) 15; Robinson D N, *Wild Beasts and Idle Humans* (Cambridge, MA: Harvard University Press 1996).

[134] Forbes (n 121) 7.

crime".[135] To explain this position further, Forbes shared similar views with Mackenzie that people considered any mischief perpetrated by the furious as if done by a beast or a tile from a house.[136]

Mackenzie's studies on the insanity defence in *the Laws and Customs of Scotland in Matters Criminal (1674)* dominated this century's opinions.[137] He noted that insanity was a misfortune, which should excuse insane offenders from liability.[138] It followed that he contended that madness punished insane people.[139] On the whole, Mackenzie stated that if an insane accused is "absolutely furious" at the time of the act, the court should acquit him.[140]

Mackenzie stated:

> Since there are some madmen who have lucid intervals, whose fury has its tides, and waxes and wanes, like the moon upon which it depends . . . that therefore they should be thought capable to commit crymes when they are in their lucid interval; but not when they are agitated by their fury.[141]

This quote suggested that Mackenzie acknowledged the possibility of partial and temporary insanity but believed that the accused's state of mind at the time of the crime was important rather than the type of insanity.

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[135] ibid 8.

[136] Forbes (n121) 8.

[137] Mackenzie (n124); Michael L. Perlin, 'Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence' (1989) The Case Western Reserve Law Review; E Miller and D R Parratt, 'Classic Text No. 74 `How Fury and Lucid Intervals may be Proven' by Sir George Mackenzie of Rosehaugh' (2008) SAGE Joournal.

[138] Mackenzie (n124) 76.

[139] Thomas Bayly Howell, T. C. Hansard for Longman, Hurst, Rees, Orme, and Brown, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours: From the Earliest Period to the Year 1783, with Notes and Other Illustrations, Volume 25*(London: Tc Hansard Peterborough-court 1818).

[140] Ibid 16.

[141] Mackenzie (n124)16.

Accordingly, writers adopted the view that the early 18th-century case law on the insanity defence applied Mackenzie's "absolutely furious" test.[142] However, the paucity of reported cases in Scotland between the 17th and 18th centuries limits the scope of this section. This limitation stems from the fact that early Common Law cases were either unreported or reported in archived material mostly referred to in literature. As a result, this thesis gathered some of the case law discussed below from academic literature.

This section notes that, despite the test provided by Mackenzie, there were significant inconsistencies in the tests applied by courts, including differences in the terminology used in various court decisions. For example, in *Jean Blair's* (Unreported) case in 1781[143] and *Sir Archibald Gordon Kinloch* in 1795[144], a not guilty because of insanity verdict was rendered based on the principle of absolutely furious.[145]

However, the courts applied a different test and term in the case of *John Somerville* in 1704*;* the court held that the accused was "absolutely outrageous", and the insanity defence was successful. Also, in *Robert Thomson*[146] in 1739, the judge considered if the evidence before him showed the accused was "so far furious, mad, and distracted" to deprive him of "total reason and understanding".[147] However, the jury decided there was "no proof of furiosity" until the murder

[142] Jim J. McManus, Lindsay D G Thomson, *Mental Health and Scots Law in Practice* (Sweet & Maxwell 2005)172; J. Higgins, The Origins of the Homicide Act 1957 (1986) Journal of Medical Ethics Vol. 12, No. 1 8-12; The *Rules of Insanity: Moral Responsibility and the Mentally Ill* (Suny Press 1996) 17; Faye Boland, *The Anglo-American Insanity Defence Reform: The War between Law and Medicine* (Routledge Revival 2019) 2; John Gunn, Pamela Taylor, *Clinical, Legal and Ethical Issues* (2nd edition CRC Press 2014) 95.

[143] Hume, *Commentaries on the Law of Scotland, Respecting Trial for* Crimes (Edinburg Bell and Bradfute 1797) 37.

[144] NAS JC3/47, June 29, 1795, to July 15, 1795; C. Denovan, *The Trial of Sir Archibald Gordon Kinloch, of Gilmerton, Bart. for the Murder of Sir Francis Kinloch, Bart. His Brother-german. Before the High Court of Justiciary on Monday June 29. 1795. Taken in Shorthand, - and Carefully Revised by the Agent and Counsel,* (Vol.1 Edinburg C Donovan 1795)113.

[145] Alexander Watson, *Medico-legal Treatise on Homicide by External Violence* (Edingburg: Maclachlan & Sterwart 1837) 319.

[146] Henry H Brown, Insanity in its Relation to Crime, (1916) 28 Jurid. Rev. 119.

[147] Collected by Maclauren, *Arguments and Decisions in Remarkable Cases, Before the High Court of Justiciary and other Supreme Court in Scotland* (Edinburgh: JB Bells 1900) 85.

and the insanity defence failed.[148] Again, in *Robert Spencer* in 1746,[149] the jury decided that the evidence showed the accused was furious when he committed the offence and found him not guilty.[150] This thesis observed that the degree to which the court considered the accused furious was unknown. As it was difficult to tell what the judges accepted as qualifying as furious

Skae, however, critiqued the "absolutely furious" test as being ineffective and outdated in most cases.[151] He held this view because he claimed that "absolutely furious" accused persons are uncommon. However, the law would imprison them if they existed, and they could neither commit a crime nor face trial.[152] This thesis disagrees with Skae's viewpoints because a person can become "absolutely furious" without prior history or warning signs and still commit a crime. Though the "absolutely furious" test existed during this time, the courts did not frequently apply it as suggested by the preceding case law.

Thus, until Hume's studies, the famous legal criteria for determining an insane person's responsibility remained essentially Mackenzie's "absolutely furious test." From the nineteenth to the twentieth centuries, writers such as Hume, Alison, Gordon, and other judges emerged and shared opinions that aided the advancement of the defence of insanity. During the Nineteenth century, Hume spearheaded a new position on the insanity defence.

3.4.2. HUME'S INFLUENCE

By the nineteenth century, the Scottish position of the insanity defence moved from the position popularised by Mackenzie to a passage in Hume's Commentaries.[153] Hume stated that the requirements for the defence of insanity should be:

> Absolute alienation of reason, *'ut continua mentis alienation, omni intellectu careat*'…such a disease as deprives the patient of the knowledge of the true aspect

[148] Ibid 85.

[149] Archibald Alison, *Principle of Criminal Law of Scotland* (W Blackwood 1832) 649.

[150] Ibid 649.

[151] David Skae, *The legal Relations of Insanity* (Vol. XII Edinburgh: Oliver and Boyd, Tweeddale Court 1867) 819

[152] Ibid 819.

[153] Hume's Commentaries 1797.

> and position of things about him… hinders him from distinguishing friend from foe… and gives him up to the impulse of his own distempered fancy, divested of all self-government, or control of his passions.[154]

According to Hume's statement, for one to succeed in defence of insanity, two requirements had to be present; the presence of a mental disorder and for it to result in an "absolute alienation of reason".[155]

This thesis observed that Hume's use of "absolute alienation of reason" was a novel approach to the Scottish insanity defence[156]. Hume's position differed from excluding responsibility based on a constant and evil passion on the accused's mind, being "absolutely furious," or comparing the accused to an infant or a beast.

Poole defined Hume's phrase 'absolute alienation of reason' as:

> the want of all intellect, the supervision of every faculty to perceive the plainest distinction among persons and things, a total surrender to the imagination, unguided and unchecked by judgement, the unjustified supremacy of animal properties.[157]

Poole put it differently that absolute alienation of reason means "an utter absence of wit and judgement", "total subversion or transference of intellect", or "entire deprivation of understanding", as opposed to using the loss of control(furious).[158] This position differed from Mackenzie and other writers, who saw the insanity defence as "absolutely furious".[159] Thus, for Hume, the accused require nothing short of absolute alienation of reason for a successful defence of insanity. Furthermore, this thesis observed that reason and furious seem different because reason is more related to intellectual capacity, while furious has more to do with losing control.

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[154] Ibid 37.

[155] Hume Commentaries (n 143) 37.

[156] Although today total alienation of reason relates to the automatism defence: https://www.judiciary.scot/docs/librariesprovider3/ accessed 30 August 2022.

[157] Richard Poole, 'Critical Remarks on the Plea of Insanity' (1855) J Psychol Med Ment Pathol 266.

[158] Ibid 266.

[159] Hume's Commentaries (n 143) 37.

Furthermore, Hume explained "want of temper" as an impulse of sudden rage, and people in the society should control it.[160] Therefore, for him, where a person cannot control this want of temper, "he is not a fit object of punishment".[161] Nothing suggested that the distemper of a furious itself is not a disease but could affect reasoning. However, Hume and Mackenzie acknowledged that the accused must lack reason (an absence of cognitive ability), although they put it differently in their respective works.

Hume's study on the insanity defence suggests it is a question of the state of mind. However, this thesis claims that it also involves a question of uncontrollable impulse by using the expression "divested of all self-government". This phrase refers to the accused's inability to control his actions while committing the crime.

Hume considered the requirement of absolute alienation of reason and questioned whether it was necessary to add that the accused must have lost knowledge of good and evil, right and wrong.[162] He considered questions like, did the accused know that murder was a crime (was it wrong to kill a neighbour)?; when he committed the act, did the accused understand its evil, or did he feel guilty or feared punishment?

According to Hume, a person may be aware that an act they committed is criminal but are "absolutely insane". They are "absolutely furious" if they lose the ability to observe facts, observe people around them, understand their intentions, or know others.[163]

He further pointed out that the accused might know that murder is a crime but cannot differentiate between friend and enemy. Additionally, the accused might consider his imagination a fact about himself and others.[164] Hume concluded that questions of "right and wrong" and "good and evil" were not crucial in determining the insanity defence.[165]

[160] Hume (n 143) 41.

[161] Hume (n 143) 41.

[162] Hume (n 143) 267.

[163] Hume (n 143) 268.

[164] Hume (n 143) 268.

[165] Hume (n 143) 267.

Accordingly, Hume's standard of "total alienation of reason" became the bedrock of Scotland's criteria for insanity until the enactment of the Criminal Justice and Licensing (Scotland) Act 2010 in s.51A. Nevertheless, the "total alienation of reason" test was not without criticism and conflicting views. Other authors suggested divergent views despite Hume's test, and case law showed inconsistencies in applying the insanity defence tests during this period.

Alison appreciated Hume's literary works.[166] According to this thesis, her position was alike but slightly different from Hume's. She acknowledged that the accused's alienation of reason at the time of the crime or during the trial was sufficient.[167] However, Alison disagreed that the disorder would completely (absolutely) deprive the accused of reasoning. Tadros argued that Alison was more flexible than Hume in applying the alienation of reason.[168] He noted that Alison claimed the accused's sense of alienation from reason should not be absolute. According to Alison:

> Either that he was altogether furious or did not understand the distinction of right or wrong. Cases of that extreme kind very seldom occur, and certainly much more infrequently than the instances in which the panel's state of mind has been such as to render him not a fit object of punishment.[169]

Alison said that complete loss of reason was uncommon in the insanity defence. Alison contended that a mentally disordered person does not generally lack reasoning but, in most cases, alienates their reason regarding themselves. Furthermore, she did not believe it was common to find a mad person who could not understand the difference between right and wrong in all respects or could converse on different subjects without understanding what was right and wrong.[170] She further stated that the alienation of their reason or illusions were mainly about themselves, as few men were generally mad about everything and others.[171] Hence, she claimed that fewer cases existed of a complete(absolute) alienation of reason or complete insanity, as required by Hume. Significantly,

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[166] Sir Archibald Alison, *Principles of the Criminal Law of Scotland* (W. Blackwood, 1832)12.

[167] Victor Tadros, 'Insanity and the Capacity for Criminal Responsibility' (2001) Vol 5 E L R 331.

[168] Ibid 331.

[169] Alison (n 169) 645.

[170] Alison (n 169) 645.

[171] Alison (n 169) 645.

Alison suggested that for determining the insanity defence, courts should inquire if the accused person was an object fit for punishment.

Gordon claimed that courts in the twentieth century did not apply the appropriate test for insanity in Scottish cases despite Hume's.[172] However, his reasons were that the insanity defence lacked reported case law from the Court of Criminal Appeal on the subject.[173] He suggested that the best approach was for criminal law to rely on the decision of medical experts to determine who was insane.[174] He criticised "alienation of reason" as a broad description that will include acts not caused by insanity.[175]

Alison and Hume agreed on right and wrong for the insanity defence, although arguing that it is not the best test for courts to use and may be misleading. According to case law, even if an accused recognises the difference between right and wrong but suffers from delusion or deception about the state of his affairs, the courts cannot hold him criminally responsible for such conduct. For instance, in *David Hunter* in 1801.[176] The accused proved the insanity defence successfully. This case showed that even when the accused understood right and wrong[177], his delusion of the situation removed criminal responsibility. Also, this case report did not discuss the principle applied by the court to decide the insanity defence.[178]

Similarly, in *James Cumming,* decided in 1810 that the insanity defence was successful.[179] Hume observed that the court followed no test to decide the insanity defence raised in this case. Hume and Poole argued that the court should have found the accused guilty, but both did not comprehend

[172] Michael Christie ed, Gerald H Gordon, *The Criminal Law of Scotland* (3rd ed Volume 1 incl Supplement W Green 2005).

[173] Although there were no appeal courts in Scotland until 1925.

[174]Gordon (n 175) 324.

[175] Ibid 324.

[176] Hume (n 143) 144.

[177] He thought the deceased murdered his mother and he wanted revenge, he understood to kill was wrong.

[178] Hume Commentaries (n247) 144.

[179] Poole, Critical Remarks on the "Plea of Insanity" (n64) 422.

the reasoning behind the court's decision.[180] This case also demonstrated that the court failed to apply any general principle in determining the insanity defence.

The lack of evidence demonstrating that the courts applied any given test to decide on the insanity defence suggests that judges and juries relied on their mindset when deciding on the insanity defence.

The case of *Robert Robertson* in 1810[181] evidenced that the judges followed their minds in deciding on the insanity defence. Here, the court decided that the accused successfully proved the defence of insanity. The court decided that he was not guilty because of the provocation he received and his general insane state.[182] Hume noted that the jury did not mention any tests. Instead, they referred to the fact that the accused was insane at the time of the crime.

To illustrate further, in *William Gates* decided on 22nd August 1811,[183] the insanity defence test applied by this court was uncertain. The court dismissed all other evidence and held that the accused was mentally deranged and suffered from it when he committed the act.

The above case argues that Scottish courts did not apply a specific or consistent insanity defence test but decided based on the judges' minds. Hence, this thesis contends that the lack of consistency in applying tests for the insanity defence will cause uncertainty in the evidence required and applied. Hume questioned the justice and safety of courts sustaining an insanity defence of the nature seen above, mostly grounded on alcohol intake or provocation, which finally leads to outrage or fury.[184] The courts did not settle the requirement or test for criminal liability for the defence of insanity in the above case law. This thesis states that the inconsistencies were relative to the time, considering the knowledge of insanity was limited.

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[180] Poole, Critical Remarks on the "Plea of Insanity" (n64) 422.

[181] David Hume, Supplemental Notes to Mr. Hume's Commentaries on the Law of Scotland (Edinburgh Bell & Bradfute 1814) Vol.1 30.

[182] Ibid 30.

[183] Hume Commentaries (n 60) 31.

[184] David Hume, *Supplemental Notes to Mr Hume Commentaries on the law of Scotland Respecting Crimes* (Edinburgh; Bells & Bradfute 1814).

Eventually, advancements in the medical profession occurred during the last quarter of the nineteenth century. Doctors understood insanity better and recognised the growing need to protect the insane. The passage of the Lunacy Acts served as evidence of this advancement.

In this section, this thesis notes that despite courts failing to use any specific test in some decided case law, the most popular test applied by courts remained Hume's test of absolute alienation from reason.

3.4.3.THE NEED FOR CLARITY (BY THE LATE 19TH CENTURY)

Towards the end of the 19th century, the responsibility of mentally disordered offenders became a growing concern for the legal and medical professions.[185] This concern heightened because of the increasing involvement of medical practitioners in deciding the insanity defence, especially as witnesses.[186] However, with the medical and scientific advancements, the understanding of insanity and developing kinds of insanity improved, as the case law evidence better precise directives than before.

For example, in Eugene *Augustus Whelps*[187], despite the evidence that the accused was hallucinating(delusional) about being the lawful son of the Duke of York and his disorderly behaviour. The court declared him sane and guilty. Lord Justice-Clerk Hope stated that unless an accused can prove delusion in evidence and show he could not differentiate between right and wrong when he committed the alleged offence because of insanity, he would be guilty of the alleged crime.[188] The evidence showed the accused was wandering the street looking disorderly and chased by boys. The deluded accused narrated how the police arrested, detained, and maltreated him. He believed these treatments were unbearable for a royal prince like him(an illusion), which was his reason for stabbing the person tormenting him.[189] However, Lord Hope's

[185] Chloe Kennedy, 'Ungovernable Feelings and Passions": Common Sense Philosophy and mental State defences in the Nineteenth Century Scotland' (2016) Edin. L R 20(3), 285

[186] Ibid 285.

[187] [1842]1 Broun 378.

[188] Ibid 379.

[189] Charles Scott, 'Insanity in its Relation to Criminal Law' (1889) 1 Jurid Rev 252.

instruction to the jury stated that the accused should be entitled to the defence if insanity was the cause of the offence.[190] Relating this test to the case, he believed that the defence of insanity would have succeeded if the "monomaniacal behaviour" of the accused had resulted in the act.

Therefore, this decision implied that the accused's hallucinating and disorderly behaviour was insufficient to remove criminal responsibility. There was no evidence to connect this hallucination and unruly behaviour to the crime committed. This argument revealed the court's focus on causation to decide the insanity defence. This thesis argues that the accused was in a continuous circle of insane delusion, which resulted in self-importance and led to the commission of the crime. Therefore, the evidence of delusion caused the crime. Hence this thesis disagrees with the applied direction that there was no connection.

Alternatively, Gordon contended that judges' opinions influenced the development of Scotland's insanity defence because their different backgrounds and personal beliefs swayed most of their decisions.[191] For example, he believed Lord Hope applied a narrow perspective to the insanity defence.[192] Gordon noted Hope's firm religious belief that "free will was absolute" and that the law should prevent people from escaping responsibility for their crimes since they were not responsible for their actions influenced his insanity defence position.[193]

This thesis observed Lord Hope's religious undertone in *James Gibson.*[194] Here, the charge alleged that the accused burned down the warehouse of a company he worked for in the past, but he raised the defence of insanity. The defence counsel advised the jury that the accused might be insane at the time and yet be responsible for the charged act. He also stated that the jury should be careful when making such a distinction because it is a challenge to 'parcel out the intellect' to decide what was sound or not. It is only safe for the jury to hold that since there was insanity, there should be no responsibility.[195] This court pointed out that the defence raised delusion when authorities caught

[190] Whelps (n88) 381.

[191] Sir Gerald H Gordon QC, The Criminal Law of Scotland (3rd edn ed Michael G A Christie) (Edinburgh, 2000)36.

[192] Ibid 37.

[193] Gordon QC (n311) 37.

[194] [1844] 2 Broun, 332.

[195] James Gibson (n118) 332.

and charged the accused in court. Lord Justice-Clerk Hope formulated two ways of determining responsibility when an accused raises the insanity defence: He urged that it is vital to consider,

A. The nature of the act done

B. How did the accused act, whether it showed contemplation to escape detection and punishment?[196]

However, this court established the nature of the act to be fire-raising; the accused burned the warehouse. The court analysed the second requirement using the evidence that the accused burned the warehouse skillfully, indicating malice and showing that the accused knew he was wrong.[197]

However, when the court applied these principles in this case, it found Gibson guilty, considering he knew his actions were wrong. Furthermore, even if his delusions were real, the law would still have considered them an offence, and he had no evidence to show the history of the delusions. As a result, his defence of insanity failed.

Notably, the court in Gibson stated that medical science or the book does not define insanity in criminal law. However, the jury determined insanity after consideration of the evidence presented.[198] Similarly, Gordon stated that the law wants to know whether an accused was insane when the accused committed the act and whether the insanity was enough to render him not criminally liable. He further explained that the law is interested if the accused was responsible, not his mental health. Thus, the law asks, "Is he responsible?" and not, "Is he insane?" Medical knowledge might assist in answering the legal question by telling the court if the mental state is to remove liability.[199]

However, Hume's absolute alienation of reason test dominated the case law in this era. In *George Lillie Smith and another*[200], which share similar facts to the case of *Gibson,* the court adopted the principles laid down by Hume. Smith and his friend put fire to a grain storehouse, and the fire

[196] James Gibson (n 118) 332.

[197] in such a way as not to be caught and not to hurt himself.

[198] James Gibson (n118) 333.

[199] Gordon QC (n311) 325.

[200] [1855] 2 Irv 1.

gutted all the grains. Lord Brougham stated that when considering insanity for criminal responsibility, the accused must be "absolutely bereaved" of his reasoning (absolute alienation of reason).

Additionally, Lord Brougham contended that the law does not recognise partial insanity. He argued that if the mind is unsound in one area, it is unsound in all areas, mainly if the source of the unsoundness exists within the mind.[201] Thus, it was pointless for the accused to constantly show insanity because a man can be insane and have sane moments. He further stated that the insanity raised by the accused should not be a discovery, as there should have been prior knowledge of its existence. In conclusion, the court held that the accused was not guilty because of insanity.[202]

However, this court restated the importance of the accused's insanity history. It pointed out that the court should not hear the insanity suffered by the accused for the first time after the accused committed the offence or in court. The court shared similar views to Hume's requirement for an absolute alienation of reason. It further stated that the law does not recognise partial insanity or its likes; either the person was insane or not insane. In the case law cited above, the judges provided clearer but differing directions, which is consistent with Gordon's contention that their backgrounds influenced the background of the judges upon making their decisions.

Then again, in *Thomas Barr*[203] , the prosecution charged the accused with the murder of his wife and mother-in-law, and he raised the insanity defence. Lord Moncrieff pointed out that it was not a good ground for a defence of insanity to be based on right and wrong because, sometimes, a man can know right and wrong but still be insane. He further stated that losing control caused by 'passion, evil inclination or feeble control' is not enough to eliminate liability. They differ from the loss of control caused by disease of the mind. However, the evidence on the accused's action did not show any disease of the mind as the cause of his loss of control, but jealousy (passion) proves his guilt, and his insanity defence failed.

[201] Alexander Forbes Irvine, Report of the Trial of Dr George Lillie Smith and Robert Campbell, for Willful Fire-Raising, High Court of Justiciary, January 15, 16, 17, & 18, 1855. (MOML 2012).

[202] Ibid.

[203] [1876] 3 Coup 261.

Subsequently, the Lord Justice-general Inglis replaced the Lord Justice-Clerk (Hope), and Scott believed his opinions were liberal[204] , and *Alexander Milne (1868)* showed this.[205] The accused was standing trial for the murder of one of his employees. Despite all the evidence of delusion, the accused's defence of insanity failed. Here, the Lord Justice Clerk, while determining the evidence before the court, stated:

> The doctrine of criminal responsibility is an exceedingly simple one. If a person knows what he is doing, if he knew the act that he is committing, if he knew the true nature and quality of the act and apprehend and appreciates its consequences and effects, that man is responsible for what he does.[206]

The defence attorney argued that if the court agreed that a man was suffering from an insane delusion when he committed the crime, there was no point enquiring further whether he knew or did not realise that he had committed a crime.[207] His opinion was that the law has a presumption that a person under the influence of delusion cannot appreciate his acts. However, the Lord Justice-clerk believed:

> If he does not know what he is doing or if, although he knows what is the act he is performing, he cannot appreciate or understand the nature and quality or its consequences and effects, then he is not responsible, provided that he is in that condition through the operation of mental disease.[208]

This direction suggests that courts decide whether they can link the accused's action to a mental disorder or disease before being acquitted on the grounds of insanity. The link to a mental disorder here reflects older positions that phrased it as needing "furiosity" or an unsound mind but meant the same thing.

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[204] Scott (n189) 237.

[205]Report of The Trial of Alexander Milne for Murder. In which the Plea of Insanity was found Not Proven, With Remarks by Hugh Cowan, Advocate. https://pdfs.semanticscholar.org/8cf3/57662ff960bdd200dcbe588aff8c9a469d7e.pdf accessed 10t July 2020.

[206] Archibald Alison, *Criminal Law of Scotland* (W. Blackwood, 1832) 651.

[207] Ibid 651.

[208] Ibid (n 97) 651.

The defence counsel's position should have made the jury's duty straightforward by deciding on insanity alone and not going on any other journey. However, this case showed that once the accused satisfied a jury that on the crime's day, he was insane, which affected his reasoning that made it impossible for him to control his actions and volitions. The law required that courts return a verdict of insanity without further inquiry.[209]

In like fashion, in *H M Advocate v. Patrick Higgins,*[210] the prosecution charged the accused for the murder of his two children, and he raised the insanity defence. The accused co-workers' evidence suggests an abnormal lifestyle. However, no one mentioned any mental illness or disorder, except for the lady who noted that he had an attack that looked epileptic on one occasion. In contrast, the prosecution argued that sometimes alcohol consumption could cause seizures like epilepsy. Moreover, the accused could not prove that he was insane when he killed his two sons, as the evidence showed he struggled with the children after his wife passed on. Hence, the court decided that the accused's act was not a case of insanity but an intentional act carelessly conducted, and therefore he was guilty of the crime.

These later case law showed that courts gave more precise directions than the earlier case law as judges actively defined the insanity defence in Scotland. *HM Advocate v. Kidd*[211] further established Hume's test of the insanity defence. The prosecution charged the defendant with murdering his wife and daughter. Two medical examiners testified that someone administered "chloroform" and "asphyxiated" the bodies. Lord Strachan stated in his direction to the jury that the most crucial question was whether or not the accused was of unsound mind when he committed the offence. He emphasised that there was no point in considering the technicalities involved in the medical evidence. He stated:

> …There must have been some mental defect, to use a broad neutral word, a mental defect, by which his reason was overpowered, and he was thereby rendered incapable of exerting his reason to control his conduct and reactions. If his reason was alienated in relation to the act committed, he was not responsible for that act, even although

[209] T T Clark, *The Journal of Jurisprudence* (vol 7 Murray and Gibb 1863) 116.

[210] [1913] 2 SLT 258.

[211] [1960] J C 61

> otherwise he may have been apparently quite rational. What is required is some alienation of the reason in relation to the act committed…that the question whether the panel was of sound or unsound mind at the time or whether his responsibility was diminished were matters for the jury to decide on the whole evidence upon the balance of probabilities.[212]

The abovementioned principle evidenced Hume's test and influence in proving the insanity defence. It contends that there must be an alienation of reason when the accused committed the act before the defence of insanity would be successful. However, Lord Strachan also encouraged the jury to apply their common sense like every human being while considering the whole circumstances reviewed in evidence and using ordinary rules of humankind to decide. He emphasised that medical evidence was not decisive. When determining insanity, the jury should consider the nature of the offence, the accused person's conduct before and after the act, and his insanity history.[213]

This direction introduced a better appreciation of Hume's position in Scotland, especially using the phrase 'mental defect' as being broader and neutral. This direction means there must have been a mental defect that stopped reasoning and rendered the individual incapable of controlling his actions. The direction given by the judge stated that alienation of reason must not be absolute.

Similarly, in *Brennan v. HM Advocate*,[214] the court charged the accused with the murder of his father. The evidence showed that the accused's intoxication was voluntary and under the drug's influence when he committed the offence. However, the accused raised the insanity defence. In deciding on the insanity defence, the court explained that if the complete lack of reason (absolute alienation of reason) resulted in the crime, the accused must show a mental illness, mental disease, or unsoundness of the mind caused it. Also, it is unnecessary for an accused to lack reason entirely in every aspect of his life, but only as to the act charged. After reviewing the authorities, including *Kidd*, in which the court discussed the requirements for the insanity defences, Lord Justice-General Emslie concluded:

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[212] Ibid 70.

[213] Ibid 71.

[214] *Brennan v. HM Advocate* [1977] SLT 151.

> ‘In short, insanity in our law requires proof of total alienation of reason in relation to the act charged as the result of mental illness, mental disease or defect or unsoundness of mind. . . The only distinction between insanity and the state of diminished responsibility recognised by our law is that for the latter state to be established something less than total alienation of reason will suffice.[215]

This thesis notes the court’s application of Hume’s insanity defence test. In deciding the case, the court dismissed the special defence of insanity raised by the accused because self-induced intoxication does not afford the accused the insanity defence.

Subsequently, in *Cardle* v *Mulrainey,*[216] the court explained the meaning of the alienation of reason. It stated that if the accused knew what he was doing and the nature and the quality of his actions, knowing it was wrong, he could not state that he suffered from a total alienation of reason when the accused committed the alleged crime. The court refused the insanity defence but stated the case was one of automatism, referring to Lord Strachan’s statement on the insanity defence in *Kidd*,[217] on the requirement of alienation of the reason concerning the act committed.[218] The court stated that for a total alienation of reason, there must be a total loss of control of the accused’s actions regarding the charged crime and must be a matter of fact in each case.[219] In *Kidd*, the justices decided that the alienation of reason must not be absolute for the loss of control to be acceptable.

The courts more often adopted and referred to the test of alienation of reason in the case law, providing consistency. However, this position remained the insanity defence test until the statutory provision of the insanity defence in 2010 legislation.[220]

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[215] Ibid 45.

[216] [1992] S C C R 658.

[217] Kidd (n 211) 70.

[218] Ibid 666.

[219] Ibid 658.

[220] Criminal Justice and Licensing (Scotland) Act 2010 which inserted a new section 51A into the Criminal Procedure (Scotland Act 1995 (“the 1995 Act”). It provides for a special defence in respect of persons who lack criminal responsibility by reason of their mental disorder at the time of the offence with which courts charge them.

3.5. CONCLUSION

Nigeria, a jurisdiction younger than England or Scotland, lacks similar historical context and case law interpretation on the insanity defence.[221] This analysis found that the Nigerian insanity defence originated from the M'Naghten Rule during the colonial era. Consequently, this thesis adopted the history of the insanity defence in England as part of Nigeria's insanity defence history, considering the M'Naghten Rule application in Nigeria.

This chapter used three tests to mark the English development of the insanity defence: the good and evil test, the wild beast test, and the right and wrong test. It saw writers like Bracton and Lambard, Hamilton, Coke, Hale and Brydall commenting on the good and evil test. Coke, Hale, Perkins, Hawkins and Blackstone also explained the nature of the insanity defence. Case law like Arnold's and others introduced the wild beast test and a less strict period. This period saw the insanity defence becoming a special defence and providing a statutory disposal option. This section concluded with the right and wrong test before the M'Naghten Rule.

For Scotland, the review demonstrated that two tests marked the development of the insanity defence in Scotland. These tests included the "absolutely furious" and the "Absolute Alienation of reason". Additionally, Mackenzie and Hume, on each side, pioneered these tests. Makenzie championed the "absolutely furious" era, and Hume advocated for the "Absolute alienation of reason". The analyses of the positions provided an excellent analysis of legal perspectives and the nature of the insanity defence.

This chapter reviewed the historical literature on the insanity defence in England and Scotland while identifying the development of the insanity defence over the centuries. This review shifted from a time when courts poorly understood insanity to a time when case law demonstrated a closer understanding of insanity.

This review of the insanity defence from the early centuries is remarkable from two standpoints. First, they convey much about the accused's mental state and illustrate various development points

[221] Nigeria came into existence in the 1900s…please refer to Chapter Two of this thesis.

regarding the insanity defence's determination. Secondly, they laid the groundwork for developing the insanity defence and the insanity defence administration in the jurisdictions.

Nevertheless, this chapter provided an overview of the history of the insanity defence and its development. It, however, also led this study to how the different jurisdictions arrived at their current insanity defence tests. The following chapter examines the application of these insanity defence tests, having already established how the three jurisdictions acquired their respective insanity defence test

CHAPTER FOUR

THE DEVELOPMENT 0F NIGERIAN CRIMINAL LAW RELATING TO THE INSANITY DEFENSE

4.1. INTRODUCTION

The preceding chapter reviewed the history of the insanity defence in Nigeria, England, and Scotland. It observed how England and Scotland established a test for the insanity defence through common law. On the other hand, the Nigerian insanity defence originated from the English M'Naghten Rule.

The Nigerian historical review in the last chapter ended with the lawmakers enacting the insanity defence provisions in the Criminal and Penal Code Acts. The English review ended with establishing the M'Naghten Rule, while the Scottish review settled on the statutory provision of the insanity defence. Following a consistent application and comprehensive understanding of the insanity defence test across jurisdictions, the historical review resulted in the insanity defence becoming a legal provision in Nigeria and Scotland.

This chapter explores criminal law provisions related to the insanity defence in Nigeria, England, and Scotland. It will present a historical review of the legislative changes in the insanity defence over time. This examination aims to identify changes to statutory provisions on the insanity defence and its nature.

This review will show the gap in Nigeria's legislative activities on the insanity defence provision. The dynamic nature of laws demands that lawmakers constantly review them in light of changes in society, science, and technology. This study suggests that Nigerian lawmakers need to review the legal criteria governing the insanity defence. In contrast to Nigeria, the part on England and Scotland will demonstrate how changes in criminal legislation impacted and influenced the development of the insanity defence. Therefore, it will be evidence of these legislative developments related to the insanity defence in their criminal legislation. The section on Nigeria is brief because of its lack of legislative activities in this area of law compared to England and Scotland.

4.2. THE NIGERIAN LEGAL STANDARD FOR THE INSANITY DEFENCE

The National Assembly enacts federal legislation in Nigeria and empowers the Nigerian States to legislate independently (through the State House of Assembly).[1] There are few significant disparities between Federal and State laws, particularly in Nigeria's criminal law.[2] Moreover, Nigeria has various federal criminal laws dealing with different crimes.[3] This study is interested in the Criminal and Penal Codes Acts, the Criminal Procedure Code and Act.[4]

Nigeria recognises two regions and six political zones. The two regions are the Northern and Southern Regions, while the geo-political zones are the North Central[5], North- East[6], North-West[7], South -East[8], South-South [9]and South-west.[10] The States in the Southern Region use the Criminal Code, while the Penal Code governs the States in the Northern Region. In 1963, when Nigeria became a federation, the States adopted the federal laws as applicable to them. Therefore, States have replicas of the Criminal or Penal Code Act as applicable. Their provisions on the defence of insanity remain substantially unchanged from their parent Acts.

[1] The Constitution of Federal Republic of Nigeria 1999 s 4.

[2] Most states only made the federal laws enforceable in their states.

[3] the Violence Against Persons (Prohibition) Act, 2015 and other similar laws in states of the federation, the Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015, the Anti-Torture Act 2017, the Child's Right Act 2003, The Companies and Allied Matters Act (CAMA), The Money Laundering (Prohibition) Act, The Economic and Financial Crimes Commission Act (EFCC Act). the Advance Fee Fraud Act, The Failed Banks and (Recovery of Debts) and Financial Malpractices in Banks Act, Federal Competition and Consumer Protection Act, Personal Income Tax Act.

[4] The Administration of Criminal Justice Act 2000.

[5] Benue, Kogi, Kwara, Nasarawa, Niger and Plateau States including the Federal Capital Territory Abuja

[6] Adamawa, Bauchi, Borno, Gombe, Taraba and Yobe States.

[7] Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto and Zamfara States.

[8] Abia, Anambra, Enugu, Imo and Ebonyi State.

[9] Akwa Ibom, Bayelsa, Cross River, Delta, Edo and Rivers State.

[10] Ekiti, Lagos, Ogun, Ondo, Osun and Oyo States; Henry E Alapiki, State Creation in Nigeria: Failed Approaches to National Integration and Local Autonomy (2014) Cambridge University Press 8.

Hence, this section will examine the Criminal Code Act (Nigeria) 2004, the Penal Code Act (Nigeria) 1960, the Criminal Procedure Act (Nigeria) 1965 and the Criminal Procedure Code (herein referred to as the CCA, PCA, CPA, CPC) for provisions on the insanity defence.

The position of Nigerian criminal law became more complicated as this thesis acknowledges the twelve Northern States[11] that enacted the Shariah Penal Code in 2002. Also, Lagos State changed its criminal law and implemented the Administration of Criminal Justice Act, like Abuja. This section will identify how these changes impact this thesis and the insanity defence. Nevertheless, the Sharia Penal Code lacks the insanity defence provision.

This section will establish that Nigeria has not changed nor reviewed its regulations on the insanity defence since its enactment. The Nigerian criminal laws that provided for the insanity defence have never changed except in Abuja and Lagos State, which modified their criminal code and embraced ACJA. The language of insanity has changed in Lagos State.

There is no evidence of the government reviewing or changing the federal laws on the insanity defence.

4.2.1. THE NIGERIAN CRIMINAL CODE ACT 2004:

Nigeria adopted the CCA from the Queensland Criminal Code in 1904, last updated in 2004. It applies in the Southern part of Nigeria, and the States in the Southern Region adopted it.[12] Section one of the CCA defines criminal responsibility as the liability to punishment for an offence.[13] Chapter Five addresses criminal responsibility.[14] Section twenty-Eight of Chapter Five provides for the insanity defence at the time of the offence:

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[11] Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano , Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara.

[12] Lagos State has amended their Criminal Code; Cyprian O Okonkwo, *Okonkwo and Nash on Criminal Law in Nigeria* (London Sweet & Maxwell 1980) 64.

[13] The Criminal Code (Laws of Federal Republic of Nigeria) 2004, Chapter 5.

[14] Two elements must be present for an act or omission to become a crime: *actus reus* and *mens rea*. However, the defence of insanity has to do with the *mens rea.* The doctrine of *mens rea* enshrined in the criminal law principle of "no liability without fault". By this principle, for one to be found guilty of a crime and convicted, some measure of fault is required. In the case of Abeke v. State, *mens rea* means a guilty mind, a state of mind the accused must possess at the time of performing whatever conduct stated in the *actus reus.* Common law offences do not apply in Nigeria.

> A person is not criminally responsible 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 disease or natural 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.
>
> B. A person whose mind, at the time of doing or omitting to do an act, is affected by delusions on specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the acts or omission 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.[15]

However, this thesis will restrict this section to the first arm of section 28, which relates to insanity and only refer to the second arm on insane delusions when necessary. Section twenty-eight means that not every form of mental disorder can sustain a defence of insanity or relieve an accused person from criminal responsibility. The law has stipulated that for the insanity defence to stand, Section Twenty-Eight of the Criminal Code must accommodate it.[16] Chapter six of this thesis will examine the meaning of this section.

This thesis research on this section reveals a lack of legislative activity concerning the CCA, particularly the provision on the insanity defence. The lawmakers have made minor adjustments to the CCA since 1904 but not related to the provisions on the insanity defence.[17] However, there has been no change to the CCA's provision on the insanity defence since 1904.

In 2008, the Lagos State Government established the Criminal Code Law Revise Committee (herein referred to as the Reform Committee) to reform the Criminal Code. They drafted a criminal

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The Constitution of the Federal Republic of Nigeria 1999 s 36(12) provides inter alia: "Subject as otherwise provided by this Constitution a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; a written law refers to an Act of the National Assembly or law of a state, any subsidiary legislation or instrument under the provision of a law."

[15] The Criminal Code Act 2004 of federal Republic of Nigeria s 28.

[16] *Augustine Gubadia v. The State* [2004] 2 SCM 173.

[17] Akeem Olajide Bello, 'Criminal Law in Nigeria in the Last 53 Years: Trends and Prospects for the Future' (2013) AUDJ 29.

law bill for Lagos. As a result of the 2009 Draft Bill of the Reform Committee, Lagos State enacted the Criminal Law of Lagos State in 2011 (hereinafter Criminal Law, 2011). Section twenty-seven of the Code kept the same insanity defence provision as the CCA, except it changed the insanity keyword to "mental disorder" from mental diseases/natural mental infirmities.

The Lagos State Criminal Code provided that:

> A person is not criminally responsible 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 disorder as to deprive him of the capacity to understand what he is doing or of capacity to control his action or of the capacity to know he ought not to do the act or make the omission.[18]

This provision contains a substantial difference from the CCA, which has been operating for decades. This provision on the insanity defence removed the phrase "state of mental disease or natural mental infirmity" from it and replaced it with a mental disorder, making a considerable difference.

In 2020, the National Assembly received a Bill to amend the CCA.[19] However, the amendment will not address the insanity defence. Instead, it will address repealing the statute of limitations on defilement, increasing the kidnapping penalty, and removing the gender restriction on rape.

4.2.2. THE NIGERIAN PENAL CODE

Similarly to the CCA, there is always a general presumption of sanity until proven otherwise. As provided by section 43 of PCA that "A person is presumed, unless the contrary is proved, to have knowledge of a material fact if that is a matter of common knowledge."

[18] the Criminal Law Ch. C17 Vol. 3 Laws of Lagos State, 2015 s27.

[19] Senate Report on Criminal Code Act (Amendment) Bill, 2019<https://placng.org/i/wp-content/uploads/2020/07/Senate-Report-on-Criminal-Code-Act-Amendment-Bill-2019.pdf> Assessed 19 November 2021.

Even though this provision is similar to Section 27 of the CCA in substance, the terms used differ. This provision on the general presumption of common knowledge leads to the proof of the insanity defence test provided under the PCA.

Section 51 of the Penal Code states that:

> "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 contrary to law."

The phrase 'unsoundness of the mind' is unique to the Penal Code and the Criminal Procedure Act, as the law in section 28 of the Criminal Code did not use this phrase.[20] This thesis will examine the interpretation of this provision in the next chapter.

Moreover, this thesis acknowledges that in 2001, twelve states from the nineteen Northern States introduced the Sharia Penal Code.[21] However, this Sharia Code has no significant impact on this thesis (the insanity defence) because it did not provide for the insanity defence. The 1960 Penal Code and Criminal Procedure Code apply to individuals tried in conventional courts, Area Courts in the non-Shariah States, and Customary Courts in the 12 States. They also apply to individuals the Shariah courts transferred their cases to the High Courts, Court of Appeal, or Supreme Court.[22] The Shariah Penal and Criminal Procedure Codes apply only to Muslims. However, suppose the civil or criminal case involves a non-Muslim. In that case, they can bring their cases to a Shariah Court after signing a consent form. Shariah Courts cannot coerce non-Muslims into participating.

[20] The Penal Code Act 1960 s 51 is the same with the Indian Penal Code in section 84.

[21] The states include Zamfara, Niger, Jigawa, Kebbi, Sokoto, Yobe, Bauchi, Borno, Gombe, Kano, Katsina and Kaduna States; Ruud Peters, *Islamic Criminal Law in Nigeria* (Spectrum Books 2003)17; Gunner Weimann, *Islamic Criminal Law in Northern Nigeria: Politics, Religion, Judicial Practice* (Amsterdam University Press 2010) 15.

[22] Heather Bourbeau, Muhammad Sani Umar, Peter Bauman, Shari'ah Criminal Law In Northern Nigeria; Implementation of Expanded Shari'ah Penal and Criminal Procedure Codes in Kano, Sokoto, and Zamfara States, 2017–2019 (2019) <https://www.justice.gov/eoir/page/file/1250681/download> Accessed 20 January 2020.

4.2.3. THE CRIMINAL PROCEDURE ACT 2004 AND CRIMINAL PROCEDURE CODE 1978

Nigeria introduced the Criminal Procedure Act (CPA) as an ordinance in 1945.[23] Nigeria included this Act in the 2004 laws of the federation following various amendments, although these amendments did not relate to the insanity defence.[24] It is the primary law governing criminal procedure in the Southern States of Nigeria.

Also, the lawmakers introduced the Criminal Procedure Code (hereinafter referred to as CPC) in the Northern region in 1960, which the Northern States have adopted, except for twelve states.[25] These twelve States are those that adopted the Shariah Criminal Procedure Act 2001.[26]

The CPA and CPC have identical provisions, particularly the insanity defence procedure. First, they provide the procedures when a court suspects an accused person of an unsound mind. However, these pieces of legislation manage the procedure for insanity as a bar to trial. Under this legislation, the courts would stop the proceeding once they suspect insanity and make a finding on it, making insanity (Unsoundness of mind) a bar to trial.[27]

When a court stops the trial to investigate an accused's mental state, the accused may be present or absent, depending on the circumstances.[28] Nevertheless, to secure public safety and decency, most times, the accused could be absent. Furthermore, where the court postpones the trial for

[23]Doherty Oluwatoyin, *Criminal Procedure in Nigeria* (Blackstone Press Ltd 1990) 10.

[24] The Act introduced as Ordinance No. 42 of 1945 was reenacted as ordinance No. 43 of 1948 and was at various times "amended" by ordinances No. 16 of 1950, sections 244 and 6th Schedule No. 22 of 1952; No. 13 of 1953; No. 24 of 1954; No. 10 of 1955, No. 22 of 1955; No. 47 of 1955; No. 76 of 1955; No. 107 of 1955 No. 24 of 1956; No. 52 of 1958; No. 65 of 1958; No. 100 of 1958. No; 2 of 1959; Cap 128 of 1959; 257 of 1959; 258 of 1959; 30 of 1960 Act. Cap 155 of 1960 Act; Cap 40 of 1961; No. v 1962 Act No. 6 of 1963; No. 112 LN. 1964; No.139 L.N. 1965; Decree No. 22 LN. 1966. Decree No. 84 LN. 1966; Decree No. 5 LN 1967; Decree No. 44 of 1970. It was incorporated as Cap 80 Laws of the Federation of Nigeria (LFN) 1990 and later as Cap. C 41 LFN 2004.

[25] Jones Jeffrey Rechard, *The Criminal Procedure in the Northern States of Nigeria* (Zaria, Nigeria : Gaskiya corporation 1978) 1.

[26] They include Zamfara, Niger, Jigawa, Kebbi, Sokoto, Yobe, Bauchi, Borno, Gombe, Kano, Katsina and Kaduna States.

[27] The Criminal Procedure Act 1965 s 222 (prt 5); Criminal Procedure Code 1960 s 320.

[28] The Criminal Procedure Act 1965 s 223 (2); Criminal Procedure Code 1960 s 320 (1)(2).

inquiry, they will detain the accused in Asylums (suitable places provided by CPC) for observation.[29] Also, the law requires medical evidence of the accused's sanity. Therefore, the trial cannot continue. Depending on the circumstances, the court will adjourn when a medical professional deems the accused fit for trial.

Also, this Act provides for acquittals on the ground of insanity, including for insanity under section 28 of the CCA, stating if he committed the alleged act.[30] These provisions have not benefitted from any amendment, nor has the legislation. However, Abuja and Lagos enacted the Administration of Criminal Justice Act (ACJA), which replaced the CPC for Abuja and the CPA for Lagos.

4.2.4. THE ADMINISTRATION OF THE CRIMINAL JUSTICE ACT

In 2007, Lagos State enacted the ACJL and amended it in 2011. Accordingly, Governor Babajide Sanwo-Olu assented to the Administration of Criminal Justice (Amendment) Law [ACJL] of Lagos State, 2021, on the 30th of September 2021, approximately ten years after the previous amendment.

The federal government introduced the Administration of Criminal Justice Act (ACJA) in May 2015, which governs the administration of criminal justice and associated topics in the Federal Capital Territory and other Nigerian federal courts.[31] The ACJA has 49 parts, including 495 sections covering every significant area of the criminal justice system. However, more importantly, the Act governs more than just criminal procedure; it encompasses the criminal justice process, including arrest, investigation, trial, custody, and sentencing recommendations. Moreover, it made significant adjustments to the CPC, which this research does not explore because they fall outside the scope of the study.[32]

Part 29, under the title "Persons of unsound mind," defines the insanity defence. This part relates to circumstances where criminal trials cannot continue because of perceived insanity (Unsound

[29] The Criminal Procedure Act 1965 s 223 (3); Criminal Procedure Code 1960 s 320 (4).

[30] The Criminal Procedure Act 1965 s 229 – 235; Criminal Procedure Code 1960 s 326.

[31] Administration of Criminal Justice Act 2015 s 2(1).

[32] Changes were made to the procedure for arrest (unlawful arrest and constitutional right of a suspect), establishing a monitoring body, recording arrest and confessional statement, establishment of police criminal record, prosecution powers, returns by controller general, mode of instituting criminal proceeding and many more.

mind or mental capacity). Nevertheless, this part is like the CPC in Part 26, with slight amendments. For example, the ACJA in section 278(4)(b) added that if the medical officer observing a defendant needs time extended, the court can extend the time for three months and not two months as it did in the CPA.[33] Also, it allowed the court to fix a return date after extending the time for the medical officer to observe.[34] In addition, the court can release or grant the defendant bail if the medical officer does not report within three months.[35]

Notably, this legislation applied the term defendant to refer to accused persons. Nevertheless, so far as the thesis is concerned, the changes are progressive without impacting the understanding of how far insanity removes criminal responsibility. For instance, explaining what the terms unsoundness of mind and mental capacity mean in the context of this defence.

Conclusively, as society changes, the laws must reflect the societal changes. The point that the insanity defence law has not changed over time is not necessarily the problem. Unless the defence results in apparent problems, the only way to verify its effectiveness is by reviewing the law and its application. The following two chapters will review the legislative provisions of the insanity defence to determine if they are fit for purpose.

4.3. THE ENGLISH STATUTORY PROVISIONS ON THE INSANITY DEFENCE AND ITS DEVELOPMENT.

This section will review the criminal law statutes that have provided or contributed to England's insanity defence from the 19th century to date. This statutory review will help appreciate how the insanity defence has benefited from the development of English criminal legislation compared to its position in Nigeria. This examination will begin with the Criminal Lunatic Act 1800, which substantially changed the insanity defence and continues through the modified Criminal Codes to the current 1991 code. This section will further show that before and following the 1991 Act, the government subjected the insanity defence to various evaluations to improve the law via appointed

[33] Criminal Procedure Code 1960 s 320 (4).

[34] Administration of Criminal Justice Act 2015 s 378(5).

[35] Ibid s 279.

committees. The English insanity defence standard remains the M'Naghten Rule, and the lawmakers have not codified it.

4.3.1. CRIMINAL LUNATIC ACT 1800.

This Criminal Lunatic Act of 1800 was a legal landmark in England. Besides introducing a disposal option for insane defendants, it introduced the "special verdict", which included insanity as a bar to trial and defence.

The Act provided for insanity at the time of the offence:

> If [the Jury] shall find that such person was insane at the time of the committing such offence, the court before whom such trial shall be heard, shall order such person to be kept in strict custody, in such place and in such manner as to the court shall seem fit, until His Majesty's pleasure shall be known.[36]

This law applied to people charged with indictable offences such as treason, murder, or other crimes and acquitted on the grounds of insanity at the time of the offence.

Also, this statute supported the position in common law that courts could not try a person not fit to plead during a trial because of insanity, and they would detain the person until His Majesty's pleasure was known.[37]

However, introducing the special verdict to indictable offences through this 1800 Act did not remove the common law insanity defence, which applies to summary trials.[38] Unlike the common law, this Act failed to define the insanity defence and insanity as a bar to trial or set a test.

Before 1800, there was no English law governing the appropriate disposal option following a finding of insanity in a criminal trial.[39] In most cases, the insane defendant was free to go home.[40]

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[36] Ibid s 282.

[37] Criminal Lunatics Act, 39 & 40 Geo. III (1800), c. s.94

[38] Steve White, 'Insanity in a Magistrate's Court' (1984) 148 J PN. 419, 435, 452; Steve White, 'Insanity Defences and Magistrates' Courts' [1991] Crim L R 510.

[39] Richard Moran, 'The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield' (1800) Law & Society Review 1.

[40] Ibid 1.

Hence, such verdicts in the past looked like not-guilty verdicts. However, courts could use the Vagrancy Act of 1744 to confine insane criminals.[41] This Vagrancy law allowed the court to initiate a separate civil proceeding to detain the accused acquitted on the ground of insanity if the judge believed that the freedom of the accused would endanger the public. Despite the Vagrancy law, courts allowed the insane defendants to go home (allowed to go free) or put into the care of their families.[42]

When the court found James Hadfield not guilty on the grounds of insanity prompted the legislators to enact a law to dispose of insane persons, found not guilty.[43] In this period, there were no criminal laws to handle the disposal of insane offenders when Hadfield was deemed insane by the court. As a result, the court's decision that Hadfield was not guilty due to insanity aroused judicial concerns. Coupled with the fact that the Vagrancy Law was irregular and informal, it did not allow courts to detain insane defendants for prolonged periods. So, the lawmakers hastily passed the Bill on criminal lunatics to apply to *Hadfield* because they believed he could potentially threaten the public and the king if the court released him.[44] Hence, the provisions of the Act were to have a retroactive effect.[45] This position meant that it applied to cases of insanity charged after its enactment and those already decided. It provided as follows:

> all cases where any person, before the passing of this Act, has been acquitted of any such offences on ground of insanity at the time of commission thereof, and has been detained in custody as a dangerous person by order of the court before whom such person has been tried, and still remains in custody.[46]

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[41] Alan Murdie, The History of the Vagrancy Act 1824 (2010) The Pavement <https://www.thepavement.org.uk/stories/1029> accessed 18 June 2018.

[42] Audrey Eccles, 'Furiously Mad': Vagrancy Law and a Sub-Group of the Disorderly Poor' (2013) Cambridge University Press 20.

[43] Richard Moran, 'The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)' (1985) Law and Society review 510.

[44] Richard Moran, 'The Modern Foundation for the Insanity Defense: The Cases of James Hadfield (1800) and Daniel McNaughtan' (1843) (1985) AAPSS 32.

[45] Ibid.

[46] Criminal Lunatic Act 1800 s 1.

Therefore, the Act applied to *Hadfield,* and the court detained him at the king's discretion regarding time and place of confinement.[47]

Thus, this Act stopped the general acquittal of insane offenders and initiated automatic confinement for an indefinite period for an insane offender. In addition, this legislation introduced the insanity defence in England as a special verdict. However, it did not provide a test for establishing insanity as a defence for a crime.

4.3.2. THE TRIAL OF LUNATIC ACT 1883[48]

This Act further developed the statutory provision of the English insanity defence. The Queen was instrumental in the enactment of this Act.[49] On the 2nd of March 1882, a man named Roderick Maclean, with a long history of insanity, shot Queen Victoria.[50] The court tried and acquitted him of high treason because of his insanity, though they confined him as a criminal lunatic. She expressed displeasure at the verdict, believing it should have been a guilty verdict.[51] Consequently, the Queen requested a change of verdict from "not guilty because of insanity" to "guilty of the act or omission charged, but insane", not to be responsible, according to law, for his actions.[52]

This case prompted the lawmakers to pass this Act, which changed the form of the verdict where a court found the defendant committed the Act but was insane. Hence, the lawmakers changed the verdict from "not guilty because of insanity" to "guilty of the Act or omission charged, but insane.[53]

[47] Moran (n 44) 33.

[48] 1883 Chapter 38 46 and 47 Vict.

[49] John R. Hamilton, 'Insanity Legislation' (1986) Vol. 12, No. 1 Journal of Medical Ethics 13.

[50] Michael McMullan, 'What Queen Victoria Saw (book review)' (2000) 164 JPN 883

[51] Ibid

[52] Criminal Lunatic Act 1883 s 1.

[53] Criminal Lunatic Act 1883 s 2.

Furthermore, this provision changed the phrase "committed the offence" in the Criminal Lunatic Act 1800 to "did the act or made the omission".[54] Kerrigan showing that this was a positive change, stated that the phrase "did the act or made the omission" is essential in unfitness to plead cases and insanity trials. He further stated that the phrase could make a difference in the court's verdict. Furthermore, in the *Attorney General's Reference (No 3 of 1998*)[55], Judge LJ described this change in the phrase as a significant change, adding that the change in the phrase "committed the offence" and "did the act or made the omission" was important. He claimed this change was material because the previous phrase was broad; it included both the Act and intent.[56] While the restriction to act and omission does not extend to the admission of *mens rea*.

Moreover, this new phrase "did the act or made the omission" has gone uncorrected for nearly a century and remains in effect. Therefore, these reasons suggest that the insanity defence benefited from this legislation.

No provision of this Act defined insanity. The legal test of insanity remained the M'Naghten Rules. Moving forward, this new form of the verdict: "Guilty but insane", lasted till 1964, when the Criminal Procedure (Insanity) Act restored the verdict to its former terms: "Not Guilty on the grounds of insanity".[57] The following section reveals that the Atkin's Committee report in 1923 and the Royal Commission in 1953 pioneered this change.

4. 4.3.2.1. LORD ATKIN'S COMMITTEE 1923

Lord Chancellor Birkenhead established this committee on the 10th of July 1922 to examine the law, practice, and procedure relating to the insanity defence and end the confinement of insane prisoners in asylums.[58] A second important reason for establishing the committee was to amend the M'Naghten Rule. This committee's work showed the English government's commitment to improving the insanity defence.

[54] Kevin Kerrigan, 'Unfitness to plead, insanity and the mental element in crime' (2000) Journal of Mental Health Law, 125.

[55] [1999] 3 All ER 40.

[56] Ibid 126.

[57] Ibid.

[58] Criminal Procedure (Insanity) Bill [H.L.] HL Deb 16 June 1964 vol 258 cc1112-23.

The case of *R v. True*[59] brought the criminal responsibility of an insane accused to the limelight during this period. True was a man referred to as an unusual person. The police accused him of the murder of a prostitute, and he raised the insanity defence. The defence gave evidence about his remarkable past life[60] , and a medical professional testified of his insanity. Despite the overwhelming evidence of insanity, the court convicted him and sentenced him to death by hanging.[61] However, the court found him guilty of the crime and sentenced him to death because he could distinguish right from wrong.[62]

Consequently, the House of Lords debated the court's decision because of public displeasure.[63] *True's* case heightened the uncertainties and controversies surrounding the right and wrong Rule. The ultimate question was whether the M'Naghten Rule was enough to cover the cases of insanity, considering the increased knowledge of understanding psychiatric medicine. Hence, Lord Birkenhead, the Lord Chancellor, appointed a committee of eminent jurists, with Lord Atkin in charge, to consider the need for change.[64]

Recommendations:

First, medical experts recommended the recognition of irresistible impulses in the defence.[65] They explained that insanity goes beyond the unsoundness of the mind or just the cognitive part. Thus, they recommended the amendment of the M'Naghten Rules to include irresistible impulse.[66] This

[59] [1922]16 CAR 164

[60] Convicted and fined for getting morphia by false prescription. Evidence of his delusions that another Robert True was after his life.

[61] M Hamblin Smith, Rex v. Ronald True, Journal of mental Science, Cambridge Core, <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/F27DC39FAACCCA5CEA3A57261F8EEDD8/S0368315X00006988a.pdf/rex_v_ronald_true.pdf> Accessed 28 January 2020.

[62] *Rex v True* (1922), 16 C A R 164.

[63] Hambin Smith, 'Rex v Ronald True' (2018) Cambridge University Press 271.

[64] Sir E. Marshall- Hall, Sir Ernest Pollock, Sir Herbert Stephen, Sir Archibald Bodkin, Sir Ernest Blackwell, Sir Richard Muir;' Sir E. Troup and Sir Leslie Scott.

[65] Antonin Lentin, *The Last Political Law Lord: Lord Sumner (1859 – 1934)* (Cambridge Scholars Publishing 2009) Ch 8 173.

[66] Ibid.

recommendation was an effort to make the defence available for an accused who, despite knowing what he was doing and knowing his actions were wrong, could not prevent himself from doing the Act.[67]

Second, the Atkin Committee agreed that there was no need for a right of appeal because the accused raised the insanity defence and because the accused never raised the insanity defence if it was in doubt whether he committed the Act.[68]

Third, they wanted the phrase or verdict "guilty but insane" changed to "not guilty because of insanity".[69] This opinion was because, on paper, the guilty but insane verdict was, in substance, an acquittal. Therefore, it should be a verdict of acquittal in language and substance. Also, it flies in the face of the law and philosophy of criminal responsibility.

This committee's report failed to secure an immediate amendment to the insanity defence law, but in 1964, the law changed the special verdict to not guilty because of insanity.[70] The lawmakers asked twelve High Court judges for their opinions on the proposed amendment by the commission. However, ten judges presented negative feedback indicating that the law does not require such changes.[71] The high point of their reason was that partial insanity and irresistible impulses would bring "total abandonment of criminal responsibility", therefore, not needed.[72]

5. 4.3.2.2. THE 1953 ROYAL COMMISSION ON CAPITAL PUNISHMENT

Thirty years after the Atkin Committee, the effort to improve the law on insanity continued with this 1953 commission. They were concerned with the growing criticism of the insanity defence rules in criminal trials. This committee also discussed the treatment of mentally ill prisoners facing capital punishment.[73]

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[67] Lord Justice Atkin's Committee on Insanity and Crime (1923) Cmd 2005 p 8 and 25.

[68] Ibid.

[69] Ibid .

[70] William Campbell James Meredith, 'Insanity as a Criminal Defence, A Conflict of Views' (1947) Vol. xxv Canadian Bar Review, 253.

[71] Ibid.

[72] Ibid 253.

[73] Ibid (para 18.10).

The commission members believed that the test in the M'Naghten Rules was defective and caused hardship given modern medical and psychological knowledge. They claimed that the insanity defence test, as stipulated by the M'Naghten Rule, failed to consider insanity caused by will and emotion.[74] Also, the Commissioners used "mental abnormality" to describe all types of mental diseases, mental deficiencies, or personality disorders. They thought the term "mental disease" meant that someone had a mental decline that was not there before, which caused them to break from a pre-existing norm.[75]

Recommendations:

After their review, the commission made the following recommendation:

i. They urged that the Rule in M'Naghten be "abrogated" and the Jury given the power to decide on the accused's sanity.[76]

ii. Where the law cannot remove the insanity defence, they supported the view of the British Medical Association to enlarge the scope of the Rules in M'Naghten, to include irresistible impulse as part of the defence. Therefore, they criticised the responsibility test set down in M'Naghten Rule and demanded a change.

However, this committee's report did not secure an amendment to the insanity defence test because the government acknowledged the issues raised and different opinions but did not see a need for change, particularly that the M'Naghten Rule was not causing any hardship in practice.[77] As a result, the lawmakers agreed that maintaining the Common Law test of insanity was the best course of action.[78]

[74] Capital Punishment (Royal Commission's Report) 317.

[75] Capital Punishment (Royal Commission's Report) para 212, 73.

[76] Ibid.

[77]Capital Punishment (Royal Commission's Report) HC Deb 10 February 1955 vol 536 cc2064-183 <https://api.parliament.uk/historic-hansard/commons/1955/feb/10/capital-punishment-royal-commissions> Accessed 20· of February 2020.

[78] Ibid.

4.3.3. CRIMINAL PROCEDURE (INSANITY) ACT 1964

This section will review this Act in line with its contribution to the insanity defence development and consider its improvements to the 1883 Act. These are the changes made to the insanity defence by this Act:

a. The form of the special verdict.

b. Introduction of the right to appeal.

c. Introduction of unfitness to plead.

d. Changes to the disposal option.

e. Evidence.

a. THE FORM OF SPECIAL VERDICT

This Act provided as follows:

> The special verdict required by section 2 of the Trial of Lunatics Act 1883 (hereinafter referred to as a "special verdict") shall be that the accused is not guilty by reason of insanity; and accordingly, in subsection (1) of that section for the words from "a special verdict" to the end there shall be substituted the words "a special verdict that the accused is not guilty by reason of insanity.[79]

This provision repealed section two of the Trial of Lunatic Act 1883 (special verdict) by stating that the verdict shall read "a special verdict that the accused is not guilty by reason of insanity". Therefore, the verdict became an acquittal in form and substance.[80]

b. RIGHT TO APPEAL

[79] Criminal Procedure (Insanity) Act 1964 s 1.

[80] Joseph Yahuda, 'The Criminal Procedure (Insanity) Act, 1964' (1964) The Solicitors' Journal 683.

Before this Act, the defendant had no right to appeal a special verdict because it was an acquittal in form, and one cannot appeal against his acquittal.[81] However, this Act established an insane defendant's right to appeal on legal grounds and upon certification of mixed facts and legal issues.[82] Therefore, an accused could appeal against the special verdict despite being an acquittal.[83] Hence, where an appellate court determined that the accused does not merit the insanity defence or that the law should allow the Jury to find the defendant guilty of any other crime, the court would replace the special verdict with a conviction for the underlying offence.[84] This provision allowed the accused to raise the insanity defence or exploit other defences.

The parties can appeal the court's finding on the fitness of the accused under disability, and where the court allows the appeal, they can also try the accused on the indictment.[85] Nevertheless, where the court reached a verdict on fitness after arraignment, and the Court of Criminal Appeal thought the trial court should have acquitted the accused before considering the question of fitness, the court may allow the appeal, despite the outcome the finding. Instead, the court should have directed recording a verdict of acquittal and quashing the finding.[86]

c. **UNFITNESS TO PLEAD**

This law widened persons deemed unfit to stand trial by a court by changing the term used.[87] The new term "disability" for any condition that would stop a trial and mental disorder was one such disability.[88] More so, where the defence, prosecution or the court observed that the defendant was

[81] *Felstead v R* [1914] A C 534.

[82] Criminal Procedure (Insanity) Act 1964 s 2.

[83] There is to be an appeal against it-as per s. 3 (a) and (b) and s. 4 of the Criminal Appeal Act, 1907- although it is in form also one of acquittal (s. 2 (1) and (2)).

[84] Criminal Procedure (Insanity) Act 1964 s 3(1)(a)(b).

[85] Criminal Procedure (Insanity) Act 1964 s 4(7).

[86] Criminal Procedure (Insanity) Act 1964 s 4(6).

[87] The Criminal Lunatic Act 1800 made provision for unfitness to plead.

[88] Criminal Procedure (Insanity) Act s 4 (1).

under any disability(insanity) that would hinder the proceeding, there would be a finding on the accused's fitness.[89]

The judge needs to resolve the fitness issue whenever it arises during trial before deciding on other matters.[90] However, considering the accused's disability and interest, the court may wait until the defence opens its case before determining fitness for trial.[91] As a result, if the judge examines the prosecution's case and finds the accused not guilty before deciding whether the accused is fit to stand trial, the question of fitness to stand trial no longer arises.[92]

The court could only decide on fitness to stand trial based on the written or oral evidence of two or more registered medical practitioners, at least one government duly approved.[93] This provision protected vulnerable persons in the community, including the insane, from criminal trials and shielded them from the stigma of conviction. In *R v Chinegwundoh (Harold)*[94], the court found the defendant under a mental disability and unfit for trial under the Criminal Procedure (Insanity) Act.[95]The court made a supervision and treatment order against him for two years. The order required him to attend a specified hospital, and he saw a named doctor.[96]

d. **HOSPITAL ORDER**

This legislation changed the disposal order for a special verdict by introducing a hospital order. The previous provision on disposal options did not specify a suitable place as suggested by the court. On the other hand, this Act mainly provided for the Secretary of State's discretion for hospitalising the accused in a special verdict, unfitness to plead and other cases relating to acquittals on the grounds of insanity or disability.[97]

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[89] Ibid.

[90] Criminal Procedure (Insanity) Act s 4 (4)

[91] Criminal Procedure (Insanity) Act, s 4(4).

[92] Criminal Procedure (Insanity) Act 1964 s 4(2) (3).

[93] Criminal Procedure (Insanity) Act, s 4(6).

[94] [2015] EWCA Crim 109.

[95] Criminal Procedure (Insanity) Act 1964 s 4.

[96] Ibid.

[97] Criminal Procedure (Insanity) Act 1964 s 5.

Dell criticised this Act for committing the accused to the hospital indefinitely. He complained that there was no flexibility of disposal, which made people avoid the insanity plea. He complained that nothing changed when the accused responded to treatment and got better or recovered from the mental disorder. As a result, the hospital did not allow him to go free. Dell described this situation as:

> the psychiatric equivalent of a life sentence: the defendant has to be sent to a hospital specified by the Home Secretary and must thereafter, indefinitely, be treated as though he were subject to a hospital order with restrictions . . . without any limit of time.[98]

Furthermore, this thesis identifies that this Act vested the Home Secretary with several powers. For example, the Home Secretary authorized the hospital to admit unfit persons with disabilities. Again, only the Home Secretary had the power to recall the trial of the accused patient whose condition had improved as certified by a qualified doctor.[99]

This thesis support Mackay's argument that such immense powers given to the Home Secretary could lead to the arbitrary use of power to the disadvantage of the accused and the public.[100] Similarly, the Butler committee shared similar opinions on the enormous power of the Home Secretary.[101]

Mackay further argued that the legislation denied the accused any opportunity to present evidence when unfitness to plead arises.[102] Furthermore, he noted that this Act did not allow courts to investigate the facts of the case.[103]

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[98] Sussane Dell, 'wanted: An insanity defence that can be used' (1983) Criminal Law Review p 432.

[99] Criminal Procedure (Insanity) Act 1964 s 5(4).

[100] Ronnie D Mackay, 'The decline of disability in relation to the trial' (1991) Criminal Law Review p. 87

[101] See the section below on the Butler committee.

[102] Ibid.

[103] Ibid.

Similarly, the Law Society (1991) criticised the courts' inability to consider the defendant's needs.[104] They claimed that lawyers advised their clients to plead guilty rather than use the insanity defence. This advice was because they did not want their clients to spend the rest of their life in a mental health home or hospital, considering the uncertainty of hospitalisation time.[105] They concluded that the 1964 Act had failed, as it failed to protect the insane persons because of its "draconian consequences".[106] The Butler Committee also adopted similar opinions and identified the need for change.[107]

6. 4.3.3.1. THE BUTLER COMMITTEE

For numerous years, English lawmakers paid less attention to the law relating to mental disorders and the unfitness to plead. Then, in 1972, the Committee on Mentally Abnormal Offenders was established (hereafter referred to as the Butler Committee).[108]

The government established the Butler Committee to review the interaction between criminal law and mental disorders, from prosecution through trial to disposal.[109] Their terms of reference are as follows:

> (a) To consider to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting his liability to be tried or convicted, and his disposal;
>
> (b) To consider what, if any, changes are necessary in the powers, procedure and facilities relating to the provision of appropriate treatment, in prison, hospital or the

[104] Law Society, 'Criminal Procedure (Insanity and Unfitness to Plead) Bill: Briefing on the private member's bill. London' (1991) The Law Society.

[105] Ibid.

[106] Law Society, 'Criminal Procedure (Insanity and Unfitness to Plead) Bill: Briefing on the private member's bill. London' (1991) The Law Society.

[107] The Committee on Mentally Abnormal Offenders, 1975 Cmnd. 6244.

[108] Ibid.

[109] The committee also considered special problems in law caused by drunkenness and use of drugs; Alfred William Brian Simpson, The Butler Committee Report, the legal Aspects (1976) Brit J Criminal. Vol16.

> community, for offenders suffering from mental disorder or abnormality, and to their discharge and aftercare; To make recommendations.[110]

This committee's primary goal was to balance "what is best for those guilty of dangerous offences and public safety".[111] This committee, during their review, criticised the law on the insanity defence for reasons considered below.

First, they complained that the available mental institutions were overcrowded and that courts could not find space to dispose of offenders with mental disorders. It recommended that "secure hospital units be provided urgently in each regional health authority area," which would be funded by a direct allocation of funds from the federal government.

Consequently, they criticised the 1964 Act's rigid method for disposing of a successful insanity defence.[112] They argued that having a single disposal opportunity (Hospital order) was unjustified, and the lawmakers needed to change this position. They gave their reason for this statement as follows:

> As things stand at present it is not in the interests of the defendant to seek the protection of a disability plea unless the charge is very serious. If the trial went ahead, he might be acquitted altogether, but even if convicted he would hope to receive from the court a more acceptable sentence than committal to hospital for an indeterminate period.[113]

This committee argued that people prefer not to plead insanity as a defence because they feared the outcome being an indefinite hospitalisation.

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[110] The Committee on Mentally Abnormal Offenders, 1975 Cmnd. 6244, Chap. 10.

[111] Henry R Rollin, 'The care of the mentally abnormal offender and the protection of the public' (1976) J Med Ethics 156.

[112] The Criminal Procedure (Insanity) Act of 1964.

[113] The Committee on Mentally Abnormal Offenders, 1975 Cmnd. 6244, chapt 10 10.18.

Second, this committee complained about the "term unfitness to plead" as inadequate because it does not convey a clear position.[114] They recommended that the phrase should state "under disability." [115]

Also, the committee criticised the 1964 Act for not allowing an accused person to present evidence when declared unfit to plead. Under this Act, courts committed accused persons to a mental institution for evaluation without their consent or providing them with other options.[116] This committee argued that this provision violated the Rule of a fair trial.[117]

Third, the committee complained that the 1964 Act lacked a provision for the court to investigate the facts of the case.[118] Hence, they recommended that the court postpone both the trial proper and the trial of the facts for up to six months when the defendant might become fit for trial within a short period.[119] The trial of facts should occur where the accused did not recover.

Fourth, this committee criticised the extensive powers of the Home Secretary under the 1964 Act. For example, the Act empowered the office to specify the hospital to admit the disabled accused. Also, the office alone had the power to recall a trial where the medical officers declared the accused fit for trial.[120] In addition, the Butler Committee noted that the legislation empowered the Home Secretary inappropriately:

> A person so committed to hospital must remain there, untried, until the Home Secretary decides otherwise, and this may mean a very long period of detention, even detention for life. [121]

As a result, they proposed that the legislation does not grant such authority to the Home Secretary but that the courts issue the relevant orders.

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[114] Ibid 10.2.

[115] Ibid.

[116] Ibid.

[117] The Committee on Mentally Abnormal Offenders, 1975 Cmnd. 6244, chapt 10 10.20.

[118] Ronnie D Mackay, 'The decline of disability in relation to the trial' (1991) Crim. L. R. Feb, p.88

[119] The Committee on Mentally Abnormal Offenders, 1975 Cmnd. 6244, chapt 10 10.19.

[120] Criminal Procedure (Insanity) Act 1964 s 5(4).

[121] Mackay (n 118) 89.

Notably, the Butler Report recommended that the law replace the M'Naghten Rules with a new defence of mental disorders test.

Despite the reported criticisms, the lawmakers took numerous years to amend the law on the insanity defence in 1991. The gap in years before enacting new legislation reflecting some recommended amendments suggest the slow pace of legal development on the insanity defence in England. However, the enactment of the 1991 act introduced new positions and benefitted the insanity defence as recommended by the Buttler Committee.

4.3.4. CRIMINAL PROCEDURE (INSANITY AND UNFITNESS TO PLEAD) ACT 1991

On the 27th of June 1991, Parliament enacted the Criminal Procedure (Insanity and Unfitness to Plead) Act, which came into operation on the 1st of January 1992.[122] Some recommendations and ideas expressed by the Butler Committee on Mentally Abnormal Offenders in their 1975 report inspired this legislation.[123]

As a result of their recommendations, this Act provided a more comprehensive or flexible range of disposal pathways when a court finds the accused unfit or insane. Under the 1964 legislation, there was only one form of disposal option for a verdict of not guilty because of insanity, equivalent to indefinite and indeterminate hospitalisation. Although the 1991 Act did not change the legal test for insanity, which remains governed by the M'Naghten rules, it introduced much-needed flexibility in disposal pathways.[124]

It gives courts multiple disposal options except where the charge is murder.[125] For example, they could order hospital admissions without the equivalent of restrictions or make a guardianship order under the Mental Health Act 1983, a supervision and treatment order, or an order for an absolute discharge of the accused.[126]

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[122] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (Commencement) Order SI 1991, No 2488.

[123] Report of the Committee on Mentally Abnormal Offenders (1975) Cmnd 6244, ch 10.

[124] Ronnie D Mackay, B.J. Mitchell and Leonie Howe, 'Yet more facts about the insanity defence' (2006) Crim. L.R May, 399.

[125] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 4.

[126] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 1.

Mackay argued that introducing flexible forms of disposal (except in murder cases) had removed a central disincentive to seeking a not-guilty verdict because of insanity.[127] This thesis agrees with Mackay that introducing flexibility in disposal options is progress and a step in the right direction because the accused would regard the insanity defence with less suspicion and fear, as under the 1964 Act. However, the position in the 1964 Act is current in Nigeria, where a not guilty verdict because of insanity results in indefinite detention.

Also, this Act amended the provision for unfitness to plead to introduce a new procedure, known as "a trial of the facts". It applies to all cases where the Jury has decided that the accused is unfit to plead and requires the prosecution to prove that the accused "did the act or made the omission charged". [128]This provision was also one recommendation of the Butler Committee and the Law Commission.[129] This new procedure requires the Jury to investigate whether the accused "did the act or made the omission charged" before being classified as unfit for trial.[130] Thus, courts hold a "Trial of the Facts" (herein referred to as TOF) before they decide that he is unfit to plead.

This 1991 Act requires that separate Juries hear these different procedures unless unfitness to plead arises during the trial. This thesis deduces that the Act adopted this process because if one Jury heard both processes, he would have listened to the evidence relating to the indictment. This hearing aimed to reach a decision that seemed like a trial.[131] So if the prosecution could not prove that the unfit defendant committed the offence, that should result in an acquittal and freedom.[132] Nevertheless, if the accused committed the offence, the result would be hospital detention.

This thesis questions the ability of the defence to give evidence and how the court would reach its decision without evidence. Therefore, how can the court hear the defence? It is common knowledge that the court is bound to hear both sides. Therefore, the law is not without a challenge.

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[127] Mackay and Others (n 124) 412.

[128] R.D. Mackay and Gerry Kearns, An upturn in unfitness to plead? Disability in relation to the trial under the 1991 Act (2000) Crim L R Jul, 532-546

[129] The Committee on Mentally Abnormal Offenders, 1975 Cmnd. 6244, chapt 10.

[130] Ronnie D Mackay and Gerry Kearns, An Upturn in Unfitness to Plead? Disability in relation to the trial under the 1991 Act (2000) Crim L R Jul, 532-546.

[131] *R v. B* [2009] Crim L R 608.

[132] Ibid.

In *O'Donnell*[133] the court reached that the defendant was unfit to plead. However, no trial of the facts followed, and the court ordered the defendant to hospital admission with restrictions. On appeal, the Appellant Court stated that this decision was a mistake in the trial process and that a trial of facts should have followed the finding of unfitness.

This legislation again emphasised the importance of medical doctors' testimony in insanity defence case law. By providing that neither a special verdict nor a finding of unfitness to plead will be returnable except on the testimony of two doctors, at least one must have expertise in diagnosing or treating the mental disorder.[134] This legislation referred to the Mental Health Act 2007 on how medical doctors present evidence in court.[135]

This section demonstrated the slow development of the insanity defence in English criminal law jurisdiction. There have been reviews of the criminal law legislation relating to the insanity defence and questions raised, but there were wide gaps between the years of reviews. Despite the developments in mental health and the criticisms of the M'Naghten Rule, it remains the test for the insanity defence. Nevertheless, this thesis observed that the laws regarding procedure and disposal options progressed or developed.

The government's 2012 Scoping Paper demonstrates its efforts to examine the insanity defence's effectiveness in England. This scoping paper resulted in the Law Commission review in 2013 to discuss the result of the scoping paper. The 2013 review in England had cast further criticism on the M'Naghten Rule and the need for a change.

7. 4.3.4.1. THE LAW COMMISSION, INSANITY AND AUTOMATISM (DISCUSSION PAPER, 2013).

While the 1991 Act and the 2013 commission report were years apart, the establishment and report of this commission proved the government's commitment to improving the insanity defence. To develop a law, we must first assess the efficacy of existing legislation.

[133] [1996] 1 Cr App R 286.

[134] Stephen White, 'The Criminal Procedure (Insanity and Unfitness to Plead) Act' (1992) Crim. L.R. Jan, 4-14.

[135]Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 section 1(2) and Schedule 3(1)(2).

The previous commissions and committees discussed have shown that the law on the insanity defence has been under scrutiny for years. They criticised the insanity defence test for being unfair, outdated, and no longer reflective of advancements in medicine, psychology, and psychiatry.[136] They also criticised the name insanity as stigmatising. The committees and commissions reviewed before having reviewed the insanity defence and made recommendations. However, they secured no change to the insanity defence test or the name of the defence.

Consequently, the law commission aimed to resolve and answer the unanswered questions concerning the insanity defence. Accordingly, the commission raised the following questions to achieve its aim:

1. What is the correct test to determine whether they are criminally responsible or not responsible because of their condition?
2. Is it right to excuse a person from criminal responsibility because of their mental state, and what type of mental disorder qualifies to excuse responsibility?
3. Can the law excuse a person from criminal responsibility because they cannot resist committing the crime?
4. Should the defence of insanity be removed, or is it unnecessary to have this defence because the lack of *mens rea* covers the lack of capacity?
5. Is there a need to propose a new special verdict?[137]

The commission focused its work on answering the questions mentioned above. For example, chapter one reviewed the issue of a defendant's fitness to plead. By doing so, they looked at laws governing the test for fitness to plead and stand trial and the defence of insanity.

The commission highlighted the defects in the present M'Naghten Rule, the law in England. They stated as follows:

[136]Report of the Committee on Mentally Abnormal Offenders (1975) Cmnd 6244.

[137] Law Commission, Criminal Liability: Insanity and Automatism A Discussion Paper, 23rd July 2013, Chap. 1 (1.18-1.22).

a. The phrase 'disease of the mind' was complicated and no longer reflected modern medicine.

b. They argued that the court's treatment of internal and external elements in determining the phrase disease of the mind, as demonstrated in *R v Quick*[138] and *Hennessy,*[139]is illogical and results in an unjust outcome.

c. The word insanity is associated with stigma, and people are unwilling to be associated with insanity. [140]

They reached a few conclusions:

a) However, this commission maintained that the test in the M'Naghten Rules still stands as the law.[141]Also, this commission maintained that the burden of proof was on the defendant to establish an insanity defence.[142]
b) Their report argued that the special verdict was significant and lawmakers should not abolish it. Therefore, courts should maintain a special verdict on the insanity defence.[143]
c) They also agreed that recognised medical conditions could deprive a person of control of their bodily actions. Accordingly, this category of people should enjoy the defence of insanity.[144]
d) They further proposed that the law accommodate more disposal options following a special verdict of "not criminally responsible by reason of recognised medical condition" like a hospital order (with or without a restriction), supervision order, or an absolute discharge. [145]

[138] [1973] QB 910.

[139] [1989] 1 WLR 287.

[140]Law Commission, Criminal Liability: Insanity and Automatism A Discussion Paper, 23rd July 2013, para1.7 2.

[141] Law Commission, Criminal Liability: Insanity and Automatism A Discussion Paper, 23rd July 2013, Para 10.3.

[142] Ibid Para 8.4.

[143] Ibid.

[144] Law Commission, Criminal Liability: Insanity and Automatism A Discussion Paper, 23rd July 2013, Para 10.3.

[145] Ibid Para 10.15.

Finally, they recommended a new defence of "not criminally responsible by reason of recognised medical condition" to replace the existing insanity defence.[146] This committee was the last set up to date, and their recommendations remain the last they have considered for over nine years.

Although the academic community have widely criticised the M'Naghten Rules, there is less evidence that they cause issues in practice. The July 2012 Scoping Paper published by the Law Commission supported this view. According to the Scoping Paper's comments, defence attorneys and doctors typically ignore the M'Naghten Rules' legal technicalities in favour of the best possible outcome for the defendant. Many people still view the term "insanity" as a pejorative one.

This study disagrees with the commission's proposal that those who lack the mental capacity to commit a crime due to a medical condition and through no fault of their own should have a defence. The commission saw no solid reason for limiting this defence to mental disorders alone, but there are reasonable grounds for the law to limit it to mental disorders. Extending the scope of this defence to include all mental conditions will overhaul the courts with defences, those they can deal with and cannot. It will also affect other defences already covered in the law, like automatism and delusion. Also, it will bring uncertainty to criminal law defences and open new criminal responsibility areas. Their recommendation moved away from the insanity defence and the M'Naghten Rule.

Additionally, the position of the M'Naghten rule in England portrays the point that the age of the law is not always the problem unless there are demonstrable issues. The difference between the English position and Nigeria is that the English law commission and other groups have reviewed the insanity defence rules numerous times.

4.4. SCOTTISH CRIMINAL LAW PROVISIONS ON THE INSANITY DEFENCE

Scotland's criminal law is largely indigenous, not influenced by English law.[147] This section will review the Scottish criminal legislation on the insanity defence, from past enactments to current

[146] Ibid para 10.6.

[147] Although there are UK statutes on reserved matters and Acts of the UK Parliament in Scotland: Gerald H Gordon, 'Institution of Criminal Proceedings in Scotland' (1968) 19 N Ir Legal Q 249.

law. This review of Scottish criminal law legislation traces the development of the insanity defence legislation compared to Nigeria, which lacks any review or has not benefited from new legislation.

The Criminal Justice and Licensing (Scotland) Act 2010 provides the procedure for managing the insane in criminal trials. Scotland's insanity defence has been the subject of several legislative instruments over the years. This section will examine those statutes and the changes made to insanity defence provisions.

Specifically, this section will examine the Criminal Justice (Scotland) Act 1949, the Criminal Procedure (Scotland) Act 1975, the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice and Licensing (Scotland) Act 2010, noting their changes over time. Notably, the Criminal Procedure (Scotland) Act 1887 c. 35 did not provide for the insanity defence. Therefore, this section will not include it.

4.4.1. THE CRIMINAL JUSTICE (SCOTLAND) ACT 1949

The scope covered by this legislation included persons of unsound mind and mentally defective in a criminal process. Under this legislation, the prosecution could raise the insanity defence and provide evidence to prove it.[148] However, this provision was not in line with the Common Law provision, where the accused always bore the burden of proof whenever a party raised an insanity defence in a case.[149] In addition, courts had the authority to order the detention of unsound-minded persons in criminal trials.[150] During a trial, the court could order the detention of persons certified to be of unsound mind by two medical practitioners to any hospital and, when certified, dangerous to a state hospital.[151]

Last, it allowed courts to remand an accused person to investigate their mental health.[152] This provision applied when the prosecution charged a person with an offence punishable by imprisonment. The court found them guilty but advised that an investigation into his physical and

[148] Criminal Justice (Scotland) Act s 23 (5).

[149] *Brennan v HMA* [1977] JC 38).

[150]The Criminal Justice (Scotland) Act 1949 s 23(2); *Smith v M [1984]* S L T (Sh. Ct.) 28.

[151] The Criminal Justice (Scotland) Act 1949 s23(3), Change in procedure in the case of mental defectives undergoing imprisonment.

[152] The Criminal Justice (Scotland) Act 1949 s 27.

mental state was required.[153] During this time, the court detained the person or released them on bail while awaiting punishment. The bail bond will be that the person will submit to treatment.[154] The period for this inquiry/medical examination was for three weeks.[155]

However, this Act did not provide for insanity as a defence at the time the accused committed the offence. This position involves raising the insanity defence during the trial to say that the accused was insane when he did the act leading to the charged offence. Nonetheless, the Mental Health Act 1960 allowed for insanity at the time of the offence and as a bar to trial. This Act was the criminal law legislation before the Mental Health Act of 1960, which made necessary provisions not provided in this Act on criminal procedures concerning an insane person.[156]

Consequently, lawmakers in 1975 enacted another Act with slight changes to the insanity provisions.

4.4.2. THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1975

This Act made some amendments to the 1949 Act on the insanity defence. First, it provided more detailed procedures for courts to follow during the trial of persons with a mental disorder. These procedures included insanity as a bar to trial and a ground for acquittal. For insanity as a bar to trial, it provided thus:

> Where any person charged on indictment with the commission of an offence is found insane so that the trial of that person upon the indictment cannot proceed, or if in the course of the trial of any person so indicted it appears to the Jury that he is insane, the court shall direct a finding to that effect to be recorded.[157]

And;

[153]The Criminal Justice (Scotland) Act 1949 s 27(1).

[154] The Criminal Justice (Scotland) Act 1949 s 27(2).

[155] Ibid; The court is mandated to send the information on its reasons for the inquiry to the institution where the person is treated or remanded in custody.

[156] Please refer to the Mental Health Legislation of 1960: like insanity at the time of the offence and as a bar to trial raised by the accused or the court.

[157] The Criminal Procedure (Scotland) Act 1975 s174(1).

> Where, in the case of any person charged summarily in the sheriff court, the court is satisfied that the person is insane so that the trial of that person cannot proceed, the court shall direct a finding to that effect, and the reasons for that finding, to be recorded, and shall deal with him in the manner provided by section 376(2) of this Act.[158]

It reproduced the section referring to insanity as a bar to a criminal trial in the Act, emphasising that an insanity defence was accessible in indictment and summary proceedings. Under this provision, the court would order a finding regarding the accused's state of mind.[159]

The court applied this provision in *Bain v Smith*[160], where the accused initially pleaded guilty, but subsequently, it was apparent that he had a mental disorder. Following an application by the prosecution and consideration of medical evidence, the court retracted the defendant's guilty plea and ordered his incarceration in the Carstairs Provincial Hospital.[161] The court found the accused unfit to plead based on section 375 of the Criminal Procedure (Scotland) Act 1975.

For insanity at the time the accused committed the offence, this legislation provided thus:

> Where in the case of any person charged as aforesaid evidence is brought before the court that that person was insane at the time of doing the Act or making the omission constituting the offence with which he is charged and the person is acquitted, the court shall direct the Jury to find whether the person was insane at such time as aforesaid, and to declare whether the person was acquitted by them on account of his insanity at that time.[162]

Both provisions on insanity as a bar to trial and a reason for acquittal added clarity to the 1946 Act. However, unlike the 1949 legislation, it permitted insanity as a defence at the time of the crime, leading to acquittal.

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[158] Ibid s 375(2).

[159] The Criminal Procedure (Scotland) Act 1975 s174(3).

[160] [1980] S L T (Notes) 69.

[161] The Criminal Procedure (Scotland) Act 1975 s 376(1).

[162] The Criminal Procedure (Scotland) Act 1975 s 174(2).

Like the 1949 Act, this legislation permitted the prosecution to raise the insanity defence in summary jurisdiction courts and all courts of law.[163] It also obliged the prosecutor to bring evidence of the accused's mental state before the court.[164] Cameron applauded this practice.[165] According to his opinion and a survey conducted, the police spotted most insanity cases and informed the prosecutor.[166] He further stated that the police had the unenviable task of the prior decision on an accused's mental state.[167] In practice, the defence notifies the prosecutor about the insanity to stop the trial.

Second, subject to the above-referred provisions on insanity as a bar to trial or as a ground for acquittal, the court can make a hospital order detaining the accused in a State hospital or such other hospital for exceptional reasons the court may specify.[168] Also, this Act allowed for issuing a restriction order besides a hospital order.[169] Courts considered a restriction order where the insane person subject to a hospital order was a risk to the public and self, judging from the nature of the offence charged, the antecedent of the person and the possibility of committing the offence again. Notably, the court must make both the hospital order and special restriction subject to the examination and evidence of an approved medical practitioner.[170]

Third, this legislation improved the disposal pathway for a successful insanity defence. The court could make a hospital or guardianship order for accused persons with a mental disorder instead of convicting the person of the offence.[171] This thesis identified that this Act developed additional guardianship orders to the hospital order.

[163] The Criminal Procedure (Scotland) Act 1975 s 376 (5).

[164] The Criminal Procedure (Scotland) Act 1975 s 175(2).

[165]Gordon Cameron, 'Defence agents and the mentally disturbed' (1993) Journal of The Law Society of Scotland 38, 16.

[166] Ibid 16.

[167]The Criminal Procedure (Scotland) Act 1975 s 330(1).

[168] The Criminal Procedure (Scotland) Act 1975 s 174 (3).

[169] The Criminal Procedure (Scotland) Act 1975 s 179.

[170] The Criminal Procedure (Scotland) Act 1975 s174(4); s 175(4).

[171] The Criminal Procedure (Scotland) Act 1975s176(3)(4).

This legislation retained the provision that gave courts the power to remand an accused person for inquiry into their mental condition if convinced that the accused did the Act or omission punishable by imprisonment.[172] The provision on probation orders provided in the 1949 Act remained unchanged.[173]

Nevertheless, there was no provision for defectives or such classification in this Act. Finally, where a court made a hospital or guardianship order, it could not make a probation order, pass a sentence of imprisonment, or impose a fine.[174]

4.4.3. CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

This Act came into force on the 1st of April 1996. The Part VI[175] of this Act contained the provisions for addressing mentally disordered defendants. It changed the provisions for mentally disordered offenders significantly.

First, Part VI consolidated similar provisions in the 1975 Act, and readers no longer had multiple sections providing similar provisions on insanity. Chiswick agreed that after twenty years, introducing this Act changed how the law treated mentally disordered offenders.[176] He also observed that this Act consolidated various provisions from other existing Acts; for example, the provisions of the Criminal Justice (Scotland) Act 1995, the Criminal Justice (Scotland) Act 1980, the Mental Health (Amendment) (Scotland) Act 1983, and the Mental Health (Scotland) Act 1984 on insanity.[177] The consolidated sections included Section 54(1) consolidated Sections 174(1) and Section 375(1) of the Criminal Procedure (Scotland) Act 1975 and Section 63(1) of the Mental Health (Scotland) Act 1960 to Section 87 of the Lunacy (Scotland) Act 1857.

[172] The Criminal Procedure (Scotland) Act 1975 s330(1) s 180(1).

[173] The Criminal Procedure (Scotland) Act 1975 s184 and s 385.

[174] The Criminal Procedure (Scotland) Act 1975 s175(7).

[175]Criminal Procedure (Scotland) Act 1995 s52-63.

[176] Derek Chiswick, 'The Criminal Procedure (Scotland) Act 1995: new legislation for mentally disordered offenders' (1997) Psychiatric Bulletin 21, 110-112.

[177] Ibid 110.

Second, like its predecessors, it provided insanity in the bar of trial but changed the procedure.[178] There were no changes to the Legal criteria for insanity in the bar of trial. However, determining insanity in the bar of trial entailed three stages: finding the mental disorder, "examination of facts", and disposal.

The court would order an "examination of facts (diet) in issue" and remand the accused to an available hospital as recommended by two medical practitioners until the examination of facts finishes.[179] This examination of facts would follow the rules of evidence and procedure as in an ordinary trial.[180] The court holds this publicly, and the prosecution must satisfy the court beyond reasonable doubt that the accused committed the act and nothing on the balance of probabilities to raise doubt. If the examination of facts proves the accused did not commit the crime, the court will acquit the accused.[181]

Furthermore, the accused had the right to appeal the finding of the examination of facts and the decided disposal.[182] Interestingly, the prosecutor had the same authority to appeal a determination of insanity in the bar of trial.[183] So adding factual examination to the insanity bar trial process was novel.

Third, this thesis found no modifications in the legal requirements or method for using the insanity defence at the time of the offence[184]; however, insanity at the time of the act became a defence available under summary procedure.[185]

Fourthly, the provision on the court's powers to send accused persons with a mental disorder to a hospital in Section 52 of this Act remained unchanged. However, it emphasised that if

[178] Criminal Procedure (Scotland) Act 1995 s 54(1).

[179]Criminal Procedure (Scotland) Act 1995 s 54(3) and (4).

[180] Criminal Procedure (Scotland) Act 1995 s 55(6).

[181] Ibid.

[182] Criminal Procedure (Scotland) Act 1995, s 62.

[183] Criminal Procedure (Scotland) Act 1995, s 63.

[184] Criminal Procedure (Scotland) Act 1995, s 54(6).

[185] Criminal Procedure (Scotland) Act 1995, s 54(6)).

circumstances change, the court can either move the patient to another institution (such as the State Hospital) or discharge him to court if the accused no longer needs the order.[186]

Additionally, this thesis observed the introduction of new modes of disposal options or flexible disposal options. The provisions for hospital orders and guardianship were unchanged. Nevertheless, defendants deemed insane at the bar of trial, and those found guilty but acquitted on the grounds of insanity had new disposal options. In both categories of the insanity defence, the court may make a hospital order with or without restrictions, a guardianship order, new supervision and treatment order, or make no order. [187]

Unless the charge was murder, the mandatory disposal was a hospital order with restrictions on discharge without a time limit.[188] Also, the court could review hospital orders if there was a change in the accused's circumstances.[189] This provision was an addition to the 1975 Act. For example, the review might lead to the court revoking the order, remanding in custody/bail, or making other orders varied or confirmed.[190] Another order might include transferring a patient to a different hospital (the State Hospital) or an order of discharge once the accused no longer needs the hospital order.

The substance of the hospital and restriction order remained the same as the 1975 Act, but with some additions. This Act added that courts could make restriction orders without time limitations. Also, a statement to show that the doctor does not relate to the accused person and to declare any pecuniary interest in the disposal would follow the evidence of the medical practitioner (written or oral) for a hospital order.[191]

In like manner, the provision on probation with a requirement for treatment for a mental condition remained the same in substance with the 1975 Act.[192] This Act expanded the condition for

[186] Criminal Procedure (Scotland) Act 1995, s 52(6).

[187] para. 1(1) of Schedule 4.

[188] Ibid.

[189] Criminal Procedure (Scotland) Act 1995, s 54(4).

[190] Criminal Procedure (Scotland) Act 1995 s 54(4)(b)(c).

[191] Criminal Procedure (Scotland) Act 1995 s 61.

[192] The requirements are unchanged; these include a maximum duration of 12 months, an option of residence in a psychiatric hospital.

treatment under this section to accommodate treatment under the supervision of a chartered psychologist.[193]

This thesis noted that the Act improved the insanity defence rules and procedures. As a result, Mackay claimed that the number of insanity pleas grew, and most cases that raised the defence were successful.[194]

4.4.4. CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

This legislation provided for the current position of the insanity defence in Scotland. It came into force in June 2012. As provided in the Act, it introduced and abolished provisions in the 1995 Act.[195]

The Scottish Law Commission (herein referred to as SLC) agreed to the need for changes to the criminal law on the insanity defence to be in line with the current medical understanding of the mental disorder.[196] Their review and recommendations led to the enactment of this Act.

Stuart-Cole rightly noted that the study by the SLC showed that the terminology of the Common Law insanity defence was "outdated, archaic and stigmatising" and believed using such archaic terms could lead to issues when a medical practitioner is giving evidence.[197] Therefore, the SLC recommended that lawmakers replace the old terminologies used with modern terms in line with modern medical practice.

Hence, section 171 of this Act reflects the SLC recommendation to abolish the common law defence of insanity, diminished responsibility, and insanity in the bar of trial. It introduced a new statutory defence of mental disorders.[198] Furthermore, Part 7 in Section 168 introduced new mental

[193]defined in section 307 as a person listed in the British Psychological Society's Register of Chartered Psychologists.

[194] Ronnie Mackay, Warren Brookbanks, *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press 2018).

[195] Criminal Justice and Licensing (Scotland) Act 2010 s 171; Like the common law defence of insanity.

[196] The Scottish Law Commission (Scot Law Com No. 195, 2004).

[197] Scot Law Com No.195 at [2.12]; Elizabeth Stuart-Cole, Mad or Bad? 'Appreciating' Insanity Scott; *Henry Sneddon MacKay v Her Majesty's Advocate* [2017] HCJAC 44 (2017) The Journal of Criminal Law.

[198] Abolition of common law rules, Any rule of law providing for— (a) the special defence of insanity, (b)the plea of diminished responsibility, or (c)insanity in bar of trial, ceases to have effect.

disorder defences by adding new sections to the Criminal Procedure (Scotland) Act 1995. They include Section 51A (criminal responsibility of mentally disordered persons), section 51B (diminished responsibility), and Section 53F (unfitness for trial).

The substance and terminology of the insanity defence provided by the 2010 Act are entirely different from the common law position and any past provision on the insanity defence in Scotland. Section 51A provides as follows:

1) A person is not criminally responsible for conduct constituting an offence and is to be acquitted of the offence if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

2) But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.

3) The defence set out in subsection (1) is a special defence.

4) The special defence may be stated only by the person charged with the offence, and it is for that person to establish it on the balance of probabilities.

The SLC argued that adopting the term "appreciation" would provide a broader interpretation of the insanity defence test. Stuart-Cole agreed that "appreciation" would accommodate a lack of cognitive capacity and volitional incapacity.[199] The test is brief and goes straight to the point, besides using contemporary words for the keywords. The provision above also provides evidence using the phrase "mental disorder" and not "insanity", but this time to both the substantive defence and the plea in the bar of trial.[200]

[199] Elizabeth Stuart-Cole, 'High Court: Insane Harassment: Is the Defence of Insanity Available for a Defendant Charged with an Offence of Harassment, Contrary to Section 2(1) PFHA? *Aline Loake v Crown Prosecution Service'* [2017] EWHC 2855 (Admin) (2018) The Journal of Criminal Law.

[200] Section 52f.

Studies have shown that the SLC were also concerned about the title of the defence but did not give a title, and the new section 51A failed to provide a name for the new substantive defence.[201] The SLC argued that if the law named the new defence "a mental disorder defence", it would suggest a generic term that includes the defence of diminished responsibility.[202] They also argued that to call it "Section 51A defence" was clumsy. Although, they finally suggested that the "mental disorder defence" was more suitable than the insanity defence.[203] This Act titled Section 51A as "criminal responsibility of persons with mental disorder", and the 1995 Act referred to the insanity defence provision as "the defence set out in section 51A of this Act". [204]

This law changed the title of section 54 of the 1995 Act (insanity barring trial) with unfitness for trial, as is the substance of the provision.[205] Here, a person is not fit for trial if the court establishes on the balance of probabilities that he cannot effectively participate in the trial because of a mental or physical condition. This provision is entirely different from the provision in the 1995 Act.

The SLC review further provided a guide to deciding when the accused is unfit for trial as follows: the ability to understand the nature of the charge, the ability to make a plea, understand the purpose of such trial, understand the evidence, instruct his lawyer and other factors the court might consider relevant.[206] Nevertheless, it also added that misinterpretation of the charge is not insanity.[207]

Notably, under 51(A) (4), only the accused can raise the defence of insanity. This provision differs from the common law position that the crown could raise the defence. The burden of proof is on the defence, and he is to prove this on the balance of probability. In contrast, the position on the plea in the bar of trial remained unchanged; the matter of fitness for trial, the defence, the crown,

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[201] Elizabeth Shaw, "Automatism and Mental Disorder in Scots Criminal Law" (2015) Edinburgh Law Review, Volume 19 Issue 2, Page 210-233; James Chalmers, Insanity and Automatism: Notes from over the Border and across the Boundary (2014) Northern Ireland Legal Quarterly, 65(2), 210.

[202] Ibid.

[203] Report on Insanity and Diminished Responsibility (Scot Law Com Report No.194 (2204).

[204] Ibid

[205]Criminal Justice and Licensing (Scotland) Act 2010 s170(2) amends the title of section 54 of the 1995 Act and introduces some amendments to that section.

[206] Report on Insanity and Diminished Responsibility (n 203)13.

[207] Ibid 13.

or the court itself may raise it.[208] Chalmers raised an issue with this amendment in a legislative comment piece. He argued that an accused may prefer to go to trial on the merits of the case or raise another defence to secure an outright acquittal now that the Crown cannot raise the issue even on the grounds of public policy.[209]

Also, this Act excluded psychopaths under the mental disorder defence provided under this section. The SLC justified this exclusion partly by reference to its definition of a psychopathy. They argued that psychopathic personality disorder had various symptoms but referred to the scenario where a person understands social norms but does not apply them, especially to anti-social conduct. To them, such a person fully understands (appreciates) his conduct but is weak in conforming their conduct to accepted standards. Hence, a person with this personality type does not lack reasoning and, therefore, could be responsible for their crimes.[210]

Scotland made evident attempts to change its test for an insanity defence and finally updated this change. However, this change or amendment is unlike the position in England and Nigeria. Nigeria has not reviewed their statutory provision, while the English lawmakers have made attempts through reviews for a change but still retained their Common Law test of the insanity defence. The English lawmakers, after their review, believed that the Common Law test of insanity defence created no practical injustice.

4.5. CONCLUSION

This chapter explored the various insanity defence provisions in Nigeria, England, and Scotland. This Nigerian criminal law provisions review on the insanity defence found no evidence that the government has amended or reviewed these provisions since they were adopted.

It showed Scotland and England have modified their insanity defence legislation and progressed in numerous ways. The government subjected the criminal law to the insanity defence to various evaluations. The earlier Acts (1800-1883) in England made provision for the insanity defence to

[208] James Chalmers, 'Insanity and automatism: notes from over the border and across the boundary' (2014) N I L 60 (2).

[209]James Chalmers and Fiona Leverick, 'Substantial and Radical Change': A New Dawn for Scottish Criminal Procedure?' (2012) Vol 75 The Modern Law Review.

[210] Maher G, 'The New Mental Disorder Defences: Some Comments (2013) Scots Law Times, pp. 1-4.

be a special defence. Also, during this time, they made several changes to the form of a verdict for an insane accused. Some committees reviewed above criticized the M'Naghten Rule and proposed new tests, particularly one to include irresistible impulse. However, their criticism did not lead to a change in the English position. Significantly, this chapter marked the government's responsiveness and willingness to make a change and develop/improve the law on insanity through the review committees. Also, the 1991 Act changed the term "unsound mind" to "disability" for unfitness to plead. The new Acts improved their disposal options to become more liberal.

Scottish criminal legislation provided the insanity defence as a bar to trial, a ground for acquittal and disposal options, making several reviews and amendments to them over time. The test for this defence existed under common law before the criminal legislation introduced a test for it in 2010, becoming a special defence. This study also observed that, like England, the Scottish law commission evidenced the government's interest in developing the insanity defence law.

The dynamism and complexity of modern society cause legal development as the law must reflect the realities of the ever-changing society.[211] It is essential to view the insanity defence as a component of the rule of law in the society from which it originates. It should also consider the individuals it affects and the institutions that enforce it. As a result, it is essential to approach the insanity defence in terms of its dynamic nature and legal development.

The next chapter will review the judicial interpretation of the insanity defence tests provided in the criminal laws of the three jurisdictions in focus. The following section will examine how courts apply the insanity defence tests and their efficiency.

[211] Afolasade A Adewumi, Victor O Adenekan, 'Towards a Legislative Reform of the Doctrine of Doli Incapax Under the Nigerian Criminal Code Act' (2020) Journal of Law, Policy and Globalization.

CHAPTER FIVE

JUDICIAL INTERPRETATIONS OF THE INSANITY DEFENCE TEST

5.1. INTRODUCTION

The previous chapter identified the statutory provisions of the insanity defence in Nigeria, England, and Scotland. It was a continuation of the historical review on the insanity defence, detailing the development of criminal legislation on the insanity defence. The review showed that Nigeria had not significantly changed their insanity defence provision in the Criminal and Penal Code Act over time. On the other hand, England and Scotland have made some positive changes to their insanity defence provisions.

The preceding chapter established the Nigerian test for insanity in the Criminal Code Act 2004 and the Penal Code Act 1960. The Scottish lawmakers codified the insanity defence test in 2010, while the English retained the M'Naghten Rule but updated in case law.

The last chapter raised the following pointers that this chapter will move to address.

1. Identify any gap with the insanity defence rules due to their age.
2. Are they fit for purpose?

This chapter will review the judicial interpretations of the insanity defence provisions in Nigeria and compare them with those of England and Scotland. By comparing the judicial interpretations of the insanity defence tests in the three jurisdictions, the study will check for gaps in Nigerian practice. Also, it will consider if the laws regarding the insanity defence comply with the modern standard of psychiatry law.

An accused can raise insanity as a bar to trial (unfitness to plead) and insanity at the time of the crime. The criminal law in Nigeria, England and Scotland provides these two ways of raising the insanity defence. Therefore, this chapter is in two parts. The first part addresses the unfitness to plead in the three jurisdictions. The second part is on insanity at the time of the offence (insanity as a defence) in the three jurisdictions.

This chapter will conclude by discussing whether Nigerian jurisdictions, including the Northern and Southern regions, should adjust their insanity defence provisions. Also, it will

refer to the changes Lagos state and Abuja made on their insanity defence. In this chapter, some reviewed Nigerian case law may predate the legislation because of the development gap.

5.2. UNFITNESS TO PLEAD

This part reviews insanity at the point of trial, otherwise known as "unfitness to plead" (herein referred to as UTP). It has to do with circumstances where insanity acts as a bar to trial. Hence, it will review the judicial interpretation of legislative positions on UTP in Nigeria, England and Scotland.

This thesis has identified the following areas of concern in Nigeria: procedural gaps in the legislation, legal transplant issues, the court having a mind of its own, and unchallenged evidence. It will begin with the Nigerian review and proceed to England before Scotland. Are their positions on UTP any different from that of Nigeria?

5.2.1. THE UNFITNESS TO PLEAD IN NIGERIA

As pointed out in the previous chapter in part 5.2, the Criminal Procedure Code 1960[1], Criminal Procedure Act 2004[2] , and the Administration of Criminal Justice Act 2015[3] (herein referred to as CPC, CPA and ACJA) provide the legal standard for UTP in Nigeria.[4] They set the procedure for courts to determine an accused's fitness to plead and stand trial, notably when the court suspects insanity. On a reasonable suspicion that an accused is unsound of mind and cannot defend themselves, the judge or magistrate may halt the trial and conduct a medical examination of the accused before or during the trial.[5]

[1] It was enacted by the Nigerian Northern Region in 1960 and applied only to the Northern Region and after state creation it applied to all the Northern States; Jeffrey Richard Jones, *The Criminal Procedure in the Northern States of Nigeria,* (2nd ed Zaria Nigeria : Gaskiya Corp 1978).

[2] It is the principal enactment governing criminal procedure in the Southern States of Nigeria.

[3] For Federal Capital Territory and federal courts. It applies throughout the nation where law enforcement agencies created by the Constitution of the Federal Republic of Nigeria 1999 (as amended) or other Federal legislation operate.

[4]The Administration of Criminal Justice Act, Part 25.

[5]The Criminal Procedure Act (2000) s 320; Okonkwo Cyrian Okechukwa, Criminal Law in Nigeria (2nd Edition Sweet & Maxwell 1980) 132.

Before the trial starts, the prosecution arraigns the accused person, and arraignment begins the trial process.[6] An arraignment ensures that the defendant understands the charges against him to defend himself before the court takes the accused's plea, to provide a fair hearing for the accused.[7] *Sanusi v The State*[8] explained this position by stating that the accused person's plea is his answer to the written charge against him. The judge or prosecution, at this point, could raise UTP if they observe any abnormality in the conduct of the accused.

The fitness to stand trial not merely connotes the capacity to understand the charge. It also involves an accused's ability to defend such a charge reasonably.[9] It is not enough that the accused understand the nature of the charge; he should be capable of following the proceedings judiciously.[10] The accused must be capable of defending himself and instructing counsel at the time of the plea and during the trial.[11] Section 223(1) of the CPA provides the procedure for courts to follow when an accused is suspected to be of unsound mind as follows:

> When a judge holding a trial or a magistrate holding a trial or an inquiry has reason to suspect that the accused is of unsound mind and consequently incapable of making his defence the judge, jury or magistrate, as the case may be, shall in the first instance investigate the fact of such unsoundness of mind.

CPC section 320:

> (1)When a court holding a trial or an inquiry has reason to suspect that the accused is of unsound mind and consequently incapable of making his defence the court shall in the first instance investigate the fact of such unsoundness of mind.

Notably, Nigeria does not practice a jury system. Therefore, it is out of place to have it in this legislation. The above provision is like Section 320 (1) of the CPC regarding substance,

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[6] Criminal Procedure Act 2004 s 353; *Effiong V. State* (2017) LPELR-49918(CA); *Onasanya V. State* (2022) LPELR-56668(CA).

[7] *Oko v State* (2017) LPELR 42267 (SC).

[8] (1984) LPELR-3007(SC).

[9] *Bakori v. Zaria N.A.* (1964) NANLA 25.

[10] *R v. Inyang* (1946) 12 WACA 5.

[11] Ibid.

excluding the jury. However, while the ACJA is similar in substance, it uses different terms. It states:

> Where in the course of a criminal trial, the court has reason to suspect the mental capacity or soundness of mind of a defendant, by virtue of which he is unable to stand trial or defend himself, the court shall order the medical examination of the defendant's mental state or soundness of mind.[12]

The ACJA also rightly omitted using "a Jury" because it is not applicable in Nigeria's system. It added the "mental capacity and mental state" to the "unsound mind", which the CPA and CPC do not contain. These two phrases are contemporary and applied in several foreign jurisdictions. For instance, the English mental capacity Act 2005 and the Adults with Incapacity (Scotland) Act 2000 applied phrases like mental capacity and mental state. However, in Nigeria, the legislation does not define these phrases. The Nigerian jurisdiction lacks the definition of these terms/phrases. However, courts in case law examined below considered these terms synonymous with insanity. For unfitness to plead, case law did not define unsound mind, mental capacity and mental state. This circumstance is another example of where the court could use mental health law for definition. The insanity defence relates to mental health because the criminal court, in this case, addresses individuals with mental health disorders.

The first part of the unfitness-to-trial provisions in the three statutes is uniform. The court (judge) and the prosecutor can raise the accused's unfitness to plead and direct an investigation or medical examination/observation. The judge can raise and order an investigation into the accused's mental health as a bar to trial. Section 222 of the CCA[13] require the court to investigate the accused's mind where the judge suspects the accused is of unsound mind. Additionally, the CPC and CPA provided for the prosecutor to raise the accused's insanity and instigate the court to investigate the accused's mental state.[14] In *Ideh v State*[15], the argument before the court was whether the judge could investigate or inquire into the mental state of an accused where the defence has not raised the insanity appropriately. As the trial judge

[12] Administration of Criminal Justice Act s 278.

[13] Criminal procedure code 1960 s 320 (1).

[14] Criminal procedure code 1960 s 320 (5); Criminal procedure Act s 223 (5).

[15] [2019] LPELR-46899(SC).

explained, only a judge could decide whether the conduct or behaviour of an accused indicates an unsound mind and incapacity to defend himself because of a mental disorder.[16] Hence, the defence (counsel) cannot compel the court to investigate such unsoundness of the mind but can bring such to his notice. The appellate court agreed that the court below complied sufficiently with Section 222 of the Ogun State Criminal Procedure Law when he refused to investigate the insanity raised.[17] Therefore, the emphasis is on the court's satisfaction with the accused person's state of mind, no matter the parties' stand.

There is no prescribed method for a court or judge to assess if an accused individual is unfit to stand trial and needs evaluation. The law does not provide a test for UTP. However, as observed in several reported cases, the accused counsel could raise the accused's insanity and urge the court to investigate the accused's mental state as a matter of practice.[18] The accused's counsel could draw the court's attention to the insanity, although the court must not act on the application by counsel.[19]

For example, in *Ideh v State*,[20] the accused's counsel requested an investigation of the accused's mental state. The trial judge asked the accused broad questions as he approached the witness box to give evidence.[21] The accused's answers to his queries suggested he was of sound mind and mental competence to defend himself. Despite the accused saying he had mental attacks thrice a year since childhood, his testimony on the events of the fateful day of the incident was graphic, detailed, and unequivocal. The judge determined that he was sane and refused the application for psychiatric examination by the accused person's counsel.

Also, in *Ukpi v State*[22], the Supreme Court reiterated that there should be a basis for the judge to investigate the mental state of the accused, not solely because the counsel requested it. The judge's reasoning implied that the court would have observed the defendant for unusual

[16] *Ideh v State* (2019) LPELR-46899(SC).

[17] The Ogun State Criminal Procedure Law is identical with the Criminal Procedure Code Act 1960 as states adopted the federal legislation.

[18] *Ideh* (n 16); *Papoola v State* (2018) LPELR-43853(SC); *Ukpabi v state.*

[19] *Ideh* (n 16)*; Ukpi v State* [1979] LPELR 3348(SC).

[20] Ibid (n16).

[21] Ibid.

[22] *Ukpi* (n 19).

behaviour or conduct. Therefore, there should be a test or a guide for the judge to follow to decide the fitness issue. This case law demonstrates that the law does not provide the grounds for the judge to assess the accused's sanity. Although, in practice, the accused's counsel can raise the accused's insanity, the judge decides whether or not to investigate.[23]

In the case of *State v Ahangba Chimbiv*,[24] the accused person's counsel brought an application to the court requesting the judge to order a medical examination of the accused mental state. This situation was after the accused's counsel visited him in prison and observed that he behaved abnormally and spoke incoherently. Despite the prosecutor opposing this application, the court granted his request and ordered the medical examination of the accused's mental state.[25]

This thesis argues that all the parties should have the right to raise and order an investigation of the accused's sanity. By so doing, there are high chances that such practice could better guarantee a fair hearing. The accused and society will be more protected. For example, if the accused refuses to raise insanity because of stigma, the court or prosecution can raise it in the public's interest.

Moreover, to convince a judge to investigate an accused's mental state, the accused's counsel must present the accused's case of insanity.[26] *In Yahama v State,*[27] the appellate court agreed that the accused must expressly raise the insanity defence in their pleading and back it in evidence. They must not raise it in passing or by merely mentioning it. The accused must clearly show his intentions to use insanity as a defence and not leave it to the court to infer.

The second part of unfitness to plead demands that the court investigates the accused's mental state after observing any abnormality. A medical officer observes the accused's mental state and provides the judge with a medical report to aid his decision on whether the accused is fit. Hence, unless the question of insanity arises, section 223 of CPA on medical examination and

[23] *Sagiru Attahiru v State* [2020] LPELR 51092 CA.

[24] Unreported Case no. MHC/26/2012, Ruling delivered 29/04/2013.

[25] Ibid.

[26] *Sanusi v the State* (1984) 10SC 166 at 177.

[27] [2021] LPELR 53451.

report does not apply. Therefore, it would be unnecessary for the court to resolve it.[28] The Supreme Court settled this position in *Abu v. State*[29], where part of the evidence before the trial court stated that he was screaming before the people forcefully opened his door. One witness noted that the accused was rolling on the ground in a pool of blood when the door opened. Another witness stated that he was crying and had a cable rope tied around his neck. The defence counsel submitted that these testimonies constituted reasons to suspect that the accused was of unsound mind and consequently incapable of making his defence. He stated further that the trial judge should have investigated the facts of such unsoundness of mind in the first instance. There was no evidence to suggest the accused was of unsound mind and incapable of making his defence.[30] It upheld that there was nothing in the proofs of evidence that touched on the accused's mental state.[31]

As a result, if no evidence leads the judge to suspect the defendant is not of sound mind and incapable of making his case, he will not investigate the defendant's mental state.[32] This case further established the importance of the defence raising the insanity unequivocally to help the judge decide. This case law is one example of where the case law predates the legislation. However, this position is because the law on insanity has remained the same since the British officials enacted the codes. The case law examples are of a certain age, but since the law has not changed, they continue to be helpful.

Under unfitness to plead, the judge can raise the accused's unsound mind and direct a mental examination at any stage before and after pleading, even during evidence.[33] For example, in *Yahaya v State,*[34] the accused's unsound mind came into focus after the court adjourned for written addresses.[35] The question was whether or not the court should have paused the hearing

[28]The Criminal Procedure Act 2004 s 224(2).

[29] (1976) 5 S.C.12.

[30] *Abu v. State* (1976) 5 S C 27; *R v Udo Mboho* (1966)1 All NLR 69.

[31] Ibid 27, G S Sowemimo, J S C; The Accused in his statement to the Police, exhibited in the proof of evidence, showed that the accused gave reasons for killing his wife and this was incompatible with a person whose mind was unsound.

[32] *Paul Eledan v. The State* (1964) 1 All NLR.

[33] *Mboho v State* [1966] LPELR.

[34] [2021] LPELR.

[35] Address is the oral or written submission of counsels at the end of evidence.

at this point to determine the accused's mental state. The court determined that the appellant's mental condition at the time he committed the offence or while he was testifying at trial was the relevant mental state that should halt the proceedings.[36]

Therefore, *Yahaya* suggested that the court cannot entertain the unsound mind as a bar to trial during the written address stage. Nevertheless, this thesis asserts that this judgement demonstrates the ambiguity surrounding when to raise the question of unfitness to plead. Is the stage of written address excluded from the trial? The stage of the written address indicates that the court has concluded the evidence and not the trial.[37] It is the written or oral submission of counsel to the defendant and prosecution after evidence.[38] In *State v Yanga*[39], the judge stated that the criminal trial of every accused person begins with the arraignment and concludes with the conviction and sentence in judgment. Also, in *Lawal*, Mohammad JSC defined criminal trial as "the whole of the proceedings including the judgment and sentence."[40]

Once the court raises unfitness to plead because of insanity, the judge would remand the insane accused to an asylum or psychiatric hospital for observation.[41] A medical officer would observe the accused for periods not exceeding one month as necessary.[42] This observation allows the court to form an opinion on the accused person's state of mind based on medical evidence. This law requires the medical officer to forward a copy of his opinion in writing to the court.

However, failure to conduct this medical investigation required by law to determine the accused's fitness to plead and stand trial annuls subsequent trials.[43] After raising the issue of insanity, this second procedure does not mean courts resolve the unfitness to plead issue on medical evidence, as they must not decide based on the expert's report. Although, for this purpose, the certificate of the medical officer is admissible.[44] This procedure supports the

[36] *Arum v State* (1979) ANLRP 255.

[37] *State v Lawal* (2013) 7 NWLR (FT. 1354) 586.

[38] Ibid 40.

[39] (2021) LPELR-53086(SC).

[40] Ibid n 34.

[41] Criminal Procedure Act 2004 s 223 (3), (4).

[42] Ibid.

[43] *Godwin Odo v The State* (1998) 1 NWLR (Pt. 532) 24.

[44] *Odo v. State* (1998) 1 NWLR (Pt.532) 24.

argument in this thesis that medical evidence should be essential whenever the accused raise insanity as a defence. As the proceeding section will illustrate, this practice is similar to the position in England and Scotland.

Nigerian legislation has no test on the requirements for proof of unfitness to plead. Nevertheless, courts have made provisions on the tests for unfitness to plead. Case law in Nigeria has held that the insanity defence is a question of facts to be decided by the judge.[45] However, these cases further explained that the facts include circumstantial and medical evidence.[46] This surrounding evidence includes the nature of the killing, the accused conduct before and after the act, any history of the accused's abnormality, insanity in blood relations or ancestors.[47] This list seems unlimited, as it goes beyond the above examples and lacks certainty.

This research identified five criticisms and gaps in the study conducted in this area. One, Sections 223 and 224 of CPA failed to provide a detailed procedure for courts to adopt during the investigation. *In Mboho v State*[48], the Supreme Court criticised this gap in the procedure for courts during the investigation for unfitness to plead. The issue was deciding the procedure to follow when the court could not agree on the accused's fitness to plead, and the trial continued. Consequently, where there are gaps in Nigerian legislation, the court referred to section 363 of the CPA, which permits the use of the same practice and procedure as in England. In England, the jury decides if an accused person is fit to plead or go to trial. If the jury cannot decide, the court must choose a new jury to decide the issue before the trial can continue. In *Mboho*, the court failed to investigate the accused's sanity. It did not call for any evidence or make any findings about the accused's fitness.[49] The Supreme Court upheld the appeal and ordered that a new judge try the case and investigate the accused's fitness to stand trial.

[45] *Edoho v State* [2013] 17 NWLR (pt.1382) 121; *Ani v State* [2002] ALL FWLR (pt.125) 651'

[46] *Karim v State* [1989] 1 NWLR (pt. 96) 124; *Anyim v State* [1983] 1 SCNLR 370; *Madjema v State* [2001] All FWLR (pt. 52).

[47] *Karim v State* (ibid); *Guobadia v State* [2004] ALL FWLR 191; *Edoho v State* (ibid).

[48] (1966) LPELR-25378(SC).

[49] Ibid 5.

This procedural gap in the legislation has allowed the court to push for a legal transplant as the Act says it should. However, the procedure in England was for the court to change the jury, where they could not decide the accused's fitness after the investigation. First, Nigeria does not operate a jury system; judges preside over their cases. Second, in *Mboho*, the judge did not investigate the accused's unfitness; there was no point in bringing another judge to investigate. This thesis argues that the position was different, and the court should have evaluated if the position was the same as the English provision before applying it to the case.

The findings of this study have repeatedly condemned wholesale transplants without considering the position of the receiving jurisdiction. It argues that importing a procedure from one jurisdiction to another is challenging without evaluating it in the host's context.[50] For example, Legrand has criticised this view, arguing that a jurisdiction cannot transfer the meaning of a rule from one legal system to another.[51] Legrand argued that no rule in the borrowing jurisdiction could have any significance regarding the rule in the borrowed jurisdiction.[52] He believed that cultures are the bases for rules and that the imported rule would have a new meaning when individuals come from various backgrounds.[53]

However, this thesis views this Legrand position as extreme because legal transplants are possible if the receiving jurisdiction implements suitable mechanisms and scrutinises the law received. Some legal transplants are based on a simple copy-and-paste, while others result from incorporating legal ideas in line with current waves and fashions. Nigerian position is more like a "copy and paste" legal transplant. Some writers refer to the practice is also known as blind copying by some writers.[54] It is a mere import of complete or partial legal rules as an Act.[55] The lawmakers adopted a legal rule hoping it would be an appropriate match for a society just for fitting in without any prior assessment.

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[50] In chapter two, in section 23.

[51] Pierre Legrand, 'The Impossibility of 'Legal Transplants' (1997) HeinOnline 4 Maastricht J. Eur. & Comp. L. 111.

[52] Ibid 115.

[53] Ibid 116.

[54] Curtis J Milhaupt, Katharina Pistor, *Law & Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press 2010) 221.

[55] Ibid 222.

Legrand was speaking about copy-and-paste legal transplant when he stated that it was inevitable that when people import words, they will be attributed a new meaning in the local context, making it a different rule.[56]As the understanding of a rule changes, the meaning of the rule changes. Moreover, as the meaning of the rule changes, the rule itself changes. Further, Hoffman argued that transferring human meanings intact from one culture to another is impossible, just as it is impossible to transcribe a text.[57] She explained further that transferring a single word without changing its meaning and moving the whole language is impossible.[58] It implies that one must transfer the target audience when translating a language or document without affecting its meaning.[59]

Legrand and Hoffman are strong opponents of legal transplants. On the other hand, Alan Watson thinks that legal transplants are one of the best ways for the law to grow.[60] Watson called Legrand old-fashioned because he failed to acknowledge that laws can move across borders and adapt.

However, Legrande's ideas have influenced this study to state that lawmakers should evaluate laws considering local context before enacting them. This view considers how a rule could change across borders, giving it a new meaning. Therefore, to become more self-sufficient, Nigeria's legal system may have to learn to rely less on the legal system of other countries. If they have to borrow, they must scrutinise it considering the local context or learn how to add an interpretation framework to define the terms.

Two, the CPC, CPA, and ACJA provisions allow the court to investigate the accused's unfitness in his absence because of his mental state or public interest/decency.[61] Also, case law have followed this procedure that the accused's presence during this investigation is

[56] Ibid 115.

[57] Eva Hoffman, *Lost in Translation (*Minerva, 1991) 175.

[58] Ibid 272.

[59] Ibid 272.

[60] Alan Watson, Legal Transplants: An Approach to Comparative Law (Edinburgh: Scottish Academic Press 1974) 19.

[61] Criminal Procedure Code s 320(2).

unnecessary based on the nature of his unsound mind and actions.[62] It is unclear why an investigation would occur without the accused present. What kind of investigation is taking place? This thesis argues that an investigation is either the court observing the accused or the medical officer observing the accused. The court needs to order a medical examination when the accused behaves harmfully to others or himself. Hence, this thesis contends that this provision is superfluous as it does not explain the investigation procedure. As the next section will demonstrate, Nigeria's process differs from England's and Scotland's, which have comprehensive procedures on unfitness to plead.

Third, notwithstanding the medical report from a medical officer, the court has the discretion to decide on unfitness. The medical report only guides it.[63] Hence, a medical report/certificate does not bind the judge to decide on fitness to plead. However, he could attach substantial weight to it.[64] This further means that the judge forms his opinion not only on the medical report but on facts and surrounding circumstances, as demonstrated in the case of *Ukpi v State*.[65] The judge believed the accused was "play-acting" and simulating an unsound mind. He rejected the medical report.[66] This case explained further that a judge is not bound by medical evidence when deciding on an accused fitness to plead. Though, he may give it considerable weight. The review of England and Scotland in this section will show that they have made the medical report or examination mandatory and of high probative value. Their courts must act based on medical evidence. It is essential to realise that while the insanity defence is not a medical test, what constitutes insanity is. Therefore, Nigeria should put greater weight on medical evidence.

Fourth, the provision on medical investigation suggests that the judge/court orders the investigation. The medical evidence or investigation report is for the judge alone and unchallenged. Therefore, neither party can cross-examine the medical official, and such an

[62] Criminal Procedure Act s 224 (3) *Adamu v State* (2015) LPELR-24748(CA); *State V. Lawal* (2013) 7 NWLR (1354) 565, 595-596.

[63] *Sagiru Attahiru v State [*2020] LPELR 51092 (CA).

[64] *Benson Madiugba v the Queen* [1958] 3 FSC.

[65] [1976] LPELR 3348 *Godwin Odo v. The State* (1998) 1 NWLR (Pt 532) 24; *The Queen v. Michael Ogor* (1961) All NLR 70.

[66] This also played out in *Paul v State* [1964] 1 AllNLR 146.

opportunity does not arise. This thesis criticises this position because no party can query the evidence to determine its integrity or question the evidence or the qualification of the expert. How can the parties verify the skills and qualifications of the medical officer? *Amosun v INEC & Ors*[67] established that a court or tribunal does not consider a witness an expert on a subject unless they possess sufficient knowledge, training, experience, and expertise to qualify as an expert. Also, in *Okotogbo v State*,[68] the accused's counsel argued that the medical officer was a pathologist and not a psychiatrist, hence not knowledgeable in mental health. The appellate court stated that the medical officer should have provided his expert qualification.[69] Every party should have the opportunity to question evidence before the court. As a result, this study states that an unchallenged medical report might hinder a fair hearing in criminal trials.

Finally, Sections 223 and 224 allow courts to postpone trials and detain the accused in asylums or psychiatric hospitals until a medical examiner certifies that the accused can proceed with a trial. Then, the court may begin a new trial.[70] An inquiry to establish if the accused is competent to stand trial for insanity is a vital measure of protection to guarantee that courts do not prosecute mentally ill individuals before they recover their sanity. Nevertheless, this procedure does not consider whether the accused did the act or made the omission. Hence, this thesis argues that this process could breach the accused's fundamental human right by requiring the court to order an involuntary hospital order (detention in hospital) before the court establishes that the accused did the act or made the omission. This position also violates the rules set by the United Nations Convention on the Rights of Persons with Disabilities.

Section 35(1)(e) of the Nigerian Constitution permits the deprivation of the personal liberty of mentally ill individuals for their care or treatment or the safety of the community. The law on unfitness to plead does not comply with the meaning of this section, as the court order is not for their care or treatment. Such court order deprives persons of unsound minds of their liberty in violation of the Nigerian Constitution.

[67] [2010] LPELR-CA.

[68] [2004] LPELR 12513 (CA).

[69] *Azu v State* [1993] 6 NWRL (pt 299) 303, *Mohammed v State* [1997] 9 NWLR (pt 520) 169.

[70] Criminal Procedure Act s 226.

Internationally, the United Nations Convention on the Rights of Persons with Disabilities and Optional Protocol states that no person or government should subject a person to medical treatment or detent without informed consent.[71] Nigeria is a signatory to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Nevertheless, their constitution does not meet its demands for persons with disabilities, including mentally disordered persons. In 2007, Nigeria ratified the United Nations Convention on the Rights of People with Disabilities (CRPD) and its Optional Protocol in 2010**.** The president signed the Discrimination Against Persons with Disabilities (Prohibition) Bill 2009 into law in 2018.

It is easy to interpret certain Articles of the CRPD in ways that challenge the legitimacy of the insanity defence as it relates to the diversion to mental institution provisions, processes and initiatives. It is pertinent to consider how courts and parties reconcile the interpretation of the insanity defence with existing human rights laws. This position also means Nigeria should consider reconciling CRPD's evolving understanding with its insanity defence provisions.

The UNCRPD is a document to ensure that people with disabilities enjoy the same human rights as everyone else. In a close examination of the Convention adopted in 2006, it aims to prohibit all forms of discrimination, torture, and ill-treatment. It advocates equal treatment for every individual, disabled or not. As Stavert noted, this convention does not imply that there are never circumstances in which authorities can deny a person with a mental disorder's rights. It just asserts that authorities (courts) should deny rights based on the same standards for everyone and not based on a mental condition.[72] According to the CRPD in Article 14, states should repeal laws permitting the institutionalisation of persons with disabilities due to their disabilities (mental disorders) without their free and informed permission. This Convention prohibits involuntary detention and treatment without consent based on a mental disorder. Article 12 of the Convention provides equal recognition of persons with disabilities before the law.

How could these convention provisions reconcile with the provisions on unfitness to plead? The insanity defence could suffer from an interpretation of Article 12 because it would be

[71] The United Nations Universal Declaration of Human Rights 1948.

[72] Jill Stavert, 'Paradigm Shift or Paradigm Paralysis? National Mental Health and Capacity Law and Implementing the CRPD in Scotland' (2018) Laws.

impossible for someone with a mental health problem to raise it. It is likely that the implementation of Article 12, equal recognition under criminal law, may reduce the insane defendants' rights and alternatives.

Furthermore, this Nigerian Provision on unfitness to plead further violates the African Charter on Human and Peoples' Rights (BANJUL charter) in Article 6, providing for the right to personal liberty and protection from arbitrary arrest. BANJUL Charter was ratified and domesticated in Nigeria, and Nigerian courts have adopted it in case law.[73] Nigerian criminal law, like the BANJUL charter,[74] presumes an accused innocent until proven guilty; therefore, the court must base the detention of an accused on more than mere suspicion of insanity.[75] There should be an apparent need for medical care and detention. Therefore, there should be a process to establish that the court knows the accused's involvement with the crime before committing the accused to an asylum, just like the practice in England and Scotland.[76]

This section identified the gaps in the provisions for unfitness to plead in Nigeria, affecting its practice. These gaps ranged from obscure procedures to practices like transplanting laws. It further pointed out issues with unchallenged evidence and inappropriate incarceration. It considered how the practices could affect fair hearing and lead to human rights abuse. This research argues that lawmakers should review these provisions considering the gaps. Based on the reported cases reviewed, there is no difference between the provisions of the CPC, CPA and ACJA.

Thus, academic writers could argue that while policy and legislative action are needed to ensure states meet the international human rights standards for persons with disabilities, the government can first take initial steps to improve their lives and well-being.

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[73] *Gbemre v. Shell* Suit No. FHC/B/CS/153/05; The African Human Rights Law Database at http://www.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleumdevelopment-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html; *Odafe and Others v. Attorney General of the Federation* (2005) CHR 309 at 323-324; a Federal High Court in WELA v Attorney-General of the Federation; Unreported Suit No: FHC/IKJ/CS/M128/2010.

[74] The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act of 1983.

[75] Constitution of the Federal Republic of Nigeria 1999 s 36(5).

[76] The trial of facts in England and trial diet in Scotland.

5.2.2. UNFITNESS TO PLEAD IN ENGLAND

The statute regulates the English procedure for unfitness to plead, while the legal standard is a matter of common law. Once a party raises unfitness to plead, the statute under Sections 4 and 4A of the Criminal Procedure (Insanity) Act 1964 (herein referred to as "the 1964 Act"), as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (herein referred to as "the 1991 Act") and the Domestic Violence, Crime and Victims Act 2004, govern the procedure for unfitness to plead. The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 made procedural adjustments to the UTP procedure in the Criminal Procedure (Insanity) Act 1964. It introduced a trial of facts and more comprehensive disposal options. For example, it allowed the courts to make guardianship, supervision, treatment, and even complete discharge orders, except for murder, which remained hospital orders with restrictions. Although the Domestic Violence, Crime and Victims Act 2004 changed this position, courts must apply the MHA, justifying detention for mental disorders, including murder cases.

This statute divides the procedure for UTP into two parts:

A. To determine if the offender is disabled (i.e., whether they are 'unfit' to plead[77];
B. To determine if the accused did the act/the omission charged.[78]

According to these provisions, the procedure for unfitness to plead differs from the Nigerian provision on UTP. The following review will demonstrate the distinction between English and Nigerian law on UTP. This study aims to determine whether Nigeria could benefit from the English practice of UTP in an informed social context while avoiding using copy-and-paste legal transplantation.

This review will start with the first part of UTP, Section Two, Criminal Procedure (Insanity and Unfitness to Plead) Act of 1991. This provision stipulates that the court will stop the trial if a party raises the accused's disability, including insanity.[79] For example, in *Bobbe v Poland,*[80] the appellant had schizophrenia or psychosis and was a chronic alcoholic. This case was an

[77] Criminal Procedure (Insanity) Act 1964 s 4.

[78] Criminal Procedure (Insanity) Act 1964) s 4(A).

[79] Criminal Procedure (Insanity) Act 1964 s 4(1).

[80] [2017] EWHC 3161 (Admin).

appeal against an extradition order. The accused did not want the court to extradite him to Poland. The judge decided he was unfit to plead.

This first part of UTP differentiates the English and Nigerian stances on four grounds. First, this English legislation uses "disability", but Nigerian legislation uses the phrase "unsound mind". The word "disabilities" embraces various impairments, including mental and physical ones. It is broader than the phrase "unsound mind". Under the Equality Act of 2010, a disabled person has a physical or mental impairment that has a "substantial" and "long-term" impact on their ability to carry out normal daily activities.

Nevertheless, there are positive and negative aspects to broad language in legislation. The positive part of broad phrases or terms is that they are comprehensive and can provide depth. It will capture several persons that need to benefit from the law. On the contrary, if broad, the court and legal practitioners may misinterpret a statute as vague or lack certainty. Also, it may end up benefiting persons the lawmakers did not intend the law to benefit. However, it all depends on the lawmakers' intention, and from the English position, this section draws that disability includes physical and mental disability.

Second, Sections 4 and 4A of the 1964 Act suggest that any party to the case could raise the accused's disability by not stating who could raise it. In contrast, the court and the prosecutor may raise the unsound mind in Nigerian legislation. According to *Roberts*,[81] when the defence raises the question of the accused's fitness to plead in England, the defendant carries the burden of proving that the accused is unfit on the balance of probabilities. However, if the prosecution asserts it, the prosecution bears the burden of establishing that the accused is unfit beyond a reasonable doubt. [82] In Nigeria, the accused's counsel may direct the court's attention to the unsound mind, but the judge may act or not act on it. He does not need to act on such notice. The Criminal Law Revision Committee (CLRC)'s report acknowledged the importance of any party raising the accused's unfitness. The Criminal Procedure (Insanity) Act 1964 reflects this position that either the prosecution or the defence, the court or a (third party) could raise the unfitness to plead due to the importance of such information.[83]

[81] [1968] 3 All ER 557.

[82] *Podola* [1960] 1 QB 325).

[83] Criminal Law Revision Committee Third Report: Criminal Procedure (Insanity) (1963) Cmnd 2149, para 15.

Third, suppose a party raises a disability issue. In that case, the English court may decide it is crucial and in the accused's best interests to review the fitness issue after hearing the prosecution's case.[84] Here, where the judge returns a not guilty verdict at the end of the prosecution's case, it would not consider the fitness issue.[85] This position means that the prosecution failed to prove their case or nothing in their case points to the accused. Hence where the judge postpones the trial of unfitness until the close of the prosecution argument, it permits the defence to submit a 'no case to answer.

This section of the code is also a vital difference between English and Nigeria's processes, as Nigeria lacks a similar provision. This rule ensures a fair trial and the accused's best interests. Moreover, the CLRC supported this procedure, stating that deferring the trial until the defence opened its case was the most appropriate approach to preserve the chances of acquittal based on the facts. The court may issue an acquittal through this procedure, or the trial Jury may discontinue the case at "any reasonable time."[86] This thesis accepts this argument as acceptable and fair because it saves the court's time and allows it to determine the accused's innocence. Therefore, from a social context, it guarantees that the court does not incarcerate an innocent person. This procedure protects and upholds human rights and the rule of law. However, the court can advise them to seek medical help and compulsory help if they pose a danger to others.

Nevertheless, subject to subsections (2) and (3) of the 1964 Act, the court (judge) shall resolve the fitness to stand trial issue as soon as possible.[87] This phrase "shall resolve the fitness to stand trial issue as soon as possible" resembles Nigerian legislation, which used the phrase to "decide the fitness issue as soon as raised".[i]

Fourthly, Nigerian judges do not compulsorily apply expert evidence, unlike their English counterparts. The English judge tries the fitness issue without the jury.[88] They must decide the

[84] Criminal Procedure Act 1964 4(2).

[85] Ibid s 4(3).

[86] Criminal Law Revision Committee Third Report: Criminal Procedure (Insanity) (1963) Cmnd 2149, para 28.

[87]Criminal Procedure Act 1964 s 4(4).

[88] Criminal Procedure (Insanity) Act 1964 s 4(5) and s 4(6); the Domestic Violence, Crime and Victims Act 2004 substituted the words the "court" by c. 28 Pt 2 s 22(2) (March 31, 2005); *John M* [2003] EWCA Crim 3452.

fitness issue based on the written or oral evidence of two or more registered medical practitioners, at least one duly approved.[89] Notably, the judge evaluates this expert evidence provision alongside the legal test for establishing that an accused is unfit to plead. The case of *R v. Pritchard*[90] founded the English legal test for unfitness to plead in 1836. Baron Alderson stated that :

> "There are three points to be enquired into: First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings on the trial so as to make a proper defence — to know that he might challenge [any jurors] to whom he may object — and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation."[91]

This rule still applies; hence, the legal standard for unfitness to plead (hereafter referred to as UTP) remained a Common Law subject in England.[92] In contrast, the Criminal Procedure (Insanity and Fitness to Plead) Act 1991 codified the procedure for UTP. Accordingly, a defendant will be legally UTP if he or she fails to meet one or more of the conditions stipulated in *R v. Pritchard*.[93] The failure of an accused to meet one or other of the criteria is sufficient for a court to declare them unfit.

In *R. v. Podola*[94] *(Guenther Fritz Erwin),* to be fit to plead, the accused person must understand the facts and the relevance of the intricacies of the evidence.[95] Courts have reinterpreted *Pritchard's case* to make it more appropriate for the modern trial process.[96] They have

[89] Criminal Procedure (Insanity) Act 1964 s 4(5) and s 4(6).

[90] [1836] 7 C P. 303.

[91] Ibid.

[92] *Clarissa Ihenacho v The London Borough of Croydon* [2021] EWCA Crim 798.

[93] *R v Pritchard* (1836) 7 C & P 303; *R v Davies* (1853) 3 Car & Kir 328; *R v Robertson* [1968] 3 All ER 557; *Friend* [1997] 2 All ER 1012, 1018; *R v M (John)* [2003] EWCA Crim 3452; *R. v Wells (Marc Martin)* [2015] EWCA Crim 2.

[94] [1959] 3 All ER 418.

[95] Ibid.

[96] *Robert Marcantonio v Regina* [2016] EWCA Crim 14, *John M* [2003] EWCA Crim 3452.

categorised the test into (1) understanding the charges; (2) deciding whether or not to plead guilty; (3) exercising his rights to challenge jurors; (4) instructing solicitors and counsel; (5) following the course of the proceedings; (6) giving evidence in his defence.[97] The court in *Robert Marcantonio v Regina* explained three of the criteria as follows:

1. The ability to instruct his counsel requires the defendant to communicate the case he intends to pursue and the points he wishes to make in his defence clearly to his counsel. This step entails being able to:

   "(a) to understand the lawyers' questions, (b) to apply his mind to answering them, and (c) to convey intelligibly to the lawyers the answers which he wishes to give.[98] In addition, the instruction to counsel must not be plausible, believable or reliable.
2. The defendant's ability to follow the course of proceedings means he could:

   "(a) understand the witness statement and counsel's speeches to the jury. (b) to communicate intelligibly to his lawyers any comment he may wish to take on anything that the witnesses or counsel says."

   It is not essential for the defendant's observations about the evidence and counsel's statements to be valid or beneficial to his attorneys or case.
3. The ability to give evidence means the accused's ability to:
   (a) understand the questions posed to him in the witness box,
   (b) apply his mind to answering them, and
   (c) communicate intelligibly to the jury the answers he desires to offer.

The court does not require an accused's responses to be plausible, believable, or reliable. A defendant must be unable to recall all or any of the matters that led to the charges. He may say he does not recall those events or anything during the relevant period. In addition, *R. v Davies*[99] and other case law have confirmed that memory loss does not result in unfitness to plead or insanity.[100]

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[97] *R v M (John)* [2003] EWCA Crim 3452 .

[98] Ibid.

[99] *R. v Davies* [1853] 175 E.R. 575.

[100] *R. v Turton* (1854) 6 Cox C.C. 385; and *Russell (Isabella) v HM Advocate* 1946 J.C. 37, [1945] 12 WLUK 2 applied; *R. v Jefferson* (1908) 24 T.L.R. 877, [1908] 1 WLUK 29 doubted; disapproving decision of Salmon J. in *R. v Sharp* (George Myhill) Times, October 8, 1957, [1957] 10 WLUK 22 overruled; Ley's Case 168 E.R. 1026, [1828] 1 WLUK 3 overruled.

Over time, case law does not indicate that Pritchard's criteria have changed but that courts have provided additional interpretations to clarify them.[101] The case law reviewed above shows that courts have followed and interpreted this common-law rule on UTP.[102] Although courts have adopted the test in Pritchard in several case law as the binding authority,[103] the Law Commission criticised the approach for being noncomprehensive and placing undue emphasis on intellectual ability.[104] The court in *Robert Marcantonio v Regina* acknowledged the criticisms against the Pritchard criteria but stated that the Pritchard criteria continue to be the law it must apply.[105] The Law Commission recommended that the lawmakers should replace the Pritchard criteria. They proposed a new test referred to as the "decision-making capacity" test.[106]

Mackay agreed with the above Law Commission's position and explained further that *Pritchard's* test focuses on cognitive ability without regard to mental capacity and participation. However, MacKay argued that the law should not abolish the Pritchard test but should widen the scope by including more limbs to include participation.[107] However, English lawmakers and courts are yet to implement this recommendation. On the other hand, Nigerian courts approach the English-style test differently. For example, courts referred to each of the six tests separately as a matter of practice.[108] For instance, in *Sanusi v the State,*[109]the court applied the ability to understand and answer the charges; in *Bakori v. Zaria N A,*[110] the judge used the ability to make a reasonable defence. These cases demonstrated a lack of consistency

[101] *JO v High Court of the Republic of Ireland* [2022] EWHC 458 (Admin), 2022 WL 00658083.

[102] *R v Wells (Marc Martin)* [2015] EWCA Crim 2; *R v Masud (Sarfraz); R. v Hone (Susan); R. v Kail (Tony Nicholas Alan).*

[103] *Padola* [1960] 1 QB 325; *Robertson* [1968] 52 Cr App R 690; *Berry* [1978] 66 Cr App R 156, *Regina v John*

[104] Law Commission, Unfitness to Plead, Consultation Paper No. 197 (October 2010) paras 2.52-2.59.

[105] Ibid (n 87) 6.

[106] Ibid 3.1.

[107] Ronnie D Mackay, *Mental Condition Defences in the Criminal Law* (Oxford: Oxford University Press, 1995). 245; W J Brookbanks, R D Mackay, 'Decisional Competence and Best Interest: Establishing the threshold for Fitness to Stand Trial' (2010) 12 Otago Law Review 268.

[108] *Sanusi v the State* (1984) LPELR-3007(SC) (applied the ability to understand and answer to the charges); *Bakori v. Zaria N.A.* (1964) NANLA 25 (ability to make a reasonable defence).

[109] (1984) LPELR-3007(SC).

[110] (1964) NANLA 25.

in the required tests. This position applies in the Northern and Southern Regions, as they do not have a consistent test for determining unfitness to plead like the English jurisdiction.

The second part of the unfitness to plead in section 4A deals with findings on whether the accused committed the act. First, this part does not exist in Nigerian Jurisdiction. In England, after the judge identifies the accused's disability, the jury will find, based on the prosecution's evidence and defence regarding the charges against the accused, whether the accused committed the omission or act.[111] Here, the court looks into the facts of the case to see if the accused did the act or made the omission.[112]

Determining the parameters of a "trial of the facts" requires interpreting what "the act" means. In this respect, it is worth noting that section 4A on fact-finding addresses the act or omission in the issue and not the mental element involved.[113] When asked to evaluate the wording in *Egan*[114], the Court of Appeal ruled that proving a defendant performed "the act" required proving all the necessary ingredients of an offence. This interpretation expanded the question of whether the defendant acted to include both his *mens rea* and *actus reus*. Parliament had criticised this approach in *Egan* and its interpretation while debating on the 1991 Act Bill.[115] Ryedale[116], a house member, stated that it would be useless to try to know the intentions of someone who, because of his mental state, is incompetent to plead.[117] Home Office Minister John Patten agreed, saying, "It would be unreasonable and perhaps contradictory if a person is incompetent to be tried because of his mental state, that the trial of the facts should include that very feature.[118] In Ryedale's opinion, the court should "examine the facts of the case only" instead of the accused's intentions.[119]

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[111] Criminal Procedure (Insanity) Act 1964 s 4A (1-3).

[112] *R (on the Application of Young) v central Criminal Court* [2002] EWHC 548 (Admin); *R v Chal (Amolak Singh)* [2007] EWCA Crim 2647; *R v H (Fitness to plead)* [2003] 1 WLR 411.

[113] Ibid 36.

[114] *R v Egan* [1998] 1 Cr App R 121, 125.

[115] Hansard (HC) vol 186, col 1280 (1 March 1991).

[116] A lawmaker, He introduced the Bill to the House of commons.

[117] Ibid.

[118] (Hansard (HC), vol 186, col 1272 (1 March 1991)).

[119] Ibid.

In R. v. Antoine[120]at trial, Antoine's legal representatives tried to use the defence of diminished responsibility to have him acquitted of murder charges. The trial judge ruled that an accused could not plead diminished responsibility in a trial of facts after the court declared the accused unfit to plead. The House of Lords affirmed the ruling from the lower court. They decided that Section 4A(2) usage of "act or omission" rather than "offence" showed that parliament had made it explicit that the jury was not to consider mental aspects of an offence. [121]This case points out that the trial of facts does not include an investigation of *mens rea* in the current practice. The 2010 English Law Commission also criticised requiring the prosecution to prove all elements of the offence.[122] According to them, examining the crime's mental element for an accused already deemed unfit would be an abuse of process.

Furthermore, the jury must acquit an accused if the prosecution does not convince them that the accused did the act or made the omission stated in the charge.[123] However, where the court finds that he did the act charged, it would not be a conviction, but a wide range of disposals would be available.[124]

Introducing this fact-finding procedure in English jurisdiction on UTP differs from Nigeria's position. The Butler Committee 0f 1975 captured the importance of this procedure.[125] They believed that its objective would be for the jury to return a verdict of not guilty where the evidence is insufficient.[126] However, the committee also identified that this fact-finding process could be unjust to the accused because, at this stage, he cannot defend himself.[127] Therefore, "unfit to plead" primarily arises where the prosecutors would have been able to establish guilt. Otherwise, the court would discharge the accused as not guilty.[128] The 1991 Act amended the 1964 Act so that a "trial of the facts" applies after a court finds a person unfit to plead. It helps

[120] (2001) 1 AC 340.

[121] *R v Antoine* [2001] 1 AC 340, 375 per Lord Hutton.

[122] Commission on Unfitness to Plead: A Consultation Paper, (Law Com No 197, 2010) para 6.128.

[123] Criminal Procedure (Insanity) Act 1964 4A (4).

[124] The Criminal Procedure Act 196, s 4 5 amended in The Criminal Procedure Act 1991 s 3, 5.

[125] Report of the Committee on Mentally Abnormal Offenders, 1975, Cmnd 6244.

[126] Ibid.

[127] Ibid para 56.

[128] *R v Antoine* [2000] 2 ALL ER 208(HL).

to determine whether the defendant had 'done the act or made the omission charged as the offence.

Furthermore, several authorities have emphasised that Section 4 and 4A hearings are not criminal trials.[129] Therefore, It can give rise to no conviction or punishment. In a decided case, the court recognised that a finding under Section 4 of the UTP did not include a criminal charge determination.[130] Loughnan acknowledged that UTP ensures a fair trial and, at the same time, protects the public.[131] He further argued that society categorised defendants unfit to plead as vulnerable defendants and the trial of a defendant declared unfit can be an abuse of process.[132]

This thesis has found that such a procedure is one that Nigerian Lawmakers should consider including in the Nigerian procedure. Unfitness law in Nigeria incarcerates people, regardless of their guilt, once suspected insane. There is no mechanism or procedure to verify the accused's involvement in the crime before hospitalisation. Nigeria should include a process that can verify the accused's involvement in the crime, such as a trial of facts or addressing the fitness issue after the prosecution has presented its case. This procedure will save the process of hospitalising an innocent person and violating their freedom of rights and liberty.

This section has established that the English position on UTP differs from the Nigerian position. The two differed in numerous ways, from the terms used to the decision to investigate unfitness after a prosecution case to the use of mandatory medical evidence, consistent test, and fact-finding provision.

5.2.3. UNFITNESS TO PLEAD IN SCOTLAND

Under the Criminal Procedure (Scotland) Act 1995 (as amended by the Criminal Justice and Licensing (Scotland) Act 2010), Sections 53F to 56 define the current rules concerning unfitness for the trial. It states that unfitness to plead is when the accused cannot effectively

[129] *Wills, Masud, Hone and Kail* [2015] EWCA Crim 2, [2015] 1 Cr. App. R 27 3-5.

[130] *H* [2003] UKHL 1, [2003] 2 Cr. App. R 2, *R. v Roberts (Alfred Michael)* [2019] EWCA Crim 1270.

[131] Arlie Loughnan, 'between fairness and "dangerousness": reforming the law on unfitness to plead' (2016) Crim LR 7, 451.

[132] Ibid.

participate in the trial because of mental or physical condition. According to Section 53(F)(2)(a), factors to consider in determining whether an accused is fit for trial include:

i. Understanding the nature of the charge
ii. Understanding and appreciating a plea to a charge
iii. Understanding the purpose and course of the trial
iv. Understand evidence
v. The ability to instruct and communicate with a representative or a counsel.
(b) any other factor which the court considers relevant.[133]

For an accused to forget what happened on the day of the crime is insufficient evidence to stop the trial.[134] Where trials stop because of unfitness, the court will order an examination of facts to determine if the accused did the act.[135]

There are few reported cases concerning the application or interpretation of the unfitness to plead provisions in Scotland. Also, case law followed this new direction in Section 53(F)(2) without explaining the tests provided in the Act.[136] For example, in *Patrick v HM Advocate*[137], Lord Boyd decided the accused was unfit to stand trial in line with Section 53(f) of the 1995 Act. He based this decision on medical evidence, which showed that the accused had a medical condition (mental disorder) that would not have allowed him to participate in the trial effectively. Consequently, the court followed the recommended procedure appropriately, as Lord Boyd directed an examination of facts under Section 55 of the 1995 Act. This review noted that the court did not apply the test of unfitness to plead provided under Section 53(f). The judge established through expert evidence that the accused had a mental disorder and judged him unfit.

The procedure provided in Section 53(f) shares some similarities and differences with the procedure in England. However, it differs from the position in Nigeria. This analysis will

[133] Criminal Procedure (Scotland) Act 1995 s53(f)(2).

[134] Criminal Procedure (Scotland) Act 1995 s53(f)(3).

[135] Criminal Procedure (Scotland) Act 1995 s55.

[136] *Charles Murphy v Her Majesty's Advocate* [2016] HCJAC 118.

[137] [2021] HCJAC 37.

compare the three jurisdictions, demonstrating their relevance and the potential benefits they could bring to Nigeria.

First, Scotland and England have expanded their UTP regulations to conform to contemporary medical/legal standards. For example, the rules in England used the term "disability", while Scotland applied "mental and physical conditions". On the other hand, Nigeria uses the phrase "persons of unsound mind", which is narrow compared to English and Scottish positions. This thesis advises a broader approach that accommodates more comprehensive mental disorders to accommodate several people to benefit from this procedure.

Second, the 1995 Scottish legislation provided a list of tests to determine when an accused is unfit for trial. In contrast, Nigeria lacks a consistent test to help evaluate and determine unfitness to try, while updated Common Law tests guide English. However, the phrase "any other factor which the court considers relevant" in Section 53(f) of the 1995 Act broadens the Scottish test compared to the updated English test in *R v M (John).*[138]

This thesis reviewing the procedure in Scotland further discovered a fundamental procedure lacking in England and Nigeria. The argument in the subsequent case law based on Section 56 (5) of the 1995 Act was enlightening. The issue in *Patrick v HM Advocate* was the procedure in Section 56(5), which provided:

> "(5) The court may, on the motion of the prosecutor and after hearing the accused, at any time desert the examination of facts *pro loco et tempore* as respects either the whole indictment or, as the case may be, complaint or any charge therein."[139]

The defence argued that under the examination of facts, Lord Beckett found that the complainant had committed the acts specified in the indictment, and there were no grounds for acquittal. As a result, the examination of facts served its purpose. This argument meant that by the time Lord Beckett granted the Crown's request to desert the examination of fact, the court had progressed to a new level of the proceedings, the disposal stage under Section 57. The

[138] [2003] EWCA Crim 3452.

[139] Ibid.

defence admitted that the judge had the power under this Section to grant the Crown's request but argued she misused it. The Appellate court decided the trial court had the authority to desert *pro loco et tempore.* Section 56(6) stipulates that the Lord Advocate may bring and insist on a new indictment after a desert. The Crown brought the motion because further information became available during the examination of facts stage. Lord Beckett had received evidence indicating that, at least in some areas, the complainant functioned reasonably effectively. Three doctors opined that the complainant was competent to stand trial. This procedure allows the Crown to file a new indictment and restart the case. The Appeal Court also agreed that the accused could raise the issue of his fitness in the new indictment.

Moreover, Section 56(5) authority may be exercised "at any moment," but only during the duration of the examination of facts; otherwise, there would be no "examination of facts to desert".[140] Therefore, the court decided the judge was right to grant the motion. This research argues that such a course of action may be appropriate, for example, in the case of a temporary unfitness. It believes Section 56(6) on a new diet reflects the importance of this procedure in Section 55(2). However, this Section and procedure are unavailable in Nigerian and English jurisdictions. Although this study cannot refer to this procedure as the most efficient way, Nigerian lawmakers could consider it. This belief stems from the fact that Nigeria is a country plagued by several malpractices, and this method would allow the prosecution to retry the accused.[141] This procedure depends on the examination of the facts in Scotland.

Another crucial differentiating factor between Scottish UTP and Nigeria is the appropriate time to stop the trial and make enquiries. *Murphy v HM Advocate,*[142] a dementia case, underlined the difficulties in determining whether a client can understand the proceedings or give appropriate directions. The trial court found the accused guilty of the charges against him despite the medical reports that he had a mental disorder. The evidence of mental disorder[143]

[140] *Murphy v HM Advocate* [2017] SLT 143.

[141] Yetunde Ayobami Ojo, EFCC drags Fani-Kayode to court over fake medical report <https://guardian.ng/news/efcc-drags-fani-kayode-to-court-over-fake-medical-report/> accessed 27 June 2022; Oladeinde Olawoyin, Investigation: Inside Nigeria's haven of fake medical reports, corrupt health officials <https://www.premiumtimesng.com/news/headlines/339360-investigation-inside-nigerias-haven-of-fake-medical-reports-corrupt-health-officials.html> accessed 27th/7/2022.

[142] [2017] SLT 143.

[143] The appellant had Alzheimer's and vascular dementia mixed together.

came before the court at the sentencing stage. However, the court ignored that the accused could have been unfit for trial. There was no dispute about his mental disorder. The question was if the party raised the accused's unfitness during the trial. After considering the medical evidence before it, the appellate court dismissed the verdict of guilt, considering that evidence showed that the accused might have been insane and unfit to plead during the trial. Therefore, the court needed to have enquired into the accused's fitness to stand trial at any trial stage, including the sentencing stage.[144] It also emphasised that when the question of mental fitness arises, it is prudent for judges to obtain a medical report rather than rely on their assessment.

This judgement is comparable to *Yahaya v State*[145] in Nigeria. The court of appeal in *Murphy* established that the trial must include a sentencing phase after the parties' addresses, unlike in *Yahaya*. At trial, the prosecution and the defendant will present their case. Each will give evidence, the parties or their attorneys will make their final arguments (address), and the judge will render a verdict. The Supreme Court in *Awoyale V. Ogunbiyi*[146] used Earl Jowitt's English dictionary to define "address" as a prayer by each party's lawyer to the court to accept their interpretation of the law and facts in a case. A judge relies on a written address to determine the issues before he arrives at a decision. Therefore, the address and sentencing stages are still part of the trial process. The Nigerian Jurisdiction should resolve the ambiguity concerning raising an accused's unfitness during the sentencing or written address stage to include them.

Also, both Scottish case law mentioned above shows that the judge will decide the question of unfitness without the jury.[147] This procedure is similar to the practice in England and Nigeria. However, Nigeria does not operate a jury system.

Another important point on unfitness to plead that strikes a difference is who raises the unfitness issue. The provisions on unfitness to plead in the 1995 Act did not determine who raised the issue, leaving the interpretation that any party could raise the defence and the court obligated to conduct an enquiry. Any party can raise this plea during a preliminary hearing

[144] Ibid.

[145] [2021] LPELR-53451(CA).

[146] [1985 NWLR (PT.10) 861.

[147] M M Walker and others, 'Compulsory admission to hospital: an operational review of the Mental Health (Scotland) Act 1960' (1979) British Journal of Psychiatry 11.

before a trial has started or during a trial.[148] The statute in England[149], similar to Scotland, suggests that any party could raise the issue of the accused's unfitness. While in Nigeria, the judge and prosecution can raise this issue.

Section 53F states that a person is unfit for trial if proven on a balance of probability that he is incapable of participating effectively in a trial due to a mental or physical ailment. In contrast to Nigeria, the provision for unfitness to stand trial is silent on who bears the burden of proof, unlike the insanity at the time of the offence provision. Therefore, any party can prove that an accused is unfit to plead. This position is a positive viewpoint because it provides a fair trial and will help to safeguard society's vulnerable members.

The medical evidence from practitioners is relevant in determining unfitness to plead.[150] However, it is unclear what evidence the court may rely on to determine unfitness under the 1995 Act. According to *Murphy's case,* courts often find it challenging to determine mental unfitness or physical ailments without the evidence of a psychiatrist, psychologist, or other qualified medical practitioners.[151] In this case, those representing Murphy had not noticed that he had issues concerning his fitness to stand trial stemming from vascular dementia. They had not raised the accused unfitness before the court convicted and passed the sentence. On appeal, the judge advised that where doubt arises about a person's mental health, seeking a medical opinion may be in the best interest of justice rather than relying on their conviction. In contrast, the English and Nigerian positions recognise the relevance of medical evidence in determining unfitness to trial. Although, the weight of medical evidence in Nigeria is low, as the judge could decide differently from the report.

Scottish courts, like the English courts, will also follow a finding of unfitness by examining the facts.[152] For example, in *Murphy and Patrick*, the court decided that being unfit for trial resulted in the court halting the trial and ordering to examine the facts. Nevertheless, this procedure does not exist in the Nigerian UTP position and raises human rights abuse concerns.

[148] The Criminal Procedure (Scotland) Act 1995, s 54(1).

[149] The Criminal Procedure Act 1964 s 4 and 4A.

[150] *Murphy v HM Advocate* [2017] [SLT 143 para [57].

[151] Ibid.

[152] The Criminal Procedure (Scotland) Act 1995, s53(5).

This opinion is because the judge incarcerates the accused without determining if he did the act or made the omission in Nigeria. The United Nations' new Convention on the Rights of Persons with Disabilities states that "the existence of a disability shall in no case justify a deprivation of liberty." [153]Therefore, it is advisable to determine the accused's involvement with the alleged crime before taking away their freedom.

Consequently, the Scottish approach to unfitness to plead is similar to the English procedure but differs in the respects noted. However, this is not the case in Nigeria. So, the Nigerian position on unfitness to trial differs from that in Scotland and England. Moreover, the Scottish and Nigeria differed in various ways, from the terms used to time to stop and investigate unfitness, consistent test, and the examination of facts provision.

Unfitness to plead rules are distinct from insanity at the time of the offence. As a result, the next part of this chapter will discuss how the court interprets the current rules on when an accused raises insanity as a defence to the crime.

5.3. INSANITY AT THE TIME OF THE OFFENCE

This part will begin with reviewing the insanity defence at the time of the offence as it relates to the Criminal and Penal Codes Act. This review will further illustrate the differences in terminology and substance between the tests depicted in the codes described in the previous chapter. This section of this chapter will further demonstrate that the provisions of the insanity defence at the time of the offence are due for a change. Their keywords are outdated and challenging to interpret. Also, this part will review the English and Scottish positions on insanity as a defence. Comparing the jurisdiction could help suggest informed ways to progress the Nigerian position.

5.3.1. NIGERIAN JURISDICTION

5.3.1.1. CRIMINAL CODE ACT:

This thesis will restrict this part to the first arm of the provision of Section 28 of the Criminal Code, which relates to the insanity defence and only refers to the second arm on insane delusions when necessary. It states as follows:

[153] Bartlett P. 'The United Nations Convention on the Rights of Persons with Disabilities and the future if mental health law' (2009) Psychiatry 8(12):496-498.

> A person is not criminally responsible 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 disease or natural 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.

In *Kayode Adams v DPP*[154], the phrase "a person is not criminally responsible" in Section 28 of the Criminal Code implies that he is not guilty of the charge and must be acquitted.[155] According to this provision, the following are the elements of the defence of insanity:

i. State of mental disease or natural mental infirmity

ii. Lack of Capacity:

    i. To understand what he is doing.

    ii. To control his action

    iii. To know that he ought not do or make the omission.

There are two arms to the Nigerian CCA insanity defence test: The state of mental disease or natural mental infirmity and the lack of capacity arm. Lawmakers in some jurisdictions have made it common to include an interpretation provision, mainly where such legislation uses words outside their ordinary parlance.[156] This statute did not provide the meaning of any terms in this provision addressing the insanity defence. Hence, the Act's absence of an interpretation framework places the onus on the courts to decide the meaning of the Act's key terms.

The definition shortfall of these phrases/terms in criminal law and mental health legislation poses a gap in Nigeria's insanity defence function. The court may give them meaning, but this

[154] [966] 1 All NLR 12.

[155] *Onyema v. The State* (1975) 12 Sc. 27.

[156] For example, the English provision as discussed in the chapter on the reviews of English position on the defence of insanity. Where the English Mental health legislation of 1959 laid the foundation for the definitions of essential mental health terms.

meaning lacks consistency, as the following reviewed reported cases demonstrate. The next part will review the elements of this provision of the insanity defence considering case law.

A. STATE OF MENTAL DISEASE OR NATURAL MENTAL INFIRMITY.

The provision of "mental disease" or "natural mental infirmity" means that the two phrases have different meanings. Also, the conjunction "or" means it could be one proposition or another. Therefore, the courts are to apply the phrase alternatively, considering the Act provided for them disjunctively. This argument gained judicial acknowledgement in *Mohammed v The State*[157] and several other reported cases.[158] They established that to prove the insanity defence successfully, the accused must show that he had either a mental disease or natural infirmity at the required time.[159]

What is "a mental disease and a natural mental infirmity"?

No statute in Nigeria defines these phrases. The CCA did not define mental disease or natural mental infirmity. Moreover, the Lunatic Act of 1958 is also short of definitions, as phrases like "mental disease" and "natural mental infirmity" are among the definitions not found in the statute.

Since the House of Lords formulated the M'Naghten Rules over a century ago, the mental disease has been essential in determining whether a person was legally insane at the time of the criminal act. The CCA has been applicable for over a decade[160], including mental disease in its provision on the insanity defence. Hence, being this old, one would expect the courts to have a consistent approach to defining it. Ekpedoho defined mental disease as any disease that produces a mind malfunctioning.[161]

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[157] [1997] 9 NWLR (Pt. 520) 169.

[158] *Mohammed v The State* [1997] 9 NWLR (Pt. 520) 169; *Onakpoya v R* [1959] 4 FSC 150; (1959) SCNLR 384; *R v Echem* 14 WACA 158; *Sademan v R* (1956) 2 AII ER 1138; *Ogbu v The State* (1992) 8 NWLR (Pt. 259) 255 @ 266 paragraphs F - G*; R v Omoni* [1949]12 WACA 511 @ 512; *Ngene Arum v. The State* [1979] 11 SC 91

[159] Ibid para.G-H; *Rex v. Sunday Omoni* [1949] 12 WACA 511, 512 and 513.

[160] 118 years old; 1904 to date.

[161] Abiama, Emmanuel Ekpedoho, 'Mental Illness and Insanity in the Nigerian Law' (2015) IOSR Journal of Humanities and Social Science.

The courts coined this word in the context of legal tests of criminal responsibility, but no formal definition arose. Since judges and lawmakers were aware of the similarity to physical disease, it was, and they commonly accepted that "mental disease" is a medical term.[162] Writers frequently interchange “mental disease” with "disease of the mind," "mental illness," "mental disorder," and "unsound mind."[163] Reported cases merely referred to *Omoni* for a description of this phrase.[164]

R v Omoni defined “mental disease and natural mental infirmity” as a defect of reason produced by the disease of the mind or following a defect in mental power neither caused by the accused’s fault nor by a disease of the mind.[165] The judge adopted this definition from the “Stephen’s Digest of criminal law”[166], an English text on criminal law. The judge gave no reason for adopting this definition. However, it is understandable that our legal system permits courts to seek interpretation from the English jurisdiction where there is a gap in Nigerian law.[167]

Also, in *Ukadike v State*,[168] one of the justices of the Supreme Court stated that:

> We do not regard a defect in mental power as equivalent merely to an inability to master the passions. In the Mental Deficiency Act, 1913, as amended, mental defectiveness is defined as a condition of arrest or incomplete development of

[162] Herbert Fingarette, ‘The Concept of Mental Disease in Criminal Law Insanity Tests’ (1966) The University of Chicago Law Review.

[163] Luca Malatestia, Marko Jurjakoa, Gerben Meynenb, ‘The insanity defence without mental illness? Some considerations’ (2020) International Journal of Law and Psychiatry.

[164] *Ngene Arum v. The State* [1979] 11 SC 91

[165] *Rex v. Sunday Omoni* [1949] 12 WACA 511.

[166] James Fitzjames Stephen, *Digest of criminal law: Crimes and Punishment (1883)* (Kessinger Publishing 2008)

[167] The following authorities support the use of English law in Nigeria:

- Interpretation Act: Section 32 provided that the common law of England, the doctrines of equity and statutes of general application that were in force on 1st January 1900, will be in force in Nigeria.
- Supreme Court Ordinance of 1914 provided that:

Subject to the terms of this or any other ordinance, the rules of common law, doctrines of equity and Statutes of General Application In force on January 1st, 1900, shall be in force in the jurisdiction of this court.

[168] [1973] LPELR-3336 14.

> mind, and that or something like it may well be the meaning to be given to natural mental infirmity in the Criminal Code.

This court likened natural mental infirmity to mental defectiveness, another phrase without a definition in the Nigerian legal framework. This case also acknowledged the definition of natural mental infirmity from *Omoni*. One wonders why the same court will give two different meanings to a phrase. Both definitions lack any relationship or similarities.

Further, in *Taiwo v State*[169], the judge defined natural mental infirmity and disease of the mind as:

> any disorder that has manifested itself in violence and is prone to reoccur, at any rate, it is a sort of disease for which a person should be detained in a hospital rather than given an unqualified acquittal.

In further explanation, he referred to the foreign case of *Bratty v AG Northern Ireland*[170], which defined mental disease as any disease that produces a malfunction of the mind. However, these descriptions of diseases of the mind do not seem to have adequately explained what these diseases are, as there were no examples or evidence to apply them. Instead, they raise more questions about the nature of "natural mental infirmity and disease of the mind."

As a start, these reported cases gave different interpretations to the "state of Mental diseases and natural mental infirmity." This position points to a lack of consistency in the judicial interpretation of these phrases. Also, these reported cases noted the Nigerian habit of consulting other jurisdictions for legal interpretation. Although it is not always inappropriate to seek direction from authorities in foreign jurisdictions, doing so without first familiarising oneself with the applicable local terminology and legal framework exposes the jurisdiction to the risks of legal transplant.[171]

[169] [2019] LPELR.

[170] [1961] 3 ALL ER 523.

[171] Refer to chapter 3 section 3.2.

In addition, this research observed in case law that Nigerian courts decide on the insanity defence without defining the phrase "mental disease.[172] For example, according to the trial judge in *Guobadia v. The State*[173], Dr Malomo's evidence established beyond doubt that the accused did not have a mental disease. There was no explanation of what the mental disease meant. Yeo argued that the phrase "mental disease" was narrow, which was one of the reasons the Nigerian lawmakers have included it alongside the phrase natural mental infirmity.[174]

In contrast, courts have tried defining "natural mental infirmity". In *Queen v Tabigen,*[175] the Federal Supreme Court referred to Section 5 of the repealed English Deficiency Act of 1938, which defined natural mental infirmity as:

> A condition of arrested or incomplete development of the mind existing before the age of 18 years, whether arising from the inherent cause of induced by disease or injury[176]

First, these definitions further demonstrate Nigerian courts' habit of adopting foreign interpretations in judicial interpretation. The actual issue is not the habit of borrowing, as it is not bad nor wrong to borrow from another jurisdiction. However, the issue is that most times, the court or lawmakers during transition do not consider the local context or the workability of the transplanted law in the new jurisdiction. It is crucial to ensure that the transplanted laws fit its new audience by using suitable language familiar to the people to transmit the message.

Second, this study agrees with scholars who criticise these definitions, stating that they made it more challenging to prove an insanity defence and require a high standard of proof.[177] For example, the case of *R. v. Alice Eriyamremu*[178] applied the definition of natural mental infirmity

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[172] *Ishola Karimu v State* (1989) 1 SC 121 at 139; *Philip Upetire v AG Western Region Nigeria* [1984) 1 ALL NLR 204.

[173] (SC 295/2002) [2004].

[174] Stanley Yeo, 'The Insanity Defence in the Criminal Law of the Commonwealth of Nations' (2008) SJLS 245; Queensland Criminal Code Act 1899 s 27; New Zealand Crimes Act s 23.

[175] [1960] 5 F S C. 8.

[176] Repealed English Deficiency Act 1938 s5; repealed by the Mental Health Act 1959.

[177] Ofori Amankwa, Criminal Law in the Northern States of Nigeria (Zairia: Gaskiya Corp. 1985) 220.

[178] [1959] WRNLR 270.

in *Omoni* and *Arum.*[179] The trial court considered whether the accused was suffering from a natural infirmity that deprived her of the capacity to know she ought not to kill her albino granddaughter. It held that the accused suffered mental infirmity during the act, but it was not natural but induced by her worship[180]of Juju/witchcraft.[181] Despite the Supreme Court's finding that the accused's mental infirmity was self-induced (witchcraft) on appeal, it held that the trial court had erred by focusing on the arm of natural mental infirmity. Instead, they should have considered whether there was evidence of mental diseases, another basis for an insanity defence under section 28 of the CCA. However, the court decided there was a lack of evidence to acquit the accused on insanity, and the misdirection occasioned no injustice. Thus, her defence of insanity failed.[182] This case also indicates that the *R v. Omoni* definition does not address the definition gap effectively.

Aguda criticised the decision of the Supreme Court in *Eriyamremu.*[183]He argued that where an accused alleges witchcraft, the court should inquire whether the belief in witchcraft impaired their mental state to amount to a 'disease of the mind' either of a temporary or permanent nature.[184] They should have established whether the accused could not comprehend or know what he was doing at the time of the offence because of a mental disease induced by his belief in witchcraft.[185] As shown below, this attitude has not yet shifted.

Similarly, other scholars have criticised Nigerian courts' attitudes toward mental abnormalities based on supernatural beliefs without considering the possibility of their effects on the minds of the accused.[186] Consequently, one of the difficulties surrounding the insanity defence in Nigeria is the attitude of Nigerian courts regarding supernatural or witchcraft beliefs

[179] Ibid.

[180] An individual choice of worship is a voluntary and personal decision.

[181] *R. v. Alice eriyamremu* [1959] W R N L R 222

[182] *R. v. Alice eriyamremu* (n30) 271; see also [1959] SCNLR 556 at 557

[183] Timothy Akinola Aguda, *Principles of Criminal Liability in Nigerian Criminal Law* (Ibadan University Press 1965) 119.

[184] Ibid 119.

[185] Aguda, (n 175) 120.

[186] Aremu L O, 'Criminal Responsibility for Homicide and Supernatural Beliefs' (1980) International and Comparative Quarterly, 113; Chukkol K S, *Supernatural beliefs, and the Criminal Law in Nigeria* (ABU Press Zaria 1981) 200.

concerning the definition of natural mental illness. This perspective aligns with the notion that witchcraft or supernatural influences cause most insanity in individuals.[187]

For example, *Willie v. State*[188] portrayed courts' attitudes towards mental disorders caused by witchcraft. The court inquired whether a mental disease or natural mental infirmity impaired the accused's knowledge capacity on the day of the act. The judge rejected the evidence of witchcraft and the doctor who examined him during the trial. It stated that there was no evidence that the accused was insane at the time of the act and rejected the plea of insanity. Therefore, the court did not consider witchcraft capable of causing mental diseases or natural mental infirmity required under section 28 of the CCA.[189] However, the effect of such belief on the person and not the belief itself should be important to the court.[190]

It is unclear what Nigerian law means by "mental disease and natural mental infirmity" under this review. Courts have also been inconsistent with the definition provided. In Nigerian legal jurisdiction, as no statute defines "mental disease and natural mental infirmity, academic writings like case law defined these phrases as referring to English or foreign texts and legislation.[191] Okonkwo acknowledged the challenge of defining mental disease. He advised that medical views will be necessary to understand the meaning of mental diseases, and courts should adopt broader views instead of narrow ones.[192] However, this thesis agrees with Okonkwo's advice that lawmakers and courts should seek guidance for a definition in the mental health statute. Hence the need to review the Lunatic Act of 1958 in light of current medical development and, like other Western jurisdictions[193], to provide the definitions of important terms relating to the insanity defence.

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[187] See the chapter seven of this thesis.

[188] [1968] 1 ALLNLR. 152; *R v. Konkomba* (1952)14 WACA 236; *Thamu Guyuk v Rex* 14 WACA 353 at 372

[189] *Okon Esibehe Edoho V. State* [2010] F.W.L.R. (pt530)1262 SC; *Muyibi Oshinaike v State* [1984]10 SC 89 at 90.

[190] *Ihonre v. The State* (1989) 4NWLR (pt67) 778; *Goodluck Oviefus v. State* (1984) 10 S C 207 at 261.

[191] Okonkwo (n 5) 134, 135; Ebele Boniface Ewulum, *The Plea of Insanity under the Nigerian Criminal Jurisprudence*(n)117.

[192] Cypril Okonkwo, *Okonkwo and Nash on Criminal Law in Nigeria* (London: Sweet & Maxwell, 1980) 134.

[193] England and Scotland.

The second part of section 28 requires an accused person to understand what he was doing, his capacity to know that he ought not to do the act or make the omission, or his capacity to control his actions.

B. LACK OF CAPACITY

A mental disease/natural mental infirmity is insufficient to remove criminal liability. In *Ani v The State,*[194] the court stated that the accused needed to show that when he committed the crime, he suffered a mental disease to deprive him of:

i. Understanding what he was doing, or

ii. Control his actions or

iii. Know that he ought not to do or make the omission.

i. LACK OF CAPACITY TO UNDERSTAND WHAT HE IS DOING

Courts in Nigeria are yet to interpret this phrase as used in the CCA. Most case law on the insanity defence acknowledges the importance of this phrase, but none of the case law interpreted it.[195] For example, in *Guobadia v State*[196], the Supreme Court acknowledged the importance of the capacity to understand what he is doing, "control his actions", or that "he ought not to do" such action to satisfy the criteria for a successful insanity defence. However, the courts gave no interpretation of this phrase.[197] There was no evidence of mental illness before the court or evidence to indicate a lack of capacity to know what he was doing. The appeal succeeded based on the accused being under 17 years old, and the court could not sentence him to death and not on the insanity defence.

Okonkwo confirmed that courts had not interpreted this arm of Section 28 and argued that it would be challenging to interpret the precise understanding required.[198] Although, he believed

[194] [2002] 10 NWLR (Pt.776)644; *Okon Nsibehe Edoho v. The State* [2010] 3-5 SC (pt.1)127.

[195] *Kazeem Popoola v The State*.

[196] [2004] 6 NWLR (pt 869) 360.

[197] *Ulueka v the State* [1998] 12 NWLR 579.

[198] Okonkwo (n 5) 136.

that the word understanding has a broader meaning than the word 'know'.[199] He explained further that a person might know what he is doing when stabbing someone but would not understand that stabbing the person would kill them.[200]

ii. CAPACITY TO KNOW HE OUGHT NOT TO DO THE ACT OR MAKE THE OMISSION.

Academic writers have suggested different interpretations of this phrase. According to Ewulum, this phrase refers to a defendant unaware of breaking the law, though he understands the nature of his actions.[201] Another side of the argument supports that courts should interpret the phrase by suggesting that the accused could distinguish between good and evil, legal and illegality.[202] This argument raises the contention between morality and the law. Okonkwo and Nash considered this phrase an exception to the general rule that ignorance of the law is not an excuse.[203] Therefore Okonkwo supported the argument that wrong represents contrary to the law.[204]

iii. LACK OF CAPACITY TO CONTROL HIS ACTIONS

This phrase means that the accused could not resist the impulse to commit a crime because of a mental disorder.[205] According to *R v. Omoni*[206], this phrase permits a defence based on an irrepressible or uncontrollable impulse.[207] Idem stated clearly that this provision makes it immaterial that the person could distinguish between right and wrong or knowledge or understanding of acts if a person with a mental disorder cannot resist acting in a prohibited

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[199] Ibid.

[200] Okonkwo (n 150) 136.

[201] Ewulum, 'The Plea of Insanity under the Nigerian Criminal Jurisprudence' (2018) AFJCLJ 3….

[202] Abiodun Ashiru, Re-Examining the Defence of Insanity under the Nigerian Criminal Justice System: The Way Forward (2021) Researchgate 11.

[203] Okonkwo and Nash (n150) 136.

[204] Ibid.

[205] Udosen Jacob Idem, 'Criminal Responsibility and the Defence of Insanity, Insane Delusion and Irresistible Impulse in Nigeria' (2018) Donnish Journal of Law and Conflict Resolution 16.

[206] *R v Omoni* (n 185).

[207] Ibid 3

manner.[208] Reported cases suggest courts have no issue applying this capacity arm of Section 28 of CCA.

For example, in *Ani v state,*[209] the accused believed the mother of the children she killed used her for a money-making ritual. Knowing their mother was not home, she went to their house and murdered the kids. The Appeal Court confirmed that at the time of the commission of the offence, the appellant was not in such a condition of mental disorder or natural mental disability as to render her incapable of controlling her actions. From the evidence presented to the trial court, it is evident that the appellant was always in complete control of her thinking abilities. There was a lack of evidence regarding mental disease or natural mental infirmity and lack of control. They upheld the trial court's judgement, and he was found guilty.

In *Arisa v The State*[210], the doctor diagnosed the defendant with psychogenic psychosis, also called schizophrenia. This sickness indicated a mental disorder that presented with the disorientation that affected some components of the patient's senses. The accused could begin to imagine unreal things. During a crisis, the patient lacks normal control over his actions. Such a person would be unable to comprehend what he is doing when attacked. This ailment may appear and go away on its own or develop later. The Supreme Court stated that if the court accepts this evidence, it qualified to mean that at the time of the offence, the accused could have had a mental disease or natural mental infirmity that made him lose control of his actions or understand what he was doing. However, they also discarded this doctor's testimony because he failed to explain the basis for his opinion.

Nevertheless, in *R v. Echem,*[211] the trial court showed a lack of readiness to accept this arm of Section 28. The medical officer stated that although the accused might know what he was doing and know he was doing wrong, he could not control his actions when he had a mental disorder attack.[212] He further stated that when the accused has a mental attack, he loses control, to amounts to an uncontrollable impulse. The trial judge rejected this evidence for not

[208] Ibid.

[209] [2002] 5 SC pt1 33.

[210] [1988] LPELR-553(SC).

[211] [1952] 14 WACA.

[212] Ibid 158.

emanating from the doctor's observation and stating that the accused pretended to suffer from a mental disease. However, the Court of Appeal quashed the trial judge's decision and stated that the doctor's evidence was sufficient to prove that the accused acted under uncontrollable impulse.

As Okonkwo pointed out, it is difficult to convince a court that an accused could not prevent himself from committing the offence.[213] Although automatism resembles an uncontrolled impulse, it is a defence implied under Section 24 of the Criminal Code Act. However, this section of CCA does not expressly provide for automatism. However, when automatism stems from a mental disorder, it becomes an uncontrolled impulse under Section 28 of the Act. Automatism refers to unconscious behaviour.[214]

This section has shown that the first arm of section 28 for the insanity defence remains largely undefined. Without explicit knowledge of mental disease and natural mental infirmity, it will negatively impact the insanity defence. Therefore, there is a need to provide statutory definitions and clear judicial interpretations of the terms and phrases used in this provision on insanity at the time of the offence. The lawmakers can also update these terms to modern, medically applied terms.

This section further shows the gap in not having mental health legislation in Nigeria, where courts could refer to it for definitions and guides. Although it is undeniably a prerogative of the lawmakers and law agencies to define in what manner and under what conditions the presence of insanity excludes criminal responsibility, the question of mental disease, mental infirmity, or the question of what constitutes the lack of capacity should be a medical and psychological problem. Therefore, courts and lawmakers should consult mental health experts for a more precise definition and description of the phrases used in section 28. However, the next chapter will determine the impact of this definition gap in the insanity defence provisions. Does it affect it in practice, or is it a theoretical issue? What are the implications?

[213] Okonkwo (n13) 67.

[214]Abiama, Emmanuel Ekpedoho, 'Mental Illness and Insanity in the Nigerian Law' (2015) IOSR Journal Of Humanities And Social Science.

II. DEFENCE OF INSANITY IN THE PENAL CODE AS APPLICABLE IN THE NORTHERN REGION (NORTHERN STATES)

The Penal Code Act (hereinafter referred to as PCA) provides differently from the CCA on the insanity defence. Also, the PCA provisions on the insanity defence theoretically face the same challenge of interpretation as the CCA.

Section 51 of the PCA states that:

> "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 contrary to law."

The phrase 'unsoundness of the mind' is unique to the Penal Code and the Criminal Procedure Act 2004, as Section 28 of the CCA did not use this phrase.[215] This research confirms that the PCA provides no interpretation framework or definition for the insanity defence terms. Nigeria could borrow an explanation of this phrase from an Indian text discussing Section 84 of the Penal Code, identical to Section 51 of the Nigerian Penal Code Act. The authors stated as follows:

> Whether the want of capacity is temporary or permanent, natural or supervening, whether it arises from disease or exists from birth, it is included in this expression. Thus, an idiot, who is without understanding from birth (including lucid intervals) and a person who is mad or delirious, are all persons of unsound mind.[216]

This extract suggests that "unsoundness of mind" is comprehensive enough to cover several mental disorders. Also, Gledhill described the unsound mind as broader than "insanity" or "mental disease".[217] As this text fails to explain the extent of the unsound mind, this position raises even more questions. Being broad could have a negative and positive impact. More contentious are laws that clearly state their requirements yet appear to require too much,

[215] The section 51 of the PCA is the same with Section 84 of the Indian Penal Code.

[216] Ratanlal Thahore, *Law of Crimes* (Bombay 1956) 158.

[217] Alan Gledhill, *The Penal codes Northern Nigeria and the Sudan* (Sweet and Maxwell, London 1963) 91.

sweeping so broadly that ordinary people, although able to comprehend their responsibilities, cannot modify their conduct or forecast the law's functioning in practice.[218]

The problem is that the lack of legislative means to limit statute scope directly compounds the problem. In other words, the issue with the unsound mind is not the certainty but the breadth of what it contains. What does the law include, and what is not? While it is positive that they are comprehensive because they could include those not envisaged. However, having a scope is necessary not to include mental disorders not intended.

In addition, while this study applauds the availability of a definition from a foreign jurisdiction, it criticises the failure of Nigerian courts to explain the concept of "unsound mind" in a local context. Instead, courts often refer to it without suggesting a need to explain it.[219] However, in S*tate v. Shittu,*[220] a little explanation was offered as follows:

> If in his lunacy the ,,, thought he was reciprocating the faithfulness of his loving mother or was correcting her by using a shovel to hit her several times believing till his trial that she was living, then the unsoundness of the mind denied him the capacity to understand the nature of his Act.[221]

This extract does not efficiently describe the unsound mind, as it relates more to describing delusion. Possibly it could be part of what it means. However, the extract from the case did not achieve the desired certainty.

Moving forward, the existence of an unsound mind should remove the "knowledge of the nature of the Act" before a successful insanity defence. Also, there is hardly a court explanation of this phrase but facts to prove it. For example, in *Papoola v. State*,[222] the Appeal Court stated that the accused absconded after the offence, disappearing for months, and was later

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[218] Kiel Brennan-Marquez, 'Extremely Broad Laws' (2019) Arizona Law review 662.

[219] *Yakubu Kure v. State (1988) NWLR (Pt.71) 404; State v. John* (2013) LPELR-20590(SC); *Alfa v. State* (2016) LPELR-40552(CA)*; State v. Kalib* [2021] LPELR-56084(CA).

[220] (Unreported) suit no KWS/1/84.

[221] Ibid 22.

[222] [2011] LPELR-CA/I/66/2007.

apprehended. This action suggested that he knew what he was doing and the nature of the act.[223] There was no definition or clarification of what the phrase meant. However, there is a need for mental health legislation or the PCA to define these terms and phrases for a more unified decision.

Nonetheless, in this thesis's opinion, the Penal Code's use of different terms and phrases from the CCA raises questions about their similarity in substance. The PCA does not provide for uncontrollable impulses in the CCA. Uncontrollable impulse has to do with situations where the accused, because of mental disorder, appreciates the nature or wrongfulness of their actions but cannot stop themselves from doing them.[224] There has been no review by lawmakers or courts to determine if the provision of the PCA needs to add the lack of volitional capacity to the provision on the insanity defence. This thesis believes that adding the loss of control or volitional capacity will widen the scope of the defence and affected parties. Moreover, the rationale for having different codes for the Northern and Southern regions is primarily cultural and religious-oriented. [225]

Chapter two of this thesis explained this position when it discussed the conflict in the northern region because of the application of the criminal code and native law. As earlier stated, the Northern region established a committee in 1958 to address the issue. They suggested either full adoption of English Criminal Law, full acceptance of Islamic Law, or a hybrid. After deliberation, they determined that a hybrid was the best option. This debate became a reality with the establishment of the Penal Code.[226] They chose this because a Muslim community (Sudan) effectively implemented it.

[223] *Peter Johnny Loke v. The State* (1985) 1NWLR (pt1)1.

[224] *Taiwo v. State* [2019] LPELR-47488(CA).

[225] They have certain crimes that are unique to either the Criminal Code and Penal Code. Take the Criminal Code as an example; it prohibits multiple marriages through the Bigamy statute. While adultery is a crime in the Penal Code.

[226] modeled after the Indian Penal Code of 1860.

The Penal Code contained some elements of Islamic law through the criminalisation of certain acts like Adultery,[227] Drinking of Alcohol,[228] and insulting the modesty of Muslim Women.[229] The code also preserved the culturally significant punishment of severe lashing.[230] Nevertheless, since the insanity defence has no religious ties and its fundamental idea is the same in all countries, its provisions could be the same.

As a further point of reference, this review supports the notion that lawmakers adapted the PCA from a foreign jurisdiction since it lacks local context. They introduced it when most Nigerians were either uneducated or unfamiliar with mental illness, an ignorant era. The terminology used should meet modern medical standards. Also, it is necessary to provide an interpretation that sits well with the context or jurisdiction in view.

Given current social, medical, and educational developments, lawmakers should re-examine this section of the Act. In addition, lawmakers should assess foreign content in Nigeria's insanity provision considering the local context to determine whether to retain or update them.

5.3.2. ENGLISH JURISDICTION

5.3.2.1. THE M'NAGHTEN RULE

To raise a successful defence under this Rule, the accused must prove that:

A. The accused was labouring under a defect of reasoning
B. The defect arose from a disease of the mind, and
C. Because of the defect of reasoning, the accused either:
    i. did not know the nature and quality of the Act he or she was doing, or
    ii. not know that what he or she was doing was wrong.

THE DEFECT OF REASON AND THE DISEASE OF THE MIND

The M'Naghten's Rule stipulates that to be eligible for the insanity defence; the offender must have had a defect of reason due to a mental disease at the time of the offence. According to the English Law Commission, a defect of reason refers to a person's inability to reason at the time

[227] Penal Code Act 1960 s 387 and s 388.

[228] Penal Code Act 1960 s 403.

[229] Penal Code Act 1960 s 400.

[230] Penal Code Act 1960 s 68(2).

of the offence.[231] However, where one refuses to use the power of reason is not a defect of reason.[232] Therefore, the disease of the mind must be the cause of the defect in reasoning. As Ashworth explains, "Some types of mental illness impair practical reasoning and the capacity for self-control."[233]

Different case law suggests that the phrase "disease of the mind" has had several interpretations. For example, Lord Denning, in *Bratty v AG for Northern Ireland,*[234]described the disease of the mind as follows:

> The major mental diseases, which doctors call psychosis, such as schizophrenia, are clearly diseases of the mind… It seems to me that any mental disorder which manifests itself in violence and is prone to recur is a disease of the mind.

However, Walker criticised the preceding description, claiming that it is "tautologous" and that mental disease can present itself in non-violent activities such as theft.[235] This chapter previously acknowledged that Nigerian courts had adopted this definition severally.[236]

In *R v. Kemp*[237], Lord Devlin stated that medical specialists do not classify any disease as a "disease of the mind". Instead, he suggested that it is best to use the ordinary court rule of interpretation[238] while seeking help from medical opinion. He believed that medical opinion explains the nature of the disease and the matters that courts, from the medical point of view, must consider in determining whether it is a disease of the mind.[239]

Nevertheless, it is challenging for courts to define the disease of the mind without recourse to the medical profession. The National Institute for Health argued that the closest similar term to

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[231] English Law commission Review..1.35.

[232] *Clarke* [1972] 1 All ER 219, 221, by Ackner J.

[233] Andrew Ashworth, *Principles of Criminal Law* (USA:Oxford University Press 2009) 145.

[234] [1963] AC 386.

[235] Walker, *Crime and Insanity in England* (1963)

[236] Taiwo v the State; R v Omoni.

[237] [1973] 3 ALL ER 347.

[238] The literal rule (also: the ordinary meaning rule; the plain meaning rule)

[239] *R v. Kemp* (n78) 406.

the disease of the mind or insanity in the present medical field is a mental disorder.[240] However, the terms disease of the mind and insanity are alien to the medical field.[241] Furthermore, some authors suggested that the defect must result from some internal degenerative or damage-causing factors and not due to the impact of external factors.[242]

Hodgson explained that the phrase "disease of the mind" suggests the law is less concerned with the brain than the mind of the accused.[243] Devlin J in *R v Kemp* stated:

> The law is not concerned with the brain but with the mind, in the sense that "mind" is ordinarily used, the mental faculties of reason, memory and understanding.[244]

The justices in *Kemp* rejected the defence's argument that a disease of the mind meant a disease of the brain.[245] They also rejected the argument that the accused suffered from a "disease of the mind". This decision was because the cause of the defect of the reason was physical and not a mental disease. Nevertheless, one could say that it could be a "disease of the mind" when the physical disease regenerates to affect the mind.

Most of the definitions of disease of the mind refer to a lack of precision. Therefore, like in Nigerian jurisdiction, the English courts face similar challenges in interpreting keywords.

NATURE AND QUALITY OF THE ACT AND THE CONCEPT OF WRONG

The condition here is that the accused either lacks knowledge of the nature and quality of the act committed or does not know that the action was wrong. Therefore, the existence of both or either of the two is sufficient. Thus, under this Rule, although the accused may know the nature

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[240] ibid

[241] Information about Mental Illness and the Brain, <https://www.ncbi.nlm.nih.gov/books/NBK20369/> accessed 4 November 2019.

[242] Richard Card and Jill Molloy, *Card, Cross and Jones: Criminal Law* (22nd edn Oxford University Press 2016) 630.

[243] David Hodgson, 'Guilty Mind or Guilty Brain? Criminal Responsibility in The Age of Neuroscience' (2000) The Australian Law Journal 74, 80

[244] *R v. Kemp*

[245] Ibid.

and quality of his act, courts exempt him from criminal responsibility if he does not know that his action was wrong.

The nature and quality of the act as used indicate the physical nature.[246] Ormerod enunciated that this phrase means when the accused did not know what he was doing or did not appreciate the potential consequences of his actions.[247] For example, he pointed to Stephen's book, that if a person slashes a sleeping person's head and thinks it would be entertaining to watch the sleeper hunt for it when up.[248] Again, a person stabbed another with a knife without knowing the consequences.[249] Ormerod concluded that it is a state where a person engages in an act without appreciating the consequences.[250] The court interpreted "nature and quality" simply as when one does not know what they are doing.[251] For example, an unconscious person does not know the nature or quality of their Act.

The courts interpret "wrong" as either morally wrong or legally wrong.[252] In *R. v Rivett*[253] and others,[254] the Court of Criminal Appeal's judge held that a "wrong," as used in the M'Naghten rule, meant contrary to law. In Windle, Lord Chief Justice Goddard emphasised that from the Rule, wrong meant an act is contrary to the law, and courts can only distinguish between what is under the law and what is contrary. Also, in *Codere*, the judge commented that in a murder charge, the accused could not argue that he did not see the act as morally wrong when he knew it was punishable by law. He further held that it would be unreasonable to determine this issue based on the standard of the accused.[255]

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[246] *Codere* [1916] 12 Cr App Rep 21.

[247] David Ormerod, *Smith and Hogan Criminal Law cases and materials* (Oxford University Press 2005) ch 4 78.

[248] Stephen James Fitzjames, *History of the Criminal Law* (Vol.II Macmillan and co 1883) 166.

[249] Ormerod (n 239)78.

[250] Ibid.

[251] *Sullivan* [1983] 2 ALL ER 678.

[252] Ajay B. Sonawane and Adv. Radhika S. Banpel-Raje Bhonsle, Defence Of Insanity In India And England: Comparative Legal Paradigm, International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212:Volume 3 Issue 1 <http://ijlljs.in/wp-content/uploads/2016/02/10.pdf>accessed 30 October 2019.

[253] *R. v Rivett (James Frank)* (1950) 34 Cr. App R 87.

[254] *R v. Windle* [1952] 2QB 826; *R v Johnson* [2007] EWCA Crim 1978; *Codere* [1916] 2 WLUK 77.

[255] *Codere* (n91)

Like Nigeria, the English courts have also struggled to define their insanity defence test. However, aside from the challenge of defining the key terms, academic writers have criticised the Rule from other perspectives, as shown below.

CRITICISM OF M'NAGHTEN RULE

This Rule, which has been predominant as the test for England's insanity defence, is not without criticism. Academic writers and case law have identified loopholes and uncertainties in the M'Naghten Rules of the insanity defence.

Given how difficult it has been to understand the phrases, the M'Naghten Rule's language appears to have produced numerous theoretical issues. For example, Mackay believes the "nature and quality" limb is unnecessary. He explained that if an accused did not know what he was doing at the time of the act, he could not have known that the action was wrong or a crime.[256] As a result, the law should seek to incorporate a requirement that combines the "knowledge" and "nature and quality" limbs. Conversely, Glanville Williams criticised the 'wrong' limb as superfluous in the light of the provision of the "nature and quality" limb. It adds nothing to the other requirements.[257]

Furthermore, there is uncertainty in courts as to what category of disease qualifies as a "disease of the mind". Case law shows these various applications of the phrase disease of the mind. For example, in *R v Kemp*[258], the accused suffered from arteriosclerosis. The judge held that hardening the arteries is a disease shown in the evidence that could cause a permanent or temporary defect in the mind. Therefore, result in a "disease of the mind", as contemplated in the M'Naghten Rules. In *Bratty v. AG for Northern Ireland*[259], Lord Denning stated that disease of the mind means any mental disorder manifested in violence and is likely to recur. However, in *R. v. Charlson,* [260] the courts held that epilepsy or brain tumour was not a "disease of the mind", even though it exhibits violence and irrational behaviour. Elsewhere the court in *R v.*

[256] Ronnie D Mackay, 'Righting the wrong? - some observations on the second limb of the M'Naghten Rules' (2009) Criminal Law Review 2 80

[257] Glanville Williams, *Textbook of Criminal Law (*2nd edn 1983)645.

[258] [1957] 1 QB 399

[259] [1963] AC 386 at 413

[260] [1955] 1 W.L.R.317

Sullivan[261] stated that epilepsy was a "disease of the mind". Ramage has criticised this Rule for including various crimes caused by non-mental illnesses and conditions like epilepsy, diabetes, and sleepwalking.[262] It also includes psychiatric, neurological conditions and physical conditions.[263]

This uncertainty in the meaning of the M'Naghten language extends to the "wrong" limb. Considering the decision in *Windle*[264] on the meaning of "wrong", Mackay pointed out that the second limb containing the word 'wrong' is insufficient.[265] Mostly because he believed that the decision in *Windle* on "wrong" was narrow. According to him, courts should weigh the legal and moral implications of interpreting the "wrong" limb.[266] Although, he believed that courts often ignored the *Windle* definition and made minor distinctions between a lack of awareness of legal and moral wrong.[267] However, as stated in Windle, the strict position remained that "wrong" meant legally wrong.[268]

There is a high chance that courts erroneously defined 'wrong' as only applicable to legal wrongs, thereby restricting the defence as the judges in M'Naghten never intended. Similarly, the Law Commission observed this challenge. It argued that 'English law has adopted an unusually, and arguably unjustifiably, narrow interpretation of the "wrongfulness" limb'. Courts have widened the "wrong limb" scope beyond illegality in Canada[269] and Australia,[270]

[261] [1984] 1 AC 156

[262] Ramage Sally, 'Peter Young's Insanity Plea: a retrospective examination of the verdict of "Not Guilty on the Ground of Insanity' (2008) 183 Criminal Law Review 1-6 3

[263] Rumbold J, 'Diabetes and Criminal Responsibility' (2010) 174 Criminal Law and Justice.

[264] *R v. Windle* [1952] 2QB 826

[265] Mackay D, 'Righting the Wrong? Some Observations on the second limb of the M'Naghten Rules' (2009) 2 Criminal Law Review, p.86

[266] R. Mackay, B. Mitchell and L. Howe, 'Yet More Facts about the Insanity Plea' [2006] Crim. L.R. 406

[267] Ronnie D Mackay, 'Mental Condition Defences in the Criminal Law' (1995) 105-107

[268] *R. v Johnson (Dean)* [2007] EWCA Crim 1978; [2008] CLR 132 (CA (Crim Div))

[269] *R* v *Chaulk* [1990] 2 CR (4th) 1

[270] *R* v *Stapleton* [1952] 86 CLR 358.

The M'Naghten Rule only focuses on the cognitive ability of insane individuals, making it narrow. This position means it is pre-eminently concerned with the ability to reason.[271] Therefore, it lacks the provision for a volitional limb, including uncontrollable impulses. A mental disease could impair the accused's cognition and will or volition.

Also, this Rule does not consider advancements in medicine, psychology, and psychiatry. Ashworth argued that the law is yet to incorporate the "advancement of science" into the M'Naghten Rule.[272] For example, the legal words "insanity" and "disease of the mind" are outdated and no longer relevant in today's world of medicine. Also, the medical/mental health law did not interpret or refer to the phrase "disease of the mind".[273] The closest definition offered in the Mental Health Law was the definition of "mental disorder".[274]

These criticisms raise a need to modify M'Naghten to suit the present-day legal system and align with modern psychiatric practice. However, this thesis encourages the mental health and legal systems to find common ground to avoid difficulties in the relationship between the two fields. Furthermore, the mental health legislation could assist the court in resolving the interpretation issues.

5.3.3. SCOTTISH JURISDICTION

The last chapter traced the Scottish statutory test of insanity to the Criminal Procedure (Scotland) Act of 1995. Section 51(A), as inserted by Section 168 of the Criminal Justice and Licensing (Scotland Act) 2010, provides for the Criminal responsibility of persons with a mental disorder in Scotland (formerly known as the insanity defence) as follows:

> (1)A person is not criminally responsible for conduct constituting an offence and is to be acquitted of the offence if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

[271]Larry O. Gostin, Justifications for the Insanity Defence in Great Britain and the United States: The Conflicting Rationales of Morality and Compassion, Bulletin of the AAPL Vol. 9, No.2.

[272] Ashworth (n 226) 146.

[273] The Mental Health Act (2007); Formerly known as Mental Health Act (1983).

[274] Mental Health Act (2007) s 2; Mental disorder" means any disorder or disability of the mind".

By the preceding provision, the insanity defence became a statutory defence in Scotland, as it is in Nigeria. This provision abolished the popular common law position of "total alienation of reason". Furthermore, based on the phrasing employed in this provision, the legislators intended a different meaning from the common law understanding.[275]For example, in *MacKay* (*Scott Henry Sneddon MacKay)* v *Her Majesty's Advocate*,[276]the judge stated that the legislature intended the new law to have a different meaning for the insanity defence from the Common Law definition.

It also seems similar to the English M'Naghten Rules terminology, aside from removing the word "quality" and using "appreciation" instead of knowledge. While Nigerian legislation uses understanding and "ought to and not to know". Nigerian provision seems cumbersome compared to that of England and Scotland.

The Scottish Jury Manual explained that the law requires two elements to establish an insanity defence:

i. A mental disorder at the time of the offence.
ii. Inability to appreciate the nature or wrongfulness of the Act done.[277]

In explaining the statutory defence, in *MacKay (Scott Henry) v HM Advocate*,[278] the court emphasised that courts should interpret Section 51A in its ordinary meaning. Other rules of interpretation can only be resorted to when there is apparent ambiguity.[279] It was not in dispute if the accused suffered from a mental disorder but to what extent it affected his action. The mental health law's definition of mental disorder may explain the absence of disagreement around its meaning. The 1995 Act adopted a broad definition of "mental disorder" in the Mental Health (Care and Treatment) (Scotland) Act 2003. Section 328(1) of the 2003 Act defines "mental disorder" to include mental illnesses, learning disabilities and personality disorders "however caused or manifested". Hence, this provision settles the meaning of mental disorder.

[275] *Dunn v W* [2013] S L T (Sh Ct) 2 at 15.

[276] [2017] HCJAC 44).

[277] Jury Manual, Judicial Institute for Scotland, Parliament House, Edinburgh 2016.

[278] [2017] HCJA 44 at 30.

[279] Lord Nicholls at 396-397 citing in turn Black-Clawson International v Papierwerke Waldhof-Aschaffenburg [1975] AC 591, Lord Reid at 613).

This provision's "mental disorder" terminology distinguishes it from the Nigerian and English provisions. For example, the Nigerian Criminal Code Act referred to "mental disease or natural mental infirmity," the Penal Code to "unsound mind," and the M'Naghten Rule to "mental diseases." However, this study argues that "disease of the mind" or "natural mental infirmity" and "unsound mind" are medically undefined terminologies criticised as archaic. By integrating "mental disorder", the lawmakers adhered to the Scottish Law Commission's suggestions to broaden the definition of insanity and bring it into step with modern medical advancements.[280]

Also, this approach alludes to the impact of mental health legislation on an insanity defence by referring to mental health legislation. It evidences the interplay between the mental health system and criminal law. Courts and parties could establish the insanity defence definitions by referring to mental health legislation.

The second part of the Scottish insanity test begins with "appreciate," so let us move on to that. The court in *MacKay (Scott Henry) v HM Advocate*[281] agreed that the words "appreciate" and "wrongfulness" were commonly used and not difficult to explain, and their ordinary English meaning applied. Therefore, the words of the statutory test speak for themselves. However, an appropriate direction may state that an inability to appreciate the nature or wrongfulness of action was not confined to a lack of knowledge of such matters but might also include an incapacity to act in line with a rational and normal comprehension.

The meaning of "appreciation" can be clarified by contrasting it with the M'Naghten Rules' definition of "knowledge." The term "appreciate" in the new Scottish test avoids the narrowness of the M'Naghten approach by focusing on whether the accused completely comprehended the specific acts and the entire context in which they occurred.[282] A defendant may have "knowledge" at the time of an alleged offence but may not understand its full significance in the context.[283] Nigerian jurisdiction in the Criminal Code uses the words understand and knowledge. Comparatively, Nigerian insanity tests have broad interpretations

[280] Scottish Law Commission, Report on Insanity and Diminished Responsibility, para.2.59.

[281] [2017] HCJAC 44.

[282] Gerry Maher, 'The new mental disorder defences: some comments' (2013) S L T 1.

[283] Scottish Law Commission, Report on Insanity and Diminished Responsibility, para.2.30.

because they rely on English and Scottish terminology for “appreciation” through the use of “understanding” and “knowledge”.

From this thesis review, Scottish courts have had no difficulty defining or interpreting terminology in the new laws thus far. Instead, they apply everyday meanings and have a mental health definition framework. Case law corroborates this position, as they focused less on interpretation but instead focused on the defence.

5.4. CONCLUSION

The chapter identified issues ranging from interpretation gaps to using outdated terms and issues related to social-cultural influence on transplanted laws, suggesting there is a need for an amendment. Nigerian lawmakers should revise these provisions found in this chapter to be inadequate to reflect contemporary legal, medical, and social concepts and attitudes. This chapter supports the thesis’ argument that the criminal law on the insanity defence reflects the necessity for a legislative revision. Finally, this thesis addressed one of its objectives in this chapter: It established that the legislative provisions of Nigeria’s insanity defence rules are outdated as keywords are no longer in use and are difficult to interpret.

Having looked at the suitability of the provisions on the insanity defence in the statute, which this chapter concluded has some lapses, the next chapter will review the function of the insanity defence. In other words, the next chapter will examine the application of the rules examined in this chapter and how efficiently they function in practice. As the criminal and penal codes differ, this thesis will demonstrate their impact on practice in the next chapter.

CHAPTER SIX

PROOF OF THE INSANITY DEFENCE

6.1. INTRODUCTION

The preceding chapter reviewed the judicial interpretation of the insanity defence, which included insanity as a bar to trial (unfitness to plead) and at the time of the offence in Nigeria, England, and Scotland. It addressed the procedural consequences of the unfitness to plead, considering the provision and efficacy of the procedure.

At the outset, this chapter will review the burden of proof/standard for the insanity defence in each jurisdiction. This chapter will do the following to determine how the accused could raise and prove the insanity defence in each of the three different jurisdictions:

First, it will review the required evidence for successful proof of the insanity defence. Second, it will evaluate the importance of medical evidence and the need for the law to make it compulsory. Finally, it will show the difference in disposal options and the need for expert evaluation of the appropriate option. The order for this review will follow the review of the position in Nigeria, England, and Scotland.

6.2. PROOF OF THE INSANITY DEFENCE IN NIGERIA

This study has shown in the preceding chapters that Nigeria has two criminal law jurisdictions with two distinct tests for the insanity defence. However, given that the two jurisdictions have identical evidential burdens and standards, this analysis will review both simultaneously.

To begin with, in both codes (Criminal and Penal Codes), the burden of proof in all criminal trials is on the prosecution, and the standard of proof is beyond a reasonable doubt.[1] In contrast, where an exception or excuse is available for the crime, the burden of proof will shift to whoever raises such. The standard of proof will also change to a balance of probability.[2] The constitution of the Federal Republic of Nigeria[3] provides in Section 36(5) as follows:

[1] Evidence Act 2011s 135 (1); *Okoh v. The State* (2014) LPELR-22589 (SC).

[2] Evidence Act 2011s 139 (1).

[3] 1999 Constitution Federal Republic of Nigeria.

> Every person who is charged with a criminal offence shall be presumed to be 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 such person the burden of proving particular facts.[4]

The Nigerian Evidence Act of 2011 states how courts apply evidence in both civil and criminal law cases in Nigerian courts. It confirms the second arm of the above provision that explicitly imposes the burden of proof of specific facts on the accused.

> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.[5]

Accordingly, the defence of insanity is one circumstance in which the burden of proving the existence of specific facts in a case shifts to the accused. [6]

The Criminal Code Act of 2004 (herein referred to as CCA) presumes every person to be of sound mind before the court proves to the contrary.[7] On the other hand, Section 43 of the Penal Code Act 1960 (herein referred to as PCA) states that "a person is presumed, unless the contrary is proved, to have knowledge of any material fact if such fact is a matter of common knowledge".[8] As a result, these laws provide a presumption of knowledge negated by the insanity defence.

In *Yakubu Kure v The State*,[9] one of the Supreme Court judges related the meaning of section 43 of PCA and section 22 CCA to the insanity defence. He explained that people do not take a sane

[4] Constitution of Federal Republic of Nigeria 1999 s 36 (5).

[5] The Nigerian Evidence Act 2011 s 136 (1); the Evidence Act comes in for proof of insanity and deals with evidence.

[6] The Nigerian Evidence Act 2011 s 139(3) (c); Nothing in sections 135 and 140 or in subsection (1) or (2) of this section shall …affect the burden placed on a defendant to prove a defence of intoxication or insanity.

[7] Criminal Code Act s27.

[8] Penal Code Act s 43.

[9] (1988) LPELR-1719(SC).

person to the psychiatric hospital for treatment.[10] Hence, when people take a person to a mental facility for treatment, he is assumed insane. As a result, sending the person to a mental facility for treatment rebuts the presumption of sanity under Nigerian laws. Therefore, when an accused raises insanity as a defence, the accused is responsible for proving the insanity in the Northern and Southern Region (both CCA and PCA).

For the above reasons, no burden or onus is on the prosecution to prove the insanity defence raised by an accused. The court confirmed this position in *Kazeem Popoola v. The State*[11] when one of the Supreme Court justices stated as follows:

> Every person is presumed to be of sound mind at any time in question until the contrary is proved. So, the prosecution does not set out to prove the sanity of an accused which the law presumes in its favour. The word "presume" implies the possibility that the thing being presumed may be rebutted. It follows that the presumption that an accused was of sound mind at the time of the alleged offence can be rebutted. It is an issue of fact to be settled on evidence. Arising from the presumption of soundness of mind is the burden placed on the accused, who sets up a defence of insanity to lead evidence to prove same.[12]

Also, the Nigerian Evidence Act 2011 in Section 136 places the burden of proving the insanity defence on the accused:

> (2) The burden of proof placed by this Part of this Act upon an accused charged with a criminal offence shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether on cross-examination or otherwise, that such circumstances in fact exist.
>
> (3) Nothing in sections 138, 142 of this act or in subsection (1) or (2) of this section shall -

[10] Ibid 1719.

[11] (2011) LPELR-CA/1/66/2007.

[12] Ibid Per PETER-ODILI, J.S.C. (P. 19, Paras. C-F).

(c) affect the burden placed on an accused person to prove a defence of intoxication or insanity.[13]

Therefore, the law is settled in Nigeria (the Evidence Act, CCA and PCA) that the burden of proving an insanity defence in a criminal charge lies on the accused, as evidenced in reported case law.[14] Consequently, the accused must discharge the legal burden of proving the insanity defence. The judge in *Karimu v The State*[15] emphasised that a presumption of sanity means that there is a way to rebut the supposed. To rebut the presumption of sanity is an issue of fact settled on evidence. The court expects the accused to discharge this burden of proof by leading evidence to prove the same on a balance of probability.[16] This standard means that when the burden of proof shifts to the accused, the law ensures that the burden imposed on the accused is lighter than the duty placed on the prosecution.[17] The Evidence Act state that:

> Where in any criminal proceeding the burden of proving the existence of any fact or matter has been placed upon the defendant by virtue of the provision of the law, the burden shall be discharged on the balance of probabilities.[18]

Hence, the quantum of proof required for an accused person is the same as that placed on a plaintiff/defendant in a civil proceeding.[19] In other words, when proving the defence of insanity, the standard of proof required of an accused is not as high as that of the prosecution in criminal cases.[20]

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[13] The Nigerian Evidence Act 2011 s136.

[14] *Idowu v. State* [1972] 5 SC 6; *Francis Ezediufu v the State* [2001]17 NWLR (Pt.741) 82.

[15] [2005] 4 ACLR 438 at 443.

[16] Ibid 444.

[17] *Ogbu v Wokoma* [2005] 7 SC (pt.11) 123; *Onakpoya v Queen* [1959] 4 FSC 150; *Guobadia v State* [2004] 6 NWLR (Pt.869) 380.

[18] Section 137 of Evidence Act, Chapter 112, Laws of the Federation of Nigeria 2011.

[19] *Onyekwe v. State* (1988) 1 NWLR (pt. 72). p. 555 and Arisa v. State (1988) 3 NWLR (PT. 83) P. 388.

[20] *R v Yaro Biu* (1964) NNLR 45; *Adegbesan v. The State* [1986]1 NSCC. 457; *Richard Omoniyi v State* [1978]5 FCA.

The accused can discharge this legal burden of proof through sufficient evidence. In *Francis Ezediufu v the State*[21], the Justices stated that when an accused claims insanity as a defence, they must provide evidence to dispense the burden of proof.

6.2.1. THE REQUIRED EVIDENCE FOR THE ESTABLISHMENT OF THE INSANITY DEFENCE AT THE TIME OF THE CRIME

It is important to note that the time the accused committed the criminal act is crucial to establishing the defence of insanity. For example, in *Mohammed v State,*[22] the court stated that under Nigerian law[23], to establish a defence of insanity, the accused must prove that at the relevant time of committing the offence, he was insane. Therefore, the time of the offence is essential for an insanity defence.[24]

When he committed the offence, the accused must prove that he was insane within the conditions stipulated under section 28 of the Criminal Code Act and section 51 of the Penal Code, respectively. The accused must discharge this burden the law placed on him by evidence, and the mere mention of the defence is insufficient.[25]The relevant question is how the defendant can discharge the burden placed on him by law and the required evidence.

This thesis places a strong emphasis on evidence to prove the insanity defence. Neither the Criminal Code, Penal Codes, nor the Evidence Act provides the evidence required to prove the insanity defence. This situation leaves the courts in the two jurisdictions with the duty to decide the evidence required. Consequently, case law has provided the evidence that an accused needs to present for a successful insanity defence.

In *Usman Abubakar v The State,*[26] the judge stated that an accused person who raises the insanity defence has the onus of displacing the presumption by credible evidence. For a successful defence

[21] [2001]17 NWLR (Pt.741) 82.

[22] [1997]9 NWLR (Pt 520)169.

[23] The Penal code 1960.

[24] *Uluebeka v State* (1998) 12 NWLR pt. 579.

[25] *Anthony Ejinima v The State* [1991] 7 SC (Pt.III) 1; *Energy v The State* [1973] 6 SC 215 at 226; *Peter v State* [1997]12 NWLR (pt.531) 45; *Sanusi v The State* [1984] 10 SC 166 at 167 – 169.

[26] [2017] LPELR-43197(CA).

of insanity, there must be convincing and credible evidence, not just showing an accused was suffering from a mental disease, natural mental infirmity, psychosis, or insane delusions. It must also show that an accused's mental health at the appropriate time, deprived capacity: (i) to understand what he was doing, or (ii) to control his action, or (iii) to know that he ought not to do the act or make the omission.[27]

What convincing or credible evidence does the court require for an accused to prove the insanity defence in Nigeria? Judicial authorities amply provide the evidence courts have considered for proving the insanity defence.[28] The list of circumstantial evidence, as presented by case law in both the Northern and Southern areas, nonetheless, appears inexhaustible.

Notably, the Nigerian courts in the Northern and Southern regions consider circumstantial and medical evidence to establish an insanity defence. Judicial authorities such as *Egbe Nkanu v The State*[29], *Yusuf v State*[30] and *Effiong Udofia v The State*[31] contended that circumstantial evidence is essential for a successful insanity defence.[32] However, these case law showed that courts place more weight on circumstantial evidence than medical evidence.

For example, in *Edoho v State*[33], which originated from the Southern Region, the Supreme Court stated that the determination of the insanity defence is a question of facts for the trial judge to decide. The accused must present facts that indicate that they were incapable of understanding what they were doing or controlling their actions due to mental infirmity. Then, they would have discharged the legal burden of proof required. It is the responsibility of the judge to consider all the admissible evidence before it. They admit evidence of factual and surrounding circumstances and medical evidence if made available by the accused. One of the Supreme Court's Justices

[27] Ibid, Per Abiru, J.C.A. (Pp. 30-31, Paras. B-A).

[28] *Ngene Arum v. The State* (1979) 11 SC. 91; *Egbe v. Nkanu v. The State* (1980) 3 -4 SC. 1; *Effiong Udofia v. The State* (1984) 11-12 SC.49; *M. A. Sanusi v. The State* (1984) 10 SC.166; *Edoho v State* [2010] 14 NWLR (Pt. 1214) 651 *S.C.*

[29] [1980] 3 -4 SC. 1.

[30] [1988] All N.L.R. 341.

[31] [1984] 11-12 SC.49.

[32] Ibid.

[33] [2010] 14 NWLR (Pt. 1214) 651 S C.

(herein referred to as JSC) stated that evidence of ancestral insanity and blood relations are admissible, coupled with medical evidence. He emphasised that medical evidence is probative and not essential.[34] However, the defence of insanity failed for a lack of circumstantial and medical evidence. It was only the accused that testified for the defence. Moreover, evidence by the accused of his insanity is not sufficient proof and has low probative value.[35]

Circumstantial evidence in this context means evidence of the facts raising insanity. In *Onyekwe v. The State,*[36] the Supreme Court acknowledged that the issue of insanity is one of the concurrent findings of facts supported by evidence.[37] Moreover, it stated that when there is no evidence to support a finding, there may be a miscarriage of justice. It further projected facts required for establishing insanity under section 28 of the Criminal Code as follows:

i. Evidence as to the history of the accused.

ii. Evidence as to his conduct immediately preceding the killing of the deceased.

iii. Evidence from Prison Warders who had custody of the accused and looked after him during his trial.

iv. Evidence of Medical Officers and/or Psychiatrists who examined the accused.

v. Evidence of relatives about the general behaviour of the accused and the reputation he enjoyed for sanity or insanity in the neighbourhood.

vi. Evidence showing that insanity appears in the family history of the accused[38]

The Appeal court discharged the case for lack of sufficient evidence to support the facts of a mental disease/mental infirmity and upheld the conviction. Like in *Edoho v State,* the accused testified to his insanity without presenting other evidence. The appeal failed, and the Supreme Court affirmed

[34] Ibid 40.

[35] Ibid 41; *Idowu v State; Lasis v State*.

[36] [1988] 1 NWLR (part 72) 565, 579.

[37] *Ibodo v Enarofia* (1980) 6-7 SC 42.

[38] Ibid 579.

his sentence. Therefore, if the defendant introduces evidence of any of the facts listed, it guarantees a successful insanity defence.

Similarly, in the Northern Region in *Sanusi v The State,*[39] His Lordship Anagiolu JSC stated the required evidence for proving the insanity defence held that:

> positive act of the accused person, before and after the deed complained of ; evidence by a doctor who examined and watched the accused over a period of time as to his mental State; evidence of relatives who know the accused person intimately relating to his behaviour and change which had come upon him; the medical history of the family which could indicate hereditary mental affliction or abnormality, and such other facts and circumstance which will help the trial judge come to the conclusion that the burden of insanity placed on the accused, has been discharged.[40]

The court above in *Sanusi* and *Edoho* noted circumstances not mentioned by Oputa JSC in the *Onyejekwe* ruling.[41] He mentioned that the court considers the testimony of the prison warders, who had custody of the accused during his trial, and the neighbour's testimony.[42] However, the accused provided the judge with insanity evidence that was six years old. The insanity defence failed because there was no evidence that he was insane at the time of the crime.

However, this thesis observed that the factual evidence required by courts seems inexhaustible and unique in every case. The frequently mentioned factors included:

(a) the nature of the killing

(b) the conduct of the accused person before, at and after the killing

(c) any history of mental abnormality of the accused; and

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[39] (1984) 10 SC 166 at 177-178.

[40] Ibid 178.

[41] *Onyejekwe v. The State (*1988) 1 NWLR (pt.72) 565 at 579.

[42] *Edoho v. The State* (2010) 4 SCNJ 100; see also; *Karimu v. The state* (1989) 1 NWLR (pt.96) 124; *Ogbu v. The State* (1992) 10 SCNJ 88 at 99.

(d) evidence of insanity in the accused ancestors or blood relations.[43]

(e) Medical evidence.

The required factual evidence overlapped in the case law, raising insanity but with some differences. This study observed this overlap where the courts mentioned similar evidential requirements using exact or different words.[44] Furthermore, the elements on the list are superfluous since the law can join related facts for absolute certainty.

The disparities in the facts and circumstances show that each case is unique and that the surrounding facts are always different and inconclusive. However, this study criticises these factual evidence requirements for lack of certainty and precision. Hence, it advocates consistency in the factual evidential requirement to prove the insanity defence in Nigeria. To create this consistency, courts can place more weight on medical evidence. This thesis states that courts should place more weight on medical evidence than circumstantial evidence. It advocates that medical evidence should be compulsory for proving fitness to plead.

Also, an accused can prove the insanity defence using the prosecution's evidence. There is no law against an accused using evidence made available by the prosecution to prove his defence of insanity. In *Makosa v State,*[45] the accused testified he was insane when he killed the victim. The court convicted the accused, and the Supreme Court dismissed his appeal. The Justice of the Supreme Court (herein referred to as JSC), while giving his reason for dismissing the appeal, alluded to the prosecution's witnesses mentioning that the accused was acting abnormally before the crime.

The second prosecution witness was the accused brother. He testified that the accused had behaved abnormally for five years before the crime. He gave three reasons for saying this. First that the accused tried to burn his family (himself, his wife and two children) while they were asleep. Second, he beat a ram to death for no cause. Last, for no cause, he also beat an ewe to death. He also stated that he knew the accused got treatment for mental illness but that he usually relapsed.

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[43] *Loke V. The State* [1985] 1 S.C.1 [I985] 1 NWLR (Pt) 1 S.C; *Egbe Nkanu v. The State* [1980] 3/4 S.C.; *Udofia V. The State* [1981] 11-12 S.C. 49.

[44] Like "evidence of the accused history" and any "history of mental abnormality of the accused".

[45] (1969)1 All NLR.

The third prosecution witness had known the accused for thirty years and stated that he was troubled the past five years before the crime. He reiterated the incident where the accused tried to murder himself and the family by burning down the room.

The JSC in *Makosa v the State* confirmed that the testimonies of the two prosecution witnesses suggested the accused had a mental disorder. In the High Court, the prosecution did not pursue this element of the inquiry as not his duty to prove the insanity defence. Although section 140(3)c of the Evidence Law places the burden of proving insanity on the accused, this does not necessarily mean that the accused must call evidence. It is common for the accused to elicit sufficient evidence from witnesses in the prosecution's case to discharge this burden.[46]

In addition, the JSC stated that in most cases, an accused is not competent to testify about his insanity. When he testifies to his insanity, it carries low probative value.[47] This case law established that the accused do not need to call a witness or testify to his insanity if he can extract from the prosecution's witness. Such evidence suffices to discharge the onus on him to prove the insanity defence.[48] Also, in *Christopher Akhimien v. The State*[49], the JSC said the accused might use the defence and prosecution's evidence to discharge this onus on him.[50]

On the other hand, the court showed the importance of the accused testifying in an insanity defence case in *Kazeem Popoola v. State*[51]. The accused confessed to committing the alleged offence without a plea of insanity. He did not testify at the trial. Both his father and a pastor attested to his insanity during his trial. However, the judge claimed that neither the father nor the pastor had training as a psychiatrist, nor were they qualified to vouch for mental soundness. The court decided that the accused had not raised the insanity defence and did not give evidence. However, the father and pastor's evidence did not establish the insanity defence on the balance of probabilities.[52] The court decided they were insufficient to establish his insanity, according to section 28 of the CCA.

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[46] *Makosa v State* (1969)1 All NLR.

[47] Ibid; COKER, J S C.

[48] Ibid.

[49] (1987) J E L R 42688 (SC).

[50] *Queen v Yaro Biu* (1964) N M L R 45; M. *Onakpoya v The Queen* (1959) 4 F S C 150.

[51] [2013] vol. 222 LRCN (Pt. 2) 8.

[52] Mahmud Mohammed, J.S.C (P. 30, Paras. F-G).

Hence, the accused failed to prove the alleged insanity. This decision raises more questions concerning the circumstantial evidence listed above.

The testimony of the father and brother was evidence of relatives of the accused's general behaviour and reputation for sanity or insanity in the community.[53] However, the court rejected the evidence as not credible. The examination of *Kazeem* demonstrated the inconsistency and uncertainty of evidence and the need for the law to clarify issues surrounding the appropriate level and form of circumstantial evidence.

Even in older case law, determining the insanity defence through circumstantial evidence is not without flaws. For instance, in *Locke v The State*[54], the circumstantial evidence before the trial court pointed out that the accused was insane, but the defence failed. The evidence before and after the incident suggested the accused was insane. Based on the testimony of the accused's relatives, the accused had returned to the village after leaving Lagos in a chain as an insane person. He was always shouting and going around naked. The deceased was riding a bicycle when the accused cut his head off, calling people to come and see a headless body. After the incident, he went home with the head of the deceased. Despite the evidence before the court, the trial judge declared that there was no indication that the defendant had any mental disorder on the day and time he severed the deceased's head.[55] The supreme court held that the trial judge misdirected himself on the evidence and allowed the appeal, upholding the insanity defence. The trial judge misdirected himself on the circumstantial evidence.

Also, in *Christopher Akhimien v. The State*[56], circumstantial evidence was evaluated. Here, the claim of the first defence witness that certain members of the accused's father's family had a history of mental disorders was inconsistent with the testimony of the accused and the first, fifth, and sixth Prosecution witnesses. The judge concluded that the first defence witness lied when she claimed several members of the accused's father's family have a history of mental illness. He

[53] Refer *Onyekwe v. The State* (n 36) (for the south) and *Sanusi v state* (n39) (for North).

[54] [1985] 1 N W L R 1.

[55] Ibid 1.

[56] Ibid (n 50).

trusted the first, fifth, and sixth prosecution witnesses, who stated that the defendant was sane and that none of his relatives had a history of mental illness.[57]

Most of the reported cases reviewed were unsuccessful, primarily because of a lack of or insufficient evidence. Even though the courts present factual evidence, case law shows that lawyers cannot prove an insanity defence. This situation could result from the lawyers or law officers not knowing the required evidence or how to present them or, with using the prosecution's evidence, not being certain about it. Moreover, it is not the court's duty to scout for evidence to establish a defence of insanity sought to be relied on by the accused.[58]

The courts require factual evidence as listed by courts to help determine the presence of mental diseases, mental infirmity and unsoundness of the mind. The case law reviewed does not suggest that proving the insanity defence has been effortless using factual evidence. However, medical evidence could solve this problem of evidence, considering that the best way to know if a person is mentally disordered is through a medical diagnosis. The other factual evidence can rely on expert evidence and not the other way around.

The case law confirms the importance of medical evidence among the evidence that helps the accused establish his insanity. How much weight did the Nigerian court attach to the medical evidence? The following section will review the position of expert evidence in Nigeria.

6.2.2. EXPERT EVIDENCE

The mention of insanity anywhere takes everyone's mind to a mental disorder. The insanity defence is not the same as medical insanity. When an accused raises the insanity defence, it becomes a matter of fact for the judge to decide through evidence.[59] Insanity raised as a legal defence removes it from the medical profession and leaves it to the judges/court to decide.

[57] Ibid Belgore, J S C.

[58] *Kazeem Popoola v. State* [2013] LPELR-20973(SC), P. 30, Paras. E-F; *Sanusi v. state* (1984) 10 SC 166 at 176." Per NGWUTA, J.S.C. (P. 30 Paras. E-F).

[59] Ogunwale Adegboyega, Oluwaranti O, 'Pattern of utilization of the insanity plea in Nigeria: An empirical analysis of reported cases' (2020) Forensic Science International: Mind and Law Volume 1.

However, by law, the accused have the burden to prove the facts of the insanity with evidence.[60] Among the vital evidence needed to prove the insanity defence is the evidence of a medical expert.

In most trials involving an insanity defence, the court summons the medical expert who observed the accused assessing his state of mind when he committed the crime to give evidence. It is a general rule of evidence that when a witness appears in court, the court only obliges the person to give facts known to him, not his opinion or beliefs.[61] In some circumstances, where the court lacks the necessary knowledge, the law permits her to seek the expertise of persons with the required skill and experience on the subject matter.[62] The expert opinion obtained becomes admissible and relevant.[63]What constitutes an expert witness is the evidence of a professional based on his specialised field of knowledge. For the insanity defence, the evidence of a psychologist, doctor, or medical practitioner based on his specialised field of scientific knowledge is expert evidence.

In Nigeria, there is no legal necessity to establish the defence of insanity at the time of the offence using expert evidence. Aguda and Okonkwo explained that the insanity defence is a matter of fact for the jury to decide and not one to be determined by expert opinion.[64] This assertion still supports the position in Nigerian case law that courts are not bound to accept and act on expert evidence in determining insanity as a legal defence. No matter how prominent a medical practitioner is, in psychiatry, despite the opinion given, courts in Nigeria decide on the question of insanity based on observation of the accused and the available circumstantial evidence presented before them.[65]

Case law has also portrayed the importance of medical evidence in establishing an insanity defence. They suggested that courts should place more weight on the evidence of a medical expert in an insanity claim. In *R v Madugba,*[66] the judge admitted that courts should place more value on

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[60] *Anthony Ejinima v The State* [1991] 7 SC (Pt.III) 1; *Energy v The State* [1973] 6 SC 215 at 226*; Peter v State* [1997]12 NWLR (pt.531) 45; *Sanusi v The State* [1984] 10 SC 166 at 167 – 169.

[61] The Evidence Act 2011 s 67.

[62] The Evidence Act 2011 s 68.

[63] Evidence Act of 2011 s 68.

[64] Aguda, '*Mental Abnormality' in Principles of Criminal Liability in Nigerian Law* (Ibadan, I965); C O Okonkwo, *Okonkwo and Nash; Criminal Law in Nigeria* (Sweet & Maxwell 1980) 140.

[65] Ani v. State (2002) 10 NWLR (Pt.776)644, p.7

[66] [1959] 3 FSC 1.

medical opinion.[67] *In R v. Ogor*[68], the accused presented a credible medical report during the trial, which the court omitted to consider for no reason. The Supreme Court decided that the doctor's evidence was crucial to the case. The trial court should have considered it, and the Supreme Court ordered a retrial.[69] Furthermore, in the case of *Guobadia v. The State*[70], the evidence of Dr Malomo[71]established that the accused person had no mental disease. The trial judge and justices of the Supreme Court put a high probative value on it.

The doctor stated:

> "On examination the only complaint since he came into prison over a year ago has been occasional dizziness. His orientation as to time, place and person is intact. His flow of speech is normal and rational. Emotional reaction to his present predicament is as expected as it is characterised by regret and poorly coordinated lies. There is nothing to suggest presence of insane delusion or any other type of abnormal experience. He is fully aware of the nature and gravity of the alleged offence"

This expert opinion supported the circumstantial evidence before the court. However, it was the primary evidence, and the other facts became relevant. In *Usman v State*[72], the justice of the appeal court stated that the accused could establish the insanity defence through compelling medical evidence.[73]

The above case law favoured expert evidence and showed that medical evidence usually assists in establishing insanity in Nigerian courts. However, judges may make up their minds on the insanity defence without expert evidence in several case law.

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[67] *R. v. Ogor* (1961) 1 SCNLR 121; (1961) 1 All NLR 70, *Mboho v. The State* (1966) 1 All NLR 69, *Benson Madugba v. Queen* (1958) SCNLR 17, (1958) 3 FSC 1, *Oden Ikpi v. The State* (1976) 12 S.C. 71 etc." Per Iguh, J.S.C (P. 18, paras. C-F).

[68] [1961] 1 SCNLR 121.

[69]*See also Oladele* (n 165).

[70] [2004] (SC 295/2002).

[71] Prosecution witness 5 (pw5).

[72] (2018) LPELR-46568(CA).

[73] Ibid p 21.

For example, in *State v Kalib*,[74] the appeal court judge acknowledged that medical evidence is unnecessary to prove the insanity defence. The judge could determine an accused's mental state through his acts before and after the incident.[75] He further stated that medical evidence becomes necessary only when circumstantial evidence fails.[76] Similarly, in *State v Joshua Agboola*,[77] medical evidence showed that the accused was of sound mind, but other evidence in court suggested that the accused was insane. Hence, the court dismissed the medical evidence and decided the accused was insane[78].

In *Idris v State*[79] , the Justice of the Court of Appeal stated:

> Courts have been guided by the law that in establishing the defence of insanity, medical evidence is, of course, desirable but it is not essential. Indeed, insanity is primarily a question of fact to be determined by the trial judge and not by medical men, no matter how eminent they might be.

Similarly, in *Mohd V. Kano State*[80], the court determined that although medical evidence usually is of considerable value in establishing insanity, a judge may decide the question regardless of such expert testimony by considering the whole information presented to the court.

These case law support the proposition that the evidence of a medical practitioner, no matter how eminent, cannot stand alone to determine the defence of insanity. It further establishes the importance of considering other evidence before the court. Therefore, courts considered the totality of all the evidence tendered before them, not medical evidence only.[81] The courts make medical evidence secondary and evidence of other facts primary. This study argues that the reverse should be the case. As the JSC stated in *Ejinima v State*[82], medical evidence is the surest way to establish

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[74] [2021] LPELR 56084 (CA).

[75] Ibid 27.

[76] Ibid 28.

[77] (1954) WACA.

[78] Ibid .

[79] (2021) LPELR-54581(CA).

[80] (2013) LPELR-22365(CA).

[81] *R v Madugba* (1958) 3 FSC 1*; R. v. Ogor* (1961) 1 All NLR 70.

[82] (1991) 7SCNJ.

a person's mental disease, infirmity, or unsoundness of mind. It is outrageous to decide that a person is insane without a diagnosis. Jurisdictions like England and Scotland place greater weight on expert evidence than Nigeria.

On the other hand, this research highlighted other factors impacting the use of expert evidence in courts or the weight placed on it. It raises questions about the veracity of medical evidence in Nigerian courts and the dearth of medical specialists. Okonkwo also claimed that courts are reluctant to accept the opinions of psychiatrists in Nigeria on their merits because of corrupt practices and unqualified practices.[83] According to a study, Nigeria's economy, including the health sector, is plagued by corruption.[84] The health sector is corrupt, and the demand for medical reports has created a booming market for corrupt medical professionals in hospitals and laboratories across Nigeria. In collaboration with corrupt medical practitioners, hospitals issue certificates to people indiscriminately once the right amount of money exchanges hands.[85] According to Transparency International, poor working conditions and weak systems undermine competence and integrity in the health sector.[86] Writers have joined the heightened fight against corruption among health providers in Nigeria, and they are all looking for ways to curb health

[83] Okonkwo (n 5)138.

[84] Corruption in the Nigerian health sector has many faces. How to fix it (2018) <https://theconversation.com/corruption-in-the-nigerian-health-sector-has-many-faces-how-to-fix-it-99043> Accessed 20 June 2022.

[85]Oladeinde Olawoyin, Investigation: Inside Nigeria's haven of fake medical reports, corrupt health officials https://www.premiumtimesng.com/news/headlines/339360-investigation-inside-nigerias-haven-of-fake-medical-reports-corrupt-health-officials.html>Accessed 21 June 2022.

[86] Corruption perception index <https://www.transparency.org/en/news/corruption-perceptions-index-2017> accessed 20 June 2022; Various institutions just like the court in Nigeria demand medical certificates for sundry reasons. The certificates are sometimes required to obtain health benefits, to describe medical conditions, to make an insurance claim, for tax purposes, or for some legal procedures.

example: Some job providers demand medical reports before employment, to certify that someone is free of contagious diseases, drug addiction, mental illness, or other health complications.

sector corruption and improve health outcomes.[87] Moreover, the shortage of suitably qualified and experienced medical practitioners could otherwise cause preventable trial delays.[88]

These factors add to the public belief about insanity, contrary to western psychiatry's general tenets.[89] Further, as a part of the issues of the defence of insanity, this thesis argues that people's supernatural and cultural beliefs affect how much faith they place in the mental health system.[90] This faith, in turn, affects the insanity defence. In the next chapter, we will examine this position in greater detail on how poor public perception of mental health could affect the insanity defence.

An expert witness must clear their client's position and help the court or tribunal with the information about the special or technical area necessary for courts to reach a just decision.[91] Therefore, although his evidence is relevant, he does not function as a judge or decider. Although medical evidence is usually of great assistance in establishing insanity in Nigeria, a judge may decide on the issue despite such expert evidence, considering the totality of all the evidence tendered before the court.[92] In addition, the specialist's qualification or experience level is irrelevant, as an opinion does not bind the court, and the court must not rely on it to establish insanity.

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[87] Pallavi Roy (SOAS University of London), Obinna Onwujekwe (University of Nigeria Nsukka), Dina Balabanova and Eleanor Hutchinson (LSHTM), Prince Agwu, Aloysius Odii, Pamela Ogbozor and Charles Orjiakor (University of Nigeria Nsukka), Combatting corruption in health providers in Nigeria What could work to curb health sector corruption and improve health outcomes?<https://ace.soas.ac.uk/wp-content/uploads/2017/09/ACE-NI-Health-2pp-A4-Leaflet-Jun19-Proof02.pdf> accessed 16 May 2022.

[88] Leigh Bienen, 'The Determination of Criminal Insanity in Western Nigeria' (1976) The Journal of Modern African Studies 6.

[89] Lambo, 'The Role of Cultural Factors in Paranoid Psychosis among the Yoruba Tribe' (1955) The Journal of Mental Sciences; Mohammed Kabir, Zubair Iliyasu, Isa S Abubakar, Muktar H Aliyu, 'Perception and beliefs about mental illness among adults in Karfi village, northern Nigeria'(2004) BMC International Health and Human Rights.

[90] Ibid; cases of witchcrafts and Juju; Temitope Labinjo Laura, Serrant Russell Ashmore Russell Ashmore James B Turner James, B Turner, 'Perceptions, attitudes and cultural understandings of mental health in Nigeria: a scoping review of published literature' (2020) Mental Health Religion & Culture 23.

[91] Ibrahim Imam, *The Nigerian Law of Evidence, (*Malthouse Law Books 2017).

[92] *Ani v. State* (2002) 10 NWLR (Pt.776) 644.

This thesis criticises this Nigerian position because the description, interpretation, and diagnosis of a state of mind which prevents a person from knowing or controlling his actions must be the concern of medical experts. In these matters, the psychiatrist, the criminologist, and other mental health professionals are specifically concerned with studying the human mind. Therefore, their duty should be to assist the court in deciding the insanity defence.

While the CCA, PCA and Evidence Act (2011) does not make the expert testimony the outcome-determining factor as the court would in England and Scotland, case law recognises the expert's opinion as one factor the court should consider. In this legal position, the courts obtain and consider an expert medical opinion as a matter of convenience rather than compulsion. They regard expert evidence as a secondary and non-determinative consideration.

According to this research, the Nigerian stance disregards the importance of medical evidence for the first prong of the insanity defence test. This first limb refers to the existence of the 'diseases of the mind,' 'natural infirmities of the mind,' or 'unsoundness of mind'. The law should make expert evidence compulsory to consider these factors in the first limb. A lawyer or judge can readily identify the loss of capacity or control, which would be a factual issue. However, it would not be ideal to think that they could reliably determine the presence of a disease of the mind or natural mental infirmity. These conditions or terms imply diagnosable mental illness and are a point of science upon which courts should seek expert opinion.

Despite suggesting that seeking such an opinion would benefit the court, it is still trite to concede that the ultimate determination of criminal responsibility remains in the hands of the court once the expert concludes that a mental disorder exists or does not exist. The courts ought to put much weight on the evidence of medical experts.

6.3. PROOF OF THE INSANITY DEFENCE IN ENGLAND

This section on England will highlight differences between the Nigerian and English positions on proving an insanity defence while emphasising certain similarities.

First, in England, unlike the position in Nigeria, the accused, the prosecution, and the court[93] can raise the insanity defence.

Secondly, there is a presumption of sanity for everyone before the court.[94] *M'Naghten's* Rules state that "every man is presumed to be sane and possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction".[95] In M'Naghten Rules, the defence has the burden of proving the case on a balance of probabilities. This position is the same in Nigeria and Scotland, as shown in the next section.

Following this rule, in *Woolmington v. Director of Public Prosecution,*[96] the judge decided the accused enjoyed the presumption of innocence. The burden of proof regarding all general defences rested upon the accused.[97] This case law established that whenever an accused raises a defence, he is responsible for proving it.[98] This position does not take away the responsibility placed on the prosecution to establish guilt beyond a reasonable doubt.

Insanity raised as a defence is one defence under the common law, where the court holds that the burden of proof completely shifts from the prosecution to the defence.[99] However, the evidential burden of establishing the defence of insanity in a criminal trial is the same in England and Nigeria.[100] Hence, the defendant discharges this burden of proof via evidence and on a balance of probabilities.

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[93] R v *Dickie* [1984] 79 Cr App R 213*; R v Sharon Andrina Thomas* [1995] Crim LR 314.

[94] *R v. Kemp* (1957) 1 QB 399.

[95] *M'Naughten* (1843) 10 C l & Fin 200, 204; 8 E R 718.

[96] [1935] AC 462.

[97] *Jayasena v. The Queen* [1971] AC 618, 623 per Lord Diplock.

[98] *Horseferry Road Magistrates' Court Ex p. K [*1997] Q.B. 23; [1996] 2 Cr. App. R. 5740.

[99] *Hill v. Baxter* [1958] 1 Q.B. 277 at p. 285 *per* Devlin J.

[100] *R v Smith (Oliver)* 6 Cr App R 19; *R v Carr-Briant* [1943] KB 607; *Sodeman v The King* [1936] ALR 156).

6.3.1. EVIDENCE REQUIRED BY THE ENGLISH COURTS

In *R. v. Stokes*[101], the court decided that if an accused wants to vindicate himself by relying on the plea of insanity, he should establish that he was insane at the time of the offence charged. The accused needs to adduce evidence to prove insanity.

During the Common law period, courts permitted expert testimony in insanity cases on a discretionary basis; in the modern age, it is a matter of legislative requirement.[102] The Butler Committee recommended that courts obtain expert testimony before deciding on an insanity defence. [103] The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 stipulates that before an accused successfully establishes insanity, the court would need expert medical testimony from two or more qualified practitioners.[104] This mandatory evidential condition of medical evidence for evaluating the insanity defence is a significant departure from the stance in Nigeria. On the other hand, medical evidence is admissible in Nigeria; nevertheless, the judge has discretion over how much weight to give it. The judge may choose not to consider it.

Writers have argued that including the medical expert criterion is necessary and plausible.[105] For example, Finnell argued that requiring expert testimony would provide uniformity to criminal law.[106] Jones further noted that this measure of having two or more pieces of medical evidence would alleviate court concerns regarding the unreliability and corruption of medical experts.[107]

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[101] (1848) 3 CK 183.

[102] Expert (psychiatric) evidence is a legal requirement under the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 for determining insanity or unfitness to plead. The case of *Turner* established a precedent for courts to reject expert testimony that dealt with 'common knowledge and experience' that a jury could comprehend without the assistance of an expert.

[103] Report of the Committee on Mentally Abnormal Offenders Cmnd 6244(1975) para 18.37.

[104] The Criminal Procedure (Insanity and Unfitness to Plead) s 5.

[105] Arlie Loughnan, 'Manifest Madness: Towards a New Understanding of Insanity Defence' (2007) 70(3) MLR 379-401 at 394.

[106] Phil Finnell, 'the Criminal Procedure (insanity and Unfitness to plead) Act 1991' (1992) 55 MLR 547.

[107] T H Jones, 'insanity, Automatism and the Burden of proof on the accused' (1995)111 LQR 475, 510.

Additionally, this clause complied with the European Convention on Human Rights. [108] Other academic writers concur that medical proof is essential to an insanity defence's viability. [109]

The Court of Appeal canvassed this position on expert evidence in *Seun Oye v Crown*[110], where it considered the written evidence of Dr Adegoke and Dr Walsh. The jury in the lower disregarded the medical evidence before them and found the accused guilty. However, based on both written evidence, the appeal court returned a verdict of not guilty by reason of insanity. Therefore, contemporary English case law on the insanity defence requires expert evidence based on the legislation.[111]

Additionally, unlike in Nigeria, which weighs medical evidence lower than other circumstantial evidence, case law indicates that courts utilise expert evidence to validate circumstantial evidence in England. For example, the case of *Regina v Jonathan Robert Keal*[112] demonstrated that English courts weigh circumstantial evidence based on expert testimony. The four psychiatrists testified based on the facts of the case, as required by the M'Naghten Rule. The expert evidence, in this case, validated the circumstantial evidence related to the facts presented. Therefore, to the extent that circumstantial evidence is beneficial, it should be consistent with and verified by medical/expert evidence according to the proof standards.[113]

This section emphasises the importance of expert evidence and how courts can use it to accommodate other circumstantial evidence without contradictions. Consequently, it is unethical to label a person insane without performing a medical evaluation and obtaining corroboration of the diagnosis.

[108] E Baker, 'Human Rights, M'Naughten and the 1991 Act' (1994) Crim LR 84.

[109] Ronnie D Mackay, B J Mitchell, Leonie Howe, Yet More Facts About the Insanity Defence (2006) Crim LR 399; R D Mackay and Gerry Kearns, More Fact(s) About the Insanity Defence (1999) Crim LR 714, 721.

[110] [2013] EWCA Crim 1725.

[111] *R v MAB* [2013] EWCA Crim 3; *R v Coley* (Scott) [2013] EWCA Crim 223, *R v Oye (Seun)* [2013] EWAC Crim 1725; *Regina v Jonathan Robert Keal* [2022] EWCA Crim 341.

[112] [2022] EWCA Crim 341.

[113] *Traylor v Kent and Medway NHS Social Care Partnership Trust Queen's Bench Division* [2022] EWHC 260 (QB).

6.4. THE SCOTTISH PROOF OF THE INSANITY DEFENCE

The Scottish Law Commission[114] reported that the accused should carry the onus of proving the insanity defence, which the Scottish Parliament, in enacting the Criminal Justice and Licensing (Scotland) Act 2010, adopted in section 168. In Section 168 on Criminal responsibility of persons with mental disorders:

> 51A (4) The special defence may be stated only by the person charged with the offence, and it is for that person to establish it on the balance of probabilities.

Under the common law, the accused, the crown/and the court could raise an insanity defence,[115] but based on section 51A (4), only the accused can raise the mental disorder defence. This Scottish stand is similar to that of Nigeria. This position only leaves the choice of the mental disorder defence to the accused; therefore, he can choose not to plead insanity when *mens rea* is lacking and receive an unqualified acquittal.[116]

This research asserts that this change was a significant but not wholly welcomed change to the defence. If the accused does not wish to raise the issue of mental disorder as a defence, then no one else could. This position does not benefit the public, who rely on the court to protect them in such circumstances. Chalmers shared the same view when he stated that insanity is a peculiar defence because it empowers the court to use coercive measures to protect the public when successfully pleaded. This position may be an apparent reason why the prosecution raises the defence. [117] He examined the proposed s.51A(4) and argued that this provision is "misconceived and potentially dangerous". He stated that the misconception stemmed from the Scottish Law Commission's assertion that forcing a defence on an unwilling defendant is wrong. He believed they placed form over substance by ignoring that the accused had made his sanity a significant

[114] Report on Insanity and Diminished Responsibility (No.195) (2004).

[115] *HM Advocate v Harrison* (1968) 32 JCL 119.

[116] James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of* Trial (W Green 2006) Ch 7 para7.05; *R v Cottle* [1958] NZLR 999.

[117] James Chalmers, 'Section 117 of the Criminal Justice and Licensing (Scotland) Bill: a dangerous loophole? '(2009) SCL 1240-1242.

issue during his trial. However, he had not filed an official defence of insanity. Also, this position meant the prosecution had no basis to force an accused to a defence.

This study entirely agrees with Chalmer's argument on this position. Although the law only permits the accused to provide a defence, it should permit all parties, when public safety is at stake, to raise the insanity defence. Furthermore, where the evidence before the court is sufficient to suggest the accused committed the crime, the next question is if there is a special defence. If the accused raise the special defence of insanity, it becomes the accused's duty to establish this on a balance of probability.[118]

The Scottish criminal legislation does not address the nature of evidence required to establish an insanity defence. It does not specify the evidence an accused must present to discharge the onus the law has placed on him. Historical writings and case law have relied most on expert evidence from this research.[119] All the court focused on in *Mackay* was the expert evidence before it. The psychiatrists concurred that the appellant had acknowledged the nature of his behaviour. However, they differed on whether the appellant understood his actions were wrong.

This case law provided practitioners with guidance on how to prove the mental disorder defence. It shows that courts use medical evidence to prove the presence of mental disorder and how it affects understanding. So how does the court deal with the expert evidence? Moreover, does expert evidence determine the insanity defence?

6.4.1. EXPERT EVIDENCE

The use of expert evidence in Scotland dates to the eighteenth century when the role of medicine in identifying insanity in criminal trials increased.[120] Houston suggested that the desire of legal practitioners for certainty and objectivity increased expert evidence for proof of the insanity

[118] Criminal procedure (Scotland) Act 1995 51 (A) (4*); Ronnie D Mackay, B J Mitchell, Leonie Howe, Yet More Facts About the Insanity Defence* (n 110) 54.

[119] *Graham (Wendy) v HM Advocate* [2018] WL 04698504; MacKay *(Scott Henry) v HM Advocate* [2017] HCJAC 44; 2017 J.C. 311; [2017] 6 WLUK 385 (HCJ Appeal).

[120] R A Houston, 'Professions, and the Identification of Mental Incapacity in the eighteenth Century Scotland' (2002) 14 Journal of Historical Sociology 441-44; .

defence.[121] However, this practice has lasted until the modern day. Therefore, in practice, the court expects an accused to provide expert medical testimony to prove his mental state at the time of the offence.[122]

In *Scott Henry Sneddon Mackay v Her Majesty's Advocate*[123], the importance and application of expert evidence were well-reflected. It was undisputed that the appellant had a mental condition, but the parties contested its severity. The two crown psychiatrists reported that the accused had post-traumatic stress and delusional disorders. On the other hand, the defence called a psychiatrist who testified and agreed to the Crown's expert witness report, adding that the appellant was psychotic. The expert witnesses linked their testimony to the Scottish mental disorder test. Following that, the psychiatrists agreed on the presence of a mental disorder. Also, they agreed that the appellant had appreciated the nature of his conduct.

Notably, the parties contended whether the accused knew his conduct was wrong. On the one hand, the Crown's psychiatrist witnesses believed he knew his conduct was wrong. The Crown's witnesses, to prove that he knew his conduct was wrong, related to the facts of the case (circumstantial evidence). They referred to his action before and after the incident and the police call. Nevertheless, the defence psychiatrist considered that he could not determine that his conduct was wrong. Therefore, the court decided to relate the medical evidence to the facts of the case to prove the insanity defence test.

Also, in *Rodgers (Nicholas) v HM Advocate,* the court decided the case based on psychiatric evidence from both parties. The evidence showed the presence of mental disorders and drugs and alcohol. The jury decided that voluntary alcohol and drugs caused the conduct considering the evidence before it.

However, the case law also suggests that expert evidence helps the court decide the insanity defence, although the law did not make it mandatory. On the other hand, the Criminal Justice and Licensing (Scotland) Act 2010 does not mention the necessity of expert evidence to establish insanity at the time of the offence. Similarly to Nigerian case law, Scottish case law does not make

[121] Ibid.

[122] *Nicholas Rodgers v Her Majesty's Advocate* [2019] HCJAC 27.

[123] [2017] HCJAC 44.

expert evidence mandatory. However, Scottish case law attaches more weight to expert evidence than Nigeria. Furthermore, the Scottish case law implies that expert evidence is primary, while circumstantial evidence is secondary. On the contrary, Nigerian case law implies that circumstantial evidence is primary and medical evidence is secondary.

This Scottish review showed limited case law on the insanity defence after the new law in 2012. It is difficult to imagine a situation in Scotland where a defence could be mounted, let alone succeed, without any medical evidence about the accused's mental state. The point here is that, since the advent of modern psychiatry, the Scottish legal tradition has relied on medical evidence to help determine whether the accused's mental state serves as a defence or prevents them from having a fair trial.

This section has shown that Nigeria would benefit from increasing the weight of expert testimony or making it mandatory. This position also underscores the need to reform the mental health system. The interaction between the mental health and criminal justice systems on mental disorders is essential to society. As a result, any improvement in the mental health system will benefit the criminal justice system. Hence, chapter seven will review the Nigerian mental health system and mental health legislation to demonstrate their impact on the success of the insanity defence.

6.5. DISPOSAL OPTIONS FOR A SUCCESSFUL INSANITY DEFENCE

What happens to those who plead insanity as a defence is a topic that should receive a significant amount of attention in criminal law jurisdiction. What happens to them is as important as proving the insanity defence. The insanity defence ultimately hinges on the outcome. What would be the result of a successful insanity defence?

“Disposal options” refers to a range of options available to the court when the accused person succeeds in proving insanity as a defence. The accused has disposal options in “insanity as a bar to trial” and as a defence during the trial.

This section argues that Nigeria’s disposal option for a successful insanity plea is narrow and discriminatory. Hence not favourable or encouraging for an insane accused. Having a single disposal option that equates to a life sentence in an asylum facility might pose considerable

difficulties for the defence of insanity. Most accused persons would prefer to plead other defences rather than insanity in exchange for a continuous period of confinement in a facility.

According to this section, English and Scottish courts have developed broad and liberal disposal options on the insanity defence, unlike in Nigeria.

Hence, Nigerian courts should expand their disposal options to include hospitalisation, guardianship, treatment and supervision, and discharge as alternatives to incarceration in an asylum.

6.5.1. NIGERIA

When an accused raises the insanity defence, the court (judge) decides if the accused has proved the defence. When the accused successfully proved the insanity defence in a Nigerian court, the judge has two steps to take.

First, the law requires the court to determine if the accused committed the crime or not. The Criminal Procedure Act 2004 in Section 229 provides the procedure for courts to follow for a verdict of the insanity defence, and it states as follows:

> Whenever any person is acquitted by virtue of the said section 28… of the Criminal Code, the verdict of the court before which the trial has been held or, in the case of a trial with a jury, of the jury, shall state specifically whether he committed the act alleged or not.[124]

Therefore, this law mandates the court to state if the accused committed the act or made the omission. There is no provision to show the procedure for a court to arrive at this conclusion. Section 28 is on insanity defence at the time of the crime. Acquitting an accused based on section 28 means he committed the act or made the omission but was under a mental disorder. This thesis argues that it does not know the purpose of this provision. It criticises this provision as superfluous. Also, Nigeria does not operate a jury system and has never operated one. This provision is another evidence of transplanting rules without considering the host legal system. The lawmakers could

[124] Criminal Procedure Act 2004, s 229.

make this section prompt and discard the provision for a jury. England and Scotland operate a jury system.

Furthermore, when the court declares an accused 'not guilty by reason of insanity, the CPC in section 230 states that:

1. Whenever the finding states that the accused person committed the act alleged, the court before which the trial has been held shall, if such act would but for incapacity found to have constituted an offence, order such a person to be kept in safe place and manner as the court thinks fit and shall report the case for the order of the Governor.
2. The Governor may order such a person to be confined in a Lunatic Asylum, prison, or a suitable place of safe custody during the pleasure of the Governor.

This provision is similar to section 225 (2) (3) of the CPA, which also, on the Governor's order, places the accused in an asylum or suitable place of custody until the Governor's pleasure. In addition, if the court determines that the defendant is insane and incompetent to stand trial, and the charge is bailable, the court may decide to release the defendant on sufficient security that an authorised person will take care of him and keep him from harming himself or others.[125] He should also be able to appear in court when required.[126]

The most important thing about the insanity defence, both for the individual and society, is not whether to blame the accused for their actions but a way to exempt them from punishment in theory and practice. One of the essential things to consider is the outcome of an insanity defence which includes the form and length of the court's order. This stance drives this study to consider the disposal option available in Nigeria. This thesis criticises the Nigerian disposal option as inadequate and does not efficiently serve the accused.

First, it adopts the argument of academic writers criticising this Nigerian disposal option for the insanity defence as narrow and unsuitable for all mental health issues.[127] It is narrow because there

[125] Criminal Procedure Act 2004 s 225 (A).

[126] Ibid.

[127] Adegboyega O Ogunlesi, Adegboyega Ogunwale, 'Correctional psychiatry in Nigeria: dynamics of mental healthcare in the most restrictive alternative' (2018) Cambridge University Press 4.

is only one step to take when every accused successfully proves the insanity defence. Having a disposal option for every successful insanity defence is unsuitable for all mental health issues because mental disorders could be temporary or permanent. Perhaps not every mental condition needs the law to incarcerate the accused. Therefore, from this Nigerian position, regardless of the mental disorder the accused suffered, indefinite detention is the only option for disposal.

Second, this thesis concurs with Idem, who concluded that the Nigerian insanity defence disposal option is punitive because no legislative instruments on the insanity defence (including the Criminal Code and Penal Code) contemplate treatment, reformation, or rehabilitation for an insane accused person.[128] The closest reference to a medical officer is that the medical officer monitors the accused and reports any information gathered to the Governor.[129]

What is the difference between an asylum and a prison? The Lunacy Act of 1958 defined asylum as "an asylum or mental hospital for lunatics established or licensed by Government".[130] This thesis argues that asylum is a prison for mentally disordered persons. Ogunlesi claimed that although the CPA directs the court to remand the successful insanity defence accused to an asylum 'during the pleasure of the Governor,' it would appear that the only existing interpretation of asylum in the country is prison.[131] He had this perspective since the current strategy is to give mental healthcare to mentally abnormal offenders in several of the country's Prisons.[132] In general, Nigerian prison conditions are appalling. Many prisons suffer significant overcrowding, food and water shortages, unsanitary conditions, and poor or non-existent medical care[133]. These conditions

[128] Udosen Jacob Idem, 'Criminal Responsibility and the Defence of Insanity, Insane Delusion and Irresistible Impulse in Nigeria' (2018) Vol 4(2) Donnish Journal of Law and Conflict Resolution 19.

[129] Criminal Procedure Act 2004, s 231.

[130] Nigerian Lunacy Act 1958 s1.

[131] Idem (n 128) 5.

[132] 0gunlesi and Ogunwale (n128) 4.

[133] Country Policy and Information Note Nigeria: Prison conditions (2016) Home office https://www.refworld.org/pdfid/5825c8044.pdf accessed 17th July 2022 ; The Nigerian National Human Rights Commission audited 173 prisons in 2012. It reported on the size, facilities and conditions in the prisons. The audit identified considerable variation in the conditions of prisons, including levels of congestion, sanitatio The audit revealed wide disparities in prison conditions, including overcrowding, cleanliness, vocational and leisure

are like the condition in the existing asylums. However, asylums are archaic and no longer used anywhere in the world. England and Scotland have established psychiatric hospitals and updated their disposal options to include hospital admissions and treatment options.[134] As a result, the legislation should shift or change the asylum to a more appropriate location, such as a hospital.

Also, Ogunlesi and Ogunwale stated that holding the insane accused for an unlimited period at the pleasure of the Governor raises ethical concerns and human rights abuses.[135] For example, research done by Perlin has shown that those courts incarcerate because of their mental disorder spend longer in incarceration than others convicted of the same offence.[136] There should be ways to check the best time to release an accused in an asylum, not based on the Governor's pleasure. This viewpoint was one of the outdated practices that England and Scotland had abandoned.[137]

Why would the Governor determine the length of time and place of safety? Unless the Governor is a medical officer, it is out of place to place such control on him. A medical officer is suitable for determining the best place to admit an accused with a mental health issue. This position is because the medical officer diagnoses the accused and knows what kind of care he or she might need and how long it might take. For example, two registered medical practitioners in England determine a hospital order.[138]

This thesis contends that for a better disposal option for the insanity defence, there should be an interaction between criminal and mental health law. The courts should base the disposal options

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programmes, food supplies, and health facilities, The Nigerian National Human Rights Commission <http://www.nigeriarights.gov.ng/download.php> , accessed on 19th June 2022.

[134]John R Hamilton, 'Forensic psychiatry symposium Insanity legislation' (1986) Journal of medical ethics, 12, 13-17.

[135] Ibid.

[136] Micheal Perlin, 'The insanity Défense in English Speaking African Countries' (2013) The Journal of Legal pluralism and Unofficial law 74.

[137] Kevin Kerrigan, 'sychiatric evidence and mandatory disposal: Article 5 compliance?' (2002) Journal of Mental Health Law; mental health (care and treatment) (Scotland) act 2003: code of practice- volume 3 compulsory powers in relation to mentally disordered offenders (2005) <https://www.gov.scot/publications/mental-health-care-treatment-scotland-act-2003-code-practice-volume-3-compulsory-powers-relation-mentally-disordered-offenders/pages/4/> accessed 22 July 2021.

[138] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, ch. 84, s. 5 (1-3).

on the medical evidence of the accused person's mental state. This suggestion draws from the current practice in England and Scotland, as shown in the following sections. The disposal option for the insanity defences in England and Scotland are more flexible than those in Nigeria.

The Nigerian disposal option provision is similar to the old practice in England and Scotland. In the past, the disposal option for the insanity defences in England and Scotland was like that of Nigeria, when the lunacy legislation governed mental health.[139] They also ordered the accused to an asylum until the pleasure of the Crown. This thesis noted the transformation of the disposal of options in the two jurisdictions. England moved from when the accused, on a successful plea of the insanity defence, walked free[140] to a time (after Hadfield's case)[141] when the courts acquitted and detained him in an asylum until Her Majesty's pleasure.[142] This automatic confinement for an unlimited period in asylums was like the position in Nigeria. This English position was in operation for a decade until 1964, when the Criminal Procedure (Insanity) Act of 1964 introduced the Hospital Order.[143]

On the other hand, Scotland also has a history of incarcerating (custody) the insane accused until the pleasure of the Crown.[144]This practice remained until the Mental Health (Scotland) Act of 1960[145], which introduced hospital order as the disposition option for the insanity defence.[146] The Mental Health (Care and Treatment) (Scotland) Act 2003 introduced more flexible disposal

[139] Criminal Lunatics Act, 39 & 40 Geo. III (1800), c. s 94.

[140] Before nineteenth century,

[141] The Criminal Lunatic Act (1800),

[142] The procedure mandated by law for the disposal of James was governed by the practices of judges and courts and not the Statute of Realm. The practice was for the crown to take him before two justices of peace, who could order his detention as a dangerous lunatic under the Vagrancy Act of 1744. The vagrancy legislation of 1744 allowed two judges to order the detention of an offender as a dangerous lunatic, but the common law only allowed his detention until he had recovered. This led to dangerous lunatics being released during 'lucid intervals', and the Attorney General pointed to 'several instances of His Majesty's subjects having lost their lives for want of a due provision in this respect'. (Walker n)78)

[143] ibid 78; Criminal Procedure (Insanity) Act 1964 s 5.

[144] From the time of common law when government enacted the Lunacy Acts of 1857 and 1862, and the Criminal and Dangerous Lunatics [Scotland] Act of 1871.

[145] which was an offspring of the Royal commission on the laws relating to mental illness and mental deficiency

[146] Mental Health (Scotland) Act of 1960 s 54.

options, including assessment orders, treatment orders, guardianship orders, compulsion orders, probation for treatment and detention for medical examination orders.[147]

A good policy should result from a rational assessment of the offender's mental state, need for care and treatment, and the likelihood of being violent again. Figuring out the person's current mental state and whether they are likely to do something dangerous is not a part of proving the defence. However, this shows future concerns and prescriptive analysis of the insanity defence. To consider whether the insanity from the past is still present, if the doctors could treat it and if it would likely lead to violence if not treated.

Hence, based on the available disposal option, this thesis argues that Nigeria cares about putting the insane away from society and not about improving or taking care of them.[148] There is a need to broaden the scope of disposal options for an insanity defence to accommodate appropriate options for all categories of insane persons, like the position in England and Scotland.[149] This position would ultimately seek to improve their care and treatment.

6.5.2. ENGLISH DISPOSAL OPTIONS ON THE INSANITY DEFENCE

A defendant found "not guilty by reason of insanity was subject to compulsory committal to a psychiatric institution under the common law. However, this position is no longer the case since the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 introduced various disposal options, including community-based disposals**.**[150]

The disposal options available following a successful insanity plea or a finding that the defendant is unfit to plead are a hospital order (with or without a restriction order), a supervision order, or an absolute discharge.[151]

[147] The Mental Health (Care and Treatment) (Scotland) Act 2003 s 133 (part 7), s 134, s 135.

[148] B E Ewulum, 'The Plea of Insanity Under Nigerian Criminal Jurisprudence' (2018) AFJCLJ 3.

[149]Micheal L Perlin, 'The Insanity Defence in the English-Speaking African Countries'(1969) African Law Studies, Vol. 2 73-92.

[150] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, ch. 84, s. 5 (1-3).

[151] Criminal Procedure (Insanity) Act 1964, s5 as amended.

The Domestic Violence, Crime and Victims Act of 2004 unified these options and aligned criminal law with the Mental Health Act of 1983, mandating that a hospital order be issued if medical evidence identifies a mental condition needing expert care.

The 2004 Act took effect on March 31, 2005. It numbered the disposals to three, specifically:

i. a hospital order (with or without a restriction order);
ii. a supervision order;
iii. an order for an absolute discharge

Where the court charges the insane with murder, it can issue a hospital order equivalent to one under the Mental Health Act of 1983. Hence, the court can make a hospital order if it is satisfied based on the evidence of two registered medical practitioners. In this case, the defendant has a mental illness of a nature or degree, warranting his detention for medical treatment in a hospital. The court must also believe that a hospital order is the most suitable method of dealing with the defendant.[152]

This English point of view has some strong points that make it different from the Nigerian standpoint.

First, English law provides a flexible disposal option. In the past, Dell has criticised the English disposal option for its lack of flexibility, which caused individuals to avoid the insanity plea.[153] Nigeria has just one disposal option, while the accused can choose from more than three options listed above in the English jurisdiction. Mackay suggested that introducing a flexible form of disposal (except in murder cases) had removed a central disincentive to seeking to rely on the insanity defence.[154] As a result, the insanity defence may be viewed with less suspicion and dread if there is a possibility for flexible disposal.

[152] s.37 of the Mental Health Act 1983; s 5A of the 1964 Act, substituted by s 24 of the Domestic Violence, Crime and Victims Act 2004.

[153] Dell, S, 'wanted: An insanity defence that can be used' (1983) Criminal Law Review 432.

[154] R D Mackay, B J Mitchell and Leonie Howe, 'Yet more facts about the insanity defence' (2006) Crim. L.R May, 399

Also, having a flexible disposal option means that the courts could consider the needs of the accused before giving a disposal order. The Law Society (1991) criticised the courts' inability to consider the defendant's needs in the past when the English had a disposal option. They complained that the then 1964 Act had failed to protect the insane persons because of having a single disposal option.[155] The Butler Committee also recognised instances when medical evidence and circumstances indicated that incarceration was unnecessary.[156] Therefore, having a flexible disposal option guarantees that courts consider the right and needs of the insane accused. A hospital order is for those needing treatment and care; a supervision order considers that the law needs to monitor an insane accused that seems sane or recovered/improved. The absolute discharge further shows that an accused does not need to be monitored and does not need treatment or care.

Secondly, having a hospital order shows the government's effort to guarantee that courts meet the needs of insane accused persons. Hospital orders ensure the insane accused undergoes treatment and proper care against being sent to an asylum. The English disposal options demonstrate flexibility by categorizing hospital orders into restricted and non-restricted. Hospital orders with restrictions provide an avenue for protecting the public's interests.

Thirdly, the role of medical experts in determining the appropriate disposal option is plausible. *Winterwerp v Netherlands*[157] showed the importance of a medical expert's involvement in the disposal option. The European Court of Human Rights made the following important ruling regarding detention for mental disorders:

> "The next issue to be examined is the 'lawfulness' of the detention for the purposes of Article 5 (1) (e). Such 'lawfulness' presupposes conformity with the domestic law in the first place and also … conformity with the purpose of the restrictions permitted by Article 5 (1) (e); it is required in respect of both the ordering and the execution of the measures involving deprivation of liberty. … in a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be

[155] Law Society, Criminal Procedure (Insanity and Unfitness to Plead) Bill: Briefing on the private member's bill. London: (1991) The Law Society.

[156] The Committee on Mentally Abnormal Offenders, 1975 Cmnd. 6244, Chap. 10.(Butler Committee)

[157] (1979) 2 EHRR 387.

> regarded as ' lawful'. … In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder."[158]

This provision of English law on disposal following a successful insanity defence aligns with the extract from the above case. Under the English Act, medical evidence is central to the justification for detention. The evidence must demonstrate that the person has a mental disorder that requires confinement. This practice is one that Nigeria could adopt.

Furthermore, medical experts determine when the hospital can release an insane accused, not the Queen, Crown, or Governor, like in Nigeria.

6.5.3. SCOTTISH DISPOSAL OPTIONS FOR A SUCCESSFUL INSANITY DEFENSE

Scotland has extensively widened their disposal options to reflect modern medical reasoning. This part will review the Scottish jurisdiction on the options open to an accused person established to be insane.

If an accused is pronounced unfit for trial, acquitted, or insane at the time of the offence and acquitted on the grounds of insanity, the Scottish court might make the following orders.[159]

- Compulsion order[160]
- Compulsion order with a restriction order[161]

[158]Ibid paragraph 39.

[159] Criminal Procedure (Scotland) Act 1995 s 57(2).

[160] Criminal Procedure (Scotland) Act 1995 s 57 (2)(a)) of 1995 Act.

[161] Criminal Procedure (Scotland) Act 1995 s 57 (2)(b).

- Interim compulsion order[162]
- Guardianship order [163]
- Supervision and treatment order[164]
- No order[165]

I. COMPULSION ORDER

In most circumstances, the courts consider this disposal option when the offence charged against the accused is punishable by imprisonment, but not one for which the law prescribes a punishment, such as in a murder case. [166] However, the court may order this option only if the accused has a mental condition that requires treatment to prevent it from progressing adversely. Alternatively, prevent another adverse outcome; if left untreated, it could harm one's health and safety and those of others. However, the court can only reach this disposal if the accused has a mental disorder and treatment is necessary to prevent it from developing negatively.

Furthermore, the court must approve the medical evidence from two medical practitioners before this order can be made based on the listed criteria.[167] Section 22 of the Mental Health (Care and Treatment) (Scotland) 2003 Act approves a medical practitioner as having special experience in diagnosing and treating a mental disorder.[168] Both medical practitioners must obtain the same result after examination and report stating the appropriate treatment procedure.

7. COMPULSION ORDER WITH A RESTRICTION ORDER

This provision is an additional order to a compulsion order. This position is a case where the court adds to a compulsion order that the person will be detained further in the hospital or any place of treatment without a time limit.[169] Scottish courts consider this disposal where it is necessary to

[162] Criminal Procedure (Scotland) Act 1995 s 57 (2) (b).

[163] Criminal Procedure (Scotland) Act 1995 s 57 (2)(c).

[164] Criminal Procedure (Scotland) Act 1995 s 57 (2)(d).

[165] Criminal Procedure (Scotland) Act 1995 s 57 (2)(e).

[166] Criminal Procedure (Scotland) Act 1995 s 57A.

[167] Ibid.

[168] An approved medical practitioner will often be a consultant psychiatrist.

[169] Criminal Procedure (Scotland) Act 1995 s57A (7); s 59.

secure the public's safety, where the accused is a high risk. Nevertheless, in making such an order, the court must consider:

i. The nature of the offence being charged.

ii. The antecedent of the person.

iii. The potential risk if let free.

iv. The nature of mental disorder.

In addition, one of the medical practitioners who made the report for the accompanying compulsion order needs to give oral evidence on this issue before the court makes this order. Finally, the court usually detained a person in hospital until conditionally or discharged by the direction of the Mental Health Tribunal for Scotland.[170]

8. INTERIM COMPULSION ORDER

The court issues this disposal order when it finds that the accused committed the offence and the penalty is imprisonment, but not when the statute sets the sentence for the offence.[171] This disposal order enables the court to get more information about the accused's mental health and safeguard. Moreover, the court can also add a restriction order to this order if it believes that the accused is a potential risk to self and the public, and it is needed to safeguard the health and safety of the accused and others

This order can be made based on written or oral evidence from two registered medical practitioners (one must be approved) that medical treatment is available, which would help the accused. The judge orders the individual hospitalised for up to twelve weeks, which he may extend for an additional twelve weeks up to one year.[172] However, the judge terminates this order when the court makes final mental health or penal disposal.

This compulsion order is the same as a hospital order in England. This order is entirely different from any option in the Nigerian jurisdiction. Compulsion orders are advantageous to the accused

[170] Mental Health (Care and Treatment) (Scotland) Act 2003 s193.

[171] Criminal Procedure (Scotland) Act 1995 s 53.

[172] Criminal Procedure (Scotland) Act 1995 s 53.

person and society from all directions. The fact that the law provides this option guarantees the care and treatment of the accused. In another light, this should be one of the focuses of the insanity defence. Finding a way to help the accused person who is insane recover is in everyone's best interest.

There are different mental disorders, neurological impairments, and developmental disorders, and the level of any impairment will vary from person to person. So, when determining if the mental disorder affects the disposal option, the court should base the disposal process on the case's specifics and tailored to the person.

9. GUARDIANSHIP ORDER

This order is suitable when an accused has lost the capacity to make decisions because of a mental disorder and when the judge finds that an accused committed the offence punishable by imprisonment. Nevertheless, not where the law fixes such a sentence, like in murder cases, the court may place his or her welfare under the guardianship of a local authority.[173]

The court's priority here is the welfare of the accused, who has a mental disability. Therefore, before a court makes this order, the court would ensure it is the most appropriate under the law to promote the accused's welfare. Therefore, this order also needs confirmation from two medical practitioners (one being an approved medical practitioner) that the person in question cannot make decisions about or act to safeguard or promote his interests in his property, financial affairs, or personal welfare. As a result, the accused will also be examined and analysed by a mental health professional to determine the order's circumstances and suitability.

10. SUPERVISION AND TREATMENT OPTIONS

By this order, the courts keep the accused under the supervision of a social worker, whose instructions the accused must obey and submit to treatment to improve.[174]However, the treatment may be through the non-resident patient at an institution specified in the order but will not entail being a hospital patient. The accused must have a mental condition for this order, and the judge could make this order for up to three years.[175] This order requires the court to believe that

[173] Or someone else approved by the local authority; Criminal Procedure (Scotland) Act 1995 S. 58-58A.

[174] Criminal Procedure (Scotland) Act 1995 s 57(2)(d).

[175] Criminal Procedure (Scotland) Act 1995 s 57(2)(d).

considering all other available disposals, this is the more suitable. Here, the treatment of the accused needs without making a compulsion order (with or without a restriction order) or guardianship order.

This order also requires the medical evidence of two or more approved medical practitioners. The court has the power to amend an order based on a medical report indicating that (a) the treatment should continue beyond the period of the order; (b) the person needs different treatment; (c) the person is not susceptible to treatment, or (d) the person does not require further treatment.

Again, the judge may revoke this order where the court believes, considering present circumstances since the making of the order, that it would be in the accused person's interests to revoke it.[176]

Like the position in England, the disposal options in Scotland have advanced from the Nigerian position. This review of the Scottish position confirms the practices that could be helpful to the Nigerian Jurisdiction. This Scottish position also has strong points, which this study perceives as an advantage.

To begin with, having several disposal options gives flexibility. Disposal options are flexible so that the court can choose from various options. Before 1996, the disposal option was one and direct, automatic detention at a state hospital under a restriction order without a time limit.[177] Historically, the Scottish Law Commission explained that the law considered the need for growth in this area from two positions.[178] First, when the disposal option was a complete acquittal, matters of public interest arose. The public concern was allowing a person with violent tendencies to roam the street without social control. However, when the disposal option changed to committing them to a mental hospital, concerns arose that it would be too inclusive and include even those who did not require treatment.[179] Hence to balance the interest of the accused and that of the public, the

[176] Ibid.

[177] Criminal Procedure (Scotland) Act 1975 (c 21) s 174; 375.

[178] Scottish Law Commission Discussion Paper No 122; Discussion Paper on Insanity and Diminished Responsibility January 2003.

[179] Ibid 2.

1995 Act introduced flexible disposal options. This position became more encouraging and favourable to an insane accused person.

Furthermore, involving a medical practitioner in deciding the disposal option is an added advantage.[180] If the court finds the accused insane, the medical professional writing the report should discuss the best possible mental health disposition.[181] When a medical practitioner identifies mental health disposals, there is a higher probability that the court might achieve the appropriate disposal option for the insane accused. This position also suggests that the court chose a disposal option based on the individual's immediate need. They focus on providing the appropriate medical care for the accused's current state. In this case, they have eliminated the unpleasant result of the former law, which automatically committed an accused to a mental hospital.

In addition, the recommended disposal option will also depend on the person's mental disorder, their needs, and the risk they pose. Therefore, having diverse options guarantees that their human rights are protected and their needs met. Like the English, although acknowledging the United Kingdom is no longer part of the European Union, these disposal options met the requirement of the United Nations on the Principles for protecting persons with mental illness and improving mental health care. Principle one guarantees the fundamental freedoms and basic rights of insane persons.[182]

Another good part of the disposal option of Scotland is that in the compulsory measures, the insane accused may conduct such an order in the community. This way, the order will require the person to reside at a specified place, attend treatment and other services, and allow access to mental health and other medical officers. Furthermore, this procedure is similar to the disposal option in civil cases, allowing equal opportunities in both courts.

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[180] Criminal Procedure (Scotland) Act 1995 s 57(2).

[181] Ibid.

[182]General Assembly resolution 46/119, Principles for the protection of persons with mental illness and the improvement of mental health care (1991) https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-protection-persons-mental-illness-and-improvement accessed 22th December 2021.

These points show the positive development of the disposal option in Scotland. The changes over time in England and Scotland could serve as a guide to changes in Nigeria. This position is especially true since they have achieved a place within the law that protects the rights, care, and treatment of the insane. Also, they created flexible options that met individual needs to balance the rights of the insane and the public. Consequently, Nigeria might profit from such a wide disposal choice as hospital, supervision, and guardianship orders.

6.6.CONCLUSION

At the outset, while examining how Nigeria, England and Scotland prove the insanity defence using the tests provided in their legislation, this chapter identified some standard practices in Nigeria, England, and Scotland.

The contention in this chapter was to identify how efficiently the insanity defence tests work in proving the Nigerian insanity defence. It set out to identify the areas that need change and the reason for the changes. It identified lessons for Nigeria from English and Scottish positions.

This chapter demonstrated that Nigerian courts in the Southern and Northern Regions, while applying the insanity defence test, have no apparent difference. The studied case law did not indicate that the applicable tests affected any jurisdiction differently.

It reviewed the burden of proof and established that the accused has the burden of establishing the insanity defence on a balance of probability in the three jurisdictions. This review identified that Nigerian law placed the burden on the accused to establish the test without stating the required evidence.

This chapter further showed that in the light of filling this gap in providing the required evidence, the duty fell on the courts. As a result, it established that for the insanity defence, courts in Nigeria (Northern and Southern regions) require circumstantial and medical evidence. It raised two issues regarding the evidence.

First, circumstantial evidence carries greater weight in Nigerian courts than medical evidence. Reviewed case law like *R v Inyang*[183]and *Idris v. State*,[184]the judges stated that medical evidence is desirable or probative but not essential.[185] Also, some case law placed circumstantial evidence as the primary and medical evidence as the secondary evidence.[186] The judges stated that deciding on the insanity defence is not for medical men. Unlike in Nigeria, where courts place more weight on circumstantial evidence than expert evidence, English and Scottish[187] courts use expert evidence to establish circumstantial evidence.

Secondly, circumstantial evidence is inconclusive, and there are inconsistencies surrounding their application in Nigeria. Case law demonstrated that the required circumstantial evidence is uncertain or unlimited. It is essential to harmonise factual/circumstantial evidence. [188]

Additionally, this section argued that courts should decide the disposal options based on medical opinion and the options available based on the options accessible in the mental health system. This research advocates for the law to widen the disposal option for the insanity defence in Nigeria and make it more flexible like their English and Scottish counterparts. It is essential to stress the reasoning behind the defence, which is that the offender is not criminally responsible, so he has no guilt, and that for the safety of society and himself, he should go through therapy/treatment. Furthermore, the nature of the order lacks any length of time to keep the accused insane; therefore, it suggests that courts hold the accused persons for definite periods. The Nigerian jurisdiction needs to strengthen medical evidence for proof and disposal options.

[183] [1946]12 WACA 5.

[184] [2021] LPELR-54581(CA).

[185] *Edoho v State* (2010) 14 NWLR (Pt. 1214) 651.

[186] *Yahaya Mohammed Vs. The State* (1997) 9 NWLR (Pt.520) 169 at 201.

[187] However, as a matter of practice, Scotland requires expert evidence to prove the insanity defence, as shown in the case law. Therefore, this position in Scotland is not a statutory requirement but a court practice. See section 6.4.

[188] *Onyekwe v state, Edoho v State, Egbe Nkanu v The State and Sanusi v State*

CHAPTER SEVEN

THE IMPACT OF THE MENTAL HEALTH SYSTEM ON THE INSANITY DEFENCE

7.1. INTRODUCTION

Chapter Six examined the question of proving the insanity defence in court and the possible challenges in the three jurisdictions. It showed Nigeria's poor relationship between criminal law and the mental health system. The last chapter showed this position in the reluctance and little weight attached to expert evidence in proving the insanity defence and the mental health system's little role in disposing of a successful insanity defence. It confirmed the need for the government and those in charge to strengthen the relationship between criminal law and mental health.

This chapter will examine Nigeria's mental health legislation and mental health legislation in England and Scotland. A successful operation of the insanity defence depends on an adequate mental health system. In addition to the already reviewed reasons in chapter six, it will further demonstrate how the insanity defence may be affected by Nigeria's current mental health system.

It will review several studies regarding people's beliefs about insanity and its treatment in various Nigerian regions to suggest that a negative perspective will not be helpful for the insanity defence. The public's unconventional perspective of insanity and the nation's deficient mental healthcare system can influence the court's inclination to adopt the insanity defence and the lawmakers' commitment to amend the mental health law.

Secondly, it will point out the shortcomings of Nigeria's current mental health legislation and how it has no bearing on the insanity defence. This position will show how Nigeria's insanity defence could be affected by poor mental health legislation. This part aims to justify the need for new mental health legislation in Nigeria that aligns with modern medical practice on mental health that could aid the insanity defence.

Additionally, it will examine how English and Scottish mental health legislation have evolved concerning the insanity defence. They moved from applying the Lunacy Act to enacting mental health legislation more aligned with current medical understanding. This review will illustrate how mental health legislation interacts with criminal law to aid the insanity defence. Besides showing their attempts to amend their mental health legislation, it will also display their efforts in setting

up committees or groups to review them, which this review shows as lacking in Nigerian jurisdiction.

Notably, many terms used in the mental health legislation could sound outdated and derogatory today. However, they were the terms commonly used and recognised by the law in the early 20th century.

7.2. THE NATURE OF THE MENTAL HEALTH SYSTEM IN NIGERIA

This section will examine the nature of the Nigerian mental health system from two perspectives: people's perception of the causes of insanity and the treatment of insanity in Nigeria.

7.2.1. THE CAUSAL FACTORS

This section will argue that if negative public attitudes toward mental illness do not change, the insanity defence may be challenging to establish in Nigeria. This position is so because the judges, legal practitioners, law enforcement personnel and the accused are all members of society. If they lack an understanding of insanity, it will be invariably challenging to identify and accept the insanity defence. Also, rehabilitation and reintegration into society will be more challenging, and there will be little political will to reform the mental health law. This section will review Nigerian literature showing perceptions of several causal factors of mental illness, primarily those not medically oriented, to show the unorthodox public attitudes.

Studies on pre-colonial and colonial Nigeria suggested that they did not entirely consider insanity a medical or biological problem.[1] Instead, these studies recorded that Nigerians predominantly believed external factors were the foremost causes of insanity or mental health disorders.[2] These

[1]Gater R, de Almeida e Sousa B, Barrientos G, The Pathways To Psychiatric Care: A Cross-Cultural Study (1991) Psychological Medicine 21, 761; Abiodun Adewuya , Roger Makanjuola, 'Preferred Treatment for Mental Illness Among Southwestern Nigerians' (2015) FMC Psych 1.

[2] Ibid.

external factors included supernatural factors relating to witchcraft (popularly known as Juju), evil spells,[3] hostile ancestral spirits, spiritual/demonic attacks, evil intrigue, and God's afflictions.[4]

Also, several Nigerian studies after independence still attributed the cause of most insanity cases to external factors like supernatural and psychosocial[5] factors.[6] Therefore, the following studies will illustrate different beliefs by different parts of Nigeria on the cause of insanity in Nigeria.

The South Western Region: Few studies on the Western Region of Nigeria (dominantly Yorubas) attributed psychosocial factors as the leading perceived cause of mental illness, followed by supernatural evil factors (including divine punishment) before medical/biological factors.[7] Examples of psychosocial factors include social support, loneliness, marriage status, social disruption, bereavement, work environment, social status, misuse of substances, alcohol, and social integration.[8]

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[3] Odejide A O, 'Traditional (Native) Psychiatric Practice; Its Role in Modern Psychiatry In A Developing Country' (1978) The Psychiatric J Univ Ottawa, 4, 297-301; Erinosho & Ayorinde, 1978; Prince, 1975) Odejide, O.A., Oyewunmi K L, Ohaeri J U, 'Psychiatry in Africa: An overview' (1989) Am J Psychiatry, 146, 708-716.

[4] Betancourt J R, Green A R, Carrillo J E, 'The challenge of cross-cultural healthcare-diversity, ethics, and the medical encounter'

(2000) Bioethics Forum, 16(3); Idemudia E S, 'Mental Health and Psychotherapy through the eyes of culture: Lessons for African Psychotherapy'. In H Arlt and Idemudia E S (eds), *The Unifying Aspects of Cultures* (Vienna, Austria 2004) 230-232.

[5] Psychosocial factors are qualities or facets of an individual that affect their psychological and/or social well-being

[6] Erinosho, O A, Ayorinde A, 'A comparative study of opinion and knowledge about mental illness in different societies'(1978) Psychiatry, 4, 403–410, 1978; Odeji A O, Traditional (native) psychiatric practice: Its role in modern psychiatry in a developing country' (1978) Psychiatric Journal of the University of Ottawa, 4, 297–301; Odejide, A O, Olatawura M O, A survey of community attitudes to the concept and treatment of mental illness in Ibadan, Nigeria. (1979) Nigerian Medical Journal 9, 343–347.; Prince R, 'Some Yoruba views on the causes and modes of treatment of antisocial behaviour' (1973) African Journal of Psychiatry, 2, 133–137.

[7] Ilechukwu S T, 'Inter-Relationships of Beliefs About Mental Illness, Psychiatric Diagnosis, And Mental Health Care Delivery Among Africans' (1988) International Journal of Social Psychiatry 34; Adewuya O Abiodun, Makanjuola O Roger, Lay beliefs regarding causes of mental illness in Nigeria: pattern and correlates (2008) Social Psychiatry and Psychiatric Epidemiology 43(4), 336- 341.

[8] Ibid.

However, Adewuya & Makanjuola's study also concluded that many people living in urban areas with higher socioeconomic and educational status believed in supernatural causes of insanity.[9] This conclusion may raise questions about the effect of educational attainment on people's perceptions of the causes of insanity. Similarly, many more studies in the Western Region found that patients and their families believed that supernatural factors, followed by drug/alcohol-related misuse, were the leading causes of mental illness, with less emphasis on medical/biological factors.[10] Therefore, supernatural and psychosocial factors were the leading perceived cause of insanity in the Western Region before medical factors.

The South-South Region: Several studies conducted in this Region concluded that a large population believed that psychosocial factors, such as drug and alcohol abuse, stress, and physical abuse, caused mental illness more than spiritual causes, such as witches/wizards, spiritual possessions, and God's retribution.[11]

The South-Eastern Region: The Igbo States and communities comprise the Eastern region. Studies have also shown that Igbo people described insanity as an "ogbanje spirit" manifesting herself or demonic possession.[12] Also, other Igbo groups believed that God afflicts persons who disobey His warnings with mental illness.[13] A study carried out among different groups and categories of persons[14] by Ikwuka *et al.* demonstrated that in Igbo societies, a large population

[9] Adewuya O Abiodun, Makanjuola O Roger, Lay beliefs regarding causes of mental illness in Nigeria: pattern and correlates (2008) Social Psychiatry and Psychiatric Epidemiology 43(4), 336- 341.

[10] Adebowale T O, Ogunlesi A O, Beliefs and Knowledge about aetiology of mental illness patients and their relatives (1999) African Journal of Med. Science, 28, 35-41; Ohaeri J U, Fido A A, 'The Opinion of Caregivers on Aspects of Schizophrenia and Major Affective Disorders in A Nigerian Setting' (2001) Social Psychiatry and Psychiatric Epidemiology, 36(10), 493-499; Gureje O, Lasebikan V O, Ephraim-Oluwanuga O, Olley B O, Kola L, Community Study of Knowledge of And Attitude to Mental Illness in Nigeria (2005) British Journal of Psychiatry, 186, 436-441.

[11] Ukpong D I, Abasiubong F, Stigmatising attitude towards the mentally ill: A survey in a Nigerian university teaching hospital (2010) South African Journal of Psychiatry 16(2); Ewhrudjakpo C, Knowledge, Beliefs and Attitude of Health Care Providers towards the Mentally ill in Delta State, Nigeria (2009) Studies on Ethno-Medicine 3(1), 19-25.

[12] Obinna, "Life is Superior to Wealth? Indigenous Healers in African Community, Amasiri, Nigeria (n104)

[13] Elijah Obinna, "Life is Superior to Wealth? Indigenous Healers in African Community, Amasiri, Nigeria" in Afeosemime Unuose Adogame, Elzra Chitando, Bolaji Bateye, *African Traditions in the Study of Religion in Africa: Emerging Trends, indigenous Spirituality and the Interface with Other World Religions* (Ashgate Publishing Ltd 2012)

[14] Young and old, married and umarried, male and female, cathelic and protestants

believed supernatural factors were the leading causes of insanity, followed by biological and psychosocial factors.[15]

Northern Region: Moving to the Northern Region, several studies on the cause of mental illness concluded that a large population believed psychosocial factors, particularly drug abuse, as the leading cause.[16] The conclusions were reached based on several surveys, and most of those surveyed believed psychosocial factors are the leading factor, followed by supernatural factors. The psychosocial factors mentioned in their studies were misuse of psychoactive agents (alcohol, cannabis, and other street drugs), followed by divine punishment, magical/spiritual possession, and accidents/trauma.[17] However, the studies on the Northern Region, like those in other regions, suggest that many people rarely believe that medical factors cause mental disorders.[18]

Ewhrudjakpor ascribed these supernatural and psychological ideas to cultural roots and stated that it is difficult to eradicate such beliefs.[19] He criticised these beliefs as misconceived by the people and raised a need for the proper education of the people on mental illness.[20] These studies suggest that the beliefs are so endemic that individuals assert so with less consideration of medical factors. Also, most study participants and respondents are not qualified to provide such an opinion, which questions the findings. However, they are people's opinions and represent their understanding of the position. They are entitled to their opinion, especially where there is no adequate framework to convince them otherwise.

Therefore, this chapter can argue that a lack of knowledge of the causes of insanity might negatively affect the insanity defence. There will likely be little support for the insanity defence

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[15] Ugo Ikwuka, Niall Galbraith, Lovemore Nyatanga, Causal attribution of mental illness in south-eastern Nigeria, (2014) Vol 60 issue 3, 274-279.

[16] Iliyasu M, Last M, Mental illness at Goron Dutse Psychiatric hospital (1991) Kano Studies, 3, 41-70.

[17] Mohammed Kabir, Zubair Iliyasu, Isa S Abubakar & Muktar H Aliyu, 'Perception and beliefs about mental illness among adults in Karfi village, northern Nigeria' (2004) BMC International Health and Human Rights; Issa B A, Parakoyi D B, Yussuf A D, Musa I O, Caregivers' Knowledge of Etiology of Mental Illness in a Tertiary Health Institution in Nigeria (2008) Iranian Journal of Psychiatry and Behavioural Sciences 2(1), 43-49.

[18]Mohammed Kabir, Zubair Iliyasu, Isa S Abubakar & Muktar H Aliyu, 'Perception and beliefs about mental illness among adults in Karfi village, northern Nigeria' (2004) BMC International Health and Human Rights.

[19] Ibid.

[20] Ibid.

against criminal responsibility as long as a large population has misconceptions based on spiritual factors. Judges' and lawyers' spiritual or religious beliefs towards insanity being part of this population could influence their attitudes towards insanity defence.

Additionally, some studies suggested that a high population of Nigerian society believed mentally disordered persons were dangerous without regard to the nature of their mental disorders. For example, Ewhrudjakpo's study claimed that a large population believed mentally ill persons were evil perpetrators, witches/wizards or menaces.[21] Also, Funke argued that the public's perception of the insane as dangerous made them an easy target for exploitation and manipulation.[22] These beliefs that the mentally ill are dangerous and evil contribute to their discrimination and stigmatisation in Nigeria.[23] Onyemelukwe argued that the lack of legislation and the proper understanding of mental illness has led to stigma and discrimination against them.[24] She further argued that available legislation[25] does not protect their rights, and the policy framework available is not enforceable.[26] She also noted that stigma influenced their admittance to treatment because most patients hesitate to seek help, inspired by a paranoid fear of what people would say or do.[27] This study, like some others[28], shares the same perspective and agrees with this position on stigma.

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[21] Ewhrudjakpor Christian, 'Knowledge, Beliefs and Attitudes of Health Care Providers towards the Mentally Ill in Delta State, Nigeria' (2009) Ethno-Med 3(1) 3.

[22] Funke M, Drew N and Baudel M, "Framework for Dignity in Mental Health: Supporting Dignity Through Mental Health Legislation" Dignity in Mental Health-World Mental Health Day, 10th October 2015, World Federation for Mental Health. In Abdulwasiu Ojo Akorede Yusuff, 'The Rights of the Mentally ILL and the Nigerian Society: Enhancing Dignity in Mental Health Through Legislation' (2016) Vol.52 JLPG

[23] Ishaq A. Audu, Suleiman H. Idris, Victor O Olisah, Taiwo L Sheikh, Stigmatization of people with mental illness among inhabitants of a rural community in northern Nigeria (2011) International Journal of Social Psychiatry.

[24] Cheluchi Onyemelukwe, 'Stigma and Mental Health in Nigeria: Some Suggestions for Law Reform' (2016) Vol. 55 Journal of Law, Policy and Globalization.

[25] The Lunacy Act of 1959.

[26] Onyemelukwe (n 24) 1.

[27] Ibid.

[28]Aderonke Bamgbose Pederson and others, Mental health stigma among university health care students in Nigeria: a cross-sectional observational study (2020) Pan African Medical Journal; Aishatu Yushau Armiyau, 'A Review of Stigma and Mental Illness in Nigeria' (2015) J Clin Case Rep; Aderonke Bamgbose and others, 'Perspectives of

In light of these opinions, the question arises: Can a society that misunderstands insanity adequately protect this group when they appear in court? These misunderstandings concerning the cause of insanity extend to the insanity defence's application in court. This viewpoint stems from the fact that judges and attorneys are members of a society depicted in literature as having an unconventional view of insanity. There is a high lack of understanding of what constitutes insanity and a lack of effective mental health legislation to guide appropriately. One can argue that without updating the mental health legislation in Nigeria, these challenges around knowledge of mental disease will continue to exist.

These reviews are essential because the findings support the argument that the public's perception of insanity might influence its use as a defence against criminal responsibility considering these public opinions do not appear sympathetic or caring. Judges and lawyers are part of this population in society and share the same perspective. However, this has a high chance of not favouring the insanity defence.

As part of this analysis of the nature of the Nigerian insanity defence, the second component focuses on the choice of treatment of insane offenders.

7.2.2. TREATMENT OF MENTAL ILLNESS

Studies have shown an unorthodox understanding of the causes of insanity in Nigeria, reflecting the Nigerian mental health system. To further show the poor state of the Nigerian mental health system and how it affects the insanity defence. This section will demonstrate that while few studies show that patients in Nigeria resort to psychiatric hospitals for mental health treatment, others claim that patients regularly seek traditional and religious treatment for mental illness. The Nigerian mental health system offers several treatment options that may not meet international standards. The crux of this section is that in Nigeria, accused persons are less likely to raise and establish an effective insanity defence due to the lack of mental health care and treatment options. This section will examine Nigeria's traditional, religious and orthodox (psychiatric) treatment methods for insanity

university health care students on mental health stigma in Nigeria: Qualitative analysis' (2022) International Journal of Mental Health Systems.

Nigerian literature well documents its traditional healing system related to mental illness.[29] Also, Nigerian communities have practised traditional medicine since the pre-colonial era.[30] Urigwe said traditional medicine was Nigeria's primary mental health system before colonisation.[31] He argued that Nigeria adopted traditional medicine to treat mental illness because it lacked mental health facilities and the professionals to treat mental illness.[32] Also, he further claimed that the lack of understanding of the root causes of mental illness led to the consultation of traditional healers.[33] These traditional medical practices involved diverse ways of treatment like herbal medicine, diviner incantation, sacrifices in the form of goods, animals, and rituals, to name but a few more.[34]

Further research shows that Nigerians' continued preference for traditional medicine for treating mental illness is due to the lack of knowledge about western medicine and the easy access to

[29] Julian Eaton, Ahamefula O Agomoh, 'Developing Mental Health Services in Nigeria: The Impact of a Community-Based Mental Health Awareness Program' (2008) 43 Soc. Psychiatry & Psychiatric Epidemiology 552; Raymond Prince, *Indigenous Yoruba Psychiatry, In Magic, Faith, and Healing: Studies in Primitive Psychiatry Today* 84 (Ari Kiev 1964); Mary Olufunmilayo Adekson, *The Yoruba Traditional Healers of Nigeria* (New York Routledge 2003) 26-38.

[30] Ibid.

[31] Stephanie E Urigwe, *understanding mental illness in Nigeria: Bringing culture and traditional medicine into mental health policy* (The University of Texas School of Public Health. ProQuest Dissertations Publishing, 2010)

[32] Ibid.

[33] Ibid.

[34] A O Odejide, M O Olatawura, Akinade O Sanda, A O Oyeneye, 'Traditional Healers and Mental Illness in the City of Ibadan' (1978) Vol. 9 Journal of Black Studies.

traditional medicine.[35] Numerous studies on varied populations, including the Yorubas[36], Hausa[37], and Igbos[38], have proven this inclination toward traditional treatment for mental illness. In addition, they noted that a community's belief that supernatural forces cause mental illness affects their choice of native mental health healers.[39] This thesis agrees with their argument that the community's belief system about the causes of mental illness influences a family's decision on where to go for mental illness treatment. Further research shows that Nigerians' continued preference for traditional medicine for treating mental illness is due to the lack of knowledge about western medicine and the easy access to traditional medicine.[40] Numerous studies on varied

[35] Heaton M M, Black sian, *White coats: Nigerian Psychiatrists decolonization and globalization of psychiatry* (Ohio University Press 2013) 120; Odejide A O,'Traditional (native) psychiatric practice; its role in modern psychiatry in a developing country' (1978) The Psychiatric J Univ Ottawa, 4; R. Olukayode Jegede, 'A Study of The Role Of Socio-Cultural Factors In The Treatment Of Mental Illness In Nigeria' (1981) Vol 15a Social Science Med 49.

[36] A O Odejide, M O Olatawura, Akinade O Sanda, A O Oyeneye, 'Traditional Healers and Mental Illness in the City of Ibadan' (1978) Vol. 9 Journal of Black Studies, 195-205; Ibukun Adeosun,Abosede Adekeji Adegbohu, Tomilola Adejoke Adewumi, Oyetayo O. Jeje, 'The Pathways to the First Contact with Mental Health Services among Patients with Schizophrenia in Lagos, Nigeria' (2013) Hindawi 1.

[37] Chikaodiri Nkereuwem Aghukwa, 'Care Seeking and Beliefs About the Cause of Mental Illness Among Nigerian Psychiatric Patients and Their Families' (2003) Vol. 63 6 Psychiatric Service 1; Mohammed Kabir Zubair, IliyasuIsa S Abubakar, Muktar H Aliyu, 'Perception and beliefs about mental illness among adults in Karfi village, northern Nigeria' (2004) BMC International Health and Human Rights 4 (3); Dauda Eneyamire Suleiman, Mental health disorders in Nigeria: A highly neglected disease (2016) Annals of Nigerian Medicine.

[38] Christian Ewhrudjakpor, Knowledge, Beliefs and Attitudes of Health Care Providers towards the Mentally Ill in Delta State, Nigeria (2009) Ethno-Med 3(1) 19-25; Agofure O, Okandeji-Barry O R, Ume I S, Knowledge and Perception of Mental Disorders Among Relatives of Mentally Ill Persons In A Rural Community In South-South Nigeria (2019) Journal Of Community Medicine And Primary Health Care Vol. 31, No 2; Ude P, Treatment of mental illness: The case of Nigeria (Pangaea Global Connections 2011) 51; Aniebue Patricia Nonye, Ekwueme Christiandolus Oseloka, Health-seeking behaviour of mentally ill patients in Enugu, Nigeria (2009) Vol. 15 SAJP.

[39] Ibid.

[40] Heaton M M, Black sian, *White coats: Nigerian Psychiatrists decolonization and globalization of psychiatry* (Ohio University Press 2013) 120; Odejide A O, 'Traditional (native) psychiatric practice; its role in modern psychiatry in a developing country' (1978) The Psychiatric J Univ Ottawa, 4, 297-301.; R. Olukayode Jegede, 'A Study of The Role Of Socio-Cultural Factors In The Treatment Of Mental Illness In Nigeria' (1981) Vol 15a Social Science Med 49 – 54.

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[41] A O Odejide, M O Olatawura, Akinade O Sanda, A O Oyeneye, 'Traditional Healers and Mental Illness in the City of Ibadan' (1978) Vol. 9 Journal of Black Studies, 195-205; Ibukun Adeosun,Abosede Adekeji Adegbohu, Tomilola Adejoke Adewumi, Oyetayo O. Jeje, 'The Pathways to the First Contact with Mental Health Services among Patients with Schizophrenia in Lagos, Nigeria' (2013) Hindawi 1.

[42] Chikaodiri Nkereuwem Aghukwa, 'Care Seeking and Beliefs About the Cause of Mental Illness Among Nigerian Psychiatric Patients and Their Families' (2003) Vol. 63 6 Psychiatric Service 1; Mohammed Kabir Zubair, IliyasuIsa S Abubakar, Muktar H Aliyu, 'Perception and beliefs about mental illness among adults in Karfi village, northern Nigeria' (2004) BMC International Health and Human Rights 4 (3); Dauda Eneyamire Suleiman, Mental health disorders in Nigeria: A highly neglected disease (2016) Annals of Nigerian Medicine.

[43] Christian Ewhrudjakpor, Knowledge, Beliefs and Attitudes of Health Care Providers towards the Mentally Ill in Delta State, Nigeria (2009) Ethno-Med 3(1) 19-25; Agofure O, Okandeji-Barry O R, Ume I S, Knowledge and Perception of Mental Disorders Among Relatives of Mentally Ill Persons In A Rural Community In South-South Nigeria (2019) Journal Of Community Medicine And Primary Health Care Vol. 31, No 2; Ude P, Treatment of mental illness: The case of Nigeria (Pangaea Global Connections 2011) 51; Aniebue Patricia Nonye, Ekwueme Christiandolus Oseloka, Health-seeking behaviour of mentally ill patients in Enugu, Nigeria (2009) Vol. 15 SAJP.

[44] Ibid.

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Religious retreats are another option for treating mental illness prevalent in Nigeria. Evidence in Nigerian literature suggests that Nigerians use traditional or religious treatment methods before going to psychiatric hospitals.[50] For example, studies have shown that religious treatments happen in prayer houses or places of worship like religious retreats. These places are camps for mentally

[45] Heaton M M, Black sian, *White coats: Nigerian Psychiatrists decolonization and globalization of psychiatry* (Ohio University Press 2013) 120; Odejide A O, 'Traditional (native) psychiatric practice; its role in modern psychiatry in a developing country' (1978) The Psychiatric J Univ Ottawa, 4, 297-301.; R. Olukayode Jegede, 'A Study of The Role Of Socio-Cultural Factors In The Treatment Of Mental Illness In Nigeria' (1981) Vol 15a Social Science Med 49 – 54.

[46] A O Odejide, M O Olatawura, Akinade O Sanda, A O Oyeneye, 'Traditional Healers and Mental Illness in the City of Ibadan' (1978) Vol. 9 Journal of Black Studies, 195-205; Ibukun Adeosun,Abosede Adekeji Adegbohu, Tomilola Adejoke Adewumi, Oyetayo O. Jeje, 'The Pathways to the First Contact with Mental Health Services among Patients with Schizophrenia in Lagos, Nigeria' (2013) Hindawi 1.

[47] Chikaodiri Nkereuwem Aghukwa, 'Care Seeking and Beliefs About the Cause of Mental Illness Among Nigerian Psychiatric Patients and Their Families' (2003) Vol. 63 6 Psychiatric Service 1; Mohammed Kabir Zubair, IliyasuIsa S Abubakar, Muktar H Aliyu, 'Perception and beliefs about mental illness among adults in Karfi village, northern Nigeria' (2004) BMC International Health and Human Rights 4 (3); Dauda Eneyamire Suleiman, Mental health disorders in Nigeria: A highly neglected disease (2016) Annals of Nigerian Medicine

[48] Christian Ewhrudjakpor, Knowledge, Beliefs and Attitudes of Health Care Providers towards the Mentally Ill in Delta State, Nigeria (2009) Ethno-Med 3(1) 19-25; Agofure O, Okandeji-Barry O R, Ume I S, Knowledge and Perception of Mental Disorders Among Relatives of Mentally Ill Persons In A Rural Community In South-South Nigeria (2019) Journal Of Community Medicine And Primary Health Care Vol. 31, No 2; Ude P, Treatment of mental illness: The case of Nigeria (Pangaea Global Connections 2011) 51; Aniebue Patricia Nonye, Ekwueme Christiandolus Oseloka, Health-seeking behaviour of mentally ill patients in Enugu, Nigeria (2009) Vol. 15 SAJP.

[49] Ibid.

[50] Aniebue Patricia Nonye, Ekwueme Christiandolus Oseloka, Health-seeking behaviour of mentally ill patients in Enugu, Nigeria (2009) Vol. 15 SAJP 19.

ill people whom they restrain with chains and only pray for healing.[51] Also, Onyemelukwe explained that people usually resort to religious explanations for mental illness in Nigeria.[52] Some religious approaches have led to significant physical, emotional and human rights abuses.[53] For example, Abimbola's study demonstrated that even during the colonial period, communities restrained insane persons by chaining them with iron or clamping them to the floor with wooden shackles away from the community.[54] Onyemelukwe suggested new legislation on mental health and more involvement of the family members of the insane person.

However, since the colonial era, conventional medicine and mental health institutions have coexisted with traditional care (treatment). Notably, Nigeria established the asylum system during the colonial period in 1906, with the Calabar Lunatic Asylum functioning as the first mental hospital. In 1907, Lagos state completed the Yaba Lunatic Asylum[55] and admitted fourteen patients.[56] Presently, there are few psychiatric facilities in Nigeria, and they cannot be said to function at their best.[57]

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[51] Benedict Carey, The Chains of Mental Illness in West Africa <https://www.nytimes.com/2015/10/12/health/the-chains-of-mental-illness-in-west-africa.html> accessed 12th February 2020; Aisha Salaudeen, Chained and locked up, why some Nigerians turn to religion first to treat the mentally ill, <https://edition.cnn.com/2020/10/10/africa/mental-health-religious-treatment-nigeria/index.html> accessed 12th December 2020.

[52] Cheluchi Onyemelukwe, 'Stigma and Mental Health in Nigeria: Some Suggestions for Law Reform' (2016) Vol. 55 Journal of Law, Policy and Globalization.

[53] Ibid.

[54] Abimbola W, "The Place of African Traditional Religion in Contemporary Africa, the Yoruba Example" in Ik Olupona (ed), *African Traditional Religion in Contemporary Society* (St Paul, MN: Paragon House 1991).

[55] Yaba Mental Hospital (renamed Yaba Psychiatric centre in 1977).

[56] Abimbola (n 44)3.

[57] Federal Hospitals: The Neuro-Psychiatric Hospital, Aro, Abeokuta, Federal Neuro-Psychiatric Centre, Kwara, Federal Neuro-Psychiatric Hospital, Uselu, Benin, Federal Psychiatric Hospital, Calabar Federal Neuro-Psychiatric Hospital, Enugu Federal Neuro Psychiatric Hospital, Kaduna, Federal Neuro-Psychiatric Hospital, Maiduguri and more; Specialty Hospitals - Federal Ministry of Health <https://www.health.gov.ng/index.php> accessed 22 February 2021.

Nigeria Initially adopted the Lunacy Ordinance in 1916.[58] These rules were revised in 1958 to allow doctors and magistrates to hold mentally ill persons in asylums.[59] However, this section will not elaborate on its provisions because it is outside the scope of this thesis, as it does not contribute to the insanity defence. Since 1958, lawmakers have not amended the Lunacy Act. The following part will examine Nigeria's mental health legislation, demonstrating that its provisions are old, outdated, and inefficient. Additionally, it has no bearing on the operation of the insanity defence.

7.3. REVIEW OF MENTAL HEALTH STATUTES

7.3.1. THE NIGERIAN LUNACY ACT OF 1958

Nigeria amended the Lunacy Ordinance of 1916, Lunacy Ordinance introduced during British rule and named it the Lunacy Act of 1958.[60] In this thesis, two points frequently relate mental health legislation to the insanity defence. First, a mental health law could provide for an insanity defence[61] or determine who is insane. Second, a diversion to a civil jurisdiction happens when the criminal courts place the accused in hospital custody for a brief or extended term. One could argue that a verdict of hospital order indicates that the accused is not a criminal due to mental illness and is free from criminal charges. However, the law regards hospitalisation and treatment sentences as part of the criminal justice system in insanity defences despite their civil natures. As this chapter will discuss later, the English and Scottish mental health legislation provided disposal options for an insane accused.

This Lunacy Act adds little to this thesis, as its provisions do not define insanity, provide for the insanity defence, or provide a way to dispose of insane criminals. Therefore, besides highlighting the inefficiency of this statute in helping the criminal courts decide on the insanity defence, this section will explore further provisions that suggest an amendment.

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[58] Jonathan Sadowsky, *Imperial Bedlam: Institutions of Madness in Colonial Southwest Nigeria* (Berkeley and Los Angeles: University of California Press 1999) 18.

[59] Ibid.

[60] Paula Ugochukwu Ude, 'Policy Analyses on Nigerian Lunacy Act (1958): The Need for a New Legislation' (2015) Journal of Psychiatry 1.

[61] See the English mental health Act 19.

This legislation has remained the national regulation for mental health in Nigeria, with States adopting its models.[62] The lawmakers are yet to make any amendment or change to this legislation from its enactment before Nigeria's independence.[63] Hence, this section will explain why this legislation needs to be amended or changed.

First, in light of modern medical advances, some of the terms used in the legislation might sound outdated or derogatory because of their age. For instance, Ogunlesi and Ogunwale noted that the terms "idiot and lunatics" used in the Lunacy Act sound derogatory in the light of modern medical development.[64] The World Health Organization (WHO) shared a similar idea when it stated that the provisions in the Nigerian Lunatic Act used terms that are no longer used in standard medical parlance today.[65] For example, modern psychiatry no longer uses the term "lunacy" or "lunatics" to characterise mental illness.[66] Scotland and England are good instances of jurisdictions that have renamed lunacy to a mental disorder.[67]

Second, this statute refers to mental illness as lunacy, describing the term "lunatics" as an "idiot" and any other person of unsound mind.[68] Moreso, the terms "idiots" and "unsound mind" was not clarified further in this statute. The WHO Resource Book defines "unsoundness of mind" as not

[62] The Lagos State House of Assembly enacted the Lagos State Mental Health Law in 2018, repealing the Lagos State Lunacy Law. The Lagos State Mental Health Law, in contrast to the Lunacy Act, addresses the notions of voluntary admission, involuntary admission, and police powers to detain mentally ill people.

[63] Adegboyega Ogunlesi, Adegboyega Ogunwale, 'Mental Health Legislation in Nigeria: Current Leanings and Future Yearnings' (2012) Vol 1 International Psychiatry; Morakinyo V O, 'The law and psychiatry in Africa' (1977) African Journal of Psychiatry, 3, 91–98.

[64] Ibid 114; Adegboyega O. Ogunlesi, Adegboyega Ogunwale, Mental health legislation in Nigeria: current leanings and future yearnings (2012) <https://www.researchgate.net/publication/322378501_Mental_health_legislation_in_Nigeria_current_leanings_and_future_yearnings/stats> accessed 29th August 2019.

[65] World Health Organisation, Best Practices: Who African Region, 6–7 (2007), available at http://www.who.int/mental_health/policy/country/BestPractices4_AFRO.pdf accessed 1st July 2019.

[66] Mental Health Act 1983; DSM-5 List of Mental Disorders <http://psychologycharts.com/list-of-mental-disorders.html> accessed the 10th of April 2021.

[67] Ibid.

[68] The Nigerian Lunacy Act of 1958, s2.

being of sound mind, which does not adequately explain it.[69] The Resource book further argued that "Unsound mind" and "mental incapacity" are relative concepts but different. It explained that the term "unsound mind" does not have a clinical equivalent and can refer to various situations not caused by mental illness. The definition of mental illness has evolved over the years in most developed countries, and the range of illnesses that qualify as mental illness has expanded. "Depression, bipolar disorder, schizophrenia, and other psychoses, dementia, and developmental disorders like autism" were added to the WHO's "mental diseases" list in 2019.[70]

Third, as the statute's title indicates, it regulates the detention and transfer of lunatics.[71] However, studies have criticised this title, arguing that the title does not mention the treatment of insane patients.[72] The authors observed in their studies that the government built asylums to protect society from lunatics without providing treatment or ensuring the rights of those insane.[73] Thus, the Lunacy Act is a better tool for social control than providing care and treatment to the insane in Nigeria.[74]

Fourth, several studies have criticised this statute for not providing treatment options, arguing that it is discriminatory.[75] This argument is persuasive because people take sick people to hospitals for treatment, while the law does not detain the insane not for treatment. Furthermore, international

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[69] WHO Resource Book On Mental Health, Human Rights And Legislation, https://web.archive.org/web/20131025235045/http://www.who.int/mental_health/policy/who_rb_mnh_hr_leg_FINAL_11_07_05.pdf accessed 2 October 2020

[70] Mental Disorders <https://www.who.int/news-room/fact-sheets/detail/mental-disorders> accessed 1st September 2021.

[71] The Lunacy Law of Nigeria 1958, the Title.

[72] Nigeria: Nigerian Health Services Available <https://www.justice.gov/eoir/page/file/1342146/download> accesses 2 July 2021

[73] Obayi N O K, Asogwa F, Ugwunna N,Universal Health Coverage and Healthy Living in South-East Nigeria: How Far with Mental Health? (2017) Open Journal of Psychiatry 7, 199.

[74] Ude (n 43) 19.

[75] Abiodun Odusote, 'Manifestation and Treatment of Mental Health in Nigeria: A Call for Responsive and Efficient Legislation in Compliance with Global Best Practices'(2021) Vol.12 Beijing Law Review; Chime Asonye, Hauwa Ojeifo, The Silent Pandemic: Legislative Reforms to Protect Nigerian Minds During COVID-19<https://apj.hkspublications.org/the-silent-pandemic-legislative-reforms-to-protect-nigerian-minds-during-covid-19/> accessed 2 December 2021.

law recognises the right to mental health treatment. For example, article 12 of the International Covenant on Civil and Political Rights (ICESCR) states that everyone has the right to optimal physical and mental health treatment. Also, the United Nations Mental Health Declaration of Human Rights provided that all persons have the right to hospital amenities without distinction as to race, colour, sex, language, religion, political opinion, social origin or status by right of birth or property.[76]

Fifth, this legislation enables the magistrates and medical officers to decide on persons who are lunatics.[77] Without a medical officer, a magistrate can declare a person insane (a lunatic) and send him to the asylum.[78] According to the United Nations Mental Health Declaration of Human Rights, no person, man, woman, or child, should be denied personal liberty due to mental illness without a fair jury trial and appropriate legal representation.[79]

The confinement order is final as the person confined had no right to challenge the order or appeal.[80] However, studies have also argued that confinement orders without the right of appeal violate human rights.[81] Also, article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) gives people the right to have their arrest or detention reviewed by a judge. Hence it can be argued that this statute does not protect the rights of persons with mental health illnesses. However, some international human rights treaties created crucial rights for mentally ill people. For example, an involuntary commitment violates Article 3 of the Universal Declaration of Human Rights (UDHR) of 1948, which mandates that all people have a fundamental right to a life of freedom, liberty, and security. Also, Article 9 of the UDHR prohibits arrest or detention without

[76] Mental Health Declaration of Human Rights, <https://www.cchrint.org/about-us/declaration-of-human-rights/#:~:text=Mental%20Health%20Declaration%20of%20Human%20Rights.%20The%20right,any%20violation%20of%20mental%20health%20or%20other%20law> Accessed 18 December 2021.

[77] The Nigerian Lunacy Act of 1958, s10, s11, s13.

[78] The Nigerian Lunacy Act of 1958, s 14.

[79] United Nations Mental Health Declaration of Human Rights <https://www.ohchr.org/en/stories/2018/05/mental-health-human-right>

[80] Paula Ugochukwu Ude, 'Policy Analysis on Nigerian Lunacy Act (1958): The Need for a New Legislation' (2015) J Psychiatry, 19.

[81] Ibid.

cause. In recent years, a significant advancement in human rights has been the recognition of the significance of preserving both personal and public safety while honouring the preferences of people in mental distress on an equal and non-discriminatory basis.[82]

Furthermore, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that everyone has the right to freedom and security. According to Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR), authorities must treat someone in custody with dignity and respect. Article 7 of the ICCPR guarantees the right to be free of medical or scientific experimentation. The UN Human Rights Committee's General Comment No. 20 explains that this right obligates state parties to protect those who cannot give valid consent, especially those in custody or jail. Furthermore, international law recognises the right to mental health treatment. Article 12 of the ICESCR states that everyone has the right to optimal physical and mental health.

In addition, in 2005, the World Health Organization (WHO) published a resource book for legislators on mental health and human rights legislation.[83] On voluntary admission, it stressed that most mentally ill people should be managed and rehabilitated with their permission. Therefore, legislation should promote voluntary entry.

The WHO's mental health action plan sets a global target of 50% of countries developing or updating their laws to conform to international and regional human rights instruments by 2020. In compliance, the Nigerian Senate held a public hearing on the Mental Health and Substance Abuse Bill on 19th February 2020. The Senate (Upper chamber) passed the Bill in December 2020, and the House of Representatives (lower chamber) voted in favour of it on 6th July 2021. As a result, the Bill is awaiting presidential approval before becoming law. Importantly, this Bill provided the procedures for admitting mentally ill persons involved in criminal proceedings into hospitals.[84]

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[82] Jill Stavert, Mental health advance statements: Crossing the divide from clinical to law enforcement settings (2020) Journal of Psychiatric and Mental Health Nursing 28(2).

[83] WHO Resource Book on Mental Health, Human Rights and Legislation (2005) World Health organization< http://www.lhac.eu/resources/library/who_resource-book-on-mental-health-human-rights-and-legislation--2.pdf> accessed 9th July 2020.

[84] Mental Health and Substance Abuse Bill 2020 Prt VI s 41 – 43.

Also, if passed, the Bill would provide the much-needed language change, the definition of mental illness, protection of rights and better disposal options.[85]

This thesis acknowledges the existence of a mental health policy framework, established in 1991 and last updated in 2013.[86] On the other hand, its principles are advisory, and users cannot enforce them. It attempted to cover gaps in some aspects of the Nigerian Lunacy Act, like treatment and hospitalisation.[87] However, just as the Lunacy Act does not contribute to the insanity defence, neither does this policy. As a result, this thesis will not review it because it is only concerned with providing mental health services at Nigeria's primary and secondary levels.

Therefore, considering the gaps outlined, the need for Nigerian lawmakers to review this legislation and subsequently amend it is eminent. The country needs a law that will update the language and guarantee the care and treatment of the insane. This new law would, in turn, greatly assist the insanity defence in defining key terms, evidence and better disposal options.

After concluding that Nigeria's mental health laws contribute little to the insanity defence and identifying potential gaps lawmakers could amend, this chapter will proceed to the mental health laws in England and their relationship to the insanity defence.

7.3.2. THE MENTAL HEALTH LAWS IN ENGLAND

The preceding section examined the Nigerian mental health system from two positions, people's perspective and the treatment of insane persons, which led to the review of their mental health legislation. However, this thesis argues that developments in the mental health sector and legislation could positively impact the insanity defence, as will illustrate below. In order to prove this argument, this section will examine the provisions of the English mental health law and how

[85] Mental Health and Substance Abuse Bill Prt VI s 42.

[86] National Policy for Mental Health Services Delivery Nigeria 2013 <https://cheld.org/wp-content/uploads/2015/02/national_policy_for_mental_health_service_delivery__2013_.pdf> accessed 30th June 2020.

[87] National Policy for Mental Health Services Delivery, presented by the Honorable Minister of Health Adopted at the National Council on Health, August 2013.

it impacts the insanity defence. Furthermore, it will show how laws on mental health have changed over time, from the eighteenth century to the present.

The history of mental health legislation in England shows a shift from an emphasis on incarceration without treatment as a social control to a more person-centred regime and treatment (The Mental Health Act of 1983 and subsequent legislation).[88]

7.3.2.1. THE LUNACY ACTS

Like the Nigerian Lunacy Act, the English Lunacy Act had minimal impact on the insanity defence; therefore, they are beyond the scope of this thesis. However, it is vital to recognise their contributions to developing the English mental health system. It will also show similarities between the Nigerian Lunacy Act and how the English developed theirs.

Historically, studies claim that English mental health legislation[89] before the late eighteenth century was unsatisfactory because it was primarily concerned with public protection and removing the insane from society rather than treating them or protecting their legal rights.[90] In addition, this period recorded the building of madhouses, and mental health treatment was undeveloped.[91] As a result, individuals exhibiting symptoms were isolated from society and were

[88] Scull Andrew, Museums of Madness: The Social Organization of Insanity in Nineteenth Century England (Allen Lane, 1979); Andrew Scull (ed.), Madhouses, Mad-doctors, and Madmen: The Social History of Psychiatry in the Victorian Era (London: Athlone Press, 1981); Andrew Scull, Social Order/Mental Disorder: Anglo-American Psychiatry in Historical Perspective (London: Routledge, 1989); Porter Roy, Mind-forg'd Manacles: A History of Madness in England from the Restoration to the Regency (London: Athlone, 1987); Peter Bartlett, The Poor Law of Lunacy: The Administration of Pauper Lunatics in Mid-Nineteenth-Century England (London: Leicester University Press, 1999).

[89] Poor Law Act, 1601; Vagrant Act, 1744; Regulation of Madhouses Act, 1774.

[90] Pauline Prior, 'Asylums and after: a revised history of the mental health services from the early 18th century to the 1990s. Kathleen Jones. London: The Athlone Press, 1993' (2014) Cambridge University Press 2014) 1.

[91] Kathleen Jones, *Lunacy, Law, and Conscience 1744- 1845: The Social History of the Care of the Insane* (Routledge 1955) ix.

left to die in deplorable and brutal conditions.[92] Melancholy, wilfulness, or being "possessed by evil spirits" were reasons to commit a person to the madhouse.[93]

From the 18th century onward, the science and practice of psychiatry developed, and society changed how it dealt with the mentally ill.[94] The 18th century was an era of progress and enlightenment: Science replaced superstitious beliefs like being "possessed by the evil spirit". The 1774 Lunacy Act introduced the requirement of medical certificates from two different doctors before entering a madhouse.[95] Madhouses became registered and inspected yearly, and a central authority recorded the people inside. However, this Act did not impact the insanity defence because it had no provision related to the insanity defence or the insane in criminal trials.

By the 19th century, the English government established Asylum houses for lunatics through the County Asylums Act of 1808.[96] The legal framework for the insane switched from detaining them as a social control measure to treating them as patients in this period.[97] The County Asylum Act and the Lunacy Act passed in 1845, reflected this shift; they treated lunatics as patients rather than prisoners.[98] The system of Asylum care progressed throughout the 1800s with the various Lunacy Acts[99] amending the insane person's admission process into the asylums.[100] However, this legislation did not provide for insane persons involved in criminal trials nor the insanity defence.[101]

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[92]Akinobu Takabayashi, 'Surviving the Lunacy Act of 1890: English Psychiatrists and Professional Development during the Early Twentieth Century' (2017) Cambridge University Press.

[93] Jones (n 91).

[94] Ibid; W A Elliot, Modern Mental Health Acts (1979) Scottish medical Journal 108.

[95] Ibid.

[96] Kathleen Jones, *Asylums and after: A revised history of the mental health services from the early 18th century to the 1990s* (London: The Athlone Press, 1993)14.

[97] Roy (n 88).

[98] Lunacy Act 1845 s XLIII.

[99] Lunacy Act of 1842, 1845, 1855 and the County Asylum of 1808 and 1845.

[100]Akinobu Takabayashi, 'Surviving the Lunacy Act of 1890: English Psychiatrists and Professional Development during the Early Twentieth Century' (2017) Med Hist 61(2), 247.

[101] However, the legal journey for insane criminals started with the Criminal Lunatic Act of 1800 (39 and 40 Geo. Ill c. 94). The "criminal lunatic" were persons the courts acquitted because of insanity or found insane on arraignment under this Act. The third classification of criminal lunatic was established by the Insane Prisoners Act 1840. It included

Studies have shown significant positive changes in mental health practice, starting with the 1890 Lunacy Act.[102] Although this legislation contributed less to the English insanity defence, it improved their mental health system by providing more opportunities for treatment.[103]

The Lunacy Acts of 1842, 1845, 1855, and 1890 had less impact on the insanity defence. However, the various Acts similarly defined lunatics. The Lunacy Acts defined a lunatic as "an idiot lunatic or a person of unsound mind not capable of managing himself or his affairs, whether found by inquisition or not".[104] These laws provided for "idiot and unsound mind" without clarifying what they meant, like the position in Nigerian Lunacy Act.[105] Thus, the Lunacy Act's provisions did not pertain to the insanity defence, aside from its definition of lunacy.

This period was influential in developing the English mental health system, as reform debates contended for the detention or incarceration of lunatics to include treatment and to provide a more flexible mode of admission into hospitals and treatment.[106] Efforts to reform the English mental

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people who were moved from prison to the asylum by the Home Secretary's warrant. Those in prison, as well as those awaiting trial, were affected by this provision. The legislators decided in 1938 that the term "criminal lunatic" should be replaced with "Broadmoor patient," which was enacted in the Criminal Justice Act 1948.

[102] Akinobu Takabayashi, 'Surviving the Lunacy Act of 1890: English Psychiatrists and Professional Development during the Early Twentieth Century' (2017) Med Hist 61(2): 246–269; Peter Bartlett, 'Legal Madness in the Nineteenth Century' (2001) Social History of Medicine; David Wright, 'The Certification of Insanity in Nineteenth-Century England and Wales' (1998) History of Psychiatry; Report of the Royal Commission on Lunacy and Mental Disorder (London: H.M.S.O., 1926.

[103] First, the lawmakers enacted this statute to tackle wrongful confinements by ensuring that patients had extensive rights of appeal to the authorities and the right to file an appeal against the justices, magistrates, and commissioners of lunacy who made decisions on their behalf. Second, it set the standard for certification and compulsory detention. Third, this legislation introduced a legal framework for the admission of private patients to psychiatric facilities. Fourth, it prohibited the new registration of private asylums to reduce their rising numbers. In addition, the Lunacy Act of 1890 triggered a professional crisis in psychiatry and sparked inter-professional competition between psychiatric and non-psychiatric medical service providers.

[104] Lunacy Act of 1890 s 3.

[105] Although England later enacted the Idiot Act !886, that defined idiots.

[106] Rose Nikolas, *The Psychological Complex: Psychology, Politics and Society in England, 1869–1939* (London: Routledge, 1985); Mathew Thomson, *Psychological Subjects: Identity, Culture, and Health in Twentieth Century Britain* (Oxford: Oxford University Press, 2006).

health legislation continued throughout the twentieth century. As a result, they successfully influenced the enactment of new mental health legislation like the Mental Deficiency Act of 1913, the Mental Treatment Act of 1930, and other laws reviewed in the next section.

7.3.2.2. THE MENTAL DEFICIENCY ACT OF 1913

This thesis claims that this Act falls outside its scope because its provisions centred on mental defectives, which the Lunacy Law did not categorise as lunatics at the time.[107] It acknowledges the various laws established for mentally disabled people by this time.[108]

The Royal Commission's recommendations led lawmakers to enact the Mental Deficiency Act Of 1913.[109] The primary aim of this legislation was to promote the establishment of institutions for the mentally defective. It grouped "mentally defective" into Idiots, imbeciles, Feeble-minded persons, and Moral imbeciles.[110]

Although the lawmakers enacted the Mental Defective Act to close the gap between persons not provided for in the Lunacy Act, there seemed to have been a disconnect between the Mental Defective Act and the Lunacy Act. For example, the Lunacy Act defined lunacy as "idiot lunacy" without further explanation of who was an idiot. More so, the Lunatic Act did not provide for mental defectives. This distinction does not exist in mental health legislation today because mental health legislation refers to lunatics and mental defectives as mentally disordered individuals.[111]

The Idiots Act and the Mental Defective Act are outside the scope of this work since their provisions did not apply to lunatics.

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[107] The Mental Deficiency Act 1913 s 1.

[108] The Idiots Act of 1886 defined "idiots" and "imbeciles".

[109] Royal Commission on the Care and Control of the Feeble-Minded, 1904.

[110] The Mental Deficiency Act 1913 s 1; According to this legislation, "idiots" are those "born with a defective mind or those who could not protect themselves from an early age". In contrast, imbeciles were not idiots but were incapable of managing their affairs because of a defective mind from birth or early years. Moreover, this legislation classified feeble-minded persons as different from imbeciles, and they were assisted with care, coupled with supervised and controlled activities. Finally, it further described moral imbeciles as persons from an early age with mental defects that could lead to criminal tendencies, and punishing them did not have a deterrent effect.

[111] The Mental health Act 1959.

However, the debate for reform continued as the government set up the Royal Commission on Lunacy and Mental Disorder.[112] This commission prompted a significant shift, although it had nothing to do with the insanity defence. Thus, their report proposed the voluntary admission of lunatics into hospitals and the establishment of outpatient and aftercare practices focused on treatment.[113] Their recommendations influenced the Mental Treatment Act of 1930 and the Mental Health Act of 1959, which introduced voluntary admission and treatment status into the mental health law.

7.3.2.3. MENTAL TREATMENT ACT 1930

Although this Act did not relate to the defence of insanity, it further marked some developments in mental health legislation.

This Act amended the Lunacy Acts (1890 to 1922) and the Mental Deficiency Acts of 1913 to 1927. The Mental Treatment Act (hereunder referred to as MTA) of 1930 amended the Lunacy Act of 1890 and officially referred to lunatics as persons of unsound minds and asylums as mental hospitals. In addition, the 1930 Act introduced the phrase "mental illness", reflecting changing social trends and attitudes. The MTA paved the way for the Mental Health Act of 1959, which eventually repealed the Lunacy Acts and the MTA. This Act further introduced voluntary and temporary admissions into mental health hospitals, which stopped being certified before hospital admission provided in the Lunacy Act.[114]

7.3.2.4. MENTAL HEALTH ACT 1959

The Mental Act of 1959 repealed the Lunacy Acts, the Mental Treatment Act, and the Mental Deficiency Act to improve the mental health system in England.[115] This Act in Part V provided a criminal law framework for convicted persons or accused persons found guilty but mentally

[112] Royal Commission on Lunacy and Mental Disorder of 1926.

[113] Ibid, para 48.

[114] Mental Treatment Act 1930. S 31.

[115] Ministry of Health: Mental Health Act 1959 General Policy, Registered Files (95,200 Series) <http://discovery.nationalarchives.gov.uk/details/r/C10978> accessed 5 February 2021

disabled by providing disposal pathways.[116] It made available two disposal pathways; compulsory hospital admission[117] or guardianship order.[118] In addition, it provided more details on hospital orders and guardianship orders made in the case of insane persons in criminal proceedings.[119] For instance, hospital and guardianship orders require the agreement of two medical doctors and the name of the hospital or guardian in the order.

The Mental Health Act of 1959 allowed courts in England to assess the need for hospital care based on medical advice.[120] Parker and Tennent stated that the provision of Part V aimed to protect mentally disordered offenders from punishment and transfer their care to the National Health Service.[121] Gustin referred to hospital or guardianship orders in conjunction with medical examinations as a utilitarian approach. It was a rational and sensible policy approach to evaluating the need for hospital care for offenders.[122] The utilitarian approach introduced by the 1959 Act represented a significant improvement over traditional legal procedures.[123] Therefore, the Mental Health Act 1959 (MHA) enabled increased powers for managing and treating the mentally ill. It determined whether individuals would benefit from hospital treatment and not whether mental illness negates culpability.

As part of the criminal law framework, this Act also provided the transfer from the prison of persons with mental illness, psychopathic disorder, sub normality or severe sub-normality to a hospital.[124]

[116] Mental Health Act 1959 Part v.

[117] Assessment and treatment order (hospital order).

[118] Mental Health Act 1959 s 60.

[119] Ibid.

[120] Larry O Gustin, Justifications for the Insanity Defence in Great Britain and the United States: The Conflicting Rationales of Morality and Compassion, Bulletin of the AAPL Vol. 9, No.2.

[121] Elizabeth Parker, Gavin Tennent, 'The 1959 Mental Health Act and Mentally Abnormal Offenders: A Comparative Study' (1979) 19 Medicine, Science, and the Law 38.

[122] Ibid.

[123] Ibid.

[124] Mental Health Act 1959 s 72

Furthermore, the provision that defined mental disorder may have impacted the insanity defence by assisting the court in determining whether someone had a mental health condition.[125] This Act defined mental disorders as:

> In this Act, "mental disorder" meant mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, and "mentally disordered" shall be construed accordingly.[126]

It further classified mental disorders into sub-normality, severe sub-normality and psychopathic disorder.[127]

7.3.2.5. THE MENTAL HEALTH ACT OF 1983

This Act came into force on 1st September 1983, inspired by the reforms brought about by the Mental Health (Amendment) Act 1982. The reforms made in the 1982 Amendment Act were because of the recommendations of the Butler Report on Mental Abnormal Offenders in 1975. Therefore, this Act consolidated the 1982 Amendment Act and the 1959 Act. Like the 1959 Act, it strived to improve the care system for the insane and supported the shift from focusing on incarceration to treatment.

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[125] Mental Health Act 1959 prt 2(local authority service); Although it also gave hospitals the right to refuse patients

[126] Mental Health Act 1959 s 4(1)

[127] (2) In this Act "severe sub normality" means a state of arrested or incomplete development of mind which includes sub normality of intelligence and is of such a nature or degree that the patient is incapable of living an independent life or of guarding himself against serious exploitation or will be so incapable when of an age to do so.

(3) In this Act " sub normality " means a state of arrested or incomplete development of mind (not amounting to severe sub-normality) which includes sub normality of intelligence and is of a nature or degree which requires or is susceptible to medical treatment or other special care or training of the patient.

(4) In this Act " psychopathic disorder " means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient and requires or is susceptible to medical treatment.

(5) Nothing in this section shall be construed as implying that a person may be dealt with under this Act as suffering from mental disorder, or from any form of mental disorder described in this section, by reason only of promiscuity or other immoral conduct.

Regarding the insanity defence, this 1983 Act made some fundamental changes to the 1959 Act. Accordingly, this section will review this legislation in light of the amendments or introductions to the 1959 Act.

First, compared to Part V of the 1959 Act, Part III of the 1983 Act clearly defined pathways for accused persons. For example, Unlike the 1959 Act, it separated Part III into remanding to a hospital for mental health assessment[128] and remanding to a hospital for treatment.[129] The 1959 Act did not provide for remanding to the hospital to inquire into the accused's mental condition. This legislation provided conspicuously for hospital treatment and not just remand in hospital. The court made this treatment order if she was satisfied that the offender had a mental disorder of a nature or degree that required medical treatment based on the evidence of two registered medical practitioners.[130]

Accused persons remanded for assessment in the crown courts were awaiting trial for an offence punishable with imprisonment or were arraigned for an offence but not sentenced. Furthermore, the courts could not remand as accused until they are satisfied with the evidence of a registered medical practitioner.[131] However, the crown court could not remand an accused convicted by or if the law fixed the sentence for the offence.

Second, unlike the 1959 Act, which provided only for the magistrate court, this legislation empowered the magistrate court and crown court to remand an accused person in a hospital to assess their mental health[132] or for treatment pending trial or sentence.[133] Similarly, the Crown Court or Magistrates' Court appeared throughout Part III.

[128] Mental Health Act 1983 s 35.

[129] Mental Health Act 1983 s 36.

[130] Magistrates, insanity and the common law Magistrates and mental disorder: a brief history; Mental Health Act 1983 s.37(3).

[131] Mental Health Act 1983 s 35(3a).

[132] Mental Health Act 1983 s 35.

[133] Mental Health Act 1983 s 36.

Third, this 1983 Act added that an accused sent to a hospital for treatment under this section might obtain at his own expense an independent report on his mental condition from a registered medical practitioner and petition the court for a termination of his remand.

The provision of a hospital and guardianship order upon the mentally disordered accused's conviction remained similar to the 1959 Act, except for adding the crown court.[134] The crown court could issue hospital and restriction orders on the recommendation of medical professionals without convicting or ending the trial.[135] However, the magistrate court could not make a hospital or restriction order without concluding the trial or convicting the accused.[136]

Aside from the addition of the crown court, the provision for a hospital and guardianship order upon the accused's conviction remained identical.[137]

In this Act—

> "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind and "mentally disordered" shall be construed accordingly;[138]

The lawmakers left the definition of mental disorder in the 1983 Act unchanged from the 1959 Act. Instead, it changed the terms used in the various categories of mental disorders. For example, it changed the terms subnormal and severe subnormal to mental impairment and severe mental

[134] Mental Health Act 1983 s 37 and Mental Health Act 1959 s 60 (1).

[135]Mental Health Act 1983 s 48(2)(a), s 51(5); *R. (on the application of Kenneally) v Snaresbrook Crown Court* [2001] EWHC Admin 968; [2002] Q.B. 1169.

[136] Mental Health Act s 46.

[137]The Mental Health Act 1983 s 47. A prisoner may have a Restriction Order placed on their detention in conjunction with a s.47 Order. This means that hospitals cannot discharge such prisoner from hospital without the permission of the Secretary of State unless the prison sentence has expired. However, for a restriction order, the Magistrates needs to commit the accused to the crown court to impose a restriction order only when the court convicts the accused. The Magistrate cannot commit the accused to the Crown Court if it decided an acquittal on the ground of insanity.

[138] The Mental Health Act 1983 s 1(2).

impairment but retained their meaning. Peay stated thus about the definition of mental disorder in the 1983 Act:

> This definition is one of acute terminological inexactitude: it acts like a concertina, expanding or contracting depending on the context in which it is applied in order to accommodate different client groups with little or no coherence.[139]

Furthermore, the Joint Scrutiny Committee on the 2004 Draft Mental Health Bill stated that the definition was possibly broad enough to cover smokers and include all individuals with a personality disorder. The broad nature of the definition of mental disorder provided in this Act meant that most offenders could utilise it.

Like other reforms on mental health in England, changes to the MHA 1983 were slow.[140] It took the government twenty-four years to implement reform.[141] The move to reform the 1983 mental health legislation in England started with the Richardson Committee. The following section will show the government's efforts towards enacting new mental health legislation, from the Richardson committee to the White Paper.

7.3.2.6. GOVERNMENT REVIEW COMMITTEES

8. THE RICHARDSON COMMITTEE

The government set up the Richardson Committee to review the MHA 1983 and published its report in July 1999.[142] The chairman pointed out that they aimed their report toward balancing the public's safety and the needs of mentally disabled persons in England.[143] To do this, the committee suggested placing the treatment and management of mentally disabled persons in the same position

[139] Jill Peay, Mental Health, Mental Disabilities and Crime.

[140] Mental Health Act 2007 <https://www.kingsfund.org.uk/sites/default/files/briefing-mental-health-act-2007-simon-lawton-smith-kings-fund-december-2008.pdf> accessed 07 January 2021.

[141] John Crichton, Rajan Darjee, 'New mental health legislation' (2007) BMJ.

[142] Department of Health. Report of the expert committee: review of the Mental Health Act 1983 London: DoH 1999 (Richardson 1999).

[143] Memoranda submitted by Professor Genevra Richardson [1] (MH 22) <https://publications.parliament.uk/pa/cm200607/cmpublic/mental/memos/uc2202.htm> accessed 07/02/2021

as those who were physically sick.[144] Therefore, they wanted to eliminate discrimination toward treating and managing mentally disabled persons.

This committee examined the relationship between the 1983 Act and criminal law concerning the insanity defence. Their proposal showed how this relationship could be improved. They proposed the following:

I. They proposed a new Mental Health Act that would require mandatory treatment and care for criminals who had a mental disorder, with or without restriction.[145] They believed the restriction order was necessary to manage mentally disordered offenders who could harm others and themselves. So, before issuing a restriction order, the court should conduct a formal risk assessment.[146]

II. Courts should base their decision to remand the accused to a hospital for treatment on a comprehensive clinical assessment of the offender's needs and the potential for medical intervention to cure them.[147]

This assessment order would allow healthcare specialists to determine whether:

a. The offender has a mental disorder that would warrant compulsory powers.

b. treatment would be effective and suitable for addressing their offending behaviour by showing the offender's understanding and compliance with treatment.

c. The offender posed a risk to public safety.[148]

This committee believed an assessment order would better inform the court of the appropriate disposal options. Therefore, they proposed a single provision for remand for assessment and

[144] Ibid

[145] Reform of the Mental Health Act 1983 - Proposals for Consultation, Presented to Parliament by the Secretary of State for Health by Command of Her Majesty November 1999, Chapter 8 para12

[146] Ibid Chapter 8 para 27

[147] Ibid Chapter 8 para13

[148] Ibid Chapter 8 para14, 15, 16.

treatment, which will guarantee greater efficiency, unlike the separate provisions in the 1983 Act.[149]

III. The requirement for the further decision to continue compulsory care and treatment should be based primarily on assessment of the level of risk whilst the mental disorder persists,'

IV. The accused patients should have access to a regular independent review of the appropriateness of detention.[150]

V. Under the 1983 Act, magistrates could not remand a defendant without the defendant's permission unless convicted of a crime punishable by imprisonment on summary conviction. They wanted the 1983 Act disparity between the authorities of the crown court and the magistrate court to issue remands abolished. They criticised this provision because it could keep people from medical help. So instead, they proposed that magistrates and crown courts remand people for treatment and assessment if they had enough medical evidence like the crown courts.

VI. Furthermore, they argued that in the 1983 Act, courts lacked the power to grant leave of absence to remanded offenders. This committee discussed the possibility of the court granting a patient remanded for treatment and assessment time off from the hospital.

Their recommendation did not secure an immediate amendment, and in the same year, the English government initiated the Green Paper to review the 1983 Act.

9. GREEN PAPER

After the Richardson committee's report, the English government published the Green Paper in November 1999 (Reform of the Mental Health Act 1983: proposals for consultation). This paper was substantially and ethically different from the Richardson committee's report. For example, the Richardson committee was more concerned with non-discrimination, patient autonomy, and

[149] Ibid Chapter 8 para18.

[150] Ibid Chapter 8 para11.

capacity. In contrast, the Green Paper was more concerned with the risk of harm to others, which they claimed should be the rationale for a compulsion order.[151]

The Green Paper showed no support that hospitals should treat mentally disabled persons like those suffering from other sicknesses fairly and consistently.[152] The Green Paper acknowledged no legal fairness or equality for people with mental disorders. Furthermore, there was no discussion of treatability, patient benefit, or the patient's best interest. However, their suggested procedure could discriminate against people with mental health disorders by focusing on the risk of harming the public or themself.

Furthermore, they criticised the definition of mental disorder as broad. They suggested that it should exclude cases where diagnosis solely relates to disorders of sexual preference or misuse of alcohol or drugs.

The Green Paper emphasised public interest and safety based on risk management. They proposed the following:

i. An addition of a guiding principle to the mental health legislation
ii. The Act should narrow the meaning of mental disorder in the 1983 Act
iii. A formal assessment based on risk management before a compulsory care and treatment order
iv. A tribunal should decide on a compulsory order
v. The compulsory order could be in the hospital or the community

10. THE WHITE PAPER

One year after, the government published a White Paper in December 2000 (Reforming the Mental Health Act). The White Paper agreed with the proposals of the Green Paper but chose a higher compulsion power without regard to ways to safeguard the patients. According to Grounds, the White Paper proposed a broad definition of mental disorder, the use of a single pathway for

[151] Jill Peay, 'Reform of the Mental Health Act 1983: Squandering an Opportunity?' (2000) Journal of Mental Health Law 2.

[152] Ibid 3.

compulsory powers, their extension to community and hospital settings, and the need for independent authorisation if the orders extend beyond 28 days.[153]

The white paper adopted the definition of mental disorder as suggested by the Richardson Committee as follows:

> … any disability or disorder of mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning [154]

This White Paper laid the foundation for a draft Mental Health Bill and consultation document published in June 2002.

Although, when the medical professionals raised concerns about the proposals, they feared that the mentally disordered persons could not make appropriate judgments, which delayed enacting a new law.[155] They further emphasised the inherent need to protect other persons while respecting the will of the mentally disordered.[156] Their concerns inspired the revised draft Mental Health Bill published in September 2004.

However, regarding the insanity defence, this White Paper recommended a significant expansion of sentence authorities, specifically those not contemplated by the Green Paper. They offered, for example, a "hybrid order," which combines hospital and limitation directions. They also pushed for restriction orders requiring courts to detain mentally ill offenders indefinitely, considering the risk of harming others and the nature of the current offence.

In 2005 a joint House of Commons and House of Lords Committee report on the draft Bill introduced a new Mental Health Bill in the House of Lords on Thursday, 16th November 2006, which received Royal Assent on 19th July 2007, to become the Mental Health Act 2007.

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[153] Adrian Grounds, Reforming the Mental Health Act (2018) Cambridge University Press.

[154] Part 1, para. 3.3).

[155]Department of Health. *Review of the Mental Health Act 1983. Report of the expert committee*. London: DoH, 1999.

[156] Ibid.

7.3.2.7. MENTAL HEALTH ACT 2007

The lawmakers enacted this Act to amend the Mental Health Act of 1983 and not repeal it. It also amended the Domestic Violence, Crime and Victims Act 2004 and the Mental Capacity Act 2005 concerning mentally disordered persons; and section 40 of the Mental Capacity Act 2005. This thesis will examine the amending Act and its application to the insanity defence.

It is important to note that this legislation did not change the court's remand process provided in the 1983 provision. The amendments in this legislation were to the care system for mentally disabled persons.[157] However, this thesis will identify changes related to the insanity defence being the focus of this thesis.

One of the key amendments to the 1983 Act was the definition of mental disorder. This legislation defined a mental disorder as "any disorder or disability of the mind".[158] Also, this 2007 Act removed the separate definitions for "severe mental impairment", "mental impairment", and "psychopaths". Lawton-Smith referred to the 1983 definition of mental disorder as complex and robust.[159]The new definition is short and direct. This definition would also aid the courts in identifying persons subject to the insanity defence.

Additionally, while the 1983 Act excluded people as mentally disordered "by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs", the 2007 Act excluded only 'dependence on alcohol or drugs.[160] Studies suggested that the lawmakers based the change on the government's assumption that societal opinions concerning promiscuity and immoral conduct have changed, and hospitals no longer detain people for treatment on those

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[157] For instance, this Act amended the test for detention with regards to a patient's treatability. This has to do with detention for treatment, where the consideration that treatment was likely 'to alleviate or prevent a deterioration' of a person mental health condition was replaced with the requirement for availability of 'appropriate medical treatment; it introduced the Supervised Community Treatment; Another important introduction in this Act is the right of Advocacy and more.

[158] Mental Health Act 2007 s 1(2)

[159] Simon Lawton-Smith, Briefing: Mental Health Act 2007 - The King's Fund, December 2008, <https://www.kingsfund.org.uk/sites/default/files/briefing-mental-health-act-2007-simon-lawton-smith-kings-fund-december-2008.pdf> accessed 22nd January 2020; The Act defined mental disorder as mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind.

[160] The Mental Health Act 2007 s 3.

grounds.[161] Also, they claimed that this change in the 2007 legislation could accommodate paedophiles when they meet the necessary insanity defence conditions.[162] Also, persons with a learning disability were accommodated only to the extent that the disability was associated with "abnormally aggressive or seriously irresponsible conduct".[163]

It is evident from this thesis that the mental health legislation in England has developed over time, improving the treatment and care of people with mental disorders. It has improved by focusing on patients' rights and treatment, equally reflected in the available criminal law disposal options. Moreover, the above review showed how the English mental health legislation moved from a period where the government focused on incarceration and removal from society, like the legislation in Nigeria. They moved to a period where the legislation focused on treatment and improving the rights of mentally disordered persons. The reform processes above have shown efforts to eliminate stigmatisation and discrimination. Therefore, it seems recommendable for Nigeria to emulate and follow suit with its mental health system.

Suppose a government takes care of the interest of mentally disordered persons. In that case, this position will reflect in the criminal law jurisdiction by reducing the number of insane persons prone to crime and how the criminal justice treats them when they commit a crime, especially regarding their disposal options.

However, the English government and lawmakers have attempted severally to enact a new mental health law. A 2022 mental health bill is waiting for lawmakers to sign into law, and a recent review in this area.

7.3.2.8. THE INDEPENDENT REVIEW OF THE MENTAL HEALTH ACT 1983:

[161] Mental Health Act 2007<https://www.kingsfund.org.uk/sites/default/files/briefing-mental-health-act-2007-simon-lawton-smith-kings-fund-december-2008.pdf> accessed 20th June 2020

[162] Ibid.

[163] Mental Health Act 2007 s 1(3).

This review team submitted their report in December 2018. The review attempted to find ways to balance respecting an individual's autonomy and protecting vulnerable people.[164] This review set out to resolve the complex balance between respecting a person's autonomy and the duty of a civilised State to protect the vulnerable. Patients, the public and professionals involved with the system are all affected by fear - the increase in coercion and the continuing legacy of stigma, discrimination and racism in society.[165]

This English review acknowledged a growing and welcoming recognition of the impact of poor mental health laws on sufferers, their families and society. At the same time, they raised questions about the nature of care for people with mental illness, particularly the increasing levels of coercion within mental health systems. This report resulted from these questions and attempts to answer them by reviewing the current law. It mainly centred on patients' care and treatment and how to improve the mental health system.

They identified Mental Health Act 1983 (MHA) contained compulsive powers, and this committee proposed shifting towards a more rights-based approach, improving respect and dignity. Assuring that a person's freely expressed wishes and preferences are given more consideration. Furthermore, they suggested that the authorities make available all reasonable assistance to allow patients to make their own decisions where possible.[166] They believed that improving patients' and service users' decision-making about their care and treatment is essential to upholding dignity.

The lack of dignity and confidence that hospital management will treat patients kindly and respectfully causes anxiety to patients. The committee's review confirmed that many service users fear forced hospitalisation will exacerbate their mental health problems rather than improve them. This committee sought how to restore the dignity of mental health users and the system. This topic pervades the entire report from beginning to end.

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[164] The independent review of the Mental Health Act, Interim report 1st May 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/703919/The_independent_Mental_Health_Act_review__interim_report_01_05_2018.pdf acccessed 28th December 2022.

[165] Final report of the Independent Review of the Mental Health Act 1983 December 2018 1.

[166] Ibid 5.

They recommended that lawmakers improve the Mental Health Act by respecting service users' views and choices. They also recommended that authorities use the Act's powers in the least restrictive way. In addition, they should support patients to improve so that the hospital can discharge them. They also suggested that mental health patients be viewed and treated as other civil medical patients.

Regarding human rights, this committee stipulated that as much as they strive to align with the Committee on the Rights of Persons with Disabilities (the Committee) (UNCRPD) objectives, they do not support all the goals. This review was more about what the Committee recommended in October 2017, suggesting that the UK abolish all forms of proxy decision-making in all areas of life (including mental health) by reviewing and re-enacting the relevant legislation.[167]

This recommendation would require fundamental changes to the MHA.[168] It would mean that it would no longer be possible to treat someone against their will or to detain someone who poses a danger to themselves or others. The Committee's recommendation would also mean fundamental changes to the MCA, which allows a person to be cared for and treated in their best interests if they do not have the mental capacity to make decisions.[169]

This review criticised the UNCRPD for going too far and not being in the best interest of such vulnerable persons. When a vulnerable person lacking capacity is refusing assistance at the time, it might prevent intervention. However, intervention would stop them from acting in a way they would never have otherwise.[170] In support of this position, they adopted the saying of the President of the Supreme Court, Lady Hale, "[i]s it not inhumane to deny to a person the care and treatment he needs because he is unable to decide whether or not to have it?"[171]

[167] Modernizing the Mental Health Act 61.

[168] The Committee's 2014 "General Comment No. 1 on Article 12: Equal recognition before the law." CRPD/C/GC/1, para 41; and 2015 "Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities." para 13

[169] Ibid.

[170] Ibid 62.

[171] Lady Hale, "Is it time for yet another Mental Health Act?" Speech to the Royal College of Psychiatrists Annual Conference, Birmingham on 24 June 2018.

Their recommendations did not consider all the changes proposed by the UNCRPD, but they agreed that lawmakers need to reform the MHA to protect patients' rights. In the body of the report, their recommendations aimed at supporting people to make their own choices, to focus more on their will and preferences, and to ensure that restrictive measures are the last resort, not the first.

Another important topic was the relationship between mental health services and the criminal justice system, particularly the provisions of Part III of the Mental Health Act.[172] There is an understanding that courts should hospitalize and not imprison people with serious mental illness facing criminal trials. The courts and police admitted too many mentally ill people to prison rather than the hospital.[173] The government could address this problem by prohibiting the use of prisons as a place of safety on welfare grounds alone when bail is being considered and by extending powers of hospitalisation to the Magistrates' Court. However, all these powers are illusory if no bed is available, which is often the case. This situation is a problem that the commissioners need to address urgently by providing more and better infrastructure.

They suggested that people with mental illness involved in the criminal justice system (CJS) should have the same access (availability, accessibility, acceptability and quality) to mental health care, outcomes, rights and protections as civil patients while not disregarding the need to protect the public from further offending.

7.3.3. THE MENTAL HEALTH LEGISLATION IN SCOTLAND

This section will chronologically examine the mental health laws relating to the insanity defence based on their dates of enactment. Moreover, it will aid in understanding the legislative progress toward Scottish mental health and how it impacted the insanity defence. Mental health legislation will go from the Lunacy Acts to Mental Health (Care and Treatment) (Scotland) Act 2003.

[172] Ibid 30.

[173] The independent review of the Mental Health Act (n164)

7.3.3.1.THE SCOTTISH LUNACY LEGISLATION

The 1815 Act to regulate Madhouses in Scotland[174] began Scottish legislation for the insane.[175] Studies showed that between 1815 and 1857, experienced two amendments to this law: An Act to Regulate Madhouses in Scotland in 1828[176] and an Act to alter and amend certain Acts regulating Madhouses in Scotland and provided for the Custody of Dangerous Lunatics in 1841.[177] These Lunacy Acts of 1815, 1828 and 1841 were responsible for the management, treatment, and confinement of lunatics. Although they had a minor impact on the criminal process, the 1841 Act provided for the confinement of "dangerous lunatics".[178] They shared similar provisions with Nigerian and English lunacy legislation[179], which focused primarily on the safekeeping or incarceration of lunatics.

In 1855, the government's committee that investigated the state of Scotland's lunatic asylums and the then-existing regulations governing lunatics and asylums inspired the Lunacy (Scotland) Act of 1857.[180] Following the commission's recommendations, the lawmakers merged the 1815, 1828, and 1841 Lunacy Acts into the 1857 Act.[181] However, the fundamental changes or amendments made to the legislation were on the care and treatment of lunatics and also addressed the insanity defence.

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[174] 55 Geo. III c. 69

[175] Daniel Hack Tuke, *Chapters in the history of the insane in the British Isle*s (London, Kegan Paul and Trench, 1882) 324; Michael Barfoot, 'The 1815 Act to Regulate Madhouses in Scotland: A Reinterpretation' (2009) Medical History, 53: 57–76

[176] An Act to Regulate Madhouses in Scotland 1828, 9 Geo. IV cap. 34

[177] An Act to alter and amend certain Acts regulating Madhouses in Scotland; and to provide for the Custody of Dangerous Lunatics 1841, 4 & 5 Vict. cap. 60

[178] An Act to alter and amend certain Acts regulating Madhouses in Scotland; and to provide for the Custody of Dangerous Lunatics 1841, 4 & 5 Vict. cap. 60.

[179] Nigeria Lunacy Act 1961 and the English Lunacy Acts of

[180] Peter Bartlett, David Wright, *Outside the Walls of the Asylum: The History of Care in the Community 1750-2000* (A & C Black 1999) 290.

[181] An Act for the Regulation of the Care and Treatment of Lunatics, and for the Provision, Maintenance, and Regulation of Lunatic Asylums in Scotland 1857, 20 & 21 Vict., c. 60.

The consolidated Lunatic (Scotland) Act of 1857 was the first mental health legislation to impact the insanity defence; others followed. As listed chronologically, the Lunacy (Scotland) Acts of 1857, 1862, and 1871 interacted with criminal law.

First, defining lunatics in legislation was essential to the insanity defence since it could have helped courts identify persons who benefited from the defence. The Lunacy Act of 1857 defined lunatics as:

> include any mad or furious or fatuous person, or person so diseased or affected in mind as to render him unfit in the opinion of competent medical persons to be at large, either as regards his own personal safety and conduct, or the safety of the persons and property of others or of the public.

Secondly, the Lunacy Act of 1857 provided for insanity in the bar of trial.[182] Thus, under the 1857 Act, the court cannot try an insane accused person for an offence.[183] For example, the case of *H. M. Advocate v Wilson*[184] established that if the trial had begun and the Jury observed the person was insane, the court shall make a finding. If found insane, the court will order such a person into custody "until the pleasure of the majesty was known".[185]

This 1857 Act further provided for insanity at the time of the offence or insanity as a defence.[186] This provision guaranteed that when a person acting under insanity committed a crime, they would be acquitted but kept in strict custody until the monarch's pleasure was known.[187] Sections 87 and 88 of this Lunacy (Scotland) Act 1857 significantly differed between the lunacy provisions in Nigeria and the then English lunacy provisions.

Furthermore, this Act considered persons in prison who behaved insanely. This provision required the sheriff to inquire, assisted by two medical practitioners, to determine the mental state of such

[182]Lunatic (Scotland) Act 1857, s 87

[183] Lunatic (Scotland) Act 1857, s 87; Russell v H. M. Advocate [1946] S L T 93; H M. Advocate v Brown [1907] 5 Adam 312

[184] [1942] S L T 194.

[185] Ibid; *H M Advocate v Wilson* [1942] S L T 194.

[186] Lunatic (Scotland) Act 1857, s88.

[187] Lunatic (Scotland) Act 1857, s88; *H. M. Advocate v Bickerstaff* [1926] S LT 268.

a person. The sheriff sent those he considered insane to an asylum and, when sound, back to prison.[188]

Subsequently, the Lunacy (Scotland) Act 1862 aimed to improve the laws governing the care and maintenance of lunatics in Scotland but did not alter or repeal any of the 1857 Act's provisions relating to the insanity defence. However, it updated the definition of lunatics. It defined lunatics as "every person certified by two medical persons to be a lunatic, an insane person, an idiot or a person of unsound mind."

This section showed the criminal law pathways provided in the Lunacy Acts. Their provisions maintained the common law position of not prosecuting or punishing a person found to be insane for a crime. However, Scotland's legislation regarding insanity differed significantly from those of Nigeria and England. This position was because the Scottish legislation on insanity included provisions for the insanity defence and criminal routes leading to hospitalisation and treatment.

7.3.3.2. SCOTTISH MENTAL HEALTH LEGISLATION

The Royal Commission for Feeble Minded (1908) contended that the lunacy provisions did not certify the state of mental defectives.[189] They further explained that evidence showed that the existing lunacy law did not accommodate a "large class" of persons who require care.[190] For example, the lunacy legislation did not provide methods of dealing with idiots and epileptics, imbeciles, and feebleminded or defective persons were not provided under the lunacy laws in Scotland, and this lacuna was not good.[191] The Commission identified the growing need to extend the existing powers relating to the insane or lunatics under the lunacy legislation to mental

[188] Lunatic (Scotland) Act 1857, s89.

[189] Report on the Royal Commission for Feeble Minded (1908) part XII Scotland Chapter XLIV 365 <https://iiif.wellcomecollection.org/pdf/b28038551> accessed 30/11/20

[190] Report on the Royal Commission for Feeble Minded (1908) The British Medical Journal 508.

[191] Ibid 509.

defectives and those classified as insane.[192] These identified lapses led to the enactment of the Mental Deficiency Acts.[193]

The Mental Deficiency and Lunacy (Scotland) Act 1913 (c 38) and the Mental Deficiency and Lunacy (Amendment) Act 1919 (c 85) were both enacted to widen the scope of the classes of people that benefited from the Lunacy Act. These laws extended the care and treatment of lunatics to the mental defectives. However, this thesis observed that the mental deficiency Act did not change the common law criminal framework relating to the lunatic or the lunacy legislation on the insanity defence. Furthermore, there was no identifiable amendment to the mental health provisions on the insanity defence until the Mental Health (Scotland) Act 1960.

THE MENTAL HEALTH (SCOTLAND) ACT 1960 (MHA)

The Russell Report acknowledged that the Scottish lunacy laws had not kept up with "changes in public sentiment and advances in mental science" in general.[194] In addition, they argued that the lawmakers group the Mental Deficiency and Lunacy Act under a single code instead of being treated as separate codes.[195] Additionally, the Royal Commission on the Law of Mental Illness and Mental Deficiency 1954 (to 1957)[196] made recommendations that aided in the passage of the Mental Health (Scotland) Act, 1960.[197] They suggested that Scotland needed new mental health legislation, and an amendment would not be sufficient.[198] Hence, they raised issues with the current

[192] it was recommended as follows: "It is intended that all existing powers relating to" insane " persons as defined in the Court of Session Act, 1868, or to " lunatics " as defined in the Lunacy Act (Scotland), 1862, Sec. 1, should be preserved and extended to all classes of mentally defective persons, as defined in Recommendation". Report on the Royal Commission on the Poor Laws (n130) 509.

[193] Ibid.

[194] Report of the Committee on the Scottish Lunacy and Mental Deficiency Laws (1946), (945-46), xiii, Cmd b634, para. 17 (Russel Committee)

[195] Ibid para17.

[196] Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency 1954-1957 (1957), PP 1956-57, xvi, Cmnd 169.

[197] Adrian Ward, A Review of Mental Health at Last, First part of article on review of mental health law, against forthcoming review by Millan Committee, https://www.lawscot.org.uk/members/journal/issues/vol-44-issue-02/a-review-of-mental-health-law-at-last/ accessed on the 15/04/2020.

[198] Ibid (n186) para137.

mental health legislation, although not particularly towards the provisions on the insanity defence.[199]

Consequently, Mental Health (Scotland) Act 1960 came into force on 1st June 1962. It was like the English Mental Health Act of 1959 because, as the English counterpart, it was the comprehensive legislation that managed the care, treatment, and management of properties and affairs of persons with mental disorders.[200] In addition, this Act repealed the Lunacy (Scotland) Acts and Mental Deficiency (Scotland) Acts.[201] Nevertheless, as a criminal law thesis, this review will focus on insanity defence provisions in this legislation.[202]

Thus, this part of the chapter is concerned with innovations in this legislation that affected the insanity defence. First, this Act defined "mental disorder" as 'mental illness or mental deficiency however caused or manifested.[203] This thesis acknowledges this definition as a new introduction to the mental health law because it provided the term "mental disorder" in place of lunatics, persons of unsound mind, insane persons, or mental defect and for all mental health issues in the review.

In the Bill leading to this Act, the lawmakers acknowledged that the Scottish Dunlop Committee believed that the medical profession in Scotland needed to change terms from "lunatic" to "mental disorder", and doctors accepted this position.[204] Likewise, the committee explained that practitioners should use the two words used in the definition, "mental illness and mental

[199] First, they complained about the multiplicity of the mental health legislation, like having a separate mental deficiency code that dealt with the same principles with the lunacy legislation in diverse ways. Second, because there were different mental health laws and amendments, it became complicated to apply them. Thirdly, they criticised the Lunacy Act and the mental deficiency Acts as containing unaccepted assumptions. Like the assumption that hospitals must detain lunatics and mentally defectives, except those in hospitals that could pass as voluntary patients. Fourthly, they criticised the legislation for providing detailed information that became daily practice or routines. The dissatisfaction shown by the various groups towards the Lunacy Acts demonstrates the development in the mental health sector and the need to review the mental health legislation.

[200] Ibid.

[201] Mental Health Act (1960) s1.

[202] Mental Health Act (1960 Part V.

[203] Mental Health Act (1960) s 6.

[204] The Mental Health (Scotland) Bill 1960, Column 1013.

deficiency", in its clinical sense and not attach a statutory meaning.[205] This provision improved the mental health system compared to its position in Nigeria, introducing a modern medical term.

Part V of this Act provided for mentally disordered persons in criminal proceedings. This part of the legislation did not change the existing law and practice but introduced the criminal pathway to hospital treatment of accused insane persons.[206] As a result, under Section 63, a mental disorder would serve as a bar to trial or defence to criminal responsibility, and the court would issue a hospital or guardianship order.[207] Before such an order could be issued, the accused must be certified as mentally challenged by two doctors, at least one certified by the government.[208] This provision was consistent with Section 55, which provided hospital and guardianship orders as alternatives to imprisonment or other penal sanctions for mentally disordered persons in criminal proceedings.

Also, Section 60 gave courts additional power to add an order restricting the patient's discharge from the hospital when the hospital acknowledged the patient as a risk to others. A restriction order placed the patient's release from the hospital under the control of the Secretary of State. However, the Bill to this Act argued that the purpose of a restrictive order is to protect the public when the court deems it necessary.[209]

This legislation achieved significant changes ranging from the change in terminology, change from the use of asylums to hospitals or guardianship, thereby removing the phrase" until the majesty's pleasure was known". This Act further introduced in sections 65 to 71 prison transfers to hospitals for mentally disordered persons detained in prisons, borstals, approved schools, and similar establishments.

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[205] Mental Health Legislation: Second Report by a Committee Appointed by the Council (1959) (Dunlop Committee) para 257

[206] Mental Health (Scotland) Bill Volume 225: debated on Tuesday 12 July 1960 <https://hansard.parliament.uk/lords/1960-07-12/debates/55f24f99-9264-425c-ab65-7cb5e1d7f83c/MentalHealth(Scotland)Bill> Accessed 20/02/20.

[207] Mental Health Scotland Act 1960, s 63 (1) (2).

[208] Mental Health Scotland Act 1960 s

[209] The Mental Health (Scotland) Bill 264.

The legislation was more concerned about treating mentally disordered persons, as observed in the provisions, which mostly adopted hospital orders. This position was emphasised by Elliot and Gerard when they explained that sections 54, 55, 60, 63, 65 and 65 all involved the hospitalisation of the mentally disordered person.[210] In addition, studies pointed out that the introduction of terms like mental disorder, mental illness and mental deficiency was in line with medical advancement.[211]

THE MENTAL HEALTH (SCOTLAND) ACT 1984

The notable change before this Act relevant to this thesis was transferring the criminal procedure provisions of the mental health legislation to the Criminal Procedure (Scotland) Act 1975.[212]This 1984 Act made minor changes to the provisions of the 1960 Act. It was a consolidating Act, re-enacting the 1960 Act with all subsequent amendments, including those in the Mental Health (Amendment) (Scotland) Act 1983. It also changed the words used in the definition of mental disorder. This Act defined "mental disorder" as "mental illness or mental handicap however caused or manifested".[213] It also defined "mental impairment" as:

> … a state of arrested or incomplete development of mind … which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned …[214]

However, this legislation did not modify the criminal law paths, but the Mental Health (Care and Treatment) (Scotland) Act 2003 did, as the following section will detail. The following section

[210]William A. Elliott, Gerald C. Timbury and Margaret M. Walker, 'Compulsory Admission to Hospital: An Operational Review' (1979) Brit J Psychiat 135 105; the Mental Health (Scotland) Act 1960.

[211]Ibid; the Mental Health (Scotland) Act 1960 s 2.

[212] Adrian Ward**, '**First part of article on review of mental health law, against forthcoming review by Millan Committee' (1999) The Journal Of the Law Society of Scotland <http://www.journalonline.co.uk/Magazine/44-2/1001140.aspx> accessed 28 August 2019.

[213] Mental Health Act 1984 s 1(2); *Johnstone v HM Advocate* [2013] S L T 1115.OSCOLA etc – no brackets should be used where the date is necessary to help you find the case in a library 2013 SLT 1115

[214] The Mental Health (Scotland) Act 1984 s1.

will examine the arguments advanced by the Millan Committee in support of the necessity to change the 1984 Act, followed by a discussion on the 2003 Act.

11. THE MILLAN COMMITTEE

However, years after the 1984 Act, a need arose to review the mental health legislation to reflect modern mental health practice developments, as evidenced by the Millan committee.[215] This committee was set up in 1999 to review the 1984 Act, headed by Rt Hon Bruce Millan (the Millan Committee). The Millan Committee[216] presented its report to the Scottish Parliament in January 2001.[217] It argued that changes in mental health care over the years had overtaken significant provisions of the 1984 Act.[218] For example, Millan's committee criticised Part V of the 1984 Act, which dealt with people with mental illnesses in criminal proceedings, for focusing on the structures rather than the patients.[219] This opinion was because the provisions of Part V made hospital orders compulsory and not optional or based on individual needs. The hospital order was a more popular disposal option, and the committee pointed out the possibility of other disposal options to consider the needs of the individuals. Hence, the committee stated that compulsory hospitalisation for all cases of insanity did not represent modern practice.[220]

Also, this committee criticised a few provisions of the 1984 Act for being confusing and inconsistent with current medical practice. They further stated that there were significant practical problems with the interpretation and operation of the 1984 Act.[221] They stated these problems and confusions were in the definition of mental disorder, the criteria and procedures for detention in and discharge from hospital, leave of absence and care outwith hospital, the role of the Mental Welfare Commission for Scotland and the sentencing and treatment of insane offenders. In addition, there was a complex interaction between the 1984 Act and other legislation, which was

[215] Millan Committee

[216] - New Directions: Report on the Review of the Mental Health (Scotland) Act 1984 need page or para numbers

[217] New Directions: Report on the Review of the Mental Health (Scotland) Act 1984 SE/2001/56, available at <http://www.scotland.gov.uk/health/mentalhealthlaw/millan/Report/rnhs-00.asp> accessed 18 June 2019.

[218] Ibid 3.

[219]New Directions: Report on the Review of the Mental Health (Scotland) Act (n181) 3.

[220] New Directions: Report on the Review of the Mental Health (Scotland) Act (n181) 3.

[221] Like the provision on detention and review.

not straightforward.[222] Therefore, medical professionals, courts and lawyers considered this 1984 Act's provisions alongside other related legislation, leading to confusion.[223]

Furthermore, the committee questioned the grounds for detention as provided in the 1984 Act and the review procedure, stating that there should have been alternatives to compulsion and that any procedure for compulsion should respect the rights and needs of the patients and carers.[224] Also, there was no provision for a review of patients in detention whose mental conditions changed.[225] In summary, the committee called for better protection of mentally disordered persons. They recommended that the Act shift emphasis from hospital detention to treating mentally disordered persons in the hospital or community.

Considering the reasons mentioned above and not limited to them[226], the Millan Committee recommended the repeal of the 1984 Act, and their recommendations inspired the 2003 Act.[227] In addition, the debates on mental health during this period suggest that the 2003 Act is a product of evolving insight into mental health.[228]

Before the Millan Committee submitted their report, the lawmakers passed the UK Government's devolution legislation, establishing a Scottish Parliament and Executive. Accordingly, the 2003

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[222] The Mental Health (Detention) (Scotland) Act 1991; in criminal procedure, the examination of facts under the Criminal Justice (Scotland) Act 1995; the community care order and altered leave of absence provisions in the Mental Health (Patients in the Community) Act 1995.

[223] New Directions: Report on the Review of the Mental Health (Scotland) Act (n181) 3.

[224] Framework of A New Mental Health Act s 1 (36).

[225] Ibid 43.

[226] Importantly, this Act provided for mental health tribunals to replace the sheriff court as the authority for granting orders and for appeals and ended the Executive's role in determining the discharge of restricted patients. In Scotland there was no provision for a mental health review tribunal. The sheriff courts where in charge of applications for long-term detention and appeals against ongoing detention. The process was criticised by the Millan committee as a limitation to the system. The sheriff process was also criticised for being inconsistent in protecting patients' rights and for having a resemblance of a criminal proceedings. Should this not be in the main body of your work?

[227] Dr J J Morrow, 'Overview of the Mental Health Tribunal for Scotland' (2010) The Journal of Community care Law 1.

[228] c. 36. See New Directions: Report on the Review of the Mental Health (Scotland) Act 1984 SE/2001/56, 'Annex 1: Summary of the Mental Health (Scotland) Act 1984, its history and comparison with England and Wales',<http://www.scotland.gov.uk/health/mentalhealthlaw/millan/Report/rnhs-43.asp>accessed 6 May 2020.

Act was not an Act of the UK Parliament but an Act of the devolved Scottish Parliament.[229] After exploring the reasons for this new Act, this section will focus on updates to the 2003 Act that pertain to the defence of insanity.

THE MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

This Act is the mental health law in Scotland, and before its enactment, the mental health law in Scotland was the Mental Health (Scotland) Act 1984.[230] Between 1984 and 2003, the subject underwent numerous amendments in a piecemeal legislative fashion.[231] The 1984 Act, as mentioned in the above section, did not introduce new provisions; instead, it consolidated existing legislation, re-enacted the Mental Health (Scotland) Act 1960 and made amendments.[232] This review will contribute to the argument that mental health legislation can support the insanity defence, considering their interaction or relationship with one another. Hence, this section will review this 2003 Act as it relates to the insanity defence and with less detail on the civil provisions.

The Millan Committee suggested that a new Act should contain the modern categorisation of mental disorders while retaining the term mental disorder.[233] Hence, this Act changed the definition of Mental disorder in the 1984 Act, defined in Section 328:

> mental disorder means any—
>
> (a)mental illness.
>
> (b)personality disorder; or

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[229] Patrick, *Mental Health, Incapacity and the Law in Scotland* (Edinburgh: Tottel Publishing 2006), para. 2.15, which discusses the impact of devolution on the reform process.

[230] Ibid.

[231] like the following: three working days extension of short-term detention following a late relapse, and five working days extension if an application for formal detention has been lodged, both under the Mental Health (Detention) (Scotland) Act 1991; in criminal procedure, the examination of facts under the Criminal Justice (Scotland) Act 1995; the community care order and altered leave of absence provisions in the Mental Health (Patients in the Community) Act 1995.

[232] Scottish Executive, Renewing Mental Health Law: Policy Statement, 2001, 'Foreword', available at <http://www.scotland.gov.uk/Resource/Doc/158764/0043097.pdf> accessed 28 May 2019; Note that based on the Scotland Act 1998, health is a devolved policy area and so falls within the competence of the Scottish Parliament

[233] In terms of section 329 of the Act, "patient" means a person who has or appears to have a mental disorder.

(c)learning disability, however, caused or manifested.[234]

The inclusion of personality disorders is new to the provisions of the mental health legislation. This change resulted from the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, which amended the Mental Health Act 1984 to include personality disorders.[235] One of the main arguments favouring this definition is that it widened the scope of individuals the law accommodates as mentally disordered. Hence more persons are protected under this legislation.[236]

Also, this Act does not consider a person to have a mental disorder solely because they meet any criteria listed in Section 328(2). The criteria include sexual orientation, sexual deviancy, trans-sexualism, transvestism, dependence on, or use of, alcohol or drugs, behaviour that causes or is likely to cause harassment, alarm or distress to any other person, or by acting as no prudent person would act.

Furthermore, Part Eight of this Act protects mentally disordered persons in criminal proceedings. Moreover, this Act significantly changed the Criminal Procedure Act of 1995, directly impacting the evaluation and management of mentally disordered offenders. This section will go over the significant changes and additions to the law.

First, it separated the provisions on assessment[237] and treatment.[238] The 1984 Act allowed for the confinement of patients to a hospital for assessment, but it did not provide for treatment.[239] Under the 2003 legislation, there are two orders: assessment and treatment orders.[240] These orders cover the period before trial and presentencing.

Second, it provided mentally disordered prisoners with assessment and treatment orders. When the Mental Health (Scotland) Act 1984 came into force, it established procedures for transferring

[234] Mental Health (Care and Treatment) (Scotland) Act 2003 s 328

[235] Lindsay D G Thomson, The Mental Health (Care and Treatment) (Scotland) Act 2003: legislation for mentally disordered offenders

[236] *Winton v HM Advocate* [2016] SLT 393; *Lord Advocate v Harrison* [2008] S L T 112

[237] Mental Health (Care and Treatment) (Scotland) Act 2003 s130.

[238] Mental Health (Care and Treatment) (Scotland) Act 2003 s130.

[239] Mental Health (Scotland) Act 1984 s.132.

[240] Mental Health (Care and Treatment) (Scotland) Act 2003 s131.

mentally disordered prisoners to hospitals. However, there was no provision in the 1984 Act to assess mentally disordered prisoners transferred to the hospital, as prisoners transferred to a hospital get treated only and not assessed.[241] Therefore, the Millan Committee recommended the assessment of prisoners with mental health disorders.[242] Hence, the 2003 Act provides mentally disordered prisoners with assessment and treatment.

Third, under this Act, a prosecutor, the court *ex proprio motu*, or the Scottish ministers can apply for an assessment/treatment order. It provided that where the court, the prosecutor and the Scottish Ministers suspect that an accused is insane during a criminal trial, they can apply for an assessment order under the terms of this Act.[243] Where the prosecutor or minister applies for an assessment order, and the court is satisfied with the written or oral evidence of a medical practitioner of the accused person's mental state, the court would make an assessment order.[244]

According to this 2003 legislation, the conditions that the court ought to consider before making an assessment order are as follows:

A. Where the applicant has a mental disorder.

B. medical treatment which would likely—

    i. prevent the mental disorder worsening; or

    ii. alleviate any of the symptoms, or effects, of the disorder, is available for the person; and

C. there will be a significant risk if the court does not offer treatment-

    i. to the health, safety, or welfare of the person; or

[241] Rajan Darjee, 'The reports of the Millan and MacLean committees: new proposals for mental health legislation and for high-risk offenders in Scotland' (2011) The Journal of Forensic Psychiatry & Psychology 19.

[242] Millan Committee.

[243]Mental Health (Care and Treatment) (Scotland) Act 2003 s 52B there is no sec 52 B in the 2003 Act it is the CP(Sc) Act 1995.

[244] Mental Health (Care and Treatment) (Scotland) Act 2003 s52B (2).

ii. to the safety of any other person.[245]

A treatment order allows hospital treatment before trial or sentencing for people in court or prison.[246] Two registered doctors, one of whom must be an approved medical practitioner, must provide written or oral evidence.[247] The treatment order can come before or after an assessment order. A treatment order has no time limit. This provision on assessment and treatment is peculiar to Scotland and not available in English and Nigerian legislation.

Furthermore, this legislation introduced the compulsion order to replace a hospital order.[248] Its purpose is to treat mental disorders in hospitals or communities. The civil equivalent is section 64(4), a hospital-based compulsion order.[249]

However, this legislation has fewer provisions for the criminal process involving a mentally disordered person. It was primarily concerned with the disposal options of an insane accused.[250] An argument supporting this point is the transfer of criminal law provisions from the mental health Act to the Criminal Procedure (Scotland) Act 1975.

The Scottish criminal law legislation provided for disorderly mental persons in criminal law proceedings from when the lawmakers transferred them from the Mental Health Act of 1984 to the Criminal Procedure Act of 1995. There was a clear interaction, particularly for the definition of terms, the procedures for treating an insane accused, the assessment and treatment of accused persons, and finally, during the disposal of the insane accused in court, among other things. However, the 2003 Act provided a more liberalised criminal law pathway for disposal options. As

[245] Mental Health (Care and Treatment) (Scotland) Act 2003 s52(7).

[246] Mental Health (Care and Treatment) (Scotland) Act 2003 s 130 (52M) (1).

[247] Mental Health (Care and Treatment) (Scotland) Act 2003 s 130 (52M) (2).

[248] Mental Health (Care and Treatment) (Scotland) Act 2003 s 57.

[249] Mental Health (Care and Treatment) (Scotland) Act 2003 s 52.

[250] In *Duzgun v HM Advocate* [2020] S L T 427, the court made compulsion and restriction orders in terms of ss.57(a) and 59 of the 1995 Act, whereby the appellant was to be detained in the State Hospital without limit of time and subject to the special restrictions set out in Pt 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003; examples of cases that the court referred to the mental health legislation for disposal options includes *FD v Gibson* [2018] S L T (Sh Ct) 59; *Johnstone v Scottish Ministers* [2015] S L T 743.

the years pass, Scotland has continued to make efforts to update and improve this 2003 Act by constituting committees to review it.[251]

THE SCOTTISH MENTAL HEALTH LAW REVIEW 2022

The Scottish government established this review team to assess the current mental health legislation of 2003, identify ways to improve it and bring it in line with global best practices so that people with mental health disorders can benefit from it.[252]

In September 2022, the Scottish Mental Health Law Review, chaired by John Scott QC, published findings from its 3-year review. They looked at the rights and protections within the current law and suggested recommendations for change. This review did not look at the insanity defence. However, as part of this thesis, it will discuss areas the insanity defence could benefit from or areas that could contribute to the development of the insanity defence in the future.

The Scottish government mandated this review to improve the rights and protections of persons who may fall under the mental health, incapacity, or adult protection laws due to a mental disorder.[253]They tasked this review team to consider how to achieve equal and non-discriminatory enjoyment of rights and make recommendations considering individuals' rights, will and preferences.

This review identified ways to improve the rights and protections of persons subject to mental health, incapacity or adult protection legislation because of a mental disorder and removing barriers to those caring for their health and welfare.[254]

Further, this review team clarified that reform should be centred on human rights and has set out some welcome principles that future mental health law should follow, such as dignity, inclusion,

[251] The independent review of learning disability and autism in the Mental Health Act (The Rome Review) and The independent review into the delivery of forensic mental health services (The Barron Review),

[252] Scottish Mental Health Law Review consultation https://consult.gov.scot/mental-health-law-secretariat/scottish-mental-health-law-review/#:~:text=Aims%20of%20Consultation,the%20end%20of%20September%202022. Accessed on 13th January 2023.

[253] Ibid.

[254] Ibid.

equality and autonomy.[255] They, among other proposals, suggested that mental health and capacity laws must explicitly consider and enshrine human rights. A primary objective of the review will be to make recommendations for changing Scots law to ensure that it conforms to both the ECHR and the UNCRPD.

The UNCRPD committee has issued guidelines under Article 14 of the Convention. Article 14 is the right to liberty and security of persons with disabilities. These guidelines say that criminal defences based solely on the grounds of mental disability breach Article 14. The Committee stated that the accused are deprived of equal rights to a fair trial due to their mental illness.

Furthermore, they recommended that the Scottish government consider a human rights-based approach to budgeting. This position means distributing resources in a way that puts people first. It involves considering how money is raised, allocated and spent impacts people's rights.[256]

Chapter 5 of this report dealt with support in judicial and administrative proceedings. At the outset, they stated that there is a need for specialised support for people who need it in judicial and administrative proceedings.[257] By this, they meant people who may appear in civil and criminal hearings and those who attend the Mental Health Tribunal for Scotland.

Also, chapter 10 of this 2022 review on forensic mental health law reviewed and suggested recommendations on the diversion of those who have offended the law. They suggested that the Scottish government should ensure that the processes and procedures for identifying people with mental disabilities who come into contact with the criminal justice system are effective to consider appropriate diversion.[258] Similarly, they suggested the Law Society of Scotland do the following: Educate solicitors and justice practitioners to increase awareness and confidence in issues relating to representing people with a mental or intellectual disability. Review the criminal justice system's ability to screen and assess people for mental and intellectual disabilities, with particular attention

[255] Scottish Mental Health Law Review Final Report https://cms.mentalhealthlawreview.scot/wp-content/uploads/2022/09/SMHLR-FINAL-Report-.pdf accessed 20th December 2022.

[256] The Scottish Mental Health Law Review 2022 37.

[257] Scottish Mental Health Law Review Final Report Chapter 5: Specialist support in legal and administrative proceedings 149.

[258] Scottish Mental Health Law Review Final Report, Chapter 15: List of recommendations 810.

to the person's earliest contact. They should improve coordination and ethical data sharing between criminal justice officials and health partners.[259] They also suggested developing community-based interventions to address the mental health needs of offenders who cannot access prison or those authorities diverted into forensic mental health services.[260]

They recommended that for pre-sentencing, the law should give the court the power to require appropriate provisions for the mental or intellectual disability of any remanded prisoner. This situation should include placement in a medical setting rather than prison.[261] There should be time limits for treatment orders.[262] For sentencing, they recommended that the Mental Welfare Commission should monitor the use of supervision and treatment orders, and the Scottish Government should engage with the judiciary and the Judicial Institute to better understand any barriers to the use of these orders

Finally, the committee recommended updating and revising the criteria for imposing a restriction order under Section 57 of the Criminal Procedure (Scotland) Act 1995 to remove any ambiguity.

In summary, this committee has a similar opinion to this thesis in that it promotes and proposes strengthening the relationship between the criminal justice system and the mental health system. For the insanity defence to function efficiently, there must be a cordial, ethical interaction between the criminal justice and mental health systems. This position also includes educating the practitioners and those connected with the insanity defence.

7.4. CONCLUSIONS

This chapter of this thesis focused on the idea that an effective mental health system is essential for a successful insanity defence. In line with the legal argument that the law should strengthen the relationship between the criminal justice system and the mental health system, it reviewed the Nigerian mental health system from three positions: people's perspectives on the causes and treatment of insanity and the mental health legislation. The review revealed that many individuals

[259] Ibid.

[260] Ibid.

[261] Ibid 812.

[262] Ibid

in Nigeria with a flawed understanding of insanity and unconventional treatment methods. These views portrayed a lack of understanding concerning insanity and could potentially affect the insanity defence. This viewpoint stems from the fact that judges and attorneys are members of a society depicted in literature as having an unconventional view of insanity and its treatment.

Also, this chapter identified the mental health legislation in Nigeria, England, and Scotland. From the review, Nigeria has had the Lunacy Act of 1958 as their mental health legislation since the colonial era. The law is old, and this review further showed it is outdated as it is barely helpful in the mental health jurisdiction.

This study also identified gaps that necessitate a review and revision. It demonstrated a lack of provision for treatment and care, stigma, discrimination, and human rights violations. The Lunatic Acts were more custodial and social control mechanisms than the mental health legislation enacted in England and Scotland, which became more focused on treating, caring for, and managing an insane person. Unlike Nigeria, England and Scotland have long since abandoned the position of the Lunacy Act. The development observed in England and Scotland is evidence of advancement in medicine/mental health understanding by focusing on the patient's rights, treatment (from institutionalised to community treatment), and liberal disposal options.

The mental health legislation in Scotland and England also defined persons known as mentally disordered, which aids the court in identifying persons subject to the insanity defence. By reviewing English and Scottish mental health legislation, this chapter demonstrated the interplay between the insanity defence and mental health legislation through provisions regarding the insanity defence, criminal disposal pathways, assessment, and treatment.

Notably, none of the analysed mental health statutes, including Nigeria, provided for the term insanity. This thesis argues that the mental health system and legislation can impact the insanity defence. A developed mental health system and legislation will improve the application of the insanity defence.

This section showed a lack of development in Nigerian mental health legislation and had no relationship with criminal law. Therefore, it showed the need for new legislation considering current mental health advancements. This review on Nigeria aids the argument of this thesis from two dimensions, lack of understanding of insanity and the need for new mental health legislation

to aid the understanding of the insanity defence. The mental health legislation should relate positively and actively to the insanity defence for the insanity defence to function efficiently.

8.0. CHAPTER EIGHT

IDENTIFYING THE GAPS IN THE NIGERIAN INSANITY DEFENCE REVIEW AND EVALUATING THE POSITION IN ENGLAND AND SCOTLAND: THE WAY FORWARD.

8.1. INTRODUCTION

The preceding chapters of this thesis examined the positions of the insanity defence in Nigeria, England, and Scotland. These reviews included the origin of the insanity defence, the insanity defence legislation, and the judicial applications of the insanity defence across the three jurisdictions. Furthermore, this thesis identified similarities and differences in their criminal law and mental health system regarding the defence of insanity. Ultimately, these reviews in the previous chapters have highlighted gaps in Nigerian insanity defence practice that point to the need for change.

Also, this thesis identified ways the knowledge of how England and Scotland have progressed in their application of the defence of insanity could help the Nigerian position. This chapter will point to the gaps identified in the reviewed chapters two to seven on Nigeria while identifying the practice in England and Scotland. Chapters two and three on Nigeria, England, and Scotland provided a substantive historical review of the insanity defence in the three jurisdictions. It showed the constant reliance on legal transplants in Nigeria. Chapters four to six provided the legal analyses of the insanity defence identifying the theoretical and practical gaps. In chapter seven, the mental health system and legislation reviewed showed how a flawed system could affect the application of the insanity defence. The chapter reviews identified problems with Nigerian law from a theoretical and practical point of view.

Central to the theme of this thesis is the importance of a strong relationship between the criminal justice system and the mental health system as it relates to the insanity defence. A key component of this thesis was identifying the need for definitions, identifying who would benefit or raise the defence, determining the required proof/evidence, and deciding on the appropriate disposal method. The analyses in this chapter will show that there is a need for the involvement of the mental health system in most stages of the insanity defence.

Also, this review will push the importance of legal review and the need for review in the Nigerian jurisdiction. In this chapter, this thesis will review the reasons identified for the argument that the Nigerian insanity defence requires an update. This thesis intends to discuss this chapter in the following segments.

1. The observations on the origin of the insanity defence in Nigeria.
2. The complex nature of the Nigerian criminal law regime.
3. The negative impact of legal transplant.
4. The identified issues with the application of the insanity defence.
    a. Unfitness to plead.
    b. Insanity at the time of the offence.
5. The need for a flexible disposal option.
6. Lack of development in the Nigerian mental health law.

8.2. OBSERVATIONS ON THE ORIGIN OF THE INSANITY DEFENCE IN NIGERIA

8.2.1. LITERATURE GAP IN THE BACKGROUND OF THE INSANITY DEFENCE

It was necessary to gain adequate knowledge of the country's traditional or indigenous criminal system before the arrival of the British to understand the history of the insanity defence in Nigeria. Chapter two of this thesis demonstrated that in the 18th century, Nigeria had various ethnic groups with distinct social controls that embodied their criminal law. This thesis observed a literature gap in the history of the defence of insanity before colonization in Nigeria. It failed to find sources or documents explaining how Nigerians treated insane persons when they committed a crime before the 18th century.

Nevertheless, England and Scotland acknowledged insanity as a defence to criminal responsibility earlier than Nigeria. In England and Scotland, academic interest in the insanity defence began as

early as the 16th century.[1] At that time, institutional writers defined the nature of the insanity defence and provided principles for treating the insane in criminal jurisdictions.[2]

Scotland and England transitioned from common law periods in which they compared insane people to children, stones, and wild beasts to medically defining it. This position was because they believed that, like children and wild beasts, the insane offender lacked reason and was incapable of committing a crime, nor should the law punish them for a crime.[3] The institution writers' analysis provided a good insight into legal perspectives on the nature of the insanity defence. As this thesis has observed in case law, they laid the groundwork for the defence of insanity in England and Scotland.[4] Their views influenced judicial decisions and contributed to the development of common law in this area.[5]

This type of jurisprudence does not exist in the Nigerian context. Against this background of lack of information, it is easy for the transient observer to give a generalized and misleading view of the Nigerian defence of insanity in the past. Therefore, it is not certain that Nigeria recognised insanity as a defence to crimes in the years before colonization. According to this study, the

[1] Bracton, Lambard, Hamilton, Coke, Hale and Brydall commented on the good and evil test. Coke, Hale, Perkins, Hawkins, and Blackstone continued with the nature of the insanity defence and case law (Arnold's case) relating it to the right and wrong test wild beast test.

[2] Coke's Institution of the Laws of England; Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown*(n3), William Hawkins, *A Treatise of Pleas of the Crown* (1716), Sir Edward Hyde East, A Treatise of the Pleas of the Crown, (Vol. 1 law-printer to the King, 1803). Early proponents of the nature of the insanity defence in Scotland include Mackenzie, Erskine, Hume, and Alison; They promoted phrases like the "absolutely furious", furious and "absolute alienation of reason" tests; George Mackenzie, *the Laws and Customs of Scotland in Matters Criminal* (Stair Society 1674); John Erskine, *An institute of the Law of Scotland: furious may include mad men* (Edinburgh: John Baxter 1871) 16; Hume's commentaries 1797; Sir Archibald Alison, *Principles of the Criminal Law of Scotland* (W Blackwood 1832). Please kindly refer to chapter three of this thesis for detailed account.

[3] Hume's commentaries 1797.

[4] Refer to chapter three in sections 3.3 and 3.4.

[5] *Eugene Augustus Whelps* [1842]1 Broun 378; *James Gibson* [1844] 2 Broun, 332; *George Lillie Smith and another* [1855] 2 Irv 1.

Nigerian insanity defence stems from the "M'Naghten test" due to colonialism.[6] Its current rules were introduced during the colonial period and retained after independence.

This research contributes to the literature on the nature of the Nigerian insanity defence and enhances more understanding of the requirements of the defence. It considered current concerns regarding the insanity defence in Nigeria, particularly regarding the definition of terms, evidence and disposal options.

8.2.2. COMPLEX NATURE OF THE NIGERIAN CRIMINAL LAW REGIME.

Nigeria has a complex criminal law regime which comprises over three regimes. Although this review focused on the Criminal and Penal Code Acts, it noted other regimes like the Sharia Penal Code in the twelve states. Also, based on the powers of States to enact their law, this review identified that Lagos State had amended their criminal law and their insanity defence provision. They updated the defence language from “insanity” to “mental disorder”.[7] This change is one of the recommendations of this study for a contemporary medical language to be updated.

Given the differing regimes in place, it would be challenging to push for a parallel change in Nigeria's position on the insanity defence. However, this position means that the regimes would need to review their law on the insanity defence individually. At the federal level, legislators need to review the Criminal and Penal Code Acts differently to apply changes. The State lawmakers would also review their laws on the insanity defence.

Also, this thesis identified that the Shariah Criminal Code of 1999 did not provide for the insanity defence. One begins to wonder which law the State courts would apply when faced with it. Although the Penal Code Act 1960 is for the Northern Region, it no longer applies to these twelve Northern States. Therefore, it is not certain the law that the court will apply in these twelve states when an accused raises the insanity defence.

In addition, religious and tribal factors underlie the existence of the two regimes. These factors do not apply to the contemporary meaning of insanity, as mental disorder is the same worldwide. In the laws, using terms such as "mental diseases and natural mental infirmities" or "unsound minds"

[6] See Chapter three of this thesis in section 3.2.

[7] Please refer to chapter Four in section 4.2.1 of this thesis.

without medical significance does not support the defence of insanity. They do not in any way complement each other. Courts in the Southern Region cannot seek help interpreting from the Northern Region and vice versa.

The substance of the provisions is also different as the Criminal Code Act 2004 contains a "volitional arm" not provided in the Penal Code. This position means that the insanity defence has two different meanings in Nigeria. The insanity defence in one region has been viewed from a wider perspective than in another region. Having an extra arm in the Criminal Code Act means more people could access the defence in the southern Region than in the Northern Region. However, the case law review did not reflect the differences between the two regimes applying the insanity defence.[8]

There is a need to settle the meaning of the Nigerian insanity defence and introduce similar or complimenting key terms in this area of law. This thesis advocates that the meaning of the insanity defence should be similar in both regions by advocating for the volitional arm in the Penal Code. Having two regimes is not an issue, but it is not ideal when some States lack certainty about applying the law. Having different regimes in an area of law can also potentially slow development in a country, as there can hardly be uniform development. It will also cost more to make such changes.

8.2.3. LEGAL TRANSPLANT

The Examination of the developments in the insanity defence identified that Nigeria has a proclivity for legal transplants. According to this study, the Nigerian insanity defence provisions are legal transplants.[9]

The Criminal Code Act of 2004 (herein referred to as CCA) and the Penal Code Act of 1991(herein referred to as PCA) are legal transplants because Nigeria adopted them from foreign jurisdictions. Through its literature review, this thesis established that the enactment of the CCA and PCA

[8] See Chapter five in sections 5.3.1.

[9] See chapter two and three of this thesis.

introduced a statutory test for the insanity defence.[10] This thesis regards the enactment of the CCA and the PCA as a positive development for the Nigerian insanity defence.

However, it argues that the provisions of the insanity defence in the PCA and CCA as legal transplants have not worked the best in Nigeria. Chapter Five established that Nigerian courts face challenges interpreting the insanity defence and the impact of the social-cultural context concerning the causes of insanity (supernatural/witchcraft).

Miller categorized a country's motivation for adopting a legal transplant.[11] According to him, a government is involved in legal transplant because it costs less financially and saves time or a foreign entity or government" imposed it (external influence) or a jurisdiction sees the foreign model as a way to enhance legitimacy in a given legal system.[12] Countries have found legal transplants reasonable and helpful because history shows that legal transplanting is common.[13]

Despite the advantages of borrowing laws or modelling laws from other jurisdictions, it also has disadvantages that make the process ineffective. For example, scholars argue that legal transplants may not be suitable for the transplanted country due to socio-cultural differences.[14] Other complaints centre the difficult interaction between foreign rules and the domestic legal system.[15] Critics have sometimes complained about the content of the transferred rules or the spread of

[10] Ibid 67.

[11] Miller Jonathan M, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) American Journal of Comparative Law 51, 839–885.

[12] Ibid.

[13] Utilized by countries like China, Japan, Peru.

[14] Mathias Siems, 'Malicious legal transplants' (2018) Legal Studies; A Donaggio, 'Limitations of legal transplants and convergence to corporate governance practices in emerging markets: the Brazilian case' in S Boubaker amd DK Nguyen, (eds) *Corporate Governance in Emerging Markets* (Berlin: Springer, 2014) pp 465–484; J Jupp, 'Legal transplants as tools for post-conflict criminal law reform: justification and evaluation' (2014) 3 Cambridge Journal of International and Comparative Law 381.

[15]G Teubner, 'Legal irritants: good faith in British law or how unifying law ends up in new divergences' (1998) 61 Modern Law Review; P Legrand, 'The impossibility of legal transplants' (1997) 4 Maastricht Journal of European and Comparative Law.

inefficient ideas.[16] This thesis relates these positions to the insanity defence in Nigeria. They face challenges interpreting the terminology of the insanity defence. They lack the mental health law to ascertain the meanings and support the care and treatment system. The asylum system is outdated and does not meet the needs of the accused insane person.

Also, some proponents of legal transplant assume implicitly, but not always the case, that countries take laws from other nations at will.[17] However, the historical review of Nigeria gives an example of borrowed laws due to external pressures (colonization). Although a legal transplant is viable, its effectiveness is in doubt and dependent on the recipient's legal frameworks.

Another perspective on transplanted law is that countries can be either receptive or unreceptive. A country's receptivity in this context refers to its ability to interpret imported laws.[18] In receptive transplants, local conditions adapt to foreign laws.[19] These countries modify the imported legal order to local demands.[20] This approach can lay the foundations for long-term institutional development, facilitating easier adoption.

On the other hand, an unreceptive transplant is when the law cannot adapt to local conditions or where circumstances impose it through mediums like colonization. They are laws imported from overseas that are not integrated into the local legal system but stand differently. Watson believed there is no unique link between law and society. This theory views laws as tools, taken to any society and used successfully. This stand is comparable to the CCA and PCA positions because Nigeria adopted them without making any significant revisions to reflect any positions that already

[16] E Carolan, 'Diffusing bad ideas: what the migration of the separation of powers means for comparative constitutionalism and constitutional transplants' in S Farran, J Gallen and C Rautenbach (eds*), The Diffusion of Law* (Farnham: Ashgate, 2015) 213.

[17] Ibid 836; Cassandra Steer, Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law (2014) Oxford Academic.

[18] Tay-Cheng Ma, 'Legal Transplant, Legal Origin, and Antitrust Effectiveness' (2013) Journal of Competition Law and Economics.

[19] Ibid.

[20] Ibid (n18).

existed in Nigeria. Many studies referred to the type of Nigerian transplant procedure as a "copy and paste" or "wholesale" transplant.[21]

"Copy and paste" transplants refer to blindly copying and pasting laws into a society to "modernize" it with laws adopted from elsewhere, deemed desirable by the receiving jurisdiction.[22] Essentially, the legal rule is blindly copied and pasted into modern society without any prior assessment of its suitability.[23]

Nevertheless, Husa argued that "wholesale" transplant presents obvious transplanting difficulties.[24] Grajzl stressed that wholesale legal transplant is dangerous and showed that local circumstances are crucial for the best approach to institutional reform.[25] The transplanted laws under the standardization or harmonization movement are usually more productive than wholesale adoptions of any legal system. This study concurs with the argument that synchronizing or harmonizing the adopted law with the existing legal system is a better approach.

This thesis supports the position on receptive legal transplant. It believes that the relationship between law and society is unique. Laws reflect the common consciousness of people, which

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[21] Pistor Katharina and Milhaupt Curtis J, 'Law and Capitalism, What Corporate crisis reveal about legal systems and economic development around the world' (2008) University of Chicago Press, Columbia Law and EconomicsWorking Paper No. 313 221; Sannerholm, Richard Zajac, A. B. Engelbrekt, and J. Nergeliu, 'Cut-and-paste'? Rule of law promotion and legal transplants in war to peace transitions' (2009) New Directions in Comparative Law 56; Collins Justine K. *Tracing British West Indian Slavery Laws: A Comparative Analysis of Legal Transplants* (London: Routledge, 2021); Pistor Katharina, and Daniel Berkowitz, 'Of legal transplants, legal irritants, and economic development' (2003) Corporate governance and capital flows in a global economy 347.

[22] María Paula Reyes Gaitán, The challenges of legal transplants in a globalized context: A case study on 'working' examples (2014) Dissertation submitted in partial fulfillment of the requirements for the Master of Laws degree in International Economic Law at the University of Warwick

[23] Li-Wen Lin, "Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example" (2009) 57:3 Am J Comp L 711.

[24]Jaakk Li-Wen Lin, "Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example" (2009) 57:3 Am J Comp L 711. o Husa, 'Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law' (2008) *The Chinese Journal of Comparative Law*, Volume 6, Issue 2 152.

[25] Grajzl Peter. The Choice in the Lawmaking Process: Legal Transplants vs. Indigenous Law (2009) Review of Law & Economics, pp. 615.

manifests itself in the behaviour of the individual members of that community.[26] Laws reflect the identity of the society that enacted them.[27] Legrand, sharing a similar opinion, stated that for a rule or a legal system to exist, users must find its meaning within the context within which it operates.[28]

Therefore, this research argues that a legal transplant will, in most cases, face challenges if one jurisdiction's laws transfer to another without considering the local context. Berkowitz and others concluded that countries receiving the law in this manner function less effectively than countries that have tailored the law to local conditions or have legal intermediaries familiar with the transplanted law.[29] This study aligns with the views of some advocates of legal transplant that it is essential to study the context of the recipient country before adopting laws from a foreign jurisdiction. Berkowitz and others argued that authorities should base a well-designed legal transplant on local knowledge, not solely on the practices in developed countries at the expense of local knowledge.[30]

A country must examine the function of law before borrowing it.[31] Ajani referred to functionalism as "concerned with historical ties and cultural appreciation, with assessment built on the assumed utility of a set of norms to improve economic performance".[32] It is crucial to consider the function

[26] Joachim J Savelsberg, Lara L, 'Cleveland, law and society' (2019) Journal of Law & Society.

[27] Ibid.

[28] Legrand Pierre, The Impossibility of 'Legal Transplants', (1997) Maastricht Journal of European and Comparative Law 4, 111–124.

[29] Berkowitz Daniel, Katharina Pistor, and Jean-Francois Richard. "The transplant effect."(2003) Am. J. Comp. L. 51 163.

[30] Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'Economic development, legality, and the transplant effect' (2003)European Economic Review, Pages 165-195

[31] The scope of judicial law-making in the common law tradition Max Planck Institute of Comparative and International Private Law Hamburg, Germany Lord Hodge, Justice of The Supreme Court of the United Kingdom 28 October 2019<https://www.supremecourt.uk/docs/speech-191028.pdf> accessed 22nd February 2023.

[32] Ajani G, Legal Transplants. In: Marciano A., Ramello G.B. (eds) Encyclopaedia of Law and Economics. (2019) Springer, New York, NY. https://doi.org/10.1007/978-1-4614-7753-2_731 Accessed 20th January 2022.

of the law before borrowing it.[33] Hence, functionality has to do with the existing laws and infrastructure of the recipient jurisdiction.

The insanity defence is one of the laws colonization introduced into Nigeria. This thesis concludes the issue of transplant by adopting a quote from Niki Tobi[34]:

> "English is English. Nigerian is Nigerian. The English are English. So also, the Nigerians are Nigerians. Theirs is theirs. Ours are ours. Theirs are not ours. Ours are not theirs. We cannot, therefore, continue to 'enjoy' this borrowing spree' or 'merry frolic' at the detriment of our legal system. We cannot continue to pay loyalty to our colonial past with such servility or servitude. After all, we are no more in Slavery". [35]

Nigeria should strive to create laws and policies that are most beneficial to its citizens. However, suppose Nigerians need to transplant any law or policy, the Lawmakers, courts or drivers should stop copying and pasting legal transplants and adopt transplants that incorporate local ideologies and beliefs. Transplanting laws should be our last resort and should be done reasonably with modifications.

It is time to revisit the laws borrowed by Nigeria, like the law on the insanity defence, to verify their effectiveness in the Nigerian context. Moving forward, Nigerian lawmakers should scrutinize the law on the insanity defence and find ways to incorporate the mental health system in the functioning of the insanity defence. The position of the mental health system, to a large extent, influences the insanity defence practice. This thesis relates this view from the perspective of understanding the defence terminology, expert evidence, and the appropriate disposal options.

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[33] Albarashdi Saleh Hamed, 'the Possibility of Transplanting Western Bankruptcy Principles to Oman', in Constantin Stefanou (ed) Helen Xanthaki (ed), *Drafting Legislation, A Modern Approach* (Routledge 2016)

[34] (July 14, 1940 – June 19, 2016) He was an Associate Justice of the Supreme Court of Nigeria.

[35] Niki Tobi JSC (1940-2016): Tribute To A Great Jurist <https://dailytrust.com/niki-tobi-jsc-1940-2016-tribute-to-a-great-jurist/> Accessed 20th May 2022.

However, examining the provisions and application of the Criminal Code and the Penal Code in chapters four to seven raised several issues in their application. The challenges identified are those related to the meaning of the terms/expressions used, the identification of those whom courts consider insane, and the understanding of the provisions on when not to assign criminal liability.

8.3. ISSUES IDENTIFIED IN THE APPLICATION OF THE INSANITY DEFENCE

This thesis after chapter four, approached chapter five, exploring whether the Nigerian insanity defence is fit for purpose. The review identified gaps in the Nigerian insanity defence practice that the system needs to cover. Chapter Five reviewed insanity as a bar to trial (Unfitness to plead herein referred to as UTP) and insanity as a defence.

8.3.1. UNFITNESS TO PLEAD (INSANITY AS A BAR TO TRIAL)

Chapter Five identified four key issues with the Nigerian unfitness to plead (herein referred to as UTP). These issues include the definition of the terms used for insanity, the lack of a test/issues with evidence, the procedure for courts to investigate the presence of an unsound mind, and the possibility of human rights abuse.

INTERPRETATION ISSUES: Rawls acknowledged that the 'Rule of Law' guarantees "that law be known and expressly promulgated, that their meaning is clearly defined".[36] If "statutes are vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of liberty are uncertain."[37] The meaning of a statute is essential to the application of the law.

The current laws providing for UTP enacted in 1959[38] do not account for modern medical understandings of lack of mental capacity. The legislation used "unsound mind" or "mental capacity". Under the UTP provisions, the CPA, CPC and ACJN did not define "unsound mind" or mental capacity. However, courts considered these phrases like insanity.[39]

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[36] John Rawl, *A Theory of Justice* (Harvard University press 1999) 235.

[37] Ibid 239.

[38] The colonial period in Nigeria witnessed, among other laws, the introduction of the Criminal Procedure Act and the Criminal Procedure code in 1959.

[39] Chris Chizindu Wigwe, *Introduction to Criminal Law in Nigeria* (Mountcrest University Press, 2016) 189; *Ezediufu v The State* [2001] 17 NWLR (pt 741) 82.

First, studies show that medical parlance no longer uses such terms or phrases as unsoundness of mind.[40] Second, the conditions under "unsound mind" are unclear, and the law does not provide an interpretation to determine this. Without knowing the conditions, how can a judge determine if someone is of an unsound mind? The title of the provision in the CPA and CPC states "persons of unsound mind". This review could not identify these persons in Nigerian laws or texts. The lack of provision to interpret this phrase has raised this position.

England used the term "disability" to describe those benefitting from the UTP.[41] This term includes physical and mental impairment.[42] It extended UTP beyond mental health issues to physical conditions that could affect the trial. Similarly, Scotland adopted the phrase "mental and physical conditions" for their UTP.[43] On the one hand, the position in England and Scotland has widened the scope of UTP beyond mental impairment to physical conditions. On the other hand, England and Scotland avoided using terms that lacked specific definitions or medical interpretations.

Due to the difficulty of interpreting the phrases, Nigerian lawmakers may need to amend them. Parties, judges and counsels need to understand the meaning and scope of the phrase used in UTP. Nigerian lawmakers could define these terms in the Acts or use terms found in the mental health legislation. Also, they might update the phrases with commonly used medical terminologies. They could use terms like "mental disorder" or "mental illness" that England and Scotland have updated.

As demonstrated, Scottish and English jurisdictions resort to mental health legislation for such insanity definition.[44] Understanding the requirements of the law is in the best interests of everyone

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[40] Wigwe (ibid) 81; Udosen Jacob Idem, 'Criminal Responsibility and the Defence of Insanity: Insane Delusion and Irresistible Impulse in Nigeria' (2018) Donnish Journal of Law and Conflict Resolution.

[41] the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (herein referred to as "the 1991 Act") and the Domestic Violence, Crime and Victims Act 2004.

[42] Equity Act 2010.

[43] the Criminal Procedure (Scotland) Act 1995 (as amended by the Criminal Justice and Licensing (Scotland) Act 2010), Sections 53F to 56.

[44]Lisa Gillespie, Mentally Disordered Offenders, <https://www.lawscot.org.uk/members/journal/issues/vol-51-issue-04/mentally-disordered-offenders/#:~:text=The%20special%20defence%20of%20insanity,defect%20or%20unsoundness%20of%20mind%E2%80%9D> Accesseed 22nd January 2022; *Brennan v HMA* [1977] SC 38, 45; Criminal Procedure (Scotland) Act

concerned in determining an accused's mental condition. Therefore, updating the phrase to contemporary medical terminology will increase certainty in the UTP process.

LACK OF A TEST/PROCEDURE: it is vital to identify defendants whose ability to participate in proceedings is impaired so that they cannot be tried fairly despite available alterations to trial. Chapter Five discovered that determining what constituted meaningful participation in a trial and the conditions that may limit or impede such participation was a problem. It showed that Nigeria lacks a test to determine that an accused is of unsound mind to stop a trial. Not having a test to determine that the accused is of an unsound mind undercuts the efficiency of the defence.

In this regard, the English courts, in their unfitness to plead, consistently applied the test in R v Pritchard.[45] The accused will be UTP, where he fails any of the criteria listed in R v Pritchard.[46] Although common law still controls the English test for UTP, they have reinterpreted the position of R v Pritchard through case law. The case of *Robert Marcantonio v Regina*[47] and *R v M(John*[48]*),* reviewed in chapter five, confirmed these changes and their application. Hence the test set out in these decided cases provided certainty in the English UTP test required.

Also, the Nigerian statutory provision[49] does not sufficiently outline the procedure for UTP, particularly the procedure for the investigation taking place in the absence of the accused suspected to be insane. For example, what other factors would the court consider aside from the medical evidence, and what would the investigation entail? It is uncertain what type of investigation the court carries on in the accused's absence as provided by the Acts. A more precise procedural rule on what is involved in the investigation for UTP would address this gap.

1995, s 51A, introduced by the Criminal Justice and Licensing (Scotland) Act 2010, s 168. It was brought into force on 25 June 2012 (SSI 2012 No 160).

[45] [1836] 7 C P 303.

[46] *R v Davies* (1853) £ CAR & Kir 328; *R v Robertson* [1968] 3 All ER 557.

[47] [2016] ECWA Crim 14.

[48] [2003] EWCA Crim 3452.

[49] CPC and CPA.

In England and Scotland, this situation is different since they have defined the procedure when any party suspects an accused is unfit for trial.[50] In both jurisdictions, a procedure is in place to determine whether the accused did the act or made the omission. Also, their issue of unfitness is mainly dependent on expert/medical evidence. The medical evidence gives credibility to the circumstantial evidence.[51]

As case law shows, Nigerian courts rely on facts (surrounding evidence) and medical evidence. Moreover, the surrounding evidence required is uncertain and largely dependent on the facts of the individual case.[52] Courts prioritise factual evidence over expert testimony.[53]

This study also showed in the fifth chapter that the court attaches less weight to medical evidence in Nigeria than in England and Scotland.

Medical professionals in England argued that the determination of insanity should "never be made without medical evidence."[54] Medical evidence is mandatory in England. The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 requires the evidence of two medical practitioners, and one must be government approved before the court declare an accused UTP.[55] The Atkin Committee on Insanity and Crime,[56] the Royal Commission on Capital Punishment,[57] and the

[50] Mackay R, Kearns G. 'An upturn in unfitness to plead? Disability in relation to the trial under the 1991' (2000) Crim LR 532; Elizabeth Shaw, Automatism and Mental Disorder in Scots Criminal Law(2018) Edinburgh Law Review.

[51] *HM Advocate v Wilson* [1942] SC 75.*; Stewart v HM Advocate* [1997] JC 183.; *Murphy v HM Advocate* [2017] SLT 143.*; R v Walls* [2011] EWCA Crim 443.; *R v H* [2017] EWCA Crim 2.; Fortson Rudi, 'Unfitness to Plead in England and Wales: A Practitioner's View of a Plea in Evolution', in Ronnie Mackay, and Warren Brookbanks (eds), *Fitness to Plead: International and Comparative Perspectives* (Oxford, 2018; online edn, Oxford Academic, 20 Sept. 2018).

[52] *Edoho v State* [2013] 17 NWLR 24; see also *Guobadia v State* [2004] All FWLR (pt. 205) 191 or [2004] 6 NWLR (tp. 869) 360.

[53] *Ani v State* [2002] 1 NWLR (pt. 747) 217; *Karim v State* [1989] 1 NWLR (pt. 96) 124; *Anyim v State* [1983] 1 SCNLR 370; *Madjema v State* [2001] All FWLR (pt. 52) 221.

[54] Rollin, H R. 'Psychiatry in Britain one hundred years ago' (2003) Br J Psychiatry 292–298.; Rudi (n44).

[55] Penelope Brown, Unfitness to plead in England and Wales: Historical development and contemporary dilemmas (2019) Med Sci Law.; Fennel P. The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. (1992) Mod Law Rev 5 547.

[56] *Committee on Insanity and Crime* ('Atkin Committee') (Cm 2005, 1923) 9, 21.

[57] United Kingdom, Royal Commission on Capital Punishment 1949–1953 Report (Cmd Paper 8932, 1953) para 225.

Butler Committee[58] had all suggested requiring expert testimony from two physicians to support a determination of unfitness (insanity). In their view, objective medical expertise should determine whether or not courts should detain someone for having an "unsound mind". In Scotland, the situation is similar.[59]

Although Nigeria requires expert evidence to decide the issue of unfitness, the judge may decide the issue without considering the expert evidence. Expert evidence should be crucial to the conclusion of an investigation into unfitness. It is unrealistic to determine that an individual is of unsound mind without a diagnosis. Insanity is a medical term, but the court determines the liability of an accused based on the insanity defence. This thesis concludes that medical evidence should be mandatory and given considerable weight when determining whether to allow a defence of insanity.

As shown in England and Scotland, medical evidence gives meaning and weight to the surrounding evidence. It is not agreeable to confirm that a person is insane without medical evidence, no matter how convincing the surrounding evidence seems. The symptoms of several mental health issues are not apparent.[60] Also, the court may be unable to identify mental health conditions based on simple observation when the mental health conditions are not manifest. Alternatively, the court might not observe mental disorders like depression, Alzheimer's and other mental illnesses. The development in psychiatry makes it necessary for medical evidence to ascertain mental diseases or before a court confirms an accused insane.

THE ISSUE ASSOCIATED WITH WHO RAISES THE DEFENCE: Under unfitness to plead, this review identified that only the judge and prosecution could cause the investigation of the issue of unfitness in Nigeria. However, in England and Scotland, any party may raise the issue of unfitness to plead and cause a court to investigate. The unfitness issue impacts all the parties in light of public safety, the safety of the accused, and a fair hearing. It is a better practice for any party to cause the investigation of unfitness to plead the issue. Therefore, this thesis concluded that

[58]The Committee on Mentally Abnormal Offenders, Butler Report para 10.41.

[59] See section 6.4 of this thesis

[60] Depression, bipolar disorder, post-traumatic disorder, and borderline personality disorder, Munchausen's syndrome, anxiety disorder.

it should not be the judge's and the prosecution's exclusive responsibility to cause an investigation. Considering the lack of pointers or tests that will cause the court to investigate, this position is also important.

HUMAN RIGHTS CONCERNS WITH NIGERIAN UTP: The provision on unfitness to plead in Nigeria raises human rights concerns. Under the provision for unfitness to plead, there is no provision or process to determine whether the accused did the act or made the omission. What is the involvement of the accused in the alleged offence? It is unjust and violates their human rights when courts take away the freedom/liberty of insane persons facing trial when not found guilty. Once the court or prosecutor raises insanity and demands an investigation, the court remands the accused in a hospital. The court's compulsory confinement of the accused without knowing their involvement in the crime raises human rights violation issues. Nevertheless, some practices in England and Scotland, as observed in this section, could assist in closing this gap.

For example, this study showed that in England, the law provides that the issue of unfitness could wait until after the prosecution's case.[61] However, chapter five demonstrated that this practice is unavailable in Nigeria and Scotland. The fact that the court could delay the question of unfitness until after the prosecution's case could ensure that the individual has a case to answer before the court declares him unfit. While this thesis recognises that the court/prosecutor may raise the issue of fitness at any moment, including at the end of the trial, it is a positive chance to assess the accused's involvement in the crime before incarceration.

Also, England and Scotland require fact-finding or examination of facts after a finding of unfitness to ascertain if the accused committed the crime or omission and whether they have any defences that the court would consider. This provision guarantees that the court would not remand an innocent person involuntarily. This stance is another way to guarantee that the court does not violate the accused's human rights of freedom/liberty while preserving their dignity.

Nigeria has local, regional and international obligations to persons with a mental health disorders. The Nigerian Constitution 1999, in chapter two, aims to maintain and enhance the human dignity of all persons.[62] Regarding the insanity defence, the Constitution guarantees the liberty of all

[61] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 S 4(2).

[62] The Nigerian Constitution 1999 Chapter II section 1 (2); section 34 (1).

persons.[63] These sections generally provide for the dignity of human persons, and this provision covers persons with disabilities, including persons with mental health conditions. In addition, it stipulated that everyone is entitled to liberty, and no authority shall deprive such freedom except for insane persons for their care, treatment, or community protection.[64] The incarceration of an unfit defendant is not for their care and treatment but for investigation. Therefore, mandatory detention of an insane person under the UTP breaches the constitutional provision of liberty. The Constitution also states that a person shall be presumed innocent until proven guilty. The 1999 Constitution's Section 42 states as follows:

> *(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such person,*
>
> *(a) be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject;*
>
> *(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.*

In addition to the abovementioned provision, no authority should deprive a Nigerian citizen of any privileges simply because of birth circumstances.[65] Hence, it is unconstitutional for courts to commit persons they found not guilty to a hospital without their permission.

However, the 1999 constitution also has some provisions contradicting international human rights provisions. For example, the constitution excludes mentally disabled persons from participating in

[63] Ibid section 35 (1).

[64] The Nigerian Constitution 1999 Chapter II section 35 (1) (e).

[65] The Nigerian 1999 Constitution s 42 (2).

certain activities because of their special condition.[66] The Nigerian Constitution 1999 states that no treaty between the federation and any other country has the force of law unless it has been enacted into law by the National Assembly. Due to Nigeria's dualist system, treaties do not apply domestically unless national legislation incorporates them.[67] Nigeria has ratified and signed several documents, including the African Charter on Human and People's Rights and the UN Charter on the Rights of People with Disabilities (CRPD), that relate to the rights of persons with mental disorders.

The African Charter on Human and Peoples' Rights (Banjul Charter)[68] is the regional agreement to promote and protect human rights in Africa within African Union. It is the first regional tool to cover several human rights in a single document.[69] Nigeria signed the Charter in 1982 and ratified it in 1983 by passing the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[70]

According to the African Charter, everyone has the right to the freedoms and rights recognised and guaranteed in the charter, regardless of race, ethnicity, gender, sexual orientation, language,

[66] The 1999 Constitution excludes mentally disabled persons who have been declared insane or otherwise of unsound mind under any law in force in Nigeria from contesting for the Senate or House of Representatives (Section 66), for President (Section 137) and the House of Representatives (Section 107). The Electoral Act 2010 contains a similar provision in section 107 (Area Council Election). See also section 3 of the Electoral Act 2008 (Presidential and National Assembly Elections).

[67] Edwin Egede, 'Bringing Human Rights Homes: An Examination of the Domestication of Human Rights Treaties in Nigeria (2007) 51(2) Journal of African Law 249; Amos Enabulele, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts', (2009) 17(2) African Journal of International and Comparative Law, 326.

[68] African Charter of Human and Peoples' Right OAU CAB/LEG/67/3 rev. 5, 21 I L M 58 entered into force on the 21st of oct 1986.

[69] Manisuli Ssenyonj (ed), *The African Regional Human Right System: 30 Years After the African Charter on Human and People's Rights in Africa* (Martinus Nijhoff Pubishers 2012); Eghosa Osa Ekhator, The impact of the African Charter on Human and Peoples' Rights on domestic law: a case study of Nigeria (2015) Commonwealth Law Bulletin, 41:2.

[70] Eghosa Osa Ekhator, The impact of the African Charter on Human and Peoples' Rights on domestic law: a case study of Nigeria (2015) Commonwealth Law Bulletin, 41:2.

religion, political opinion, or other status.[71] According to Article 4 of the Charter, everyone has the right to equal protection under the law. A mentally impaired offender's right to due process is one of the rights and freedoms guaranteed by this law.[72] However, the current position on unfitness to plead breaches the provisions of the Banjul charter. This stance is because hospital detention for examination violates the right to personal liberty[73] and freedom from discrimination.[74] This position does not demonstrate equal rights for people suffering from mental illnesses. The provision for unfitness to plead breaches Article 6 of the Banjul Charter, which guarantees the right to liberty and states that no one shall be unjustly detained or arrested.

The provisions of the United Nations instrument relating to human rights, equality, and non-discrimination of persons apply to people with disabilities, including those who suffer from mental disorders. Everyone has the right to the freedoms and rights outlined in the Universal Declaration of Human Rights and the International treaties on human rights, regardless of distinctions of any sort.[75] Nigeria ratified the United Nations Convention on the Rights of People with Disabilities (CRPD) in 2007 and its Optional Protocol in 2010.

According to the UN CRPD, mental illness cannot be determined based on a person's political, economic, or social status, affiliation with racial, ethnic, or religious groups, or any other factors that are not directly related to their mental health.[76] The UNCRPD promotes the equal enjoyment of human rights without discrimination against disabled persons, including persons with mental disorders. As noted by Stewart, this equal enjoyment of human rights without discrimination does

[71] African Charter on Human and Peoples' Rights (Ratification and Enforcement Act), Cap. A9, Laws of the Federation of Nigeria, 2004.

[72] The African Charter guarantees, among other rights, the right to enjoyment of rights without distinction of any kind (article 2), the right to life (article 4), the right to human dignity (article 5), equality of all peoples (article 19), the right to existence and self-determination (article 20), the right to free disposal of natural wealth and resources (article 21), and the right to a satisfactory and clean environment (article 24).

[73] African Charter (Ratification) Act 1983 Section 35.

[74] Ibid section 45.

[75] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

[76] Convention on the Rights of Persons with Disabilities (CRPD) Article 5 – Equality and non-discrimination.

not mean that courts cannot detain persons with disabilities.[77] It implies that, regardless of health status, the standards for detention should be the same for everyone. Therefore, it advocates that a disability (mental disorder) should not be a reason for detention. First, an accused person's mental illness is the bases of UTP's detention of unfit individuals.

Secondly, the CRPD Committee criticised non-consensual or involuntary interventions relating to persons with mental disabilities.[78] An individual unfit to plead in Nigeria faces involuntary interventions, as they are taken to a hospital for evaluation without their consent or a determination of guilt. The CRPD committee has declared that substituted decisions, described as non-consensual and involuntary interventions, are discriminatory and should be prohibited.[79] They are arrangements that permit interventions based on mental disability, including the UTP procedure. The UnCRPD committee, instead of substituted decision making adopts a supported decision-making approach as better. Courts should use the supported decision-making method to give effect to a person's rights, will, and preferences. Where the court deems it necessary, involuntary intervention should be justified for all and not based on mental illness.[80]

There is no doubt that it concerns that the UTP laws in Nigeria appear to be discriminatory and allow for unequal enjoyment of human rights by people with mental disorders. The detention for examination and disposal option without choice violates the Nigerian obligation to the CRPD. UTP is a type of 'capacity' evaluation accepted across most if not all, jurisdictions as a criterion for involuntary interventions in the case of persons with mental disorders. The CRPD Committee is concerned about using mental capacity assessments based in whole or in part on a diagnosis of mental disability or impairment.[81] They gave the reason that mental capacity assessments lead to

[77] Jill Stavert, Paradigm Shift or Paradigm Paralysis? National Mental Health and Capacity Law and Implementing the CRPD in Scotland. (2018) Laws , *7*, 26.

[78] United Nations. Committee on the Rights of Persons with Disabilities, and Northern Ireland. Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland. UN, 2017.

[79] Ibid; Stavert (n68).

[80] Stavert (n68).

[81] UN Committee on the Rights of Persons with Disabilities (UN CRPD Committee) 2014a. General Comment No. 1 (2014) Article 12: Equal Recognition before the Law. CRPD/C/GC/1. Geneva: UN Committee on the Rights of Persons with Disabilities, May 11.

substitute decisions based on others' perceptions of what is and is not wise and what is in the unfit's best interests.

This thesis adopts the statement by Stavert:

> Certainly, as far as Article 12 CRPD is concerned, if environments are to be created that is conducive to the equal enjoyment of rights by persons with mental disabilities, it is necessary to address the use of capacity assessments to justify non-consensual interventions, the authorisation of involuntary interventions themselves and support for the exercise of legal capacity.[82]

The Nigerian criminal justice system should create a conducive environment to support mentally disordered offenders. A person's autonomy should be restricted on the same basis as it would be for a person without a diagnosis of mental disability. The courts must understand the importance of making decisions equally and the need for sufficient decision-making support for mentally disabled individuals. In this way, seek ways to create an environment to achieve this while also considering and meeting the individual's needs.

Nigeria's criminal justice system ought to note international agreements that promote human rights to which it is a party.[83] Following this charter, Nigeria signed the Discrimination Against Persons with Disabilities (Prohibition) Bill 2009 into Nigerian law in 2018. A step towards Nigeria's fulfilling obligations under the CRPD is enacting the Discrimination Against Persons with

[82] Stavert (n68).

[83] The Universal Declaration of Human Rights, 1948; the International Covenant Civil on and Political Rights, 1966;United Nations Declaration on the Protection of All Persons from Torture and other Cruel and Degrading Treatment (the Convention Against Torture); United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment of 1988; Basic Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; United Nations Code of Conduct for Law Enforcement Officials, 1979; United Nations Body of Principles on the Independence of the Judiciary, 1985; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules); United Nations Standard Minimum Rules for the Treatment of Prisoners, 1977; Basic Principles on the Role of Lawyers, 1990; the Principle on the Prevention of Arbitrary Arrest and Detention and Guidelines and the Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples' Rights, 32nd Session, 17 – 23 October, 2002.

Disabilities (Prohibition) Act.[84] As a result, the government should now take adequate measures to ensure its full implementation to ensure equal treatment and participation for all people with disabilities in Nigeria. As this law provides, people should treat disabled persons in Nigeria equally and without discrimination.

According to the UN Principles for the Protection of the Mentally Ill and the Improvement of Mental Health Care, a country must determine a person's mental illness using globally recognised medical standards.[85] Nigerian lawmakers and the courts should be mindful of their obligations under the African Charter and the UN Charters when dealing with the insanity defence.

Accordingly, this study suggests that lawmakers should amend the general character of the unfitness to plead defence to provide an explicit representation of its aims and clarify what it covers. The points mentioned above motivate a change in this area of law.

LACK OF POLICE INVESTIGATION OF MENTAL DISORDER

This thesis noted no procedure or guideline for handling mentally disordered accused persons during an arrest. The police are often the agency that has initial contact with mentally disordered offenders when responding to an incident. The Police Act and the criminal law legislation did not recognise the key role of police officers in identifying when an insane person commits a crime. Even case law reveals this lacuna as none provided a guideline on the procedure for police when in contact with insane suspects.[86] Most reviewed case law showed that the police did not conduct a mental health evaluation at arrest and during the investigation.[87] They also lack the will to

[84]Ibrahim Imam, M A Abdulraheem-Mustapha, 'Rights of People With Disability In Nigeria: Attitude And Commitment' (2016) African Journal of International and Comparative Law 24.3 439–459.

[85] This is a report published by The United Nations in 1986 about Conferences, Guidelines, Human Rights, Non-Governmental Organizations, and Principles. It was written by Daes, Erica-Irene A. and UN. Subcommission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur on Detention on Grounds of Mental Illness.; Rosenthal Eric, Rubenstein Leonard S, International human rights advocacy under the "Principles for the Protection of Persons with Mental Illness."(1993) International Journal of Law and Psychiatry, 16(3-4), 257–300.

[86] *Onungwa v State [*1976] 10 NSCC 27.

[87] *John Imo v the State* [1991] NSCC 683.

approach the court for such an evaluation order.[88] Sometimes the police hold back information about the history of mental illness of the accused without further verifying the data.[89]

Therefore, this thesis submits that the Nigerian government, through the prosecutors, should not abdicate their duty of investigating, including investigating the suspects' mental health. Evidence of insanity manifests at the earliest opportunity in the accused's statement to the police or the point of arrest. Hence, the police should be more involved in identifying mental disorder even before the accused raise the issue in court. This situation is a gap which affects the effectiveness of the insanity defence, as the police or prosecution should identify several cases of insanity during an investigation.

8.3.2. ISSUES IDENTIFIED WITH INSANITY AT THE TIME OF THE OFFENCE

No Nigerian law, including criminal and mental health law, defined terms and phrases like the "state of mental disease or natural mental infirmity" or "Unsound mind". The provisions of the PCA, like the CPA, lack any theoretical definition of the terms used in the insanity defence. For the PCA, this thesis demonstrated in chapters five and six that the term "unsoundness of the mind" is unknown in Nigerian mental health or criminal law jurisprudence. As explained under issues on UTP, determining the meaning of these phrases or terms is vital for proof of the insanity defence. Defining these terms assists the law in identifying who is eligible to benefit from this defence and who is not eligible.

Case law showed that the courts struggled to define these terms as used under insanity at the time of the offence.[90] The court's definition of these insanity defence phrases in the CCA and PCA does not seem to have filled the interpretation gap. For instance, the court's interpretation in *R v Omoni*,[91] which several cases adopted, did not solve the definition issue because their definition raised further questions. For courts to clarify which diseases are diseases of the mind and which

[88] *Dickson Arisa v the State [* 1988] 3 NWLR (Pt 83) 388.

[89] *Peter John Loke v The State* [1985] 1NSCC 1.

[90] *Mohammed v The State* [1997] 9 NWLR (Pt. 520) 169; *Onakpoya v R* [1959] 4 FSC 150; (1959) SCNLR 384; *R v Echem* 14 WACA 158; *Sademan v R* (1956) 2 AII ER 1138; *Ogbu v The State* (1992) 8 NWLR (Pt. 259) 255 paragraphs F - G*; R v Omoni* [1949]12 WACA 511 @ 512; *Ngene Arum.*

[91] [1949] 12 WACA 511.

mental defects are not caused by a person's fault, they require further information.[92] Also, the courts have not been consistent with their interpretation of these phrases. The cases like *Arum v State*[93], *Taiwo v State*[94] and *Queen v Tabien*[95] reviewed pointed to the lack of consistency in court definitions of mental diseases and natural mental infirmity.

Furthermore, case law indicated that the courts resorted to foreign sources to interpret the insanity defence. For example, in the case of The *Queen v. Tabigen*[96], the court tried to define "Mental infirmity" by referring to section 5 of a repealed English Deficiency Act 1938. Also, in *Ukadike v State,*[97] the Supreme Court referred to the Mental Deficiency Act of 1913, as amended, which defined mental defectiveness as a condition of arrest or incomplete development of mind, which could also be the meaning of natural mental infirmity in the CCA. The judge in *R v Omoni* adopted the "mental disease and mental infirmity" definition from the "Stephen's Digest of criminal law"[98], an English text on criminal law. The tradition of interpreting legislation using foreign court practices also applies to the insanity defence sections of the PCA. Most Nigerian texts [99] interpret PCA's insanity defence from an Indian text.[100]

This research has condemned the Nigerian habit of resorting to a foreign jurisdiction to help define terms. This position is because, as demonstrated in case law, such transplants struggle to sit well in the Nigerian context. This thesis posits that legal transplant does not always result in defective processes or harmful consequences or results. However, they can be fallible and contain legal fallacies and misunderstandings of what they represent. In chapter five, this study demonstrated this viewpoint on decided case law on witchcraft and its relationship to the definition of natural

[92] *R v Echem* 14 WACA 158

[93] [1979] 11 SC 91.

[94] [2019] LPELR-47488(CA).

[95] [1960] 5 F S C. 8.

[96] [1960] 5 F S C 8.

[97] [1973] LPELR 3336 SC.

[98] James Fitzjames Stephen, *Digest of criminal law: Crimes and Punishment (1883)* (Kessinger Publishing 2008)

[99] Gledhill, *The Penal Code Northern Nigeria and the Sudan* (Sweet and Maxwell, London 1963) 91.

[100] Ratanlal Thahore, *Law of Crimes* (Bombay 1956) 158.

mental illness. For example, *R v Alice*[101], *Willie v State*[102], and *Okon E v State*[103] showed that the court did not consider witchcraft capable of causing mental diseases or natural mental infirmity required under section 28 of the CCA. They instead interpreted it as not a natural cause of mental infirmity or mental diseases.

As it applies to the insanity defence in Nigeria, this study endorses that judges should take the belief in witchcraft and the supernatural seriously. This position is because witchcraft or supernatural beliefs could affect the mind in a way that affects capacity.[104] This study suggests that the cause of insanity should not be the focus of the insanity defence. The court should focus on the effect or impact of insanity on a person's ability to understand proceedings and instruct their legal advisers or the effect on the person's responsibility at the time of the offence.

In the Nigerian context, people seldom believe that insanity may have a natural cause; based on the above definition of natural mental infirmity, the defence of insanity has failed in several cases.[105] It becomes complicated when Litigants or judges link the Nigerian insanity defence to witchcraft or supernatural causes because the courts do not admit evidence of witchcraft.[106] However, Lambo claimed that belief in witchcraft could affect the mind, making it hard to separate belief in witchcraft from a defect in mental power.[107] Therefore, this study claims that the extent to which this belief has destroyed mental power should be the contention.

Anjani argued for the need for interpretation criteria, stating that courts establish a link between legal concepts and the context of their legal sources.[108] It is challenging for courts to apply a law if the legal concepts are of a different contextual character. Courts and legislators need a good

[101] [1959] W R N L R 222.

[102] [1968]1A L L N L R. 152.

[103] [2010] F W L R 1262.

[104] See chapter five of this thesis in section 5.3.1.

[105] *Okon Esibehe Edoho V. State* [2010] F.W.L.R. (pt530)1262 SC; *Willie v State* [1968] 1 ALLNLR. 152; *Muyibi Oshinaike v State* [1984]10 S C 89 90.

[106] *R v. Konkomba* (1952)14 WACA 236; *Thamu Guyuk v Rex* 14 WACA 353, 372.

[107]T A Lambo, 'Characteristic Features of the Psychology of the Nigerian'(1960) West African Medical Journal (Ibadan) 95-104.

[108] Gianmaria Ajani et al., 'European Legal Taxonomy Syllabus: A Multi-Lingual, Multi-Level Ontology Framework to Untangle the Web of European Legal Terminology' (2006) 3 APPLIED ONTOLOGY 1, 1-3.

understanding of legal culture and values to define legal concepts.[109]According to Ajani, interpretation criteria are necessary because courts relate legal concepts to their contexts.[110] It becomes problematic when legal notions have a varied contextual nature. Courts and lawmakers must comprehensively consider local culture and principles to establish legal rules. When a written law is identical in two nations, its judicial interpretation may vary substantially based on each country's tradition and legal philosophy. Smith believed a legal rule in one country in the same wording in another country becomes a different law. He believed context was as important as the law.[111] Watson similarly argued that a rule once transplanted is different in its new home. [112]

Consequently, this interpretive challenge also indicates that it is sometimes difficult for transplanted legislation to integrate into the host territory without appropriate interpretive criteria. Transplanting Laws (Borrowing laws) are most inefficient when the transfer is without proper definitional and interpretive criteria to provide the means to guide courts and regulatory agencies in their interpretation and application.[113] The difficulty experienced by litigants and courts in interpreting the insanity defence explains the lack of understanding of the insanity defence.

Legislation must be clear about what it expects. If average citizens do not comprehend what the law includes, and examining a statute does not enlighten a reasonable person of their legal obligations, then the rule of law is compromised. Those with the power to apply and interpret the law are also affected. Insanity and all the terms that connote it used in Nigeria's statute lack any specific interpretation.

Furthermore, the courts in Nigeria have also paid less attention to the capacity test. (understanding what he was doing, controlling his actions, or knowing that he ought not to do or make the omission). While the capacity test may seem easy to understand, it is also important for the court

[109] Ibid 3.

[110] Gianmaria Ajani et al, 'European Legal Taxonomy Syllabus: A Multi-Lingual, Multi-Level Ontology Framework to Untangle the Web of European Legal Terminology' (2006) 3 Applied Ontology 1.

[111] Jan M Smits, *Elgar Encyclopedia of Comparative Law* ((ed) Edward Elgar 2006).

[112] A. Watson, 'Legal Transplants and European Private Law' (2000) vol 4.4 Electronic Journal of Comparative Law,< http://www.ejcl.org/ejcl/44/44-2.html> accessed 20th November 2020; Alan Watson, *Law Out of Context*, (Athens Ga 2000) 1.

[113] Silvia Ferreri,'Terminology Matters: Dangers of Superficial Transplantation'(2019) 37 BU Int'l L.J 35.

to provide a coherent interpretation based on the Nigerian context. For example, the study in chapter seven found that most Nigerians have non-medically inclined conceptions of insanity and misconceptions about its causes. For a judge with nonmedical background, convincing them that an accused was insane and could not refrain from committing a crime may be difficult. It is challenging to establish that a person cannot control their action. Chapter five has shown that the English also have problems interpreting the phrases used in their insanity defence. That is not to say there are no lessons to learn from the English jurisdiction. They make better use of expert evidence, mental health legislation and better disposal options.

This thesis commends the English effort to define mental disorders through legislative instruments. The various amendments made over time indicate that finding an adequate definition of mental disorders is difficult.[114] The Mental Health (Care and Treatment) (Scotland) Act 2003 definition[115] has helped identify mentally disordered individuals more efficiently, enabling courts to implement better safeguards.[116] Therefore, these examples demonstrate how Scotland uses its mental health legislation to provide a definition guide to the insanity defence.

Therefore, Nigeria can resolve the interpretation of the insanity defence terms used in the Acts through judicial and statutory interpretation. However, it concludes that determining their meaning remains challenging until Nigerian courts offer a judicial interpretation representing the Nigerian context for these terms. Also, the courts can adopt the international or global interpretation of the terms.

The challenge in definitions and practices relating to the provisions of the insanity defence and its application identifies the need for a review to create an interpretation framework. Nigerian

[114] Lunatic Act and the Mental Deficiency Acts did not define mental disorders, but the initial attempt was made in the Mental Health Act of 1959. It categorized mental disorders into three groups: those suffering from mental illness, psychopathic disorders, and sub-normality.; The above definition was broadened by the 1984 Act when it stated that mental disorder was "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind. See Chapter Five. Mental Health Act 1959 s2; the MHA 2007 was enacted it simplified this definition. It defined mental disorder as "any disorder or disability of the mind.

[115] Mental Health (Care and Treatment) (Scotland) Act 2003, 328.

[116] *Winton v HM Advocate* [2016] SLT 393; *Lord Advocate v Harrison* [2008] S L T 112.

lawmakers must provide an interpretative framework for the insanity defence in line with current medical/psychological definitions.

Therefore, Nigeria could resolve the issue of interpretation in three ways, by providing an interpretation framework or provision, through judicial interpretations and by a deeper relationship with the mental health system. Definitions in legislation are powerful tools, as they interpret the terms provided and, without an intention to the contrary, affect other texts dealing with the same subject matter.[117] So they have a strong influence on how a jurisdiction interprets legislation. The legislation does not require a definition provision if the meaning of the terms are common or obvious. Legislation requires a definition section if the legislators use the term differently from the ordinary everyday dictionary meaning of the words. Therefore, the definition provisions stipulate what a term means in the legislation and how users can apply them.[118] The CCA does not contain any provision defining the terms used in the insanity defence provision. There is no provision in the CCA for the meaning of "mental disease or natural mental infirmity" nor lack of capacity.

Similarly, in England, the interpretation of the terms used for the insanity defence test lacks precision. In contrast, Scotland has utilised mental health law to clarify its wording.[119] As medical practitioners have expert knowledge in this area, they could give meaning to the term through evidence. Although "insanity defence" is more commonly used in criminal law than medicine, what constitutes insanity is medically known. On the other hand, lawmakers could define these terms in mental health legislation, and courts can refer to them. Having terms or phrases that the courts, prosecution and the accused can understand will potentially increase the efficiency of this defence. Also, the defence of insanity is a field where there should be a closer relationship between criminal law and the mental health system.

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[117]Legistics Definitions, Department of Justice, Government of Canada. <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p5.html#ftn1> 2nd January 2023.

[118] Rules of Interpretation Sample Clauses <https://www.lawinsider.com/clause/rules-of-interpretation> 22nd December 2022.

[119] The Mental Health (Care And Treatment) (Scotland) Act 2003; Criminal Justice And Licensing (Scotland) Act 2010.

8.3.3. ISSUES WITH PROOF OF THE INSANITY DEFENCE

Chapter Six identified the challenges of establishing the insanity defence. It demonstrated that Nigerian courts in the Southern and Northern Regions, while applying the insanity defence test, have no apparent differences. The studied case law did not indicate that the applicable tests affected any jurisdiction differently. The review in chapter six identified two issues as follows:

I. There is a low probative value to medical evidence.
II. The circumstantial evidence is uncertain and judges question their reliability.

LOW PROBATIVE VALUE ATTACHED TO EXPERT EVIDENCE:

The accused has the burden to prove the insanity defence raised during the trial.[120] This review identified that Nigerian law only provided the burden on the accused to establish the test without stating the required evidence. It established that for a successful insanity defence, courts in Nigeria (Northern and Southern regions) require circumstantial evidence and medical evidence. Expert evidence is not mandatory, and courts can choose not to order expert evidence where none exist.

Expert evidence is one of the important pieces of evidence the courts require for proof of insanity. For the insanity defence, expert evidence includes the evidence of a psychologist, doctor or medical practitioner based on his specialised field of scientific knowledge.[121] In Nigeria, courts place little weight on the evidence of an expert in an insanity defence.[122] The criminal laws[123] did not provide expert evidence to prove insanity at the time of the crime. However, expert evidence is one of the essential pieces of evidence for the proof of insanity, but it is not conclusive.[124]Nigerian courts place more weight on circumstantial evidence like the accused

[120] *Woolminton v Director of Public Prosecution* [1935]AC 462; *HM Advocate v Mitchell* [1951] SLT 200; *Idowu v The State* [1972] 5 SC 6; *Francis Ezediufu v The State* [2001] 17 NWLR 82.

[121] *R v Turner* [1971] 1 WLR 901.

[122] *R v Ogor*[1961] 1ALLNR 70.

[123] Criminal Procedure Act, Criminal Procedure Code, Criminal Code Act and Penal Code Act.

[124] *Guobadia v the State* [2004] SC 295.

conduct before and after the offence, history of the accused insanity, evidence of relatives and neighbours, family history, the nature of the killing and more.[125]

Aguda and Okonkwo acknowledged that courts regard expert evidence as desirable but not essential.[126] Nigerian courts have determined several insanity defence cases without depending on expert testimony but all facts presented.[127]

This study showed that this position is different in England, as expert evidence, as a matter of law, is compulsory before an accused proves an insanity defence. The law provides that the court requires expert evidence from two or more medical experts, at least one registered before a court will uphold an insanity defence.[128] However, the position under the common law was like the current position in Nigeria, where courts can rely on expert evidence as an option.[129] The Butler committee criticised this practice under the common law and advised for the greater involvement of medical experts in insanity defence decisions.[130] Also, in Scotland, expert evidence is not a necessary legal requirement but one of common law practice. This thesis observed that most of the case law on insanity defence was subject to expert medical evidence.[131]

However, this study proffers four reasons courts ought to put more weight on the evidence of experts in insanity defence cases.

REASONS FOR COMPULSORY EXPERT EVIDENCE

First, this thesis draws from Loughnan's idea that because of the development of psychiatric and psychological knowledge, only experts are qualified to give insights into mental disorders "hidden from an ordinary observer".[132] Expert evidence is helpful because it deals with specialized

[125] *Edoho v The State* [2010] 14 NWLR 651; Onyekwe v The State [1988] 1 NWLR 565, 579

[126] Aguda, *mental Abnormality in Principles of Criminal Liability in Nigeria* (Ibadan 1965); C O Okonkwo, *Okonkwo and Nash: Criminal Law in Nigeria* (Sweet and Maxwell 1980) 141.

[127] *Oladele v the state; Benson Madugba v Queen* [1958] SCCNLR

[128] The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s 1 and Sched 1 para 2(2).

[129] Under the 1964 Act, the court can return a verdict on the insanity defence without considering expert evidence.

[130] Butler Report, Para 18.37.

[131] *Lambie v HM Advocate* [1973] JC 5.

[132] Arlie Loughnan, 'Manifest Madness: Towards a New Understanding of Insanity Defence' (2007) 70 MLR 83; *Ibrahim Imam, The Nigerian Law of* Evidence (Malthouse Law Books 2017) 48.

knowledge in which the court has little expertise. Also, academic writings have suggested that peopled construed mental disorders as readable or manifest at the point of the crime or circumstantially. Nevertheless, the advancement in mental health acknowledges the presence of mental disorders hidden from an ordinary observer.[133] This thesis observed in the Nigerian decided case law[134], just like Loughnan's opinion,[135] that there are subsisting convictions that mental disorder is readable or manifest in conduct and that common knowledge is sufficient for detecting them. How can the court accommodate those mental disorders that are not manifest? This question is against the backdrop that insanity can exist without apparent signs. The answer is through expert evidence.

Taking this point further, Loughnan explained that in England's early 16th and 17th centuries, courts regarded insanity as common knowledge and ordinary persons could evaluate and testify on insanity.[136] In this period, people without expert knowledge knew and understood insanity.[137] Porter supported this view when he said that in this period, authoritative insanity talks were not "traditionally the preserve of any profession".[138] Family members, neighbours, apprentices and publicans could give evidence identifying and evaluating conduct as insanity.[139] Therefore, community perception (friends, witnesses to the crime, family, magistrates, and jury) decided insanity case law in this period.[140]

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[133]Michel Foucault, Alan Sheridan, *History of Madness, and Discipline and Punish: the birth of the Prison* (Vintage Books 1995); Wiener Reconstructing the Criminal; J P Eigen Witnessing Insanity: Madness and mad doctors in the English Court (New Haven Yale University Press 1995); Arlie Loughnan (n138) 83.

[134] *Ntita v The State; The Queen v Yaro Biu* [1964] NNLR 45; *The State v Yusuf Idowu* [1971] NNLR 93; *Origbo v The State* [1972] 11 SC; *The State v John* [2013] 12NWLR (pt 1368) 337, 358.

[135] Loughnan (n 76) 139.

[136] Loughnan (n 76) 140. Fletcher supported this view on common knowledge on insanity in his text, George Fletcher, *Rethinking Criminal Law* (Oxford: OUP 2000).

[137] Loughnan (n 76) 139.

[138] R Porter, *Mind-Forg'd Manacles: A History of Madness in England from the Restoration to the Regency* (London: Athlone Press 1987) 14, 18.

[139] Ibid 38.

[140] OBP, Philip Parker, 8 December 1708; OBP, Alice Hall, 17 January 1709; R v Ferrers [1760] 19 St Tr885

This notion that courts could determine insanity from a person's conduct changed significantly as psychological knowledge developed. The scientific revolution, leading to a complex set of psychological developments, gave way to expert evidence.[141] Okonkwo supported this view that the law should make expert medical evidence necessary when deciding on an insanity defence because of the progress in psychological knowledge.[142]

Second, introducing expert evidence as necessary for deciding the insanity defence will provide consistency and certainty in this area in Nigeria. Most Nigerian case law agrees that the court should consider all the surrounding facts or evidence before determining whether an insanity defence will succeed and not simply rely on expert evidence.[143] Chapter Six identified that under the practice in Nigeria, such surrounding evidence or facts are endless.[144] Therefore, introducing compulsory medical expert evidence of not less than two doctors, like the position in England, could be helpful to bring consistency in evidence.

The Butler Commission in England supported this view; they recommended that expert evidence was necessary to bring consistency and certainty to proof of the insanity defence. Finnel also believed that introducing expert evidence as a necessity would bring consistency in this area of law.[145] Therefore, this study supports the view that compulsory expert evidence could bring consistency for proof of the insanity defence at the time of the offence.[146]

Third, criminal responsibility is for the court to determine. At the same time, the issue of insanity should be a matter of medical evidence. When the nature of insanity is determined, courts can establish criminal responsibility. Judges cannot diagnose an accused to determine the nature of insanity, as they lack such training and qualification. It will be derogatory and abusive for an accused to be adjudicated insane without a medical diagnosis. No matter how solid circumstantial

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[141] C Jones, R Porter (eds), *Reassessing Foucault*: *Power, Medicine, and the Body* (London: Routledge 1994)

[142] Okonkwo (n113) 129.

[143] *R v Inyang* [1961]1 ALL NR 70; *Ani v The State* [2002] 10 NWLR 644.

[144] *Sanusi v The State* [1984] 10 Sc 166, 177; *Onyekwe v The State* [1988] 1NWLR 565,579; *Edoho v the State* [2010] 14 NWLR 651.

[145] Phil Finnel, 'The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991' (1992) MLR.

[146] *R v Madugba* [1959]; *Ejimima v The State* [1991] 11 SCNJ 318, 328; *Mohammed v The State* [1997] 7SCNJ 40.

evidence might look, this thesis argues that it is not enough to conclude that a person is insane but can only raise suspicion. Medical experts must diagnose a person as insane.

Finally, introducing mandatory expert evidence in insanity defence trials will comply with the United Nations General Assembly Resolution on protecting persons with mental illness and the United Nations Convention on the Rights of Persons with Disabilities (CRPD).[147] This rule suggests that courts base mental disorder orders on competent and independent medical advice.[148] It is necessary to redefine how people with mental disabilities have their rights protected to achieve CRPD compliance.[149] As Peter summarised, in insanity case law, assumptions must be made based on evidence to determine if the accused was mentally disordered when he committed the offence. However, the best evidence to assist the court in making this assumption is an expert witness in mental health/psychiatry. This thesis summarily states that it should be the duty of the medical expert to identify mental disorders while the court determines liability. Therefore, this thesis concludes that the law(courts) should make expert evidence mandatory for deciding the insanity defence, just like the case in England.

THE CIRCUMSTANTIAL EVIDENCE IS UNCERTAIN OR UNLIMITED

This thesis demonstrated in reviewing case law like *Onyekwe v State*[150], *Edoho v State*[151], *Egbe Nkanu v The State*[152] *and Sanusi v State*[153]that the required circumstantial evidence is uncertain or unlimited. In these decided cases, the courts presented comparable and distinct facts to demonstrate that the defendant was insane.

[147] Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, Adopted by General Assembly resolution 46/119 of 17 December 1991 principle 20(3).

[148] Ibid.

[149]Jill Stavert, 'Paradigm Shift or Paradigm Paralysis? National Mental Health and Capacity Law and Implementing the CRPD in Scotland' (2018) Laws, 7(3) 26.

[150] [1988]1 NWLR.

[151] [2010] 14 NWLR (Pt. 1214) 651.

[152] (1980) 3 -4 SC. 1.

[153] (1984) 10SC 166 at 177.

Also, courts do not see them as reliable like in *Akhimlen v The State*[154]. It is essential to harmonise factual/circumstantial evidence. Also, *Kazeem Papoola v The State*[155], *Locke v State and Akhimlen v The State* showed the judge's hesitations on adopting circumstantial evidence. The court rejected the evidence of the accused's brother and father about his insanity, which was factual evidence. This position confirms that circumstantial evidence on the insanity defence is questionable since judges doubt its reliability.

This research posits that the insanity defence is interdisciplinary because it involves criminal and mental health law. The defence of insanity establishes a relationship between both jurisdictions. As this thesis observed in the case law on the insanity defence, a controversial issue debated in courts is whether the accused was insane (mentally disordered) when they committed the offence. However, this is a medical question concerning mental health, although raised in a criminal trial. The controversy is the link between the accused's mental condition and the criminal act.

8.3.4. THE NEED FOR FLEXIBLE DISPOSAL OPTIONS

The disposal options refer to the point that the defendants successfully prove the insanity defence. In Nigeria, a successful plea of insanity results in imprisoning an accused in an asylum at the pleasure of the state governor or court.[156] However, the Governor can only release the defendant sent to an asylum in an amnesty pattern.[157] The Governor grants this amnesty based on a report from a psychiatrist that the individual's condition has improved and is unlikely to cause harm to others and himself.[158] In some cases, their family and friends, while undertaking to care for the person to avoid harm to themselves and the public, can request a release.[159]

[154] [2018] LPELR.

[155] [2013] LPELR.

[156] The Criminal Procedure Act 2004 s 230 (Laws of the Federation of Nigeria, 2004).

[157] The Criminal Procedure Act 2004 s 233.

[158] The Criminal Procedure Act 2004 s 233.

[159] The Criminal Procedure Act 2004 s 235.

Several authors have criticized this single method of disposing of people with mental disorders in criminal courts as narrow and unsuitable for all mental health disorders.[160] Therefore, this single disposal option of holding the insane offender for unlimited time at the governor's pleasure raises ethical and human rights abuse concerns.[161]

Conversely, this only disposal option was the position in England and Scotland, but as noted, they departed from this position. England and Scotland have more flexibility in disposal options than Nigeria.[162] They moved from just incarceration in suitable places to a period of high hospitalization and a further move to hospitalization and treatment. However, their current rules on the disposal of insane offenders involve several options and focus on the care and better treatment of the insane.[163] These include hospital orders (with or without restriction), treatment orders, guardianship orders, community orders and total freedom.

The law needs a flexible disposal option for the following reasons; First, this thesis adopts the argument of academic writers criticising this Nigerian disposal option for the insanity defence as narrow and unsuitable for all mental health issues.[164] For example, regardless of the mental disorder the accused suffered, the only option for disposal in Nigeria is indefinite detention with no possibility of treatment. Second, this thesis agrees with Idem, who concluded that Nigerian law on insanity seems punitive because none of the criminal law legislative instruments (including the Criminal Code and Penal Code) envisaged treatment, reformation, or rehabilitation as the fate of an insane accused.[165] Also, Ogunlesi and Ogunwale stated that holding the insane accused for an

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[160] Ogunlesi & Ogunwale, 'Correctional psychiatry in Nigeria: dynamics of mental healthcare in the most restrictive alternative' (2018) Cambridge University Press 4.; Mafullul Y M, Ogunlesi O A, Sijuwola O A. 'Psychiatric aspects of criminal homicide in Nigeria' (2001) East Afr Med J. 78(1):35-9.

[161] This position was discussed in chapter 6 section 6.5.

[162] Stephen White, 'The Insanity Defense in England and Wales Since 1843' (1985) The Annals of the American Academy of Political and Social Science Vol. 477 43-57.

[163] Kevin Kerrigan, 'Psychiatric evidence and mandatory disposal: Article 5 compliance?' (2002) Journal of Mental Health Law July.

[164] Adegboyega O Ogunlesi, Adegboyega Ogunwale, *Correctional psychiatry in Nigeria: dynamics of mental healthcare in the most restrictive alternative* (Cambridge University Press 2018) 4.

[165] Udosen Jacob Idem, 'Criminal Responsibility and the Defence of Insanity, Insane Delusion and Irresistible Impulse in Nigeria' (2018) Vol 4(2) Donnish Journal of Law and Conflict Resolution 19.

unlimited period at the pleasure of the Governor raises ethical concerns and human rights abuses.[166] For example, research by Perlin has shown that those courts incarcerated because of their mental disorder spend longer in incarceration than others convicted of the same offence.[167] Due to the stringent sentencing process, accused persons rarely utilise insanity as a defence. If the judge declares the defendant "guilty by reason of insanity," the judge has no choice but to commit him to a secure institution for unlimited time without a maximum sentence. This position is not attractive and more like a punishment.

In the absence of a conviction, hospitalization of defendants is not justified when medical evidence does not support such a disposal option. The Nigerian 1999 Constitution mandates the detention of insane persons only for their treatment. Consequently, Nigeria's current practice contradicts the constitution and international and regional conventions. Specifically, for this section, this study relies on the argument presented in section 8.3 (a) that identifies the UTP's position against the Nigerian Constitution, Banjul Convention and CRPD. A disposal order to asylums where a person is found not guilty because of insanity violates the CRPD provision, as discussed earlier. Courts are not supposed to detain a person solely based on their mental health diagnosis. The courts do not give the accused a choice to undergo treatment, and the decision is made for him involuntarily. The position does not demonstrate equal rights and treatment.

Moreover, it is essential to stress the reasoning behind the defence, which is that the offender is not criminally responsible, so he is not guilty, and that for the safety of society and himself, he should receive therapy or treatment instead of being punished. Therefore, a flexible disposal option based on personal needs is a safe way to balance the interest of the public and that of the insane.

The medical evidence is important to the grounds for incarceration (disposal options) under insanity at the time of the offence. The court must demonstrate that the person's mental condition necessitates incarceration. The court should base the detention order on their needs. It is necessary

[166] Ibid.

[167] Micheal Perlin, 'The insanity Défense in English Speaking African Countries' (2013) The Journal of Legal pluralism and Unofficial law 74.

to broaden the scope of disposal options in the Nigerian criminal law system to consider options considered appropriate to the insane, as in England and Scotland.[168]

9. IMPROVEMENT IN THE MAINTENANCE, CARE AND TREATMENT OF ACCUSED PERSONS

There cannot be a significant development in the insanity defence without the development of the mental health system, including updated mental health legislation. The care, maintenance, and treatment of the insane in society contribute to the reduction of crime, the recognition of when an insane person commits a crime and the disposal of insane criminals. However, a jurisdiction can only care for and treat the mentally disordered when the appropriate legislation is in place. The Lunacy Act of 1961, which regulates the treatment and care of mental disorders, has remained the same since its enactment in Nigeria. Laws must change to reflect current standing and developments. The first way to change people's perspectives on mental health issues is to change the laws on mental health.

8.3.5. THE NEED FOR A NEW MENTAL HEALTH LEGISLATION

The law on mental health can help as a guide to courts in deciding the defence of insanity, especially in identifying the persons who are insane. The old mental health law in Nigeria referred to persons with a mental disorder as “lunatics”.

The Issues identified in chapter seven with the Nigerian Lunatic Act of 1958 are as follows:

i. The incarceration or imprisonment of a mentally disabled person in an asylum is the focus of the Act and not in a hospital or a place of care.

ii. Lack of provision for proper care and treatment.

iii. Old inappropriate language

iv. Involuntary commitment

v. The poor state of the Asylums or psychiatric hospitals [169]

[168] Michael L Perlin, The Insanity Defense: Nine Myths That Will Not Go Away in Mark D. White, *The Insanity Defense: Multidisciplinary Views on Its History, Trends, and Controversies* (Newyork Law School 2017).

[169] See Chapter Seven in section 7.3.1 for details.

It is worthy of note that England and Scotland were once in Nigeria's former position on mental health. The difference between the three jurisdictions is that Nigeria has been in one position for decades while England and Scotland have progressed to better treating and caring for persons with mental health issues in light of modern development.[170]

It is a fact from the amendments and reviews made in the legislation on mental health that the English mental health law has progressed. The English lawmakers' significantly changed laws, and in the 2007 Act, they tried to balance the public's interest and that of the mentally disordered. They widened the disposal options and improved treatment opportunities.

This thesis observed the changes made to the Scottish mental health legislation and how they have made efforts to keep their mental health system up to date with modern knowledge. We also observed the effort by the government to review past legislation on mental health by setting up independent committees to review the laws and their efficiency before the amendment. This situation also shows the importance of reviewing legislation to reflect modern knowledge.

The Nigerian Lunacy Act of 1958 is moribund because lawmakers have not updated it since its inception. Also, it does not sufficiently cover the management (care and treatment) of insane persons. They have set up several committees in the past that reviewed their mental health legislation. Several voices called for reform.[171] The lawmakers introduced a Bill in 2003 to repeal the Lunacy Act, but without deliberation, the Senate threw it out in 2009. This Bill was reintroduced into the National Assembly in 2013 when the National Policy for Mental Health Services Delivery suggested principles for delivering care to people with mental, neurological, and

[170] See chapter seven in section 7.3.2.

[171] Deborah Oyine Aluh, Olaniyi Ayilara, Justus Uchenna Onu, Ugnė Grigaitė, Barbara Pedrosa, Margarida Santos-Dias, Graça Cardoso & José Miguel Caldas-de-Almeida, 'Experiences and perceptions of coercive practices in mental health care among service users in Nigeria: a qualitative study' (2022) International Journal of Mental Health Systems 16; Obianuju Ugochukwu, Nkechi Mbaezue, Saheed Akinmayowa Lawal, Chris Azubogu, Taiwo Lateef Sheikh, Frédérique Vallières, The time is now: reforming Nigeria's outdated mental health law (2020) Lancet Global Health; Westbrook AH, Mental health legislation and involuntary commitment in Nigeria: a call for reform.< https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1022&context=law_globalstudies> accessed 20th November 2022; Assent to Mental Health Bill now, Obindo tasks Buhari https://www.vanguardngr.com/2022/12/assent-to-mental-health-bill-now-obindo-tasks-buhari/ accessed 20th December 2023.

substance abuse problems. A little hope was arisen on February 19, 2020, when the upper chambers held a public hearing for the Mental Health and Substance Abuse Bill. On 28th November 2022, the National Assembly forwarded the National Mental health bill of 2021 to sign into law. Finally, the president signed it into law on 6th January 2023. The passage of this law offers optimism for addressing a number of the concerns and recommendations made for the Lunacy law.

8.3.6. LACK OF DEVELOPMENT IN THE NIGERIAN LEGAL SYSTEM RELATING TO THE INSANITY DEFENCE

When the values in a society change, the laws must change as well, or else the law will not reflect the society it governs.[172] A jurisdiction needs to review, change or amend its laws to align with developing trends and anticipation of future needs for better protection of society. Laws should not be static; when lawmakers make changes to a law, it becomes more reflective of the needs of society.[173] The provision on the insanity defence in the CCA and PCA has remained the same since its first enactment. There has been no development to the criminal law provisions on the insanity defence. Although mental health has become a key area in most civilized societies, it has become even more important in criminal law jurisdiction. There have been low awareness and sensitization of the public on the inadequacies of legislation on insanity and the need for better protection of the mentally disordered in the criminal law jurisdiction.

There has been no effort on record towards reviewing the test of insanity in both Penal Code and Criminal Code legislation. This thesis argues that the inactivity in the review of insanity defence provisions points to the government's neglect of the mental health system and the lack of legislative will on the part of lawmakers. The government must examine its application and progress in society to determine whether a law is still efficient and relevant. Nigerian Criminal law provisions on insanity cannot boast of benefitting from any review or amendment. Legal reviews

[172] Law as a system of values, The Jan Grodecki lecture at the University of Leicester by Sir Rabinder Singh 24 October 2013<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/singh-law-as-system-of-values20131031.pdf> accessed on the 3/01/2021.

[173] Sanne Taekema, *The Concept of Ideals in Legal Theory* (Springer Science & Business Media 2002) 149.

are important for development. There is a need to review this area of law to ensure that insane persons under criminal law jurisdiction are identified and better managed.

The position differs in England and Scotland, as noted in chapters three and four. There have been numerous reviews of their position in the insanity defence. This thesis also observed the setting up of Law Commissions to review the insanity defence in England and Scotland. This position demonstrates that the government was aware of the need to test the effectiveness of the insanity defence legislation and the willingness to make a change.

In examining the developments highlighted in the legislative instruments identified, legislators in England and Scotland, despite their slow responses, understand the need for legal review. However, the English and Scottish legislators have introduced changes to the insanity defence to align it with current medical and psychiatric positions. This thesis observed the English and Scottish legislative willpower in this area while appreciating the need to develop the law.

Legal development is essential for any society. The laws must change with society. The lawmakers need to review the Nigerian insanity defence law considering changing mental health values.

8.4. CONCLUSION

This section examined the identified issues with the insanity defence in Nigeria. The habit of "wholesale" or "copy and paste" legal transplant. This chapter discussed four key issues regarding Nigerian UTP legislation in this chapter. It identified the interpretation gap, a gap in the test/procedure to apply, issues with evidence, the possibility of human rights abuse, and how it conflicts with the constitution, regional and international treaties.

Furthermore, it identified issues in interpreting terminologies used in insanity at the time of the offence. This review identified how socio-cultural differences had influenced the application of the defence. The court's attitude toward the supernatural and witchcraft, highlighted in this chapter, shows that culture impacts the success of a legal transplant. In addition, it identified the need to broaden the scope of disposal options in the Nigerian criminal law system to consider options

considered appropriate to the insane, as in England and Scotland. The law on insanity or mental disorder remained the Lunacy Act for decades without the required amendment.[174]

[174] At the end of this research, the Nigerian President signed the mental health and substance related Bill into law on the 6th of January 2023.

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

9.1. INTRODUCTION.

The idea of legal development is central to this study. Legal systems must evolve to keep up with the complexity and evolution of modern society. The Criminal Code and the Penal Code Acts, which provided for the insanity defence, are among the laws transplanted into Nigeria during the colonial era. From inception to date, lawmakers have not reviewed or updated the insanity defence provisions. Accordingly, this study established gaps in the Nigerian insanity defence and the need for lawmakers to review them.

This thesis began with the aim of identifying the shortcomings of the Nigerian insanity defence and proposing measures to improve it. This thesis reviewed the theoretical and practical position of the Nigerian insanity defence to achieve this aim. This thesis offered a critical analysis of the insanity defence from the positions of three jurisdictions: Nigeria, England, and Scotland. Aside from the limitations observed in Nigerian law, this comparative analysis revealed their similarities and differences to equip Nigeria to address her limitations with knowledge and insight.

Chapter Two examined the history of Nigerian criminal law to understand the complexity of the Nigerian criminal justice system. In this historical review, this study identified complexities in Nigeria's legal positions, which produced over two criminal law regimes. It discussed its criminal law development and established that Nigeria adopted the Criminal and Penal Codes Acts from foreign jurisdictions without recourse to the existing indigenous laws. It further highlighted the Nigerian habit of transplanting laws while investigating the origin of the insanity defence from the 18th century. It traced the source of the insanity defence to the M'Naghten Rule.

Chapter three demonstrated how England and Scotland developed their position on insanity defence from their common law and the position of academic writers. This study evaluated the development of the Nigerian insanity defence provisions, and it established a gap in development as there were few legislative activities in this area of law. In contrast, England and Scotland showed

positive legislative activities in this area of law, including legislative reviews. Here it attributes the problem to lawmakers' lack of political will to look into this area of law.

The fourth chapter evaluated the interpretation of the insanity defence test provided in Nigerian legislation (PCA and CCA) to establish its fitness for purpose against factors calling for a reform of the defence. It established that the keywords on insanity were outdated and lacked medical/criminal definition.

The fifth and sixth chapters investigated the application and proof of insanity defence through judicial review and case law. The review led to issues with evidence and disposal options. The was uncertainty in the evidence required for the proof of insanity and less weight on expert evidence. Also, the disposal option was narrow and more like a punishment. These chapters established that for a successful insanity defence, there is a need for deeper collaboration between the medical/mental health jurisdiction and the criminal justice system.

Chapter Seven explored the mental health legislation in Nigeria, England, and Scotland. This chapter supports the last two chapters arguing that the flawed Nigerian mental health system and outdated legislation impact the insanity defence negatively. A developed and efficient mental health system and legislation could impact the application of the insanity defence positively. According to this review, it is necessary to strengthen the relationship between the insanity defence and the mental health system for efficient practice.

The following section will state the findings and suggested solutions to the identified problems. This chapter provides a conclusion and recommendations based on this research findings.

9.2.GENERAL FINDINGS

This thesis made findings in line with this study’s aim to identify gaps in the Nigerian insanity defence and ways to close the gaps. The thesis argued that contemporary psychiatric/medical positions must inform the development of criminal law on the insanity defence. After reviewing the insanity defence through its chapters, this study concludes that the Nigerian insanity defence is due for a legislative review and amendment.

Given the gap in legislative development and reviews facing the Nigerian legal system on the insanity defence, this study examined the efficiency of the insanity defence laws. It concluded that there is a need for a legislative review and reform because of some identified gaps. The following findings informed this conclusion in order of the chapters reviewed.

A. THE NEGATIVE IMPACT OF LEGAL TRANSPLANT ON NIGERIA'S INSANITY DEFENCE

This thesis identified the provisions of the Criminal Code Act 2004 and the Penal Code Act 1960 as legal transplants. This thesis acknowledges that Legal transplanting could be successful in a host jurisdiction. It does not consider transplanting laws a bad practice but argues that, like in the Nigerian context, it could have negative impacts when incorrectly done. It showed that the adverse effect is that it might not fit well to solve the intended problem or serve its intended purpose. This position also raised interpretation issues and clog to the understanding of the law.

B. INTERPRETATION ISSUES

To begin with, the insanity defence statutory provisions in the Criminal and Penal Codes lack a definition framework for its key terms. This study demonstrated that Nigerian courts have struggled to interpret phrases like "mental disease and natural mental infirmity" appropriately.[1] Also, case law showed that the courts were not in the habit of defining terms used in Nigerian insanity defence provisions. When they did, courts preferred to use foreign sources to interpret the words used in the insanity defence tests.

This thesis acknowledges that transplanting Laws (Borrowing laws) are dangerous when the host jurisdiction lacks the proper definitional and interpretive standards to provide the means to guide courts and regulatory agencies in their interpretation and application.[2] The difficulty experienced by litigants and courts in defining the terms used in the insanity defence provisions affects the understanding and application of the insanity defence. The words used in the test of the insanity defence in the Criminal and Penal Codes Acts are old and outdated. They have existed for over a

[1] *R v Omoni* [1949] 12 WACA 511; *Okon Esibehe Edoho V. State* [2010] F.W.L.R. (pt530)1262 SC; *Willie v State* [1968] 1 ALLNLR.

[2] Silvia Ferreri, 'Terminology Matters: Dangers of Superficial Transplantation' (2019) 37 B U Intl L J 35.

century, and the medical community no longer acknowledges them. There is a need for Nigerian lawmakers to update the terminologies used in the insanity defence provisions.

C. UNCERTAINTY ABOUT EVIDENCE

This thesis proved that an accused requires evidence for successful proof of insanity in Nigeria, England, and Scotland. The accused has the burden to prove the insanity defence raised.[3] There is no clear definition of what evidence the accused needs for an insanity defence to succeed. Expert evidence is one of the essential pieces of evidence required by the courts for a successful proof of insanity defence. In Nigeria, courts place less weight on expert evidence to prove an insanity defence.[4] The criminal laws did not provide expert evidence to prove insanity at the time of the crime. They prefer to consider all other surrounding evidence like the accused conduct before and after the offence, history of accused insanity, evidence of relatives and neighbours, family history, the nature of the killing and more.[5] On the one hand, the judges constantly question the veracity of this circumstantial evidence. On the other hand, courts have no legal obligation to order expert evidence if none is available for proof of insanity at the time of the offence.

D. MULTIPLE CRIMINAL LAW REGIMES IN NIGERIA.

Nigeria has several criminal law regimes, which comprise over three regimes. Although this review focused on the Criminal and Penal Code Act, it noted other regimes like the Sharia Penal Code in the twelve states. Also, based on the powers of States to enact their law, this review identified that Lagos state had amended their criminal law and their insanity defence provision. They updated the language of the defence from "insanity" to "mental disorder". This change is one of the recommendations of this study for a contemporary medical language to be updated.

Given the differing regimes in place, it would be challenging to push for a parallel change in Nigeria's position on the insanity defence. However, this position means that the regimes would need to review their law on the insanity defence individually. At the federal level, legislators need

[3] *Woolminton v Director of Public Prosecution* [1935]AC 462; *HM Advocate v Mitchell* [1951] SLT 200; *Idowu v The State* [1972] 5 SC 6; *Francis Ezediufu v The State* [2001] 17 NWLR 82.

[4] *R v Ogor*[1961] 1ALLNR 70.

[5] *Edoho v The State* [2010] 14 NWLR 651; Onyekwe v The State [1988] 1 NWLR 565, 579.

to review the Criminal and Penal Code Acts differently to apply changes. The State lawmakers would also review their laws on the insanity defence.

D. ISSUES IDENTIFIED IN UNFITNESS TO PLEAD

This research critiqued the application "Unfitness to Plead" on four key issues: lack of police investigation, a procedure for courts to investigate an unsound mind, and the possibility of human rights abuse.

LACK OF A PROCEDURE/TEST FOR INVESTIGATION: The unfitness to stand trial in the Nigerian jurisdiction lacks a procedure for investigation as outlined. The law provided that the court detain the accused in the hospital for assessment. However, it further stated that the court could order an investigation without the accused. This position raises the question of the type of investigation that occurs in the absence of the accused, especially when the accused is insane. The court is supposed to investigate insanity; it is prudent for the law to provide a direction for this investigation, like in England and Scotland.

HUMAN RIGHT ABUSE: This research pointed out human rights concerns under the procedure for Nigeria insanity as a bar to trial. It identified that the law in Nigeria allows a court to suspend a trial where it observes that an accused might be insane and unable to defend himself. Before the court proceeds further in the case, it will order a medical examination of an accused to investigate their current state of mind.[6] There is a binary approach whereby the accused is fit or not. If there is suspicion of unfitness based on insanity, the court transfers the process to a medical practitioner who investigates the insanity. The big question is, what if the accused is innocent? There is already a presumption of innocence until proven otherwise guaranteed in the Nigerian constitution. This position can breach their liberty and freedom of choice to medical care.

Nigeria's provision on unfitness to plead violates Article 6 of the African Charter on Human and Peoples' Rights (BANJUL charter), which guarantees freedom of movement and arbitrary arrest.

[6] The Criminal Procedure Act s 222.

Furthermore, it does not demonstrate equality of rights and violates the provisions of the UNCRPD and other human rights treaties.

E. NARROW DISPOSAL OPTION

The disposal options in the Nigerian Criminal Code (Criminal Procedure Act and Criminal Procedure Code 1960) show that Nigeria practices just one disposal option.[7] This research advocates for the law to broaden the disposal option for the insanity defence in Nigeria and make it more flexible like the English and Scottish counterparts. The language of the disposal option does not reflect current medical positions. Places like asylums are no longer operative and do not serve the interest of the insane. The disposal options do not guarantee the treatment and care of insane accused persons.

F. IMPACT OF THE MENTAL HEALTH SYSTEM

This research contends that the mental health system and legislation could impact the insanity defence. Its impact could either be positive or negative. This work argued that a developed mental health system and legislation would improve the application of the insanity defence. Hence, it examined the mental health legislation in Nigeria, England, and Scotland. This review indicated a lack of development in the Nigerian mental health Act. According to this study, Nigeria's mental health law does not refer to the insanity defence. It shares no relationship with criminal law. A large population of Nigeria misinterpret the nature of insanity regarding the causes and treatment options. Nevertheless, since before independence, Nigeria has not had an updated mental health law.

However, after the completion of this study, the president of Nigeria, by January 2023, signed a new Mental Health Bill of 2018 into law. This circumstance is a welcomed development and, to a large extent, expected to solve some gaps in the old Lunacy Act. This study also hopes that when it comes into force that the defence of insanity will benefit from it.

[7] The unfitness to plead allows release to a guardian.

9.3.SUMMARY OF FINDING

This thesis argues for measures to strengthen the insanity defence in Nigeria to address the needs of persons with mental disabilities and protect society from them. On the one hand, central to this review is legal development. Law is dynamic; thus, laws should change as society does. The Nigerian insanity defence provisions enacted over a century ago have received no attention and are due for review. The language of the defence is outdated and no longer in use in criminal law jurisdiction and mental health systems globally.

On the other hand, vital to this study is the argument that the insanity defence needs to interact closely with the mental health system for it to be efficient. The mental health system should be involved in every step of the defence, from the determination of fitness to stand trial, the proof of insanity (evidence), the detention of the accused, to the options for disposal. However, this was not the position in Nigeria.

According to this thesis, the Nigerian insanity defence faces some challenges. Nigerian courts struggle with interpreting key terms, the uncertainty of the required evidence and the narrow disposal option. These findings justify the need to review and amend the insanity defence in Nigeria. Conclusively, the Nigerian insanity defence rule does not adequately cover present and future needs. There is a need to update the language of the defence, provide a better interpretation framework, increase the weight of medical evidence, and broaden the disposal options. A modern mental health law that interacts closely with criminal law will improve the effectiveness of insanity defences.

9.4.RECOMMENDATIONS

This research aimed to identify gaps in the insanity defence and sort ways to close the gaps. Having identified and discussed the gaps and how they affect the application of the insanity defence, this section will suggest the way forward. The dynamism and complexity of modern civilisation require legal evolution to match the changing society. In line with this, viewing the insanity defence in societal development is essential. This study recommends the following to protect the insane in the criminal law system.

9.4.1. THE NEED TO REFRAIN FROM "WHOLESALE" OR "COPY AND PASTE" LEGAL TRANSPLANT

This study observed that Nigerian criminal laws were legal transplants, and the courts had the habit of resorting to wholesale transplants. While discussing transplanted laws, this study highlighted the need for borrowed laws to be compatible with the receiving country's laws. This position meant transplanted laws are best when the receiving jurisdiction identifies how the legal rules they want to adopt will serve them. It is more likely that a borrowed law will be understood, applied, and used in the country when it is compatible with the context of the country. Learning from other countries can be valuable.

However, this thesis suggests Nigerian lawmakers should refrain from copying and pasting laws or policies from other jurisdictions. If a legal transplant is necessary, they can adopt a synergistic process to harmonize the borrowed law with prevailing societal trends. This thesis justifies this process by improving and developing a legal system for the benefit of its citizens.

This study suggests that Nigerian lawmakers should undertake comparative research regarding the rule they wish to transplant due to cultural diversity. It requires Nigerian lawmakers to evaluate laws considering local context before enacting them. This view considers how a rule that a popular/known rule could change across borders, giving it a new meaning. Therefore, to become more self-sufficient, Nigeria's legal system may have to learn to rely less on the legal system of other countries. If they must borrow, they must scrutinise it considering the local context.

Additionally, the lawmakers could resolve the problem associated with the transplanted laws by providing an interpretation or definition framework in the statute. Legal interpretation is key to legal transplant. If the law is understood, it could be applied. Most importantly, this thesis suggests that legislators should provide key terms in every given law with an interpretation (interpretation framework).

9.4.2. CLARITY OF THE LANGUAGE USED TO DEFINE THE DEFENCE

This review showed the need for lawmakers to update the language of the insanity defence. They should update the terminology used in the title and substance of the insanity defence to describe

mental conditions to reflect modern medical terminology. The world has moved on from the term "insanity", which is more associated with criminal jurisdiction than mental health/medicine. Second, criminal and mental health legislation does not define it. This research suggests terms like mental disorder or mental illness, which are common in the mental health system and medicine globally.

It is necessary to apply a language that is understandable and easily accessible to both law and medicine, considering their relationship. This thesis observed such change in Lagos state as they used "mental disorder" in their revised legislation. Therefore, it recommends that lawmakers follow suit in other States.

9.4.3. INTERPRETATION OF TERMS

Interpreting terms used in the insanity defence provisions was challenging to judges and counsels. Courts could use internal and external aids in interpreting statutes, as shown in this study. The legislation does not require an "interpretation clause" (definition provision) if the meaning of the terms is common or obvious but required if the legislators use the term different from common sense.

It is common for a statute to include "interpretation clauses" comprising the definition of keywords used in the law. The lawmakers use these clauses to express their plain meaning and restrict the court's interpretation. Where a statute lacks an interpretation clause, the court enquires into the words used in a statute to discover the lawmakers' intention. Providing an "interpretation section" in the legislation can solve the challenge of Judicial interpretation. Interpretation sections are internal aids[8] to statutory interpretation, and statutes provide for them.[9] Hence, the meaning provided when legislation contains an interpretation section binds the court.[10]

[8] They also include Long Title, Short Title, Preamble, Schedule, Marginal Notes, Headings and Title of a Chapter, Punctuation, Explanatory Notes, other sections of the Act and the Definition sections/clauses in the Act.

[9]Sylvester Udemezue, Role Of Internal & External Aids In Statutory Interpretation: A Disquisition On Legitimateness Of "Jurisdictive Discretion" (2019) <Role Of Internal & External Aids In Statutory Interpretation: A Disquisition On Legitimateness Of "Jurisdictive Discretion" [1] By Sylvester Udemezue - TheNigeriaLawyer> accessed 28 May 2021

[10] ibid.

External aids are sources outside the statute that courts consult to determine the meaning of statutory terms.[11] They include other legislation, textbooks, academic writings, dictionaries, Law Commission Reports, case law (Judicial decisions), and other materials outside the statute.[12] However, case law reviewed in chapter seven of this study shows the court's preference for using external aids to interpret insanity defence terms.[13]Nigerian courts prefer to use external aids from foreign jurisdictions to interpret insanity defence provisions.[14] Adapting foreign knowledge can be profitable, but it is essential to incorporate it into the local context. Courts could do this by considering how an ordinary man in such jurisdiction would interpret the borrowed interpretation.

This situation is one of the instances where the defence of insanity can benefit greatly from mental health legislation. The court or counsel could access the meaning of words linked to the insanity defence in mental health legislation. In Scotland, case law demonstrated the use of mental health legislation to define the key terms in the insanity defence.[15] It is challenging to interpret key terms related to the insanity defence in Nigeria since there is no mental health framework or local texts to turn to for assistance.

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[11] Hakeem Olasunkanmi Ijaiya, *Judicial Approach to Interpretation of Constitution; A Study of Nigeria, Australia, Canada, and India* (Malthouse Press Ltd 2017) 70.

[12]Sylvester Udemezue, 'Place of Internal and External Aids to Statutory Interpretation In the Light of Legitimaeness of Jurisdictive Discretion' (2020) SSRN15.

[13] *Willie v State* [1968] 1 ALLNLR 152.

[14] For example, in *R V Omoni* the court described "natural mental infirmity" as a defect in mental power neither produced by own default nor the result of the disease of the mind. The court extracted this definition from an English text which looked at past criminal circumstances in England. Courts adopted this definition in other case law,[14] but it raised questions regarding witchcraft and belief in the supernatural. The *Omoni* case simply described the term "natural," with less indication that the court defined mental infirmity.

[15] Mental Health (Amendment) (Scotland) Act 1983 s 2(1) This Act defined "mental disorder" as 'mental illness or mental deficiency however caused or manifested'; *Johnstone v HM advocate* [2013] SLT 1115; *Reid* v *HM Advocate* [2013] SLT 65.

The Literary Rule, the Golden Rule, and the Mischief Rule are three commonly employed principles of interpretation, among others.[16] The literal rule is the ordinary grammatical meaning of words applied in a statute.[17] Hence, the court does not add, subtract, or extend the definition they give to words.[18] The courts mainly apply this rule when the provisions are unambiguous.[19] The courts apply the golden rule, where using the literary rule will lead to absurdity.[20] Additionally, courts use the mischief rule to interpret laws by identifying the wrongs that the lawmakers meant the legislation to fix by going into a voyage of discovery to determine the history of the legislation.[21]

A Scottish court[22] stressed the difficulty of determining the meaning of phrases used in the insanity defence since their legal definitions are distinct from their ordinary usage.[23] This court explained that "the ordinary meaning of words remains the first. This position further demonstrates the need for less ambiguous terms in the provision. However, courts can resort to internal or external interpretation aids when ambiguity arises.[24]

Therefore, it is advisable to have the proper interpretation framework in place. This study recommends legislators include an interpretation provision or framework for an insanity defence in criminal laws. This position will also help resolve the issue of legal transplant. Hence, the interpretation section in a law binds the courts and parties.[25] Legislators could adopt this technique to ensure consistency in court judgments involving insanity defences.

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[16] Obilade (n21) 56.

[17] *Judith Jessah*, Interpretation of Statutes and The Retrospective Application of The Fourth Alteration Act Number 21, 2017 By the Supreme Court of Nigeria (2017) international review of law and jurisprudence (IRLJ),.

[18] Ibid.

[19]Justus Sokefun, Nduka Njoku of Nigeria - School of Law the Court System in Nigeria: Jurisdiction and Appeals

[20] *Council of university of Ibadan v Ademolekun* (1967) ANLR 225 SC

[21] *Akerele v Inspector General of Police* (1965) LPELR (25263) 1 at 10-11

[22] *Scott Henry Sneddon MacKay v Her Majesty's Advocate [2017] HCJAC 44.*

[23] Mackay (n 56) 25.

[24] Ibid 397.

[25] Ibid.

9.4.4. ENABLING THE POLICE FORCE TO HANDLE MENTAL HEALTH SITUATIONS

Lawmakers should provide laws to enable the police to respond effectively to mental health issues during arrest and investigation. They should adopt practices like having a mental health officer in police stations and detention sites. Police officers should receive regular mental health awareness training. Their training should include knowledge of the relevant mental health legislation and the nature of insanity. Finally, police officers should have unrestricted access to mental health assessments and professionals.

9.4.5. HARMONIZATION OF PROVISIONS OF INSANITY DEFENCE ACROSS NIGERIA (PENAL CODE AND THE CRIMINAL CODE ACTS).

In addition, this thesis recommends the notion of a similar provision in the Northern and Southern regions for the insanity defence for two reasons. First, the insanity defence lacks any religious or cultural affiliation. If any such association exists, the law should strive to cease such. It goes contrary to medical knowledge, which is the same globally and would be a clog to development. Mental disorder is the same globally, and the world strives to have a uniform development in this area, as it is a matter of life.[26] Without any difference in mental disorders, it would be profitable for the criminal law jurisdiction to have a similar test to determine when accused persons can benefit from this defence.

Second, the evaluated proof of the insanity defence did not reveal a substantial difference between the various tests. The case law indicated a similar evidential burden and judicial approach regarding the required evidence. Hence the defence tests differ theoretically but not in practice. For more certainty and a unified approach in Nigeria, these provisions on the insanity defence could benefit from having a similar provision. This position could also help reduce the gaps in interpreting terms.

[26] WHO on mental health movement, https://www.who.int/health-topics/mental-health#tab=tab_1 Accessed 11th December 2020.

9.4.6. HUMAN RIGHT PROTECTION

Protecting the right to a fair trial and liberty is intrinsic to considering the fitness to plead. Deprivation of freedom through hospitalisation was the most common disposal order for accused persons found unfit to plead in Nigeria. This thesis argues that the involuntary hospitalisation of the accused in unfitness to plead in Nigeria is a breach of the fundamental human right of the accused to a fair trial and liberty. This study bases this argument on whether the accused did the act or made the omission leading to the crime. The process in Nigeria requires the court to give a hospital order once the court finds the accused unfit to plead without recourse to whether he did the act or made the omission leading to the crime.

Another concern is the limited information or procedure on the procedure involved in the unfitness to plead. A detailed guideline for the process and investigation would benefit the Nigerian criminal justice system. Legislators should update the law on unfitness to plead to limit potential human rights breaches.

It proposes that the law requires the prosecution to prove no grounds for acquittal before the court decides unfitness to plead. This proposed procedure reflects the position in Scotland. In Scotland, the law permits the postponement of fitness to plead until the accused opens their defence.[27] The court evaluates the Crown's evidence. They must satisfy the court that there are no grounds for acquitting the accused.[28]

9.4.7. FLEXIBLE DISPOSAL OPTIONS

This study postulates a broader, more flexible insanity defence disposal option under Nigerian law. It suggests that criminal and mental health legislation should interact regarding insanity defence disposal options. The courts should make disposal options based on the medical diagnosis of the accused's mental condition. Therefore, lawmakers should require two or more experts to provide evidence to determine the disposal option. Such an approach is progressive and in line with the norm in countries like England and Scotland.

[27] The Criminal Procedure (Scotland) Act 1995, s 55.

[28] The Criminal Procedure (Scotland) Act 1995, s 55(1)(a), s 55(3).

Hence, this study suggests options like a hospital order, guardianship order, supervision order, treatment order and an order for an absolute discharge.[29] A flexible disposal option will help accommodate various mental disorders that do not need detention in the hospital. The disposal option should reflect the care and treatment of insane accused persons. This position on the disposal options further improves the maintenance, care, and treatment of insane accused persons. The legislators should update the provision's language by changing terms like Asylums.

The disposal option is an area that should have a closer interaction with the mental health jurisdiction from the point of entry to the hospital to release. Therefore, medical evidence should determine the appropriate disposal option and when to release. This study showed that a successful insanity defence (in the North and South) resulted in asylum imprisonment at the Governor's leisure. The government can only balance the interest of the public and the insane when there is a flexible disposal option based on a person-centred approach.

9.4.8. LIMIT THE TIME IN DETENTION OF AN INSANE ACCUSED PERSON

The time for an accused whom the court ordered into the hospital should be definite. Lawmakers should consult mental health experts for suggestions on how to fix the term for the release of an insane accused. This thesis suggests that the hospital should release an accused once certified by two independent medical assessors that they are mentally fit. The lawmakers should remove the powers of the governors to release an insane accused from detention. The mental health legislation can incorporate an appropriate procedure for a release, like in civil cases.

9.4.9. UPDATING THE MENTAL HEALTH LEGISLATION

There cannot be a significant development in insanity defence without the development of mental health law. Improving mental health care, maintenance, and treatment could reduce crime. It could assist the courts with accessible evidence of insanity and choose the appropriate disposal of insane criminals. The arguments in this research postulate that an integrated strategy between criminal and mental health law is the most effective method to tackle various concerns with the insanity

[29] The Criminal Procedure (Insanity and Unfitness to plead) Act 1991 s 6, s 14(2).

defence. The best way to change people's perspectives on mental health issues is to change the rules on mental health.

Mental health legislation is essential for the insanity defence in three ways: defining terms, expert evidence, and disposal options. The insanity defence is an area of criminal law that interacts with the mental health system. This thesis proposes that the mental health legislation in Nigeria needs a change, considering the issues identified with the current lunacy legislation.[30] The present Bill in the house is a little beam of hope for reform. If lawmakers finally pass this law, it will impact several issues raised in this research, particularly on language, care, and treatment of insane persons.

9.5.RECOMMENDATION FOR FURTHER STUDIES

Third, this study recommends further study to determine how to incorporate local understanding and perspective in choosing appropriate or suitable terms or language for the insanity defence test. Foreign knowledge can be profitable, but it is essential to incorporate an understanding of the local context. Therefore, it is vital to explore local or indigenous explanations to explain terms used in the insanity defence.

Also, as part of Nigeria's efforts to improve psychological support, President Muhammadu Buhari promulgated the Mental Health Bill on January 5th, 2013. It will be important for courts and scholars to assess how the recently signed mental health bill affects the insanity defence once it takes effect. Further study will be required to determine how this new mental health law will comply with human right obligation locally, regionally and internationally.

CONCLUDING REMARKS

Insanity strikes at the heart of the argument that when someone acts in a harmful manner and lacks responsibility due to a mental disorder, the law should excuse his actions. Even though this thesis

[30] It criticized the definition of mental illness in the legislation as instigating stigma. ii. The terms not used in standard medical parlance today. iii. The definition is discriminatory and discretionary, iii. Not in line with WHO's definition of mental illness, v. Derogatory to people with mental health needs, which violates their human rights vi. The Nigerian lunacy legislation raises issues of human rights abuse.

showed that foreign legal systems might significantly influence Nigerian Criminal Codes, at least in interpreting their words, the lawmakers and courts must discourage the wholesale importation of foreign concepts. This thesis encourages legislative activities for the insanity defence at most to change the language to acceptable modern medical terms.

This study has demonstrated how crucial it is for the criminal justice system to include expert evidence from psychiatrists and physicians and use mental health legislation to define terms and provide disposal options. In the interests of the public and the insane accused, when criminal law collaborates efficiently with the mental health system, the insanity defence will serve more efficiently. The law should view the insanity defence as a multidisciplinary issue, with the criminal justice system coordinating with the mental health system to achieve this goal on the insanity defence. The law should engage medical experts at every stage of a case involving an insane person to protect the insane accused.

Central to this research is the notion of legal development. The insanity defence is due for a legislative review considering the time elapsed since its enactment. The gaps identified demonstrate that it is inefficient and cannot meet today's and future needs. Changes of the type suggested by this study can only happen if a strong political will exists. The lack of development and limited review of this area of the law indicates that legislators and officials lack the political will to examine this area of law section. If there were stronger political will, review and revision of the insanity defence laws. The lawmakers should not leave the existing test of insanity defence only to continued development by the courts; instead, the legislators should reform the insanity defence across the board in Nigeria to reflect the contemporary medical and criminal position

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