

Original Research Article

Criminal Responsibility and the Defence of Insanity, Insane Delusion and Irresistible Impulse in Nigeria

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At Common Law and other common law jurisdictions including Nigeria, it is a well-established principle of law that no person can be held criminally responsible for his acts or omissions which occur independently of the exercise of his free will. Thus, insanity prevents the exercise of one's free will and therefore a general defence in criminal law. This article analyses the defence of insanity and insane delusion under the Nigeria law. It also examines the standard of proof of insanity and preliminary inquiry into insanity during trial. The paper then reviews the effect of self-induced insanity. It concludes by making recommendations among others to include amendment of our laws in line with the United States current approach to the subject-matter.

Keywords: Trial Courts, Criminal Responsibility, insanity, insane delusion, irresistible impulse.

INTRODUCTION

The proposition that some criminal defendants should not be held liable for their actions by reason of their mental capacity has been well settled at common law and in other common law countries including Nigeria. For instance, if a madman or a natural fool, an idiot, or a lunatic in the time of his lunacy kills a man, this is no felonious act for he cannot be said to have any understanding will, as a crime of felony requires both the *mens rea* and the *actus rea* before the accused can be convicted. However, the guidelines for determining the criminal responsibility for defendants claiming to be insane as at the time they committed the crime were carefully enunciated by the English Court in the famous case of *McNaughten*.¹ In that case, Daniel McNaughten who was a Scottish woodcutter shot and killed the secretary to the British Prime Minister, Edward Drummond, believing that the Prime Minister was the architect of the myriad of personal and financial misfortunes that had befallen him.

During his trial, nine witnesses testified to the fact that he was insane, and the court acquitted McNaughten, finding him "not guilty by reason of insanity," and he was placed in a mental institution for the rest of his life. The decision of the court, in this case, shocked the English public and caused a public uproar. The resultant public outcry led the House of Lords to formulate a set of hypothetical questions, which they sent to the judges who decided the case for answers regarding

the plea of insanity. The answers given to the judges are now generally referred to as the *McNaughten* rules which now become the basis of the law governing legal responsibility in cases of insanity in England and other Common Law countries. The rules may be summarized as follows: (a) Every person is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved; (b) to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong; (c) if a person commits an offence under an insane delusion, and is not in other respect insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real².

The *McNaughten* rules were embraced with almost no modification by American Courts and legislatures for more than 100 years, until the mid-20th century. But, in the case of *Durham V. United States of America*³, the American Court of Appeal refused to follow the rules formulated in *McNaughten's* case in favour of a broader medical test and held that an accused is not criminally responsible if his unlawful act was the

²<http://www.law.comell.edu/background/insane/insanity.html>. Visited on 3/11/2017

³ 214 F2d862 (1954)

¹(1843) 8 ER 718

product of mental disease or mental defect⁴. That is to say that a defendant is entitled to acquittal if the crime was the product of his mental illness (i.e., crime would not have been committed but for the disease)⁵. However, the decision in Durham's case gave rise to criticism and objections and in 1972 a panel of federal judges overturned the decision in Durham's case in favour of the Model Penal Code test of American Law Institute (A.L.I) which allows for the introduction of medical and psychiatric evidence, together with the introduction of defence of diminishing responsibilities/ capacity to cure manifest injustice many accused persons were exposed to before now in America.

In Nigeria, the M'Naughten Rules as formulated by the British Courts enunciated above guided our courts in respect of insanity and insane delusions, but not with respect to an irresistible impulse. Indeed, it was not until 1952 that the first case on this issue came up in the case of *R. v. Omon*⁶ where Verity, C.J., delivering the lead judgment of the West African Court of Appeal took a hard look at the M'Naughten rules *vis-à-vis* the provisions of Section 28 of our Criminal Code and said:

This may look a little different from English law, though I do not think it is meant to be. Be that as it may, if one takes the words of capacity to control his actions alone, one is left with this: if he is in such a State of mental disease of natural mental infirmity as to deprive him of capacity to control his actions.

He continued.

The English law on the subject is that laid down by the judges in answer to certain questions propounded to them by the House of Lords in M'Naughten's case. The answers most nearly analogous to the provisions of the first paragraph of Section 28 of the Nigerian Criminal Code are those to the second and third questions. It is clear to us by comparing these words with those of Section 28, that the legislature, we must assume, for good reason, has not only departed from the phraseology of the judges but has also introduced two entirely new factors, that of natural mental infirmity and that of incapacity to control his actions. The words of the section, 'such a state of mental disease' may well be considered as equivalent to the words? Such a defect of reason from the disease of the mind used by the judges in M'Naughten's case, but the introduction of the words 'or natural mental infirmity' goes beyond the latter words. We must ascribe to them an intention to distinguish between 'mental disease' and natural infirmity, 'for otherwise the last words be redundant.'⁷

The learned Chief Judge then laid down what must be proved to establish insanity in Nigeria thus:

First it must be shown that the prisoner was, at the relevant time, suffering either from mental disease or from 'natural mental infirmity' as we have interpreted its meaning. Then it must be established that the mental disease, or the natural mental infirmity, as the case may be was such that, at the relevant time, the prisoner was as a result deprived of capacity:

- (a) to understand what he was doing; or
- (b) to control his actions; or
- (c) to know that he ought not to do the act or make the omission.

The Court further stated that if the defence be one of partial delusion, the provisions of the second paragraph in the Nigerian Section 28 are applicable and that they are similar to the rules in M'Naughten's case as to delusions."⁸

It could be gleaned from the above decisions of the Courts that insanity is an absolute alienation of reason, which can deprive a person of the knowledge of the true aspect and position of things. It may hinder a person from distinguishing friend from foe and give him up to the impulse of his own distempered fancy⁹. Insanity may impair a man's power of perception so that he may not be able to foresee or measure the consequences of his actions as he would if he were sane.

It may also impair a man's power to decide between right or wrong, so that he may say or do the same thing when sane. He does not realize he is doing wrong or that his decision is wrong. It may impair a man's power of self-control so that he may more readily give way to anger and provocation than if he were sane. When all these happened to an individual in breach of criminal law, he is clearly in need of medical treatment rather than punishment. His actions in contravening the criminal law should be regarded as lacking criminal responsibility and exempted from punishment.

DEFINITION OF INSANITY

The definition of insanity is very nebulous, fluid and incapable of precise definition. However, different academic writers, jurists and statute laws define insanity differently. For instance,

The Black's Law Dictionary¹⁰ described insanity as:

Any mental disorder severe enough that it prevents a person from having legal capacity and excuses the person from criminal or civil responsibility.

The same Black's Law Dictionary further defines insanity as:

A social and legal term rather than a medical one used to denote that degree of mental illness which negates the individual's legal responsibility or capacity¹¹.

The New International Webster's Comprehensive Dictionary of the English language¹² defines insanity as:

Any mental disorder characterized by temporary or permanent irrational or violent deviations from normal thinking, feeling, and behavior: not a technical term in medicine or psychiatry,

⁸ *Ibid.*, p.513

⁹ Hume D: commentaries on the law of Scotland respecting crimes (4th edn.1844) p. 37

¹⁰ Garner, B., Black's Law Dictionary (7th Edn, St. Paul Minn: Thompson west, 1999)p.797

¹¹ *Ibid*

¹² Funk and wagnalls, The New International Webster's Comprehensive Dictionary (2010 Edn, Typhoon Media Corporation: United State of America.)p.655

⁴ <http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html>. Retrieved on 3/11/2017

⁵ Wikipedia. retrieved on 3/11/2017

⁶ (1949)12 W.A.C.A.511

⁷ *Ibid.*, p.512

The same New International Webster's Comprehensive Dictionary of the English language¹³ defines insanity as:

Any degree of mental unsoundness resulting in inability to distinguish between right and wrong, to control the will, foresee the consequences of an act, make a valid contract, or manage one's own affairs, or lack of sound sense; extreme folly,

while **Oxford Advanced Learners Dictionary**¹⁴ defines insanity as:

The state of being insane or action that is very stupid and possibly dangerous.

Statutorily, in the southern part of Nigeria, *Section 28 of The Criminal Code*¹⁵ which is the main provision for insanity defines insanity on the basis of the criminal responsibility of the accused person as follows:

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.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some 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 act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist,

While *Section 51 of The Penal Code*¹⁶ defines insanity on the basis of the act of the accused as follows:

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.

In England, The English Mental Deficiency Act¹⁷ currently replaced by the Mental Health Act 1959 defines mental defectiveness as a condition of arrested or incomplete development of mind existing before the age of 18 years, whether arising from inherent causes or induced by diseases or injury. In explaining what insanity is all about, Lord Denning in the English case of Brathy V.A.G. for Northern Ireland¹⁸ stated inter alia as follows:

A disease of the mind as any disorder that has manifested itself in violence and is prone to reoccur at any rate is a sort of disease for which a person should be detained in hospital, rather than being given an unqualified acquittal by the court

Commenting on a similar concept, His Lordship Justice Verity CJ (as he then was) of the WACA in *R. V. Omoni*¹⁹, defined insanity as:

A defect in mental power neither produced by his own default nor the result of disease of mind

On our part, we define insanity as "a defect of reasoning in a person due to natural infirmity or mental disease depriving him of the capacity to know what he is doing whether it is right or wrong".

In the light of the foregoing definitions of insanity or mental health disease by scholars and eminent jurists, it is clear that the State of mental health of a person at the time of committing the offence is relevant and vital in determining whether the defence will be available to him or not.

Insanity under the Nigerian Law

Nigerian law presumes every person to be sane until the contrary is proved. This assertion is contained under Sections 27 and 43 of the criminal and Penal Codes respectively²⁰. Since the two codes serve the Nigerian criminal justice system, we shall discuss them separately.

The Criminal Code Provision

The relevant provisions of insanity in the Criminal Code are contained in Sections 27 and 28. Section 27 of the Act states the obvious, and is meant to be a prelude to the defence of insanity in the following words:

Every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question, until the contrary is proved.

While section 28 of the Criminal Code which is the main provision on insanity stipulates as follows:

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. A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some 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 act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.

It is obvious from the above passage that Section 28 of the Criminal Code provides for the defence of insanity if at the time of doing the act or omission a person is in such a state of mental disease or natural mental infirmity²¹ as to deprive him of his 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.²²

¹³ Funk and wagnalls, The New International Webster's Comprehensive Dictionary (2010 Edn, Typhoon Media Corporation: United State of America.)p.655

¹⁴ Honby, A., Oxford Advanced Learners Dictionary (6th Edn. Oxford University Press), P.618

¹⁵ Cap. C38 Laws of the Federation, 2004

¹⁶ Penal Code

¹⁷ (1913-1938)

¹⁸ (1961)

¹⁹ (1949)

²⁰ Cap.c38 Laws of the Federation Of Nigeria, 2004 and cap.p.14, LFN,2004

²¹ The expression "natural mental infirmity" means a defect in mental power neither produced by his-own default

nor the result of disease of the mind. See the Queen V. Michael

Tabigen(1960) 1 NSCC 6 S.C.

²² Ezediufu v the State (2001)17 NWLR (Pt.741) 82

The second arm of Section 28 addresses situations of insane delusion. The section states that a person whose mind, at the time of his doing or omitting to do the act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the first arm of the section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusion to believe to exist. The effect of this section is that an accused person affected by delusion can only be relieved of criminal responsibility:

1. if at the time of doing the act or making the omission he is in such a State of mental disease or natural infirmity as to deprive him of such capacity to understand what he was doing and or capacity to know that he ought not to do the act or make the omission.
2. where he has a valid and absolute defence in law, i.e. under the statute or under the constitution.²³

Section 28 of the Criminal Code was given judicial recognition by the Supreme Court of Nigeria in the case of *Edoho V. State*²⁴. In this case, the Appellant was charged with murder of one Akanimo Jacob Edoho contrary to the provision of Section 319(1) of the Criminal Code. At the trial, the Appellant relied on the defence of insanity and alleged that he stabbed the deceased with a dagger because he suffered temporary insanity through witchcraft. He stated that the incident was beyond his control as he was then under the spell of witchcraft. At the end of the trial, the trial Judge rejected the Appellant's plea of insanity and convicted him as charged.

Aggrieved by his conviction, the Appellant appealed to the Court of Appeal which affirmed his conviction. He further appealed to the Supreme Court which Court said the onus of proving insanity is on the accused person who should make available evidence to satisfy the Court that he was insane at the time he committed the offence because by Section 27 of the Criminal Code there is a presumption that every person is of sound mind, at any time which covers the period in question, until the contrary is proved and that in the absence of such proof the Supreme Court affirmed the decision of the Court of Appeal.

Also, in the case of *Popoola V The State*²⁵ the facts of the case from the evidence adduced by the prosecution revealed that on the 29th day of January, 2004 at about noon, the prosecutrix (Bukola Adebajo) a student was urinating at the school farm of the Abeokuta Grammar School, Abeokuta, Ogun State when the Appellant accosted her and threatened to report her to the school authority on the ground that students had been barred from defecating in the school farm.

The prosecutrix (PW1) pleaded with him but the Appellant demanded money which the prosecutrix said she did not have and in the process of further threat of reporting the prosecutrix, the Appellant grabbed PW1 and dragged her further into the farm, overpowering her, and raped her before fleeing the scene. The incident was reported to the school Vice Principal who took PW1 to the hospital and reported the matter to the police. The Appellant could not be found for arrest but on the 24th day of July, 2004 at about 9.20am at a place called mortuary junction in Abeokuta, PW1 saw the Appellant and she called her mother by phone who came over and got the

Appellant arrested. He made a confessional statement to the police and was charged to court for offence of rape. The Appellant pleaded "not guilty" to the charge. The prosecution called four witnesses including a medical officer and tendered two exhibits. The Appellant did not testify but called two witnesses who gave evidence on his behalf and their defences were based on defence of insanity. At the end of the trial, the Appellant was found guilty and was sentenced to a term of 5 years imprisonment. Dissatisfied, the Appellant proceeded to the Court of Appeal which dismissed his appeal. The Appellant further appealed to the Supreme Court.

At the Supreme Court, one of the issues for determination was whether the failure of the trial court to comply with the provisions of Sections 223 and 224 of the criminal procedure laws of Ogun State to determine the insanity of the Appellant at the trial prejudiced the trial of the Appellant. After elaborate and careful consideration of the proceedings of the trial Court, the Court held that the Appellant having failed to establish the defence of insanity in the case by himself, calling two witnesses who gave evidence on the defence of insanity on his behalf was not enough to avail him. The Court further stated that the kernel of the provision of Section 28 of the Criminal Code law is that the onus of establishing the insanity of the Appellant at the material time of the offence is on no other than the Appellant himself, the burden of proof, however, being on balance of probability.

Also, the case of *Madjemu V. State*²⁶ the Supreme Court decision is very instructive on the relevant facts to establish the defence of insanity by the defence. In this case, the Appellant was arraigned for the offence of murder of his wife. He pleaded not guilty to the charge. At the conclusion of the trial, the trial Court found him guilty as charged and sentenced him to death by hanging. He appealed to the Court of Appeal which dismissed the appeal. He further appealed to the Supreme Court which also dismissed the appeal and stated that to establish the defence of insanity, recourse could be had to the following relevant facts namely: evidence as to past history of the accused person; evidence as to the conduct of the accused immediately preceding the killing of the deceased; evidence from prison officials who had custody of the accused person before and during his trial; evidence of medical officers who examined the accused; evidence of relatives about the general behaviour of the accused person and the reputation he enjoyed for sanity or insanity in the neighbourhood and evidence showing that insanity runs in the family history of the accused; and such other facts which will help the trial court come to the conclusion that the burden of proof placed by law on the defence has been dismissed but in this case the Appellant has failed to do so.

The Penal Code

In the northern States of Nigeria, the Penal Code takes the place of the Criminal Code. The Code makes the following provisions with regard to insanity. 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 he is doing what is either wrong or contrary to law.

²³ Udofia v. State (1981) 11 SC 49

²⁴ (2010)F.W.L.R. (pt530)1262 SC

²⁵ (2013)vol. 222 LRCN (Pt. 2)p8

²⁶ (2001)fwrl (p52) 2210 s.c.

Section 51 of the Penal Code is for all intents and purposes interpreted *similimodo* as Sections 27 and 28 of the Criminal Act.

It is important to note that the Penal Code, unlike the Criminal Code, uses the phrase unsoundness of mind which is different from what is contained in Section 28 of the Criminal Code. No doubt, the term “unsoundness of mind” is broad enough to cover all forms of mental abnormalities arising from “mental disease” or “disease of the mind” as well as sub-normalities.

By virtue of Section 51 of the Penal Code, an act of a person of unsound mind shall be a defence where it is proved that:

- (a) something administered to him without his knowledge or
- (b) against his will, reason of which he suffered from which in fact would lead to his
 - (i) incapacity to know the nature of the act or
 - (ii) that he was not aware of doing something wrong or contrary to law.

This issue of unsoundness of mind was carefully highlighted in the case of *Yakubu Kure V. The State*²⁷ In this case, the Appellant was found naked one morning, armed with a big stick. He hit his daughter with the stick and she became paralyzed in the right arm. He hit another girl on the head and she died. No one ever saw the Appellant behave in that manner. He was arrested and taken to the psychiatric hospital, Lokoja. Following the psychiatric report, the Magistrate discharged the Appellant.

After months of treatment, the Appellant was discharged from the hospital. Thereafter, he was charged with the offence of murder and convicted as he was not known to have suffered any mental abnormality previously. At the Supreme Court, the issue of his treatment and discharge by the magistrate earlier was shown to be evidence by the prosecution of the state of mind of the Appellant, although the defence did not make the report available at the trial and the accused was sentenced to death. On appeal, the Supreme Court per Obaseki JSC stated that:

The defence is entitled to make use of evidence of insanity of the accused tendered by the prosecution even if the defence tendered no evidence²⁸. The learned justice of the Court of Appeal also considered this defence of insanity. He too failed to give due weight to the evidence tendered by the prosecution.²⁹

In *Bhagwati v. Emperor*,³⁰ the accused committed murder for which there was apparently no motive. After the offence, he made no attempt to disappear or to offer an explanation in extenuation. In answer to police interrogation, he said: “arrest me, I have shed blood”; he took no interest in the pretrial inquiry and was certified medically insane. The Court held that he did not know the nature of his act and therefore, was legally insane under section 51 of the Penal Code.

In a recent decision of the Kwara State High Court in *State v. Shittu*,³¹ the accused person killed his mother by hitting her with a shovel several times on the head, apparently to make her follow the path of Islam. The trial Judge, Gbadayan J.

found the accused not guilty on the ground of insanity and remarked, *inter alia*:

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

INSANE DELUSION

The second arm of Section 28 of the Criminal Code provides for defence of insane delusion. The section states that: a person whose mind, at the time of his doing or omitting to do an act, is affected by delusion on some specific matter or matters, but who is not otherwise entitled to the benefit of the first arm of the section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusion to believe to exist. For instance, if the person under insane delusion thinks that a child is a dog and hits him with stick, the Court treats it as if the child was a dog (akin to a defence of mistake or fact). But, to succeed, the defence must prove insanity at the time of the crime. That is to say he has to prove as follows:

- (i) That at the time he did the criminal act, he was labouring under such an insane delusion on some specific matter or matters
- (ii) That if the matter or matters of his false belief were true, his act or omission would have been justified.

It must be observed that this provision of our law is a codification of that portion of Mc`Naughten Rules dealing with insane delusions. Generally, where an accused is unable to claim protection under the first segment of Section 28 of the Criminal Code, he may still be able to raise some defence under the second arm of that section provided he can show that he had some affliction of mind or delusion on some specific matter or matters. In *R v Grumah*³² the WACA defined delusion as “a symptom of mental disturbance and a false belief which is unshakable by facts”.

Also, in *Ngene Arum v. The State*³³ the Supreme Court of Nigeria per Fatayi Williams, CJN (as he then was) stated the defence of delusion in the following words:

Where an accused person under the influence of his delusion supposed that another man was going to kill him and he killed that man believing he did that in self-defence, he would be exempted from punishment. If his delusion is that the deceased had inflicted serious injury to his character and fortune and he killed him in revenge for such supposed injury, he would be liable to punishment.

Similarly, In *Iwuanyamu V State*³⁴, the question that came up for determination before the court was whether a deluded belief held by the appellant that the deceased intended to kill him through witchcraft, would entitle the appellant to claim protection under the second arm of Section 28 of the Criminal Code, for his pre-emptive strike. His defence of insanity was rejected. Onyeama J.S.C (as he then was) said, *inter alia*:

³² (1957) WALR 225

³³ (1979) 11sc 91

³⁴ (1964) 1 ALL N.L.R 413

²⁷ (1988) N.M.L.R. pt. 71, 404

²⁸ Section 140(2) of the Evidence Act, Cap.62, Vol.2, Laws of the Federation 1958

²⁹ *Ibid*, p.411

³⁰ (1924)A.I.R. oud 190

³¹ (Unreported) suit no1 KWS/1^c/84 delivered on February 26, 1985.

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

In *Thenus Guyak v R*³⁵ the WACA accepted that the Appellant who had been convicted of murder was suffering from delusion. The Appellant is deluded belief was that the deceased had been following his wife and had promised to snatch her away. In spite of the finding, the Court upheld the Appellant's conviction for murder on the ground that he knew that he was doing what was wrong. Accordingly, in the defence of insane delusion, exculpation of responsibility cannot in law be available to an accused person. So, too, a defence founded on witchcraft or superstitious belief cannot afford a legal defence under the Criminal Code.

UNCONTROLLABLE IMPULSE

Uncontrollable impulse does not *ipso facto* come under the McNaughten rules, since it is not, in England, regarded as insanity or as an insane delusion. In Nigeria, however, it is a defence under the second segment of Section 28 of the Criminal Code Act. It is the impulse to commit an unlawful or criminal act, which cannot be resisted or overcome because mental disorder has destroyed freedom of will or the power of self-control, and the choice of action. Here, it is immaterial that the person was capable of distinguishing between right and wrong, or fully aware of the nature and quality of his acts, if through a disease of the mind he was unable to resist acting in the manner he did.

The first limb of Section 28 puts it as "or of capacity to control his actions." As we shall see later, Section 229 of the Criminal Procedure Act says that a trial Court must, where the person is acquitted because of being incapable of "knowing the nature of the act alleged as constituting the offence," or "that it was wrong or contrary to law," find specifically whether or not the offence was committed. It says nothing of where offence was committed due to "incapacity to control his actions," even though this raises the question of the applicability of Section 230 to such a person. Thus, it was argued in *Ted Kayode Adams v. D.P.P. (Federation)*³⁶ that such a person cannot be detained "ordered to be kept in safe custody, and the case reported for the order of the Governor" as provided for under section 230. Bairamian, J.S.C., was, however, not so convinced, and he said:

Section 229 relates to acquittal on the ground of insanity, and enjoins the trial court upon such acquittal to state in the finding specifically whether the defendant committed the act or not: for, if he committed the act, it is necessary to confine him. The object of confining him is to safeguard the public from an insane person's criminal propensities, and he is usually sent to a mental hospital where he can be suitably looked after. When a person is insane and criminally inclined, it makes no difference whether he has one incapacity or another – whether his incapacity is to understand what he is doing, or to know that he ought not to do it, or to control

his actions. We cannot see why a person who stabs because he is so insane as not to know that he ought not to stab should be confined, and yet a person who stabs because he cannot control his actions should be left at large to the danger of the public, and we would not agree to exclude the insanity of uncontrollable impulse from the operation of Section 230 unless we were compelled to do so by reason of sound interpretation; but these do not exist."³⁷

Although automatism is like uncontrollable impulse, it is *stricto sensu* a defence under Section 24 of the Criminal Code Act. Where, however, the automatism, like uncontrollable impulse, results from a disease of mind, it becomes a case of uncontrollable impulse under Section 28 of the Act. Automatism simply means acting while unconscious. This was the basis of the English Court in the often quoted case of *Brathay V Attorney General for Northern Ireland*³⁸ where Lord Denning said:

The requirement that it should be a voluntary act is essential, not only in murder case, but also in every criminal case. No act is punishable if it is done involuntarily, and an involuntary act in this context – some people nowadays prefer to speak of it as "automatism" – means an act which is done by the muscles without any control by the mind such as spasm, a reflex action or convulsion; or an act done by a person who is not conscious of what he is doing such as an act whilst suffering from concussion or whilst sleep – walking.³⁹

Lord Kilmuir of the same court accepted the definition of automatism as connoting the state of a person who, though capable of action is not conscious of what he is doing and as a defence because the mind does not go with what his brain has done⁴⁰. Having looked at the legal position, how scientific or commonsensical is it? For instance, what is the evidence between 'he did not resist the impulse' and 'he could not resist the impulse? Hence, Barbara Wootton asks:

Apart from admiration of the optimism which expects common sense to make good the deficiencies of science, it is only necessary to add that the problem would seem to be insoluble, not merely in the present, but indeed in any, state of medical knowledge. Improved medical knowledge may certainly be expected to give better insight into the origins of mental abnormalities, and better predictions as to the probability that particular types of individuals will in fact control their physical acts, or make 'rational judgments;' but neither medical nor any other science can ever hope to prove whether a man who does not resist his impulses does not do so because he cannot or because he will not...after all, every one of us can say with St. Paul (who, as far as I am aware, is not generally suspected of diminished responsibility) 'the good that I

³⁷ *Ibid.*, p.16

³⁸ (1963) AC 386

³⁹ See *Bratty v. Attorney – General for Northern Ireland* (1961) 3 All E.R. 523 at 532. Section 24 of the Criminal Code act would; however appear to deal with two different situations. According to Okonkwo and Naish:-

"When a court is asked to determine whether section 24 applies in a particular case, it must begin by deciding what conduct is being called in question. If it is an act or omission, then the court has to decide whether or not the act or omission was independent of the will of the actor. But if the case centers round the "events" of man's acts or omission, then the court has to determine whether or not those – events" occurred by accident."

See criminal law in Nigeria, 2nd Edn. (London: Sweet & Maxwell, 1980), p.81

⁴⁰ *Supra* at p.401

³⁵ (1953) 14 WACA372

³⁶ (1966) 1 All N.L.R. 12

would I do not; but the evil which I would not, that I do."⁴¹

Thus, according to Barbara Wooton, it is part of the traditional theory of mental responsibility that the exculpating intellectual or emotional deviation must be due to mental disorder, which includes not only insanity but any lack of full mental health, and that the idea that any illness which causes misconduct also excuses that misconduct is deep-seated in contemporary ideas on responsibility. True, law is not necessarily logic, but if a person acted from an irresistible impulse," does it matter whether or not this state of affairs resulted from mental sickness. In other words, was the irresistible impulse a sign of mental illness, or the irresistibility a cause of the mental illness? These are questions better left for empirical investigation, but suffice it to say that they are not relevant to the issues raised in this paper.

ONUS AND STANDARD OF PROOF OF INSANITY

By virtue of Section 27 of the Criminal Code which has no equivalent under Penal Code, everyman is presumed to be sane and to have sound mind at the time he committed the offence with which he is charged⁴². Having regard to this section it follows that the prosecution has no duty to prove that the accused person was sane or insane⁴³. The Onus lies on the defence to overcome this presumption, by proving to the contrary and establishing that he was of unsound mind or is suffering from insane delusion or irresistible impulse in such a way 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.

In proving his insane condition, the accused need not produce evidence that will convince the Court beyond a reasonable doubt. What the law requires of him is to lead evidence to show that it is most probable that at the time of the commission of the offence with which he is charged, he was insane within the meaning of Section 28 of the Criminal Code⁴⁴. The question of the unsoundness of mind of the accused person can be inferred by the court itself from the accused own appearance or conduct in Court⁴⁵. Evidence by a medical doctor on oath as to the insanity of the accused person will also be of great help to the Court in deciding the issue of insanity⁴⁶.

Another way the accused can prove his insanity is mental history of himself in order to show that he was actually insane at the time he committed the act or made the omission. Thus in *R v. Inyang*,⁴⁷ the Court had no difficulty to hold that the accused was insane as at the time he committed the offence of murder and entered a judgment of not guilty by reason of insanity. In this case, one witness Francis Ekpeyong Idio who came from the same village as the Appellant and has known him from his birth, deposed that at the age of twenty the Appellant developed pains in the head and said he felt his head was bursting and received medical treatment and that from then onwards he periodically suffered from the said pains and received treatment. This witness went on to say `of my knowledge he was not right in the head. His mother suffered

from similar pains in the head and his father had no proper control over his mental powers. He (the Appellant) had `a wandering disposition`, he would `lock the house and wander about at night. Sometimes, he would leave on a cycle and come back later with a dirty tin leaving the cycle by the wayside and when he was in this condition his eyes grew red`. The accused`s wife gave evidence and stated `he was given at times to insane laughter, at other times he would throw his food away, sometimes he would proceed to school with shoe and hose on one foot and nothing on the other`.

Appellant's uncle also deposed that Appellant used to speak in a meaningless manner and do things no sane man would do. The warder in charge of lunatics equally deposed that whilst Appellant was in charge `when food was passed to him he urinated into it, and stirred it up with his finger`. This witness also said he did not consider him normal`. The Appeal Court accepted the defence of insanity and allowed the appeal. Also in the case of *State v. John*⁴⁸ the Court held that "on the evidence to sustain the defence of insanity as per the provision of Section 51 of the Penal Code:

The accused person must show that at the time of committing the offence he was suffering from mental disease which affected his will and ability to control his action. The respondent can only be found not guilty of culpable homicide by reason of insanity if and only if he is able to establish the defence of insanity under Section 51 of the Penal Code.

From the above, it is instructive to note that the Onus of proof of insanity on the accused person is not as heavy as that which rests on the prosecution when proving a case against an accused person. The burden of proof, however, is on the balance of probability.

SELF - INDUCED INSANITY: WITCHCRAFT AND JUJU

Although no one can cause his own insanity in order to use the disease to camouflage pre-meditated murder, scientific knowledge can now go back to reconstruct a background of self-induced insanity. This principle of the law prevailed in the case of *Ishola Karimu v. The State*,⁴⁹ where the Court refused to accept the evidence of insanity when the accused macheted his own mother to death and explained why he did so. There was, however, medical evidence that he suffered from catatonic schizophrenia at one time or the other but, facts during his trial revealed that the accused had stimulated his matricide to kill his mother by having a smoke of Indian hemp to which he had by that time become an addict. The court held that the killing of his mother was self-induced and that s.28 of the Criminal Code cannot avail him.

In another case of *Benson Ihonre v The State*,⁵⁰ the issue here was whether if belief in juju or witchcraft produced a state of insanity, it would be a defence under section 28 of the Criminal Code Act. In this case, the appellant confessed to the killing of a 67-year-old woman and three of her grandchildren, stating that the woman was responsible for his sickness and downfall through witchcraft. She had also bewitched and killed her junior brother. His Lordship Oputa, J.S.C., as he then was stated as follows:

My only comment here is – where does one draw the line between superstition and delusion? Delusion if

⁴¹ Barbara Wooton, *crime and the criminal law*(London: sweet & Maxwell, Ltd., (1963), p.80

⁴² Cap c.38, L.F.N, 2004

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Sections 223 and 224 of the Criminal Procedure Act

⁴⁶ *Rex v. Inyang* (1946)12 WACA5

⁴⁷ Ibid

⁴⁸ (2013) vol.222 LRCN (pt. 2) p.8

⁴⁹ (1989)1 N.W.L.R. pt. 96.134

⁵⁰ (1989) 4 NWLR (pt67) 778

established affords a defence under Section 28 of the Criminal Code but superstitions do not. What then happens if a superstitious belief leads to a delusion? Will it then be right to dismiss the defence just summarily because it is based on a superstitious belief? After all, there is much in common between superstitious belief and delusion, as both are based upon a concept for which there is no reasonable foundation; upon a belief in a state or condition of things which no rational person would believe and which refuse to yield either to evidence or reason. A belief in witchcraft may if proved, amount to a delusion in which case the criminal responsibility of the accused holding such belief would be based on the law relating to the defence of delusion and not be simply dismissed as superstitious.⁵¹

Also, in the case of *Queen v. Alice Eriyamremu*⁵² where the accused the grandmother of the deceased, admitted killing her albino granddaughter in the night because her mates in witchcraft came to her house and instructed her to kill her granddaughter Oyinbo and that she killed her that very night with a stick which is still in her room, and before this was done she held her two legs swung her round her head and knocked her on the floor three times and she died, she attributed the killing of her granddaughter to witchcraft and put forward the defence of insanity. In rejecting the defence of insanity raised by the accused person, the learned trial Judge Morgan J. (later C.J.W.N) said that:

Having regard to the prisoner's reference to her worship of juju and to witchcraft and to the clear manner in which she gave her evidence I am of the opinion that, even if it is arguable that at the time she killed the girl she was afflicted with mental infirmity which deprived her of capacity to know that she ought not to kill the girl, on the balance of probabilities the infirmity was not natural and that it was induced by the prisoners worship of juju and/ or witchcraft. In my view, her defence of insanity must therefore fail because mental infirmity which is self-induced is not natural and is not a defence to insanity under the provision of Section 28 of the Criminal Code.

From the above situation, it would appear clear that a defence under Section 28 of the Criminal Code can arise, albeit not by express provision. This raises the further question with regard to sections 207 (2) of the code dealing with prohibited jujus, and 210(b) which States as follows:

Any person who accuses or threatens to accuse any person with being a witch or with having the power of witchcraft, is guilty of a misdemeanor, and is liable to imprisonment for two years

If it is a misdemeanor to accuse a person of witchcraft, can such an accuser claim the defence under Section 28, if he acted under the belief of witchcraft and accused his victim of being the witch? A similar question may be posed in respect of the prohibited witchcraft and jujus under Section 207(2) and 210(1) of the Criminal Code. It is submitted with respect that any person who by his statement or action represents himself to be a witch or to have the power of witchcraft cannot raise the defence of insanity successfully because juju and witchcraft are prohibited under our laws.

CONCLUSION

From the foregoing, it is apt to posit that in Nigeria up till now the defence of insanity seems to exclusively follow the footsteps of the McNaughten case when in fact many countries including Britain that propounded the rules, had long replaced it. This has led to the conviction of some persons who really lacked capacity at the time of committing the offence. Accordingly, in Nigeria we need to re-state the law to take care of the inadequacy pointed out earlier in this paper. Our present approach is anchored upon `disease of mind`, `natural mental infirmity` and insane delusion.

Added to this is insanity from drunkenness. This approach is as a result of our English Common Law heritage. It is the finding of this work that the Common Law approach on the defence of insanity formulated under McNaughten's Rules is not the universal acceptable approach any longer. For instance, the American Court of Appeal in the case of *Durham v United States of America* earlier cited refused to follow the rules formulated in McNaughten's case in favour of a broader medical test and held that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

This decision of the American Court of Appeal gave rise to criticism and objections and in 1972 a panel of Federal Judges overturned Durhams test in favour of the Model Penal Code of the American Law Institute which allows for the introduction of medical and psychiatric evidence, together with the introduction of defence of diminished responsibility/capacity to cure manifest injustice many accused persons are exposed to currently in our local system.

It is submitted that our Criminal and Penal Codes are two archaic and obsolete, to serve any meaningful purpose as far as defence of insanity is concerned and therefore require urgent legislative intervention. We recommend that our National Assembly should endeavor to enact and re-state our own law, taking into consideration our local circumstances.

The paper also discovers that the principal legislation governing the defence of insanity in Nigeria to wit: the Penal and Criminal Codes seem to provide different positions in solving similar legal problems. The harmonization of Nigerian laws on the defence of insanity and criminal liability is therefore imperative. For example, the provision of Section 24 of the Criminal Code defines Criminal Responsibility using such expressions as "Voluntary Act", "intention" or "motive" as an ingredient constituting an offence. Section 28 of the Criminal Code uses phrases such as `mental disease` or `natural mental infirmity` or `delusions` which are quite analogous to the McNaughten rules to provide for the defence of insanity.

On the other hand, the Penal Code adopts simple language in Section 51 which phrases talk about "a person of unsound mind" and are very easy for Court interpretation.

However, the problem with Penal Code is that it has not specifically provided for the defence of irresistible impulse as a factor for exemption of a person from criminal responsibility. This omission is clearly against current scientific development in the sphere of psychiatry where it is now recognized that incapacity to control one's action is a part of insanity. Perhaps, the justification for excluding the concept of irresistible impulse under the Penal Code is on the belief that insanity is concerned only with cognitive faculties and can, therefore, not accommodate a person who understands but cannot control his actions. Be that as it may, there is no doubt that the formulation of the Penal Code requires an urgent legislative amendment to extend the provision to cover cases of irresistible impulse.

⁵¹ Ibid.,
⁵² (1959) W.N.L.R. 270

Our analysis in this paper also shows that the Nigerian law seems to be punitive in its outlook towards insanity plea rather than reformatory and rehabilitative. Neither the Criminal Code nor the Penal Code envisages the use of the terms 'treatment', 'reformation' and 'rehabilitation' with regard to the fate of an accused person incapable of making a defence by reason of insanity, insane delusion or unsound mind or for an accused or prisoner or an acquitted person by reason of insanity, insane delusion, or unsound mind whereas, the central concern of reformation or rehabilitation theory is aimed at making the Criminal, as far as possible, a better citizen by means of physical, mental, moral, medical and ethnical training.

It lays much emphasis on rehabilitation of the criminal through peno-correctional institutions in order to secure the transformation of criminals into good citizens. The law under the present dispensation prescribes that such persons should be sent to or confined in a lunatic asylum or prison or such suitable place or safe custody as the act thinks fit. Although it is recognized that setting a person acquitted on the ground of insanity free could be dangerous in certain cases, it is fundamental that before incarcerating an accused, he should be certified mentally ill by a medical expert and not single-handedly, by a Judge.

It is suggested that the disposal of persons acquitted on the ground of insanity should be based on medical categorization of the mental state of such persons. This suggestion is forward-looking and it accords with current practice in some jurisdictions. For example, in New South Wales, the appropriate Act governing the disposal of persons acquitted on ground of insanity is not the Crimes Act, but the Mental Health Act 1958, which provides in Section 23(4) thus:

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

It is clear, that this approach of disposal of insane persons in a non-criminal apparatus is more humanistic than the practice in Nigeria where the Judge solely determines the question of disposal of threat necessarily being bound by medical evidence. This situation is quite anomalous because, whereas, the Judge inquires medical assistance to determine the fitness of a person to stand trial, no such assistance is required for the disposal of persons acquitted on the ground of insanity. There is the urgent need to amend the Criminal Procedure Act and Criminal Procedure Code to reflect the new approach in other jurisdictions.

The findings of this paper show that in spite of the defect associated with S. 51 of the Penal Code, it is close to providing the answer to our problem on the issue of insanity in Nigeria. Therefore, Section 28 of the Criminal Code should be amended to simply provide 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.

This simple provision commends itself to the author because the entire provisions of Sections 222 to 235A (part xxv) of the Criminal Procedure Act (applicable to both the Criminal Code and the Penal Code) deal with "persons of unsound mind" which, without defining, is not what Section 28 of the Criminal Code Act is all about.

RECOMMENDATIONS

Having examined and analyzed the defence of insanity, insane delusions and irresistible impulse in Nigeria in a holistic way, the writer is of the view that:

The Law Reform Commission should work towards the harmonization of both the Criminal Code and the Penal Code to reflect similar line of thought resolving similar legal problem. This should be in line with what obtains currently in the United States under the 1972 model Penal Code of the American Law Institute that allows for the introduction of medical and psychiatric evidence, together with the introduction of defence of diminished responsibility/ capacity to cure manifest injustice many accused persons are exposed to currently in our local system.

It is noted in this paper that the only sentence provided for, both in the Penal and Criminal Codes and other legislations, is punitive rather than reformatory/ rehabilitation which leave one in doubt as to whether these legislations have actually served the objectives and principles of sentencing. It is therefore advocated that the punishments sections of the Criminal and Penal Codes be amended to provide for reformatory or rehabilitative theory of punishment in the following terms: "treatment", or "reformatory" or "rehabilitative" with regard to the punishment of the accused persons making a defence by reason of insanity or unsound mind or for an accused or prisoner or an acquitted person by reason of unsound mind.

Section 230 of the Criminal Procedure Act should be amended to reflect that all persons sent to or confined in a lunatic asylum or prison or other safe custody should be treated and rehabilitated by the government by sending them to appropriate health facilities such as a psychiatric hospital (for treatment) and rehabilitation homes and not only to dump them in a lunatic asylum or prison as is presently the case. This recommendation is in line with what is obtainable in Denmark and Norway, where psychotic perpetrators are declared guilty, but not punished. Instead of prison, they are sentenced to mandatory treatment. For instance in Norway, Section 44 of the Penal Code states specifically that "a person who at the time of the crime was insane or unconscious is not punished"⁵³

We further recommend that Section 233 of the Criminal Procedure Act⁵⁴ should be amended to fix term for the release of an accused person or a prisoner once two independent medical officers certify him psychologically and mentally fit and not on the recommendation of the Governor as it is practiced currently rather the recommendation should be on the recommendation of the prison officer or the officer of lunatic asylum.

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