

## **THE PLIGHTS OF MENTALLY ILL PERSONS UNDER THE CRIMINAL JUSTICE SYSTEM IN NIGERIA**

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### **Abstract**

*A fundamental presumption of Nigerian criminal law is that every person is presumed to be sane at all times relevant to liability until the contrary is proved. The burden of rebutting the presumption is upon the defendant. Despite the force of this presumption, it is not conducive to mental health, fair trial, or individual autonomy, for criminal justice institutions to process or deal with persons who are mentally ill the way persons who do not labour under abnormality of mind are conducted during investigation or trial, or to detain persons suffering from mental illness in regular prisons. Using the doctrinal approach, this article reviews extant legislation, cases, and practices associated with mental abnormality in Nigeria and finds that mentally ill persons require better protection in Nigeria. Apart from advocating amendments of legislation, it is suggested that relevant criminal justice institutions need to accord a more temperate disposition towards mentally ill suspects and defendants during criminal investigation, trial, and disposition in Nigeria.*

### **Introduction**

The presumption that every person has sound mental capacity to control his actions is a cornerstone of Nigerian criminal law.<sup>1</sup> The principle that every person is criminally liable for the consequences of his actions exists in virtually all jurisdictions.<sup>2</sup> Prior to this presumption, the jurists of the early common law did not probe the human mind but were fixated on the effects of human action.<sup>3</sup> Early common law judges were of the opinion that the

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<sup>1</sup> See section 27 Criminal Code, sections 43 and 44 Penal Code, and section 26 Criminal Law, Lagos State, 2011.

<sup>2</sup> See *R v. M'Naghten* 8 E.R 718; *Durham v. U.S* 214 F.2d 862 (1954).

<sup>3</sup> See for instance *Sweet v Parsley* (1875) L.R 2 C.C.R. 154. See also Peter Ocheme, *Nigerian Criminal Law*, pp. 29-30.

mind of a person cannot be probed because even the devil does not know the mind of man. At that time, strict liability was the rule rather than the exception. However, it was later recognized that the mind rather directs virtually every human action, hence the Latin maxim, *actus non facit reum nisi men sit rea*, meaning the physical conduct does not make a person liable unless there is mental blame. This progressive development later led to the recognition of the defence of insanity and other mental related criminal defences. The recognition of the negative influences of insanity and mental disorder on human action at the early stages of the development of the common law may not have been based on scientific proof. Modern science has however confirmed the existence of different forms of mental illness and their correlation with, or influence on criminality.<sup>4</sup> According to a team of Nigerian scholars:

*Many people with identifiable psychiatric illness do conflict with the law, often by no fault of their own but because of symptoms of their psychiatric illness and end up in jails. Such symptoms include impaired judgement, lack of impulse control, suspiciousness, disinhibition, paranoia, inability to trust others, delusions and hallucinations.*<sup>5</sup>

Whereas many countries<sup>6</sup> have enacted or updated their laws to address most of the needs or persons with mental challenges,

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<sup>4</sup> see generally Thomas Hugh Richardson “Conceptual and Methodological Challenges in Examining the Relationship Between Mental Illness and Violent Behaviour and Crime” *Internet Journal of Criminology* 2009 [www.internetjournalofcriminology.com](http://www.internetjournalofcriminology.com) Last Visited 10/09/2014 13:44PM.

<sup>5</sup> Aishatu, Y., Armiya’u, et al. “Prevalence of psychiatric morbidity among inmates in Jos maximum security prison” *Open Journal of Psychiatry*, Vol. 3 (2013) pp. 12-17 available at <http://www.scirp.org/journal/ojpsych/> Last accessed 12/09/2013 13:06 PM.

<sup>6</sup> See for instance sections 304A and 304B of the Queensland Criminal Code Act 1899 (as amended by all amendments that commenced on or before 1 July, 2010). Section 304A deals with diminished responsibility while section 304B pertains to killing in an abusive relationship. Under section 304A, state of abnormality of mind covers conditions of arrested or retarded development of

laws inherited from the period of colonial rule still govern processes associated with persons with mental health issues in Nigeria.<sup>7</sup> Nigerian law<sup>8</sup> on the defence of insanity, for instance, still reflects the position under the common law. One of the first common law cases to recognize insanity as a defence to criminal liability was that of *R v Daniel M'Naghten*<sup>9</sup>. Since the decision in that case, issues pertaining to the effects of mental disorder, mental disease, unsoundness of mind, or mental defect upon criminal capacity, and the reaction of the criminal justice system to such persons, have individually or collectively taxed legal minds, as regards duty of proof by the sane person who already is diseased as at the time not only of doing the act but before and during trial. The controversial nature of certain aspects of the defence of insanity were accentuated by the acquittal of John Hinckley in *U.S. v. Hinckley*<sup>10</sup> on the basis of the insanity plea, after he attempted to kill Ronald Reagan, the President of the United States, and Mehmet Ali Agca following his attempted assassination of Pope John Paul II in 1981.

From the early period of the development of the English common law when mental disease was not recognized as a defence, to its establishment as an incapacitating condition in *M'Naghten's case*, and the subsequent codification of insanity as a defence in the Criminal Code, Penal Code, and the Criminal Law

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mind or inherent causes or causes induced by disease or injury, which substantially impair the person's capacity to control his actions.

<sup>7</sup> Andrew Hudson Westbrook, "Mental Health Legislation and Involuntary Commitment in Nigeria: A Call for Reform" 10 Wash. U. Global Stud. L. Rev. 397 (2011) available at <http://digitalcommons.law.wustl.edu/globalstudies/vol10/iss2/7> Last visited 12/09/2014 12:09 PM. He stated that: "While much of the world has enacted or revised legislation and policies to protect and serve the mentally ill, antiquated colonial law still governs mental health in Nigeria. To make matters worse, stigma and abuse of the system, especially that of involuntary commitment permeate Nigerian society." Ibid at 397-398.

<sup>8</sup> See section 28 of the Criminal Code and section 52 of the Penal Code, respectively.

<sup>9</sup> 8 E.R 718; (1843) 10 C & F 200.

<sup>10</sup> 306 U.S. District Court for the District of Columbia. 525 F. Supp. 1342 Nov. 17, 1981.

of Lagos State in Nigeria,<sup>11</sup> the criminal justice system has had to, and still must deal with persons whose mental health were (or are) in issue. A review of courts decisions suggests that the first time the criminal process responds to persons with mental health challenges is when they are arraigned in court, but that suggestion is far from reality. The reality is that at the time of trial, many aspects of the needs of the mentally ill person-cum-accused become belated. By virtue of his mental state, he is no longer in a state of mind to even recollect how his state of mind was (sane or insane) at the time he did the act or made the omission complained of. His counsel, who at the trial, helps to plead his insanity is expected to rely on medical records, if any was kept as at the time of his action/omission, and not records obtained thereafter. Such is the ill-attuned nature of the criminal justice process in perceiving the mentally ill at trial; the situation is not any better after trial as this paper will illustrate.

It is also true that the police and other investigation agencies react to persons whose mental health is in doubt whenever a crime is committed and reported. In other cases, the first time the mental capacity of an “accused person” falls for consideration is at the time of the commission of the crime when first responders may witness exhibition of mental aberration. Witnesses to such crimes, and investigators may observe tell-tale signs of mental ill-health that should ultimately determine how the perpetrator is handled by the criminal justice system. The next stage is the arraignment of the accused at which time the judge or court must determine whether the accused is fit to stand trial. If he is declared fit to stand trial, a plea of insanity may be raised at the trial. During investigation, trial and after trial, the court may order the detention of the accused at an appropriate institution for examination or for safety.

Against the foregoing background, this paper examines the statutory and institutional framework for processing persons with mental disability in the Nigerian criminal justice system. The paper compares the Nigerian framework with aspects of the framework

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<sup>11</sup> See sections 28 CC and 52 PC, *supra*.

in other jurisdictions as a template for reform. It observes that the institutional framework for dealing with persons with mental health challenges in the Nigerian criminal justice system manifests significant weaknesses and limitations that require immediate overhauling. The authors suggest that the police and other law enforcement agencies and the courts should refine how they process suspects and accused with mental illness. Finally, it is suggested that the legal tests for determining criminal capacity at the pre-trial, trial, and post trial stages of criminal justice adjudication in Nigeria should be reformed to respond to the nuances of mental health of suspects and accused persons. This paper examines the reaction of the criminal justice system to persons suffering from mental illness in Nigeria and suggests that the framework for dealing with persons suffering from mental illness within the criminal process in Nigeria needs to be reformed to better cater for the needs of such persons.

### **The Criminal Process and Mental Illness**

The criminal process commences from when a crime is reported, through investigation, arraignment, trial, judgment, sentence and enforcement of the decision and appeal. On the other hand, medical science has identified numerous forms of mental illness “primarily schizophrenia and other psychoses”<sup>12</sup> all or any of which, for purposes of the law of crimes, must inhibit the mind of the offender before the time or date of his action necessitating the criminal process. Apart from psychoses and schizophrenia, other factors “including substance abuse, personality disorders, developmental disorders and neuro-cognitive impairments”<sup>13</sup> are correlated with many violent crimes. While medical science approach mental illness from the perspective of treatment, the

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<sup>12</sup> Alison MacPhail and Simon Verdun-Jones “Mental Illness and The Criminal Justice System” Prepared for Re-Inventing Criminal Justice: The Fifth National Symposium Montreal, QC, Canada January 2013 available at <http://www.icclr.law.ubc.ca> Last accessed 10:09/2014 21:02 PM.

<sup>13</sup> Ibid.

criminal process determines the extent to which mental illness can absolve perpetrators of responsibility for their actions and how they should be handled by the criminal justice system.

The necessity to adopt a more nuanced approach to mental illness is predicated upon the notion that virtually every person suffer from one form of mental disorder or the other, but the degree of illness or disorder of the mind of those who are committed or who commit crimes under the influence of mental disease is more serious than those that ails the average person. Medical research shows that a large percentage of the population of many countries suffers from several types of mental disorder.<sup>14</sup> The idea that mental disorder is rampant postulates that a systematic view be taken of the health/mental antecedents of all citizens so that their acts and omissions can be predicted or at least be anticipated as a foundation for decision making during investigation and for the assessment of criminal liability at trial. In the absence of systematic treatment or reference to stored information or database of medical history, the mentally impaired person discovered only at the investigation or trial stages becomes incapable of asserting the causes or effects of his conduct.

Persons with obvious mental problems wander the streets of many towns in Nigeria. The society and its institutions appear oblivious or ill-equipped to deal with such persons or properly treat and integrate them into society. The law regulating the handling of persons suffering from mental health who are not accused of committing an offence is the Lunacy Act 1958. It was originally

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<sup>14</sup> See for instance, Aishatu Y. Armiya'u, et al. "Prevalence of psychiatric morbidity among inmates in Jos maximum security prison" op cit; Rachel Jenkins, et al. "Prevalence of Common Mental Disorders in a Rural District of Kenya, and Socio-Demographic Risk Factors" *Int. J. Environ. Res. Public Health* Vol. 9, (2012) 1810-1819 available at [www.mdpi.com/journal/ijerph](http://www.mdpi.com/journal/ijerph) Last visited 22/09/2014 14:13 PM; Joel Adeleke Afolayan, Isu Odo Peter, Alex Nancy Amasueba "Prevalence of Schizophrenia Among Patients Admitted into Neuro-Psychiatric Hospital, Rumuigbo, Port Harcourt, Rivers State, Nigeria" *Continental J. Nursing Science* Vol. 2 (2010) 8 - 16, available at <http://www.wiloludjournal.com> Last visited 22/09/2014 13:56 PM;

enacted as the Lunacy Ordinance 1916<sup>15</sup> and came into force on 21<sup>st</sup> December 1916. The Act is not in the Laws of the Federation 1990 or 2004. That does not mean it has been repealed. Omission of an enactment by the authority that compiled the laws is not repeal of the enactment that was omitted.<sup>16</sup> Courts lean heavily against implied repeal.<sup>17</sup> The law is that special Acts cannot be repealed unless there is express provision in a subsequent legislation to that effect.<sup>18</sup> Legislations can only be repealed where there is express or implied provisions annulling the previous law.<sup>19</sup> It is interesting to note that the Act has been preserved in Lagos State as the Lunacy Law.<sup>20</sup>

Section 2 of the Act defines a lunatic as an idiot or any person of unsound mind. This definition covers all categories of persons suffering from mental disorder, whether organic or inorganic, and regardless of the cause. Under section 13 of the Act, any person suspected to be suffering from mental disease or lunatic as defined by the Act may be arrested and committed to an asylum if adjudged by a Magistrate as a lunatic. However, before the committal, a medical practitioner shall first examine the person and certify him. Thereafter, the Magistrate shall issue an order as in Form E in the Schedule. But the suspected person shall not be detained in custody for more than one month for the purpose of inquiring into his state of mind.<sup>21</sup> Under section 17 of the Lunacy Law of Lagos State, a Magistrate may grant an order of discharge as in Form H in the Schedule in respect of any person detained in an asylum with regard to whom a certificate of sanity as in Form I has been granted in accordance with the provisions of the section.

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<sup>15</sup> Andrew Hudson Westbrook, "Mental Health Legislation and Involuntary Commitment in Nigeria: A Call for Reform" op cit at 403.

<sup>16</sup> See *Akintokun v. LPDC* (Unreported) SC.111/2006 decided on Friday, 16<sup>th</sup> May, 2014 by the Supreme Court of Nigeria.

<sup>17</sup> See *Gov. of Kaduna State v Kagoma* (1992) NSCC 166.

<sup>18</sup> See *Trade Bank PIC v Lagos Island Local Govt Council* (2003) 3 NWLR (Pt. 806) 11.

<sup>19</sup> See *Uwaifo v A-G., Bendel State* (1982) NSCC 221.

<sup>20</sup> Cap 177 Laws of Lagos State 2004.

<sup>21</sup> See section 15 of the Act.

In any case, the State Commissioner may order the discharge of any person whether recovered or not.<sup>22</sup>

Section 13 of the Lunacy Act 1916 is similar to sections 1 and 13 of the Lunacy Act 1912 of India. Westbrook has observed with respect to the Nigerian Act as follows: “As related to involuntary detention, the flexibility of the definition can lead to an over-inclusive application of the law, resulting in wrongful confinement of mentally healthy individuals.”<sup>23</sup> The discretionary power of magistrate is enhanced by the power to issue a warrant of arrest and commit a person to an asylum for up to one month to facilitate the medical examination of the person to determine his mental health status. The Act does not contain any provision for legal representation of the person under examination, neither does it provide for the review of the decision of the Magistrate. However, it is submitted that the Magistrate’s decisions are reviewable and may be quashed by the High Court either by an order of *certiorari* or under the Fundamental Rights (Enforcement Procedure) Rules 2009.

There is little evidence to suggest that there exists coherent government policy on mental health in Nigeria. There is little activity in the area of interdiction of persons suffering from mental disease by the police and magistrate courts in most states of the federation. It is reasonable to suppose such persons may not enjoy basic rights whether as suspects or in situations where a determination needs to be made as to their mental health status. The Legal Aid Act, 2011 contains provisions for legal services to indigent person. Both healthy and mentally ill persons may meet the indigence test prescribed by section 10 the Legal Aid Act 2011. Section 8(5) of the Act provides that legal aid shall consist of the type of legal services provided by private legal practitioners. The subsection provides that:

*(5) Legal Aid shall consist, on terms provided by this Act, of-*

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<sup>22</sup> See section 18 of the Law.

<sup>23</sup> *Ibid* at 404.

- (a) the assistance of a legal practitioner including all such assistance as is usually given to by a private legal practitioner in the steps preliminary or incidental to any proceeding;*
- (b) representation by a legal practitioner including all such assistance as is usually given to by a private legal practitioner before any court; and*
- (c) such additional aid (including advice) as may be prescribed.*

Thus the Act does not make specific provisions for special legal services to persons suffering from mental illness in the course of investigation or trial. The provision of community legal services as provided by the Act does not fit into the context of legal services for mentally ill persons.

### **Handling of Persons Suffering from Mental Illness at the Investigation Stage in Nigeria**

Apart from civil committal of lunatics who have not committed any crime under the Lunacy Act, persons of unsound mind may be involved in the commission of crimes and may therefore be subject to investigation. Section 4 of the Police Act, inter alia, charges the police with responsibility for the investigation of crimes and apprehension of offenders.<sup>24</sup> The Police Act, the Criminal Procedure Code,<sup>25</sup> the Criminal Procedure Act,<sup>26</sup> the Administration of Criminal Justice (Repeal and Re-enactment) Law of the Lagos State, 2011,<sup>27</sup> and the Administration of Criminal Justice Act, 2015 are the principal enactments that, among other things, regulate criminal investigations and trials in Nigeria. Investigation usually involves the apprehension and questioning of persons connected with the crime. In *Onungwa v The State*<sup>28</sup> the Supreme Court of Nigeria held that the police may

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<sup>24</sup> See *Onyekwere v The State* (1973) 8 NSCC 250.

<sup>25</sup> See Sections 117-133 CPC applicable to states in the northern part of Nigeria.

<sup>26</sup> See sections 3-10 CPA used by most states in the southern part of Nigeria.

<sup>27</sup> See 1-10 ACJ(R&R) L, 2011; see Parts 2-4 ACJA, 2015.

<sup>28</sup> (1976) 10 NSCC 27.

ask any person questions for the purpose of discovering facts to assist in the investigation. Such questions and the answers to them may provide the first real time information about the mental health of a person involved in the commission of the crime. Section 35(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) guarantees the right to silence, but such right can only be exercised by persons of full mental capacity. The Judges Rules made to regulate police conduct of questioning of suspects and the Criminal Procedure (Statement to Police Officers) Rules 1960<sup>29</sup> along the same line makes no distinction between the handling of persons who have manifested any tell-tale signs of mental abnormality and suspects who show such signs from their speech, mannerism and gestures. The writers could not locate any case law with guidance on how the police are to handle such suspects. In the case of *John Imo v The State*<sup>30</sup> the police was informed that the appellant had in the past been taken to a native doctor for treatment and the native doctor predicted that the appellant would run mad one day. Evidence also showed that the appellant was partially treated but that they did not return for the full treatment by the native doctor. There was evidence that the appellant killed the deceased under the influence of alcohol. There was no evidence that the police took the appellant for psychiatric evaluation or examination and the court did not order an examination before convicting him of murder.

The police in Nigeria rarely take suspects suffering from mental illness for medical examination during investigation. Instead, mentally ill persons charged with crimes face the criminal process like suspects who have no such challenge.<sup>31</sup> In *Dickson Arisa v The State*,<sup>32</sup> the Investigating Police Officer testified during the trial of the appellant, inter alia, as follows:

*It came to my knowledge through the statement of the accused person's wife that the accused had mental*

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<sup>29</sup> Applicable to CPC states.

<sup>30</sup> (1991) NSCC 683; (1991) 11 SCNJ 137.

<sup>31</sup> See *Adebanjo Ogunbanjo v The State* (1973) NMLR 257.

<sup>32</sup> (1988) 3 NWLR (Pt 83) 388.

*trouble in the past. I arrested the accused the day of the crime. I gave the wife of the accused opportunity to show me the native doctor who attended the husband and the prayer house where people prayed for the husband.*<sup>33</sup>

The IPO however forgot to mention that the wife of the appellant stated in her statement to the police that the appellant had been treated at St. Anthony's Hospital Aba, Abia State. The IPO also did not say what he did to verify the medical status of the appellant as determined by the hospital. The police did not approach any court for an order for the psychiatric evaluation of the appellant proximate to the commission of the crime. Similarly, in *Peter Jonny Loke v The State*<sup>34</sup> there was evidence that the police had ample information concerning the previous history of mental illness or madness of the appellant, yet no medical examination was conducted to determine that he was suffering from mental abnormality.

The facts of the above cases are not coincidental but, unfortunately, represent the expectation of both the police and some judges who expect every accused person to raise the issue of mental abnormality at the earliest opportunity, that is, in their statement to the police.<sup>35</sup> It is submitted that a person who is genuinely mentally abnormal cannot reasonably be expected to have the presence of mind to control his actions, except during lucid intervals, to raise the issue of mental capacity because that may be the strongest evidence of sanity. It is submitted that the state cannot abdicate its responsibility of conducting thorough investigations, including investigation into the mental condition of suspects before arraignment. In *Karimu v The State*<sup>36</sup> both the IPO and his superior testified that the appellant behaved in an abnormal

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<sup>33</sup> *Ibid*, at p. 390.

<sup>34</sup> (1985) 1 NSCC 1.

<sup>35</sup> See *Karimu v The State* (1989) 1 SCNJ 74 where the Supreme Court held that evidence on insanity should manifest at the earliest opportunity in the statement of the accused to the police.

<sup>36</sup> (1989) 1 NWLR (Pt. 86) 12.

manner on the date of the commission of the offence, yet, it took the State more than a year to conduct medical examination. It is submitted that it is about time that Nigeria enact a mental health legislation to regulate various aspects of handling of persons suffering from mental illness by the criminal justice system in the country. It is undesirable to postpone psychiatric evaluation of suspects to more than one year<sup>37</sup> after the incident because such period makes it difficult for psychiatrists to determine criminal capacity at the time of the offence. In *Sule Noman Makosa v. The State*<sup>38</sup> the Supreme Court dismissed his appeal and stated, obiter, that in cases where issues pertaining to insanity might arise, it is advisable for the accused person to be closely observed by the prison doctor to determine any manifestation of mental abnormality. Also, where police investigations raise any issue of mental abnormality, the investigation should probe deeper to prove or disprove any suspicion as the criminal capacity of the suspect.

Unlike the situation in Nigeria where every offender, whether or not he is mentally ill, is railroad through the criminal process in more or less the same manner, in Canada the procedure is different in the sense that, adequate provisions are made by law for the medical care and treatment of offenders who are mentally ill. According to some Canadian jurists:

*Either in the absence of a charge or once a charge has been laid, police officers, Crown Counsel and the criminal courts can help guide the individual towards appropriate community services or medical treatment. The overall objective of diversion is to address the root causes of crime through early intervention.*<sup>39</sup>

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<sup>37</sup> This occurred in *Karimu v The State*, *ibid*.

<sup>38</sup> (1969) All NLR 355.

<sup>39</sup> Tanya Dupuis, Robin MacKay and Julia Nicol, "Current Issues in Mental Health in Canada: Mental Health and Criminal Justice System" Parliamentary Information and Research Service, Publication No. 2013-88-E 16 December 2013, p. 2.

In a similar vein, there are no specially designated institutions to handle and care for persons suspected or accused of crimes in Nigeria like the institutions designated under the provisions of the Mental Care Act 2002 of South Africa or for treating such persons in accordance with Chapter VII of the Act. As a matter of fact, section 40 of the Mental Care Act empowers a member of the South Africa Police Service to apprehend and take any person with serious mental illness who presents a risk of injury to himself or to others and to take such person to an appropriate health establishment administered under the auspices of the State for the determination of the mental health status of such a person. This power is similar to the power of the police to arrest dangerous lunatics in Nigeria, but the provisions of the South African Act are more elaborate and modern, and better address the needs of the community and those suffering from unsoundness of mind.

### **Determining the Fitness of an Accused to Plead and Stand Trial in Nigeria**

The Criminal Procedure Code (“CPC”), Criminal Procedure Act (“CPA”), and Administration of Criminal Justice Act<sup>40</sup> (“ACJA”) contain provisions that regulate how courts in Nigeria should conduct proceedings where the Judge or Magistrate suspects that the accused may not be fit to plead and stand trial, or follow the proceeding. For instance, section 223 of the CPA provides that when a judge or a magistrate holding a trial has reason to suspect that the accused is of unsound mind and as a result is incapable of making his defence, the court shall investigate it, either in the presence of the accused or in his absence if his presence would be against public decency or against his or other persons’ interest.<sup>41</sup> The court may remand the person in the first instance for one month for observation in an asylum until certified fit to make a defence.<sup>42</sup> The court must take evidence to determine fitness to plead.<sup>43</sup> In *R v Ogor*<sup>44</sup> it was held that a

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<sup>40</sup> See Part 29 ACJA, 2015.

<sup>41</sup> See section 320(1) of the CPC to the same effect.

<sup>42</sup> See *R v Ogor* (1961) All NLR 70.

<sup>43</sup> See *Zaria NA v Bakori* (1964) NNLR 25.

court must hear evidence before ruling as to whether the accused is fit to plead or follow the proceedings and that what counsel says from the Bar is not evidence. A medical certificate to the effect that the accused is fit to plead, the court can rely on the report and need not conduct a further inquiry as the court would not in such a situation have any reason “to suspect” that the accused is abnormal or mentally unfit within the language of section 223(1) of the CPA. Where there is indication that the accused is able to understand the implication of sworn testimony, he would be deemed fit to follow proceedings.<sup>45</sup>

However, the procedure the court conducts to determine fitness to plead is not part of the trial proper<sup>46</sup> such that evidence taken at that stage cannot be used to establish a substantive defence of insanity during the trial, but such evidence may be used for cross examination. Where the court has doubt as to the ability of the accused to plead, the court can remand the accused for medical observation. But the court is not bound by a medical certificate as to the mental health status of the accused.<sup>47</sup> The remand may be in prison or a psychiatric hospital. In view of the dilapidated and overcrowded nature of prisons in Nigeria, it is fair to say that Nigerian prisons are not proper places for proper observation of persons suspected to be mentally ill as such prisons are capable of causing mental imbalance in normal persons.

Where a court fails to conduct the investigation required by law to determine the fitness of the accused to plead and stand trial any subsequent trial would be a nullity.<sup>48</sup> If an appellate court quashes conviction on the ground that the failure to investigate the fitness of the accused to plead nullified the proceedings, the proper order to make is a retrial and not a discharge or acquittal.<sup>49</sup>

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<sup>44</sup> Op cit.

<sup>45</sup> See Paul Eleadn v The State (1964) All NLR 138

<sup>46</sup> See Karimu v The State, supra.

<sup>47</sup> See Benson Madugba v The Queen (1958) SCNLR 17.

<sup>48</sup> See Godwin Odo v The State (1998) 1 NWLR (Pt. 532) 24.

<sup>49</sup> See Mboho v The State (1966) All NLR 63.

There is a difference between fitness to plead and stand trial and the plea of insanity. The former relates to capacity to follow the proceedings while the latter is a substantive assertion that the accused was so mentally ill at the time of the offence that he should not be imputed with legal responsibility for the crime.<sup>50</sup>

### **The Defence of Insanity in Nigeria**

The thrust of the defence of insanity is that the accused person was mentally unsound at the time of the commission of the crime and was therefore legally incapable of controlling his actions or understanding that what he was doing was wrong. The requirements of the defence of insanity under the common law were laid down in the celebrated case of *R v. Daniel M'Naghten*.<sup>51</sup> The facts, inter alia, were that the accused person believed that he was being persecuted by the Tories and Sir Robert Peel (the Prime Minister). M'Naghten stalked the Prime Minister to kill him but instead killed his secretary, Edward Drummond. Medical evidence disclosed that the accused was acting under the insane delusion that the establishment of the Metropolitan Police by Sir Robert Peel would destroy liberty. He was found not guilty by reason of insanity and committed to hospital. The verdict generated a storm of controversy which consequently prompted the Attorney General to refer the matter to the House of Lords. The House of Lords proposed a number of questions to the Judges which included:

1. What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?
2. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

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<sup>50</sup> See *Innocent Nnamani v The State* (1967) NSCC 19.

<sup>51</sup> 8 E.R 718; (1843) 10 C & F 200 (or *R v MacNaughten* 8 E.R 718; (1843) 10 C & F 200 as spelt in some texts).

Tindal C.J. who delivered the main answers to the questions stated, inter alia, as follows:

*[T]hat everyman is to be 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 he was doing what was wrong.<sup>52</sup>*

The Judges stated further that if a man commits a crime under insane delusion he is under the same degree of culpability on the facts as he imagined them to be. Unease with the *M’Naghten* rules led to the articulation of an alternative test in the United States case of *Durham v U.S*<sup>53</sup> where it was stated that “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect”.

The *M’Naghten* case declared qualities that must exist before a defence founded on insanity can succeed. They include:

- (a) the presence of defect of reason or disease of the mind;
- (b) such defect or disease must have deprived the accused of capacity to know the nature and quality of the act he was doing;
- and (c) if he did know it, that he did not know he was doing what was wrong.

The phrase “disease of the mind” has engendered a substantial line of cases. In *Bratty v. Attorney General for Northern Ireland*<sup>54</sup> Lord Denning stated that disease of the mind was “any mental disorder which has manifested itself in violence

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<sup>52</sup> Ibid. See also 8. Eng. Rep 718 (H.L.) cited by Seidman, R, B, *A Sourcebook of the Criminal Law of Africa: Cases, Statutes and Materials* (London: Sweet and Maxwell, 1966) pp. 374-376.

<sup>53</sup> (1954) 214 F. 2d 862.

<sup>54</sup> (1963) A. C 386.

and is prone to recur.” However, in *R v. Burgess*<sup>55</sup>, Lord Lane CJ expatiated on the definition and said the danger of recurrence is an extra reason for categorizing a condition as a disease of the mind, but the “absence of the danger of recurrence is not a reason for saying that it cannot be a disease of the mind”. Thus, under English law, any mental disorder that has manifested in violence would be a disease of the mind whether or not it is not prone to recur. In *R v. Hennessy*<sup>56</sup> the Court of Appeal (Criminal Division) (England) held that hypoglycaemia caused by high blood sugar levels was “an inherent defect, a disease of the mind, within the *M’Naghten* Rules.”

Similarly, the phrase “disease of the mind” was examined by the House of Lords in *R v. Sullivan*.<sup>57</sup> The court defined ‘mind’ to mean the mental faculties of reason, memory and understanding. It held that if the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the *M’Naghten* rules, it matters not whether the aetiology of the impairment itself is permanent or is transient and intermittent, provided that it subsists at the time of the commission of the act.<sup>58</sup> But defect in mental power is not “equivalent merely to an inability to master the passions” and mental defectiveness is “a condition of arrested or incomplete development of mind.”<sup>59</sup>

The mental infirmity must be natural and not self-induced. In *The Queen v. Alice Eriyamremu*,<sup>60</sup> the accused murdered her female albino grand-daughter aged 3 years old. Her plea of insanity was rejected. The court held:

*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*

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<sup>55</sup> (1991) 2 QB 92.

<sup>56</sup> (1989) Crim. App. R. 10.

<sup>57</sup> (1984) A.C 156.

<sup>58</sup> See *Ntita v. State* (1993) 3 SCNJ 28 at 37 for the application of the rules on insanity in Nigeria.

<sup>59</sup> See *R v Tabigen* (1960) 5 F.S.C 8.

<sup>60</sup> (1959) W.R.N.L.R 270 (High Court).

*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 prisoner's 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 . . . under the provision of section 28 of the Criminal Code . . . .*<sup>61</sup>

Natural mental infirmity means a defect in mental power neither produced by his own default nor the result of disease of the mind”<sup>62</sup>

It is possible for the accused to acquire his insanity from another person, but it would be immaterial to liability if the accused at the material time knew that what he was doing was wrong in the legal sense of the term.<sup>63</sup>

The defence of insanity as laid down in the *M'Naghten* case has substantially been codified in Nigeria. The defence of insanity in Nigeria is thus a creation of statute.<sup>64</sup> It can be found in sections 27 and 28 of the Criminal Code; section 72 of the Zamfara State Shariah Penal Code, section 51 Penal Code and in certain sections of the Criminal Code Law of Lagos State, 2011. The provisions of Nigerian law on insanity are exhaustive because some have been codified. Recourse to English cases for the interpretation of the Codes should be a last resort.<sup>65</sup> The first hurdle that any person who raises the defence of insanity must surmount is the presumption of sanity.

### **Presumption of Legal Sanity**

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<sup>61</sup> *Ibid*, at 271; see also (1959) SCNLR 556 at 557.

<sup>62</sup> Per Verity C.J in *R v. Omoni* (1949) 12 WACA 511 at 512.

<sup>63</sup> See *R v Windle*(1952) 2 Q. B 826.

<sup>64</sup> Per Obaseki JSC in *Effion Udofia v. The State* (1981) NSCC 465.

<sup>65</sup> *Odu v. The State* (1965) 1 ALL N L R 25, *Imo v. The State* (1991) 11 SCNJ 137 at 155 per Karibi-Whyte J.S.C.

The first principle is the presumption of sanity. Section 27 of the Criminal Code provides that every person is presumed to be of sound mind and to have been of sound mind at any time in question until the contrary is proved. This presumption has been applied in many cases.<sup>66</sup> Liability under the Penal Code is also grounded upon this presumption, because under the Indian Penal Code, which is similar to the Penal Code applicable to northern Nigeria, the presumption is not expressly stated, but it has been imported by the courts.<sup>67</sup> The presumption is however, rebuttable. For instance, where a person is taken to a mental hospital for treatment and the doctor in charge gives credible evidence of insanity based upon his observation that may suffice to rebut the presumption of sanity.<sup>68</sup>

A plea of insanity amounts to or involves an acceptance of responsibility for the act complained of. It therefore places the legal onus on the accused to prove the defence which is discharged on the balance of probabilities.<sup>69</sup> From the presumption of sanity, it follows that the onus of proof of insanity is on the accused. But the defence of insanity is not established by the *ipse dixit* of the accused who raised it.<sup>70</sup> “Evidence of insanity tendered by the accused himself is suspect and is not taken seriously.<sup>71</sup> A legal defence is not made by merely shouting it. There must be evidence to support it.<sup>72</sup> In *Sule Noman Makosa v. The State*,<sup>73</sup> the accused person gave evidence in his defence as follows:

*Then I heard a voice saying, “Here are two girls, I should open them.” At this stage I woke up feeling afraid. A knife was lying close to my head. After waking*

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<sup>66</sup> See *Guobadia v. The State* Supra; *Oladele v. The State* (1993) 1 SCNJ 60 at p. 68).

<sup>67</sup> *Aguda & Okagbue*, supra, p. 360.

<sup>68</sup> See *Oladele v. The State*, supra).

<sup>69</sup> See *Madjemu v. The State* (2001) 5 SCNJ 31 at 46.

<sup>70</sup> See *Lasisi Saliu v. The State* (1984) 10 S.C 111 at 127.

<sup>71</sup> Per *Edozie J.S.C* in *Guobadia v. The State*, supra p. 204. See also *Onyekwe V The State* (1988) 1 NWLR (pt. 72) 565.

<sup>72</sup> See *Nkanu v. The State* (1980) 2 -4 S. C 1, at p. 23.

<sup>73</sup> (1969) All NLR 355.

*up I went to Mainasara I stabbed him with a knife, but I did not know whether he was Mainasara or not. I did not know what I was doing at the time.*<sup>74</sup>

The trial court did not believe the evidence of the accused. The court convicted him of culpable homicide punishable with death and later sentenced him to death. The Supreme Court dismissed his appeal and stated, obiter, that in cases where issues pertaining to insanity might arise, it is advisable for the prison doctor to observe the accused person closely to determine any manifestation of mental abnormality. Also, where police investigations raise any issue of mental abnormality, the investigation should probe deeper to prove or disprove any suspicion as the criminal capacity of the suspect.

Acts of the accused immediately before and after the date of the actual commission of the alleged offence are relevant to rebut the presumption of sanity. The fact that the accused had received treatment for mental illness or for insanity in the past may or may not be relevant for the purpose of determining whether the defence of insanity is available to him.<sup>75</sup> It may not be relevant if the treatment was given a long time before the commission of the offence.<sup>76</sup> Evidence of a responsible and respected member of the community may provide proof to rebut the presumption of sanity. In *R v Yayiye of Kadi Kadi*<sup>77</sup> the evidence of the village head of the accused was held sufficient to prove insanity. Also, proof of insanity can be grounded upon the evidence of the relatives of the accused.<sup>78</sup>

### **Rebuttal of the Presumption of Legal Sanity and Conditions under Nigerian Law**

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<sup>74</sup> *Ibid*, at p. 356.

<sup>75</sup> See *Chukwu v. The State* (1994) 4 SCNJ (Pt. 1) 85 at pp. 95 – 96.

<sup>76</sup> See *John Imo v The State*, *supra*.

<sup>77</sup> (1957) NRNLR 207

<sup>78</sup> See *Ejimima V State* (1991) 11 SCNJ 318 at 328

Section 28 of the Criminal Code and section 51 of the Penal Code both deal with the plea of insanity and have similar effects.<sup>79</sup> Section 28 of the Criminal Code provides 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 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.*

In contrast, 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 text of section 28 CC and section 51 PC are couched differently, but both provisions were inspired by the *M'Naghten* rules. The cases earlier discussed under the *M'Naghten* rules are therefore of assistance in the interpretation of the provisions of the sections of the PC and CC that pertain to insanity. But in *R v. Omoni*<sup>80</sup>, the West African Court of Appeal held that section 28 of the Criminal Code shows that the legislature intended to depart from the phraseology of the Judges in *M'Naghten's* case. The

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<sup>79</sup> See *Yakubu Kure v. The State* (1988) 1 NSCC 269

<sup>80</sup> (1949) 12 WACA 511.

Judges employed the phrases “defect of reason” or “disease of mind” whereas the Code use “natural mental infirmity” and “state of mental disease” and ‘capacity to control his actions”. The provision of section 28, according to the West African Court of Appeal is a “considerable extension of the Law of England.” The section also used the phrase “to deprive him of capacity to control his actions”. These words, according to the court, were a further departure from the law in England because section 28 appears to recognise irresistible impulse as a defence whereas the *M’Naghten* rules did not.

In relation to the conditions for a valid plea of insanity under the PC and CC, the Supreme Court stated in *George v The State*<sup>81</sup>, (while referring to section 28 of the Criminal Code) that for the defence to establish insanity and overcome the presumption under section 27 of the Criminal Code, the accused must establish that at the relevant time, he was suffering from either mental disease or from natural mental infirmity, that is, a defect in mental power which was neither produced by accused own fault nor the result of disease of the mind. The accused person must also establish that the mental disease or natural mental infirmity was such that, at the relevant time, he was as a result deprived of capacity to understand what he was doing or to control his actions or to know that he ought not to do the act or make the omission.<sup>82</sup>

Insanity may be temporary or transient. If at the time of the alleged crime the accused was suffering from some mental sickness, transitory or otherwise, that may entitle him to a defence under section 28 of the Criminal Code.<sup>83</sup> Thus, it is not necessary that a man shall have been insane for a long period before the crime in order to establish that he did not know the nature of his act. Unconsciousness of mind may be temporary.<sup>84</sup>

The phrase “unsoundness of mind” in the section is dissimilar to natural mental infirmity, but is similar to mental

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<sup>81</sup> (1993) 6 SCNJ (pt 11) 249 at 259 – 260.

<sup>82</sup> See also *Nnabo v. The State* (1994) 9 SCNJ 144 at 156; *Guobadia v. The State* (2004) 17 NSCQR. 222 at 232 – 233; *Mohammed v. The State*, supra at p. 547.

<sup>83</sup> See *Ntita V The State*, supra, p. 37.

<sup>84</sup> See *Mohammed v. State*, supra, p. 551.

disease as employed in section 28 of the Criminal Code. In *Yakubu Kure v. The State*<sup>85</sup> the appellant was tried on a charge of culpable homicide punishable with death under section 221 (b) of the Penal Code Law, Laws of Northern Nigeria applicable to Kwara State. The court convicted and sentenced him to death. The evidence was that the appellant was naked and armed with a stick at the material time. The court described it as unusual. He then hit his daughter Ana on the right hand and injured her. He also hit another girl with the stick on the head and she fell down and died. The mother of the deceased who testified to the incident said she had never seen the appellant behave in that way before that day. PW 3 testified that when he came to arrest the appellant he found him tied to a chair on which he was sitting looking blank into space and at them. The appellant was admitted to the psychiatric hospital and spent three months there. The hospital sent a report to the Magistrate before whom he was arraigned on a holding charge, and consequent upon the report the Magistrate discharged the appellant. The Supreme Court held that the piece of evidence raised a serious question as to the appellant's mental health, and that "patients treated in Psychiatric Hospitals are people who are of unsound mind, i.e. people with mental disease. The discharge of the appellant by the Magistrate after receiving the report of the psychiatrist is evidence of enormous weight rebutting the presumption that the appellant was sane at the time he committed the offence."<sup>86</sup> The court stated further that:

*A sane and normal person is not taken to the psychiatric hospital for treatment and where a person is taken to a psychiatric hospital and detailed for treatment, the implication is that he is insane. The presumption of sanity under our law is thereby rebutted and displaced. There is no burden or onus on the prosecution to prove insanity but where it leads evidence to rebut the presumption of sanity, the legal defence of insanity is available. It is not the defence of*

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<sup>85</sup> *Supra*.

<sup>86</sup> *Per Obaseki JSC in Yakubu Kure v. The State, ibid.*

*insane delusion that is available as delusion whether sane or partial is a very much reduced degree of sanity which does not have the same legal consequences as insanity proper.....*

*Where there is evidence that the accused received treatment in psychiatric hospital from a psychiatrist and on the report of the psychiatrist being placed before a Magistrate, he discharged the accused, the Judge is bound to give due weight to that evidence as the only conclusion from that piece of evidence is that the accused was insane or mentally ill. He cannot properly hold that the accused was sane because the defence has not led or called evidence to prove the content of the report. Since there was no evidence to show that the psychiatrist found nothing wrong with the accused, a doubt must exist in the mind of the Judge as to the mental health of the accused.<sup>87</sup>*

The Supreme Court therefore set aside the concurrent findings of the trial court and the Court of Appeal on the ground that the failure of both courts to consider and give due weight to relevant evidence occasioned a miscarriage of justice. The court acquitted him of the offence charged by reason of unsoundness of mind and ordered that he be detained in a safe place at the pleasure of the Governor of Kwara State.

However, psychiatric expert report or testimony may be rebutted by evidence showing that the accused was not insane at the material time.<sup>88</sup> In insanity cases, it is not enough for the judge to consider the behaviour of the accused before the incident. His behavior before, during and after the incident are all relevant in determining whether he was probably sane or insane. The absence of motive may be considered, but absence of motive by itself is not sufficient proof of insanity.<sup>89</sup>

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<sup>87</sup> *Yakubu Kure v. The State*, supra, at pp 271-272.

<sup>88</sup> See *The State v. Yusufu Idowu* (1971) NNLR 93.

<sup>89</sup> See *The Queen v. Yaro Biu* (1964) NNLR 45.

## **Defence of Mental Disorder under the Criminal Law Lagos State 2011**

Lagos State reformed the criminal law of the State in 2011 by introducing the Criminal Law 2011. Section 26 of the Law preserves the time honoured presumption of soundness of mind. Section 27(1) on the other hand provides that a person is not criminally responsible for conduct if at the time he is in such a state of mental disorder as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or capacity to know that he ought not to do the act or make the omission. Subsection (2) of section 27 of the Law states that:

*For the purpose of this Section, capacity implies ability to make a decision, to understand issues and information relevant to the decision, to retain the information, to weight the information as part of the process of making the decision and to understand the consequences of the decision.*

Sections 26 and 27 of the Law largely adopt the tests of insanity or unsoundness of mind under the M’Naghten rules. However, it is submitted that the term “mental disorder” used by the Law is wider in scope than “insanity” as understood by lawyers. It is our view that the Lagos State legislature has indicated that persons suffering from mental disorder who suffer from the three incapacitating conditions stated in section 27(1) of the Law should benefit from a plea of mental disorder.

Interestingly, in *Goubadia v The State*<sup>90</sup> the Investigating Police Officer testified that the behaviour of the appellant was abnormal. The Supreme Court held, inter alia, rejecting the plea of insanity, that abnormal behaviour *per se* is not evidence of insanity.<sup>91</sup> The court further held that mere evidence that an accused person had mental disorder without showing that the disorder deprived the accused of the capacity to understand what

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<sup>90</sup> (2004) ALL FWLR (Pt. 205) 191.

<sup>91</sup> See also *Lamidi Salami v. The State* (1984) 6 S.C 357) But contrast with *Ntita v. The State*, supra.

he was doing and to know that he ought not to have done the act which is called in question is not satisfactory evidence of the defence of insanity under the law. It is submitted that the ratio in this case is not applicable in Lagos State by virtue of the recognition of mental disorder as a defence under section 27(1) of the Criminal Law 2011.

Section 28 of the Law also recognises the effects of puerperal or post partum psychosis. Under the section, if a woman causes the death of her child who is under 12 months due to depression as a result of childbirth-postpartum or puerperal psychosis or previous history of psychosis, or psychosis triggered by a reoccurrence because of childbirth or lactation/breast feeding, she is not criminally responsible for causing the death of the child. A judge may make hospitalization order if medical examination finds that the balance of her mind is still disturbed.<sup>92</sup>

### **Constitutional and Procedural Safeguards for the Trial of Persons Suffering from Mental Disorder in Nigeria**

Under Nigerian law, just like under English law, not every mental abnormality, disorder, or abnormal behaviour qualifies as insanity. This calls into question the constitutional and procedural safeguards for fair trial of persons suffering from mental illness in Nigeria. It was earlier stated in this paper that Nigerian law does not treat those with mental illness differently from those without such conditions when crimes are investigated and during trial. The Constitution of the Federal Republic of Nigeria 1999 (as amended) contains several provisions designed to guarantee fair trial.<sup>93</sup> For instance, Section 35(2) of the Constitution enshrines the right of a person arrested or detained to remain silent or avoid answering any question until consultation with a legal practitioner or person of his choice while section 36 (11) of the Constitution guarantees the right to silence during trial. But this right can only be asserted by a person with complete mental equilibrium and not by a person suffering from mental disorder. Admittedly, laws by nature applies

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<sup>92</sup> See section 28(2) of the Law.

<sup>93</sup> See generally Chapter IV CFRN 1999 which pertains to fundamental rights.

to every person, but it is possible to create exceptions for special vulnerable persons.

The test for determining the fitness to stand trial of a person alleged to be insane is a necessary safeguard to ensure that mentally ill persons are not subjected to trial until they regain their senses. However, the provisions of Chapter XXVI of the CPC and Part 25 of the CPA which prescribe the procedure for courts to determine fitness of an accused to plead and stand trial are now archaic and need to be tuned to better address the peculiarities of different forms of mental disorder. Courts cannot discharge the onerous responsibility without enhanced capacity and capabilities of the health sector in the country.

### **Proof of Insanity**

The presumption of sanity or soundness of mind implies that the onus is on the accused to rebut the presumption. Evidence of insanity given by the prosecution witnesses are however relevant. In *Ntita v. The State*<sup>94</sup> it was held that the fact that the prosecution witnesses were unanimous that on the night in question the appellant behaved abnormally before and after the alleged incident, ought to raise doubt in the mind of any reasonable tribunal that the appellant was sane.

The fact that the accused had received treatment for mental illness or for insanity in the past may or may not be relevant for the purpose of determining whether the defence of insanity is available to him.<sup>95</sup> It may not be relevant if the treatment was given a long time before the commission of the offence.<sup>96</sup> Evidence of a responsible and respected member of the community may provide proof to rebut the presumption of sanity. In *R v Yaiye of Kadi Kadi*<sup>97</sup> the evidence of the village head of the accused was held sufficient to prove insanity. Also, proof of insanity can be grounded upon the evidence of the relatives of the accused.<sup>98</sup>

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<sup>94</sup> *Supra*.

<sup>95</sup> See *Chukwu v. The State* (1994) 4 SCNJ (Pt. 1) 85 at pp. 95 – 96.

<sup>96</sup> See *John Imo v The State*, *supra*.

<sup>97</sup> (1957) NRNLR 207.

<sup>98</sup> See *Ejimima V State* (1991) 11 SCNJ 318 at 328.

Sometimes, the best evidence of insanity is evidence of medical men.<sup>99</sup> Such medical men may even be herbalists.<sup>100</sup>

However, the question of insanity must be decided by the Judge, not by doctors or medical men.<sup>101</sup> Thus insanity can be established by evidence with respect to the following:

1. evidence as to the past history of the accused;
2. evidence as to the conduct of the accused immediately before the killing;
3. evidence from prison officials who had custody of the accused person before and during his trial;
4. evidence of medical officers who examined the accused;
5. evidence of relatives about the general behaviour of the accused person and the reputation he enjoyed for sanity or insanity in the neighbourhood;
6. evidence showing that insanity runs in the family history of the accused; and
7. 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 discharged.<sup>102</sup>

In the case of *The State v. John*<sup>103</sup>, the Supreme Court (per Rhodes-Vivour JSC) had this to say:

*The Court of Appeal fell into grave error when it inferred (wrongly) after examining exhibit P8 that the respondent was insane because there was absence of evidence of motive of murder. On no account should insanity be inferred on such reasoning. Insanity is established by compelling medical evidence produced by the accused person. It is not the business of the court to go on a voyage looking for motive. This is so because*

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<sup>99</sup> Ibid.

<sup>100</sup> See Mohammed v The State (1997) 7 SCNJ 532.

<sup>101</sup> See Josephine Ani v The State (2002) 5 SCNJ 40 at 43 – 44 & 46. See also Ngene Arum v. The State (1979) 11 S.C. 109.

<sup>102</sup> Per Iguh J.S.C in Madjemu v. The State, op cit at P. 48.

<sup>103</sup> (2013) 12 NWLR (Pt.1368) 337 at 358.

*the absence of motive is not enough. The onus is not discharged by the respondent denying his own actions or/and claiming that he did not know what came over him when he killed Memunatu Rasaan. Rather the onus on the accused respondent is discharged by credible evidence which was never produced in court. The defence of insanity ought to and must be rejected since no evidence of previous abnormality was given. See *Origbo v. The State* (1972) 11 SC. 133, *Ughiakha v. The State* (1984) 1 SC 1.*

The Supreme Court berated the Court of Appeal for holding that the defence of insanity was raised and disclosed in the confessional statement and declared that such decision was wrong.

The evidence of insanity must disclose that by reason of unsoundness of mind or disease of the mind, etc, the accused did not know the nature of the act or that he was doing what was wrong or contrary to law.<sup>104</sup>

The defence of insanity in Nigeria as presently constituted may be challenged as out-dated. It is perhaps of such criticisms that the Draft Criminal Code, England has proposed wholesale changes to the law of insanity in order to introduce a defence of severe disorder and defence on evidence of disorder as follows:

Clause 34 of the Draft Criminal Code defines

*[S]evere mental illness as: mental illness which has one or more of the following characteristics –*

- (a) Lasting impairment of intellectual functions shown by failure of memory, orientation, comprehension and hearing capacity;*
- (b) Lasting alteration of mood of such degree as to give rise to delusion appraisal of the defendants' situation, his past or his future, or that of others, or lack of any appraisal;*

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<sup>104</sup> See *Nnabo v. The State*, op cit.

- (c) Delusional beliefs, persecutory, jealous or grandiose;*
- (d) Abnormal perceptions associated with the delusional misinterpretation of events;*
- (e) Thinking so disordered as to prevent reasonable appraisal of the defendant's situation or reasonable communication with others.*

*“Severe mental handicap” is defined as “a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning.*

*Clause 35 provides as follows:*

- (1) A mental disorder verdict shall be returned if the defendant is proved to have committed an offence but it is proved on the balance of probabilities (whether by the prosecution or by the defendant) that he was at the time suffering from severe mental illness or severe mental handicap.*
- (2) Subsection (1) does not apply if the court or jury is satisfied beyond reasonable doubt that the offence was not attributable to the severe mental illness or severe mental handicap.*
- (3) A court or jury shall not, for the purposes of a verdict under subsection (1), find that the defendant was suffering from severe mental illness or severe mental handicap unless two medical practitioners approved for the purposes of section 12 of the Mental Health Act 1983 as having special experience in the diagnosis or treatment of mental disorder have given evidence that he was so suffering.*

That is food for thought, but in Nigeria, where there is no jury trial, and where functional modern medical facilities are out of the reach of a substantial proportion of the population, reform would

probably only favour a few who can afford expensive specialists to write reports that would support their claim when all other defences fail.

### **Consequences of Verdict of Insanity**

Insanity is a general defence that can be raised against any charge. In practice, it is usually raised in respect of offences like murder where the accused has no alternative to the defence. This is because the consequences of a successful plea of insanity may be less palatable than a prison term. A prison term is certain but committal upon a successful plea of insanity is at the discretion of the appropriate authority. In Nigeria, if the plea of insanity succeeds the verdict of NOT GUILTY by reason of insanity is entered and the person is ordered to be detained at an approved institution at the pleasure of the President or Governor, as the case may be. In *Mohammed v The State*,<sup>105</sup> the Supreme Court, per Kutigi, J.S.C (as he then was) entered the following verdict:

*The verdict of **NOT GUILTY** by reason of insanity shall be substituted therefore. I direct that the said Yahaya Mohammed be kept in prison custody or be taken to the psychiatric Hospital for observation and treatment pending the order of his Excellency the Governor or Administrator of Ekiti State.*<sup>106</sup>

Where a person is ordered to be detained at the pleasure of the appropriate authority, he may be released upon the licence of that authority.<sup>107</sup> However, the insane person who is ordered to be detained at the pleasure of the appropriate authority does not have a right to appeal that order.<sup>108</sup>

### **The Condition of Persons Suffering from Mental Illness in Nigerian Prisons**

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<sup>105</sup> Supra.

<sup>106</sup> Ibid, at p. 73.

<sup>107</sup> See for instance, section 401 CAP.

<sup>108</sup> See *Kayode Adams v DPP* (1966) 1 All NLR 12.

Insane persons may be detained in lunatic asylum or prison. “Without doubt prison inmates do not get adequate medical care in Nigeria.”<sup>109</sup> This is the recent verdict of a researcher about the state of prisons in Nigeria. Another writer painted a similar bleak picture of the health conditions of prisoners generally and prisoners with mental illness as follows:

*The general condition of health care delivery in Nigeria has further placed prisoners' health in jeopardy. Again, there are chances that many of the mental health problems may be under diagnosed in Nigeria. Some studies have confirmed the vulnerability and plausibility of prisoners with mental health problems becoming problematic to correctional staff and other prisoners than prisoners without mental health problems...An appraisal of the mental health policy in Nigeria ... revealed a general poor social attitude from the government and other stakeholders towards the mentally ill. Again those in prisons are worse off as they are left out of the policy. The policy has not lived up to expectations in meeting the challenges of caring for the mentally ill in the populace and that of prisoners who are worse off.<sup>110</sup>*

The deficiency of mental health facilities in Nigerian prisons is a reflection of a larger and general deficiency in the national mental health policy and institutional lack of preparedness to address issues relating to mental illness. Jack-Ide, Uys and Middleton in a recent article described existing infrastructure for mental health in Nigeria as follows:

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<sup>109</sup> Ajayi J.O. “Nigeria Prisons and the Dispensation of Justice” *International Journal of Arts and Humanities* Vol. 1(3) (August 2012) pp. 208-233 at 217.

<sup>110</sup> Agunbiade Ojo Melvin, “Prison health in Nigeria: A sociological discourse” *African Journal of Political Science and International Relations* Vol.7 (2) (May 2013) pp 38-41 at 40 available at <http://www.academicjournals.org/AJPSTR>. Last visited 12/09/2014 12:55PM.

*Nigeria's mental health facilities consist of eight federally funded psychiatric hospitals and six state-owned mental hospitals financed and managed by various state governments, for a population of over 150 million people. Given the limited number of these hospitals, their catchment's areas often go beyond their immediate location in terms of city or even state. None of the facilities have beds for children and adolescents. There is only one private community residential facility available with 10 beds in Lagos State and it is administered by a religious organization for rehabilitation of persons with drug problems....<sup>111</sup>*

In contrast with Nigeria, section 49 of the Mental Care Act 2002 of South Africa requires the designation of health establishments to admit, care for, treat and provide rehabilitation services to prisoners who are mentally ill. No such arrangement currently exists under Nigerian law. Chapter VII of the South African Act similarly makes provisions for periodic review of the mental status of prisoners and for the discharge of such prisoners after treatment. It is submitted that Nigeria borrow a leaf from South Africa in designing appropriate mental health legislation for mental health. The proposed review of current Nigerian law should also address prison reform, otherwise Nigerian prisons would continue to be viewed by some as institutions for deformation rather than reformation.<sup>112</sup>

## **Conclusion**

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<sup>111</sup> Jack-Ide I. O., Uys L. R. and Middleton L. E. "A comparative study of mental health services in two African countries: South Africa and Nigeria" *International Journal of Nursing and Midwifery* Vol. 4(4), pp. 50-57, May 2012 at p. 52, available online at <http://www.academicjournals.org/IJNM> Last visited 12/09/2014 12:15 PM.

<sup>112</sup> See Micheal C. Ogwezzy, "From Reformation to Deformation: An Approach Towards Sustainable Development of the Defective Prison System in Nigeria" *Journal of Sustainable Development in Africa* Vol. 13, No. 7 (2011) pp. 269-283.

The paper pointed out that mentally ill persons or persons suffering from various degrees of mental disorder who encounter the criminal process in Nigeria at the investigation, trial, and post trial stages in Nigeria often do not receive the legal cloak that is required. Therefore, there is need to debate the relevance and capacity of the legal and institutional framework for dealing with such persons in Nigeria. Detention of such persons with little or no legal protection requires concerted efforts by public spirited persons and organizations to project the plight of such persons to enable them enjoy legal protection.

In addition, persons suffering from mental disorder do not receive the keen appreciation and understanding of law enforcement agents. The system for medical examination of persons with mental disorder during criminal investigation is almost non-existent. From cases litigated in court, it can be concluded that investigators treat suspects with mental disorder in more or less the same fashion like they handle those who do not labour under such constraints.

The Constitution of the Federal Republic of Nigeria (hereinafter referred to as “CFRN”) 1999 (as amended) provides several safeguards to guarantee the rights of suspects during investigation and accords protection to defendants during trial, but such rights can only be effectively invoked by persons with full mental capacity. The procedure for determining the fitness of a person to stand trial relies on a medical infrastructure and sector that is groaning from lack of funding and capacity deficits. If the mentally ill person finds himself in a Nigerian asylum or prison, his mental condition is likely to turn out for the worse due to the deplorable state of such institutions.

Persons with mental health challenges who face the criminal process in Nigeria are placed in a disadvantageous position by the legal framework and relevant institutions. They are often denied basic rights. Their plight is compounded by the antiquated provisions of the Lunacy Act and the relevant codes of criminal procedure in Nigeria. A person suspected to be a lunatic may be detained with or without the order of a Magistrate in an asylum or prison without a proper determination of their status and

with little institutional capacity for rehabilitation. Also, before and during trial for offences, the presumption of sanity assumes that a mentally ill person should prove by evidence that he was mentally incapacitated at the point of commission of the crime. It is submitted that while we are not challenging the merit of this presumption, it is submitted that in-depth reform of mental health legislation is needed to better address the needs of mentally ill persons at the pre-trial and trial stages of criminal cases in Nigeria in order to reduce the burden of such persons and ensure more humane treatment of persons with mental health issues who may face the criminal process.

### **Recommendations**

A situation where persons who are obviously ill are detained in regular prisons is not conducive to proper treatment of such persons. The writers therefore recommend continuous advocacy for the plight of mentally ill persons in the hope that it would spur legislative reform. There is also the need for systematic reform of the relevant laws and institutions that confront mentally ill persons in Nigeria to provide a more humane atmosphere for those of them who may face the criminal process at the pre-trial, trial and post-trial stages. This can be achieved through advocacy and legislative reform. We recommend that Nigeria study extant legislation on mental health in South Africa and England for inspiration on how to reform the legal framework for dealing with mentally ill persons who confront the criminal justice apparatus. The relevant institutions need to accord a more temperate disposition towards mental illness or mental disorder. The defence of insanity currently in force in many States in the Federation is antiquated and lags far behind advances in medical science. Criminal and procedural legislation should be amended in order to place courts and practitioners alike in a better position to handle the plights of mentally ill suspects and accused persons. Section 278 of ACJA is a step in the right direction but it should be complemented with the provision of facilities and capacity before the purpose of the section can be realized. Thus, persons who are genuinely mentally sick are victims that require treatment. Any

system or institution that does not contribute to their treatment compounds their problems and add rather than reduce the problem of criminality in the society.

This paper also advocates legislation towards the reformation and solutions for the plight of persons of unsound mind in Nigeria particularly those who may face the criminal process. It is suggested that the proposed review of the Lunacy Act should include provisions for compulsory registration of persons with serious mental disorder, periodic review of the status of such persons, and legislatively mandated creation and maintenance of a data-base of mentally ill persons in Nigeria. The purpose should not be stigmatization but provision of a ready reference point where mental illness manifests in violence and criminality.