

**"JUSTICE AND MENTAL ILLNESS IN KENYA'S
CRIMINAL JUSTICE SYSTEM"**

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A DISSERTATION SUBMITTED IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR
THE LL.B. DEGREE, UNIVERSITY OF NAIROBI.

BY

H. N. OKUMU

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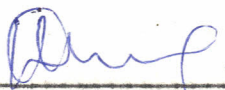
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APRIL 1984.

DECLARATION

I, Horace Nyapinda Okumu, do hereby declare that this Dissertation is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

Signed



H. N. OKUMU

This Dissertation has been submitted for examination with my approval as University Supervisor.

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DEDICATED TO MY PARENTS

MR. & MRS. SAMSON OKUMU

'The notion that convicts are ungovernable is certainly erroneous. There is a rule of managing some of the most desperate with ease to yourself, and with advantage to them.... manage them with calmness, yet with steadiness'

John Howard

The State of the Prisons in
England and Wales, 1777.

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'Ninawashukuru nyote wakati wo wote'

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CASESAbbreviations

All E.R.	All England Reports 1936 -
A.L.R.	Australia Law Reports 1973 -
C.L.R.	Commonwealth Law Reports 1903-
Cl & Fin	Clark and Finnelly 1831 - 1846
E.A.	Eastern African Law Reports 1957 - 1975
F.2d	Sessional Cases, 2nd Series (Fraser) C.S. 1898-1905
Q.B.	Queen's Bench Division Law Reports 1899 -
Qd. R.	Queensland State Law Reports 1908 -
T.L.R.	Times Law Reports 1895-1947
U.S.	United States Supreme Court Law Reports 1754-

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Abbreviations

Periodicals

B.J.C.	British Journal of Criminology
CAL.L.REV.	California Law Review
COL. L. REV.	Columbia Law Review
E.A.L.J.	East African Law Journal
J.A.L.	Journal of African Law
S. CAL. L. REV.	South California Law Review
Y.L.J.	Yale Law Journal

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INTRODUCTION

Kenya's criminal justice system is based on the ethical premise that only those persons to whom blame can be attached should be punished.¹

This ethical position should not be construed as calling for a return to the more primitive, and clearly more sadistic, system of avenging all sorts of mishaps. It is intended only to show how, once the idea arises that a person must be blameworthy before being punished, we are forced into the position of having to determine when and in what measure blame can be assigned to anyone who has violated our criminal laws.

It is noteworthy that, nobody has ever written on this topic before. There is however, some literature on topics close to this one by some writers especially, those who have written on "insanity defence". But the "insanity defence," will constitute only an episode in this dissertation.

The view that a person who is mentally ill cannot be blamed for conduct which would attract blame in the absence of the illness is firmly embedded both in the ethics of our Kenyan societies and in the Kenyan Penal Code.²

It is however, one thing to say that a mentally ill person is not to be blamed for his conduct, and it is quite another thing to say that his conduct is not a warrant for putting him under restraint, or even subjecting him to measures which, if we were imposing them on a normal person, could properly be described as punitive. If a man is so mentally ill that he is likely to engage in dangerous conduct, no one would deny that it is proper to put him under some form

of restraint.

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In our present system of criminal justice, a trial serves two purposes. First, the guilt of the defendant is ascertained; if he is not guilty, the trial is complete at this first stage. The second stage is that of deciding the appropriate mode of dealing with a guilty defendant. This calls for a type of technique. In ascertaining guilt we look to the past, that is, we look into the record of the accused. If the record shows that the past convictions of the accused were of crimes similar to the one in issue then the finding him guilty is more justified.

But when deciding the disposition of the guilt, we look to the future; that is, we look into whether the accused person has a higher propensity to commit a crime and thus he poses danger to the society. It does not follow that because a man is condemned as having offended he stands in need of some measure of punishment; the everyday practice of the courts reflects this truth.

Nevertheless, the divorce between the two stages of a criminal proceeding - the ascertainment of guilt and the decision as to punishment - though desirable in ideal theory, cannot be accomplished in practice. For the courts to be aware that if they find the defendant not guilty, he will not be subject to punishment, and there is thus always the risk that their judgement as to his guilt will be warped by their view as to what should be done with him.

In a case where the defence of insanity is raised, the problem becomes especially acute. For it is usually plain that the defendant is a dangerous man against whom

some measures must be taken, and the court's decision is likely to be influenced by this fact.

Centuries ago Coke wrote that the execution of such a man "should be a miserable spectacle, against law and of extreme inhumanity and cruelty".³ While this probably states community opinion accurately so far as the general run of cases is concerned, it is felt that there are some cases in which a large section of the community would take the view that the defendant's admitted conduct reveals him to be so dangerous that the best way of dealing with him is to remove him permanently from society as quickly as possible. The merits of this view are dismissed in the succeeding chapters especially in chapter three.

The basic rule of the criminal law concerning the defence of insanity was laid down by English judges as a result of M'Naughten's case.⁴ This is the starting point in England and in Kenya which asks whether at the time of the act the accused was labouring under such a disease of the mind as not to know the nature and quality of the act he was doing, or that it was wrong. The justification for this formulation is that it does in fact exclude from liability a category of persons who by definition could not be deterred by the prospect of punishment, simply because they were incapable of choice, and whom, in consequence, it would be futile as well as unjust to punish. The definition of the exculpation, therefore, coincides with the rationale of the traditional requirement of mens rea. Nonetheless, the M'Naughten test has been vigorously and consistently criticised since its formulation. One can roughly identify four major themes of criticism, which roughly, the writer wants to refer to as themes of reaction, liberal reform, radical reform and neo-reaction.

The reactionary criticism is based on the premise that the defence of insanity provides a loophole through which those who deserve punishment can too easily manage to escape. Therefore, the protection of the public requires that the defence be eliminated altogether or at least be made so difficult to establish for example, by placing the burden upon the defendant to prove his insanity beyond reasonable doubt, that very few will escape.

The liberal reform criticism is that the M'Naughten test does not go far enough. Inconsistently with its own premise of exculpating the blameless the test fails to cover classes of defendants who merit exculpation as much as those it does exculpate. The major class of such defendants comprises those whose ability to choose to conform is destroyed even though their cognitive capacity is sufficiently intact to disqualify them under M'Naughten.

The radical critique of M'Naughten is that it is wrongheaded, not simply inadequate, because it is based upon particular symptoms of mental disease in large part meaningless in the medical conception of mental illness. In short, it is a mistake to attempt to impose a legal definition upon what is inevitably a medical phenomenon. As a result of this criticism such proposals emerged as those of the Royal Commission on Capital punishment in 1953 which put the test of insanity in terms of whether an accused was suffering from mental disease or deficiency to such a degree that he ought not to be held responsible.⁵ It also produced the famous Durham test in 1954 which inquires whether the unlawful act of the accused was the product of mental disease or defects.⁶ Such proposals have found virtually no acceptance either in Kenya or in the United Kingdom.

The neo-reactionary criticism recommends that efforts to find improved definitions of the test of insanity to be abandoned and that insanity as a defence be eliminated from the criminal law. Both end up proposing indiscriminating penalisation of the sick and the bad. But the new criticism, or much of it, does so as a step toward penalising neither. This more sophisticated proposal for abolition has been 7 advanced by a variety of persons for a variety of reasons. The writer now proceeds on to summarise what he understands to be the major arguments.

In the first place, it is submitted that the administration of the tests of insanity - all tests - have been a total failure. It has proved impossible to administer the defence rationally and equitably. In the end the court's determination is largely persuaded by the credentials and presentation of the psychiatric experts. Moreover, psychiatrists disagree on key concepts and their conclusions and analyses turn on their own value judgements. Finally, the whole enterprise is an elaborate search after something that does not exist - there is not and cannot be a workable distinction between the responsible and the irresponsible, particularly when the distinction is drawn in terms of the issue of volitional capacity. In short, then psychiatry as such is not a science but an art.

Secondly, it is argued that the defence of insanity is of little practical importance. To be sure the defence has real bite in cases of capital punishment. With increasing frequency, issues of the mental abnormality of the offender are being taken into account after conviction rather than before. For example, mental abnormality questions in Kenya are taken into account before conviction to determine whether or not the accused is able to stand trial, in

probation orders with mental treatment as a condition, in hospital orders made under section 21 of the Mental Treatment Act⁸ and in transfers of persons from prisons to mental hospitals. As a consequence of these developments only a small percentage, say, one to two percent, of cases is the mental abnormality of an offender taken into account by finding the defendant not guilty because of insanity.

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Finally, and of central importance, it is believed that the retention of the distinction between those to be punished and those only to be treated is unfortunate and invidious because in point of fact it is in all cases, not only in some, that persons who do harm should be treated and held in the interest of the public protection. The effect of maintaining the dichotomy between the sick and the bad is to block public and legislative perception that in most crimes psychical and social determinants inhibit the capacity of the actors to control their behaviour. As a consequence effective development and use of psychiatric therapeutic resources for the vast majority of offenders are thwarted.

In the last analysis - this case for abolition makes two claims - the first, that the present situation is bad; * the second, that abolition would make it better. The writer's opinion is that the first claim is supportable while the second claim the writer is of the view that it is unfounded and uncalled for.

The writer contends that the record of the administration of insanity defence is very bad indeed. And to some extent he is inclined to believe that the "softness" of psychiatry as a science and the inherent difficulty of the issue which the defence presents are partly responsible. The insanity defence

is scarcely the only feature of our criminal justice system which is badly administered in practice. For example, inefficiency and inequity are evidence to system committed to an adversary process but not committed to supplying the resources of legal contest to the typically penurious who make up the bulk of criminal defendants. But it is submitted that the lesson of all this would not be to abandon the adversary method on that score, but to improve its operation. Likewise, with the insanity defence, improvement of its operation rather than its abolition would seem the more appropriate response.

The notion of mental disease inevitably conjures up a picture of a person who was once functioning normally, but whose mental condition has changed for the worse or just changed. The M'Naughten Rule, which required a mental disease at the first step, thus left no room for the person whose mind has never properly developed, so that although adult in the body he has, as it were, the mind of a child. These cases should be brought within the ambit of the defence of insanity.

The law presumes further that when a man is in this state, he is not able to calculate whether what he does is right or wrong. Thus being unable to judge his actions he is declared not to be responsible for them. This is the point where medicine conflicts with law. A man may be moved by a desire to do something which could be criminal, and at the same time know that what he is doing is wrong. For instance, take the case of a mentally ill person who has killed somebody. His defence, if he has any, might be that "the devil" told him to go and kill. If asked whether he knew what he was doing and whether he knew that it was wrong he might say, yes. Yet the court would find him guilty of murder but acquit him on grounds of insanity.

Now the second claim. Would we achieve a net advantage in eliminating the defence? As a start let us try to get clear what would follow if the defence of insanity were abolished. Certainly what would follow would depend on the formulation of the defence. But for present purposes we can confine ourselves to M'Naughten. Some other tests include the cases which it covers, what is true of eliminating the other formulations as well e.g. defence of infancy or self defence.

It will be remembered the M'Naughten authorises the defence of insanity when the effect of the defendant's mental disease is to destroy his cognitive capacity, to make him unable to know the nature and quality of his act. When this is so the defence of insanity is made out and the defendant becomes subject to the variety of provisions governing commitment of the criminally insane. Now if this defence were eliminated what would be the position of the mentally ill defendant charged with a crime? Apparently, it would depend upon the mens rea, in the special sense, required by the definition of the crime. If the crime were one like attempt, requiring a purpose by the defendant to achieve an object; or if it were one like manslaughter, requiring knowledge of a particular risk, would it not be the case that the defendant has a complete defence? A total inability to know the nature and quality of the act quite plainly precludes convicting a defendant of any crime whose definition requires that he must have that knowledge. Any crime which requires intent, or knowledge or recklessness surely posits that knowing. What the insanity defence does is to deprive a defendant of his normal mens rea defence and to require that he be acquitted on his special ground within its consequences for indeterminate commitment.

If on the other hand, the crime required only negligence, the absence of an insanity defence would leave the defendant with no defence at all, since all that is required is that the defendant has fallen substantially below the test of reasonableness, and this, by definition, an insane defendant fits well.

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Up to this point we have seen that the insanity defence is a very important vertebra of the criminal law skeleton and without it or abolition of the defence will deny criminal law of a very essential element called justice. We should be borne in mind that criminal law as any other laws must contain a given amount of justice for it to be a good law.

The concept of insanity as enacted in our Kenyan Penal Code is, as closely as possible, a codification of the English concept of insanity (M'Naughten Rule).⁹ In the Kenyan criminal justice system, a big stride has already been made in the direction of upholding the therapeutic doctrine with the enactment of the Mental Treatment Act. This Act provides inter alia that while a person who is insane under the M'Naughten rules must still be convicted, the courts may order his detention for medical treatment in a mental hospital in place of passing a penal sentence.¹⁰

Admittedly, these powers have come to be widely used. For example, the Act provides that an alleged mentally ill person may be hospitalised indefinitely by the recommendation of a medical doctor without prior requirement of a court or other hearing.¹¹

One thing we should not ignore is that although crime, especially urban crime is seen as a moral and law enforcement

problem, crime is a product of identifiable competitive socio-economic forces in a society. Undoubtedly, socio-economic values in a capitalist society like Kenya, are dominated by money to an extent that we would wish to lock up a possible insanity victim instead of rehabilitating him.

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FOOTNOTES

1. Section 9, subsection 1; Cap 63, Laws of Kenya.

This is a view still strongly held by some Commonwealth lawyers and writers. It is expressed in many forms, including the following from Lord Denning (then Lord Justice

"In order that an act should be punishable, it must be morally blameworthy. It must be a sin".

The changing Law (1953) Stevens & Sons Ltd. (London) at p. 112.

2. Section 12; cap 63, Laws of Kenya.

3. Coke, 3 Institute 6

4. (1843) 10 Cl & Finn at p.200.

5. Royal Commission on Capital Punishment, (1949-1953), Report, Section 333 (Cmd. 8982, 1953).

6. Durham v. United States of America 214 F. 2d. 862 (1954).

7. Hart, The Morality of the Criminal Law (1965) Magnes Press, Hebrew University - Jerusalem). Lady Barbara Wootton, Crime and the Criminal Law, Hamlyn Lecture (1963) Chapters 2 & 3.

8. Cap 284, Laws of Kenya.

9. Before the enactment of the Code, the Indian Penal Code applied. For an interesting discussion of the history of the Kenyan Penal Code, See J.S. Read's Criminal Law in the Africa of Today and Tomorrow (1963) 7J. A.L. 5. See also his article Some Legal Problems in East Africa (1966) E.A.L.J. 37.

10. Section 21, Cap 284, Laws of Kenya.

11. Section 20, cap 284, Laws of Kenya.

CHAPTER ONE.

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THE HISTORICAL DEVELOPMENT OF MENS REA

In criminal law, no problem is of fundamental importance or has proved more baffling through the centuries than the determination of the precise mental element: the mens rea¹ necessary for crime. For hundreds of years the books have emphasized with unbroken cadence that actus non facit reum nisi mens sit rea, meaning that a man is not criminally liable for his conduct unless the prescribed state of mind is also present.² In the English case called Williamson v. Norris, LORD RUSSEL C.J. had the following to say about mens rea:

It is a sacred principle of criminal jurisprudence, that the intention to commit the crime, is of the essence of the crime, and to hold, that a man shall be held criminally responsible for an offence, of the commission of which he was ignorant at the time, would be intolerable tyranny.³

The rule has been furiosus solo furore punitur which simply means that a madman is punished by madness alone, that is, since he is suffering under an insane delusion, subjecting him to other punishments would amount to injustice bearing in mind that the required state of mind is absent in him.

But when it comes to attaching a precise meaning to mens rea, courts and writers are in disagreement as to what mens rea should be. Some writers define it in the broadest and most general terms; others define it with more precision, but with greatly varying meanings. It becomes important therefore, to examine with some particularity the mental requisites of criminal responsibility and for this purpose to understand something of historical development which has made the law what it is today. For our own convenience we shall divide the development into five somewhat arbitrary divisions:

- (1) The mental requisites for criminal responsibility in

in the early law.

- (ii) The beginnings of the conception of mens rea.
- (iii) The subsequent development of mens rea as a requisite for criminal responsibility.
- (iv) The growing particularisation of this general mens rea with respect to specific defences such as insanity and infancy.
- (v) Mental requisites that constitute criminal responsibility under the Kenyan Penal Code.⁴

(i) The Mental requisites for criminal responsibility in the early law

So far as the law in the ancient is concerned, there are numerous isolated passages. Pointing to criminal responsibility in certain cases without criminal intent. But one has to remember that there was no distinction in those days between crime and tort. From such records modern legal scholars are bound to conclude that primitive English law started from a basis bordering on absolute liability:

Law in its earliest days tries to make man answer for all the ills of an obvious kind that their deeds bring upon their fellows.⁵

The law thus set forth smacks strongly of liability without fault and certainly without criminal intent. This is clearly in the record law prior to the 12th century that a criminal intent was not recognised as an indispensable requisite for criminal responsibility. The clearest indication of criminal liability imposed by the early law without blameworthy intent is perhaps to be found in the cases of killing through misadventure and in self-defence. In the early times, with the exception of killings under the

King's warrant or in the pursuit of justice, which had always been justifiable, so far as we know the killer seems to have been held liable for every death which he caused whether intentionally or accidentally. This law survived up to the 12th century.

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The foregoing examination of the early law seems to show that up to the 12th century the conception of mens rea in anything like its modern sense was non-existent. In certain cases at least criminal liability might attach irrespective of the actors state of mind.

Although the old records fail to set forth mens rea as a general requisite of a crime, one must not reach the conclusion that even in early times the mental element was entirely disregarded. The very nature of the majority of the early offences rendered them impossible of commission without a criminal intent. Waylaying and robbery are impossible without it, so is rape, and the same is roughly true of house-breaking. Furthermore, the intent of the defendant seems to have been a material factor, even from the very early times, in determining the extent of punishment. It was manifestly unjust that the man who accidentally killed with no intention of doing harm should suffer the extreme of penalty of death.

In seeking to determine the part played by intent in the early criminal law, therefore, one must guard against drawing too sweeping conclusions from evidence which is admittedly meager. What the recorded fragments of early law seem to show is that a criminal intent was not always essential for criminal responsibility and many offenders were convicted on proof of causation without of any intent to harm. But it also appears that even in the very earliest times the intent element could not be entirely disregarded, and at least with

respect to some crimes, was of importance in determining criminal responsibility as well as in fixing the punishment.

(ii) Beginning of the Conception of Mens rea

By the end of the 12th century the influence of Canon law was making itself strongly felt. Canon law whose insistence upon moral guilt emphasized still further the mental element in crime. As a result, there was constant interaction and reaction between church and state laws. It was the priests of the church who conducted the trials by ordeal and monks or priests who were the educators of the day. It was at this time that the court of Chancery was growing into power and the Chancellor, a churchman of high dignity, was continually tempering the rigours of the common law with Equity. Bracton, whose book, written in the middle of 13th century powerfully influenced the later shaping of the common law, was strongly tinged with the canonist ideas. Indeed as Maitland has pointed out,⁶ in writing on homicide Bracton actually has transplanted a discourse from the distinguished canonist, Bernard of Pavia, which he sets forth as part of the common law. Thus we read in Bracton that there are two types of homicide - "the one spiritual and the other corporeal." Corporeal homicide may be committed:

By an act in four ways i.e. by the administration of justice, by necessity, by misadventure or by desire. By justice, as when the judge or justiciar or his officer kills a criminal justly condemned. But it homicide, if it be done from malignity or through shedding human blood, although the criminal be justly killed, nevertheless because of the corrupt intent the judge commits mortal sin.⁷

Killing by misadventure Bracton divides into cases where one is employed upon a lawful or unlawful work. In the latter case the killer is liable; in the former, blame is not imputable to him. Although the greater part of Bracton's

book is a statement of the actual English practice, in some passages it is very evident that he is pouring into English common law ideas gained from the canonists or Romanists.

In another place he says:

We must consider, with what mind (animo) or with what intend (voluntate) a thing is done, in fact or in judgement, in order that it may be determined according to what action should follow and what punishment....⁸

Further along, speaking of homicide by misadventure, after giving various examples some of which are taken directly over from Roman texts, Bracton says that he who kills by misadventure,

but without an intent to kill ought to be acquitted, because a crime is not committed unless the intent to injure (Voluntas noscendi) intervene....and no theft is committed without an intent to steal. And this is in accordance with what might be said of the infant or the madman, since the innocence of design protects the one and the lack of reason in committing the act excuses the other. But in the evil doing, it is the intent (voluntas) which is regarded and not the event, and it makes no difference who does the actual killing or furnishes the cause of death.⁹

Here Bracton is expressing the unquestioned law as it existed in his time and for centuries before. Bracton however, defining theft, borrows from the Roman law definition of the ancient actio furti and makes much of the mental element, the animus furandi. "Theft", he says:

Is according to the law the fraudulent taking of another's property with an animus furandi against the will of the owner. I say with intent because without an animus furandi the crime is not committed.¹⁰

It is evident that Bracton, writing under strong Roman and Canonist influence, emphasized, often beyond the actual law of his day, the mental requisites of criminal responsibility. It remains to be seen how far this growing sense that criminal responsibility should depend upon moral guilt became the

accepted law of a later day.

(iii) Development of a general Mens rea as a requisite for criminal responsibility

Mens rea in the period following Bracton, thus smacked strongly of general moral blameworthiness. During the centuries following Bracton's day this growing consciousness of a blameworthy mind or felonious intent as the basis of criminal responsibility is sometimes seized upon to mark the line of increasing differentiation between the crime and the tort, for the allowance of damages continued in the main independent of considerations of moral blameworthiness. Apart from the difficulty of proving crime based on intent, an overt act was also to be established to have been committed.

By the second half of 17th century, it was universally accepted law that an evil intent was as necessary for felony as the act itself. Hale, in discussing death through "casualty and misfortune," writes that:

As to criminal proceedings, if the act that is committed be simply casual and per infortunium, regularly the act, which were it done ex animi intentionae were punishable with death, is not by the laws of England to undergo that punishment; for it is the will and intention that regularly is required, as well as the act and event, to make the offence capital.¹¹

At the outset when the mens rea necessary for criminal responsibility was based on general moral blameworthiness, the conception was an exceedingly vague one. Since each felony involved different social and public interests, the mental requisites for one almost inevitably came to differ from those of another in similar circumstances! Let us therefore examine

separately the developing and slowly changing mental elements required for homicide, theft and arson.

(a) Homicide:

The most serious form of homicide, called "murder" meant at the end of the 12th century "homicide which is committed in secret, no-one seeing or knowing of it" for which the offender was liable to a heavy punishment,¹² which was called the murdrum. It is clear, therefore, that murder in those days was not distinguished from other felonious homicides by any mental element. By the 14th century when there were practically no foreign born Normans left, the practice was definitely abolished.

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During the end of the 15th century and first half of the 16th century a series of statutes were passed excluding the worst kind of homicides from the jurisdiction of the clergy. In these statutes such homicides as defined as "wilful prepensed murders," "prepensedly murder," "murder upon malice prepensed", "wilful murder of malice prepensed," and "murder of malice prepensed". Thus felonious homicides was finally divided into two main divisions that with and that without malice aforethought, and the first was designated as murder. The two classes of homicide were punished very differently. The first, from which the jurisdiction of clergy was excluded, was punishable by death; and the second which was clergyable, came to be practically punishable only by a year's imprisonment and branding on the brawn of the thumb.

The distinction between the capital crime of murder and the less serious form of felonious homicide, which later came to be called manslaughter depended therefore upon the presence or absence of "malice aforethought". The subsequent

history of homicide is largely the story of the shifting meanings attached to the term "malice aforethought."

(b) Theft:

With regard to theft, the early actio furti lay against one in possession of stolen goods even though not the thief, and required therefore, no proof of a wrongful intent. But Bracton, borrowing largely from Roman law sources, laid down as one of the requisites of the felony of theft animus furandi.

Coke, writing a century and half later, after quoting the language of Bracton about the necessity of an animus furandi say:

First, it must be felonious, id est cum animo furandi, as hath been said, Actus non facit reum nisi mens sit rea. And this intent to steal must be when it cometh to his hands or possessions; for if he hath the possession of it once lawfully, though he hath animus furandi afterward, and carryeth it away, it is no larceny (theft).¹³

Later decisions develop Coke's statements of the law and define with growing precision the exact mental element necessary for theft. The old animus furandi of Bracton comes to mean an "intention to deprive the owner of his property permanently, fraudulently, and without claim of right."¹⁴

(c) Arson

Of arson little need be said from the earliest times the malicious burning of another's buildings was a crime of peculiar gravity. By Bracton's day it seems to have been well settled that to convict for arson proof must be had that burning was with evil design (mala conscientia); a burning

caused by negligence was not arson. Coke, after emphasizing Bracton's language, recites that the necessity of proving "maliciously and voluntarily" is shown "by the words of the indictment, which be voluntaire ex malitia sua praelogitata, et felonice, meaning, for if it be done by mischance or negligence, it is no felony"¹⁵

Ever since Coke's time the law has remained unchanged that to convict for arson the burning must be "ex malitia". But the meaning of malitia has changed considerably. The mental requirement is no longer a motive of malevolence, desire to injure, or general ungodliness, as it was in early days, but a narrow specific intent to burn a building, irrespective of the underlying motive or purpose.¹⁶

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(iv) The growing particularisation of the general "Mens rea" with respect to specific defences.

After the 12th century new general defences began to take shape such as insanity based on the lack of a guilty mind and thus negating moral blameworthiness.

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Insanity which robs one of the power to make intelligent choice between good and evil must negative criminal responsibility rests upon moral blameworthiness. Before the 12th century it is not known whether mental disease as such constituted a legal defence. Gradually however, insanity, like self-defence or misadventure became not a bar to criminal responsibility but a recognized ground for the granting of royal pardon. In time insanity became a well recognized defence. Bracton cites an example of a pardon granted by King Henry III on the ground that the inquest showed

That Mand (name of a person) who is in prison for slaying her two sons killed them in a fit of madness

and not by felony or malice aforethought.¹⁷

Bracton's conception of a madman was one who does not know what he is doing, who is lacking in mind and reason, and who is not far removed from the brutes. Hale, evidently seeking to assimilate the defence of insanity to that of infancy on the basis of lack of mens rea writes:

Such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as a child of fourteen years hath, is such a person as may be guilty of treason or felony.¹⁸

Hale, thus assumes that the criminal irresponsibility of the insane person can be gauged by the same measuring rod as the criminal irresponsibility of a child. But the attempt breaks down in practice; for in reality the same immature mind is quite incommensurable with the insane mature mind.

Under the influence of the answers of the judges to the House of Lords in M'Naughten's case,¹⁹ the eighteenth century good- and-evil test passes into the nineteenth century right-and-wrong test, to which some American states have added the irresistible impulse test.²⁰ The Kenyan law has adopted the right- and-wrong test as formulated in the M'Naughten's case

(v) Mental requisites that constitute criminal responsibility
Under the Kenyan Penal Code.

The Kenyan Penal Code²¹ is, as closely as possible, a codification of the English criminal law. Most individual offences in the Code are set out in fine detail and, on first impression, it appears that only the words creating an offence need be looked at for its definition, and that the court should not go outside the legality of the section creating and defining

the offence to examine further what its meaning might be. Then the further impression that Penal Code offences do not have extrinsic elements is created.

But the Penal Code rejects this view in two fundamental respects. First, inspite of the conclusion above that the common law views of mens rea as "evil mind" or "guilty knowledge" are untenable, it is true that common law courts apply them when they are interpreting statutory criminal law.²² Kenyan courts have also assumed that mens rea, unless specifically excluded, is a necessary assumption of every Penal Code offence and tests for it are now standard.²³ The code has itself instigated this judicial attitude. Section 3, of the Code says:

This Code shall be interpreted in accordance with principles of legal interpretation obtaining in England and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.²⁴

The writer is of the opinion that this is a bad stand. While it would have been proper to insert a clause saving English criminal law in cases of uncertainty, it was wrong to tie the Kenyan Code to the English criminal law. The reason for saying so is that after codification, the old law is, for practical purposes, dead. It should not therefore be permitted to influence the living tissues of the Code.²⁵ The Code should be able to operate on its own, within its context, and uninfluenced by the law which it has codified.

In general, a study of the historical development of mental requisites, of crimes leads to certain inescapable conclusions. In the first place, it seems clear that mens rea, the mental factor necessary to prove criminal responsibility

has no fixed continuing meaning. The conception of mens rea has varied with the changing underlying conceptions and objectives of criminal justice.

At the beginning when the object of criminal administration was to restrict and supplant the blood feud, the mental factor was of importance in so far as it determined the provocative nature of the offence. Under the dominating influence of the canon law, and the penitential books the underlying objective of criminal justice gradually came to be the punishment of evil-doing; as a result the mental factors necessary for criminal responsibility were based upon a mind bent on evil-doing in the sense of moral wrong. Our modern objective tends more and more in the direction, not of awarding adequate punishment for moral wrongdoing, but of protecting social and public interests. To the extent that this objective prevails, the mental element requisite for criminal responsibility, if not altogether dispensed with, is coming to mean, not so much a mind bent on evil-doing as an intent to do that which unduly endangers social or public interests. As the underlying objective of criminal administration has almost unconsciously shifted, and is shifting, the basis of the requisite mens rea has imperceptibly shifted lending a change to the flavour, if not to the actual content of the criminal state of mind which must be proved to convict.

FOOTNOTES

1. The term mens rea is used throughout this Dissertation as signifying the mental element necessary to convict for any crime. The discussion is restricted to crimes not based upon negligence.
2. The offender must know that he is doing a legally bad thing.
3. (1899) 1 Q.B. 7 at p.14.
4. Cap 63, Laws of Kenya.
5. 2 Pollock and Maitland, History of English Law (2d. ed. (1923) at p. 47.
6. DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE
7. 2 Pollock and Maitland op. cit. ^{supra} note 5 at p.477.
8. Bracton, DE LEGIBUS 101 b
9. For the first time now mens rea becomes linked with insanity as being exclusive of each other (emphasis is of the writer).
10. Op. cit. supra note 5, at p.498.
11. 1 Hale, Pleas of the Crown, 38.
12. Bracton asserts that this practice was introduced in England by King Cnute to prevent his countrymen the Danes, from being secretly murdered by the Englishmen. It was continued by William the Conqueror to protect the Normans.
See Op. cit. supra note 5, at P.487.

13. Third Institute 107
14. 2 Stephen, History of Criminal Law (1883) at p.95
15. Coke, Third Institute 67
16. Thus a prisoner who sets a jail on fire in order to escape would seem under the modern view, guilty of arson, even though his motive was not to injure but solely to escape.
17. Op. cit. supra note 5, at p.480
18. 1 Hale, Pleas of the Crown 30
19. (1843) 10 cl & F. 200
20. Durham v. United States, 214, F. 2d 862 (1954)
21. Supra note 4.
22. "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute clearly or by necessary implication rules out mens rea as a constituent part of crime the court should not find a man guilty of an offence against the criminal law unless he has a "guilty mind." Per Lord Goddard C.J. in Brend v. Wood (1946) 62 T.L.R. 462.
23. Generally speaking, in order to constitute a crime there must be an actus reus as well as mens rea." Hawkings v. R (1959) E.A. 47 at p.51. Exceptions have, however, been recognized in strict liability offences e.g. George Buwanika and Another v. R (1957) E.A. 279.
24. Section 3, cap 63, Laws of Kenya.

24. "A Code intended to replace the common law and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the stood before the Code and then to see if the code will bear an interpretation which leaves the law unaltered" - High court of Astralia on the Western Australia Criminal Code in Brennam v. R (1936) 55 C.L.R. 253, 263.

CHAPTER TWO

THE JURISPRUDENTIAL ASPECT OF MENTAL
ILLNESS IN CRIMINAL JUSTICE

(1) The Ambiguity of Insanity Definitions

Defining insanity is not an easy task. The problem is complex as that of defining "responsibility". Baroness Wootton has repeatedly argued that no satisfactory line can be drawn between the mentally normal and abnormal offenders, that there are no clear or reliable criteria.¹ And in 1968, the late Professor Packer described the issue as the most controversial in the criminal law. He wrote:

There is no more hotly controverted issue in the criminal law than the question of whether, and if so, to what extent and according to what criteria individuals whose conduct would otherwise be criminal should be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did.²

Neither the M'Naghten³ formular dating from 1843, nor the doctrine of irresistible impulse nor the Durham⁴ Test of 1954 provide a clear and satisfactory definition of insanity.

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The absence of an adequate definition and lack of proper criteria are compounded by the discrepancy which exists between legal definitions of "irresponsibility" and psychiatric definitions of "mental illness". For judges and lawyers, insanity is a legal standard; for the psychiatrist, it is a medical conclusion. In addition, insanity tests include questions involving elements of law which lay outside the psychiatrist's field of competence. As a result, the psychiatrist may be asked in court to give an opinion in terms of knowledge of right and wrong, or of responsibility and may feel that he is not especially competent to express a view on such matters.

Insanity, then, means different things to different people and the inevitable result is a lack of uniformity and a wide disparity in court decisions on the issue. The ambiguity of the definitions and the relativity of the notion open door to both intentional and unintentional errors. The latter may occur in the application of criteria or in the judgement of symptoms. The former results directly from the death penalty. A judge having doubts about the defendant's guilt, having scruples about the death penalty, or, for some reason, unwilling to send the accused to his death, may find in an insanity plea a way out of this dilemma and may declare the defendant insane despite the lack of strong evidence attesting to the responsibility of the accused.

In another sense, particularly that of a defendant admitting to have committed a whole series of heinous crimes, the judge may deliberately disregard overwhelming psychiatric evidence on insanity in an attempt to rid society of a dangerous insane killer.

The legal provision of capital punishment, then, makes the life or death of a defendant in a capital case contingent upon the imprecise and relative notion of insanity, a notion which is neither susceptible to scientific assessment nor to accurate measurement. In his usual eloquent manner, Professor Black Summarises the situation thus:

The upshot of the best writing on the subject is that we have so far failed in defining exculpatory insanity and that success is nowhere in sight. Yet we have to assume, unless the whole thing has been a solemn frolic, that we execute some people, and put others into medical custody, because we think that the ones we execute fall on one side of this line, and the others on the other side.⁵

(11) Mental illness and Criminal Responsibility

Mental illness which incapacitates from practical reasoning, therefore, both excludes mens rea and exempts from responsibility. This has long been recognised in the traditional defence of insanity. It is for this reason that the M'Naghten rules were framed in the way they are. Such a recognition is quite different from the fashionable attitude of the structure of crime and punishment by that of illness and treatment. So far as possible, citizens who are capable of reasoning should be appealed to by means of reason, rather than casually acted upon like irrational agents. The forcible incarceration of the dangerously insane is not a violation of this principle. On the normal case of punishment the notion of treatment is an inappropriate one, just as the notion of illness is an inappropriate one in the normal case of crime. The concept of mental illness in present day is constantly being so extended that it loses all meaning, or turns into a condescendingly emotive description of tendencies to behave in ways of which the writer disapproves. This inane extension of the concept should be resisted.

Few of those who are actually concerned with the administration of the law look with favour on such a boundless extension of the notion of mental illness. Nonetheless, it is a widely held view that the M'Naghten rules err on the other side by offering an excessively narrow definition of the circumstances in which it is proper for "disease of the mind" to free from criminal responsibility. Certainly a person can suffer from a severe mental illness, such that he would be regarded by almost anyone as being quite mad, and yet not necessarily satisfy the M'Naghten conditions of not knowing the nature and quality of the acts he does, or their moral and legal status.

Such mental illness will not necessarily incapacitate from all practical reasoning. Should it exempt from criminal responsibility, and if so when?

The writer is of the opinion that it should exempt from responsibility for those of the accused's actions for which it is itself responsible. The Butler Committee on Mentally Abnormal offenders⁶ considered this proposal, but rejected it on the grounds that it is difficult to be certain how much of a person's behaviour is affected by mental disorders that he may suffer. So it is hereby submitted that severe mental disorder should free completely from criminal responsibility, and that when a court believes that the accused, at the time of his alleged criminal act, was suffering from severe mental illness or severe subnormality they should bring in a verdict of "not guilty on evidence of mental disorder." The court would have wide discretion in disposal after such a special verdict, having in its power a number of alternatives from committal to secure hospital to absolute discharge.

The Butler Committee, to show the excessive narrowness of the M'Naughten rules points out that some severe mental disorders do not prevent the sufferer from forming positive intentions and carrying out efficiently. "An instance would be a person who killed someone quite deliberately but under the delusion that he had been ordered by God to do so." The instance seems uncommonly ill-chosen. Such a person would fit without any strain under the M'Naughten exemption of one "labouring under such a defect of reason, from disease of the mind.... that he did not know he was doing what was wrong."

The M'Naughten rules recognise that even those with severe mental illnesses conduct a great part of their lives in accordance with practical reasoning in the light of the

alternatives to them and the consequences of those alternatives. To the extent that they can do so, they can be influenced by the penalties which the law holds out for intentional wrongdoing. To the extent that their delusions vitiate their reasoning by disguising from them the nature of what they are doing, or the moral and legal consequences of their actions, they will fall within the exemptions provided by the M'Naughten rules.

Beyond this, there is nothing unjust to them in holding them criminally responsible for their actions: and there may well be an injustice to others in removing from them the deterrents which the law holds out to the sane.

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The general principle, then, that responsibility should extend as far as mens rea extends, can be applied without injustice to the mentally disordered no less than to the sane. In so far as the afflictions of the mentally disordered make them incapable of being susceptible to the deterrents provided by the law, they make them also incapable of the state of mind constituting the mens rea of the various crimes.

(111) Mental illness and Capital Punishment.

Capital punishment raises in a particularly acute form the question of the insanity defence. Many legal scholars believe that the historic purpose of insanity defence has been to avoid capital punishment.⁷ It makes little or no difference for the protection of society whether the murderer is detained in a mental institution for the insane or incarcerated in a penal institution for convicted offenders. Thus, when the punishment for murder is life or term imprisonment, the outcome of insanity defence does not carry the same serious consequences as when the punishment is death. In the latter case, the courts on an insanity plea may mean

the difference between incarceration and execution, between life and death. When capital punishment is abolished the insanity defence becomes redundant and loses most of its practical importance. The Law Reform Commission of Canada expressed this view in its working paper No. 14

For all its theoretical importance, the insanity defence - whatever its form - is now of little practical consequence. Probably as a result of the virtual abolition of capital punishment.⁸

When capital punishment is retained, the assessment of the mental state of the defendant at the time of the crime and of his fitness to stand trial become crucial evidentiary issues. In deciding on these issues the possibility of error looms large because the insanity issue is settled not on the basis of objective, hard facts, but on a subjective and frail psychiatric diagnosis. It is true that the final decision on the insanity defence rests with the judges and they are not bound by the psychiatric evidence presented in the case. But it would be too optimistic to expect the common sense of the judge to make good the deficiencies of psychiatry. Judicial errors, contrary to the popular conception, are not restricted to cases in which an innocent person is convicted or a guilty person is acquitted. Because our criminal law recognises insanity at the time of the offence as an exculpatory condition, we have to acknowledge that a judicial error is made every time an insane offender is convicted or a "normal" offender is declared "not guilty by reason of insanity." The potentiality for such error is enhanced and aggravated by the retention of the death penalty.

First, capital punishment increases the frequency of insanity pleas and consequently increases the probabilities and the risks of judicial errors.

Second, although the potentiality for mistake is always present when the question of material guilt is decided, it

it is much greater with regard to the issue of moral guilt and the moral elements of the crime. Third, although the potentiality for error is ever present in any system of human justice, it is much more serious when the life of a human being is at stake. Errors of justice not involving the taking of a human life may always be revoked when the mistake is discovered, though the harm done by imprisonment or labelling is usually irreversible. Capital punishment is not only irreversible it is irrevocable as well. The great potential for error regarding the insanity defence can be attributed to at least three factors:-

- (i) the extreme difficulty of reaching an adequate definition of such a complex and relative notion as the concept of insanity.
- (ii) the limitations of psychiatry and the frailty of the psychiatric diagnosis of insanity.
- (iii) the difficulty of linking the defendant's disease or defect, if such has been diagnosed to his alleged offence.

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(iv) Proposals to Abolish the Insanity Defence

It is one thing to say that the insanity defence coupled with hospitalization after acquittal is consistent with the purposes of the criminal law: it is quite another to decide on the purpose of the defence itself. A general assumption underlying the insanity defence is that it enables society to distinguish between the cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow. A dividing line drawn between the criminal offender and the insanity-acquittee. The former receives public condemnation through a criminal conviction with resulting punitive sanctions; the latter receives no public condemnation but is restrained for treatment of his mental condition to

ensure the anti-social conduct is not repeated. The insanity defence allows introduction into the criminal trial of psychiatric testimony concerning the accused's mental condition at the time the criminal act was committed. These authorities contend this testimony is not relevant if the ultimate goal of the criminal trial is appropriate disposition of the individual. The insanity defence says nothing of the accused's current mental condition or of the probability that the condition is treatable in a mental hospital. Thus, these authorities argue that the criminal trial should be conducted without psychiatric input on the issue of legal accountability and that psychiatric insight should be reserved for a post-conviction analysis of proper disposition of the offender.⁹

Other abolitionists ^uquestion whether a line should be drawn at all between confinement of convicts in prison and confinement of non-convict acquittees in mental hospitals. To these abolitionists, the appropriate choice is significantly different. If the commission of a crime requires both the commission of a criminal act and a criminal intent to commit that act, the individual who lacks criminal intent because his mental condition deprived him of free will is simply not guilty of a crime. The insanity defence, coupled as it is with commitment of the acquitted individual to a mental hospital, is viewed as a device inappropriately to confine individuals who should go free. Generally, unless all the elements of an offense can be proven against an individual, he can be neither convicted nor confined. Thus the insanity defence does not

....absolve of criminal responsibility "sick" persons who would otherwise be subject to criminal sanction. Rather, its real function is to authorize the state to hold those "who must be found not to possess the guilty mind mens rea" even though the criminal law demands that no person be held criminally responsible if doubt is cast on any material element of the offence charged.¹⁰

These authorities would limit evidence of an accused's mental condition

....to the question of whether he did or did not, at the time of the act have the prohibited mens rea of the crime of which he is charged.¹¹

Both abolitionist positions have been subjected to attack. In his definitive book on the insanity defence, Dean Abraham S. Goldstein criticizes the first opposition discussed above. He cites four major objects to separating the offending act from the mental state of the offender and reserving evidence of mental condition for the dispositional portion of the trial.¹

First, the jurisdictions that have attempted this have been singularly unsuccessful. Courts have held that evidence concerning the mens rea element may not be excluded from the guilt-finding portion of the criminal trial. This, evidence of the defendant's mental condition has been admitted in both portions of the trial, and in essence the defendant has been accorded the opportunity to prove his insanity twice.¹³

The second major objection is that a proposal to defer consideration of a defendant's mental condition to the dispositional stage would result in convicting some individuals who are now acquitted because they lack mens rea. Experience indicates

....that prematurely labeling a person an 'offender' is more likely than any other single factor to confirm him in a criminal career...."¹⁴

Third, keeping a line the concept of blame is essential to the continued order of society, for this concept fosters individual responsibility. In our culture, the principle of blameworthiness establishes the limits beyond which non-conformity may not go without such limits, society would

become less law-abiding. By giving a person the opportunity to contest his blameworthiness through the device of the insanity defence, society reinforces the individual's sense of obligation. The individual is not viewed as a programmed machine who has been acted upon by forces beyond his control; rather he is assumed responsible for his own judgements unless the contrary is established. A proposal to reserve for dispositional use only evidence of a person's mental condition would erode the concept of blameworthiness and therefore weaken the moral order.

Fourth, for blameworthiness to remain the basis of continued social order, the decision to impose official condemnation through conviction or to show court compassion through acquittal must be made by a court or jury rather than by a panel of experts. The public identifies with the court and is influenced by court decisions.

(v) The Significance of the Insanity Defence

The mental condition of a person accused of crime may be raised in two different determinations. The first determination is defendant's competency to stand trial. Here the court examines the accused's present mental capacity to participate in the preparation and presentation of his defence to the criminal charge. The second determination is defendant's responsibility at the time the criminal act was committed. Here, through the insanity defence, the court examines the accused's passed mental capacity in order to determine whether criminal condemnation is appropriate. Of the two issues, the latter has received the most attention from scholars. However, the significance of insanity defence has recently been questioned. As Professor Norval Morris eloquently stated:

Rivers of ink, mountains of Printer's lead, forests of paper have been expended on this issue (the insanity defence), which is surely marginal to the chaotic problem of effective, rational, and humane prevention

and treatment of crime.¹⁵

There are at least two reasons for asserting that the importance of the insanity defence has been exaggerated. First, the inquiry into competency to stand trial has traditionally been the critical phase in classifying and disposing of cases involving mentally disturbed defendants.¹⁶

A second reason for asserting that the insanity is relatively unimportant concerns practical choice facing a defendant.

The consequence of successful assertion of the defence in most jurisdictions is confinement in a maximum-security hospital with little prospect of care or early discharge. A defendant....would reasonably subject himself to capital punishment.... A ssertion of the defence appears to be directly associated with the severity of the offence and the therapeutic reputation of the maximum security hospital in any particular jurisdiction.¹⁷

Nevertheless, recent developments suggest an increased importance of the defence. In 1972, in Jackson V. Indiana,¹⁸ the Supreme Court of United States held, ..that a person

....that a person charged by a state with a criminal offence who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. It is determined that this is not the case, then the state must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress towards that goal.¹⁹

Because mentally disordered defendants can no longer be indeterminately and even permanently committed to a mental

hospital as incompetent to stand trial there are potentially more defendants who will be returned to court for trial and who will assert the insanity defence to avoid a finding of criminal responsibility.

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vi) Alternatives to the Defence of Insanity

In urging the abolition of a separate insanity defence, Dean Norval Morris observed:

It too often is overlooked that one group's exculpation from criminal responsibility confirms the inculcation of other groups.²⁰

That simple perception provides as well the principal jurisdiction for retention of the defence. For it is through the on-going, case-by-case process of exculpating the non-responsible that society evolves its concepts of individual autonomy and accountability. If we abolish in large measure the defence of blamelessness, we detract from our ability to impose blame. The number of offenders so exculpated is likely to remain small; they are the exception we use to prove the rule of personal accountability. Symbolically, their significance outstrips the social gains to be realised by submitting them to our largely ineffective correctional process.

What then should parliament do about the insanity defence?

Indeed, one may doubt any special competence of a legislative body, dealing with the issue on an abstract level, to formulate a "test" of criminal responsibility. The better form for evolving our notions of personal accountability and measuring them against our developing knowledge of human behaviour may be individual cases depending on

their own circumstances. For it is the individual case that provides us with bits and pieces of knowledge that we now lack.

The first option, then is for parliament to stay its hand, to provide procedures for raising a defence of lack of criminal responsibility, but to leave the substantive "test" to the common law (McNaughten Rules).

A second option would be the expert dominance and the medical model to be disregarded completely by the courts. This option would leave the law of criminal responsibility free to develop with judicial experience. It will enhance that development by removing the distraction of determining whether a defendant's condition may properly be termed "mental disease or defect," and concomittantly reducing the court's dependence on the expert witnesses.

Finally, it focusses court's attention on what must be the central issue: the balance to be struck between moral blameworthiness and the concerns of social order.

Neither option addresses the important practical issue of what is to be done with an offender acquitted for non-responsibility and perceived as mentally ill and continuing to threaten others. But that issue should be analytically distinct from the issue of responsibility irrespective of the legal test employed. Preventive confinement addresses future conduct. Past conduct is relevant only as a factor for prediction.

Indeed, one hidden benefit of the second option, the "justly" responsible test may be that it will force us to confront the real issues in preventive confinement which

now lie masked behind the "special verdict" of "not guilty by reason of insanity".

vii) Recommendations

In deciding if we should continue to utilise an insanity defence, we must consider whether there are any individuals who should be absolved from criminal responsibility because they are unable to conform to the demands of society. The writer believes that such individuals exist and that given society's current stage of development, the insanity defence is an appropriate device for dealing with them.

However, some abolitionists argue that having an insanity defence is senseless, for a mentally disordered individual who is absolved from criminal responsibility is then penalised by placement in a maximum security ward of a so-called mental hospital without treatment for an indefinite sentence that could continue for life. Their solution is to abolish the insanity defence and substitute the concept of mens rea. Such a solution would result in pure acquittal and release back into society of those individuals who have committed in the past - and who may continue to commit the future - criminal acts without the requisite criminal intent. The writer rejects this solution as potentially dangerous and therefore understandably unacceptable to society.

The strength of the abolitionists argument lies not in their call for abolition of the insanity defence but rather in their assertion that society fails to make a meaningful distinction between the stigma of involuntary institutionalization due to conviction and the stigma of involuntary institutionalization due to mental abnormality. If the insanity defence is to be retained, this problem must be confronted. The writer proposes that the insanity defence be retained and

expanded to include those individuals whom an enlightened society would define as not criminally responsible. Second, whenever a crime requires as a necessary element that the act be committed with a particular mental state, evidence of a defendant's mental abnormality should be admissible to prove he lacked the required mental state, separate and apart from the insanity defence.

If the purpose of the insanity defence is to find those individuals who are not criminally blameworthy, sentence-serving convicts. Whether imposed by law or by practice, a requirement that an individual successfully pleading the insanity defence be committed to a maximum security facility for an indefinite time destroys any justification for the defence and reduces its significance to less than de minimus.

FOOTNOTES:

1. Baroness Wootton, "Morality and Mistakes," in L. Blum - Cooper (ed.), The Hanging question (London: Duckworth & Co., 1969), pp. 13-19.
2. H.L. Packer, The Limits of Criminal Sanction (Stanford: Stanford University Press, 1968); p. 131.
3. McNaughten v. R. (1843) 10 Cl & F 210
4. Durham v. United States, 214, F. 2d 862.
5. C.L. Black Jr., Capital Punishment: The inevitability of Caprice and Mistake (New York: W.W. Norton & Co., Inc., 1974); p. 53.
6. Report of the Butler Committee on Mentally Abnormal Offenders (Butler Committee), Cmd 6244, 1975. Chapter 18.
7. A.A. Stone, "Mental Health and Law, A System in Transition (Rockville, Maryland: National Institute of Mental Health, 1975), p. 219.
8. Canada, Law Reform Commission, "The Criminal Process and Mental Disorder," Working Paper No. 14, (Ottawa: Information Canada, 1975), p. 31.
9. See e.g. H.L.A. Hart. THE MORALITY OF THE CRIMINAL LAW, Chapter One (New York: OUP, 1965).
10. Goldstein and Katz, Abolish the "Insanity Defence" - why not?, 72 Yale L.J. 853, 864 (1963).
11. Morris, "Psychiatry and the Dangerous Criminal" 41 S. California Law Review 514, 518 (1968).

12. A. Goldstein, *THE INSANITY DEFENCE II* (New Haven,: Yale University Press, 1967).
13. See generally, Louisell and Hazard, "Insanity as a Defence: The Bifurcated Trial" 49 Cal. L. Review 805 (1961).
14. A. Goldstein *Supra* note 12, at 223.
15. Morris, *Supra* note 11, at p. 516.
16. A Mathews, *Mental Disability and the CRIMINAL LAW 193* (Chicago: American Bar Foundation, 1970).
17. A. Mathews, *Supra* note 16, at 193.
18. 406 U.S. 715 (1972).
19. *Supra* note 18 at p. 738.
20. Morris, *Supra* note 11, at 520.

CHAPTER THREE

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MENTAL ILL-HEALTH AND THE OBJECTIVES OF THE PENAL SYSTEM

The concept of free will embodied in the criminal law has been criticised by those who subscribe to the view that all behaviour is "determined by psychological and biological causative factors".¹ A focal point of the moralist-determinist debate is the insanity defence, for implicit in the defence is society's admission that a serious mental condition may destroy a person's free will and that moral condemnation is not appropriate in such circumstances.

In any insanity defence discussion, the battle between moralists and determinists is a primary concern. However, the insanity defence itself must be placed into the broader context of generally accepted criminal law principles. Whatever the merits of the determinists' arguments free will generally reigns supreme in the enactment of criminal laws, in the determination of guilt, and even in the sentencing process.

Justice Robert H. Jackson wrote:

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How far one by an exercise of free will may determine his general destiny or his course in a particular matter and how far he is the toy of circumstance has been debated..... the practice business of government and administration of law is obliged to proceed on more or less rough and ready judgements based on the assumption that nature and rational persons are in control of their own conduct.²

The insanity defence excludes from criminal responsibility those individuals whose mental condition is such that a finding of guilt would not serve the purposes of the criminal law. However, as one authority has stated:

Unfortunately, we are at a point in history when it is not at all clear what those purposes are and, therefore, what the function of the insanity defence is or should be.³

Criminal punishment means any particular disposition or the range of permissible dispositions that the law authorises (or appears to authorise) in cases of persons who have been judged through the distinctive processes of the criminal law to be guilty of crimes. Punishment is a concept; criminal punishment is a legal fact. This distinction is observed by references in judicial opinions to "punishment" when what is meant is "criminal punishment". For example, in one American case,⁴ the deportation of an alien for membership in the Communist Party under a statute that made such membership a ground for deportation after the alien's membership had terminated was upheld by the Supreme Court of United States against the claim, among others, that it constituted ex post facto punishment in contravention of the constitutional prohibition.

The court refused to characterize the deportation as punishment, or so they said. What they were refusing to call it was not punishment considered as a general concept, but rather a particular kind of punishment, criminal or perhaps quasi-criminal. If they had agreed that the deportation was quasi-criminal punishment, it would fall within the prohibition of the ex post facto clause.

The range of permissible punishments is at the present time very broad, ranging from death, at one extreme to a suspended sentence at the other. Criminal punishment always includes but is not limited to a formal judgement of guilt. Typically, this judgement is entered when the judge,

determines that the accused is guilty of the offence charged.

The writer is of the view that, there are two ultimate purposes to be served by criminal punishment, that is, the deserved infliction of suffering on evil doers and the prevention of crime. These two purposes are incompatible, and the moralists have tended to assume that one or the other of these purposes must be justifiable to the exclusion of the other. The writer's point here is that, not simply as a description of existing reality but as a normative prescription for legal action, the institution of criminal punishment draws substance from both of these ultimate purposes; it would be socially damaging in the extreme to discard either. Before arguing this point, however, it may be desirable to elaborate somewhat the description of the two ultimate purposes of punishment.

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Although punishment is explained and justified by several theories, the insanity defence has been construed as inconsistent with each.⁵ The prevention theory is based on the assumption that subjecting the individual to the highly unpleasant experience of imprisonment or other sanction will deter him from engaging in future crimes because he will not want to be punished again. This theory assumes the individual is able to comprehend the sanctions imposed on law violators and to respond accordingly. But a severely disordered person may not be so deterred. However, the existence of the insanity defence coupled with hospitalization of the individual who successfully raises the defence affords society the opportunity to treat him and thus reduce his potential for repetition of criminal conduct.

The deterrence theory attempts to reinforce the public's law-abiding tendencies by punishing the individuals

who have not been law-abiding. But because normal individuals do not identify themselves with the insane defendant, the latter does not serve as an appropriate deterrence example for the public.

Under the rehabilitation theory, sanctions are imposed to alter a person's behaviour to a pattern that is socially acceptable. The insanity defence, coupled with hospitalization following acquittal, permits rehabilitation of the mentally disordered person through appropriate treatment techniques.

The incapacitation theory is based on the need to protect society from dangerous individuals. Hospitalization following acquittal by reason of insanity fulfills this purpose because the individual is detained, not for some fixed period of time but indefinitely, until he is no longer dangerous.

The retribution theory which has recently been criticised, asserts the appropriateness of society's inflicting on one who has inflicted suffering on others. Criminal culpability generally requires mens rea - that is, an intent to commit a criminal act. Severely mentally disordered persons are considered not blameworthy because they lack the capacity (free will) to form this criminal intent. The insanity defence developed as a device to preclude retributive punishment of these individuals whom society views as not blameworthy.

The fact that punishment involves suffering is a moral embarrassment. But it is just as much an embarrassment as it is to the claim that punishment is justified because it

deters. Life terms for habitual offenders are urged because of an asserted need to protect society from their depredations.

The tendency to introduce models from medicine and social welfare into the criminal justice system in juxtaposition with the traditional institutions of criminal justice has its own merits and some scientific limitations. The medical model fits conveniently within the framework of schools of thought oriented towards efficiency. The social welfare model likewise uses arguments concerning efficiency, but potentially at least it is capable of going a step beyond this. It sees the "criminal" within his real life context and thus it works together with the traditional institutions of criminal justice but without the same intentions.

The Mental Treatment Act,⁶ is basically treated oriented. The powers involved in the compulsory admission procedure are there to enforce treatment on that group of cases where compulsion is necessary either in the interests of the patient or of society.⁷ In this sense the Act is certainly unique, unique in the sense that it offers the paradigm of all treatment models, that is, that the person is ill and needs treatment, that an expert will decide and that treatment will be given irrespective of the wishes of the patient. Armed with this model of an illness, mentally ill people can be regarded as unintentional deviants who need and require treatment, and treatment of course defined in medical terms. Is there any justification for demanding compulsory hospitalization?

The Act suggests two justifications for compulsory hospitalization. These are, the patient's own interests and

the protection of society. As it concerns the former justification the Act says:

If a magistrate is satisfied by information on oath or affirmation that any person suspected to be suffering from mental disorder is at large or is dangerous to himself....8

But is it ever justifiable to infringe an individual's liberty solely in his own interest? The writer suggests that some individuals such as the mentally ill persons are so incapable of looking after themselves that they must be obliged to accept help from either hospital or prison authorities.

As regards the second justification, that is, the protection of society; the Act says:

If a magistrate is satisfied by information on oath or affirmation that any person suspected to be suffering from mental disorder is at large or is dangerous to others or is acting or is likely to act in a manner offensive to public decency....9

It is submitted that every society must protect itself from anti-social behaviours, and does so inter alia through the mechanisms of the criminal law and compulsory hospitalization. Thus the justification for controlling other anti-social persons, but the mechanism is different.

Mental illness in a person accused of a crime raises the legal question of the individual's competency to enter into the legal procedures of trial and punishment. Once he is determined that he is incapable of understanding the nature of the offence he is charged with, he is simply compulsorily hospitalized pending when he recovers.

Discussions, therefore, of the powers granted to the

medical profession under the Act must be linked to those involved in the whole criminal process. The concept of treatment and mental illness is two sided, for the psychiatrist can withhold treatment in the same way as he can provide it as seen above. The rules invoked in compulsory hospitalization are unique in that they deal specifically with mental health but it seems that the Act was part and parcel of a wider trend which transferred or simply gave, power to certain interested groups who claimed to have an expertise specifically oriented to notions of "welfare" or best "interests". Links can be made here with what David May calls the "treatment model"¹⁰ and with Kenneth Davis' concept of "discretionary justice" where Davis argues that discretion has increased in modern society to the point where discretionary power is excessive.¹¹ The discretionary power within the medical model is perhaps the most important for the essence of treatment as it currently exists in the criminal justice system. The discretionary power of the medical model advocates for decisions to be individualised, that is, relate to the individual's needs and not to some abstract legal rules such as the rules in the Act. Once decisions are individualized, then, it is submitted, it becomes difficult to formulate precise rules, for in the area of "people change" rules cannot, and do not, take account of individual variations.

Nonetheless, inspite of viewing the process of compulsory hospitalization in wider social terms, it is still important to note that the psychiatrist makes the final decision. To support this decision the doctor must have an application from the nearest social worker. But what may happen if the social worker disagrees with the doctor? From the Royal Commission's report it is clear that the social workers are not of equal standing in the compulsory

admissions procedure.

If a social worker were to consider that the patient should be compulsorily admitted to hospital but this was not recommended by the doctors, the view of the doctors would prevail. 12

However, what happens if the reverse is true? that is, the doctor wants admission but the social worker disagrees. Here the commission was equivocal, it suggested that doctors, particularly those with experience in the diagnosis and treatment of mental disorders, are better qualified than anyone to diagnose the patient's mental condition, to assess his need for treatment and to judge the probable effects if treatment is not provided. The commission did not think that any responsible social worker would lightly disregard or dissent from that advice. But suppose they do, what then? Here the commission was obscure for it recognised the right of the social worker to be free to decline to sign the order, thus suggesting that the difficulties such as this seldom arise, but when they do, they could be solved by discussion. What happens if that fails too? No answer was provided on that question. The writer submits that since insanity is a legal conclusion and in case there is a misunderstanding between a doctor and a social worker as to whether the mentally ill person is to be admitted or not, the matter should be referred to a judge. The judge is the suitable arbiter even if he may lack medical or social analysis. The reason is that sometimes there are, as is often the case, conflicting psychiatric testimonies regarding the defendant's mental state at the time of the offence. A psychiatrist for the prosecution may testify that the mental faculties of the accused were not impaired when he committed his crime, when another psychiatrist for the defence may attest that he was insane. And the "lay" judge has to find his way through a maze of conflicting psychiatric opinions, Therefore, in case a misunderstanding

arises there should be no debates because as such debates continue the patient continues to suffer for the court process is delayed and hence justice is denied to the offender. Furthermore, a doctor and a social worker are mere witnesses in a court process and so they should not be seen to operate as finalities in themselves.

Nonetheless, inspite of viewing the process of compulsory hospitalization in wider medical terms, it is important to note that it is too part of a wider trend of the professionalization of welfare of which social workers and probation officers are involved. Professionalization in this context refers specifically to the concept of decision-taking and power in addition to the other sociological features of professionalization such as status, recognition and so on.

Linking the concepts of professionalization to therapeutic legal rules it is possible to assert that these types of rules are created for, and created by professional groups in order that they can demonstrate their expertise. Where legal rules restrict professional decision-making then they would be resisted because the professional groups would not be able to regard themselves, or be regarded as occupying a professional role. To put the argument in a different way, once an occupational group claims to be involved in a professional enterprise then that group will claim to be the sole arbiter for all matters concerned in the group's province. It is noteworthy that the transfer of power to professional groups such as the medical profession in the case of the Mental Treatment Act, does not mean a democratization or a devolution of power. The patient or recipient of the service still gets what he is given, the difference being that the definitions of the solutions

are determined by medical ideologies. The writer submits that, may be the law should emphasize concerted action rather than placing the lawyer above all.

The Mental Treatment Act is a paradigm for the professionalization of welfare, for it is in the Act that we find the clearest exposition of this concept. Whereas punishment, for example, is linked to rights and deserts, welfare has no such links except those subsumed under the general heading of "helping people". But what constitutes "help" is still a matter for debate at a moral, social and political level and the Act does not pose these questions.

The generally accepted modern view of compulsory hospitalization is that it is essentially a medical issue as stated in the Act.¹³ However, there are two defects in this. In the first place, exclusive reliance upon the psychiatrist arises in part from the assumption that the diagnostic aspect of psychiatry is a branch of medicine. Hence psychiatry is as much an art as it is a science. For instance, when an individual is unable to adjust to society, the psychiatrist is able to formulate a theory of causation which, because of his experience and training, is more sophisticated than that of a layman. In the same sense, the sociologist can usually work out a more reliable theory on the causes of an abhorrent group behaviour than a banker, although possibly the sociologist will run second to the politician. The point being made here is that mental illness is not a fact in the same sense that a broken leg is, it is a "theory" used to explain deviant behaviour.¹⁴

Secondly, the psychiatrist, who is trained both in medicine and in mental illness, is not necessarily the person

most qualified to decide on compulsory hospitalizations. Compulsory hospitalization, it is submitted, depends on social value judgement. Clearly this is not a medical judgement.

Once it is recognized that the medical witness in a compulsory hospitalization proceeding, is acting as one of "society's agents" in determining an essentially sociological question, several conclusions important to judicial administration can be drawn. For instance, if impartial experts are to be used, there seems to be no reason why the panel should be limited to psychiatrists. The social case worker, sociologist, or clinical psychologist knows as much about social values as the doctor of medicine, if not more.

Secondly, in order to emphasize to the participants in the decision-making process that the questions are essentially social, the expert witnesses should be required to testify in terms of social facts and predictions rather than in medical terms. Specifically, the expert should not be asked questions such as "is this man psychotic?" or "is he a proper subject for hospitalization?" The questions should be phrased as follows: What is the probability that this man will behave in such and such manner in the future, specifying the sorts of situations which involve danger to himself or others? What is the possibility that such situations will occur? What is the probability of a successful cure? How long will it take? It is submitted the answers in this two situations will be different - since the professional will not be working from a model alone but also on how he understands the society in which he and the patient live.

The decision of hospitalization may have to be correlated with the decision on guardianship. For instance, who should have the custody of the mentally ill person? Should it be the state or the relatives of the very person? If the state should win the guardianship of the person, then it may decide whether to treat him if the illness is curable or decide to institutionalize him somewhere else.

To conclude, the Mental Treatment Act should be revised to provide for a maximum period of time for which the defendant could be hospitalised in a mental hospital if found to be suffering from a disease of the mind and hence incompetent to stand trial. For example, the statute could provide that at the end of a two year period, the patient would have to be discharged from mental hospital and then be charged or civilly committed. This would set an absolute time limit on the possibility of trial, which should have salutary therapeutic effects, if not during, then certainly after the two year period, since the uncertainty of a trial appears to be a factor which inhibits recovery from the mental affliction. It would also exert pressure on the hospital staff to ready the defendant for trial.¹⁵

FOOTNOTES

1. F. Alexander and H. Staub, The Criminal, The Judge, and The Public (New York: The MacMillan Co., 1931) pp.70-71
2. Gregg Cartage and Storage Co. v. United States of America 316 U.S. 74-80 (1941)
3. A. Goldstein, The Insanity Defence 11 (New Haven: Yale University Press, 1967)
4. Galvan v. Press, 347 U.S. 522, 531 (1954)
5. See generally W. LaFave and A. Scott, Handbook on Criminal Law 271-27 (St. Paul: West Publishing Co., 1972)
6. Cap 248, Laws of Kenya.
7. Section 20, of Cap 248
8. Section 19, Cap 248
9. See note 7.
10. May, Delinquency Control and the Treatment Model: Some implications of Recent legislation (1971) 11 British Journal of Criminology at p. 359.
11. K. Davis, Discretionary Justice (1971, Illinois University Press, Illinois).
12. Report of the Royal Commission on the law relating to Mental Illness and Mental Deficiency 1954-1957 (1957 Cmnd. 169) paragraph 404.

13. See note 8.
14. Szasz, Psychiatry, Ethics and the Criminal law
58 COLUMBIA LAW REVIEW (1958) at pp. 187-92.
15. However, the writer is not advocating for a treatment
to speed restoration to competency if it would have
deleterious effects on final and ultimate recovery.

CHAPTER FOUR

SHOULD THE CRIMINAL JUSTICE SYSTEM PROTECT THE MENTALLY ILL
OFFENDER OR THE SOCIETY?

The most hotly controverted issue in the criminal law, is the question of whether and, if so, to what extent and according to what criteria, individuals whose conduct would otherwise be criminal should be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did. The question of criteria has been the focus of legal debate, with much learned disputation about the merits and demerits of the M'Naughten rule.

In this chapter we shall not deal with these important issues since we have already discussed them in chapter two but only with the prior question: should it be a protection of the society or the mentally ill offender? In other words the question may be framed as: Why an insanity defence? Specifically, must the minimal doctrinal content of the criminal law provide for such an excusing condition?

It is believed that, at the present time it must, ~~and~~ we should disagree with those who assert that the dictates of utility require it. The reason is that, in a purely preventive view of the function of the criminal sanction, the case for an insanity defence is weak indeed. That case rests securely, indeed inescapably, upon limits that are imposed through the dictates of culpability as reflected in the integrated rationale of punishment.

One might argue that such a person poses an inherent

danger, to the society, in that the lack of ability to control behaviour that led to his acquittal might lead to the commission of further prohibited acts. The mental state involved, however, is that of the defendant at the time of the act charged, which may be months or even years in the past at the time of the acquittal. The implications for the future behaviour of defendant, or for his need for further institutional treatment, seem difficult to pin down merely on a basis of a verdict of not guilty by reason of insanity.

Let us begin by considering the consequences of a verdict of not guilty by reason of insanity. Such a verdict does not operate to release the person from custody but instead, either automatically or through procedures customarily invoked, operates to deprive the person of liberty through confinement in an institution called a mental hospital.¹ It is noteworthy that the institution in question is in most respects very like a prison, that the person's confinement there is not marked by a notably therapeutic regime, and that his release is determined in part by a judgement of the seriousness of the conduct for which he was tried and in part by an estimate of his propensity to repeat that or similar conduct.

For some people these consequences of a verdict of not guilty by reason of insanity, demonstrate the absurdity of the insanity defence. Why not abolish it, ask these critics, relieve the criminal process of the need to litigate the issue, and let the disposition of mentally ill offenders be attended to after conviction, without regard to labels.²

We must put up with the bother of the insanity defence because to exclude it is to deprive the criminal law of its chief paradigm of free will. The criminal sanction as pointed earlier, does not rest on an assertion that human conduct is a

matter of free choice. In order to serve purposes far more significant than even the prevention of socially undesirable behaviour, the criminal sanction operates as if human beings have free choice. This contingent and instrumental posit of freedom is what is crucially at stake in the insanity defence. There must be some recognition of the generally held assumption that some people are, by reason of mental illness, significantly impaired in their volitional capacity. The point is that some kind of line must be drawn in the face of our intuition, however wrongheaded it may be, that mental illness contributes to volitional impairment. Hence the criminal justice system should protect the mentally ill person by upholding the defence of insanity.

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How we perceive volitional impairment is a culturally conditioned matter. There is nothing immutable about it; nor is there anything immutable about the law's reaction. For example, we presently regard epilepsy as resulting in so great a loss of consciousness that volitional capacity is utterly destroyed. If a person engages in criminal conduct while in an epileptic fit, we say that he was incapable of performing a voluntary act and we acquit him. Unlike an insanity acquittal, this decision operates to release the person from further custody. It is as if he had not committed the act at all.

At the other extreme, we recognise that cultural deprivation of a kind associated with urban poverty may in a very real sense restrict the individual's capacity to choose and make him more susceptible to engaging in anti-social conduct than the "average" member of society. However, we regard those constraints as too remote to justify an excuse on the ground that the person could not have helped acting as he did.

Perhaps, some day the law will take a culturally differential as well as a physiologically differential view of volitional impairment. The insanity defence is somewhere between these two extremes, which helps to explain why it is so controversial and why we are so ambivalent about recognizing it.

If some kind of mental illness is shown to have a chemical basis, or some other explicit physiological origin, we may abandon the ambivalent reaction of acquittal-cum-detention. This is, of course, mere speculation. The point the writer is making is that our attitudes towards volitional impairment can change, and the criminal law can change with them. However, as matters stand, to impose the moral condemnation of a criminal conviction on a person who is thought to have acted in a state of severe volitional impairment would be to abandon the notion of culpability in its most crucial use.

The insanity defence cannot be viewed as an excuse in the ordinary sense. It would be more understandable to say that its successful invocation is a direction to punish but not to punish criminally. The forced incarceration of a person in a mental institution because he has signaled his dangerousness by committing what would ordinarily be an offence is clearly a form of punishment. However, it is not criminal punishment; for although it is imposed to express community condemnation of the original offence. This, as we have seen, is what distinguishes criminal punishment from other forms, and it is precisely what is lacking in the case of the insanity defence.

It is noteworthy that the insanity defence has nothing to do with mens rea and so is the defence of infancy. The attackers of the insanity defence assert that, like any mens

rea defence, it should lead to total acquittal.³ They say that, to acquit on the ground of insanity is to say that the actor did not have the requisite purpose, knowledge, recklessness or negligence with respect to a material element of the offence charged and, that being so and no offence having been proved against him, he should be unconditionally discharged. Since we are obviously not willing to do that, they say the defence is a sham and should be abolished. Others, equally assert that the insanity defence must be preserved because it is an aspect of mens rea.⁴

The writer submits that, if one makes either assertion, is to confuse the idea of culpability which is implicated in the insanity defence, with technical culpability requirements, which are not.

However, these assertions find refuge in the existence of the peculiar defence of "partial insanity" or "diminished responsibility" particularly in the law of homicide. Here the idea is that mental illness may be adduced to show that the actor lacked the state of mind required for a particular homicidal crime as, for example, unlawful killing with malice aforethought in murder. That would have the effect, if accepted by the court in the particular case, of reducing what would otherwise be murder to manslaughter. The latter is defined as unlawful killing of a person without malice aforethought. It is noteworthy that the defence of diminished responsibility bears no relation to the insanity defence, which is not at all addressed to particular elements of the offence but rather to the actor's general mental condition. The diminished responsibility defence is simply a useful ploy to avoid conviction for an offence whose penalty is a mandatory death sentence.

The criminal law constitutes a description of harms which a society seeks to discourage with the threat of criminal punishment for those who commit those harms. At the same time the criminal law comprises an elaborate body of qualifications to these prohibitions and threats. All these qualifications to liability are expressed in terms of the requirement of mens rea. This is the thought behind the classic maxim, Actus non facit reum, nisi mens sit rea.

In sum, the insanity defence is not implied in intrinsic to the complex of mental element defences that make up most of the laws of culpability. It is an overriding, sui generis defence that is concerned not with what the actor did or believed but with what kind of person he is.

In recent years there has been a resurgence of the controversy produced by serious proposals to eliminate the defence of insanity. The writer now turns to what he refers to as the fundamental objection to these proposals. Essentially it is that, they open to the condemnation of a criminal conviction a class of persons who, on any common sense notion of justice, are beyond blaming and ought not to be punished. A just and humane criminal system has an obligation to make a distinction between those who are eligible for this condemnation and those who are not.

The need of modernity to give a rational base to human actions and institutions is well summarised and still upheld by Nizer Walker in his treatise.⁵ He asserts inter alia, that the criminal justice system should be such as to cause the minimum of suffering whether to offenders or to others by its attempts to achieve its aims. In other words he means that the criminal system should be humane in its approach.

In sentencing, a distinction is to be drawn between mental disorder and the treatment for and future behavioural manifestations of that disorder. As Deane J. stated in the case Channon v. R:

The existence (as distinct from treatment) of a psychosis may be of direct relevance in the determination and imposition of sentence. It may be relevant to the degree of culpability. (However, if)... it involves a propensity to violent or serious crime, it may raise considerations in circumstances, of the protection of the public from the offender which can legitimately result in a heavier sentence being imposed than would be the case of the psychosis with such propensity had not been present.⁶

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The existence of some mental abnormality may, of course, be relevant to the retributive theory justifying punishment and indicia of moral culpability or desert of the offender. It has been said by many courts that the existence of such a disturbance will show a lesser culpability and is therefore a factor which will mitigate the severity of the punishment.⁷ There are also dicta to suggest that the existence of such disturbance will not aggravate the severity of the punishment.⁸ However, from the retributive point of view, mental abnormality appears to operate in only one way, to reduce the severity of punishment below the punishment that is proportionate to the offence of which the offender has been convicted.⁹

On the other hand, if the existence of some mental disturbance is also accompanied by some propensity to future violence, it is of clear relevance to the rehabilitative theory of punishment since the aim is to reform the offender and reformation clearly involves treating and curing the mental disturbance and, presumably, thereby eliminating the future dangerousness.

In conclusion, our criminal justice system must reflect the kind of society there is in Kenya. Since in Kenya, we have a democratic system of government and we are striving to build a democratic society too, our criminal justice system must reflect these by being rational and more humane. Hence it must recognise the difference between the "sick" and the "bad" and thus treat the sick (mentally ill offenders) with calmness, yet with steadiness. Finally, since the purpose of the insanity defence is there to protect the mentally ill offenders against injustices that could befall them if such defence was not there, the insanity defence must stay and even be extended to cover similar situations such as automatism and diminished responsibility.

FOOTNOTES

1. He is institutionalised at the pleasure of the president of Kenya or until he recovers from the situation in which he is
2. See, e.g., J. Goldstein and J. Katz, Abolish the "Insanity Defence" - Why Not?
72 YALE LAW JOURNAL 853 (1963).
3. This proposition is at least hypothetically advanced in Goldstein and Katz, p. 865.
4. Morris, Psychiatry and the Dangerous Criminal (1968)
41 SOUTHERN CALIFORNIA LAW REVIEW 514 at 524-525
5. Niger Walker, Sentencing in a Rational Society (Penguin Press, 1969)
6. (1978) 20 A.L.R. 1 at p.21 (emphasis in original)
7. Channon v. R. (1978) 33 F.L.R. 433 at 436-437;
Smith v. R. (1967) Crim. App. Rep. 376
Moylan v. R. (1969) 3 All ER. 783
Ford v. R. (1969) 53 Crim. App. Rep. 551
8. On the other hand dicta in Taylor v. R (1977) Qd. R. 199, suggest that it is only transient or temporary mental disturbance which will operate to mitigate and, by implication, chronic or long-term disturbance might be said to aggravate.
9. The reason for this is that the mental disturbance is regarded as something beyond control of the offender and something rendering the offender's control of his actions

less than complete. The lack of complete control therefore serves to diminish the moral culpability of the offender, but it would be a surprising position indeed, if something over which the offender has no control would render his conduct more blameworthy and of greater moral culpability.

CONCLUSION AND RECOMMENDATIONS

If an accused is to be in a position to exercise his right to a full and complete defence, he must be able to understand the charge that has been brought against him.¹

The Penal Code mentions a number of measures that a magistrate may order to be put into effect at various stages in the trial if he has any doubt about the mental condition of the accused.²

At any time when such a person is brought before a magistrate, the latter may order that the accused be kept under observation by qualified persons when in his opinion and according to evidence given by a doctor, there is reason to believe that the accused may be mentally ill or that his or her mind may be unbalanced as in cases in which the accused is a female person and is charged with an offence arising out of the death of her newborn child. The magistrate may not order this step to be taken without hearing the testimony of a duly qualified doctor, except when circumstances demand such action and it is impossible to find a doctor who can examine the accused on short notice and give evidence.³

Moreover, the magistrate may order that the psychiatric observation period last longer than twenty-eight days (but not more than fifty-six days) when in his opinion, and according to testimony given by a qualified doctor, an observation period of that length is necessary.⁴

The law also provides that at any time during the trial, but before the verdict is brought in or the sentence imposed, the judge or magistrate before whom the accused is being tried

may, under the same conditions and for the same reasons, remand the accused for observation purposes.⁵

When it appears that the accused is, by reason of insanity, unfit to stand trial, the judge or magistrate as the case may be, may direct that the accused be examined to ascertain whether he is capable of conducting his defence. When the verdict is that the accused is unfit to stand trial he must be kept in custody until the President decides otherwise. When the accused thus detained has recovered and is considered fit to answer to the charge brought against him, the proceedings that were interrupted as a result of the verdict of unfit to stand trial may resume.

During the trial the accused may defend himself by providing that he was unable to understand or control his actions at the time the offence was committed.⁶ If the judge or magistrate, is convinced by the evidence presented by the accused that he was insane at the time the offence was committed, there must be a verdict of acquittal by reason of insanity. If such a verdict is returned, the judge, or magistrate must order the detention of the accused in a specific place⁷ until the president indicates what disposition he intends to make regarding him.

It should be noted that an appeal may be brought against a verdict of unfit to stand trial or a special verdict of insanity.

Because our criminal law recognises insanity at the time of the offence as an exculpatory condition, we have to acknowledge that a judicial error is made everytime an insane offender is convicted or a normal offender is declared "not

guilty by reason of insanity." The potentiality of such error is enhanced and aggravated by the retention of the death penalty.

First, capital punishment increases the frequency of insanity pleas and consequently increases the probabilities and risks of judicial errors. Second, although the potentiality for mistake is always present when the question of material guilt is decided, it is much greater with regard to the issue of moral guilt and the moral elements of the crime. Third, although the potentiality for error is ever present in any system of human justice, it is much more serious when the life of a human being is at stake. Errors of justice not involving the taking of a human life may always be revoked when the mistake is discovered, though the harm done by imprisonment or labelling is usually irreversible. Capital punishment is not only irreversible it is irrevocable as well. The great potential for error regarding the insanity defence can be attributed to at least three factors.

Firstly, the extreme difficulty of reaching an adequate definition of such a complex and relative notion as the concept of insanity.

Secondly, the limitations of psychiatry and the frailty of the psychiatric diagnosis of insanity.

Thirdly, the difficulty of linking the defendant's mental disease or defect, if such has been diagnosed, to his alleged offence.

One of the problems associated with insanity defence is the need to establish that the mental disease or defect existed

at the time of the offence. This time linkage is not an easy task. Many of the so-called functional psychoses are cyclical in nature. They oscillate between acute episodes with more or less detectable symptoms and remission phases characterised by an amelioration or disappearance of the symptoms. When an insanity defence is made, the judge is asked to decide on what the accused was really thinking when he committed the crime, with all the difficulties and uncertainties involved in the attempt to penetrate another man's mind, and to recapture his mental condition as it was in the highly dynamic situation of the crime. This is a process strewn with pitfalls. For instance, Goldstein has noted that:

When the psychiatrist testifies at the trial, he is called upon not only to describe the person he examined but also to estimate the mental condition of that person at the time of crime, which may have been months, perhaps years, before. Inevitably, therefore, he must deal in probabilities.⁸

The unreliability of the psychiatric diagnosis would not be serious were it not for the confidence that is usually placed in the expertise of the psychiatrists. Given the limitations of psychiatry, such confidence can only increase the possibility of judicial errors. Faulty decisions based on inaccurate predictions of dangerousness only result in the deprivation of liberty and are usually subject to periodical review. But in capital cases, an error regarding the insanity defence may mean the difference between life and death.

It is submitted that to avoid judicial errors made when an insanity defence is pleaded is to abolish death penalty.

FOOTNOTES

1. Section 77 subsection 2(b), Kenya Constitution.
2. Section 19 and 20, cap 284, Laws of Kenya.
3. The proviso in section 20, cap 284, Laws of Kenya.
4. Section 21, cap 284, Laws of Kenya.
5. Ibid;
6. Section 12; cap 63, Laws of Kenya.
7. In Kenya the practice is that persons adjudged guilty but insane are usually admitted to Mathare Mental Hospital in Nairobi City for treatment. If his or her mental illness is cured the individual may be released to go home. But if the illness tends to be incurable then he or she is detained there in the hospital at the pleasure of the president.
8. A.S. Goldstein, The insanity defence (New Haven, Yale University Press, 1967) p. 30.

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