Reconceiving the Insanity Defense: Lacuna in Law Enforcement, towards Amending the Kenyan Law on the Defense of Insanity

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Abstract: The insanity defense is a controversial legal doctrine that has been discussed widely not only in Kenya but also in other states like the United States. This defense allows psychologically impaired defendants to avoid conviction because of the belief that such people cannot recognize the very character of their deeds. As Bracton states, "a crime is not committed unless the will to harm (*voluntas nocendi*) be present".[1] The dictates of a fair sense of justice provide that the laws enacted for the protection of society should neither be tarnished with malice nor be ferocious, and it is for that matter that the psychologically impaired people escape punishment for their crimes. It is also important to signal that the same "fair sense of justice does not dictate that people should be allowed to escape the consequences of their wrongful acts". This article examines whether the defense of insanity creates a loophole in law enforcement by enabling other people to overuse it to escape punishment.

Keywords: *Insanity, Defense, Law Enforcement.*

1. Introduction

Debates show that the insanity defense is a reward given to the mentally ill defendants in criminal matters to "stay sick".[2] and by staying sick, they are not punished for committing a criminal offense. Robert remarks, "Christ had the courage and felt a sense of outrage to drive the money changers from the temple. Will we have the fortitude to admonish the lawyers to back off and stop getting killers acquitted, especially by the insanity defense?[3] To respond to Robert's remarks, we must examine the law on the insanity defense and its

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[1] Henry de Bracton, *Of the Laws and Customs of England* (New Haven, CT: Yale University Press 1915)
[2] Ed Gogek & Jim Gogek, 'Why the Public Hates the Insanity Defense' (1995) L.A. Daily Journal
[3] Robert Hall, 'Criminals Taking Advantage of the Christian Love' (1994) Buff News

origin. This then enables us to establish whether the defense is a refuge[4] for guilty defendants or not.

2. Defense of Insanity

Before the nineteenth century, the medieval notions of insanity were that insanity was an apparition from the Creator and that the victims' state was a result of demoniacal influences. Therefore, insanity was only treated as a disease and given no recognition in law.[5] A mental anomaly can be categorized into two; mental perversity[6] which includes the people recognized by the law as lunatics, and other category is mental insufficiency, which the law considers as wazzocks. The difference between these two categories is that the first category involves the absence of anything in the mind of the possessed. In contrast, in the second category, there is the presence of mental disorders in the mind of the insane individual. The idea of preventing the conviction of a person through the defense of insanity came up in A Treatise on the Medical Jurisprudence of Insanity by Isaac Ray,[7] along with the M'Naghten case decision.

In the M'Naghten case[8] - M'Naghten was charged with the murder of the Secretary to Britain's Prime Minister. During his arrest, the defendant informed the police that his main aim was going to London was to kill the Prime Minister as he had been instructed. The Defense Counsel laid witnesses who testified that the defendant suffered from acute insanity and was obsessed with delusion. The Judge instructed the Jury to consider the defendant's lack of understanding when committing the murder in question. In reaching a verdict of not guilty, the Jury stated that the defendant was insane during the commission of the offense. Therefore, the M'Naghten Rule was developed as a test for criminal insanity where a defendant is not considered guilty if, at the time of the commission of the offense, he or she was so deranged that he or she failed to understand the nature of his or her actions.

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[4] Karen Fernau, 'Tough Law Makes Pleading Insanity Harder to Prove; Killers Face Roadblock in Quest for Freedom' (1994) Phoenix Gazette

[5] Homer D. Crotty, 'The History of Insanity as a Defense to Crime in English Law' (1921) 12(2) California Law Review

[6] Rosanoff and du Fursac, *Manual of Psychiatry* (1916)

[7] Background and History of the Insanity Defense (*Find Law*, 5 February 2019) <www.findlaw.com/criminal/criminal-procedure/the-insanity-defense-history-and-background.html> accessed 4th January 2022

[8] *R v McNaughten* (1843) 8 E.R. 718, (1843) 10 Cl. & F.20

The defense of insanity is provided for under Section 12 of the Penal Code which provides that;

> "*a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission*…"[9]

Considering the above provision of law, the courts hold a person guilty but insane when the person is found to have committed an offense while suffering from mental illness. This law treats a mentally ill person as receiving a conviction for a crime they lack responsibility for. Furthermore, the Section provides that

> "*…a person may be criminally responsible for an act or omission, although his mind is affected by a disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.*"[10]

This part indicates that the mentally ill people who commit a criminal offense while knowing very well that their actions are wrong but have unfeigned impotence to control their actions because of the disease cannot rely on the defense of insanity. This law is unfair to these people who cannot control their actions because of suffering from a mental illness.

Additionally, the law should consider the mentally ill people who commit an offense unknowingly as "not guilty" instead of "guilty but insane". Justice as fairness requires that guilty people be punished according to the law; therefore, sparing other guilty defendants promotes unfairness and inequality in justice administration. Inequality promotes arbitrariness unless it is advantageous to everybody[11] but failing to punish other guilty people is not advantageous to everybody. When the courts of law refer to the mentally ill defendants as "guilty but insane" and forgive them on that ground, then the court of law fails to perform their mandates. Forgiving a guilty defendant creates a loophole in law enforcement. As Clarence puts it, "if everything is forgivable, then everything is permissible."[12]

[9] Laws of Kenya, Penal Code cap. 63
[10] Laws of Kenya, Penal Code cap. 63 at 22
[11] John Rawls, 'Justice as Fairness' (1958) 67(2) The Philosophical Review 165
[12] Clarence Gates, 'Sorry Results of Blaming Society Instead of People' (1994) Orlando Sentinel

3. Is the Insanity Defense a Loophole in Law Enforcement?

The concept of mental illness was influential in the late eighteenth and early nineteenth century, but right now, it may prove to be socially harmful. Szasz remarks that "Not only do I believe that mental illness should never be accepted as a release from criminal responsibility, but also it should never be the ground for a refusal to try a person charged with an offense. Everyone accused of breaking the law should be tried".[13]

Someone might say that Szasz is careless about the mentally ill in society, but maybe his view should be considered from a broader perspective. In my view, for example, he does not entirely mean that mentally ill people should be treated equally with the same people, but a better way needs to be established to deal with the mentally ill defendants. Distinguishing between a sick mind and a healthy mind may sometimes prove to be difficult[14] thus, the defense is likely to create a loophole that allows guilty people to escape punishment. After all, the society we live in is so sick that the people who revolt against conforming to society's conventions are the ones who can be said to be candidly sane.

The opinion may sound extreme, but it is worth noting that there has been an advancement in technology both in the legal and medical fields, so saying that a mentally ill person lacks responsibility for their wrong actions may lack support from scientific evidence. Bodenheimer also posits, "to tell people that they have no power over their actions tends to prevent or weaken efforts to build inner controls."[15] We need to stay in the sunlight of scientific truth and shut the doors of the darkness of medieval legalism.

Maybe prisons and jails are the best places to find and compare the relationship between criminality and mental illness. In those places, one can discover psychopathology amongst the criminals awaiting conviction and those who have been convicted. Honestly, the insanity defense does not really exist. The only thing we have is a defense that is pleaded in notable cases like homicide that allows the community and lawyers, in particular, to relish their dive into the debate of morality. One might even ask why the defense is not available to those who commit minor offenses while a large amount of psychopathology

[13] T. Szasz, *Law, Liberty and Psychiatry: An Inquiry Into the Social Uses of Mental Health Practices* (New York: Macmillan 1963)
[14] B. Wootton, *Social Science and Social Pathology* (London: George Allen & Unwin 1959)
[15] E. Bodenheimer E, *Philosophy of Responsibility* (Colorado: Fred B. Rothman 1980)

exists among those defendants. An accused person found "guilty but insane"[16] or not guilty because of insanity is in many cases locked in a prison inside a mental hospital, which is not much different from the prison where they would have been locked up if they had received a conviction.

In my view, this defense is entirely used for a purpose that is far from controlling crime, which is or at least should be the *raison d'etre* of a criminal justice system. Even if we regard this defense from the point of moral posturing and pretend that we acquit the mentally ill defendants, the reality is that they are not free or absolved as it may look. Some of these defendants still receive double stigmatization because society sees them as criminals and lunatics, and even their treatment is based on this postulation. Another essential factor to consider is whether the defense succors the mentally ill defendants. Evidence shows that doctors manipulate the patients' sense of responsibility for their deportment during psychiatric treatments. Most people might ignore this, but it shall remain to be the truth, the mentally ill should remain responsible for their past wrongful and criminal actions if at all they are to live mundane lives.

4. Conclusion

This is an attempt to make it clear that it should not be conjectured that – I discount the situation of the mentally ill in society but that I am only questioning the operation of the insanity defense in the current criminal justice system. The defense was pragmatic when its primary role was to avoid capital punishment for the mentally ill defendants because they could not understand the very character of their deeds when committing an offense. If we put aside capital punishment, we will only be pretending to breathe moral force into a doctrine while in reality, we are not.

The insanity defense is not suitable for our Penal Law, and the paper propose that we should replace it with the Defense of Diminished Responsibility. This legal doctrine absolves a defendant of part of the liability for their unlawful conduct if they suffer from a disease of the mind that impairs their responsibility in committing an offense.[17] The

[16] Laws of Kenya, Penal Code cap. 63
[17] Britannica, The Editors of Encyclopedia. "Diminished Responsibility" <www.britannica.com/topic/diminished-responsibility.> Accessed on 13th January 2022.

doctrine only provides a mitigating defense to a defendant who has a mental disease. In *Atkins v. Virginia*[18], the court stated that;

> "*mentally retarded persons frequently know the difference between right and wrong… Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and to learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others… Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability… With respect to retribution the interest in seeing that the offender gets his "just deserts" the severity of the appropriate punishment necessarily depends on the culpability of the offender*."[19]

It had earlier stated in this paper that scientific research has shown that most mentally illdefendants can understand what is right and wrong. Instead of letting them walk free, this doctrine gives them partial responsibility for their criminal acts through a reduced sentence.

Modern scientific knowledge can ensure that the main objective of the criminal justice system, which this paper had also stated to control crime, is realized. The special defenseof insanity, together with its utility among the psychologically impaired defendants, whichhas been in operation in Kenya for a very long period, is now proving to be superannuated. With Diminished Responsibility, the court saves itself from distinguishing between different degrees of liability of an identical crime because a Judge only treats the defendant's mental illness as a mitigating factor that reduces the penalty.

Dovetailing a defendant's derangement to the requirements of the statutory state of mind has proven to be difficult[20] so the doctrine of Diminished Responsibility provides Criminal Law with a more straightforward way of dealing with the defendants who cannot recognize the nature of their deeds during a commission of an offense. We should change from "Guilty but Insane" to "Guilty but partially Responsible".

[18] 536 U.S. 304 (2002)
[19] Stephen J. Morse, 'Diminished Rationality, Diminished Responsibility' (2003) 1 Ohio State Journal of Criminal Law 289
[20] Peter Arenella, 'The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage' (1977) 77 Columbia Law Review 849