'Lunacy Defence' in Botswana's Criminal Law: Reflections of a Mental Health Practitioner.

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ABSTRACT

This article reflects on the lunacy defence in Botswana from a mental health practitioner's vantage point with the hope of adding to the discourse on the nation's jurisprudence. In particular, the paper asserts that the defence as articulated in the Criminal Procedure and Evidence Act of 1939, Cap. 08:02, Laws of Botswana, employs prejudicial and misleading terminology. The article also argues that the inquiry and evidence to determine fitness to stand trial and criminal responsibility, respectively, lack the detail to avoid being misunderstood. The discussion of the above two points is accompanied by suggestions for reforms.

1. INTRODUCTION

Among many possible indicators of successful self-governance is the establishment of functioning laws that protect and promote the well-being of individuals and society as a whole. Criminal law is an integral aspect of such functioning laws as it codifies offences against society or individuals and also guides the disposition of offending actors. Within criminal law, the lunacy[1] defence has been a controversial topic worldwide, from time immemorial,[2] and Botswana is not exempt. The defence evokes a precarious balance between a society's paternalistic belief that offenders ought to be punished and society's maternalistic inclination to care for those that are mentally ill.[3]

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1 Lunacy is used here as a legal construct written in law. Within psychology and psychiatry, the term is antiquated, and many find it offensive. Continued use of the word by the author is only to conform to its legal construction. The same applies to its variations such as 'lunatic', and to other words like 'idiot' or its variations such as 'idiocy', or 'imbecile'. See the discussion below on terminology employed in the defence.

2 H. D. Crotty, "The History of Insanity as a Defence to Crime in English Criminal Law", 12 *California Law Review*, (1924), pp. 104-123.[hereinafter Crotty]

3 J. Harrison, "Idaho's Abolition of the Insanity Defence- an Ineffective, Costly and Unconstitutional

Recent internationally publicised cases such as *State* v *Breivik* in Norway, and *State* v *Dewani* and *State* v *Pistorious* in South Africa, have brought to the fore the issue of mental illness in criminal proceedings. These cases have aroused public interest and the interest of non-legal professionals in other fields such as psychology and psychiatry. Although the lunacy defence is predicated on the existence of psychopathology, the defence and the determination of which psychopathologies negate responsibility, is a legal issue and not a clinical or scientific issue.[4] However, the non-legal experts in psychopathology are in most jurisdictions part of the proceedings and disposition of offenders when the defence is raised. As party to the process, reflections of mental health practitioners may aid the legal construction, but without commenting definitively on legal matters. Reflections in this paper, similarly, are not intended to be definitive pronouncements on the law, but reflections which legal professionals could do well to take into consideration when evaluating this area of the law in Botswana after 50 years of its existence as an independent state. The paper first describes the history and tenets of the lunacy defence, followed by an exposition of its invocation in Botswana's jurisprudence, and posits some recommendations to be taken note of.

2. LUNACY DEFENCE

2.1 Basic Tenets

The lunacy defence[5] is an affirmative criminal defence which is raised to negate criminal responsibility in cases where the offending actor was mentally ill or defective during the offence.[6] The defence rests on the moral principle of desert and on the permissibility of excuses in criminal law.[7] As Fingarette has put it, the defence relates to situations where 'the individual's mental makeup at the time of the offending act was such that, with respect to criminality of

Eradication.", 51 *Idaho Law Review*, (2015), pp. 575- 605 [hereinafter Harrison]; Legal Information Institute retrieved from https://www.law.cornell.edu/wex/insanity_defence.

4 S. Morse, "Excusing the Crazy: The Insanity Defence Reconsidered", 58 *Southern California Law Review*, (1985), pp. 777-836. [hereinafter Morse].

5 An equivalent term is the 'insanity defence' as particularly used in the United States of America.

6 B. Weiner, "Not Guilty by Reason of Insanity: A Sane Approach", *Chicago-Kent Law Review,* (1980), pp. 1057- 1085. [hereinafter Weiner].

7 M. Hathaway, "The Moral Significance of the Insanity Defence", 73 *The Journal of Criminal Law,* (2009), pp. 310-317. [hereinafter Hathaway].

his conduct, he substantially lacked capacity to act rationally'.[8] It has been argued that the defence rests on the lack of rational thought and the presence of compulsion[9]. Thus, the mental illness or defect negating criminal responsibility has to substantially impair the rational thought process[10]and also impair self-restraint and control.[11] These two elements can be viewed as the cognitive and volitional prongs of the defence, respectively.

A related concept to the defence is *mens rea*. *Mens rea* refers to 'a guilty mind; a guilty or wrongful purpose; a criminal intent; guilty knowledge and wilfulness'.[12] Legal practitioners[13] and mental health practitioners[14] sometimes address impaired criminal responsibility and *mens rea* as if one rests on the other. However, some have warned against the contamination of matters by assuming that impaired criminal responsibility in the lunacy defence negates *mens rea.*[15] As understood by the author, the lunacy defence, like other affirmative defences, requires an admission that one committed an offence otherwise deemed criminal but offering lunacy as an excuse. Should lunacy negate *mens rea,*[16] the issue would be that the prosecution has not proved a prima facie case by establishing

8 H. Fingarette, "The Meaning of Criminal Insanity", *University of California Press: Berkeley, CA (1972)*. As cited in Hathaway.

9 Morse, p.782.

10 The presence of delusions is an example. Morse makes the point that rational thought is the better leg because compulsion is difficult to 'measure' and seemingly arises from impaired rational thought. However, current scientific understanding of disinhibition (common in major neurocognitive disorder due to traumatic brain injury) indicates that someone can have rational thought process but be unable to control his or her actions.

11 There are numerous mental disorders that can impair control and will. The obvious ones being aptly labelled Impulse-control disorders and Substance Use Disorders. However, legally speaking, these are not viewed as substantially impairing. One wonders if command hallucinations would be admitted as sufficient. Likely candidates to be admitted as sufficient would be automatisms- for example epileptic seizures.

12 Black's Law Dictionary. *Definition of Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 5th ed., St Paul Minnesota, USA, West Publishing Co. (1979).

13 See Weiner, p. 1057, who says: "…this defence can be raised whenever intent is an element of the crime. By pleading the insanity defence, the defendant is admitting that he has committed the act that he is accused of, but is stating that because of his 'insanity' he could not form the requisite mental state, the intent which is a crucial element of crime".

14 See S. Feuerstein, F. Fortunati, C.A. Morgan, V. Coric, H. Temporini, & S. Southwick. "The Insanity Defence", *Psychiatry* (2005), pp.24-25 at p. 24 where it is contended that "The insanity defence derives from the idea that certain mental diseases or defects can interfere with an individual's ability to form *mens rea* as required by the law".

15 See Morse pp. 2801: "as a factual matter, mental disorder, even of the extreme variety, rarely negates the requirements of an act and appropriate mental state. Disordered persons are not automatons. Unlike sleepwalkers or persons acting reflexively who lack the *actus reus* for the crime, disordered persons' acts are willed even if they are the result of crazy reasons and compulsions."

16 This can occur during automatisms and delirium (often seen in the context of a major neurocognitive disorder).

that the elements of a crime (*actus reus* and *mens rea*) are met. To indicate the separateness of the two concepts- criminal responsibility and *mens rea*- some jurisdictions[17] have abolished the lunacy defence and have adopted a *mens rea* approach where mental illness can be used to put in doubt the element of a crime. For example, in the United States of America, the Idaho Code 18-207 states that:

> "(1) Mental condition shall not be a defence to any charge of criminal conduct. …
>
> (3) Nothing herein is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offence, subject to the rules of evidence".[18]

The constitutionality of the abolishment has been questioned with some arguing that due process is denied.[19] However, such appeals on the constitutionality of the abolishment have not succeed in the jurisdictions which have abolished them. In Idaho's *State* v *Searcy*, Bakes CJ follows the position of Hawswell CJ[20] who judged that abolition of the insanity defence "neither deprives a defendant of his Fourteenth Amendment right to due process nor violates the Eighth Amendment proscribed against cruel and unusual punishment. There is no independent constitutional right to plead insanity". American states that have abolished the defence maintain that mental illness can still be used in proceedings as long as it is limited to the demonstration of lacking criminal intent.

These recent controversies regarding the lunacy defence betray the long history of the defence, which is now briefly discussed.

2.2 Brief History

The differential treatment of mentally ill offenders can be found as early as the 3rd century in Jewish Law, under which the mentally ill were exempt from legal responsibility.[21] In its earliest days, English law, which Botswana draws from, also exempted the mentally ill from punishment and provided for their

17 Four states of the USA: Utah, Idaho, Montana, and Kansas.

18 Idaho Code 18-207 pp.737.

19 *State* v *Searcy* 798 P.ed 914, 118 Idaho 632 (1990).

20 In *State* v *Korell* 690 P.2d992 no.83-410 (1984).

21 Y. Fraenkel, R. Durst, & Y. Ginath. "The Criminal Liability of the Mental Patient in Jewish law (Halacha)", 12 *Medicine and Law*, (1993), pp.283-286.

differential disposition.[22] Even into the 16th Century AD[23], a maternalistic approach was held in English law with an inclination to protect and care for mentally ill offenders instead of punishing them as other offenders.[24] Within this rich past, three notable English cases are worth individual mention: the *Arnold* case[25] (1724), *Hadfield* case[26] (1800) and the *M'Naughten* case[27] (1843). These cases are turning points and made an impact on the formulation of the lunacy defence and its tests.

Edward Arnold shot and wounded one Lord Onslow. Arnold claimed that Lord Onslow had sent imps to his home which danced all night and denied him rest.[28] The *Arnold case* led to the formulation of the Wild Beast test wherein Justice Tracy required the jury to evaluate Arnold's matter with the following standard to meet exemption from responsibility:

> "… it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute or a wild beast, such a one is never the object of punishment."[29]

No expert witness was called upon to comment on Arnold's mental state.[30] Arnold was found guilty and sentenced to execution albeit Lord Onslow intervened to have a lesser sentence of 30 years imprisonment imposed.[31]

James Hadfield's case is one of the earliest illustrations of immediate disposition of those found not guilty by reason of insanity without a separate trial

22 Crotty, p.110.

23 See Matthew Hale's *Pleas of the Crown*. (Sir Mathew Hale, *History of the Pleas of the Crown*, London, (1736), (posthumous). Sir Hale demonstrates appreciation beyond his time. He described classes of mentally ill persons, delineated those who could be exempt from responsibility, and recommended appropriate disposition, for example, acquittal.

24 Thus the maxim "*furiosus furore solum punitur*" - madness alone punishes the madman. See A. Dillard, "Madness Alone Punishes the Madman: the Search for Moral Dignity in the Court's Competency Doctrine as Applied in Capital Cases", 79 *Tennessee Law Review* (2012), pp. 461-514.

25 *Rex* v *Arnold* 1724 16Howell State Trials 695.

26 *Rex* v *Hadfield* 1800 27 Howell State Trials 1281.

27 *Queen* v *M'Naughten* 1843 State Trials Eng. Re718.

28 This description, and witness testimony of Arnold speaking to himself, and speaking tangentially with others fits what is understood to be persecutory delusion and formal thought disorder, respectively. Given the bizarreness of his beliefs, his symptoms could be classified as 'paranoid schizophrenia' using the Diagnostic and Statistical Manual of Mental Disorder (DSM) Fourth edition Text-revised or just plainly Schizophrenia as is revised in the DSM Fifth edition (DSM-5).

29 *Rex* v *Arnold* 16 How St Tr. 695.

30 C. Moriarty, "Introduction", in C. Moriarty (Ed), *The Role of Mental Illness in Criminal Law*, New York, Routledge, (2001), pp. IX- XVII.

31 *Ibid.*

for civil commitment.[32] Hadfield had sustained severe, multiple head injuries during war which led to his discharge from the army on grounds of insanity.[33] He believed that he had to sacrifice himself like Jesus did, and thus needed someone to take his life.[34] To achieve this goal, he attempted to assassinate King George III, a crime of high treason, punishable by execution. Medical experts were called during the case and they found Hadfield insane. The court acquitted[35] him due to insanity and as per the Criminal Lunatics Act of 1800, he was committed at his Majesty's pleasure. Hadfield's case speaks to the origins of a special verdict allowing courts to automatically commit those found not guilty by reason of insanity. The special verdict codified in UK's Criminal Lunatics Act of 1800[36] arising from the Hadfield case has been adopted in Botswana.[37] Furthermore, the UK's subsequent 1883 Trial of Lunatics Act,[38] which led to a verdict of "guilty but insane", is also found in Botswana's laws.[39]

The most famous of the three cases is that of Daniel M'Naughten.[40] M'Naughten attempted to assassinate then English Prime Minister Edward Peel but mistook Edward Drummond, Peel's assistance, for Peel. M'Naughten believed that Peel was conspiring against him and thus needed to kill Peel to protect himself.[41] He was acquitted to much public outcry. The case led parliament and the Queen to pose five questions to the House of Lords, in their judicial capacity, answers to which we now know as the M'Naughten Rules. Lord Tindal CJ responded:

32 This came in the form of the Criminal Lunatics Act of 1800 which led to the automatic confinement at his Majesty's pleasure. A special verdict was born. R. Moran, "The Origin of Insanity as a special verdict: the trial for treason of James Hadfield", 19 *Law & Society*, (1985), pp. 487-589.

33 Crotty, *op. cit*., p.116.

34 Based on these descriptions and the onset of such beliefs by Hadfield, this fits our understanding of a Major Neurocognitive Disorder due to traumatic brain injury, severe, with psychotic features.

35 There have been criticisms of the judgment. Critics argue that Hadfield had malice aforethought and appreciated the wrongfulness of the act.

36 Statute 39 & 40 George III c 94 (famously known as Criminal Lunatics Act) cited in Crotty.

37 See Criminal Procedure and Evidence Act, Cap. 08:02, Laws of Botswana, Section 160.

38 White: The verdict of "guilty but insane" arose from pressure by the Royal house whose members were targets of crimes attempted or committed by the mentally ill. The usage of the word "guilty" sought then to be a deterrent and an emphasis that all should be held responsible for their acts. However, this Act was amended by the Criminal Procedure (Insanity) Act of 1964 to read "not guilty by reason of insanity".

39 See Section 160 CP&EA.

40 Controversy surrounds the correct spelling of M'Naughten. The spelling used here follows the most common spelling. See D. Giorgi-Guarnieri, J. Janofsky, E. Keram, S. Lawsky, P. Merideth, D.Mossman, D. Schwartz-Watts, C. Scott, J. Thompson Jr, & H. Zonan; "American Academy of Psychiatry and the Law. AAPL practice guideline for forensic evaluation of defendants raising the insanity defence", 30 *J Am Acad Psychiatry Law* (2002*)* S3–S40.

41 Weiner, pp.1059.

> "…every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction: and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

M'Naughten's case set a test adopted and applied in the Commonwealth nations,[42] including Botswana.[43] The test is primarily a cognitive test.[44] It requires knowing the nature and quality of acts, and knowing wrong from right. There have not been significant adaptations to these rules, save for the American Law Institute's Model Penal Code of 1955,[45] which uses "appreciate" rather than "know". By using "appreciate", the cognitive prong of the test broadens and allows for more people to make the lunacy defence.[46] However, as will be shown below, Botswana's law has maintained the word "know" as is used in the M'Naughten rules.

3 LUNACY DEFENCE IN BOTSWANA

3.1 Relevant Legislation

The Penal Code (1964) and the Criminal Procedure and Evidence Act (1939) frame and guide the lunacy defence in Botswana. Both statutes were enacted before independence in 1966. There have been no amendments to both statutes insofar as the lunacy defence is concerned. Section 10 of the Penal Code makes a

42 S. Yeo. "The Insanity Defence in the Criminal laws of the Commonwealth of Nations", *Singapore Journal of Legal studies*. (2008), pp 241-263.

43 See *State* v *Mathabathe*1970 BLR 214(HC) for explicit mention of the rules and adherence to them.

44 There is a volitional prong to the insanity defence in some jurisdictions. This volitional prong is not without critics, see Morse at pp. 784-785.

45 Section 4.01 states: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law".

46 D. Giorgi-Guarnieri, J. Janofsky, E. Keram, S. Lawsky, P. Merideth, D.Mossman, D. Schwartz-Watts, C. Scott, J. Thompson Jr, & H. Zonan; "American Academy of Psychiatry and the Law. AAPL practice guideline for forensic evaluation of defendants raising the insanity defence", 30 *J Am Acad Psychiatry Law* (2002*)* S3–S40.

presumption of sanity of all unless proved otherwise;[47] and Section 11 addresses criminal responsibility in the following manner:

> "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; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects mentioned above in reference to that act or omission."[48]

This determination of criminal responsibility is a cognitive test requiring "understanding" and "knowing" the act and that one should not be doing it. The first part of the formulation is in accord with the M'Naughten rules.[49] The second part of the formulation makes a distinction between an offender who also happens to be mentally ill, and an offender who commits an offence as a result of the illness. The former is culpable. This has semblance to the Durham rule or product rule[50] in American law but has a distinct difference. The Durham rule negates responsibility if the act was the product of mental illness or defect, however, Section 11 of the Penal Code negates responsibility if the mental illness or defect produced a particular effect- for example, deprivation of understanding and knowing- which results in an act.[51]

Whereas the Penal Code provides a formulation of criminal

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

48 The formulation is a cognitive test. A volitional test is not included in the formulation. The cognitive formulation is sustained in the CP&EA Sec 159.

49 M'Naughten rules: "the nature and quality of the act he was doing…he did not know he was doing what was wrong".

50 *Durham* v *United States* 214 F.2d 874-75 : "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect".

51 An example may elucidate: consider person A experiencing a delirium which is marked by an acute disruption in consciousness and disorganized behaviour, sometimes violent (American Psychiatric Association. Diagnostic and Statistical Manual of Mental Disorders, Fifth edition, 2013). During the delirium, person A swings punches at those trying to restrain him. Should a punch hit another person then it can be said that the delirium produced the behaviour which is an offence (assault). This is likely to satisfy the Durham rule (and also the M'Naughten rule). Now, consider person B who was born with severe intellectual disability which is marked by impaired reasoning. Individual B is part of a significant number of those with intellectual disability who purposefully sets fires and enjoys the experiencing of seeing the fire (pyromania). B sets alight a building (malicious damage to property). In B's case, we can say that his mental defect did not produce the unlawful act but the defect has the effect of depriving him of understanding the wrongfulness of his acts. Person B would pass on Section 11 but would have a questionable verdict using the Durham rule.

responsibility, Sections 157 – 185 of the Criminal Procedure and Evidence Act[52] (CP&EA) provides the procedure to be taken in cases of the insanity of an accused.

3.2 EVALUATION OF LEGISLATION

3.2.1 Misleading and Prejudicial Terminology- "Guilty…but was Insane" Verdict and "Criminal Lunatic"

Section 160 of the CP&EA refers to the success of a lunacy defence at trial and the subsequent verdict. The section states that in cases where an accused person is "insane so as not to be responsible" for the charged offences, then "the court shall return a special finding to the effect that the accused was *guilty* of the act or omission charged, but was insane as aforesaid when he did the act or made the omission."[53] Subsection (2) of Section 160 goes on to say that "… the court returning such finding shall meantime order the accused to be kept in custody as a *criminal lunatic* in such a place and in such a manner as it shall direct."[54]

It has earlier been suggested that this special verdict draws from English law, the Trial of Lunatics Act, 1883.[55] Prior to this Act, "guilty" was not part of the lexicon for those whose lunacy defence succeeded. However, this Act was amended by the Criminal Procedure (Insanity) Act of 1964 to read: "The special verdict required by section 2 of the Trial of Lunatics Act 1883 (hereinafter referred to as a 'special verdict') shall be that the accused is *not guilty* by reason of insanity…"[56]

From the author's position, the "guilty… but insane" verdict maintained in the CP&EA is paradoxical and misleading. The paradox lies in the fact that the word "guilty" is used to describe someone who is not criminally responsible ergo on whom blame cannot be imposed. This issue has been raised in criminal cases in Botswana because the verdict connotes a criminal conviction. In, *Mhlanga* v *State*[57] McNally AJP (as he was then) found it "perhaps unfortunate that the word 'guilty' is used in section 160." Defence counsel in the matter

52 Specifically Sections 157-185.
53 Emphasis added.
54 Emphasis added.
55 See note 38 above.
56 Emphasis added.
57 2010 1 BLR 33 (CA).

believed a clearer verdict was "not criminally responsible on account of mental disorder".[58] This proposed phrasing is used in Canada.[59] McNally AJP addressed the verdict and its relation to implied conviction as follows:

> "… it must be noted that the section speaks of 'guilty of the act or omission charged'. It does not say he is guilty of the offence charged. So the finding of 'guilty' does not amount to a conviction. It would probably have been clearer if the drafters of the Act had used the phrase used in some other jurisdictions - 'not guilty by reason of insanity'. 'Guilty but insane' does sound like a conviction, but, read carefully, the section is clear enough. It is not a conviction."[60]

In this remark, McNally AJP implicitly suggests that there is no discord between section 160 of the CP&EA and section 11 of Penal Code. It is however contended, with all due respect, that there is discord between the two provisions. Section 160 of the CP&EA finds accused persons "guilty of the act or omission charged…", yet section 11 of the Penal Code states that "a person is not criminally responsible for an act or omission …" Section 11 essentially absolves blame, but section 160 apportions blame by using the word "guilty". It is appreciated that the spirit of section 160 may not be to impose blame, but the wording of the finding tacitly, yet fortunately, without legal consequence,[61] imposes blame. A layman's understanding is that "guilty" means "culpable of or responsible for a specified wrongdoing".[62] One is, however, in agreement with both McNally AJP and counsel on the need for a differently worded finding. One could borrow a simplistic finding from South Africa's Criminal Procedure Act 51 of 1977. Section 78 (6) of this Act states:

> "If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act-
>
> *(a)* The court shall find the accused not guilty…"

Another paradox in the use of the word "guilty" in section 160 relates to section 150 of the CP&EA on pleas.[63] In *State* v *Mogampana*[64]the court held

58 *Ibid*.
59 See Criminal Code Section 672.34.
60 Note 57, above.
61 A point is made in sections below that there is a non-legal consequence.
62 See definition at: http://www.oxforddictionaries.com/definition/english/guilty?q=guilty accessed on 30 May 2016.
63 "Guilty but insane" is not one of the seven pleas available to accused persons.
64 1990 BLR 534 (HC).

that persons advancing a lunacy defence ought to plead not guilty. The accused successfully raised the lunacy defence, and a special verdict of "guilty but insane" was handed down.[65] This gives rise to a paradox: the accused pleaded not guilty and succeed, yet he was still described as "guilty". It is submitted that a more intuitive and easy to understand verdict would be "not guilty".

Another related paradox would be use of the term "criminal lunatic". Others have found the phrase to be an oxymoron.[66] A criminal is "one who has been legally convicted of a crime; one adjudged guilty of crime."[67] A mentally ill person who has been found not responsible should not be labelled as a criminal. It is also to be noted and appreciated that the position in law is different when other affirmative defences are raised. The successful advancement of self-defence, for example, leads to an acquittal, and no subsequent label is used attaching the offender to the offence committed.[68]

These paradoxes in the law, call into question the purpose of the lunacy defence and its terms, "guilty" and "criminal lunatic". It has been noted that the purpose and objective of the defence has not been clearly expressed in law.[69] Although sentiments frequently expressed suggest that the objective is to protect mentally ill offenders,[70] this has been questioned.[71] In fact, in other jurisdictions like Canada, protection of society is "paramount" when disposing those found "not criminally responsible on account of mental disorder".[72] In the case of Botswana, how do labels of "guilty" and "criminal lunatic" reflect protection of mentally ill and non-responsible agents? It is contended that the labels do not reflect a desire to protect. They suggest fear and anger towards mentally ill and non-responsible offenders. These terms may seemingly then justify the indeterminate period of restraint of "criminal lunatics". Consequently, it has been observed that "the insanity defence is not designed, as is the defence of self-defence, to define an exception to criminal liability, but rather to define for

65 *Ibid*

66 A. I. Gilani, U.I. Gilani, P.M. Kasi, & M.M. Khan. "Psychiatric Health Laws in Pakistan: From Lunacy to Mental Health", (2005*) PLoS Medicine* 2 (11): e317. [(hereinafter Gilani].

67 Black's Law Dictionary. *Definition of Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 5th ed., St Paul Minnesota, USA, West Publishing Co. (1979), pp. 336.

68 It would be facetious to have a status of "criminal self-defender" or "self-defending criminal".

69 J. Goldstein & J. Katz, "Abolish the 'insanity defense'- Why not?" *The Yale Law Journal*, (1963) Vol 72: pp. 853 – 876, at p.859.

70 See, for example, Judge Bazelon's oft cited words in *Durham* v. *United State* (D.C Cir 1954): "Our collective conscience does not allow punishment where it cannot impose blame".

71 Goldstein & Katz, *ibid*.

72 Criminal Code Section 672.54. However, this Code also considers: "…the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused".

sanction an exception from among those who would be free of liability".[73] And this restraint fits a punitive-correctional disposition. The CP&EA's inclination towards confinement of mentally ill and non-responsible agents gives credence to critical appraisal from Goldstein and Katz who argue that "… the insanity defence is not a defence, it is a device for triggering indeterminate restraint."[74] However, it must be noted the CP&EA does espouse a medical-custodial disposition in the form of rehabilitation by acknowledging the cessation of mental illness and allowing for release upon that cessation.[75] Nevertheless, the CP&EA could further magnify this medical-custodial stance if operative terms are amended, for example, a finding of "not guilty" replacing one of "guilty but insane"[76]; and use of "state patient"[77] in place of "criminal lunatic".

Additionally, a more significant approach would be to allow for different forms of disposition as per case instead of a blanket confinement into a place of safety. Consider how China provides for other dispositions like discharge into community with strict surveillance from family.[78] Canada's criminal code goes further and allows for the following types of disposition:

"(a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely; or

(b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

(c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate."

73 Goldstein & Katz, *op. cit*., p.86.

74 Goldstein and Katz, p.868.

75 Section 169 provides for the annual reports of confined persons, and Section 170 provides for the possible release of confined persons upon cessation of mental illness or defect. The prerogative to release the person rests on the President who according to Section170 (a) can order the continued confinement of the person. Section 170 (a) begs the question: what would be the objective of the continued confinement of a rehabilitated person? Would this not be a case of arbitrary detention which the Universal Declaration of Human Rights opposes?

76 This has been done in English law which Botswana borrows from.

77 This term is borrowed from South Africa's medicolegal parlance, see S. Kaliski, " The Criminal Defendant" in S. Kaliski (ed), *Psycholegal Assessment in South Africa*, Oxford University Press, (2206) pp. 93-112., hereinafter Kaliski.

78 L. Zhao, & G. Ferguson, "Understanding China's Mental Illness Defence", 24 *The Journal of Forensic Psychiatry and Psychology*, (2013), pp. 634-657; and Article 18 of China Criminal Law, 1997, accessed on 30 May 2016 at http://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm.

By rewording and amending the CP&EA to include other forms of disposition, therefore, Botswana could mitigate against psychological consequences of the lunacy defence in its law. These psychological consequences are now considered.

3.2.1.1 Psychological Consequences

The paradoxes in the lunacy defence as described above have clinical implications. At the core is the ability of the terms used in the CP&EA to add an additional layer of stigma.[79] Stigma towards those with mental illness is likely to prevail when terms like "criminal lunatic" and "guilty" are used to describe their condition. In fact, "terminology deeply reflects the mood of those who use it."[80] For example, the Trial of Lunatics Act 1883 in the UK, which brought about the finding of "guilty but insane," reflected fear and anger from society which sought punishment and deterrence rather than rehabilitation and care.[81] Mental illness has been found to elicit among community members perceptions of dangerousness, increased social distancing and reduced pity towards people living with mental illness.[82] Cross-national comparative research has shown that about 40% of people with mental illness experience significant levels of alienation, discrimination and social withdrawal.[83] Reflecting on public perception towards the mentally ill in the UK, psychiatrist John Gunn has said:

> "There seems to be a basic human fear of 'irrational', 'crazy', 'unpredictable' behaviour that is conceived of as malign and often homicidal. Basic terrors about being struck down by a mad axe-man make good newspaper copy, and every crime reporter is on the lookout for a story about an incomprehensible lunatic who strikes randomly and murderously."[84]

The stigma arising from mental illness is thus compounded by the label of "criminal lunatic". If ex- criminal convicts already experience significant

79 Another example of this layered stigma is in the response towards gay/lesbian individuals living with HIV who experience stigma for their sexual orientation and for having a feared virus.

80 Gilani, p. 1107.

81 White, p.45.

82 M.C. Angermeyer & H. Matschinger, "The Stigma of Mental Illness: Effects of Labelling on Public Attitudes towards People with Mental Disorders", 108 *Acta Psychiatr Scand*, (2003), pp.304-309.

83 J.E. Boyd, E.P. Adler, P.G. Otilingam, & T. Peters, "Internalized Stigma of Mental Illness (ISMI) Scale: A Multinational Review", 55 *Comprehensive Psychiatry,* pp. 221-231.

84 J. Gunn, "The Future Directions of Treatment in Forensic Psychiatry", 276 *British Journal of Psychiatry*, (2000), pp.332-338.

levels of stigma,[85] what more when they are labelled as "criminal lunatics"? It is submitted that theirs is a "spoiled identity".[86] Consider the case of Charles Guiteau who assassinated American president James Garfield in 1881.[87] Although expert opinion suggested that there was reason to believe that he may have been mentally ill, Guiteau distanced himself from using the insanity defence, and asserted: "I would rather be hung as a man than acquitted as a fool".[88] Guiteau's sentiments reflected the stigma attached to mental illness. The issue of stigma touches on a fundamental human right- dignity. Dignity can be understood as "the state or quality of being worthy of honour or respect".[89] Terms like "criminal lunatic" do not seem to advance the dignity of mentally ill and non-responsible persons. This also applies to similar or related terms like "idiot", "lunatic" and "imbecile", in reference to which Newman J opined:

> "It seems to me that [section] 148 is yet another example of the Penal Code showing its age, and crying out for revision. In modern parlance, the terms 'idiot' and 'imbecile' carry negative, non-medical meanings, and, in my view, should have long been relegated to the medical and legal archives."[90]

Sadly, the "mad man" is not only punished by his madness but also by society's use of labels that spoil what is left of his dignity.

The graveness of stigma can also be appreciated from its negative effect on treatment adherence and recovery from mental illness.[91] Some studies have found that about 80% of individuals with mental illness do not seek mental health services due to the embarrassment and shame associated with the illness.[92] Furthermore, the stigma and labels attached to the condition may also perpetuate mental illness. The author has experienced cases of maternal

85 K. Moore, J. Stuewig, & J. Tangney. "Jail Inmate's Perceived and Anticipated Stigma: Implications for Post-release Functioning", 15 *Self Identity*, (2013), pp.527-547.

86 The phrase "spoiled identity" is from E. Goffman, *Stigma: Notes of the management of spoiled identity*. Prentice Hall, Michigan, (1963).

87 A.J. Frances, "Are Religious and Political Extremists Crazy?" *Psychology Today,* (2014) Article accessed on 30 May, 2016 at: (https://www.psychologytoday.com/blog/saving-normal/201410/are-religious-and-political-extremists-crazy.

88 *Ibid*.

89 See definition at http://www.oxforddictionaries.com/definition/english/dignity accessed on 30 May 2016.

90 *Gaabatholwe* v *State* 2011 (2) BLR 1103 at p.1107 (HC).

91 See World Health Organisation, "Stigma and Discrimination", at: http://www.euro.who.int/en/health-topics/noncommunicable-diseases/mental-health/priority-areas/stigma-and-discrimination accessed on 30 May 2016.

92 P.S. Wang, M. Lane, M. Olfson, H.A. Pincus, K.B. Wells, & R.C. Kessler, "Twelve-month use of mental health services in the United States: Results from the National Comorbidity Survey Replication", 62 *Archives of General Psychiatry,* (2005), pp.629 -640.

infanticide following postpartum mental illness which provide support for the link between labels of guilt and increased distress which perpetuates mental illness. However, no scientific study was identified by the author investigating such a link. Conducting such research would aid and give clarity about the effects of labels of guilty and criminal on the psychological functioning of mentally ill and non-responsible agents. Such research would hopefully influence public policy and reform.

3.2.2 Inquiry Procedures

Mental illness and defect can put into doubt criminal responsibility and competence to stand trial.[93] Thus, procedures are put in place for an inquiry into the criminal responsibility of accused persons and/ or their competence to stand trial. An inquiry into criminal responsibility is a retrospective investigation of the mental state of an accused person at the time the offence was committed.[94] A competency inquiry investigates the current mental state of an accused with reference to whether the accused is fit to understand court proceedings and to formulate a logical defence.

Under Botswana's CP&EA, criminal responsibility is addressed through the tendering of evidence during trial.[95] It is notable that the CP&EA does not explicitly describe who should provide the evidence or indicate its nature. Given the implications of criminal responsibility on a case, specific statutory requirements and guidelines on the nature of evidence to negate criminal responsibility would appear to be important. Such guidelines could be used to ensure the robustness of determinations of the lunacy defence. Based on a review of adjudicated cases, the courts would generally appear to appreciate that expert evidence is required to fulfil Section 160. Perhaps Botswana could copy from laws of other countries that are more specific on this point. For example, in the United Kingdom, from 1991, written or oral evidence of two or more medical practitioners is required in reaching a decision on the lunacy defence.[96] South Africa also has detailed provisions on the conduct of an

93 Kaliski, p. 93.
94 *Ibid*.
95 Section 160.
96 Criminal Procedure (Insanity and Fitness to Plead) 1991 Chapter 25. This Act amended the Criminal Procedure (Insanity) Act of 1964 which did not prescribe the nature of evidence required for a determination on the lunacy defence.

inquiry on the criminal responsibility of accused persons. Section 79 of South Africa's Criminal Procedure Act, 51 of 1977 provides:

> "(1) Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on-
>
> (a) Where the accused is charged with an offence other than one referred to in paragraph (b), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court; or
>
> (b) Where the accused is charged with murder or culpable homicide or rape or compelled rape as provide for in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in public interest, or where the court in any particular case so directs:
>
> (i) By the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court;
>
> (ii) By a psychiatrist appointed by the court and who is not in the full time service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions;
>
> (iii)By a psychiatrist appointed for the accused by the court; and
>
> (iv)By a clinical psychologist where the court so directs."

Section 79 also prescribes a time period within which the inquiry must be conducted a report furnished.[97] Furthermore, the report of the panel inquiry which is admitted as evidence guides the panel of experts.[98] Botswana could learn from and copy or adapt the South African process.

The procedure for inquiring into the competence of an accused person to stand trial, described in section 158 of the CP&EA also lacks sufficient detail. Section 158 (1) reads:

> "When in the course of a trial or preparatory examination the judicial officer has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, he shall inquire into the fact of such

97 Section 79 (2)(a).
98 Section 79 (4).

unsoundness."

The nature and form of such an inquiry is not described. It is thus not surprising that the provision has been interpreted and applied differently in some cases. Two cases illustrate the point. The inquiry in one case relied on an expert witness, while in another case only the judicial officer's impressions were relied upon.

In *State* v *Mathabathe,*[99] Dendy Young CJ adjudicated on a matter referred from a Magistrate Court in terms of section 166 B (4) of what at the time was the Bechuanaland Criminal Procedure and Evidence Proclamation. The section was in the material part identical to section 158 of the contemporary CP&EA. It read:

> "(1) When in the course of a trial or preparatory examination the judicial officer has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, he shall enquire into the fact of such unsoundness.
>
> (2) If the judicial officer is of opinion that the accused is of unsound mind, and consequently incapable of making defence, he shall postpone further proceedings in the case.
>
> (3) If the case is one in which bail may be granted, the judicial officer may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person and for his appearance before the judicial officer or such other officer as the judicial offer may appoint in that behalf.
>
> (4) If the case is one in which bail may not be granted or if sufficient security is not given, the judicial officer may remand the accused in custody and shall report, in the case of a subordinate court, to the High Court, which shall report to the President, and, in the case of the High Court, to the President direct, who, in either case; may order the accused to be confined during his pleasure in a place of safe custody."

The Magistrate Court in the case referred the accused to the High Court based on a psychiatric assessment that the accused was not competent to stand trial. The referral was in terms of subsection 5 which required lower courts to refer such matters to the High Court for further perusal. The psychiatric opinion was tendered during a preparatory examination in the absence of the accused.

99 1968-1970- BLR 214 (HC).

One can presume that the magistrate regarded the psychiatric assessment as an adequate inquiry required under section 166 B (4). However, Dendy Young CJ disagreed:[100]

> "… Only when the judicial officer has tried the issue and is satisfied that the accused is incapable of making his defence by reason of unsoundness of mind can he prevent the trial from proceeding. To satisfy himself on this issue involves a trial of the issue. …The judicial officer's own observation are important and should be noted on the record; and he will usually consider it desirable to have the assistance of expert medical opinion.
>
> … The ultimate inference whether or not the accused is capable of making defence is for the judicial officer, not for the psychiatrist."

Thus, according to Dendy Young CJ, a competence inquiry requires a trial of the issues in which the judicial officer considers opinions of experts and also makes his or her own determination as to soundness of the mind of the accused. An expert witness is there to assist the court in its determination, but not to order the course of action to be taken. A judicial officer would be within his or her purview to decide contrary to the expert witness, hopefully with reason.

The more recent case of *Sete* v *Director of Public Prosecution (DPP),*[101] also illustrates misunderstanding of the competence inquiry. The case was brought by a self-acting applicant who applied for a discharge from custody, claiming that he had not been tried within six months by the High Court after he was committed for trial. Sete's original matter had been referred to the High Court by a Magistrate Court pursuant to Section 158 (5) of the CP&EA. The court referred the matter during mention on grounds that the applicant "may be of unsound mind and consequently incapable of making his defence". The Magistrate's opinion was informed by his or her own impressions of the then accused during mention. Ruling on the matter at the High Court, Motswagole J found that no inquiry was conducted because no evidence was led *viva voce* or in documentary form to arrive at the finding of unsound mind. Motswagole J held: [102]

> "… Insanity or sickness of the mind has different levels and there may

100 Ibid, pp. 215 - 216
101 2010 3 BLR 234 (HC).
102 *Ibid* pp 238 -239.

> be intermittent period of sanity. As judicial officers, we are not equipped to fully appreciate, on our own, the complexities of such issues and we therefore need to be assisted by experts for us to make an informed decision. Whilst the judicial function of adjudication is for the judicial officer alone, and a judge may even overrule an expert, a judicial officer can only make a determination after hearing and evaluating evidence."

Motswagole J candidly admits that judicial officers may have limited knowledge of such matters and may have to rely on expert witnesses.

These cases suggest that it would be worthwhile for Botswana to consider revising the CP&EA to provide for clearer procedures for conducting such inquiries. As in many other areas of the law, Botswana could pick and learn from South Africa's Criminal Procedure Act 51 of 1977 on how a competence inquiry should be conducted, and at what stage in the proceedings. Cases of courts misunderstanding the nature of a competence inquiry would be reduced, and there would be an additional benefit for mental health practitioners, who would be better informed as to what is expected from them.

4. CONCLUSIONS

This article puts forth some reflections of a mental health practitioner on the invocation and application of the lunacy defence in criminal proceedings in Botswana. The lunacy defence creates an interface between law and mental health professions like psychology and psychiatry. Continuous discourse between the professions can foster improved formulations of the law. Calls have already been made by some within the legal fraternity for amendments to some sections of the CP&EA and Penal Code. This article buttresses the need for such amendments, particularly to align the CP&EA and Penal Code with current scientific knowledge, nosology and lexicon. This article has pointed out that the UK, from which Botswana's law was derived, has reformulated its law on the lunacy defence. Basic wording changes in the law can be a start. The change in wording can also symbolise a different attitude towards those with mental illness—an attitude that not only protects society but protects the dignity of those with mental illness. Such an attitude can inspire reformulations about the disposition of mentally ill and non-responsible agents in criminal proceedings. In fact, Botswana could learn from the Canadian formulations of

their "defence of mental disorder" especially with regard to allowing for other forms of disposition rather than confinement. In addition, although not the focus of this paper, the Mental Disorders Act could similarly be evaluated. Celebrating 50 years of independence affords an impetus for considering reform, and it is hoped that the moment will be seized.