

# INSANITY AS A DEFENCE IN CRIMINAL LAW

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I am glad to have this opportunity to speak on the psychiatric aspects because I feel that I have something to say which needs to be said. But let me explain at the very outset that my main object in presenting these comments is to contribute towards restricting the areas of misunderstanding which sometimes arise between the judicature and the psychiatrist.

Problems of forensic psychiatry are the most complex because of the very nature of the field of study. For here we are concerned not with fixed anatomical structures or physiological functions but with all the vagaries of human conduct and behaviour, both normal and abnormal.

This is indeed a very vast subject which cannot be condensed in a brief introduction without creating mental confusion. It is for this reason that I have chosen just one of the most outstanding problems of forensic psychiatry which is the issue of insanity as a defence in criminal law. The legal issues involved in determining responsibility, in convicting and in sentencing have corresponding medical issues in the diagnosis, care and treatment of the abnormal offender and it is in this area that mutual understanding and cooperation between law and medicine present the greatest challenge.

## **Criminal Responsibility**

It is a fundamental doctrine of criminal law that if a man is sane he is responsible for his criminal acts and if insane he is not responsible. In Malta this doctrine is entrenched in Sec. 34 of the Criminal Code which states as follows: 'Every person is exempt from criminal responsibility if at the time of the act or omission complained of such person (a) was in a state of insanity or frenzy.' This is in line with the provisions of the Criminal Code of various European countries. Pasquale Tuozzi in his book 'Corso di Diritto Penale' traces the developmental stages of the concept of culpability and responsibility from the Sardinian Code of 1859 to the present Sec. 46 of the Italian Penal Code. The relevant section (Sec. 94) in the *Codice Sardo* states: 'Non vi è reato se l'imputato trovava in stato di assoluta imbecillità, di pazzia o di morboso furore

quando commise l'azione.' ('There is no criminal offence if the accused was in a state of complete imbecility, insanity or morbid frenzy when he committed the act'). The corresponding section in our criminal code is practically identical with the Sardinian Code except that it did not include imbecility or mental subnormality as it is now known. According to Tuozi this section in the Sardinian Code was thought to be too restrictive in its application. The concept was therefore expanded to embrace a wider category of abnormal mental conditions and to define the terms in law which determine responsibility. The present Sec. 46 of the Italian Penal Code states: 'Non è punibile colui che nel momento in cui ha commesso il fatto era in tale stato di infermità di mente da togliergli la coscienza o la libertà dei propri atti.' (No person is liable to punishment who at the time when he committed the act was in such a state of mental infirmity as to be deprived of consciousness or of freedom of action). The concept of 'Infermità di mente' encompasses a vaster field than the concept of insanity. The Italian code defines the two ingredients for determining criminal responsibility namely intelligence, knowledge and awareness of the act or omission and volition including freedom of choice.

In Malta we have no legal definition of insanity or frenzy but the mental attributes which exempt a criminal offender from punishment are contained in Sec. 35 which deals with intoxication and was amended as recently as 1956 by Act 5 and now reads as follows: 'Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of was incapable of understanding and volition, etc. This makes the legal test of culpability and responsibility in Malta dependent on the same mental attributes applicable to the Italian and other European penal codes.

In England the legal test of insanity is based on the M'Naughten rules which state that in order to be acquitted of criminal responsibility by reason of insanity it must be proved that the accused was suffering from a defect of reason due to disease of the mind such that (a) he did not know the nature and quality of his act (b) that he did not know that he was doing wrong – and the word 'wrong' in England means wrong in law and not morally wrong and, (c) that the disease of the mind resulted in a delusion which if true would have justified the accused doing what he did.

The M'Naughten rules put all the emphasis on reason, knowledge and understanding of the nature of the act and of its illegality.

lity and do not take into account the concept of volition or the impairment of the ability to control conduct. Even the delusion clause depends on reason and understanding. The law accepts the delusion but requires the accused to reason about it as a sane man. As an American Judge put it, the prisoner must not only be mad but must use sufficient reason in his madness so as to tailor his criminal action to fit his delusion. It has been rightly said that nobody is hardly ever mad enough to be within the definition of the law (Baron Bramwell) and most psychiatric offenders evaded conviction because the rules were stretched and interpreted in a charitable way.

In comparatively recent times an attempt to break the rigid distinction between M'Naughten insanity and full responsibility had been made through the introduction of the doctrine of the Irresistible Impulse and that of Diminished Responsibility. In many American states as well as in Scotland the right or wrong test of the M'Naughten rules has been supplemented by the doctrine of the Irresistible Impulse which is based on the assumption that men can make a deliberate choice to act or refrain from acting but that insanity can give rise to impulses which cannot be resisted; but whether an impulse is truly irresistible or has not been resisted cannot be scientifically proved. It is not a distinction that anybody can make about anybody else.

English law does not recognise the irresistible impulse as a defence. The passing of the Homicide Act 1957 however introduced the doctrine of diminished responsibility and Sec. 2 of the act reduces guilt from one of murder to manslaughter if an abnormality of the mind substantially impairs the accused's responsibility for his acts.

### **Legal and medical concepts of mental disorder**

The legal concept of mental disorder is at variance with modern psychological and psychiatric concepts and the attempts to keep notions of culpability in step with the growth of medical knowledge does not seem to have produced the desired result.

In practice there are two fundamental issues in which psychiatry cannot satisfy the demands of legal principles governing culpability and responsibility. One is the concept which views individual characteristics as falling into distinct classes rather than continuous scales, and the other is the concept which views the mind as

composed of separate and distinct functions or faculties rather than a number of interdependent ones.

In psychiatry, as in all biological sciences we learn to think in terms of continuous scales rather than clear cut classes. In all biological variables there is a continuum between two extremes. We do not classify human beings on an either/or basis as tall or short, thin or fat, idiots or geniuses, sane or insane. Just as there is a continuous scale for height and a continuous scale for weight so one finds all shades and gradations from idiocy at one extreme to genius at the other and from the well adjusted to the raving psychotic. Some psychiatrists have in fact today come out with the theory of a continuum of deviation from a normality which shades gradually into psychoneuroses and psychoneurosis shading gradually into psychosis.

The law in its doctrine of criminal responsibility shows little respect for this concept of a continuum of deviation. The traditional legal view works in terms of black or white whereas as one author puts it 'the minds of men are shades of grey.' Indeed one of the most frustrating experiences of many expert witnesses is that court officials demand impossible yes or no answers to their questions and ignore all the uncertainties and all the ambiguities of behaviour which we as psychiatrists have learned to accept in practice.

Today it is well recognised that there is no clear-cut line between the legally sane and the legally insane. Between these two extremes there are many so called twilight conditions which are not serious enough for an accused to be acquitted of criminal responsibility under the present tests nor to require that he be indeterminately confined to a mental hospital, but which at the same time render him incapable of sound and calm judgement. All of us who have acted under conditions of emotional stress know how foolish our actions appeared when seen in retrospect. Certain criminal offences are committed under the stress of emotional tension when forces are unleashed which under normal conditions are inhibited or at least damped down. Thanks to Freud even the man in the street now knows that we often act for reasons which we do not understand. Persons with hysterical personalities are particularly prone to these twilight states (when they are apt to go on a fugue, in a state of dissociation) when their behaviour becomes dominated by unconscious forces but cannot in all fairness be said to satisfy the legal tests of insanity even if we were to butcher the facts

to fit the theory.

One other concept in which criminal law and modern psychiatric thinking have drifted apart is that contained in the theory of distinct faculties of the mind functioning independently. This is apparently derived from the theory of phrenology when it was believed that each function of the mind had its own water tight compartment in the brain with its respective bump on the skull. One still hears talk in legal circles of partial delusion or partial insanity or monomania. In psychiatry we do not recognise such conditions. The mind works as a whole and a delusion is a symptom of a disease affecting all aspects of mental life. We cannot divorce cognition from affection and conation as the McNaughten rules would have us do. The idea that part of the mind can be diseased while the rest is completely normal is pure legal fiction. A mental illness interferes with the patient's thought, feeling and conduct, and brings about a breakdown in the harmonious psychological connections and a disorganization of the personality as a whole. Intellect, feeling and striving are constantly interacting between themselves and the environment to produce the behaviour we know and in our assessment of this behaviour we must take stock of all this interaction. A mother, who in the abyss of a melancholic illness kills her new born baby, knows what she is doing and that it is against the law to do so but her thoughts and her judgement are influenced by the outlook of hopelessness and despair which a severe depression brings into her mental life. In fact Sec. 258A of the Maltese Criminal Code changes such a crime from one of wilful homicide to one of infanticide liable to imprisonment for a term not exceeding 20 years. This section conforms to the doctrine of diminished responsibility of many continental countries and accepts a degree of mental disorder which comes between sanity and insanity. The law is apparently recognizing what has been accepted teaching in psychiatry for a long time now. But this recognition is apparently limited in Malta to cases of infanticide only. The doctrine of diminished responsibility has not received general acceptance in the Maltese criminal code notwithstanding that a proposal for the introduction of limited responsibility was twice made in the Council of Government first by Sir Adrian Dingli in 1850 and then by Sir Arthur Mercieca in 1909.

#### **Pleading and court procedure**

From the somewhat academic concepts of insanity at law I would

ow like to pass on to the more practical considerations of the medico-legal procedures involved in criminal trials where the plea of insanity is raised.

In Malta this plea can be raised either by the prosecution or by the defence and in cases where the plea is supported, the Court sends the accused for a period of observation at Mount Carmel Hospital and appoints one or more medical experts, (usually three), to submit a written report on the mental state of the accused during the time of the alleged offence and during the trial. In the case of *Alex vs Giuseppe Cauchi* determined on 24th September, 1942, rules were given by the Court for the guidance of medical experts where the issue of insanity was referred to them. One of the recommendations made by the Court states that 'A regular process verbal of the interrogatory of the patient, when made by the experts, should be kept and filed together with the report.' In an explanatory note on this rule Judge Harding states: 'It would appear that the result of the interrogatory is a very important consideration in guiding the experts to their conclusions. It seems proper that some sort of control be made possible by the keeping of a process verbal and the filing thereof with the report.'

This rule runs counter to ordinary psychiatric practice of history taking and psychiatric examination in which the patient submits information willingly in an atmosphere of trust and confidence in his physician. In examining a Court patient the psychiatrist is concerned solely with arriving at a fair opinion of the accused's state of mind at the time of the alleged crime and at the time of the trial. He is not concerned with determining innocence or guilt. But if his rule were to be strictly applied one would have to warn the accused that anything he says would have to be filed in the report to the Court. This would very likely give rise to an atmosphere of suspicion and mistrust which in the case of a patient with paranoid trends would often end up compelling him to remain mute and unresponsive. In ordinary psychiatric practice one is already handicapped by the problem of establishing rapport with some patients. But how can you communicate meaningfully with someone who sees you as part of the oppressing establishment when you warn him that anything he says may be repeated in Court?

As the psychiatric interview is essential for a psychiatric referee to form a sound opinion of a person's mental condition and as this cannot be had if the patient refuses to talk, it would appear that if this rule is insisted upon it is likely to defeat its own ends. There

are, of course, other considerations emanating from the defendant's constitutional privilege not to be a witness against himself. It seems that the objections to this rule of procedure have not so far been given their due weight.

In accordance with present laws of criminal procedure applicable in Malta as in many other countries, any allegation of insanity shall first be determined by a jury whose members are not bound to accept the findings of the referees. This raises a point of principle of great importance and one which appears to be at variance with the principles of expert evidence applicable to medical or surgical cases. No court of law would accept the testimony of a group of laymen as to whether a person was affected with heart disease, tuberculosis or cancer. Why therefore should there be a different rule regarding mental disorders? Why indeed are laymen with no special knowledge or experience of mental illness ever qualified to express an opinion on the sanity or insanity of another person? How, may one ask, can nine men selected at random be assumed to be capable of conceiving the intricate elements of psychiatric disorder and form an opinion, based on one fact without having examined or observed the patient for any length of time? Insanity, whether in law or in psychiatry is a condition of the mind and not a mere lack of self control; it cannot be recognised from any one act however atrocious, anti-social or impulsive it happens to be. The process of establishing a clinical diagnosis of insanity is similar to that of constructing the picture of a jig-saw puzzle. The pieces acquire meaning only if they fit together into a coherent whole, but one piece by itself is absolutely meaningless.

With this situation we have to consider not only the risks involved in condemning a sick man but also the risk of sending a sane person to pass the rest of his life within the strict custody imposed on insane offenders. This is as terrible a punishment as any known in the annals of the martyrdom of man. As one author mildly puts it 'To have a sane man found insane may be a forensic triumph but it has little else to commend it.' To my mind such a finding would impose a change in the role of the hospital from one of care and treatment to one of custody and detention and a change in the role of its staff from one of doctors and nurses to that of white coated jailers.

These remarks are meant to highlight the difficulties of the jury verdict of sanity or insanity and the heavy responsibility which lies with their decision. It has to be admitted however that although

the system may at times fail to attain the good intentions of the legislator no better alternative is yet in sight. The last word on the question of criminal responsibility must rest with the law.

### **Methods of disposal**

From conviction we now pass on to sentencing and it is here that cooperation between law and medicine is most important. Unfortunately in Malta this is the area in which we lag far behind other countries. The most serious weakness in our system is in my opinion, the lack of flexibility in the disposal of the accused found to be insane. This disposal is prescribed in Sec. 619 of the Maltese Criminal Code where it is stated that if the accused is found to be insane the Court shall order the accused to be kept in strict custody in Mount Carmel Hospital and shall cause information thereof to be forthwith conveyed to the Governor who will give such directions as he may deem fit for the care and custody of such insane person.

In practice this amounts very often to an indeterminate sentence and is applicable not only to major crimes but also to minor offences; so that if insane behaviour finds expression in petty thefts or in taking unauthorized joy rides or in any other form of minor delinquency the offender may be sent to hospital for the same indefinite period as in the case of the patient who has maimed or killed. There is apparently no provision in our legislation to enable the judge or magistrate to obtain the experts' opinion on the most appropriate psychiatric disposal. Neither is there any provision to ascertain that facilities for treatment are available or that the condition from which the accused is suffering is susceptible to medical treatment or should better be dealt with within the penal system. In my experience once the jury's verdict of insanity is given the accused is invariably dealt with in accordance with Sec. 619.

In many developed countries with progressive mental health legislation a number of possibilities are open to the court after sentencing. In England for example, according to the Court's assessment of the case, an abnormal offender may be dealt with in several ways:

1. As in Malta he may be compulsorily admitted to hospital with a restriction order on discharge – detention being for an indefinite period unless overruled by the Secretary of State;



2. He may be compulsorily admitted to hospital without any restriction on discharge – discharge is determined by the responsible medical officer in much the same way as that of a certified patient;

3. He may be admitted to guardianship of relatives or others;

4. He may be put on probation and required to undergo treatment;

5. He may be conditionally or absolutely discharged if he agrees to receive treatment voluntarily either as in-patient or out-patient.

6. He may be made subject to normal penal sentence such as imprisonment or fine.

This last provision may sound harsh and unorthodox when applied to abnormal offenders but I would like to go back to the concept of continuous scales mentioned previously and emphasize the fact that abnormal offenders cannot be classified into the two categories of the utterly irresponsible and the fully responsible. Apart from those who suffer from severe psychiatric disorders the majority of offenders retain some element of responsibility and although medical treatment is necessary during overtly unstable phases, discipline and character training still have a role to play. This applies particularly to severe forms of psychopathic personalities whose main symptom is violence in an apparently normal person. They are unlikely to benefit by any kind of mental hospital treatment because their needs are different. Indeed in the conventional mental hospital they receive no treatment – they are admitted solely for board and lodging, they become a nuisance and a danger to other patients, monopolize the staff's attention and prevent the development of therapeutic community attitudes. You do not admit a criminal psychopath to a conventional mental hospital for the same reason that you do not admit a patient with smallpox to the general hospital. In most countries they are cared for in special hospitals or in special units in prisons known as prison hospitals.

It is because of such considerations that measures have been introduced in most courts abroad to enable them to obtain further information so as to assess whether the condition is susceptible to medical treatment or whether the hospital has facilities for dealing with serious criminal propensities. In the modern mental hospital where the milieu has been freed from the old restrictions, the requirements of this type of patient are at variance with those of the majority. This being the case, it is advisable in Malta in or-

der not to restrict the many because of the needs of the few, to provide a special unit in the form of a small prison hospital where the needs of the criminal patient could be adequately met. However, for the courts to continue to commit to conventional hospitals such offenders whose abnormal behaviour constitutes a real threat to other patients and staff is unrealistic, to say the least.

I would like to conclude with a plea to all my legal and medical colleagues not to allow my list of shortcomings and criticisms to overshadow my praise and admiration for the way in which justice is done and is seen to be done in the Maltese Courts of Law.

## ~~CIVIL PARTNERSHIPS AND JURIDICAL PERSONALITY~~

~~GUIDO SALIBA~~

~~In regulating Civil Partnerships the Maltese legislator certainly did not intend conferring on them legal personality. This can be concluded by reference to Italian law of the same period i.e. the Civil Code of 1865, and by analogy from a consideration of the historical aspects of the question in the case of commercial partnerships.~~

~~Before examining the status of civil partnership in the Italian Civil Code it may be apposite to explore the antecedents of the definition of the contract of partnership contained in Sec. 1738 of our Civil Code – originally Art. 1404 of Ord. VII of 1868.~~

~~Partnership is a contract whereby two or more persons agree to place a thing in common, with a view to sharing the benefit which may derive therefrom.~~

~~This is basically the same definition as that of the Roman *societas*, as indeed is the notion of civil partnerships in practically all continental codes including the English Partnership Act of 1890. Under Roman Law the *societas* was considered to be a con-~~