REDEFINING INSANITY

BRINGING THE INSANITY PLEA INTO THE 21ST CENTURY

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ABSTRACT

In criminal law, certain prerequisites must coexist for an offence to have been committed. Firstly, the *actus reus* must occur, which is, the action that gives rise to the criminal activity as committed by the accused. The *mens rea* is also an indispensable prerequisite. This refers to the accused's criminal intent to commit the act. In the event of an offence being committed by someone suffering from 'legal insanity', the *mens rea* is flawed. Therefore, the defence of legal insanity allows individuals to be exempt from criminal responsibility if 'legal insanity' at the moment of an offence is proven.

This begs the question, what is 'legal insanity'? The notion is of a purely legal nature and its interpretation varies significantly in different jurisdictions. Currently, the Maltese Criminal Code does not expressly define insanity, but Common Law influences and works from criminal theorists such as Sir Anthony Mamo have led to the understanding that 'legal insanity' refers to a 'disease of the mind'[1] that eliminated the accused's capacity to know the nature of their act. The features of said disease are not elaborated upon, however. Consequently, Malta exemplifies one of the most restrictive interpretations in Europe.

This thesis will explore the possibility of expansion of legal insanity under Maltese Law by analysing the current system with an understanding of the history and development of the defence. It will highlight the issues in the Maltese approach and compare and contrast the local system to other foreign jurisdictions. Finally, arguments will be presented for the introduction of diminished responsibility to cater for the mentally ill and intellectually

[1] Sir Anthony Mamo, Mamo Notes 1954, vol 1, 84

disabled, who do not satisfy the conditions for legal insanity as it stands. To conclude, suggestions in respect of the above will be made to revive the antiquated defence and bring it into the 21st century.

Key words:

1. Insanity
2. Mens Rea
3. Diminished Responsibility
4. Mental Illness
5. Intellectual Disability

To my parents and brother, for their endless support, love and patience.

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INTRODUCTION

Exculpation due to mental illness is an age-old concept which dates back thousands of years as is evidenced in the Bible:

> *"a murderer who unintentionally but knowingly has killed someone, may flee"* [2]

This quote demonstrates that an individual should not be held criminally liable if s/he 'unintentionally' commits a criminal act. This reasoning is the basis of the defence of criminal insanity as well as other formal 'excuses' in the criminal code. To commit an act 'unintentionally' implies that one did not consciously wish for that event to occur, and thus the criminal 'intent' to commit an act may be absent.

Criminal intent is one of the indispensable formal prerequisites of any criminal offence. These prerequisites are expounded in the phrase '*actus non facit rem, nisi mens sit rea*'[3]. The Latin phrase states that mere actions do not amount to criminal liability, unless accompanied by a guilty mind. The legal terms *actus reus* and *mens rea* referring to the criminal act itself and the criminal intent respectively are directly derived from this statement. The *mens rea* is a crucial component in the examination of legal insanity due to the fact that one's ability to form such clear intent is disturbed by the existence of an unsound mind and state of insanity.

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[2] *The Holy Bible* (Numbers 35:11)
[3] translates to: actions do not make a person guilty unless the mind is guilty

Legal Insanity is addressed in paragraph (a) of Article 33[4] of the Criminal Code. Interestingly, this provision does not expressly define the term 'insanity', but theorists such as Sir Anthony Mamo have chosen to accept the notion that the word refers to a 'disease of the mind'[5]. What falls under the ambit of a 'disease of the mind', however, is not elaborated upon, leaving great doubt and resulting in several interpretations and differing opinions on the matter. The Maltese approach to insanity was initially largely modelled on the Italian system but currently bears more likeness to the Common Law system, which has retained a particularly strict understanding of the concept. As a result, the Maltese approach to 'legal insanity' is one of the most stringent in Europe and by extension, the world, resulting in a situation where several medically recognized mental conditions are not considered severe enough to meet the legal standard of insanity.

The 21st century has seen an increase in awareness of mental health issues as well as the attempted de-stigmatization of mental conditions. Such a raised knowledge and awareness on the subject has made it apparent that the prevalence of mental illness in our society is more widespread than ever. Before proceeding, there is an essential distinction to be made between legal insanity and medical insanity. Firstly, in the medical field, the term 'insanity' has become obsolete and in lieu of this, the term mental illness has been employed to address such mental issues. 'Insanity' therefore remains a strictly legal concept. Despite this, there is still an undeniable link between the medical understanding of mental illness and what the law considers to be 'insanity'. In fact, medical experts are required to give evidence in court to attest to the mental state of the accused in criminal trials in which the insanity defence is pleaded. Medicine is an ever-evolving field. Hence,

[4] Criminal Code Chapter 9 of the Laws of Malta 1854 s 33
[5] Sir Anthony Mamo, Mamo Notes 1954, vol 1, 86

our understanding of mental illness has developed remarkably over the years. In contrast to the medical field, however, the legal sphere has seen little alteration and consequently appears antiquated in its application in the 21st century. The first Chapter of this thesis will, therefore, give an overview of the current implementation of the insanity defence in Malta as well as a brief history of the defence and what has led the Maltese system to this point. The second Chapter will then proceed to examine different international perspectives on the notion of insanity, comparing them to the local approach whilst drawing inspiration for potential amendments.

The scope of this thesis is to explore the prospect of the expansion of the interpretation of 'legal insanity' in the Maltese Islands, in an attempt to update and amend current legislation to better cater to the realities of the modern world and mental illnesses. One of the primary issues with the local perspective is that insanity is only considered in absolute terms, considering people to be either entirely insane (and thus incapable of any form of reason) or completely sane. The reality of a state of partial insanity[6] however, as discussed by Sir Anthony Mamo, has seemingly been overlooked. Denying this state inevitably creates a gap in the law in which individuals who suffer from a mental illness but do not qualify for legal insanity may find themselves. In these scenarios, defendants may be held completely criminally liable for their actions, despite their impaired mental faculties. In response to this issue, other jurisdictions have introduced the concept of diminished responsibility[7] to cater for situations of partial insanity. This approach does not entirely exculpate an offender of criminal responsibility but rather, takes their mental illness into consideration during the sentencing phase, mitigating their punishment and

[6] Sir Anthony Mamo, Mamo Notes 1954, vol 1, 85
[7] ibid

reducing their level of criminal liability. This shall be examined in the third chapter of this thesis.

As mentioned previously, insanity refers to the elimination of one's capability to form the prerequisite intent in a criminal action. Therefore, in a criminal offence concerning an individual of unsound mind, whilst the *actus reus* of the offence is not atypical, the *mens rea* is arguably flawed in that it is assumed that the mental infirmity limited the person from forming the required intent to be held criminally liable. One's capacity for rational thought may also be impacted by other conditions that do not necessarily fall into the realm of mental illnesses, however, as is the case in individuals suffering from an intellectual disability.

The term 'intellectual disability' is used to describe all those individuals with learning conditions characterized by difficulties in mental functioning and the delayed development of cognitive abilities and adaptive skills[8]. These conditions were previously referred to as cases of 'mental retardation'. Currently, the criminal code makes no mention of the level of criminal responsibility to be afforded to the intellectual disabled. Thus, in the absence of any provision dictating otherwise, the mentally disabled are held to the same legal standard of responsibility as the ordinary reasonable person[9]. Alternatively, in civil law, the intellectually disabled experience a number of legal

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[8] Roberto Cajao, Carlos Pereira, Cajao R, Pereira C, 'Critical analysis on legal capacity of the mentally retarded: The Portuguese reality in the European context' (2016) 33 European Psychiatry 560

[9] West's Encyclopedia of American Law (2016) <http://legal-dictionary.thefreedictionary.com/Reasonable+Person> accessed 1st June 2017
'Reasonable person', phrase frequently used in Tort and Criminal
Law to denote a hypothetical person in society who exercises average care,
skill, and judgment in conduct and who serves as a comparative standard for determining liability.

restrictions due to their incapacity for apt reasoning. There is evidently an inconsistency between the criminal approach to intellectual disability and the civil one as shall be expounded in the final Chapter of this thesis. This Chapter will encourage the possibility of reducing the level of criminal responsibility afforded to the intellectually disabled whilst also highlighting the areas of civil law that appear to contradict the criminal approach. Finally, this dissertation will conclude by identifying areas of concern and making suggestions for amendments.

Law is, undeniably an ever-evolving field. Legislation is constantly being scrutinised, amended and erased in an attempt to establish the best possible laws which reflect the current sentiments of society and provide adequate protection and security to the community at hand. Legal stagnancy may lead to a situation where the law becomes out of touch with the society it governs. Therefore, frequent reflection and critique of legislation is fundamental to any community. It is, therefore, the objective of this thesis to re-examine the current plea of insanity, to identify its flaws and to make suggestions for its improvement to ensure that the defence is a more accurate representation of Maltese society in the 21st century.

CHAPTER 1

AN OVERVIEW OF LEGAL AND MEDICAL INSANITY

1.1 What is Insanity?

Insanity is described as a 'medically obsolete term' used to refer to a 'mental derangement or disorder, (which is) now a purely legal term, denoting a condition due to which a person lacks criminal responsibility for a crime and therefore cannot be convicted of it'[10]. The plea of Insanity is encompassed in paragraph 'a' of Article 33 of the Maltese Criminal Code which provides that:

> *'33. Every person is exempt from criminal responsibility if at the time of the act or omission complained of, such person - was in a state of insanity;"*[11]

This provision elucidates the fact that a person will be completely exempt from criminal responsibility if they were 'insane' at the 'time of the act'[12]. There is a distinction to be made between legal insanity at the moment of the commission of the offence and 'insanity' during trial. The former would exculpate the defendant of all criminal liability whilst the latter will postpone criminal proceedings until the defendant is of sound mind and fit to stand trial. This thesis will focus on the level of culpability of an 'insane'

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[10] Keane Miller, Marie T O'Toole, *Miller-Keane Encyclopaedia and Dictionary of Medicine, Nursing, and Allied Health* (7th edn, Saunders an imprint of Elsevier Inc 2003)

[11] Criminal Code Chapter 9 of the Laws of Malta 1854, s 33(a): It is interesting to note that prior to amendments in 1956, this provision also included 'frenzy' as a reason for exemption from criminal responsibility.

[12] ibid

offender for his/her acts and thus shall concentrate on the concept of insanity at the moment of an offence.

The Criminal Code presents three instances which may lead to the total or partial exemption of a person from criminal responsibility. These include; (i) cases where the agent does not have the full use of his intellectual faculties, (ii) when the offender's will is overborne by his natural compulsions and (iii) when the agent's will and understanding are not directed towards the criminal act. These different instances are all essential in the examination of legal insanity, and shall be examined in this thesis.

Whilst the Criminal Code presents 'insanity' as a cause for exemption of criminal responsibility, it fails to provide a formal and clear-cut definition of such 'insanity'. As a result, the Maltese system has had to draw inspiration from continental and common law as well as criminal law theorists, such as Sir Anthony Mamo[13] to inform its approach towards the defence. An understanding of the UK system is crucial to an understanding of the current state of insanity in Malta due to the British development and introduction of the McNaughton rules. Therefore, this Chapter will provide a brief history of the inception of the plea in the UK. The different standards for legal insanity and the international tests employed to establish insanity shall also be featured in this chapter. Firstly, however, one must examine those formal elements of a criminal offence that play an integral part in identifying legal insanity.

[13] In his work, Sir Anthony Mamo has referred to 'insanity', as a disease of the mind that took away the accused's capacity to know the nature and wrongfulness of his act.

1.1.2 Elements of Legal Insanity

Before examining the development of the insanity defence, an overview of some of the qualities of the defence must be studied. As described in the introduction of this thesis, there are essential elements that must coexist for a person to be convicted of an offence. These include the *actus reus* and *mens rea*. The latter *mens rea* is a key component in 'insanity' as it considers the accused's ability to form the necessary criminal intent. The ability of an offender to control his volitional capacities and his/her capacity to do so are also of importance and shall be observed hereunder.

1.1.2.1 The Mens Rea

It is crucial to clarify what is globally understood as intent. The *mens rea* refers to the internal mental fault of the accused and is translated to mean 'a guilty mind'[14]. The *mens rea* differs in every criminal offence and may present itself in various forms, 'with intention and knowledge' of the act 'being the most culpable, followed by recklessness, belief and then by suspicion'[15]. This quote encompasses the fact that knowledge of the wrongfulness of one's actions and an intent to carry them out would inevitably render someone more criminally liable than someone who was simply negligent and was unintentionally responsible for a criminal offence.

For the legally insane offender, the argument of exculpation from criminal responsibility rests on the fact that the offender, as a result of his flawed mental state, could not have wilfully developed the intent to carry out an act or possessed the necessary knowledge of

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[14] David Ormerod, Karl Laird, *Smith and Hogan's Criminal Law* (13th edn Oxford University Press 2015) 107
[15] ibid

the wrongfulness of his act. Therefore, when speaking of *mens rea*, we are also referring to one's will and understanding. It can be surmised that an 'insane' person would not possess the ability to 'understand' the full consequences of his actions and thus cannot be deemed to form the required intent. Criminal theorist Carrara[16] further elaborates upon the notion of intent by differentiating between different types of intent - primarily, direct and indirect intent. He establishes the former as *dolus* and the latter as *culpa* (or negligence). Most intent tends to be founded upon motive, however. This would give rise to *dolus* but not *culpa*. Despite being the cause of the intent itself, this motive would not justify the act. Taking Carrara's definition into consideration, one may note that in the case of a mentally unstable perpetrator, one would be dealing with an indirect and, also, negative intent. This means that the event was neither foreseen nor desired. Even though it may have been desired in their confused mental state, their lucid conscious mind would not have wished for it to occur and thus they should not be held criminally liable.

1.1.2.2 Understanding

For legal insanity to be established, it must be proven that at the moment of the commission of the act, the accused lacked the necessary will and understanding to be found criminally responsible. The term 'understanding' refers to the defendant's knowledge and awareness of the nature, quality and wrongfulness of his/her act. This capacity for 'understanding' can ultimately be greatly impacted by the effects of mental illness as well as intellectual disability and, thus, it is an essential component in determining the presence of legal insanity. This critical element of legal insanity is

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[16] Francesco Carrara, *Laws, statutes, etc. Programma del corso di diritto criminale* (2nd edn, Lucca Giusti 1868)

expounded in the Judgment ***Ir-Repubblika ta Malta v . David-Norbert Schembri***, which states that legal insanity exists when: as a result of a disease of the mind, the accused was lacking:

'il-kapaċita' li jifhem li dak li qed jagħmel hu ħażin, jew (iii) il-kapaċita' li jifhem in-natura u il-kwalita' ta' dak l-att li qed jagħmel."[17]

1.1.2.3 Volition

One's volition is also an important component in determining legal insanity. In these cases, it is often accepted that the accused's mental state may have deprived him/her of the ability to control his/her impulses. In the judgment ***Ir-Repubblika ta Malta v. Christopher Degiorgio***[18], Chief Justice Vincent Degaetano described insanity as a disease of the mind which 'has as its nature and grade, the faculty of depriving the accused individual either from the capacity of recognizing and knowing the nature and quality of his act or of depriving him of the capacity to know whether the act is wrong or not, in other words depriving him of his freedom of choice, i.e. 'la capacita di intendere' and 'volere', as derived from Italian Law.[19]The belief that the accused was robbed of his freedom of choice is crucial to an understanding of legal insanity as the mentally ill offender would be at the mercy of his/her mental state and not in a position to control his acts.

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[17] *Ir-Repubblika ta' Malta v. David-Norbert Schembri*, Court of Criminal Appeal per Chief Justice Vincent de Gaetano, Honorary David Scicluna, Honorary Judge Joseph R.Micallef – 25th September 2008 – that the accused did not possess the capacity to understand the wrongfulness of his acts and the capacity to understand the nature and quality of his/her acts.

[18] *Ir-Repubblika ta' Malta v. Christopher Degiorgio* (Bill of indictment No 17/94) 11th July 1995

[19] *Il-Pulizija v. Mohammed Makhlouf Court of Magistrates* (Criminal Judicature) per Magistrate Dottor Consuelo Scerri Herrera, 22nd January 2001 quoting Ir-Repubblika ta' Malta v. Christopher Degiorgio (Bill of indictment No 17/94) 11th July 1995 translates to: English as the capacity for will and understanding.

1.2 A Brief History of Legal Insanity

The notion of legal insanity can be dated back to the ancient Greeks and Romans as can be evidenced in some of Plato's work:

> *'I believe we had set down what pertains to those who plunder the gods and what pertains to traitors, and also what pertains to those who corrupt the laws with a view to the dissolution of the existing regime. Now someone might perhaps do one of these things while insane, or while so afflicted with diseases or extreme old age or while still such a child as to be no different from such men. If, on the plea of the doer or the doer's advocate, it should become evident to the judges chosen for the occasion that one of these circumstances obtains, and he should be judged to have broken the law while in such a condition, let him pay to the full exact compensation for the injury he has done someone, but let him be released from the other judicial sentences, unless he has killed someone and has hands that are not unpolluted by murder. In the latter case, he is to go away into another country and place, and dwell away from home for a year; if he comes back prior to the time which the law has ordained, or sets foot at all in his own country, he is to be incarcerated in the public prison by the Guardians of the Laws for two years, and then released from prison'.20*

This excerpt establishes several key features of legal insanity that still apply today. Firstly, it establishes the plea as an excuse to a crime to be raised by the defendant and his attorney. Alternatively, Plato proposed financial restitution as a remedy to the offence. This has not yet been adopted in criminal cases, as financial restitution may only be awarded in separate civil judgments for damages. Where murder or more serious offences are concerned, the perpetrator would have been exiled to another country and dwelling place for a year. **[21]** Plato seemed to acknowledge that the mentally ill, like children, should not be unforgivingly punished for their actions, as they do not possess the ability to understand the consequences of their actions nor the knowledge to form the necessary

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[20] Plato *Plato* (London Heinemann Publishing 1914)

[21] Gerben Meygen, *Legal Insanity Standards: Their Structure and Elements', 71 Legal Insanity: Explorations in Psychiatry, Law, and Ethics, International Library of Ethics, Law and the New Medicine* (1st edn Springer International Publishing 2016)

intent needed for a successful criminal conviction. This quote clearly establishes the fact that the defence has existed for hundreds of years and has withstood the test of time.

1.3 Legal Insanity in the UK

Common law has undoubtedly left a rather large footprint on Maltese legislation and jurisprudence in many ways. The same can be said of our current interpretation of the legal notion of insanity. The Maltese version of 'insanity' was initially largely modelled off the Italian system but currently bears more resemblance to the British system and therefore it is essential to have a quick look at the history of 'lunacy' in the UK before we can proceed.

Legal Insanity in the UK can be dated back to the year 1324. During this historical period, if insanity were proven, the legal defence would allow the defendant to either return home or be incarcerated until he/she was granted a royal pardon. The defence went on to experience some reform by the year 1542. At this time, a defendant who became insane prior to the trial could not be tried for any crime. In the year 1800, a British national James Hadfield, attempted to assassinate King George III. The Hadfield case involved the defendant 'discharge[ing] a horse pistol at the king as he entered the royal box at Drury Lane Theatre'[22]. Controversially, Hadfield was acquitted of the crime of high treason after pleading insanity. At the time, it was believed that if a person was not 'sane' enough to take responsibility for their actions and subsequently be acquitted then they should essentially be set free and allowed to return home. Understandably, a case of this

[22] Richard Moran, 'The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield [1800]' (1985) 19(3) 487-519 Law and Society review 504

magnitude, did not allow for such a lack of punishment in the eyes of the people. Therefore, the government held him in the Newgate Prison temporarily whilst they quickly discussed new legislation that would allow them to keep such perpetrators detained for as long as they felt necessary. This came in the form of the Criminal Lunatics Act of 1800 which introduced the concept of the detainment of those arrested for criminal activity who are also found to be mentally ill[23]. The US Case of John Hickney also followed a similar narrative as the defendant was acquitted and found to be insane after his attempted assassination of President Reagan. [24] These cases understandably garnered significant attention from the public due to them concerning the untimely deaths of public figures. The attention was not always positive in nature however and oftentimes, public disapproval over verdicts and the state of the legal system saw the implementation of a number of reforms in the legislation governing insanity.

1.3.1 The Daniel McNaughton Case

In 1884, a man by the name of Daniel McNaughton notoriously attempted to assassinate the Prime Minister, accidentally killing his secretary Edward Drummond instead. At the time of his arrest, McNaughton stated that he had been instructed to carry out the murder by 'the Tories in my city' who 'follow and persecute me wherever I go, and have destroyed my peace of mind. They do everything in their power to harass and persecute me; in fact, they wish to murder me.'[25] The defendant was acting under a false delusion that the government was out to get him and had been living with these paranoid thoughts

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[23] ibid 505
[24] ibid 506
[25] Andrew Garofolo, 'History Of Forensic Psychology - The McNaughton Rules' (Article 2017) <http://historyforensicpsych.umwblogs.org/the-insanity-defense-outline-by-andrew-garofolo/the-mcnaughton-rules/> accessed 10th July 2017

for years prior to the commission of the offence. The defence counsel went on to introduce several witnesses to give evidence and testify to McNaughton's acute insanity. The decision was then left in the hands of the jury, who unanimously concluded that the defendant was not guilty, by reason of insanity. After this landmark decision, the house of Lords urgently met up to properly establish and standardize the requirements to determine insanity in the future. Thus, the McNaughton rules were created.

1.4 The McNaughton Rules

In previous years, the test for insanity simply revolved around the question of whether a person had the capacity to distinguish between what is right and wrong. In 1843, however, following the landmark case of Daniel McNaughton, a more formalized set of 'rules' was created. The rules expounded the following:[26]

'every man is to be presumed to be sane, 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'[27].

These rules are still the cornerstone of most international legislation on insanity (including the Maltese system) and present 3 key requirements for the identification of legal insanity. These include:

'(i) a disease of the mind, which results in (ii)a defect of reason, causing the person to lack the necessary (iii) knowledge concerning the nature, quality and/or wrongfulness of the act.'[28]

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[26] ibid
[27] John Kaplan, Robert Weisenberg, Guyora Binder, *Criminal Law - Cases and Materials* (7th edn, New York Wolters Kluwer Laws and Business 2012) 45
[28] ibid

If any of these factors are not present, legal 'insanity' does not exist. The rules have also been referred to by Sir Anthony Mamo and may also be found in the judgment ***Ir-Repubblika ta' Malta v. David-Norbert Schembri.*** Both Mamo and the aforementioned case establish the McNaughton rules as the cornerstone of the Maltese understanding of legal insanity today.

The rules give a lot of importance to the 'knowledge' of one's actions. If a person is aware of the wrongfulness of his act and is generally capable of distinguishing between right and wrong, but commits the act regardless, the accused will be found culpable and punishable for the offense. Possibly the most salient point brought forward by McNaughton rules however, is the fact that 'insanity' must be present at the time of the commission of the offence, thus influencing his volitional capacities when the act was carried out. This remains an essential pre-requisite in establishing insanity. Despite being met with some disagreement, some theorists have argued that a fourth rule exists. The final rule surmises that if certain circumstances and surrounding facts cause a delusion in the accused, then he/she can only be charged with those acts which he understood that he was committing. This last 'rule' has been divisive amongst theorists and legislators alike and, consequently, has not been adopted into the Maltese system.

The rules are still rigorously applied in modern jurisdictions, as is this case with the Maltese system, but they are often the subject of criticism due to the narrowness of their application. The US Butler Committee, for instance, has stated that the rules are 'based on too limited a concept of the nature of mental disorder' and that 'the outmoded language of the McNaughton Rules gives rise to problems of interpretation' and that 'the rules are

not a satisfactory test of criminal responsibility.[29] The McNaughton rules were also met with hesitation when they were incorporated into the US system. This was based on the fact that many believed that the rules had no basis in medicine or science and thus should not be considered relevant. Whilst the McNaughton rules have provided structure to the insanity defence in Malta ever since their inception, the widespread criticism of the rules is not unwarranted and signifies shared disapproval of the current approach. The expansion of the interpretation of insanity and a departure from the stringency of the McNaughton rules is, therefore, a necessary step for local legislation as shall be emphasized throughout this dissertation.

1.5 The Irresistible Impulse Test

In response to the excessive strictness of the McNaughton rules, legal theorists began to propose expanding the legal interpretation of insanity to include a more cognitive element. Thus, the irresistible impulse test was born. This test would not only address whether the defendant could distinguish between right and wrong but also if they could control their natural impulses at the time[30]. The test finds its roots in the US judgment, ***Rex v. Hay***[31]. In this case, the Chief Justice laid down that, whenever one is faced with the insanity defence, one should not only consider the issue of right and wrong but should also employ other tests for responsibility and the courts must always acknowledge a form of mental disease effecting one's volitional capacities[32]. The irresistible impulse test was

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[29]C.M.V Clarkson, H.M Keating, S.R Cunningham, *Clarkson and Keating Criminal Law: Texts and Materials* (6th edn, Sweet & Maxwell 2007) 394

[30] 'The irresistible impulse test ' (2016) <http://criminal.findlaw.com/criminal-procedure/the-irresistible-impulse-test.html> accessed 21st June 2017

[31] *R v. Hay, 22 Cox C.C. 268* (1911)

[32] ibid In this case the medical officer of Brixton Prison testified that the defendant, who was charged with feloniously shooting at 'the prosecuting witness with intent to murder him, "knew that he was firing a revolver and that it was wrong to do so, but that owing to disease of the mind he was unable

therefore developed as a legal test to answer the question of whether insanity was present. Often seen as an extension of the McNaughton Rules, this defence is used when it is being argued that, although the offender may have understood the consequences of his actions, he could not have controlled his natural impulses at that moment in time. The test seems to rest on the fact that overwhelming emotion/delusion at a specific moment in time can cause a person to act in an uncharacteristically impulsive way, possibly resulting in the commission of an offence.

The US (Alabama) judgment ***Parsons v. State***[33], also presents one of the first times the irresistible impulse test was used. In the proceedings, it was stated that whilst the defendant could differentiate between right and wrong, he was ultimately subject to 'the duress of such mental disease',[34]so much so, that he had 'lost the power to choose between right and wrong' and that 'his free agency was at the time destroyed'[35]. Thus, it was concluded that 'the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely'[36]. This test has also been met with some scrutiny in that it has been argued that the test is both too wide-reaching as well as too narrow. The test is broad in its application in that can be used in most scenarios, making it potentially easy for defendants to abuse. However, in practice it seems to exclude a number of individuals suffering from mental illnesses.

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to control the homicidal impulse which dominated him." Darling J. directed the jury that "if they believed the evidence of Dr. Dyer they would be justified in finding the prisoner guilty of the act charged, but insane at the time of committing it so as not to be responsible according to law."

[33] *Parsons v. United States*, 167 U.S. 324 (1897)

[34] Brooks Borders, 'Veterans imprisoned by the violent shadows of military war time: The expansion of the Insanity defence to include post-traumatic disorder ' (2015) 36(1) 73-99 Biomedical, Pier reviewed, USA 90

[35] ibid 78

[36] ibid 80

1.6 Other Standard Insanity Tests

Whilst the Maltese system accepts the McNaughton rules and the irresistible impulse test as benchmarks for establishing legal insanity, foreign jurisdictions have seen the development of other legal tests over the years. From the earliest 'wild beast'[37] test to the model penal code as shaped by the American Law Institute, these tests provide a further understanding of the insanity defence and an alternative approach.

1.6.1 The Good and Evil Test

As early as the year 1313, the UK had developed one of the first standard insanity tests in the form of the 'good and evil test'. The test rested on the idea that 'because mentally ill people were unable to differentiate between good and evil (similar to infants), they were unable to commit sins'[38]. Moreover, the mentally ill did not need to be punished through the legal system because the insanity they suffered was sufficient punishment .'[39] In 1616, the test was narrowed down so that only those considered 'idiots' would be exempt from criminal responsibility. A person would have been considered an 'idiot' if he/she could not: (i) Count up to 20, (ii) recognize his/her own parents and (iii) acknowledge if actions were useful as opposed to harmful[40]. The test was eventually replaced by the wild beast test.

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[37] Anthony Platt, 'The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility' (1965) 1(1) 1-18 Issues in Criminology 11

[38] Beatrice. R Maidman, 'The Legal Insanity defence: Transforming the Legal Theory into a medical standard' (2016) 24 Boston University Law review

[39] Gabriel Hallevy, *The Matrix of Insanity in Modern Criminal Law* (1st edn, Springer International Publishing 2015) 201

[40] Richard Moran, 'The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)' (1985) 19(3) Law and Society review 487-519

1.6.2 'Wild Beast' Test

Throughout the years, several tests have been created to determine the presence of legal insanity. One of the oldest tests, is the 'wild beast' test. This test essentially equates the mentally ill with wild animals and children, both incapable of controlling their conduct and behaviour[41]. The Test finds its origins in the US case, ***Rex v. Arnold*** (1724), where it was recognized that an 'insane' person:

> *"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"*[42]

As a society, we would never expect any form of civilised, lawful behaviour from animals in the same way we would not expect prudence, discretion and understanding from a young child. This is the logic upon which this test is founded. With regards to children and animals, it is unnecessary to identify a link between the act committed and their mental state at the time of the act because regardless of this, they are, as a result of their nature, unconditionally inculpable. This test is not a medical or psychological one and consequently no expert testimony would be required to arrive at a legal conclusion. Nowadays, courts do include expert psychiatric evaluations to ascertain the existence of mental illness, but the final question of 'insanity' remains a purely legal one. This test is clearly outdated and inapplicable in its complete dismissal of a medical outlook. However, the foundation of its reasoning remains sound. The equating of the mentally

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[41] Anthony Platt, 'The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility' (1965) 1(1) 1-18 Issues in Criminology 13

[42] *R v. Arnold* How St. Tr 765 (1724) cited from Asokan T, 'The insanity defence: Related issues' (2016) 58, (6) 191-198 Indian Journal of Psychiatry

'insane' with children who cannot be held accountable for their actions is also appropriate.

1.6.3 The Model Penal Code

Created by the American Law Institute, the Model Penal Code was created with the intention of establishing a middle ground between the stringency of the McNaughton Rules and the wide application afforded by the Durham Rule (which shall be discussed at a later stage)[43]. This test decrees that:

> *"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 (wrongfulness) of his conduct or to conform his conduct to the requirements of the law."*[44]

The test can be distinguished from the McNaughton Rules in many ways; Firstly, the institute chose to add the word 'defect' to the explanation, expanding the scope of application of the test. Intriguingly, the essential component of the 'knowledge' of the wrongfulness of one's act, presented by the McNaughton rules, has been transformed into a 'substantial capacity'. This significantly lowers the standard required to effectively plead insanity as it does not exclude those who still possess some level of capacity to understand their actions, so long as their capacity was impacted 'substantially'. Additionally, one must not only possess a mere awareness of the law and the criminality of their actions, but an 'appreciation' of such illegality. The word 'appreciation' implies an additional cognitive and social awareness of the impact that the crime would have on society. This provides a stricter criterion than the 'knowledge of wrongfulness' approach. Whereas a sociopath would not typically fulfil the criteria for legal insanity, this line of

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[43] see 22
[44] Model Penal Code the American Law Institute 1985 26

thought would permit a sociopath to successfully take the plea. This is so because it can be argued that a sociopath knows the consequences of his crimes, but cannot 'appreciate' the true severity of them. Finally, and most importantly, the test 'adds a control prong to the criteria for insanity. If, due to a mental disease or defect, a defendant was unable to conform his conduct to what the law requires of him, he is considered to have been insane.' [45]Therefore, if a person is aware of their wrongful actions, but cannot (by means of a mental disorder or defect) adhere to the laws and what is expected of him, he is deemed insane.

The Model Penal Code was popularised in several US states, however, due to the assassination of Ronald Raegan and subsequent acquittal of James Hickney (on the basis of his insanity), the public expressed its outrage over the leniency of the judicial system. This caused some states to revert back to the firmer, McNaughton standard. Likewise, I imagine the potential adoption of this test into the Maltese system may be met with some controversy due its leniency. However, it would provide a necessary departure from the current stringency of the McNaughton rules in a move towards a more expansive approach to legal insanity in Malta.

1.6.4 Durham Rule

As we have seen above, different tests are employed to determine the presence of legal insanity. Each test/rule focuses on one aspect of 'human functioning'[46] that is directly linked to the mental illness. The McNaughton Rules focus on the knowledge of one's act, the irresistible impulse test on the impossibility to control one's emotions and the Model

[45] ibid 28
[46] ibid 29

Penal Code on the ability for one to acknowledge the wrongfulness of their conduct. The Durham Rule on the other hand, does not limit itself by solely focusing on one realm of 'functioning'. Instead, it considers all areas of functionality so long as the offence occurs as a product of the mental illness/disorder itself.

The test is currently used in the state of New Hampshire (US) and provides an interesting analysis of legal insanity, as it considers mental functioning as:

> *'essentially unitary but multifaceted. No single mental faculty determines the existence or nonexistence of sanity, just as no single faculty is responsible for the control of human behaviour. Impaired control may result from a wide variety of causes in the psyche, not all of which are cognitional'*[47]

I believe this perspective correctly acknowledges the complexities of the human psyche and does not attempt to confine legal insanity to some single criteria. This rule also places a lot of value on the expert psychiatrist's testimony, who in turn is free to determine the mental condition of the accused without any previously imposed legal restrictions or guides. Some have argued that the position affords such expert witnesses too much power and has led to the 'domination of the courtroom by psychiatrists'[48] (Gerber). Since this test hinges on the presence of a mental illness (which can only be established through psychiatric evaluation) and essentially no legal criteria, power to decide on the existence of legal insanity shifts from the jury and the judge/magistrate and onto the medical expert. The case ***'Blocker v. the US'***[49] caused quite a stir in the US for this reason. Blocker was convicted of an offence and awaiting his application for appeal to be processed, when the ruling of another case (Rosenfeld case) saw the ruling of his trial having to be overturned.

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[47] ibid 33
[48] ibid 34
[49] *Blocker v. the US,* United States 288 F.2d 853 (D.C. Cir. 1961)

During the Rosenfeld case, a local hospital (St. Elizabeth's) altered its formal position that sociopathic/psychopathic disorders did not qualify as mental disorders over the course of a weekend, leading to the instant reversal of the Blocker judgment. This demonstrated how the court was ultimately at the mercy of the medical experts in this area and in accepting this alteration by overturning the judgment, the court was 'tacitly concede(ing) to the power of the hospital to alter drastically the scope of a rule of law'[50].

People have also been divisive in their opinions about this test due to the interpretation of the phrase 'product' of the disorder. Critics believe that this interpretation is too vague as it can be argued that any act performed by a mentally ill person is inevitably the product of their mental state at the time[51]. Alternatively, one may apply the test in a much stricter manner, only accepting the legal insanity defence if the act was directly related to the mental illness in an undeniable manner. For instance, if a paranoid schizophrenic violently murders his mother who s/he was convinced was trying to kill him/her, then the standard would be met, but if that same individual committed a random, unrelated act of arson, then the offence will not be deemed to have been the product of the mental illness. Of all the tests for insanity, however, the Durham Test is often regarded as the most lenient of all.

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[50] Model Penal Code the American Law Institute 1985 35

[51] David Ormerod, Karl Laird, *Smith and Hogan's Criminal Law* (13th edn Oxford University Press 2015) 333

1.7 The Maltese Approach

The approach towards legal insanity in Malta has been heavily influenced by Continental Law[52] as well as Common Law[53] and observes the standards for insanity laid out in the McNaughton Rules and irresistible impulse test.[54]For legal insanity in Malta to be proven it must be shown that the accused:

> *'kien qed ibati minn marda tal-mohh li minħabba fiha, fil-mument tal-att… huwa kien priv (i) jew mill-kapaċita' li jifhem li dak li qed jagħmel hu hazin, jew (iii) mill-kapaċita' li jifhem in-natura u l-kwalita ta' dak l-att li qed jagħmel, jew (iii) mill-kapaċita li jagħzel jekk jagħmilx jew le dak l-att'* [55]

This quote also elucidates the fact that Maltese Law distinguishes between insanity at the moment of commission of the act and at the time of the trial. This thesis will focus on the presence of insanity at the moment of the commission of the offence however, and the impact that insanity may have had on the accused's mental faculties. If insanity at the moment of commission is proven, the offender will not be held criminally liable and he/she will not be sentenced to a term of imprisonment. Instead, s/he will be committed to a psychiatric institution for treatment and care. If the accused is deemed 'insane' at the time of the trial however, the criminal proceedings will be postponed and the accused will be committed to a psychiatric institution to seek treatment until s/he is deemed fit to stand trial.

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[52] in relation to 'la capacita' di intendere or volere' – the capacity of will and understanding
[53] In relation to the adherence towards the McNaughton rules as mentioned by Sir Anthony Mamo
[54] refer 14-16
[55] Translate to: it must be proven that the accused was suffering from a disease of the mind, a result of which, at the moment of commission of the offence, the accused lacked the: capacity to understand the wrongfulness of his/her act, (ii)the capacity to understand the nature and quality of that act and (iii) the capacity to control themselves and commit that act or not.

In Malta, a person is always assumed to be of sound mind until he is proven otherwise. Therefore, when legal insanity is pleaded by the defendant, the burden of proof lies on the defence to prove that s/he was legally insane at the moment of commission of the offence. To prove this, expert psychiatrists may be employed to attest to the mental state of the accused. At this point the discrepancy between medical and legal insanity is of great significance. This is due to the medical expert being able to diagnose the defendant with a mental disorder which may subsequently not meet the standard of legal insanity. Therefore, an examination into the medical conditions that meet this strict legal standard in Malta is essential.

1.7.1 The Link between Legal and Medical Insanity in Malta

As we have observed throughout this thesis, there is a clear distinction to be made between medical and legal insanity as was evidenced in the landmark judgment ***Ir-Republikka ta Malta v. David Norbert Schembri***. In the case, Chief Justice Vincent Degaetano stated the following:

> *'Kif inhu risaput, l-espressjoni 'stat ta' ġenn' fil-paragrafu (a) tal-Artikolu 33 tal-Kodici Kriminali għandha sinjifikat legali u mhux neċessarjament jattalja ruhu ma' dak li fil-mediċina jew fil-psikjatrija jitqies bħala 'ġenn'. Kif jispjegaw l-awturi Jones u Christie fil-ktieb taghhom 'Criminal Law': 'It is important to emphasise at the outset that insanity is a purely legal concept. It is not a clinical term derived from psychiatry'*[56]

[56] *Ir-Repubblika ta' Malta v. David-Norbert Schembri*, Court of Criminal Appeal per Chief Justice Vincent de Gaetano, Honorary David Scicluna, Honorary Judge Joseph R.Micallef – 25th September 2008

Furthermore, in 2008, Toulson LJ stated that there is 'a mismatch between the legal test [of insanity] and a psychiatric understanding'.[57] As we have seen, legal insanity and medical insanity are two completely separate notions, which often do not align. Legal insanity is concerned with attributing criminal responsibility to perpetrators who commit a crime, whilst medical insanity simply seeks to diagnose psychiatric/medical conditions in individuals. In Anton D'Amato's view, law is often perceived as a set of procedural and substantive rules which govern and regulate human interactions. The law does not claim/seek to necessarily understand that behaviour however, and therefore, it often refers to other areas of study to supplement these cracks that the law is not equipped to fill[58].

In the case of legal insanity, science must inevitably play an important role in understanding the human psyche. This is evident in the fact that psychiatrists are required to come into the courts as expert witnesses to testify as to the mental state of the accused. Since the study of medicine is not within the realm of knowledge of the Judge/Magistrate/Jury, the expert witness must provide an objective and educated opinion on the accused, which will help the courts to reach a decision. This evaluation is not binding, however. The court will determine legal insanity separately to the notion of medical insanity or, rather, mental illness.

We have seen that for legal insanity to be proven in Malta, the existence of a 'disease of the mind' must be proven. From a medical perspective, the term dates back to the 19th century when psychiatry was going through a great period of evolution. Since the medical field is ever-changing, this definition has been altered throughout the years, but the Law

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[57] David Ormerod, Karl Laird, *Smith and Hogan's Criminal Law* (13th edn Oxford University Press 2015) 333

[58] Anton D'Amato, the Interrelation between legal and clinical insanity in criminal law 62

has retained the (now outdated) terminology. Nowadays, the term of choice used by the medical field is that of a 'mental disorder', which incorporates a wide array of mental conditions, which are not all recognized for the purposes of establishing legal insanity. The Mental Health Act defines a 'mental disorder' as a 'mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of the mind.'[59] The definition incorporates all conditions which may impact ones psychological and/or behavioural development, such as 'organic mental disorders, mood affective disorders, stress related disorders, adult and children behavioural disorders and mental retardation amongst others'.[60] The inclusion of mental retardation and stress related/behavioural disorders are important to note as these are not commonly accepted by the courts as conditions that may give rise to insanity. The concept of mental retardation shall be investigated in the final chapter of this thesis.

Both the cause and origin of mental disorders has been the subject of much debate throughout the years and it has been accepted that most conditions arise due to a combination of one's genetics, their social/physical environment as well as substance abuse[61]. Genes provide the limits of one's behaviour whilst the environment influences to what degree or whether at all it comes to establish itself.[62] That being said, no specific gene has been attributed to determining psychiatric issues or criminal behaviour and thus the argument that some individuals are destined to be criminals and have no choice in the matter does not hold water, from a scientific perspective. As a society, we must abandon

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[59] Chapter 262 of the Laws of Malta, s 2
[60] Anton D'Amato, the Interrelation between legal and clinical insanity in criminal law 63
[61] ibid 65
[62] Ronald Blackburn, *The Psychology of Criminal Conduct* (Wiley and Sons Ltd West Sussex, England 2006) 137

the perception that the mentally ill are predisposed to violent, antisocial behaviour as is often portrayed in the media.[63] This does the mentally ill a great disservice and skews public perception on Mental Health. Someone's environment is an additional key factor in their growth and thus may influence the development of mental issues (although there is no evidence to prove that environmental factors alone may give rise to mental illness). Other factors such as family relationships, culture, and socio-economic factors[64] may also impact mental health in different ways. A study conducted on the Maltese population illustrated that individuals from a low socio-economic background with low levels of education were more likely to suffer from a mental disorder, when contrasted with the more-educated members of society[65]. Long-term substance abuse, (alcohol and narcotics) may also cause irreparable damage to the brain, leading to a mental disorder. Finally, head injuries may also be the cause of psychiatric illnesses[66].

Legal insanity rests on the fact that the necessary *mens rea* for someone to be found criminally liable was absent at the moment of the commission of the offense. Therefore, an essential distinction must be made between those disorders that directly affect the *mens rea* of the accused and those which do not. Mental disorders may manifest themselves in various degrees and severity ranging from dangerous and harmful acts to conduct that is essentially innocuous[67] and the law must reflect this reality. The field of psychiatry has always categorized mental disorders into different categories depending on the nature,

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[63] Op.cit Bartol and Bartol 229
[64] Avshalom Capsi, 'Neighbourhood deprivation affects children's mental health Psychological Science', 11(4) 338-342 340
[65] Camilleri, N., Attard, R., and Grech, A. Socioeconomic status and population density risk factors for psychosis? A prospective incidence of the Maltese islands, January 2009
[66] Anton D'Amato, the Interrelation between legal and clinical insanity in criminal law 60
[67] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders. DSM V* (5th edn, American Psychiatric Association Publishing Washington DC 2013)

causes and effect of the specific disorders and we shall examine some of these classifications and their applicability to the medical notion of insanity. Four different medical classifications of medical disorders shall be examined below. The classifications were discussed in the legal dissertation by Anton D'Amato where he examined the overlap between clinical and legal insanity and are taken from the officially recognized Diagnostic and Statistical Manual of Mental Disorders (5)[68]:

1.7.1.1 Psychosis

In Malta, the general consensus is that if an individual were suffering from a form of psychosis at the moment of the commission of the offence causing him/her to experience detachment from reality, they cannot be held criminally liable for their actions. A psychotic illness is 'a disease of the mind with multiple clinical manifestations.'[69] Psychotic illnesses are acknowledged as being very severe, often characterised by delusions[70] and hallucinations which have no basis in reality. Psychosis can be caused by schizophrenia spectrum disorders[71], mood effective psychotic disorders[72], bipolar effective disorder[73], psychotic depression[74], psychotic paranoid delusional disorder[75] or through substance use. What makes these conditions 'psychotic' is the fact that the

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[68] ibid
[69] Parmanand Kulhara, Subho Chakrabarti, 'Culture, schizophrenia and psychotic disorder' (2001) 24(3) 449-564 Psychiatric Clinics of North America 561
[70] Carl Aquilina, 'Perceptions arising within the mind without any external stimulation of sense organs – ears and touch'. (2009) A guide to psychiatric examination
[71] These disorders are defined by abnormalities in one or more of the following five domains: delusions, hallucinations, disorganized thinking (speech), grossly disorganized or abnormal motor behavior (including catatonia), and other negative symptoms. DSM V
[72] As the name suggests, these conditions directly impact a person's mood and may cause a person to have impaired personal and work functioning as well as suicidal tendencies. DSM V
[73] This condition is characterized by episodes of extreme elation and/depression, often causing individuals to do things in a 'manic' state. DSM V
[74] This condition refers to a state of extreme depression where one may also experience psychotic hallucinations as a result of the disorder. DSM V
[75] A disorder characterized by the experience of vivid delusions and hallucinations. DSM V

sufferers lose touch with reality and their actions are based on what they perceive to be real and not what is truly in front of them[76]. These delusions will manifest themselves through a person's senses, so that s/he will see, feel and/or hear the hallucinations in a very real manner.

Psychosis may also manifest itself for short intervals of time, as is the case in brief psychotic disorder. If someone sufferers from this condition, they may experience delusions for short periods of up to one month, after which they will return to a regular, lucid state. For this disorder to sufficiently meet the criteria for legal insanity, the period of psychosis must inevitably overlap with the time when the crime was executed. Article 34(2)(b)[77] dealing with intoxication refers to temporary or permanent insanity and, therefore, it would suffice to say that the law was referring to this short-term psychosis and not a mere lapse in judgment due to intoxication. The disorders in this category all currently fall under the umbrella of legal insanity in Maltese law.

1.7.1.2 Impulse control disorders

These disorders control one's ability to control their impulses and may cause a person to act in a way that is determined solely by their respective mental disorder, where one fails to restrain himself. This should be distinguished from automatism in which someone carries out acts while unconscious[78], because of some disorder of the mind. These disorders are further divided into the following sub-categories: Kleptomania[79]

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[76] Anton D'Amato, the Interrelation between legal and clinical insanity in criminal law 76
[77] Criminal Code Chapter 9 of the Laws of Malta 1854 s 34(2)(b)
[78] Anton D'Amato, the Interrelation between legal and clinical insanity in criminal law 79
[79] Kleptomania involves the failure to resist impulses to steal things that are not needed for either personal use or for their monetary value. There is typically anxiety prior to the act of theft and relief

Pyromania[80], Intermittent Explosive Disorder[81], Pathological Gambling[82] and Trichotillomania[83].

In recent years, there has been much debate in the medical sphere surrounding the classification of these conditions as mental disorders and thus they may be removed from the medical manual in years to come. The notion of 'irresistible impulse(s)' remains a crucial concept in criminal law however (the irresistible impulse test is still employed by Maltese courts) and thus this category of disorders must still be considered from a legal standpoint[84]. This is due to the fact that, 'from a legal perspective, the volitional element is fundamental to most theories of *mens rea* and insanity, especially in Continental doctrines'[85].

1.7.1.3 Neurosis

Neurosis-based conditions differ from those referred to in the Psychosis category in that the neurosis sufferers still retain a clear awareness of reality and their environment. The

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of gratification afterward. If the theft is related to vengeance or psychosis, kleptomania should not be diagnosed. Kleptomania is quite rare, where common shoplifting is not – DSM V

[80] Pyromania refers to the someone who causes the deliberate and purposeful fire setting to things on multiple occasions. They are likely to experience tension or affective arousal before the act as well as fascination with or attraction to fire and its situational contexts (e.g., paraphernalia, uses, consequences). They will experience feelings of pleasure, gratification, or relief when setting fires or when witnessing or participating in their aftermath. The fire setting is not done for monetary gain, as an expression of sociopolitical ideology, to conceal criminal activity, to express anger or vengeance, to improve one's living circumstances, in response to a delusion or hallucination, or as a result of impaired judgment. DSM V

[81] This disorder manifests itself in the form of frequent and random outbursts of anger. These outbursts are usually very unexpected as the individual will typically show no signs of violence or aggression between episodes. DSM V

[82] As the name indicates, this condition causes sufferers to be unable to resist gambling which may often result in problems in personal, financial and vocational functioning. DSM V

[83] This disorder is characterized by the frequent pulling out of one's hair, resulting in severe hair loss. DSM V

[84] Anton D'Amato, the Interrelation between legal and clinical insanity in criminal law 79

[85] ibid 80

conditions under this category are characterized by an inability to adapt to one's surroundings and circumstances in a healthy or appropriate way, excessive worrying, anxiety, depression, phobias and an overall negative outlook on life[86]. Oftentimes, people diagnosed with one of these disorders are aware of the law and its consequences but choose to voluntarily act otherwise. For this reason, these conditions rarely satisfy the requirements for legal insanity. These conditions typically do not meet the legal standard for 'insanity' as they are not considered severe enough. Varying degrees of Anxiety, depression and PTSD, mental illnesses that have become extremely predominant in the 21st century, all fall under this category. These conditions, therefore, appear to present a form of 'partial insanity' that seem to fall between the states of complete sanity and insanity and are, thus, not catered for under our law. This shall be elaborated upon in the third Chapter of this dissertation.

1.7.1.4 Personality disorders

All personalities are unique and help to distinguish us from other people. What makes a personality type qualify as a 'disorder' however? The Diagnostic and Statistical Manual of Mental Health Disorders (DSM) clarifies the difference between the two as follows: 'Personality is the way of thinking, feeling and behaving that makes a person different from other people. An individual's personality is influenced by experiences, environment (surroundings, life situations) and inherited characteristics. A personality disorder is a way of thinking, feeling and behaving that deviates from the expectations of the culture, causes distress or problems functioning, and lasts over time'[87].

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[86] C. George Boerre, 'A bio-social Theory of Neurosis', Shippenburg University (2002)
[87] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders. DSM V* (5th edn, American Psychiatric Association Publishing Washington DC 2013)

Therefore, personality disorders appear to provide a person with a mandatory way of thinking that is essentially beyond his/her control and deviates from what society would consider desirable/appropriate. Personality disorders can be grouped into three different 'clusters'[88]. The first cluster covers those personality disorders associated with 'eccentric or odd behaviour'[89] (such as schizoid paranoid personality disorder and paranoid personality disorder). The second cluster incorporates all those disorders which seem to result in erratic, overly-emotional and dramatic behaviour[90], such as antisocial personality disorder[91], borderline personality disorder[92] and narcissistic personality disorder[93]. The third and final cluster deal with conditions exhibiting anxious or fearful behaviour[94]. These include: avoidant personality disorder[95], dependent personality disorder[96] and obsessive compulsive personality disorder[97].

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[88] ibid
[89] ibid
[90] ibid
[91] ibid a person suffering from this disorder will likely engage in a 'pattern of disregarding or violating the rights of others. A person with antisocial personality disorder may not conform to social norms, may repeatedly lie or deceive others, or may act impulsively'. DSM V
[92] ibid a person suffering from this disorder will likely engage in a 'pattern of instability in personal relationships, emotional response, self-image and impulsivity. A person with borderline personality disorder may go to great lengths to avoid abandonment (real or perceived), have recurrent suicidal behavior, display inappropriate intense anger or have chronic feelings of emptiness'. DSM V
[93] ibid a person suffering from this disorder will likely engage in a 'a pattern of need for admiration and lack of empathy for others. A person with narcissistic personality disorder may have a grandiose sense of self-importance, a sense of entitlement, take advantage of others or lack empathy DSM V
[94] ibid
[95] This disorder causes people to have certain feelings of inadequacy, inferiority and a fear of criticism. For this reason he/she may choose to avoid social interactions as much as possible for fear of being rejected and/or criticized. DSM V
[96] A person suffering from this disorder may show signs of being very clingy and attached to others. They may struggle to make decisions or do anything without the constant assurance of others. DSM V
[97] this condition is characterized by an 'obsession' with order, perfectionism and control. Sufferers will often become so engulfed in their need for perfectionism that may isolate themselves from others. DSM V

As we can see above, the term 'personality disorder' is an umbrella term which includes a wide variety of disorders. Even though these conditions are medically recognized and play an important part in the decision-making process of an individual, the disorders do not satisfy the requirements for legal insanity unless they appear with such severity that they cause psychosis and hallucinations in the offender (as mentioned above) that would have eliminated the accused's capacity for will and understanding. [98]

In Malta, personality disorders do not fall into the category of legal insanity and this can be seen in the case ***Ir- Repubblika ta' Malta v. David Norbert Schembri***. In this case, the defendant was diagnosed by expert witness Dr. Joseph Vella Baldacchino as possessing anti-social personality disorder, but that did not qualify the legal requirement for legal insanity and as a result the court held that the accused *'mhuwiex qed ibati minn xi forma ta' ġenn'*[99].

1.7.2 Expert Psychiatric Assessment and Commitment to a Psychiatric Institution for care

The Criminal Code also proceeds to outline that if one is found to be insane at the moment of the commission of the offence, his/her records will be transferred to the Attorney General who will process them within three working days, after which the court will order their commitment to Mount Carmel. [100]The Treatment and care of the mentally ill perpetrator is subsequently safeguarded by the Mental Health Act which underwent

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[98] Richard Rogers, Orest E Wasyliw, James L Cavanaugh Jr., 'Evaluating Insanity: A study of Construct insanity' (1984) 8, 314 Law and Human Behaviour

[99] *Ir-Repubblika ta' Malta v. David-Norbert Schembri*, Court of Criminal Appeal per Chief Justice Vincent de Gaetano, Honorary David Scicluna, Honorary Judge Joseph R.Micallef – 25th September 2008 translates to: is not suffering from a form of insanity.

[100] Criminal Code Chapter 9 Laws of Malta 1854, s 623

significant reform in 2014. Chapter 525 of the Laws of Malta outlines details on treatment and protocol for dealing with the mentally ill. The purpose of the Act is to 'regulate the provision of mental health services care and rehabilitation whilst promoting and upholding the rights of people suffering from mental disorders'. The most recent amendments to the act saw the introduction of a Commissioner (to safeguard patient rights) and of multidisciplinary teams, patient care plans with specific time frames, professional accountability etc. Article 3 (n), (o), and (q) of the act also clearly state that individuals who are institutionalized must be cared for in a way that provides 'full respect for their dignity'[101], 'protection from cruel, inhuman and degrading treatment'[102], as well as a 'safe and hygienic environment'[103] which would ultimately be conducive to healing. Once the accused is placed in care, s/he will be observed and treated by a multidisciplinary team to be released once s/he has regained his/her sanity and is deemed fit to be reintroduced into society.

After the court finds a defendant not guilty by reason of insanity, the individual would automatically be placed in the custody of the medical practitioners at the mental health facility, Mount Carmel. At this point, the court essentially abandons its power to control or determine the duration of the perpetrators confinement as this decision will be entirely up to the multidisciplinary care team responsible for the defendant's treatment. The Criminal Code does not expressly account for the procedure that would take place if the accused has regained his sanity after the act was committed, however. This could lead to a situation where a mentally stable defendant is involuntarily committed to a psychiatric

[101] Mental Health Act Chapter 525 of the Laws of Malta 2013 s 3 (n)
[102] ibid s 3 (o)
[103] ibid s 3 (q)

institution for an indeterminate period. This is undoubtedly an issue that requires further clarification in the law to avoid such a situation.

Prior to being committed to Mount Carmel for treatment, however, the accused must undergo psychiatric evaluation from a medical expert. This is encapsulated in article 402(3)(1)(a) of the Criminal Code which states that the court shall appoint one (or more) experts to examine the accused and the facts relating to the alleged insanity[104]. Interestingly, expert psychiatric testimony is not binding on the court but, should not be neglected nonetheless. This was discussed in the judgment ***Il-Pulizija v. Ruggero Sultana***[105]. In this judgment, Judge J Harding expressed the opinion that the expert witness' testimony is not decisive and the Judge's opinion cannot be replaced by such a psychiatrist. Therefore:

> *'the question (of sanity) must be decided by the Judge after studying and reflecting on the circumstances and the facts of the alleged crime in particular if such circumstances corroborate the medical expert advice given to the court'*[106].

In conclusion, since insanity is a legal concept (not a medical one) expert psychiatric testimony will not be final. Instead, the Judge and Jury are permitted to dismiss the expert testimony in favour of a different verdict provided there is sufficient justification for doing so.

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[104] Criminal Code Chapter 9 of the Laws of Malta 1854, s 402(3)(1)(a)
[105] *Il-Pulizija v. Ruggero Sultana* Criminal Court per Judge J Harding 10th April, 1937
[106] *Il-Pulizija v. Mohammed Makhlouf* Court of Magistrates (Criminal Judicature) per Magistrate Dottor Consuelo Scerri Herrera, 22nd January 2001 17

1.8 Conclusion

This chapter sought to provide an overview and understanding on some of the key elements of the insanity defence. To develop an argument for the expansion of the insanity defence in Malta, it is crucial to examine what would, in fact, constitute a state of insanity in the eyes of the law and, furthermore, how that insanity may be proven to the courts. The Chapter has also delved into the interplay between the legal and medical understanding of insanity in Malta and the issues that have arisen due to the discrepancies of the two independent concepts.

CHAPTER 2

INTERNATIONAL PERSPECTIVES ON LEGAL INSANITY

2.1 Introduction

Malta currently possesses one of the most restrictive approaches to legal insanity in all of Europe. This Chapter focuses on a number of alternate jurisdictions which are essential to explore in a discussion for the expansion of the interpretation of legal insanity on the island. The states referenced in this Chapter have been included for a variety of reasons. Some states have been incorporated for their unique approach to the defence, others for their relevance to the Maltese legal system and/or others for the issues they have encountered in relation to the defence.

2.2 Norway: The Medical Principle

The Norwegian model for legal insanity has often been referred to as the 'Medical principle'. As this would suggest, the approach stresses the importance of medicine and science to determine 'insanity'. Section 44 of the Norwegian Civil Penal Code lays down that:

"A person who was psychotic or unconscious at the time of committing the act shall not be liable to a penalty. The same applies to a person who at the time of committing the act was mentally retarded to a high degree."[107]

[107] Norwegian General Civil Penal Code, 1902 Chapter 3 s (44*)*

Criminal liability in insanity cases in Norway has not always been a medico-legal concept however. Rather, 18th century legislation indicates that legislators were solely concerned with whether the supposed mental illness impacted the accused's potential for free will as a *'A person lacking free will was not a fit subject to stand for the law.*[108]*'* The 19th century saw Norway implement a number of amendments into their laws, and thus, the current system came to be.

This perspective is possibly the most lenient in all of Europe in that is does not require a link between the mental illness and the offence itself. The McNaughton Rules require that one lacks the knowledge to understand the wrongfulness of his specific act. The Durham model expects that the act is a bi-product of the mental issue the accused is suffering from. This system on the other hand, only demands that a person was 'psychotic' at the moment of the commission of the offence. Such a psychotic state would render the accused unconditionally inculpable for his/her crime, and committed to involuntary treatment. This system introduces the term 'psychotic' into the legal discussion. The definition of the term is dependent on the Norwegian diagnostic manuals at the time. Therefore, like the rest of the medical field, it is an ever-evolving concept. At this point in time, one is generally deemed to be in a psychotic state if the accused finds him/herself in their own delusional universe where his actions are governed by his own delusions. This is in line with the Maltese system. Interestingly, however, under the Norwegian system, certain conditions which are medically considered to be 'non-psychotic' disorders, such as PTSD and Dementia, would not be exculpated under the insanity defense. These conditions undeniably impact one's judgment and I would, therefore,

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[108] S.A Skålevåg, 'The matter of forensic psychiatry: a historical enquiry' 37 82–90' (2014) 82, 83 International Journal of Law and Psychiatry

consider this to be a short-coming of the Norwegian insanity defence. Therefore, despite Norway's 'medical principle', the same issue presents itself with regards to Neurosis based conditions that fall between the realms of sanity and insanity and are therefore not catered to by the law.

The Medical Model remains one of the most lenient models in Europe and was under heavy scrutiny for this reason following the international Breivik case[109]. The media closely followed the trial of Norwegian national Anders Behring Breivik, who was accused of murdering 77 people on 22nd July 2012. Whilst disguised as a policeman, Breivik detonated a large car bomb (killing 8 people instantly) and gunned down another 69 teenage individuals at a summer camp on an island (Utoya) in the area. In July of the previous year, Breivik had published a 1,500 page online 'manifesto', where he had professed his extremist views in an elaborate 'manifesto' in which he described his plans to protect Norway from Marxism and a Muslim invasion. The document was presented as evidence in his subsequent trial.

Breivik's lawyer argued that his client was clearly of unsound mind and entrapped by his own delusions. After his first set of psychiatric evaluations, Breivik was diagnosed with Paranoid Schizophrenia, fulfilling the Norwegian criteria of being 'psychotic' and thus, exculpating him for his crimes. This generated great public outcry from the community who were still in a state of national mourning for the victims. Breivik then faced a second round of psychiatric tests, which identified him as someone with 'narcissist personality disorder'. The overly calculated nature of the murders and the existence of his 'manifesto'

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[109] *Norway v. Anders Breivik,* Oslo District Court (Oslo tingrett) TOSLO-2011-188627-24E (11-188627MED-OTIR/05) (2012)

also made convicting Breivik particularly complex. Anders Forsman (a Swedish Forensic Psychiatrist) said of the case:

"It is difficult to see this as criminal insanity. He seems to have carried out the killings in a rational way. He is an efficient killing machine."[110]

This quote encompasses societies' apprehension to recognize mental illness as a reasonable cause for incapability where heinous criminal acts are concerned. In the Maltese system, personality disorders do not generally fall into the category of mental illnesses (as was elaborated upon in the first Chapter of this thesis) and thus, do not meet the standard for legal insanity. Despite Norway's medical model and more lenient approach, personality disorders still do not meet the standards for legal insanity. Henceforth, the Breivik judgment was overturned, finding him legally accountable for the murders and sentencing him to 21 years in prison (the maximum possible sentence in Norway).

Norway featured in Michael Moore's award winning documentary 'Where To Invade Next' for its particularly humane prison and justice system. Their interpretation of the insanity defence is a reflection of that. The country has become known for its oddly pleasant prisons and its light sentencing. It is currently entirely opposed to life sentences, and has, thus, settled for a maximum of 21 years of punishment for even the most heinous of crimes. Some argued that, in the case of Breivik, this approach was far too merciful and that he could have committed the acts with the knowledge that at worst, he would be

[110] Debra J. Saunders, 'Norway's strange definition of insanity' (Article 2011) <http://www.sfgate.com/opinion/saunders/article/Norway-s-strange-definition-of-insanity-2339878.php> accessed 13th July 2017

released in his 50's. Despite Norway's liberal reputation, Breivik was, ironically held in solitary confinement for 5 years, which many argued was in violation of Article 3 of the European Convention of Human Rights.[111]

Despite this, the Norwegian system is focused significantly on redemption and rehabilitation. This approach has proven successful as the country boasts one of the lowest crime rates in all the world. International justice systems always face the difficult task of finding a balance between punishing criminals for their acts whilst concurrently seeking to rehabilitate them into society as standard citizens. The Norwegian system has proven that when people are treated with dignity and allowed the possibility of redemption, they are unlikely to re-offend and may be integrated into society with ease. Therefore, one may question why other nations have not followed suit and adopted this successful approach.

The Norwegian system is important to consider as it has crafted a formal link between the medical approach to mental illness and the notion of criminal insanity, which is lacking in the Maltese system. The Norwegian medico-legal approach presents the same difficulties that have always surrounded the insanity defence as may be demonstrated in the early James Hadfield and Daniel McNaughton cases, that is, its potential leniency and exculpation of criminal offenders for even the most horrible acts. Regardless, the importance of a formal link between the medical and legal fields is undeniable and should be noted in a discussion for the amendment of the insanity defence in Malta. The incorporation of 'mental retardation' as a reason for exculpation from criminal

[111] The Article states that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

responsibility is also noteworthy and this shall be heavily elaborated upon in the final Chapter of this dissertation.

2.3 The Netherlands Degrees of Insanity

The Dutch system shares the Maltese opinion that the accused must be suffering from a mental 'disease' at the time of the commission of the act and does not seem to differ from our system too drastically on paper. In practice, however, Dutch theorists have established a system of 'degrees of insanity' which has been adopted into judicial practice[112]. It is impossible to place all mental/intellectual conditions in the same box and, therefore, some flexibility in this department is required. A person who has battled with severe schizophrenia throughout their life simply cannot be paralleled with someone who suffers from occasional bouts of clinical depression. That is not to say, however, that either person is entirely mentally stable. In the initial research phase of this thesis, I developed the opinion that mental illness exists in so many forms, that the only realistic way to address mental illness in court would be to determine 'degrees of insanity', with the help of expert psychiatrists. Such a system would not put the question of insanity down to a binary system. Instead, it would reflect the complexity and wide spectrum of mental illnesses and their various degrees of gravity.

Interestingly, the Netherlands had introduced a system which employed the use of 5 'grades of responsibility'. These include:

> *'Being responsible, slightly diminished responsibility, diminished responsibility, severely diminished responsibility, and (complete) legal insanity.'*[113]

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[112] Susanna Radovic, Gerben Meynen, Tova Bennet, 'Introducing a standard of legal insanity: The case of Sweden compared to The Netherlands' (2015) 40 International Journal of Law Psychiatry 180
[113] ibid

The grades have not been formalized into Dutch legislation but have been developed through practice and, thus, have been employed for decades. After much discussion, the grades have now been reduced to 3, based on the fact that between the two opposites of sanity and insanity, there exists a third, 'grey area', where most people find themselves. Even simply acknowledging such an 'in-between' state is a progressive concept. Of all the international approaches to insanity, I believe this notion of 'degrees of insanity' would most accurately depict the wide array of mental illnesses that exist and, thus, Maltese legislators should consider establishing such a graded system with the help of medical professionals. All the nuances of the mind and mental illness simply cannot be catered for by a system that only considers insanity in absolute terms.

2.4 Sweden: Abolishing the Insanity Defence

Interestingly, in 1965, Sweden chose to completely abolish the insanity defence and eliminate it from all its legislation. Instead, it has introduced new (unitary) legislation to cater for all mentally ill individuals in the form of the Forensic Psychiatrist Act and the Compulsory Psychiatrists Act. The idea behind the updated legislation was to:

> *'strengthen the legal safeguards for the patients, to restrict the use of compulsory care and coercive measures, and to improve safeguards for next-of-kin and the community. Another aim was to expand opportunities for detainees, persons remanded in custody, or for prison inmates to obtain psychiatric care on a voluntary basis in medical institutions*[114]*'.*

[114] Research Project (EC) European Commission - Placement and Treatment of Mentally Ill Offenders – Legislation and Practice in EU Member State [2005]216

The legislation also amended the interpretation of mental illness to that of a 'severe mental disorder'[115], which is defined in the recommendations for the acts as presented by the Swedish National Board of Health and Welfare. A mental disorder shall be considered severe if it causes the sufferer to experience psychosis, serious depression with suicidal thoughts or even if s/he experiences psychotic episodes stemming from a personality disorder. Cases of extreme sexual perversions, kleptomania and pyromania may also qualify[116]. In Malta, these conditions (with the exception of psychosis in certain scenarios) would not typically satisfy the requirements for legal 'insanity', unless it can be proven that the conditions eliminated the accused's capability for will and understanding.

Chapter 30 (article 6) of the Swedish Penal Code states that:

A person who commits a crime under the influence of a serious mental disturbance may not be sentenced to imprisonment. If, in such a case the court also considers that no other sanction should be imposed, the accused shall go free from sanction. (Law 1991:1138)[117]

Nowadays, under the Swedish system, mentally ill offenders will always be held accountable, but may only be committed to a psychiatric institution for care (as a sanction) and may never be sent to prison. This is illustrated in Chapter 31 Section 3[118] of the Swedish Penal Code which affirms that an offender with some mental disturbance will be committed to forensic mental care if found guilty and if there is the fear of the patient re-offending, the court may order that s/he be subject to a 'special assessment'

[115] Susanna Radovic, Gerben Meynen, Tova Bennet, 'Introducing a standard of legal insanity: The case of Sweden compared to The Netherlands' (2015) 40 International Journal of Law Psychiatry 25
[116] ibid 27
[117] Swedish Penal Code 1999 s 30(6)
[118] ibid s 31(3)

before his/her potential release. If there is no such risk, then the patient will be released without any additional assessment.

The Swedish approach is not without fault and has given rise to a number of ethical and criminal issues. Firstly, the prohibition of Swedish criminal courts to commit guilty offenders to prison means that they are always bound to commit mentally ill offenders to psychiatric institutions, even if there is no existing treatment for the condition. Forcing psychiatric 'care' on an individual even if there is no available treatment at hand, is a major ethical issue to consider, which places the courts in a very difficult position. Secondly, there is the possibility that the offender's mental disturbance (present at the moment of commission of the offence) does not persist through to trial stage. In this situation, the sanction of imprisonment still cannot be implemented, since he was not sane at the time of the act. The accused also cannot be sent into psychiatric care due to the fact that the mental disturbance has ceased to exist. This can make it extremely challenging for courts to award an appropriate sanction, especially if the crime committed was particularly heinous. If placed in such a catch-22 situation, the courts have opted to award conditional sentences or probation[119], which may be regarded as a disproportionately lenient 'punishment' to many.

2.5 Italy: Partial Insanity

In his book 'Corso di Diritto Penale', Pasquale Tuozzi 'traces the developmental stages of the concept of culpability and responsibility from the Sardinian Code of 1859 to the

[119] Research Project (EC) European Commission - Placement and Treatment of Mentally Ill Offenders – Legislation and Practice in EU Member State (2005) 217

later Article 46 of the Italian Penal Code'[120]. Article 33(a) of the Maltese Criminal Code consequently bears a resemblance to the corresponding provision of the Sardinian Code which illustrated that:

'"Non vi e` reato se l'imputato trovasi in stato di assoluta imbecillita`, di pazzia o di morboso furore quando commise l'azione." [121]

Tuozzi proceeded to argue that this understanding was too stringent and demanded revision, thus the concept was widened to cater for a wider array of mental illnesses. This led to the latter development of Section 46 of the Italian Penal Code which elucidated that:

'Non e punibile colui che nel momento in cui ha commesso i1 fatto era in tale stato di infermita di mente da togliergli la coscienza o la liberta dei propri atti.'[122].

The use of the phrase 'infermita` di mente', in contrast to the strict state of absolute imbecility, signifies the departure from the rigid understanding of insanity to a more flexible and liberal one. The Italian Code is essential to reference in relation to Maltese Law on insanity as it established the main criteria required for acknowledging legal insanity. These are encompassed in the phrase 'la capacita` di intendere e volere'[123], which can be interpreted as one's:

'intelligence, knowledge and awareness of the act or omission and volition including freedom of choice'[124]

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[120] Pullicino, J. (1974). Insanity as a Defence in Criminal Law
[121] ibid translates to: There is no criminal offence if the accused was in a state of complete imbecility, insanity or morbid frenzy when he committed the act
[122] ibid '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' Section 46 of the Italian Penal Code has now been replaced by Articles 88-89 of the Italian Penal Code 1930.
[123] The Penal Code of Italy 1930 s Libro I, Titolo IV s 85 – the capacity for volition and intent
[124] Pullicino, J. (1974). Insanity as a Defence in Criminal Law

Nowadays, insanity is addressed in Articles 88-89 of the Italian Penal Code, as follows:

'Chi, nel momento in cui ha commesso il fatto, era, per infermità, in tale stato di mente da scemare grandemente, senza escluderla, la capacità d'intendere o di volere, risponde del reato commesso; ma la pena è diminuita'.[125]

The Italian legal system shares the Maltese view that a state of insanity would render someone incapable of forming the necessary intent (*volere)* as they lack the mental capacity to do so and should, therefore, not be held accountable for his/her actions. In contrast to local legislation however, the Italian system accepts that 'it is possible to distinguish between different degrees of mental insanity.'[126] They observe Mamo's view that between the states of sanity and insanity, there exists a third realm of 'partial mental insanity'[127]. In the event of a mentally ill offender being found completely legally insane, the Italian courts will force the accused to undergo involuntary psychiatric treatment. If, however, one does not fulfil the requirements for complete legal insanity but cannot be deemed completely sane, the courts will mitigate the sanction of the perpetrator (usually by about 1/3rd) [128]and commit him/her to a clinic or 'casa di custodia' for hospitalisation as an additional security measure, for 'half of the period provided for lack of responsibility*'*[129]. If such a scenario presents itself, the accused must serve his sentence as well as benefit from treatment (that is to say that the prison sentence may not be

[125] The Penal Code of Italy 1930 s Libro I, Titolo IV s 89 translates to: Whoever, at the time when he committed the crime, was, as a result of an infirmity of the state of the mind, without the ability to undertstand or want the offence committed, will have a diminished penalty.
[126] Astolfo Di Amato, Suzanne E Tomkies; et al, *Criminal law in Italy* (2nd edn, Alphen an den Rijn , Kluwer Law International Publishing 2011) 241
[127] Sir Anthony Mamo, Mamo Notes 1954, vol 1, 85
[128] Research Project (EC) European Commission - Placement and Treatment of Mentally Ill Offenders – Legislation and Practice in EU Member State (2005)178
[129] ibid 179

evaded). Italy has awarded such sentences to both people suffering from severe personality disorders and individuals with mental difficulties.

Article 86[130] of the Italian Penal Code is also noteworthy as it states that the courts may hold others responsible for the 'mental incompetence of another'. This is demonstrated as follows:

'Se taluno mette altri nello stato d'incapacità d'intendere o di volere, al fine di fargli commettere un reato, del reato commesso dalla persona resa incapace risponde chi ha cagionato lo stato d'incapacità'.

Therefore, if someone causes the mental incompetence of another, resulting in the commission of an offence, the person causing that incapacity will be found guilty, rather than the accused. This article is useful in that it recognises how easily the mentally/intellectually challenged may be easily manipulated at the hands of another.

The Italian perspective is important to consider as Maltese legislation has been highly influenced by this Continental Jurisdiction over the years. The Italian system has formally incorporated the concept of 'partial insanity' (as Sir Anthony Mamo presented in his notes[131]), thus employing the use of the diminished responsibility defence. Italy presents a functional and more lenient approach to the insanity defence and may be used as a model for reform of the defence in Malta.

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[130] The Penal Code of Italy 1930 s Libro I, Titolo IV s 86 If somebody places another in a state where they lack the will or understanding to commit an offence, then the person causing that state will be answerable for the offence

[131] Sir Anthony Mamo, Mamo Notes 1954, vol 1, 85

2.6: France: Criminal Responsibility and the Problem with Forensic Treatment

In France, legal insanity is dealt with in Article 64 of the Criminal Code which states that:

> *'If the person charged with the commission of a felony or misdemeanour was then insane or acted by absolute necessity, no offense has been committed'.*[132]

The French system simply requires that the mental illness/disturbance was present at the moment of the commission of the act and does not look into any causal links between the act and the mental illness. It also finds a legally insane person completely free of criminal responsibility, going so far as to say that 'no offence was committed' if carried out by an 'insane' person. The system focuses primarily on the concept of criminal responsibility. It does not expressly refer to diminished responsibility or any other related concepts.

Finally, if the accused is suspected to suffer/have suffered from a mental illness, the court will appoint an official/attorney to investigate the issue by opening a formal inquiry into the defendant's mental health. At this point the accused will be examined by two expert forensic psychiatrists who will determine whether a mental condition exits. As is the case in all jurisdictions, if a person is diagnosed with a mental illness and deemed criminally insane, he will be committed to a forensic/psychiatric institution for care until he is deemed fit to be released back into society. France is currently facing a crisis, however, in that the number of beds in psychiatric institutions has been cut by half. According to a French social anthropologist Samuel Leze: 'Psychiatric hospitals do not want to receive

[132] The French Penal Code 1791, s 64

any more people'[133] and the institutions aim 'to make sure more people do not enter the system and to empty the beds'[134]. This means that federal prisons have been overpopulated with mentally ill offenders, who are not receiving the necessary treatment. This is an issue that has presented itself around the world resulting in many mentally ill and intellectually disabled offenders finding themselves in prisons, not receiving the care they need.

2.7 The UK

As mentioned in the first Chapter of this dissertation, being an ex-colony of the United Kingdom, the Maltese legal system bears a great resemblance to Common Law, and some of the rules governing legal insanity in Malta are a prime example of this. English Law uses the McNaughton Rules to determine whether those pleading 'not guilty by reason of insanity' should be found criminally liable or not. In reality, despite the existence of the plea very few people choose to 'invoke the defence and of those few who do, very few are successful.'[135] This can be attributed to the unreasonable stringency of the standard of legal insanity.

In the UK, Section 2 of the Homicide act states that an individual will not be convicted of murder if he is suffering from an 'abnormality of the mind'[136] which either resulted from the pre-existence of a 'medical condition' or which (b) substantially impaired

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[133] Colette Davidson, 'France's forensic psychiatry provision—is it up to scratch?' [2015] 2 (5) <http://thelancet.com/journals/lanpsy/article/PIIS2215-0366(15)00186-8/fulltext> accessed 23rd July 2017

[134] ibid

[135] John Q. La Fond. 'Observations on The Insanity Defence and Involuntary Civil Commitment in Europe.' Essay 532

[136] UK Homicide Act 1957 s 2 (1)(a)

defendant's ability to do one or more of the things mentioned in subsection (1A)[137]. Those things are:

(a) to understand the nature of defendant's conduct;
(b) to form a rational judgment;
(c) to exercise self-control.[138]

The ***R v. Golds***[139] case clarified what the courts were willing to acknowledge as 'substantial.' The impairment should either be something which is significant enough to impact the mind or something which is not trivial and, therefore, has 'substance' in relation to the case. Much of the power to establish what should be accepted is left up to the discretion of the Jury and remains quite subjective.

In contrast to the Maltese system, however, the UK system has incorporated the diminished responsibility defence. The Homicide Act as well as the Coroners and Justice Act of 2009 eventually saw the notion of diminished responsibility receive some amendments. The updated legislation focuses less on 'medical responsibility' and instead places importance on the establishment of a 'mental abnormality' as the result of a recognized 'medical condition'. The main requirement for a condition to be considered a valid and recognizable ' medical condition' is that it is universally considered a prevalent clinical condition, officially recognized in the medical sphere.[140] Various psychiatric and medical institutes have drawn up classificatory lists of recognized medical conditions, but such a classification does not necessarily render the medical condition effective when

[137] ibid s 2 (1)(b)
[138] ibid s 2 (1)(A)
[139] *R v. Golds,* EWCA Crim 748 (2014)
[140] Alan Reed and Michael Bohlander Reed A, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate publishing Ltd 2011)16

employing the defence due to the fact that the condition may not present a case of an abnormality of the mind as the law necessitates.

2.8 Canada – Criticism of a Stringent Approach

Canadian law follows the same approach to legal insanity as other Anglo-American jurisdictions and, thus, views legal insanity as the result of a mental disease or defect, causing an individual to lack the capacity to distinguish right from wrong[141]. The Insanity defence is explained in Section 16 of the Canadian Criminal Code which states that:

> *'No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong'*[142].

Like Malta, they maintain a narrow perspective towards legal insanity by adhering to the strict McNaughton Rules, which are frequently criticized for their inflexibility. In response to the stringency of the rules, many Canadian theorists have tackled the issue of legal insanity and made proposals for change.

Canadian writer Benjamin L. Berger wrote an essay entitled 'Mental Disorder and the Instability of Blame'[143], where he heavily criticised the restrictive system in place. He interestingly produced two theories on insanity which would identify when a defendant should be held accountable. The first theory is that of a 'reasons based account' which would exculpate an offender if s/he 'lacked the capacity to bring assessment and

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[141] Stephen Garvey, Garvey S, 'Canadian Scholars on Criminal Responsibility' (2015) 9(2), 351- 364 Criminal Law and Philosophy 360
[142] Canadian Criminal Code R.S.C 1985, s 16
[143] Stephen Garvey, Garvey S, 'Canadian Scholars on Criminal Responsibility' (2015) 9(2), 351- 364 Criminal Law and Philosophy 362

rationality to bear on the situation that she/he confronts'[144] The second theory, referred to as an 'agency/authorship-based account',[145] focuses on the act itself being regarded as 'insane' in so far as it would not, 'owing to a disease of the mind, be fairly attributed to the will of the accused'[146]. According to Berger, these theories will excuse those offenders who have acted out as a result of a mental disorder that may not be considered severe enough to exculpate someone under the strict McNaughton test[147]. He proceeds to elucidate that there is a 'yawning chasm'[148] between theory and doctrine, and these disorders tend to wrongly fall through it[149]. This is also apparent in the Maltese system, where there appears to be no way to deal with those complex 'in-between' mental conditions which have become prevalent in the 21st century. In the same article, another Canadian scholar proposed that the law should incorporate a 'partial generic excuse based on a substantially diminished capacity for rationality'[150], thus establishing a fair system to cater for the disorders that tend to fall through the cracks of the legal system.

The 'yawning chasm' in legal insanity as referenced by Berger, and as portrayed in this thesis, inevitably calls for reform on the subject. However, many jurisdictions have maintained this narrow interpretation of the notion regardless of numerous proposals for amendments. Berger believes that there is a sociological reason for this, stating that the 'law's narrow definition of insanity… allows us to deny our complicity in crimes by the

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[144] Stephen Garvey, Garvey S, 'Canadian Scholars on Criminal Responsibility' (2015) 9(2), 351- 364 Criminal Law and Philosophy 362
[145] ibid
[146] ibid
[147] ibid
[148] ibid
[149] ibid
[150] ibid 356

mentally ill'[151] This statement might seem quite far reaching and vague, but it is clearly explained as follows:

> *'if we were to excuse every wrongdoer who was, as a result of a mental disorder, sufficiently irrational to warrant an excuse, we would end up excusing 30-50% of those who we currently hold liable and imprison. Faced with this reality we would be forced to wonder why so many among us suffer so. Surely, we would realize, we must be doing something wrong and we must be collectively failing them somehow. And so, to take account of mental disorder in a manner consistent with the principle reasons why one might consider the defence crucial to issues of criminal responsibility would simultaneously point fingers at social, political and collective responsibility for crime'*[152].

This quote is extremely poignant and could potentially encapsulate the underlying reason for which jurisdictions are hesitant to adopt a more lenient approach towards legal insanity, despite the evident ethical necessity for such an approach.

2.9 Conclusion

International comparison is essential for any discussion concerning legislative amendment. Henceforth, this Chapter has observed the state of the insanity defence in seven distinctly contrasting jurisdictions in an attempt to draw inspiration from the foreign systems, and consider their relevance and applicability to the Maltese system. The unique construction of the defence in the Netherlands, Italy and Norway are specifically noteworthy and will be presented as the basis for some suggestions in the conclusion of this thesis. The Italian approach is significant as it may be sourced as a model for the introduction of partial insanity and diminished responsibility under our law. The Norwegian legal system on the other hand, provides a particularly liberal interpretation

[151] ibid
[152] ibid

of legal insanity, whilst the Netherlands have introduced a unique system of ‘degrees of insanity.’

CHAPTER 3

DIMINISHED RESPONSIBILITY

3.1 Introduction

As we have seen, the Maltese interpretation of insanity is a very strict one, and leaves little room for variation. It is essential that the law in a country is a flexible, ever-evolving thing, reflecting the current era and state of society. Therefore, the fact that the insanity plea has followed the McNaughton Rules model so stringently and has never made any changes/amendments can only be viewed as a shortcoming in our legal system. Local legislation only appears to recognize an absolute state of insanity for the insanity plea to be upheld. This strict interpretation has not gone unchallenged, however. Consequently, suggestions for amendments have been brought forward on numerous occasions throughout the years. Henceforth, the potential introduction of the diminished responsibility defence into the Maltese Criminal Code has become a popular point of discussion amongst legal professionals and students alike[153].

The notion of 'diminished responsibility' has been adopted in many jurisdictions, who view it as an answer to the problems that may arise when establishing a necessary intermediary between fully fledged, complete insanity and complete sanity. Diminished responsibility presents itself as a legal defence to those who may not satisfy the requirements for complete legal insanity but still suffer from a medically recognized

[153] Amanda Scott 'A Case for Diminished responsibility in Maltese Law' 15

condition. The defence would allow individuals to have their sentences mitigated after taking their mental state at that time of the offence into consideration. It is essential to point out that the nature of the defence is not to eliminate criminal responsibility in the accused, but rather to hold the perpetrator accountable for his/her actions, whist taking any mental issues into consideration to achieve the fairest sentencing possible. Even though diminished responsibility has been rejected under our law, Sir Anthony Mamo, whose works are frequently referenced in the legal profession, seems to favour the idea as he has spoken of a 'partial insanity'[154] numerous times in his notes. Sir Anthony Mamo considers that in Malta, 'there is no clear-cut line between the sane and the insane'[155]. Acknowledgement of a state of 'partial insanity' would cater for situations where if complete mental impairment cannot be proven, a less severe mental abnormality would suffice[156].

In the Case ***ir-Repubblika ta Malta v. Raymond Vella***[157], the accused was medically diagnosed with manic depressive psychosis, rendering him incapable of managing his natural impulses. The case is important to consider when having a discussion on diminished responsibility because the court clearly expressed its view that whilst there are articles in our law that permit the mitigation of sentences in certain scenarios, this should not be confused with diminished responsibility:

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[154] Sir Anthony Mamo, Mamo Notes 1954, vol 1, 88
[155] ibid
[156] ibid
[157] *Il-Pulizija v. Raymond Vella* Court of Criminal Appeal as per J.Vincent DeGaetano – 2nd August 1999 translated to: in our law, it is incorporated into specific dispositions but is not a concept that can be applied generally, except for the purpose of punishment

' Fil-Ligi taghna l-kunċett ta' 'diminished responsibility' hu inkorporat f'disposizzjonijiet specifici, u ma huwiex kuncett ta' applikazzjoni generali, hlief ghall-finijiet ta' piena'[158]

Therefore, as it stands, the Maltese courts are maintaining the position that diminished responsibility is not an applicable concept in our law. This chapter will present an argument in favour of the introduction of diminished responsibility by comparing the position of other continental jurisdictions, demonstrating local legislation that hints at the acceptance of the notion and by presenting some mental illnesses that have become increasingly common in the 21st century but don't necessarily satisfy the requirements for legal insanity.

3.2 'Semi-Responsibility' by Sir Anthony Mamo

In his well renowned works, Sir Antony Mamo clearly defines a state of 'partial' insanity. Understanding that there is no definitive line between sanity and insanity, Mamo believes that a state of partial insanity would cater for certain:

'twilight conditions, not serious enough to render the victim irresponsible for crime not even to require his confinement as an insane person in a mental hospital, but nevertheless rendering him incapable of sound, calm judgment, especially under the conditions of stress at which crime may be resorted to'[159]

In his opinion, 'borderline'[160] mental illnesses can be classified as cases of partial insanity. Those suffering from such a condition are not necessarily capable of fully controlling their impulses or comprehending the wrongfulness of their acts in the same

[158] ibid
[159] Sir Anthony Mamo, Mamo Notes 1954, vol 1, 87
[160] ibid

way that the ordinarily reasonable man would. Consequently, they should not endure the full force of the law and the courts should 'make allowance(s) for this deficiency'[161] by mitigating their sentences accordingly.

This idea was also incorporated into the Italian Penal Code of 1889 (Article 47)[162]. It stated that if the mental issue was 'such as to greatly diminish responsibility, without however, excluding it, the punishment prescribed for the crime committed is to be reduced'[163]. Similar provisions also exist in Greek, Norwegian, Swedish and Swiss codes[164]. Since Mamo remains a prominent point of reference for Maltese Judges and legislators, it is odd that legislators have dismissed his backing of the concept and are yet to incorporate diminished responsibility into our law.

3.3 International Perspectives on Diminished Responsibility

As mentioned in the previous chapter, the Italian courts have incorporated the notion of 'partial insanity' as was similarly expounded by Sir Anthony Mamo[165]. Other jurisdictions have also introduced the defence of diminished responsibility into their systems in different forms as shall be examined below. The notion of diminished responsibility was first employed in New South Wales in 1974 and is to be viewed in conjunction with the UK Homicide Act of 1957[166]. The concept was introduced to cater for cases concerning wilful homicide where the awarding of a 'life-sentence', seemed

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[161] ibid 89
[162] The Penal Code of Italy 1889, s 47
[163] ibid
[164] Sir Anthony Mamo, Mamo Notes 1954, vol 1, 88
[165] ibid
[166] Alan Reed and Michael Bohlander Reed A, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate publishing Ltd 2011) 23

excessive. The notion therefore allowed the penalty for wilful homicide to be reduced to that of manslaughter if the requisite mental deficiency was present. It was also not necessary for a permanent disease of the mind to exist, but rather that some kind of mental deficiency was present at the moment of the act.

The defence of Diminished responsibility has most notably been adopted in some parts of Australia and New South Wales, and is now more commonly referred to as the 'substantial impairment' defence[167]. The phrase 'substantial impairment' frequently features in discussions regarding diminished responsibility and accordingly appears in the UK's definition of the defence. In all jurisdictions, it is imperative that this 'substantial impairment' directly impacted the accused's mental reasoning at the moment of the commission of the crime, to allow him/her to receive a mitigated sentence through the defence.

In New South Wales, emphasis is placed on the presence of an abnormality of the mind, which also causes evident damage to the brain (something which is not required under UK or Australian Law)[168]. Accordingly, if one intends to employ the defence based on the fact that their mental faculties were impaired by narcotics or drugs, it must be proven that such chronic use caused permanent damage to the brain. An instance of self-intoxication would therefore not permit an individual to use the defence.

Ireland saw the insertion of diminished responsibility in the year 2006[169] by means of the Criminal Law Insanity Act of 2006. This provision describes the protocol for when the Jury is convinced that the accused committed the act for which charges have been brought

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[167] Law Reform Commission of New South Wales, 'Partial Defences to Murder: Diminished Responsibility' (1997) 82 Law Reform Com. of NSW
[168] ibid
[169] Criminal Law (Insanity) Act 2006, s 6

forward and was suffering from a mental disorder at the time of the act, but that disorder was not substantial enough to exculpate him of all criminal responsibility through the plea of insanity. In such a scenario, the 'jury or court' shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility'[170]. The provision also clearly places the burden of proof on the defendant, to ascertain 'that the person is, by this section, not liable to be convicted of that offence'[171]. Finally, the last provision of this section refers to how women guilty of infanticide shall also be dealt with according to this section of the Law. Including infanticide in this section highlights that the defence of infanticide is a clear denomination of the diminished responsibility plea. Thus, the presence of infanticide in Maltese legislation could be seen to foreshadow the possible eventual introduction of diminished responsibility in our law.

3.4 Diminished Responsibility as a Means of Catering for Common Mental Illnesses in the 21st Century

One of the issues concerning the current application of the insanity defence in Malta is the fact that some of the mental illnesses that have come to characterize the 21st century, are not officially recognized by the law. Whilst a wide variety of conditions fall into this category, Depression and Post Traumatic Stress Disorder have become two of the most common illnesses that have found their feet in modern society and, thus, shall be examined below.

[170] ibid
[171] ibid

3.4.1 Depression

As an adult of the 21st century, one would argue that the widespread prevalence of mental illnesses, specifically anxiety and depression, is undeniable. Even the media has taken note of the phenomena, and we are now seeing an increase in TV shows/films tackling these issues. As a result, the cult hit '13 Reasons Why'[172] has garnered significant attention (as well as criticism) for its portrayal of teenage suicide. Despite varying opinions on the manner in which the show has chosen to tackle the subject matter, most people shared the general sentiment that the show was necessary to start a conversation, raise awareness and bring these pressing mental health issues to the forefront[173]. In a conference concerning the state of international mental health services, UN official Kofi Annan stated that depression was so rife that: 'At the most conservative estimate, 350 million lives are overshadowed by depression.' And that 'depression is already the leading cause of disability in our world, with a global economic cost (2010 estimate) of US$800 billion and rising'[174] He also emphasized the fact that there was a lack of treatment and social support for those diagnosed with the condition which he believed 'denies those who suffer their human rights.[175] These staggering figures shed a light on the true extent of the issue. Seeing as mental health issues are so rampant, it seems increasingly odd that legal systems would not approach the notion of legal insanity with a more modern and understanding approach. Once again, that is not to say that defendants should be perpetually exculpated from all criminal responsibility if they commit an illegal

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[172] in 2017, the popular television streaming service 'Netflix' released a twelve-part Television series entitled '13 Reasons Why'. The show primarily dealt with issues of teenage suicide and depression, and garnered significant attention from the public as a result.

[173] Haley Elizabeth Roberts, 'The Importance of '13 Reasons Why' and It's Reflection of Teen Mental Health' (2017) <https://psychcentral.com/blog/archives/2017/04/21/the-importance-of-13-reasons-why-and-its-reflection-of-teen-mental-health/> accessed 30th June 2017

[174] Woody Caan, 'The Global Crisis of Depression: the low of the 21st century?' (2015) 13(2) Perspectives in Public Health conference report

[175] ibid

act. Instead, their mental state should be heavily taken into consideration when awarding punishments.

Depression is defined as a clinical condition characterized by 'major depressive episodes'[176], which cause a person to experience overwhelming sadness and a lack of pleasure in all forms[177]. These 'episodes' typically last up to two weeks. When a person is in the midst of a depressive episode they are justifiably not fully themselves and their actions and thoughts may reflect this. Lashing out at loved ones, isolating themselves and sometimes even going so far as to take their own lives are just a few examples of how their mental condition may effect their behaviour[178]. When describing the psychological effects of depression on his patients, an American doctor said that:

'Patients who have suffered from other serious diseases, such as cancer, have told me depression is worse. They speak of an enveloping blackness which shuts everything else out. It is so painful that they feel compelled to bring it to an end—even by ending everything'[179].

Unfortunately, news of a person's suicide is sometimes accompanied by an element of judgment towards the victim, based on the assumption that suicide is a selfish act done with little consideration towards those being left behind[180]. The problem with this approach lies in the false presumption that the victim was in a lucid and logical state at

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[176] Meron Wondemaghen,'Depressed but not legally impaired ' (2013) 1, 160-167 International Journal of Law and Psychiatry 165

[177] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders. DSM V (5th edn,Washington DC)

[178] Meron Wondemaghen, 'Depressed but not legally impaired ' [2013] International Journal of Law and Psychiatry 160, 167

[179] Fredric Nueman M.D psychologytoday.com, 'Some Reasons Why People Kill Themselves' (2017) <https://www.psychologytoday.com/blog/fighting-fear/201506/some-reasons-why-people-kill-themselves> accessed 30th July 2017

[180] ibid

the time of his/her death to be able to contemplate the severity and finality of their actions. On the contrary, those who suffer from episodes of depression are in a mental state of such sadness that they will compulsively take their own lives to relieve themselves of their pain, with little thought or consideration[181]. Such a momentary lapse of reason can be equated with an 'irresistible impulse' to commit an act. Crimes of sudden passion caused by 'mental excitement' warrant mitigations in punishment (Article 227 of the Criminal Code), and the irresistible impulse test remains one of the most frequently employed tests to determine legal insanity at the moment of the commission of an offence. Therefore, it would appear that a person suffering from depression may fit the aforementioned criteria, but cannot receive a mitigated sentence for their acts, unless they were in a complete state of psychosis (described in Chapter 1) and robbed of all capacity for will and understanding. A study on the insanity defence in Victoria (Australia), which presents a very similar interpretation of the insanity defence to Malta's, sums up this issue as follows:

> *'Overall, it may be argued that mentally impaired offenders tried in Victoria are at a disadvantage because in cases in which the courts consider non-psychotic illnesses as falling short of mental impairment there is no option to raise the partial defence of diminished responsibility to achieve a determinate and shorter sentence.'*[182]

Victoria (Australia), like Malta, has maintained a rather restrictive view on insanity and this quote clearly highlights how the rigidity of the current system is outdated and leaves much to be desired. Additionally, for a person to be found liable for a criminal offence it must be proven beyond reasonable doubt that the accused understood the severity of his

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[181] Fredric Nueman M.D psychologytoday.com, 'Some Reasons Why People Kill Themselves' (2017) <https://www.psychologytoday.com/blog/fighting-fear/201506/some-reasons-why-people-kill-themselves> accessed 30th July 2017

[182] Meron Wondemaghen, 'Depressed but not legally impaired ' [2013] International Journal of Law and Psychiatry 160, 167

actions and could distinguish between right and wrong and fully intended to carry out the act in question (thus possessing the requisite *mens rea*). In conclusion, I would raise the question of whether we can truly establish that a person suffering from an episode of depression at the time of the commission of an offence was totally sane and possessed the same volitional capacities as the ordinarily reasonable man, 'beyond a reasonable doubt'. I believe that it is not possible to comprehensibly rule out the impact a mental illness may have on the accused's volitional capacities and, therefore, this standard of proof would not be met if such a verdict were to be reached.

The Australian case ***R v. Fitchett***[183] saw these issues come to light as the case surrounded a mother of three who murdered all her children and attempted to take her own life. Fitchett believed that in killing her children she would be putting them out of harm's way and in a 'safer place' where 'all [was] peaceful [and] no one could ever hurt them'[184]. She proceeded to drug her three children and place them in their beds, after which she wrote a suicide note and attempted to take her own life. In court, Fitchett pleaded not guilty due to insanity (as she suffered from a depressive illness), but the court rejected her plea, ruling that she was guilty of the offence, committing her to a psychiatric ward under a 14-to-28 year custodial order. The court acknowledged that she possessed a 'mental impairment'[185] (equivalent to our local 'disease of the mind' concept), but it was not severe enough to grant a ruling of not guilty by reason of insanity. The 'guilty' verdict following both trials suggests that, although Fitchett was mentally ill (clinically depressed) at the time of the crime, the degree of mental illness did not reach the threshold

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[183] *R v. Fitchett,* VSCA 150 (2009)
[184] Meron Wondemaghen, 'Depressed but not legally impaired ' [2013] International Journal of Law and Psychiatry 160, 167
[185] ibid 162

to satisfy the defence of mental impairment to the extent that it impaired her knowledge that her conduct was wrong. This case has been used in many arguments advocating the introduction of diminished responsibility into the Australian system.

3.4.2 Post-Traumatic Stress Disorder

As I conducted my research, I became increasingly aware of the prevalence of Post-Traumatic Stress Disorder (PTSD) in our society and consequently encountered an American Law Journal dealing with the issue of diminished responsibility in occasions of victims suffering from PTSD[186]. The American approach to the subject is one that can be easily transferable into all other realms of diminished responsibility as it takes into consideration a variety of factors and reaches a necessary balance between the stringency of the Maltese approach and the more lenient idea of mitigated sentencing for partial insanity.

As the name suggests, PTSD refers to a mental illness an individual may develop following a particularly traumatic (typically life-threatening) event in his/her life. Cases of rape, child abuse/neglect, terrorist attacks, kidnapping, natural disasters, car/plane accidents have all resulted in the development of PTSD[187]. Despite these instances, war veterans still experience the highest rate of PTSD of all[188]. As a matter of fact, the term was officially coined in 1980 with the publication of the Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition, during the aftermath of the Vietnam War.

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[186] PTSD – abbreviated from Post-Traumatic Stress Disorder

[187] helpguide.org, 'PTSD Symptoms, Self-Help, and Treatment Alternatives' (2015) <https://www.helpguide.org/articles/ptsd-trauma/ptsd-symptoms-self-help-treatment.htm> accessed 30th July 2017

[188] ibid

According to a study, by 1985 roughly 1 million U.S veterans were officially diagnosed with PTSD. The publication of the manual allowed for sufferers of the condition to 'mount affirmative or mitigating defences for charges ranging from murder and kidnapping to drug trafficking'[189]. This was necessary following a series of offences involving ex-veterans who were clearly still dealing with their war demons and were not in a completely sane state of mind. One particular case (***Kemp v. State 1973***)[190] saw an ex-veteran murder his wife, following his return to the US. Upon his arrival, he began drinking heavily, experiencing bouts of amnesia and night terrors. His defence team attempted to prove his insanity at the time of the murder, and this was attested by the appointed expert witnesses (psychiatrists). However, the Jury rejected this plea and found him to be sane. This decision was eventually taken to the Supreme Court and overturned, on the grounds of his sanity, or rather, lack thereof. The Court concluded that Kemp was clearly suffering from a severe case of PTSD which led him to murder his wife in a moment of insanity and thus could not be found guilty of the murder.

The mental suffering borne by soldiers dealing with PTSD (referred to as 'shell shock' during the first world war) is brilliantly articulated by Wilfred Owen in his poem 'Mental Cases', when he says;

> *'These are men whose minds the Dead have ravished.*
> *Memory fingers in their hair of murders*
> *Multitudinous murders they once witnessed.*
> *Wading sloughs of flesh these helpless wander,*
> *Treading blood from lungs that had loved laughter'*[191]

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[189] Brooks Borders, 'Veterans imprisoned by the violent shadows of military war time: The expansion of the Insanity defence to include post-traumatic disorder ' (2015) 36(1) 73-99 Biomedical, Pier reviewed, USA 93

[190] *Kemp v. State*, Court of Criminal Appeal Oklahoma No. S-2009-65 September 15 (2009)

[191] Wilfred Owen 'Mental Cases' 1917

The poem clearly depicts how the horrors and inhumanity of war remain with soldiers for long after the events themselves. These memories ultimately 'ravish' their minds, and this strong image can be shifted onto all people coping with the condition. I felt it essential to include this quote as oftentimes art can communicate those emotions and empathetic sentiments that legal jargon and discussion cannot. I feel a case for diminished responsibility is not simply a legal issue, but also a more personal, humane one. Before one delves into issues of enforcement and legislation one must simply question if the current system is fair and just. A person suffering from a mental health condition at the time of the commission of an offence, simply cannot be held to the same standard of responsibility as a person in complete control of his/her volitional capacities.

In the US, the standard tests for determining insanity are the McNaughton Rules as well as the Model Penal Code (discussed in Chapter 1 of this dissertation). The American system is still not overly lenient, however. In fact, the only way to successfully plead not guilty by reason of insanity (specifically in relation to Post Traumatic Stress Disorder) would be if the accused suffered from a *dissociative flashback*[192] in which he believed he was reliving a previous experience where he felt his life was being threatened, resulting in him violently resisting him/her and killing the victim. Other manifestations of the disorder, however, (such as Mood-disorder associated violence, noncombat Trauma-associated violence, sleep-disorder associated violence etc.) will not amount to a verdict of not guilty by reason of insanity.

[192] Brooks Borders, 'Veterans imprisoned by the violent shadows of military war time: The expansion of the Insanity defence to include post-traumatic disorder ' (2015) 36(1) 73-99 Biomedical, Pier reviewed, USA 90

Whilst only the most severe dissociative episodes are necessary for a verdict of not guilty by reason of insanity (PTSD) in the US, other symptoms such as sleeplessness, extreme irritability, and alcohol addiction have been taken into account to deliver a mitigated/reduced sentence to the accused[193]. If, however, there are witnesses who give evidence to the effect that any of these traits existed prior to the veteran's time at war, the defence will fall. Therefore, it is essential that all factors are evaluated. Observing all the facts and circumstances in a case of this nature would be essential to avoid abuse of the system. In a 2012 article, US lawyer Laurence Miller said that during his career he encountered four cases of this nature; Two of them clearly suffered from the disorder but showed no clear evidence of any dissociative flashback episodes, one was clearly feigning the disorder and the last apparently committed the crime in a fit of rage, against someone who he had a negative history with.[194]

It also goes without saying that a professional psychological assessment of the accused must be taken in order to confirm the presence of the disorder and its severity as well as to be able to 'credibly draw a clear, bright line connecting the effects of the behaviour to the criminal behaviour in question'[195]. In the case of a dissociative episode, it would be unlikely for a defendant to be found innocent if he had a previous relationship with the victim, for instance, if they had previously got into an argument or it was a known fact that the two did not get along. The system of mitigation with regards to PTSD in America is one that could be clearly replicated on a local scale and presents an ideal balance

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[193] ibid

[194] Lawrence Miller, 'Post-traumatic stress disorder and criminal violence: Basic concepts and clinical-forensic applications' (2012) 17(4) Aggression and Violent Behaviour 364

[195] Brooks Borders, 'Veterans imprisoned by the violent shadows of military war time: The expansion of the Insanity defence to include post-traumatic disorder ' (2015) 36(1) 73-99 Biomedical, Pier reviewed, USA 95

between allowing for dissociation/flashback related violence, combat addiction/sensation-seeking syndrome.

3.5 Total and Partial Exemptions from criminal responsibility under Maltese Law

The Criminal Code presents a number of 'excuses' which allow the accused to be exempt from criminal responsibility or acknowledge that the accused cannot be held entirely criminally liable for his/her actions. These provisions are important to consider in an argument for diminished responsibility as they prove that the legislator was willing to accept instances of partial responsibility or exemptions from responsibility in certain instances, as shall be observed below.

3.5.1 Infanticide

It would be impossible to develop an argument for the introduction of diminished responsibility under Maltese Law without referring to the article in the Criminal Code dealing with 'infanticide'. As it stands, this provision presents the closest thing to diminished responsibility under our law. The term 'infanticide' is a legal term, coined to refer to those crimes concerning the murder of a new-born child by its mother. The crime is enshrined in article 245 of the Criminal code:

> *Article 245.*
> *Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effects of giving birth to the child or by reason of the effects of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that for this article the offence would have amounted to wilful homicide, she shall be guilty of infanticide and shall be liable to the punishment*

of imprisonment for a term not exceeding twenty years'[196]

The Provision saw its incorporation into Maltese Law through Act 6 VI of 1947. This article illustrates that if a woman causes the death of her child, and at the moment of the offence 'the balance of her mind (was) disturbed by reason of her not having fully recovered from the effects of giving birth',[197] then the said woman shall be convicted of the crime of infanticide rather than wilful homicide and have her sentence mitigated accordingly. This article of the law indirectly refers to the condition of 'Postpartum Depression'[198], more commonly referred to as the 'baby blues'. The condition is extremely common and is brought on due to the hormone imbalances women may experience post-partum, when their bodies are still in the process of recovering from birth. According to the NHS website, one in ten women suffer from the condition[199].

Under our law, infanticide is dealt with as a substantive crime, considered as separate and distinct from the crime of wilful homicide[200], in which case one would face a life-sentence if found guilty. Ashworth has stated that:

'it is a separate offence of manslaughter, but one with diminished responsibility[201]'.

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[196] Criminal Code Chapter 9 of the Laws of Malta 1854, s 245
[197] ibid
[198] 'Postnataldepression'(2016)<http://www.nhs.uk/Conditions/Postnataldepression/Pages/Introduction.aspx> accessed 30th June 2017
[199] ibid
[200] Criminal Code Chapter 9 of the Laws of Malta 1854, s 211
[201] Andrew Ashworth, *Principles of Criminal Law* (4th edn, Oxford University Press 2003) 162

Therefore, if this provision is considered, it would appear that the Maltese legal system has introduced the notion of diminished responsibility in some capacities, whether it was intended to be so or not.

The history of infanticide is quite a rocky one, in that it has always been met with some scepticism and mixed public opinion. For the larger part of history, the killing of an infant was considered a particularly heinous act as the victim is essentially defenceless as well as completely innocent. However, in the early 19th century, criminal theorists began to lean towards the idea that this crime is not as terrible as other types of murder because of the nature of the victim. They believed that a baby could not experience the same level of suffering as an adult and would have made no major contributions to society yet. Therefore, such a loss would not necessarily shake the fabric of the community. It must also be noted that such cases did not present the same malicious intent as other murders, because oftentimes the crime was committed by illegitimate mothers who wished to conceal their shame and had 'not recovered from the effects of giving birth'[202]. At this time, many suggestions for reform were put forward and, thus, the offence of infanticide was introduced. The excuse of instantaneous passion or mental agitation was adopted in the case ***Regina v. Giuseppa Sultana***[203]*,* where, after proving the existence of mental agitation the Court directed the jury to accept the excuse. In another case*,* ***Regina v. Maddalena Camilleri & Marianna Bartolo***[204], the jury declared:

'essere l'accusata Marianna Bartolo rea del delitto imputata nell'atto di accusa, colle circostanze, pero` che Marianna Bartolo nel commettere il delitto, agiva sotto

[202] Criminal Code Chapter 9 of the Laws of Malta 1854, s 245
[203] *Regina v. Giuseppa Sultana*, Criminal Court (1861) translated to: Marianna Bartolo, under the circumstances acted under the immediate influence of sudden agitation or mental excitement of the mind under which she was incapable of reflection
[204] *Regina v. Maddalena Camilleri & Marianna Bartolo*, Criminal Court (1890)

l'immediata influenza di una instantanea agitazione di mente per cui era incapace di riflettere'[205]

In the aforementioned cases, one may note the first times the Court seemingly accepted instantaneous passion or mental agitation as an excuse for murder in the case of infanticide. In 1944 however, in the case ***Rex v. Vittoria Micallef***[206], the Criminal Court held an alternate view. The Court informed the jury that the legal excuse set out in section 227(c)[207] of our Criminal Code only applies when the passion or mental agitation pleaded by the accused has been induced by provocation, and does not apply when it is merely the effect of the biological fact of having given birth to a child. If the jury considered that the accused acted under the stress of excitement, they could, if they found the defendant guilty, recommend her for clemency. In this case however, the Court sentenced the woman to death, having no option to inflict a lesser punishment. This ruling was eventually overturned and the sentence commuted. After this case, the necessity to introduce legislation dealing with infanticide became apparent and consequently, in 1947, a new model was adopted (the English Law model). The grounds of mitigation here are not based on the object of concealing shame, but rather, acknowledging the unstable state of mind of the mother arising from the child birth, which undeniably reduces the moral responsibility for the act.

More recently, The Criminal Law Reform Committee in the UK concluded that to prove infanticide, it must become clear that the 'balance of her mind was disturbed by reason

[205] ibid
[206] *Regina v. Vittoria Micallef*, Criminal Court (1944)
[207] Criminal Code Chapter 9 of the Laws of Malta 1854, s 227(c) of excusable and justifiable homicide.

of the effect of giving birth to the child or circumstances consequent upon that birth'[208]. The committee initially believed that diminished responsibility could cater for these cases. Therefore, there was no need for the uniquely titled crime of infanticide. Here, the woman would be charged with manslaughter and her sentence mitigated by diminished responsibility. They eventually concluded that it would be best to avoid making the mother face a charge of manslaughter. Also, diminished responsibility might not cover all the circumstances which are needed to prove infanticide. Some of the circumstances include;

> *'overwhelming stress from the social environment being highlighted by the birth of a baby, with the emphasis on the unsuitability of the accommodation (2) overwhelming stress from an additional member to a household struggling with poverty; (3) psychological injury, and pressures and stress from a husband or other member of the family from the mother's incapacity to arrange the demands of the extra member of the family; (4) failure of bonding between the mother and child through illness or disability which impairs the development of the mother's capacity to care for the infant'*[209]

As stated previously, nowadays, under our law, infanticide is dealt with as a substantive crime, considered as separate and distinct from the crime of wilful homicide, in which case one would face a life-sentence in prison. Ashworth has stated that 'it is a separate offence of manslaughter, but one with diminished responsibility'[210]. Therefore, in conclusion, I have presented the case of infanticide as a model for the introduction of diminished responsibility in our system, because it is apparent that the courts are willing to accept a state of partial insanity in this instance and should henceforth adopt this approach in all other aspects.

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[208] David Ormerod, Karl Laird, *Smith and Hogan's Criminal Law* (13th edn Oxford University Press 2015) 593
[209] ibid 597
[210] Andrew Ashworth 'The Doctrine of Provocation' (1976) 35, (2) The Cambridge Law Journal 292-320

3.5.2 Young age

One may argue that people are not inherently vested with a sense of what is right and wrong. Whilst this may be a far-reaching statement, we can all agree that understanding how to act in society (relative to the laws and morals of that place) is a learnt behaviour which one adopts over the course of his/her life. Additionally, for one to be able to fully comprehend and understand the consequences of their actions, some maturity and intellect are required. Because of this, there is an irrefutable presumption that 'infants' below the age of nine, are believed to be *doli incapax* (i.e. incapable of forming the requisite intent for a crime) and exempt from criminal prosecution under all circumstances[211].

Minors below the age of fourteen, are dealt with in Article 35(1) of the Criminal Code, which clearly states that:

> *'...a minor under fourteen years of age shall be exempt from criminal responsibility for any act or omission.*[212]

The Law respects and understands that children are not capable of forming the same level of understanding as an adult, and therefore does not hold children below the age of 14 accountable. Nevertheless, in these cases, the court may still:

> *'on the application of the Police, require the parent or other person charged with the upbringing of the minor to appear before it, and, if the fact alleged to have been*

[211] Criminal Code Chapter 9 of the Laws of Malta 1854, s 35(1)
[212] ibid

committed by the minor is proved and is contemplated by the law as an offence, the court may bind over the parent or other person to watch over the conduct of the minor under penalty for non-compliance of a sum of not less than one hundred euro (€100) and not exceeding two thousand euro (2,000), regard being had to the means of the person bound over and to the gravity of the fact."[213]

Adolescents below the age of sixteen on the other hand (and above the age of fourteen), are not completely exempt form criminal responsibility. In these instances, the courts will assess the nature of the crime and whether the adolescent possessed a mischievous intent/discretion. If the minor was fully aware of the wrongfulness of his actions but committed the act regardless, he would be found criminally responsible. Since they have not attained the age of majority at this stage and cannot be held to the same standard as legal adults, the court is required to mitigate their sentence by one or 2 degrees. If such a mischievous intent cannot be found in the minor, he will not be held criminally liable. Minors between the ages of sixteen and eighteen on the other hand, do not benefit from the refutable presumption of innocence, and instead would only benefit from this same mitigated sentence of one or two degrees[214]. These provisions of the law clearly depict the indirect incorporation of diminished responsibility in our law.

3.5.3 Excusable homicide

Maltese legislation recognizes that many a time, when a homicide occurs, the circumstances of the case never present an entirely black on white image of guilt and/or innocence. Therefore, apportioning total blame may sometimes be considered quite a challenge. As a result, article 227 of the criminal code accounts for situations when

[213] ibid s 35(2)
[214] ibid s 37(1)

homicide may be considered excusable, sometimes leading to a significant mitigation of punishment:

> *'Wilful homicide shall be excusable - (c) where it is committed by any person acting under the first transport of a sudden passion or mental excitement in consequence of which he is, in the act of committing the crime, incapable of reflecting', the offender shall be deemed to be incapable of reflecting whenever the homicide be in fact attributable to heat of blood and not to a deliberate intention to kill or to cause a serious injury to the person, and the cause be such as would, in persons of ordinary temperament, commonly produce the effect of rendering them incapable of reflecting on the consequences of the crime;'*[215]

If the accused commits murder under any of the circumstances mentioned in sub-articles (a) and (b) then they will only face a maximum sentence of two years[216], a significant difference to the life-sentence imposed for wilful homicide. Finally, if they act out impulsively under the first transport of a sudden passion, the court will take this into consideration and award a sentence between five to twenty years depending on the circumstances of the case[217]. This latter article is of particular relevance as it deals with the notion of one's irresistible and natural impulses, which, as we have seen in chapter 1 of this dissertation, are often seen as an essential component employed to determine legal insanity. The courts' willingness to reduce punishment in these scenarios, specifically that mentioned in 227(c) denotes the courts' acceptance of the fact that mental 'excitement' may cloud one's judgment at the moment of the commission of an offence and cause them to act in an uncharacteristically rash way. They should consequently not be held completely criminally responsible and have their sentences mitigated instead. Likewise, a person who is not completely sane (but not found legally insane either) may have his/her judgment clouded, not necessarily by mental excitement or sudden passion

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[215] Criminal Code Chapter 9 Laws of Malta Article 1854, s 227(a)-(c)
[216] ibid s 228(1)
[217] ibid s 228(2)

but by their medical condition and, thus, they should similarly be granted a mitigated sentence. Each case should obviously be considered individually and punishments determined on a case by case basis, but essentially it would appear that the line of reasoning behind excusable homicide is almost identical to the concept of diminished responsibility. Thus the courts' apprehension to formally include the notion appears to be quite contradictory.

3.5.4 Article 21 of the Criminal Code

An interesting article to consider under our law is article 21 of the Criminal Code which states that:

> *'Saving the provisions of article 492, the Court may, for special and exceptional reasons to be expressly stated in detail in the decision, apply in its discretion any lesser punishment which it deems adequate, notwithstanding that a minimum punishment is prescribed in the article contemplating the particular offence or under the provisions of article 20, saving the provisions of article 7'*[218]

This section indicates that criminal punishments may be reduced in 'special and exceptional' circumstances, which is the only tool a court may employ to significantly mitigate the punishment of an offender if they do not meet the legal standard for insanity. The terminology used in this provision also hints at the fact that the courts are still not eager to mitigate sentences unless the circumstances are absolutely 'exceptional' and there is no other standard course of action. Therefore it would appear that the legislator included this provision as a last resort option to cater for cases that simply cannot be handled in any other way, and not as a move towards the introduction of diminished responsibility.

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[218] ibid s 21

3.5.5 Deaf Mutes

This condition inevitably impacts one's mental faculties and has therefore been formally recognized by the legislator, who has dictated how the condition may lead to exemptions from responsibility or mitigation in sentencing. According to Sir Anthony Mamo: 'a deaf mute, deprived as he may be, of speech and hearing cannot acquire but late, and perhaps never completely, the capacity to discriminate between right and wrong[219], and are often regarded as infantile in so far as their mental faculties are concerned. Considering their 'infantile' capacities, people have argued that the irrefutable presumption of *doli incapax* should be extended to an older age for those concerned[220].

If a 'deaf mute' commits a criminal act, the court will assess whether there is evidence of mischievous discretion, and if so, the accused will be prosecuted according to articles 36 and 37 of the criminal code, pertaining to the prosecution of minors. For deaf-mutes to benefit from this defence it must be proven that the condition was present from birth and not something which developed after attaining the age of majority. "A person who becomes deaf and dumb after he has already reached the age of discretion will have already had the opportunity of learning to discriminate between right and wrong and of understanding the penal enactments of the law.' [221]

3.5.6 Hypnotism and Somnambulism

If someone is in a trance-like 'hypnotic' state or even 'sleep-walking', their actions may appear to be coming from a conscious state of mind, when in fact their actions

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[219] Sir Anthony Mamo, Mamo Notes 1954, vol 1, 79
[220] Amanda Scott A Case for Diminished responsibility in Maltese Law 46
[221] Sir Anthony Mamo, Mamo Notes 1954, vol 1, 80

are ‘merely mechanical, automatic acts, undirected by volition and unaccompanied by consciousness’. [222] Whilst sufferers of somnambulism shall not be held criminally liable for their actions whilst asleep/unconscious, it has been argued that they may still be found guilty of negligence (*culpa*) for not taking the necessary preventative measures to avoid the commission of an offence. Hypnotism provides a slightly trickier scenario, in that one person is essentially being controlled by another. For this defence to be upheld, it must be apparent that the accused was stripped of his volitional capacities at the time of the incident and also had no memory of the event[223].

The justification for these exemptions in the Maltese Criminal code revolves around the fact that the accused was not in control of his full mental faculties at the time of the commission of the offence and thus, these circumstances must be considered when issuing a fair punishment. Similarly, the same reasoning can be transferred onto considerations of legal insanity.

3.5.7 Intoxication

According to Article [224] 34 of the Criminal Code, ‘intoxication’ shall not constitute an excuse to a criminal charge. That being said, the article proceeds to elucidate the fact that the influence of alcohol shall constitute a defence to a criminal charge if the person was ‘incapable of understanding or volition and the state of intoxication was caused without his consent or by the malicious or negligent act of another person’. The Law also ironically states that one may be excused of a criminal charge if their state of intoxication

[222] ibid 90
[223] ibid 88
[224] Criminal Code Chapter 9 Laws of Malta 1854, s 34

put them into a state of temporary/permanent insanity at the time of such act or omission [225]However, when considering the fact that the Maltese legal system has not chosen to formally acknowledge the idea of temporary or partial insanity and instead leans towards a far more stringent idea of a disease of the mind it is particularly odd that the legislator chose to include this provision. The legislator intended to account for situations of partial insanity but a lack of clarity in the law has meant that it is very unlikely (if not, impossible) for one to successfully plead insanity due to intoxication or receive a reduced sentence. After examining the relationship between medical and legal insanity (as outlined in Chapter 1) one may conclude that in article 34(2)(b) the legislator was making reference to situations of psychosis and delusions caused by intoxication. Therefore, one would have to effectively prove that at the moment of the commission of the offence their state of mind was such that they were completely detached from reality and experiencing hallucinations/delusions as a result of their intoxication. I would argue that this section of the law is too stringent and should be elaborated upon to also allow for the possibility of a reduced sentence in cases of acute intoxication which do not necessarily result in psychosis.

In Germany, legislators have demonstrated much more leniency in sentencing people who were under the influence of alcohol at the time of the commission of the offence. This European country acquits those who are 'extremely intoxicated' in so far as their 'ability of control is suspended'[226]. These people will not be held criminally responsible but will be convicted of 'total intoxication'. On the other hand, those who are severely intoxicated but not to an extreme point of total intoxication will be awarded a mitigated sentence in

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[225] ibid s 34(2)(b)
[226] Benedikt Fischer, Jurgen Rehm, 'Intoxication, the law and criminal responsibility-a sparkling cocktail at times: The case studies of Canada and Germany. European Addiction Research', (1998) 4(3), 89-101 Contemporary Drug Problems 90

line with the principle of diminished responsibility. In these cases, experts are requested to carry out a two-part test to determine the extent to which the alcohol/narcotic effected the accused's ability to control him/herself. Firstly, it must be proven that the intoxication occurred (evidenced by witness testimonies, etc.). Secondly, an in-depth analysis into the extent to which such 'an intoxication impacted the capacity to restrain oneself' is carried out.

In Germany, 'intoxication is the most frequent cause of diminished responsibility, and judges want to have a system to assess the grade of intoxication as simply and reliably as possible. Therefore, they found the blood alcohol concentration (BAC) to be a safe indication' of this[227]. Determining one's level of intoxication solely based on their blood alcohol level at that moment in time may prove problematic though, due to the issue of time sensitivity and the question of habitual consumption. It has been scientifically proven that those who frequently consume large quantities of alcohol become accustomed to the effects of the substance and build up a form of 'tolerance'. Therefore, someone who habitually drinks five glasses of wine a day may appear and act much soberer than a non-drinker after a single glass, even though the former's blood alcohol level would be significantly higher. This factor must, therefore, also be taken into consideration when assessing levels of intoxication in the accused.

In an online journal[228] dealing with intoxication and diminished responsibility, the author analysed diminished responsibility concerning intoxication in a number of jurisdictions, namely England, Scotland, New South Wales as well as New Zealand. Under the newly revised UK homicide act it has been universally acknowledged that a 'recognized mental

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[227] Nicola Wake, 'Recognizing Acute Intoxication as Diminished Responsibility? A Comparative Analysis' (2012) 71-98 80 The Journal of Criminal Law 90
[228] ibid 80

condition' must exist for diminished responsibility to be considered in such circumstances. Whilst the notion of a 'recognized medical condition' has been left quite open to interpretation and clear demarcation lines still need to be established, the author contends that cases of acute intoxication would theoretically fulfil this requirement, something which we are yet to see in Malta. Whilst New Zealand has never formally accepted diminished responsibility into its laws, it has previously held that proof of a mental condition will be taken into consideration to mitigate a guilty verdict of homicide to one of manslaughter with the argument of provocation in these instances. However, this has been abandoned in recent years[229].

In England and new South Wales on the other hand, the consensus is that:

> *'in the absence of an explicit or implied exclusionary clause pertaining to voluntary intoxication, states of acute intoxication could potentially satisfy the 'recognized medical condition' requirement'*[230].

This approach therefore creates the possibility of pleading insanity due to excessive intoxication. This must be considered in line with the medical expert's opinion before the jury, which is also paramount to establish whether such acute intoxication would amount to such a condition.

I think it is important that Maltese legislation has come to include this 'recognised medical condition' clause, thus moving away from the highly restrictive 'disease of the mind' argument. This clause, in addition to the contribution of medical experts attesting to the state of mind of the accused, should provide a fairer system to the one in place

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[229] ibid
[230] ibid 82

today. I believe that, firstly, the amendment to the law should be made, and then it will be up to the medical experts to inform the court to what extent the alcohol affected the accused's state of mind and if any permanent damage was caused. The court would then exercise its discretion to determine whether they are willing to accept a state of acute intoxication as a 'recognized medical condition'.

There have also been several studies concerning the severe structural and cognitive damage chronic alcoholism may cause, proving that alcoholism (to be differentiated from a single instance of acute intoxication) may cause such loss of function to the addict's brain that it would qualify as a recognized medical condition/disease. The acceptance of alcoholism as a disease would then give rise to the assumption that the addict could no longer be held liable for the offence of public intoxication and that the person: 'as a sick person, should not be punished for the commission of other crimes if his criminal act is symptomatic of chronic alcoholism.'[231]

3.6 Il-Pulizija v. RV

Whilst diminished responsibility isn't officially recognized under our law, in the case of ***'Il-Pulizija v. RV'***[232], the court took the defendant's traumatic history of sexual abuse into consideration when determining an appropriate sentence. This case was dealt with by the Court of Magistrates acting as a Court of Criminal Judicature. Whilst such judgments do not hold the same weight as those determined by the Criminal Court, due to the lack of local case law on the issue and the relevance this case presents towards the subject matter it was essential to present it in an argument for the introduction of

[231] Tao L.S, 'Alcoholism as a Defence to Crime' (1969) 45, 68 Notre Dame Law Review
[232] Il-Pulizija v. RV, Court of Magistrates (Criminal Judicature), per Hon. Madam Justice Miriam Hayman, 3 April 2012, Rikors Numru 653/2002, (unpublished)

diminished responsibility. The case involved a 17-year-old boy (still considered a minor) being convicted of the rape of two young girls[233]. He also faced allegations of violent indecent assault of a third victim, which he denied. In the rape cases, the defendant admitted to raping the first victim (fourteen years old) twice and the second (eight years old), five times. The defendant claimed that he didn't force the girls into his home, and they entered of their own free will, believing that they were going to play computer games. RV proceeded to introduce other adult games into the mix, eventually resulting in his taking advantage of their vulnerability and raping them. The defendant held that his urge to rape the victims stemmed from the fact that he had experienced similar sexual abuse when he was thirteen. The court ultimately held that:

'illi l-imputat kien fil-fatt vittma ta' abbuz vjolenti tant illi din ir- reazzjoni tiegħu, u 'cioe' illi jipperpetwa dan ir-reat, ma kienx frott il- volonta' ħielsa tiegħu iżda frott it-trawma psikologika inflitta fuqu minghajr tort imputabbli lilu. L-esternament ta' din it-trawma psikologika fil- forma ta' dan l-abbuż, huwa wiehed normali u mistennija tant illi l-imputat u kull persuna fiċ-ċirkostanza tiegħu ma jistgħax jevita'[234]

The appointed medical expert also claimed that the defendant had little control over his actions due to the psychological trauma he had previously experienced. The expert also drew the courts attention to the fact that the defendant suffered from another mental abnormality (obsessive compulsive disorder.) The accused was then given a heavily mitigated sentence due to his history of abuse and his mental condition, which, led the court to believe that he was not of completely sound mind[235]. This case is one of the only of its kind in Maltese jurisprudence and consequently is essential to reference when

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[233] Amanda Scott A Case for Diminished responsibility in Maltese Law 47

[234] *Il-Pulizija v. RV*, Court of Magistrates (Criminal Judicature), per Hon. Madam Justice Miriam Hayman, 3 April 2012, Rikors Numru 653/2002, (unpublished) translates to: The victim was also a victim of violent abuse and therefore his behaviour was not the result of his free will but the result of the psychological trauma inflicted on him which was not his fault. This reaction is expected of someone who experiences such circumstances and thus was unavoidable.

[235] Amanda Scott A Case for Diminished responsibility in Maltese Law 50

exhibiting an argument in favour of diminished responsibility as it seems to hint at the idea that the Maltese courts are not opposed to the introduction of diminished responsibility.

3.7 Conclusion

This Chapter has made an argument for the introduction of the diminished responsibility defence into Maltese legislation. As we have seen, the defence has already been incorporated into specific dispositions under our law, suggesting that the legislator was not entirely opposed to the concept. The defence simply cannot be applied in a general manner.[236] Diminished responsibility would provide a solution to many of the issues that have arisen in the current application of the insanity defence. Firstly, it would acknowledge a state of 'partial insanity', thus incorporating a number of mental illnesses that do not fall under the umbrella of legal insanity as it stands. It would also provide the courts with the liberty to apply the concept with their own discretion wherever they deem fit. This may equip the legal system with the flexibility it needs to better deal with the complexities of mental and intellectual issues in the 21st century.

[236] *Il-Pulizija v. Raymond Vella* Court of Criminal Appeal as per J.Vincent DeGaetano – 2nd August 1999

CHAPTER 4

INTELLECTUAL DISABILITY VS MENTAL ILLNESS

4.1 Introduction

The Year 2016 saw the release of the popular Netflix crime documentary series 'Making a Murderer'. The series followed the case of Stephen Avery, an American citizen from Manitowoc county (Wisconsin), who was accused of murdering and sexually assaulting a young photographer, Theresa Halbach. The series closely followed his controversial trial and later conviction. From the get go, there were many factors at play (such as a lack of conclusive evidence, false witness testimonies etc.) which made the eventual conviction of Avery questionable. But it was not Avery's eventual conviction which struck a chord with viewers. Instead it was that of his 16-year-old nephew, Brendan Dassey[237]. Whilst there was no evidence placing Dassey at the scene, his conviction hinged on his 'confession', which he gave after hours of police interrogation. He was eventually found guilty of being an accessory to first-degree murder, sexual assault and mutilation of a corpse and sentenced to life in prison.

Whilst Brendan Dassey's case[238] does not seem to be out of the ordinary at first, what is particularly disconcerting is the fact that Dassey happens to have an extremely low IQ, that of a 'fourth grader'[239] (i.e. a nine-or- ten-year-old child). Therefore, Mr.

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[237] ''Making a Murderer': How the justice system criminalizes mental illness, disabilities' (*RT Questions more*, 13th August 2016)<https://www.rt.com/usa/355757-making-murderer-dassey-criminal-justice/> accessed 3 July 2017

[238] *US State of Wisconsin v. Brendan Dassey,* Circuit Court of Manitowoc County 2010, Case no 06 CF 88 (2007)

[239] ibid

Dassey suffers from a severe intellectual disability, which would have formerly been referred to as mental retardation. Dassey's 'confession' was also given without a lawyer or parent present after being pressured and strong armed into admitting to his participation in the crime by two professional police detectives. Apart from the obvious issue of being interrogated without his lawyer present, Dassey was simply not in a position to fully understand the questions being asked and the consequences of a confession[240]. A US Journal of Applied Behaviour analysis stated that '90 percent and 68 percent of adults with mental retardation received scores of zero on one or more tests of relevant vocabulary, understanding of the Miranda warnings, and understanding of the function of rights in interrogation (which was most poorly understood of all)' [241]. Luckily, after ten years of incarceration, Brendan Dassey was released from prison. Dassey's case brought in a lot of publicity from the TV series and this undoubtedly aided in bringing his unfair trial to the forefront of international discussion, leading to his eventual acquittal. But Brendan is one of the lucky few. This is not the reality of hundreds of wrongly incarcerated individuals around the world. 'Individuals with Intellectual Disabilities are presumed to have diminished capacities that would render those individuals vulnerable to a significant risk of being wrongfully persecuted [Renaud, 2003.]' They also 'make false confessions, are often unable to help their attorneys, and are frequently poor witnesses' and are 'less morally culpable' and 'more at risk of wrongful conviction'[242]

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[240]'Making a Murderer': How the justice system criminalizes mental illness, disabilities' (*RT Questions more*, 13th August 2016)<https://www.rt.com/usa/355757-making-murderer-dassey-criminal-justice/> accessed 3 July 2017

[241] ibid

[242]Press Association, 'Texas executes 'low IQ' inmate' (Article 2012) <https://www.timesofmalta.com/articles/view/20120808/world/texas-executes-low-iq-inmate.431950> accessed 4th July 2017

This case inspired me to compare the way both society and the legal system treat people with intellectual disabilities vs those with mental illnesses. In my eyes, it is glaringly obvious that both the conditions do not afford people the full level of understanding necessary to form the required intent and understanding of their actions to be found guilty. However, it seems that the legal system has fallen short in this department and seems to hold the two conditions to entirely different standards. Mentally ill people are granted the opportunity to plead insanity (albeit in a few restricted scenarios) to attest to the fact that they were not capable of developing the required intent to be found guilty. The intellectually disabled, on the other hand, are afforded no such option at all. Rather, they are held to the same standard as the ordinarily reasonable man. A Judge may take intellectual disability into consideration when awarding a prison sentence. However, this is not obligatory and purely discretional. If we use Dassey's case as an example, though, his evident lack of comprehension during proceedings and the interrogation, clearly were not enough for the Judge to mitigate his life sentence in any way[243].

There is an obvious hypocrisy in the way the law handles the mentally ill and the intellectually disabled which I will tackle in this chapter. Whilst people have gained awareness of mental illness and the issue is progressively becoming less taboo, the same cannot be said for intellectual disabilities. In fact;

> *'Almost 50 years after the mental Health reform in Europe and the deinstitutionalization of the mentally ill, there seems to be a slow change in the social concept of mental disorder. However, in the case of mental retardation, little progress has been made'*[244]

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[243] *US State of Wisconsin v. Brendan Dassey,* Circuit Court of Manitowoc County 2010, Case no 06 CF 88 (2007)

[244]Roberto Cajao, Carlos Pereira, Cajao R, Pereira C, 'Critical analysis on legal capacity of the mentally retarded: The Portuguese reality in the European context' (2016) 33 European Psychiatry 567

In Malta, the interdicted/incapacitated are prohibited from entering certain civil contracts (such as marriage and the buying of property) based on their inability to reason in the required way. However, contradictorily, they are viewed to possess the necessary capacity to reason when it comes to criminal charges and are condemned as such. This is simply unacceptable and not an accurate reflection of reality. I imagine lawyers and legislators have strayed away from this particular issue as it concerns two very different aspects of the law: civil and criminal. These areas of law are governed by entirely different codes, courts and even possess different standards of proof (the former being that of the balance of probabilities and the latter, beyond reasonable doubt). Therefore, clear, formalized demarcation lines have been drawn between civil matters and criminal ones and there is very little room for overlap. In truth, such distinctive margins might work well on paper, but do not hold up as well in practice.

In the Case [245]'***Ir-Repubblika ta Malta v. Matthew Mizzi'***, the defendant was a young man accused of assisting in the armed robbery of a shop owned by Charles Zammit (who was shot twice during the commission of the offence). Mizzi was also charged with driving without a license and faking a police report. The defendant acted alongside his friend, Johnathan Coleiro. Criminal Lawyer Michael Sciriha maintained that his client (Mizzi) possessed a particularly low IQ which made him more susceptible to Coleiro's manipulation. Sciriha argued that Mizzi had been coerced into participating in the crime by driving Coleiro to the scene of the crime. He asserted that Mizzi had a spotless record in comparison to Coleiro's 10 prior convictions. Sciriha also informed the Jury that

[245] *Ir- Repubblika ta'Malta v Matthew Mizzi* (2015) 19/201 Criminal Court as per Imhallef Dr.Antonio Mizzi

'Coleiro himself had said that Mizzi was not capable of theft, let alone how capable he would be of shooting anyone.'[246] Sciriha also attested to the fact that his client's [247]'timid' nature was his biggest flaw in all this, in contrast to Coleiro's sharp intelligence and domineering personality. This dynamic is reminiscent of the one between Avery and Dassey. The case can also be likened to Dassey's in that there was [248]"missing evidence that would exculpate' the defendant. Sciriha asked why no fingerprints had been taken from the revolver used in the commission of the offence and also questioned the method of interrogation of his client. Regardless as to whether Mizzi committed the crime or not, one must acknowledge that there is a fundamental distinction to be made in the characters of Mizzi and Coleiro. It can be argued that being timid does not amount to having an intellectual disability and that would be justifiable. However, the case proves that there was no investigation into the intellectual capacity of Mizzi at all. Thus, even if he did suffer from such a condition, there would be no remedy or plea in the eyes of the law that he could employ to acknowledge a reduction in his criminal responsibility.

4.2 What is a Learning Disability?

A US academic journal described a state of 'mental retardation' (now intellectual disability) as (i) having "significantly sub-average general intellectual functioning," (ii) "resulting in or associated with impairments in adaptive behaviour," (iii) "which manifested during the developmental period." People with learning disabilities are typically characterized by adaptive and intellectual difficulties. The former refers to one's

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[246] Jacob Borg , 'Defence lawyer says client accused of hold-up complicity has low IQ, was tricked' (Article 2015) <http://www.independent.com.mt/articles/2015-10-01/local-news/Defence-lawyer-says-client-accused-of-hold-up-complicity-has-low-IQ-was-tricked-6736142930> accessed 4th July 2017

[247] ibid

[248] ibid

ability to cope and function in everyday life whilst the latter tackles difficulty with learning and understanding certain concepts. An American study found that 1 % of the population are affected by mental disability[249] (of which, 85 % had a mild disability). Intellectual disabilities can be identified through a variety of tests and expert opinions from doctors. Previously, IQ tests were the main tool employed to determine the presence of such an abnormality of the mind. Anyone with an IQ below 70-75 was assumed to possess a disability. Nowadays, Doctor's examinations and standardised testing help diagnose these conditions. Intellectual disabilities can manifest themselves in several forms, and affect many aspects of a person's development.[250] Typically, people suffer when grasping conceptual things such as reading, mathematics, abstract thinking, logic etc. This also tends to be accompanied by social delay, where they may find it difficult to communicate, understand social queues, empathise with others and form/maintain relationships with others. Finally, they may struggle with everyday practical tasks and are often very dependent on others. This makes it challenging to find work as well as manage money and responsibilities[251]. An overview and understanding of intellectual disabilities would confirm that those diagnosed with such a condition are not endowed with the intellect and capacity needed to understand the wrongfulness of their acts or consequences of their actions in the same way the ordinarily reasonable man would. Therefore, holding the intellectually disabled to the same standard of criminal responsibility as the ordinarily reasonable man is unjust.

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[249] American Association on Intellectual and Developmental Disabilities , 'Definition of Intellectual Disability' (Article 2017) <http://aaidd.org/intellectual-disability/definition#.WV68aBOGPOQ> accessed 4th July 2017

[250] Yolanda Williams, 'Social Delay in Children: Definition & Examples' (Article 2012) <https://www.psychiatry.org/patients-families/intellectual-disability/what-is-intellectual-disability> accessed 4th July 2017

[251] American Association on Intellectual and Developmental Disabilities , 'Definition of Intellectual Disability' (Article 2017) <http://aaidd.org/intellectual-disability/definition#.WV68aBOGPOQ> accessed 4th July 2017

4.3 The Intellectually Disabled as Victims and Perpetrators.

A number of studies concerning the prosecution of the mentally and intellectually disabled have spoken of the prevalence of our tendency as a society to 'view offenders who have perpetrated the most appalling atrocities as less than human and subsequently to deny their human strengths, qualities and weaknesses. This extends to a denial that they could be victims of illness, either physical or mental'.[252] This quote speaks volumes as it addresses one of the key issues with criminal liability in the mentally ill and intellectually disabled in that society is always apprehensive or unwilling to alleviate people of criminal responsibility if they have committed an amoral act, despite their obvious lack of ability to reason.

A study concerning people with intellectual disabilities in Australia reached the conclusion that these individuals are 'more likely to be victims and perpetrators of crimes.'[253] The study examined the behaviour of 2220 people with registered intellectual disabilities and discovered that this group are more likely to fall victims to and to perpetrate criminal acts and were at a higher 'risk of sex offending and victimisation'. These acts should be combatted by treatment, social support and access to justice.[254]Nearly one in five individuals with such a disability were proven to have a criminal record, with men being twice as likely to be charged with a criminal offence than women. People with an intellectual disability were also more likely to be formally charged with a criminal offence than an individual of average intellectual capacities.

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[252] John Tobin, 'The Psychiatric defence and international criminal law' (2007) 23(2), 111, 112 Medicine, conflict and survival

[253] Nixon, M., Thomas, S., Daffern, D., & Ogloff, M. (2017). Estimating the risk of crime and victimization in people with intellectual disability: A data-linkage study. Social Psychiatry and Psychiatric Epidemiology, 52(5), 617-626.

[254] Ibid

These figures indicate that this antisocial criminal behaviour may often stem from a lack of consciousness and understanding of the repercussions of their acts.

4.4 Maltese Legislation

The Civil Code provisions dealing with interdiction and incapacitation provide a necessary outlook on the civil perspective of intellectual disability and shall be examined hereunder.

4.4.1 Interdiction and Incapacitation

In this chapter, a distinction must be made between legal interdiction in a civil and a criminal context. Criminal law presents the notion of 'interdiction' as a punishment for people in different professional departments and may be special or general.[255] Whilst the former decrees that the interdiction 'disqualifies the person sentenced from holding some particular public office or employment, or from the exercise[ing] of a particular profession, art, trade, or right, according to the law',[256]the latter interdiction disqualifies a person 'generally.'[257]

This is evidenced in Article 243 of the Criminal Code (amongst others) as follows:

> *'Any physician, surgeon, obstetrician, or apothecary, who shall have knowingly prescribed or administered the means whereby the miscarriage is procured, shall, on conviction, be liable to imprisonment for a term from eighteen months to four years, and to perpetual interdiction from the exercise of his profession.* '[258]

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[255] Criminal Code Chapter 9 Laws of Malta 1854, s 10
[256] ibid s 10(3)
[257] ibid s10(2)
[258] ibid s 243

Therefore, in the instance mentioned above, a medical practitioner would be stripped of his medical license as punishment for his illegal act. In Civil Law, however, interdiction has a very different purpose. In this context, interdiction represents a legal restraint imposed upon certain individuals to carry out certain civil acts, without the approval of a designated guardian or interdictor/curator. For the purposes of this thesis, only Civil interdiction will be addressed in relation to the limitations it enforces on the intellectually disabled and mentally ill.

Civil Interdiction and Incapacitation are covered in article 189(1) of the civil code. The Law describes those individuals who satisfy the requirements for interdiction as:

> *'Major[s]…[with] a mental disorder or other condition, which renders [them] incapable of taking care of [their] own affairs, or who is insane or prodigal'*[259].

Interdiction/incapacitation exists as a method to restrain people from entering contracts or carrying out acts to their own detriment, such as the dispending of property. This legal restriction assigns those concerned a curator or guardian to care for their affairs, who would need to provide their consent for the interdicted individual to be able to enter certain agreements. The idea behind the concept is that the interdicted/incapacitated individuals do not possess the competency to make sensible decisions for themselves and should be assisted as such.

This article is further supplemented by Articles 520-527 of the Code of Organization and Procedure. Firstly, the provision explains that the term 'other condition', shall be: [260]

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[259] Civil Code Chapter 16 Laws of Malta 1874, s 189 (1)
[260] Code of Organization and Civil Procedure Chapter 12 Laws of Malta 1855, s 520 (4)(a*)*

'used in the context of a condition that renders a person incapable of managing his own affairs, mean(ing) a long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder one's full and effective participation in society on an equal basis with others'.

This provision presents four categories of disabilities, all characterized by conditions that may inhibit them from engaging in day to day life in the same capacity as others. Whilst the sensorial and physically disabled may be at a disadvantage due to their bodily limitations, the mentally and intellectually disabled are effected by their cognitive abilities. It is interesting to note that where interdiction is concerned, mental and intellectual impairment are categorised in the same way, but this reasoning does not translate into other ambits of the law. Article 520 then proceeds to clarify that the term mental disorder shall have the same meaning provided in the Mental Health Act, that is:

'a significant mental or behavioral dysfunction, exhibited by signs and, or symptoms indicating a disruption of mental functioning, including disturbance in one or more of the areas of thought, mood, volition, perception, cognition, orientation or memory which are present to such a degree as to be considered pathological in accordance with internationally accepted medical and diagnostic standards and "mental illness "shall be construed accordingly, and for the purpose of any matter related to criminal proceedings, it shall include "insanity" as understood for the purpose of the Criminal Code'[261]

The legislator was evidently of the belief that the above conditions may limit people's ability to make cognizant decisions or carry out normal day-to-day tasks and, therefore, felt it necessary to introduce this legal tool to ultimately protect the interests of these individuals and the rest of society. The notion of interdiction seems to recognise the shortcomings of these individuals without completely stripping them of their ability to be active participants in their own lives.

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[261] Mental Health Act Chapter 525 Laws of Malta 2004, s 2

As we have observed throughout this thesis, Article 33(a) of the Criminal code alleviates a person of criminal responsibility if they were considered 'insane' now of commission of the act however there is no mention made to those declared 'incapable' (who no longer possess any legal capacity) by their interdiction/incapacitation as is described in the Civil Code. There is no legislation on this issue and therefore in cases where a person has only been declared incapable, criminal responsibility is assessed on a case by case basis.

4.5 Civil Legal Restrictions for People with Intellectual Disabilities

In Civil Law, the interdicted and incapacitated are subjected to several legal restrictions. As we have established above, the intellectually disabled may be subjected to interdiction/incapacitation and, consequently, would also face such restrictions. These limitations are imposed based on the idea that the conditions suffered by these individuals may inhibit them from carrying out certain civil acts with the level of cognizance required by law. These restrictions shall be elaborated upon in this section. Despite these limitations in the civil field however, criminal Law does not formally distinguish between an intellectually disabled person and the ordinarily reasonable man, holding them to the same criminal standard of responsibility. Therefore, there appears to be an evident discrepancy between the civil and criminal approaches to the intellectually disabled in the two legal fields.

4.5.1 Marriage

The right to marry is enshrined in Article 12 of the ECHR[262] and may be seen in conjunction with Article 8,[263] which protects an individual's right to a private and family life. The specific methods of implementation are then left up to the individual member states, in line with the principle of the margin of appreciation, which accepts that there may be discrepancies between domestic and EU laws, so long as these fundamental rights are not threatened. In Malta, heterosexual couples have the option to get married civilly, canonically, or both, whilst civil marriage for homosexual couples has only recently been incorporated into the law.

Being a Catholic country, most couples opt for a marriage that is recognized by the church as well as the state. The intellectually disabled are not afforded this right in the eyes of the Canon Law, however, and Article 4 of the Marriage Act clearly stipulates that a marriage contract shall be null and void if one/two of the parties to the marriage is unable to contract 'by reason of infirmity of the mind, whether interdicted or not'. [264] The phrase 'infirmity of the mind' has a rather broad sphere of application. This places those suffering from mental or intellectual issues in the same category. Interestingly, it would appear that what constitutes an 'infirmity of the mind'[265] is entirely up to the discretion of the church and formal interdiction/incapacitation isn't required for the church to invalidate a marriage on these grounds. The Marriage Act also does not state if any professional examinations or tests should be carried out to determine any 'infirmity'.

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[262] Human Rights Act (1998) s 12
[263] ibid s 8
[264] Marriage Act Chapter 255 Laws of Malta 1975, s 4
[265] ibid

To enter a civil marriage on the other hand, interdicted individuals would require the consent of their respective tutors/guardians. In conclusion, the Church and in part the state too, do not believe the intellectually disabled should enter a marriage contract as they may not fully understand the expectations of marriage and may not possess the ability to make a knowledgeable decision on the matter. In conclusion, I would ask the question: Why is it legally plausible that the intellectually disabled do not possess the requisite will and understanding to enter a marriage contract but are viewed to possess that same will and understanding for the commission of a criminal act? The law does not provide a reasonable explanation for this. Thus I would argue that the civil interpretation of the mental capacities of the intellectually disabled should be transferred into the criminal sphere.

4.5.2 Wills

Those who are legally interdicted/incapacitated and those who are not of sound mind at the time of the drafting of a will, are considered incapable of making wills (article 597)[266]. For a will to be deemed valid, the testator should possess '*testamenti factio*'[267], that is the legal and mental capacity to create the document. In the case concerning the Marquees of Winchester, Mellows stated that (in relation to mental capacity):

> *'It is not sufficient that the testator be of memory when he makes a will to answer familiar and unusual questions, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason'*[268]

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[266]Civil Code Chapter 16 Laws of Malta 1874, s 597

[267] Jeremy Buttigieg (2015). Testamentary Capacity: Medico-legal Implications of Vulnerability and Coercion 30

[268] Anthony R. Mellows, The Law of Succession (Butterworth & Co Publishers Ltd, 1970) 6 (n50)29, citing Marquees of Winchester Case (1598) 6 Co. Rep. 23a

The legally incapable are also deemed to lack the necessary testamentary capacity to receive or dispose of movable and immovable objects in a will. Even if one's state of mind improved prior to their death, the will shall still be considered invalid and null (Article 599).

> *As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory, in other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged.* [269]

For one to make a valid will they are not required to be perfectly sane, but it is enough *'li jkollu l-użu tar-raġuni fi grad tali li jippermettilu jkun jaf x'inhu jagħmel.'*[270] Therefore, complete sanity or intellectual capacity does not seem to be necessary in these instances. As long as the testator possesses adequate reason to dispose of his assets in the way he desires. The level of 'reason' of the subject writing the will is then inspected in relation to the nature of the testamentary dispositions incorporated into the will. This was evidenced in the judgment ***Joseph Vassallo v. Dr. Victor R. Sammut***, where it was stated that; *'Ir-Raġjonevolezza tad-dispozizzjonijiet kontenunti fit-testment hija kriterju li għandu jwassal lill-Ġudikant biex jiddeċiedi dwar l-insanita' mentali jew le tat-testatur'*[271]. Therefore, if a disposition seems so bizarre that it could not have been contemplated logically by a sane and reasonable man, the validity of the will is brought into question. In conclusion, whilst complete 'sanity' and intelligence are not necessary

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[269] Civil Code Chapter 16 Laws of Malta 1874, s 599

[270] *Joseph Harmsworth v. Gaetana Bezzina, First Hall Civil Court 16 December 2002, 3 Portelli v. Portelli, 12, George Cini et v. Francesca Saveria Cini, First Hall Civil Court*, 21 February 2014, 37 translates to: it is sufficient that the subject possessed the ability to reason to the level that he was aware of what he was doing.

[271] *Joseph Vassallo et v. Avv. Dr. Victor R. Sammut* et. ne. Court of Appeal, 24 April 1950 translates to: The reasonableness of the testamentary dispositions in a will is one of the criteria assessed by a Judge to determine whether the testator was of sound mind.

to make a will, the document may be nullified if the subject did not possess adequate reason to understand his actions at the time of drafting of the will or if his testamentary dispositions are so abnormal that they would not have been disposed of by an ordinarily reasonable man.

4.5.3 Contracts

There are four requisite elements that must coexist for a contract to be valid [272]: the capacity of the parties, their consent, the subject-matter of the contract and a lawful consideration. For this argument, we must analyse what would render someone incapable of contracting in the eyes of the law and, thus, the notion of 'capacity' shall be studied. Firstly, legal capacity to make a contract is deemed to be lacking if a person is: Not of contracting age, interdicted or incapacitated and ultimately those who the law prohibits from making contracts. The Civil Code lays down the following:

(1) All persons not being under a legal disability is capable of contracting.
(3) The following persons are incapable of contracting, in the cases specified by law:

(a) minors;
(b) persons interdicted or incapacitated; and
(c) generally, all those to whom the law forbids certain contracts.
Persons not having the use of reason.

968.

Any contract entered into by a person who has not the use of reason, or is under the age of seven years is null. Persons who have not attained the age of fourteen years.

969.

(1) Any obligation entered into by a child under the age of fourteen years is also null.[273]

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[272] Civil Code Chapter 16 Laws of Malta 1874, s 966
[273] Civil Code Chapter 16 Laws of Malta 1874 s 967-969

As we can see, civil law will automatically nullify contracts entered into by anyone without the legal capacity to do so. The interdicted/incapacitated are considered incapable of entering into any formal contracts. Any contract entered into by a person who does not have the use of reason would also be considered invalid. However, a person who is capable of contracting cannot claim nullity of a contract on the grounds that the other contracting party did not have such capacity (Article 973)[274]. This section of the law also places emphasis on the invalidity of contracts involving minors. As we discussed in Chapter 3 of this thesis, minors below the age of nine have not yet acquired maturity, life-experience and capacity for understanding and are, therefore, irrefutably not criminally liable (*doli incapax*). Apart from the fact that the intellectually disabled may 'lack reason' (restricting them from entering contracts), these individuals often also present the mental capacities of minors, as was in the case of Brendan Dassey.[275] The intellectually disabled are not dissimilar to minors with regards to their intellectual capacity and the level of criminal responsibility attributed to their acts. Thus, I believe that a similar approach to sentencing and criminal liability should be adopted in relation to the intellectually disabled and minors.

4.5.4 Election and Management of Affairs

Whosoever would like to form part of the House of Representatives of Malta will be prohibited from doing so if s/he is 'interdicted or incapacitated for any mental infirmity

[274] ibid
[275] refer to 90-91

… or is otherwise determined to be of unsound mind.'[276] Those who fall under these categories would also not be permitted to vote in elections for the House of Representatives.[277] Once again, evidence of a mental or intellectual incapacity would render one incapable of participating in these formal democratic processes due to their inability to reason adequately.

The management of one's affairs, including representation in civil matters and the management of one's assets and property[278] would also subsequently be placed in the hands of the interdicted person's assigned tutor/curator.[279] These Civil Law provisions all emphasise the legislator's view that the intellectually disabled and mentally ill do not possess the mental faculties to reason in the desired manner. Therefore, if the Civil Law sphere is so adamant about this lack of 'capacity' for understanding, why does the Criminal Code present such a different narrative?

4.6 Local jurisprudence

In the case ***ir-Repubblika ta Malta v. Christopher Degiorgio***, the accused suffered from both mental and intellectual incapacities. He was diagnosed with a personality disorder and was said to possess the intellectual capabilities of an eight or nine-year-old boy, exhibiting *'immaturita' intellectwali, emozjonali u interverzjoni sesswali'*[280], which was

[276] The Constitution of Malta Chapter 1 Laws of Malta s 54
[277] ibid s 58
[278] Civil Code Chapter 16 Laws of Malta 1874, s 172
[279] Alzheimer Europe, 'Malta Legal capacity and proxy decision making' (2017) <http://www.alzheimer-europe.org/Policy-in-Practice2/Country-comparisons/2010-Legal-capacity-and-proxy-decision-making/Malta> accessed 30th July 2017
[280] *Ir-Repubblika ta' Malta v. Christopher Degiorgio* – Criminal Court p Judge Vincent De Gaetano – Court of Criminal Appeal per Judge Joseph Said Pullicino – 2nd October 1997 translates to: Intellectual and emotional Immaturity as well as sexual introversion.

confirmed by medical experts. Despite this, the jury and the court believed that neither of the incapacities were 'severe' enough and, therefore, the:

> *'lack of intendere and volere was not complete to warrant a lack of criminal responsibility or a reduced sentence, (which) meant that he understood his conduct and could have controlled and refrained himself from committing the act.'* [281]

Since the personality disorder did not result in a form of psychosis (as was discussed in Chapter 1)[282] it was not sufficient to be found not guilty by reason of insanity. At appeal stage, Degiorgio's attorney requested a mitigation of his sentence in line with article 21 of the criminal code which refers to the mitigation of sentences in 'exceptional circumstances'[283]. The court rejected this appeal and ruled that, if anything, the sentence should be increased since they believed that Degiorgio still posed a threat to the public and other youths. As we have identified in this dissertation, holding the mentally ill and/or intellectually disabled to the same standard as the ordinarily reasonable man if they do not satisfy the very stringent requirements for the defence of legal insanity is, quite frankly, unjust[284] and this ruling reflects just that.

4.7 Conclusion

As we have observed in this chapter, the Criminal and Civil Codes present very different interpretations of intellectual disabilities. As it stands, the Criminal Code does not formally acknowledge intellectual disability as grounds for exculpation from criminal

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[281] Anton D'Amato, the Interrelation between legal and clinical insanity in criminal law 97
[282] refer to 29
[283] Criminal Code Chapter 9 Laws of Malta 1854, s 21
[284] American Association on Intellectual and Developmental Disabilities , 'Definition of Intellectual Disability' (Article 2017) <http://aaidd.org/intellectual-disability/definition#.WV68aBOGPOQ> accessed 4th July 2017

responsibility. Additionally, in the absence of the 'diminished responsibility' defence, the intellectually disabled would be unable to have their sentences mitigated in any way if they commit a criminal act. Therefore, despite their intellectual limitations, the intellectually disabled are held to the same standard as the reasonable man, in contrast to the Civil Code, where the intellectually disabled may experience certain legal restrictions due to their condition. In contrast to Malta, jurisdictions such as Norway and Italy have formally maintained that 'mental retardation' would in fact inevitably lead to a reduction in criminal responsibility and their legal systems are a reflection of that.

CONCLUSION

SUGGESTIONS FOR REFORM FOR THE INSANITY DEFENCE IN MALTA

In the study of the philosophy of law, one must recognise the deep-rooted relationship between morality and the law. Generally, the moral sentiments of society are echoed by legislation. For instance, we are not legally allowed to kill, because there is a negative moral implication attached to taking the life of another. We are not allowed to steal, because it is not ethical to take one's property without their permission and we are not allowed to have sexual relationships with minors because our moral conscience tells us that they lack the capacity for appropriate consent. This philosophical moral/legal approach would consequently give rise to the question of whether a person should be condemned for wrongdoing and when a person should be 'excused for doing that which is wrongful'[285]. Undoubtedly, those individuals who carry out criminal acts whilst suffering from a mental illness or intellectual disability cannot be held criminally responsible in the same way as an ordinarily reasonable man would. However, as we have observed throughout this dissertation, the rigid application of the legal insanity defence in Malta has meant that entire categories of mental illnesses and all intellectual disabilities do not meet the legal standard for insanity. Thus, sometimes unjustly condemning these individuals for their acts. The mentally ill and intellectually disabled are amongst the most vulnerable in society and, thus, it is our societal obligation to safeguard and protect them. This 'protection' should extend itself into all facets of society, including the legal system.

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[285] Garvey, S. (2015). Canadian Scholars on Criminal Responsibility. Criminal Law and Philosophy, 9(2), 351- 364

In refusing to acknowledge the impact that all mental illnesses and intellectual disabilities may have on the level of culpability of the accused, we are denying the most defenceless and vulnerable in society of all empathy and understanding. Therefore, I believe that the issue of expansion of the legal insanity defence in Malta is a moral argument as well as a legal one and reformation of the defence is well overdue. In conclusion, if the law reinforces and formalises the morals of society, why has the law failed to align itself with the reality of mental illness and intellectually disabled in the 21st century?

As we have observed throughout this dissertation, Malta's restrictive approach to the insanity defence has meant that a number of legitimate mental illnesses do not meet the legal standard of insanity. Thus, it has been established that there is significant room for improvement in this facet of Maltese legislation. I would argue that legislators should thoroughly revisit the defence in the criminal code and provide it with the necessary amendment it requires. Firstly, there should be an attempt to bridge the gap between the legal concept of insanity and the medical one. That is not to say that 'insanity' should not remain a legal concept, but rather, that there should be a synergetic relationship between the two fields. This would allow them to be consistently informed by one another and constantly evolving. This can initially be achieved by formally defining insanity in the criminal code and replacing the current understanding of insanity as a 'disease of the mind' (a purely legal definition) with that of a 'recognized medical condition'. This would acknowledge that any condition that is accepted in the medical sphere may fall under the ambit of legal insanity in Malta. Additionally, the introduction of such an official definition into the Criminal Code would eliminate any vagueness and uncertainty that may have surrounded the interpretation of legal insanity beforehand. This change would ultimately broaden the scope of application of the insanity defence exponentially.

The McNaughton Rules have provided the Maltese system with the necessary structure it needs for many years. Nowadays, however, the narrow interpretation afforded by these same rules is simply out of touch with reality. As an alternative to these rules, the American Law institute's 'Model Penal Code' presents a more expansive approach to the subject as it was specifically created to combat the stringency of the McNaughton rules. The Model Penal Code illustrates that:

> *"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 (wrongfulness) of his conduct or to conform his conduct to the requirements of the law."*[286]

This interpretation would replace the McNaughton requirement that the 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'[287]. If such a shift were to occur, the essential component of the absolute 'knowledge' of the wrongfulness of one's act, presented by the McNaughton Rules, would be transformed into a 'substantial capacity', significantly lowering the standard required to effectively plead insanity. Additionally, one would not only be required to possess an awareness of the illegality of their actions, but an 'appreciation' of such criminality. The word 'appreciation' implies an additional cognitive and social awareness of the impact that the crime would have on society, as opposed to mere 'knowledge of wrongfulness'. Ultimately, I believe this standard insanity test would be better suited to a newly reformed perspective on legal insanity in Malta in the 21st century.

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[286] Model Penal Code the American Law Institute 1985
[287] John Kaplan, Robert Weisenberg, Guyora Binder, *Criminal Law - Cases and Materials* (7th edn, New York Wolters Kluwer Laws and Business 2012) 50

Whilst this dissertation has encouraged the expansion of the insanity defence, some control and restraint must still be exercised when applying it. The discretion afforded to courts to mitigate sentences as provided by the diminished responsibility defence would, consequently, present a solution to the potential over application of the insanity defence that may occur if the 'recognized medical condition' clause were to be incorporated. Mental illnesses exist on a spectrum and cannot be placed in a single, all-encompassing category[288]. As a result, I believe that the only way to cater to the complexities of mental illness would be to create a system of 'degrees' of insanity. Such a system has already presented itself in the Netherlands[289] as observed in the second Chapter of this thesis. The Netherlands currently implement a 3-grade system, but previously utilized a five-grade system, made up of the levels: '*Being responsible, slightly diminished responsibility, diminished responsibility, severely diminished responsibility, and (complete) legal insanity*'[290]. Through the collaboration of medical health professionals and legislators, a similar grading system can be implemented in Malta. Each 'grade' would consequently dictate the level of culpability of the accused and the sentencing to be imposed. Details should be provided in relation to the extent of the mitigation of punishment for each grade as well as an outline of the legal characteristics required for each category. Each instance of 'legal insanity' would then be classified and examined on a case by case basis.

This dissertation has also aimed to shed light on some of the issues surrounding the intellectual disabled in Criminal Law. The 4th Chapter of this thesis elucidated the fact

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[288] Haley Elizabeth Roberts, 'The Importance of '13 Reasons Why' and Its Reflection of Teen Mental Health' (2017) <https://psychcentral.com/blog/archives/2017/04/21/the-importance-of-13-reasons-why-and-its-reflection-of-teen-mental-health/> accessed 30th June 2017

[289] refer to 55

[290] Susanna Radovic, Gerben Meynen, Tova Bennet, 'Introducing a standard of legal insanity: The case of Sweden compared to The Netherlands' (2015) 40 International Journal of Law Psychiatry 30

that whilst 'there seems to be a slow change in the social concept of mental disorder. In the case of mental retardation, little progress has been made.'[291]The same can be said for Maltese legislation on the subject. As it stands, the Criminal Code does not formally acknowledge Intellectual disability as grounds for exculpation from criminal responsibility. Firstly, I believe that the 'legal insanity defence' should be expanded to include 'intellectual disability' as an additional ground for total or partial exculpation from criminal responsibility, as is the case in the Norwegian Civil Penal Code. The Code illustrates that, if the accused was, at the moment of the commission of the offence, *'mentally retarded to a high degree.''*[292]then s/he would be not be held criminally liable. The aforementioned proposal for the introduction of a graded system of responsibility could also be directly applied to cases where the accused was suffering from an intellectual disability. If such a situation presents itself to the courts, the degree of mental retardation would similarly be examined on a case by case basis to determine the level of criminal responsibility to be awarded. The graded system would subsequently be applied in a general manner, and may also be extended into other problematic or complex ambits of the law (such as in the case of intoxication). Whilst I believe such a graded system of responsibility would be the most fair and scientifically accurate way to deal with the complexities of mental illnesses and intellectual disabilities, it may not be the most practical or viable option and, therefore, an alternative to this approach shall be offered hereunder.

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[291] Roberto Cajao, Carlos Pereira, Cajao R, Pereira C, 'Critical analysis on legal capacity of the mentally retarded: The Portuguese reality in the European context' (2016) 33 European Psychiatry 569

[292] Norwegian General Civil Penal Code 1902, Chapter 3 s 44

As it stands, when a person is found to be suffering from a mental impairment which does not fall within the parameters of legal insanity[293], it is within the judge's discretion to decide whether to take that mental condition into consideration for the purposes of punishment or not. The Judge could subsequently either choose to apply a punishment that leans more towards the minimum rather than the maximum if he deems this to be fit, but such a decision is entirely within his discretion. Therefore, as a more practical alternative to the 'graded' system, I would suggest that if such a serious impairment is found, but it is not severe enough to satisfy the requirements for Article 33(a), there should be a provision of the law resembling Article 29 of the Drug Control Ordinance. This Article proclaims that:

> *'29. Where in respect of a person found guilty of an offence against this Ordinance, the prosecution declares in the records of the proceedings that such person has helped the Police to apprehend the person or persons who supplied him with the drug, or the person found guilty as aforesaid proves to the satisfaction of the court that he has so helped the Police, the punishment shall be diminished, as regards imprisonment by one or two degrees, and as regards any pecuniary penalty by one-third or one-half*[294]*'*

The proposed provision of law would subsequently dictate that in the event that the accused does not meet the legal standard for insanity, but still possessed a legal impairment, his/her punishment will be mitigated by a number of years or degrees. In this way, the deduction in punishment would not depend entirely on the Judge's discretion, but rather, would be directly derived from the law. There could also be the introduction of a schedule of mental illnesses or intellectual disabilities, which would provide a non-exhaustive list of mental impairments or illnesses which would fall within the definition

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[293] 'someone would not meet the legal standard for legal insanity in Malta if they at the moment of the commission of the offence they still possessed 'la capacita di intendere or volere'

[294] Dangerous Drug Ordinance Chapter 101 s (29)

of insanity not for the purposes of section 33(a) but for the purposes of the mitigation of punishment.

Whilst society has always acknowledged mental infirmity as grounds for exculpation in the law, mental illness and intellectual disabilities remain quite a taboo subject. Thus, 'when it comes to the most horrendous crimes, the possibility to be acquitted due to legal insanity is slim, which, in turn, suggests that the threshold for legal insanity is not just set with regards to our intuitions about the requirements for rationality, but also with respect to the severity of the crime committed'. [295] This quote encompasses one of the main issues behind the legislator's apprehension towards expanding the sphere of application of the defence. As a society, we may appear to theoretically acknowledge the mentally ill and intellectually disabled as inculpable for their criminal acts. However, this theoretical knowledge is often contradicted by our carnal, instinctive need for justice. The idea that someone could perform criminal acts and not be chastised accordingly, is, therefore, an unpalatable concept for the public. As a result, we have abstained from addressing the antiquated nature of the insanity defence and, in doing so, failed to protect the most vulnerable in society (the mentally and intellectually unstable). In conclusion, the excessively rigid and archaic approach to legal insanity does a great disservice to these individuals and should, ultimately, be revised and brought into the 21st century.

[295] Susanna Radovic, Gerben Meynen, Tova Bennet, 'Introducing a standard of legal insanity: The case of Sweden compared to The Netherlands' (2015) 40 International Journal of Law Psychiatry 180

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