The Insanity Defence Revisited: To Retain or Abolish? The Study from the UK and US Regimes
ข้อต่อสู้กรณีบุคคลวิกลจริตกระทำความผิดทางอาญา: คงไว้ หรือ ยกเลิก? ถอดบทเรียนจากระบบกฎหมายของสหราชอาณาจักรและสหรัฐอเมริกา

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Abstract

Despite being subjected to various criticisms, the insanity defence should be retained, although a reformation is highly recommended. It is essential that some mentally disordered offenders who are non-culpable agents under criminal law are exempted from criminal responsibility and punishment by the special defence, not by other ordinary defences. The defence not only reflects several moral principles of criminal law as mentioned above but it also allows the mentally disordered offenders to be prosecuted and handled under the 'alternative' criminal justice system, which means that these offenders would be diverted to a more therapeutic system for a rehabilitation rather than the 'ordinary' punishment-based criminal justice system. For without it, some severely mentally disordered offenders will end up in prison. Hence, this is unjust and contrary to the principles of criminal law, and furthermore, the purpose of rehabilitation would not be fulfilled. This paper will support the argument to retain the defence by first exploring the rationale behind the defence itself as well as examining the current legal insanity tests under the UK and US jurisdictions, following by the critical analysis of the arguments for the abolition and retention. Lastly, it will conclude by explaining why the defence should be retained.

Keywords: Insanity Defence, Criminal Defences, Criminal Law, Mentally Disordered Offenders

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บทคัดย่อ

ข้อต่อสู้กรณีบุคคลวิกลจริตกระทำความผิดทางอาญาเป็นประเด็นหนึ่งที่ถูกวิพากษ์วิจารณ์อยู่เสมอมา เพราะมีฝ่ายที่สนับสนุนให้มีการคงอยู่และฝ่ายที่ต้องการให้ยกเลิก ฝ่ายที่ต้องการให้ยกเลิกนั้น ให้เหตุผลว่า ข้อต่อสู้ดังกล่าวมักถูกใช้เป็นช่องทางในการไม่ต้องรับโทษ มากกว่าที่จะใช้เพื่อช่วยเหลือบุคคลวิกลจริตอย่างแท้จริง อีกทั้งข้อต่อสู้ดังกล่าวยังอาจขัดต่อหลักความเสมอภาคของบุคคลภายใต้กฎหมาย นอกจากนี้ เหตุยกเว้นความผิดหรือยกเว้นโทษทั่วไปทางอาญา เพียงพอที่จะทำให้บุคคลวิกลจริตได้รับการยกเว้นโทษและความรับผิดทางอาญาอยู่แล้ว จึงไม่จำเป็นต้องมีข้อต่อสู้กรณีบุคคลวิกลจริตกระทำความผิดทางอาญาแยกไว้ต่างหาก ในทางกลับกัน ฝ่ายสนับสนุนให้เหตุผลว่า กฎหมายอาญามองว่าบุคคลวิกลจริตเป็นบุคคลที่ไม่มีความสามารถภายใต้กฎหมาย จึงควรได้รับการยกเว้นความรับผิดและโทษทางอาญาภายใต้ข้อต่อสู้พิเศษ มิใช่ภายใต้ข้อต่อสู้ทางอาญาธรรมดาทั่วไป ทั้งนี้ ข้อต่อสู้กรณีบุคคลวิกลจริตกระทำความผิดทางอาญานั้น ไม่เพียงสะท้อนหลักศีลธรรมของกฎหมายอาญา หากยังทำให้บุคคลวิกลจริตได้เข้าสู่กระบวนการยุติธรรมทางเลือกที่มุ่งเน้นการบำบัดรักษาฟื้นฟู มิใช่กระบวนการยุติธรรมทางอาญาตามปกติที่เน้นการลงโทษ ทั้งนี้ หากปราศจากข้อต่อสู้กรณีบุคคลวิกลจริตกระทำความผิดทางอาญาแล้ว บุคคลวิกลจริตอาจถูกลงโทษจำคุก ซึ่งการกระทำดังกล่าว เป็นการอยุติธรรมและขัดต่อหลักการของกฎหมายอาญา อีกทั้งยังขัดต่อหลักการแก้ไขฟื้นฟูอีกด้วย บทความนี้สนับสนุนให้มีการคงไว้ซึ่งข้อต่อสู้กรณีบุคคลวิกลจริตกระทำความผิดทางอาญา โดยเริ่มจากการวิเคราะห์หลักการและความจำเป็นของข้อต่อสู้กรณีบุคคลวิกลจริตกระทำความผิดทางอาญา ตามด้วยการพิจารณาวิเคราะห์กฎหมายเรื่องข้อต่อสู้กรณีบุคคลวิกลจริตกระทำความผิดทางอาญาในสหราชอาณาจักร และสหรัฐอเมริกา และสรุปว่าเพราะเหตุใดจึงจำเป็นต้องคงข้อต่อสู้กรณีบุคคลวิกลจริตกระทำความผิดทางอาญาไว้ภายใต้กฎหมายอาญา

คำสำคัญ: ข้อต่อสู้กรณีบุคคลวิกลจริตกระทำความผิดทางอาญา เหตุยกเว้นความรับผิดและโทษทางอาญา กฎหมายอาญา ผู้กระทำผิดวิกลจริต

1. INTRODUCTION

The insanity defence is based on the defendant's claim that, while committing a criminal offence, his 'insanity' or mental illness undermined his rational capacities, thus rendering him an inappropriate candidate for criminal responsibility and punishment. The success of the defence would exempt the offender from criminal responsibility and punishment. Nonetheless, he could be diverted to a 'therapeutic' track, which includes indefinite detention, admission to hospital or supervision and treatment orders.

Although the insanity defence has long been recognised as one of the available defences in criminal law in most of the UK and US jurisdictions under the Common Law, it is still being subjected to multiple criticisms. Thus, the options of abolishing or retaining and reforming the defence have been the subject of considerable academic debate in the Anglo-American legal literature. This paper aims to engage with this debate by critically analysing the most influential arguments from both sides. For the purposes of the present paper, only the UK (mainly England and Wales and Scotland) and selected US jurisdictions will be discussed. The term 'insanity' will be used in this paper, since this term is used in England and Wales and the US jurisdictions under discussion. However, it should be noted that Scots law no longer uses the term 'insanity', instead referring to offenders suffering from a 'mental disorder'.

2. BACKGROUND

To begin with, it is essential to examine the theoretical and historical background of the defence. Hence, this section begins with an exploration of the function and general principles of criminal law in relation to the insanity defence before discussing a brief history of the insanity defence and ending with an analysis of the current insanity defence tests in the US and UK jurisdictions.

2.1 Function and general principles of criminal law

Criminal law serves as a tool for social-control.[2] Therefore, it is necessary to determine which actions are not allowed in society and to designate these as 'crimes'. Many of these forbidden actions (typically, the most serious crimes) are actions that are considered 'morally wrong' (known as '*mala in se*') such as assault and murder. If a responsible agent has freely and knowingly done something morally wrong, without justification or excuse, this implies that the agent is blameworthy. Under modern criminal law, to hold someone 'criminally responsible', the state must prove the elements

[2] It is not within the scope of this paper to engage in a detailed discussion of the nature of crime. For further discussion of this concept see, e.g. Reiner, R. (2016). *Crime, the mystery of the common-sense concept*. New Jersey: John Wiley & Sons.

of crime, which consist of the prohibited/wrongful conduct (known as *actus reus*) and the mental state (known as *mens rea*). Normally criminal law is based on an assumption that everyone is responsible for their actions (or are appropriate candidates for 'criminal responsibility'). Thus, if the elements of the crime have been proven, a person would receive punishment.

Punishment is an important tool for social control since it could be used to maintain law and order within society. It can help achieve a range of forward-looking goals, of benefit to society. For example, punishment imposed by an authority can prevent private citizens from seeking revenge by themselves. It can also make the general population afraid of committing crimes, since people do not want to face punishment (general deterrence). It can make the offender afraid to reoffend (specific deterrence). Punishment may make society safe because offenders are incapacitated (incapacitation principle). Certain rehabilitative sentences may help to 'fix' the offenders (rehabilitation principle). Regardless of whether punishment produces forward-looking benefits, some theorists maintain that punishing the guilty is 'intrinsically appropriate' because it is 'deserved' (positive retributivism).[3]

Before imposing punishment and criminal responsibility on the offender, the issue of whether it is justified to impose punishment on any offender must be considered first. Thus, the criminal law allows some circumstances to be raised in order to reduce or exempt a person from punishment and/or criminal responsibility. This is known as a 'defence'. Several questions are relevant to considering whether it morally justifiable to hold an offender criminally responsible or to provide him with a defence. For example, it is important to ask: Is the defendant 'morally blameworthy' for his action? Are there any circumstances in which his 'blame' should be reduced? These moral questions are relevant to the issue of 'criminal responsibility' since there is a strong case for saying that criminal responsibility should be based on the moral principle of 'fault'. This principle requires that only those who were at fault (i.e. blameworthy) should be punished.[4] For example, if one is too young, it would not be justified to hold one responsible (the defence of infancy) or if one committed crime to defend oneself using necessary and proportionate force, then one should not be held criminally responsible (self-defence). The fault principle is sometimes called 'negative retributivism'. This principle is widely-accepted and is sometimes endorsed even by theorists who do not subscribe to positive retributivism.[5]

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[3] For further discussion of penal theories, see Hall, J. (1960). *General Principles of Criminal Law* (2nd edition). Indianapolis: Bobbs-Merrill; 'Punishment' (Stanford Encyclopedia of Philosophy 2015) <https://plato.stanford.edu/entries/punishment/#ThePun> accessed 11 October 2018

[4] Morse, S.J. (1999). Craziness and Criminal Responsibilities. *Behavioral Sciences and the Law*, 17(2), 147-164, 149.

[5] Read more at Lippke, R. (2013). Some Surprising Implications of Negative Retributivism. Journal of Applied Philosophy, 31(1), 49-62.

Thus, to determine whether one should be criminally responsible, certain criteria must be satisfied. Since criminal law is based on a presumption that individuals are moral agents, it believed that they are capable of making free choices about how to behave.[6] Furthermore, it is generally agreed that 'rationality' is an essential qualification to be considered as a 'moral agent'.[7] Only moral agents can be considered 'blameworthy' and can fairly be responsible under the criminal law. In other words, to be 'culpable' or 'criminally responsible' requires an ability to understand and reason about society's perceptions, attitudes and values concerning how one ought to act.[8] One has to have a capacity for 'practical reasoning'.[9]

2.2 The insanity defence

The concept behind the insanity defence could be explained as follows. Essentially, the insanity defence is based on a concept that if one is too 'mentally disordered' while committing crime, one is without blame and should not be held criminally responsible. Theoretically speaking, the legally insane, whose minds are severely affected by mental disorders, are considered to be non-culpable agents under criminal law. It is the insane person's 'irrationality' specifically, which makes criminal law excuse him, since he is not capable of making his own choices (or exercising 'free will'). Therefore, he is not a 'blameworthy' moral agent.[10] It should be noted that some writers base these ideas on the thought that mental disorders are not self-induced[11] and that the offender should be excused because he was not at fault for having the mental disorder and because the mental disorder prevented him from responding to the reasons for obeying the law.

Since the insane offender is a non-culpable agent, this also means that he would not be a 'fit' subject for punishment. This is based on the concept that punishment presupposes responsibility and that the insane are not responsible. [12] Moreover, punishing the insane might not serve the

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[6] Mackay, R. (1995). *Mental Condition Defences in the Criminal Law*. Oxford: Clarendon Press, 76.

[7] *Ibid.*

[8] Howard, H. (2003). Reform of the Insanity Defence: Theoretical Issues. *Journal of Criminal Law*, 67(1), 51-67.

[9] Moore, M. (1985). Causation and Excuses. *California Law Review*, 73, 1091-1149.

[10] Morse, (n 4).

[11] Gross, H. (1985). Justice and the Insanity Defense. *The ANNALS of the American Academy of Political and Social Science*, 477(1), 96-103. For a discussion of whether a mentally ill offender who fails to take medication should be considered 'at fault', see Maliha, G. (2018). Noncompliant Insanity: Does It Fit within Insanity. *Harvard Journal of Law and Public Policy*, 41(2), 647-689.

[12] Hermann, D. (1983). *The Insanity Defense: Philosophical, Historical, and Legal Perspectives*. Springfield, Illinois: Thomas, 151.

purposes of punishment. It could be concluded that the insanity defence is *"rooted in moral principles of excuse..."*[13] and it reflects the morality of criminal law.

Interestingly, the defence does not only concern legal issues but also medical issues, especially psychology. Expertise in these medical issues is required by legal insanity tests, in order to determine whether the defendant is suffering from a 'mental disorder'. Medical expertise is also required during the rehabilitation process for the insane offender. The insanity defence also raises policy issues, specifically a policy concerning social protection. Society must ask: What is to be done with the insane offender so that social safety can be guaranteed? Should they be incarcerated, or should a therapeutic route be provided? Or, indeed, should an insanity defence be available at all? Moreover, it is also a social issue since public opinion and society's level of tolerance toward mentally disordered offenders play a significant role in shaping the policy regarding the insanity defence. Lastly, the defence is also associated with human rights issues since (involuntary) detention in a mental hospital, which is one of the standard disposals following a successful plea of insanity, might affect the human rights of insane offenders, or a detention on the grounds of mental illness might be considered as discriminating against the disabled, hence, it might violate the United Nations Convention on the Rights of Persons with Disabilities (CRPD). These considerations make the insanity defence one of the most complicated and difficult problems in criminal law.[14]

Consequently, the legal insanity test is needed in order to determine whether a person suffering from a mental disorder should be held criminally responsible or not. The test draws a distinction between those who should be 'blamed and punished' and those who should not. The next section will provide an overview of the legal insanity tests from the origin of the defence to the present day, to lay the groundwork for a critical examination of the current tests.

2.3 The legal insanity tests

In English law, the first insanity defence appeared in 1313 as a 'good and evil' test, which had deep roots in morality and religion.[15] However, it should be noted that prior to 1724, there was no fixed legal insanity test under the English Common Law. An important question that juries needed to answer was whether the defendant was really insane. If he was, he would be discharged to the care of family or friends to guarantee his future behaviour. If there were no such person, he could be jailed

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[13] Morse, S.J. (1985). Excusing the Crazy: The Insanity Defense Reconsidered. *Southern California Law Review*, 58, 777-836.

[14] Fingarette, H. (1972). *The Meaning of Criminal Insanity*. Berkeley, California: University of California Press, 4.

[15] Platt, A. and Diamond, B.L. (1966). The Origin of the Right and Wrong Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey. *California Law Review*, 45(3), 1227-1260.

until he recovered.[16] After the *Arnold* case in 1724, a 'wild-beast' test was introduced in English law and it was held that to be legally insane one must 'not know what he is doing, no more than an infant, than a brute or wild beast'.[17] But it was not until 1800, in the *Hadfield* case[18], that a further significant development of the insanity defence emerged under English Common Law. In this case, the 'wild beast test' was used. Hadfield, although suffering from a delusion, in a strict sense, knew what he was doing. It was eventually accepted that his head injury was the cause of his insanity and his mind was not sane at the time of committing the crime, thus he was acquitted.

The verdict in *Hadfield* led to an enactment of the Criminal Lunatic Act 1800. This 'new' Act created the special defence of insanity where a verdict of 'not guilty on the ground of insanity' was introduced and it allowed the state to detain those who successfully plead the insanity defence. Prior to *Hadfield*, the criminal justice system had no direct power to detain the insane offender,[19] unless the detention was done under the Vagrancy Act of 1744, which could not be automatically applied to every insane offender.[20]

Additionally, the Act also introduced the concept of 'unfitness to plead', according to which the state is allowed to detain an insane person who is alleged or suspected of committing a crime, but who is not fit to stand trial. It should be noted that at that time, since punishment was severe and capital punishment was a common punishment, [21] for the insane offender to be spared death could be viewed as 'merciful'. Nonetheless, at the same time, the Act was rather 'punitive' since the success of the defence led to an automatic confinement for a long time. Hence, it could be argued that the insanity defence served as a tool for punishing, deterring and incapacitating the insane.[22] Noticeably, 3 years later, the Trial of Lunatics Act 1883 was introduced, and the verdict of the insanity defence was changed to 'guilty but insane'. The terms in this verdict caused some confusion, as they are self-contradictory.[23] The verdict was changed to the current verdict of 'not guilty by reason of

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[16] Walker, N. (1985). The Insanity Defence Before 1800. *The ANNALS of the American Academy of Political and Social Science*, 477(1), 25-30; and Walker, N. (1968). *Crime and Insanity in England: Vol 1*. Edinburgh: Edinburgh University Press.

[17] *Rex v Arnold* [1724] Y.B. 10 GEO. 1.

[18] *R v Hadfield* [1800] 2 State Trials (New Series) at 1281.

[19] Crotty, H.D. (1924). History of Insanity as a Defence to Crime in English Criminal Law. *California Law Review*, 12(2), 105-123.

[20] Blackstone, W. (1765-9). *Commentaries on the Laws of England*, Book IV, Ch.2. London: Blackstone.

[21] White, S. (1985). The Insanity Defense in England and Wales since 1843. *The Annals of the American Academy of Political and Social Science*, 477(1), 43-57.

[22] For arguments regarding the punitive use of the defence, see Moran, R. (1986). The Punitive Uses of the Insanity Defence: The Trial for Treason of Edward Oxford (1840). *International Journal of Law and Psychiatry*, 9(2), 171-190.

[23] McAuley, F. (1993). *Insanity, Psychiatry and Criminal Responsibility*. Dublin: Round Hall Press, 111.

insanity' in 1964 when the Criminal Procedure (Insanity) Act 1964 was introduced. As a result of this Act, the success of the insanity defence does not mean automatic detention in a mental hospital anymore since there are five available disposals.[24]

Despite these recent developments, the case which is still the landmark decision for the insanity defence was *M'Naghten*[25] from 1843, which created the legal insanity test that is still used in most Common Law jurisdictions today. The *M'Naghten* rules require that in order to establish the insanity defence, the defendant must be suffering from a defect of reason caused by a disease of mind, such that he either does now know the nature and quality of his acts; or does not know that they are wrong.[26] In England and Wales, it was held that the 'disease of mind' must arise from an internal cause[27] (which could include physical disorders that affect the mind, e.g. hardening of the arteries affecting the supply of blood to the brain). Additionally, it was held that personality disorders such as psychopathy are not diseases of mind[28] and that 'wrong' strictly means legally wrong.[29]

However, some US jurisdictions have a broader conception of a 'disease of mind' (with some states even allowing certain types of personality disorder, as well as postpartum psychosis to be classed as diseases of mind) [30] and some US jurisdictions have held that the term 'wrong' in the test means morally wrong rather than just legally wrong.[31] Notably, the *M'Naghten* rules did not reflect the insanity defence in Scotland even prior to the introduction of the Scottish statutory defence.[32] The concept of the insanity defence in Scotland was originally based on Hume's *Commentaries*, which mainly focused on the phrase 'an absolute alienation of reason'.[33] In Scotland, if the mental disorder (or a physical disorder affecting the mind) deprived the person of rationality (or according to some authorities, of the ability to control his actions) [34] he would qualify for the insanity defence. Ever since its introduction in 1843, *M'Naghten* has faced serious criticisms. One of the main objections

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[24] Criminal Procedure (Insanity) Act 1964 Section 5.

[25] *R v M'Naghten* (1843) 10 Cl&F 200; 8 ER 718.

[26] *ibid*

[27] As if it was external cause, it will not be a disease of mind see *R v Quick* [1973] 3 WLR 26.

[28] Law Commission UK. (2013). *Insanity and Automatism Discussion Paper*, paras 4.96 & 4.98.

[29] *R v Windle* [1952] 2 All ER 1 (CCA).

R v Johnson [2007] EWCA Crim 1978.

[30] Resnick, P.J. (2007). The Andrea Yates Case: Insanity on Trial. *Cleveland State Law Review*, 55(2), 147-156.

[31] *R v Windle* [1952] 2 All ER 1 (CCA). See also, Meynan, G. (2016). *Legal Insanity: Explorations in Psychiatry, Law, and Ethics*. New York: Springer, 27.

[32] Scottish Law Commission. (2004). *Report on Insanity and Diminished Responsibility*, Part 1 Introduction, para 2.6.

[33] Hume, D. (1819). *Commentaries on the Law of Scotland, respecting Crimes* (2nd edition). Surrey: Bell and Bradfute, 37.

[34] *HM Advocate V Kidd* [1960] JC 61. *Cf Cardle v Mulrainey* [1992] SLT 1152.

is that it is only focuses on 'cognitive' abilities (i.e. knowledge of what one is doing and knowledge of right or wrong). Hence, many critics argue that the test is too narrow and would not exempt the truly insane. As a result, several tests were developed, especially in US jurisdictions, in order to solve the problems that the old *M'Naghten* case could not.

The Irresistible Impulse test or the 'control test' was first introduced in the US in the influential case of *Parsons v State*.[35] The test is based on the concept that if the defendant's mental disorder directly caused the impulse, by depriving him of willpower and making him unable to prevent himself from doing the act, he would be found not guilty.[36] Interestingly, this test could be used along with the *M'Naghten* rules to broaden the definition of insanity.[37] However, it is criticised for broadening the insanity defence far too much, for introducing the idea of being 'unable to resist', which is very difficult to prove, and for not being based on scientific concepts.[38]

The Durham test or the 'product test' was introduced in *Durham v States*[39] to originally replace the former *M'Naghten* and control tests in the District of Columbia. The product test relied on the concept that if the unlawful act was the product of a mental disease or defect, the defendant would not be held criminally liable.[40] The advantage of the Durham test is that it seems to introduce more 'psychological' concepts to the legal insanity test, hence, make the test more 'scientific'. Nonetheless, the disadvantage of the test is that it leaves the matter of the determination of legal insanity to the expert witness (psychiatrists or psychologists) rather than juries, in the sense that the expert witness needs to testify whether the defendant's mental disease produced the alleged conduct or not. Therefore, this makes the legal insanity test more of a medical issue rather than a legal issue.[41] Consequently and unsurprisingly, the test was not popular in the US jurisdictions.

The American Law Institute (ALI) rule is the legal insanity test under the Model Penal Code (MPC) and it is widely used in the United States.[42] In the attempt to widen the insanity defence, under the rule, a person is not responsible for criminal conduct if at the time, ''...as a result of his mental disease or defect he lacks substantial capacity to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.''[43] Interestingly, to avoid the

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[35] 2 So. 854 (Ala. 1887).

[36] *Ibid.*

[37] See Goldstein, A. (1973). *The Insanity Defense*. New Haven: Yale University Press, 67.

[38] Hall, J. (1956). Psychiatry and Criminal Responsibility. *Yale Law Journal*, 65(6), 761-785.

[39] 214 F.2d 862, 869 (D.C. 1954).

[40] *ibid* at 874-75.

[41] Gerber, R. (1975). Is the Insanity Test Insane. *The American Journal of Jurisprudence*, 20(1), 111-140.

[42] Meynan, (n 31) 26.

[43] Model Penal Code (American Law Institute 1985).

problem of psychopathy, the ALI rule specifically excluded psychopathy as a mental disease/defect from the insanity defence.[44] Notwithstanding, the ALI rule still has not defined the term 'mental disease' nor 'mental defect'. The ALI rule combines 1) a modified version of the old *M'Naghten* cognitive test (replacing the phrase 'did not know right and wrong' with the 'appreciation of the criminality') and 2) a control test, focusing on the ability 'to conform his conduct to the requirements of law'. The term 'appreciate' is deemed to be broader than the previous term 'know' - demanding more than mere knowledge.[45] Furthermore, when implementing the test, the states could choose between the words 'criminality' and 'wrongfulness'. Depending on which term is employed, it could cover moral as well as legal wrongfulness. Nonetheless, it received the same criticism as the old control test that the control prong is too broad.

The statutory test of the 'mental disorder defence' was introduced in Scotland in 2010 when Scotland decided to abolish the common law doctrine of insanity.[46] Under the new test, a person would not be held criminally responsible if at the time of the conduct, by a reason of mental disorder, a person is unable to appreciate the nature or wrongfulness of the conduct.[47] The term 'mental disorder', relies on the definition in the Mental Health Act[48], but does not include psychopathy. The test also substitutes the term 'know' with 'appreciate' since it would be broader than just a simple knowledge and will include a level of (rational) understanding.[49]

It could be seen that from the 'wild-beast' test and the *M'Naghten* rules to the Scottish mental disorder defence, the insanity defence has been through many developments. Nevertheless, as mentioned above, since the defence is not limited to legal issues but also raises issues of morality, psychology and social policy, debates about whether the defence is still necessary (and, if so, why) have repeatedly arisen. In particular, calls for abolishing the defence have been extremely strong after high-profile cases, when the public have taken the view that the offender has 'escaped' punishment by raising the insanity defence.[50] Indeed, it is time for the re-consideration whether the defence is necessary in the 21st century. Hence, the next section will critically analyse the arguments for the abolition versus the retention of the defence.

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[44] *ibid*.

[45] Sinnott-Armstrong, W. and Levy, K. (2011). Insanity Defenses (p. 314). In Deigh, J. and Dolinko, D. (eds.). *The Oxford Handbook of Philosophy of Criminal Law.* Oxford: Oxford University Press.

[46] Section 168, Criminal responsibility of persons with mental disorder Criminal Justice and Licensing (Scotland) Act 2010.

[47] *ibid* Section 168 51A.

[48] Mental Health (Care and Treatment) (Scotland) Act 2003.

[49] Scottish Law Commission, (n 32) Part 2 Insanity as a defence at para 2.47.

[50] Like the Hinckley case in the US.

3. THE ARGUMENTS FOR THE ABOLITION AND RETENTION OF THE INSANITY DEFENCE

Most of the strong calls for the abolition of the defence came from the US. Particularly after the attempted assassination of President Reagan by John Hinckley, who was found not guilty by reason of insanity (NGRI) in 1982 under the ALI rule.[51] The verdict of *Hinckley* sparked debate among academics, politicians and the public as it was a high-profile case and the verdict itself did not satisfy public opinion. Indeed, in the aftermath of *Hinckley*, four states - Montana, Utah, Kansas and Idaho - abandoned the insanity defence. Currently, 46 states have the insanity defence and 45 of these have insanity tests based on *M'Naghten* or ALI.[52]

Meanwhile, in the UK, there are no strong calls for abolition.[53] On the contrary, in several law reform reports, it was held that the insanity defence is needed but it was suggested that reforms must be made.[54] Currently, England and Wales still use *M'Naghten*, while Scotland[55] and Northern Ireland[56] have their own mental disorder defences as statutory defences. This section will critically analyse the arguments for the abolition versus the retention of the insanity defence in preparation for the next section, which will argue that the defence is needed.

3.1 The arguments for abolition

One of the leading abolitionists, Morris, viewed the insanity defence as a form of "hypocrisy"[57], as the defence, especially the language of the test, does not really identify the offenders who need psychiatric treatment nor or lack moral culpability, since the defence itself contains illogical tests and terms.[58] Thus, it had not succeeded in what it is was supposed to do. To prove his point, Morris presented some statistical evidence that there are far more non-NGRI (not guilty be the reason of

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[51] Mackay, R.D. (1988). Post-Hinckley Insanity in the U.S.A. *Criminal Law Review*, 88.

[52] Cevallos, D. (2015). Don't rely on insanity defence (*CNN*, 17 July 2015). Available at: <https://edition.cnn.com/2015/02/11/opinion/cevallos-insanity-defense/index.html> accessed 17 July 2018

[53] Mackay, R.D. (1987). McNaughtens Rules OK? The need for Revision of the Automatism and Insanity Defenses in English Criminal Law. *Dickinson Journal of International Law*, 5(2), 167-192.

[54] The latest example is the Law Commissioner's Insanity and Automatism Discussion Paper (n 28).

[55] Criminal Justice and Licensing (Scotland) Act, (n 46).

[56] Criminal Justice Act (Northern Ireland) 1966 Section 1.

[57] Morris, N. (1984). *Madness and Criminal Law.* Chicago: University of Chicago Press.

[58] Spring, R. (1979). The End of Insanity. *Washburn Law Journal*, 19, 23.

insanity) convicted offenders who suffered from severe mental illness than those who were acquitted under the NGRI.[59]

When it comes to the issue of a relationship between mental illness and criminal act, Morris argued that the assumption that mental illness impairs a person's ability to choose to commit crime is misplaced. According to him, we all have some choice; what matters most is the degree of freedom of choice.[60] His argument is that there are stronger grounds for having a "social adversity defence" than for having an insanity defence, because social adversity can affect freedom of choice even more than mental disorder does. .[61] Moreover, he criticised the state for the failure to grant the defences for others whose actions are also equally beyond their control. Hence, he argued that if the state allows 'insanity' to be a criminal defence, the state must also allow 'social-adversity' to be the criminal defence.[62]

Meanwhile, Goldstein and Katz have taken the approach that the insanity defence is a tool for the state to confine insane offenders rather than a tool to determine whether people should be held criminally responsible or not. For if a person is found not guilty then how come the state still has the authority to confine such a person?[63] Their answer is because insane offenders are both *"...feared as crazed and criminal"*.[64] In this sense, the state actually takes the view that they are too dangerous to set loose but at the same time they are not being convicted of any crimes. Thus, this makes the defence deceptive,[65] as although they are not criminally responsible and should be acquitted and allowed to go free, instead the state is using the insanity defence as a tool to confine insane offenders. Consequently, regardless of whether they are found 'innocent' or 'guilty', defendants who rely on the insanity defence are still incapacitated.

The defence is also criticised for involving 'double-stigmatization',[66] since instead of marking the insane offender as a non-culpable agent, as it is supposed to do theoretically, the defence itself labelled the offender as 'mad and bad' and 'criminal and insane'.[67] Additionally, it is suggested that

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[59] Morris, N., Bonnie, R. & Finer, J. (1985-87). Should the Insanity Defense be Abolished - An Introduction to the Debate. *Journal of Law and Health*, 1, 113-140.

[60] Morris, (n 57) 61.

[61] Morris, Bonnie, & Finer, (n 59) at 121.

[62] Morris, (n 57) 63.

[63] Goldstein, G. and Katz, J. (1963). Abolish the "Insanity Defense"--Why Not?. *Yale Law Journal*, 72(5), 853-876.

[64] *ibid* at 868.

[65] Singer, R.G. (1982). Abolition of the Insanity Defense: Madness and the Criminal Law. Cardozo Law Review, 4, 683-707. Cited in *ibid*.

[66] Morris, (n 57) 516.

[67] Perlin, M.L. (1992). On "Sanism". *SMU Law Review*, 46(2), 373-408.

by abolishing the defence, the stigma associated with mental illness (sometimes called 'sanism') would be reduced.[68]

The next argument concerns the fact that the defence allows too much involvement of psychiatrists in the trial, especially in the determination of 'mental illness/disorder', which could possibly lead to the determination of criminal responsibility and guilt of the defendant and also the abuse of the defence as stated above.[69] Hence, there is a concern that the defence will turn into a medical rather than legal issue and the ultimate power of deciding guilt would be shifted from juries to psychiatrists. Furthermore, there is a concern that the defence could be abused by spending a lot of money on expert witnesses to testify as a favour for the defendant and as a ticket for an acquittal.[70]

Interestingly, it is argued that abolishing the defence would improve the public's image of the criminal justice system.[71] Since, as mentioned above, there is a negative image that the defence is being used to 'beat the rap'. If the special defence is abolished and the general criminal law defences (e.g. mistake, self-defence or duress) are applied, where relevant, when mentally disordered offenders commit crimes, the verdicts in such cases would be less likely to cause public outrage than the verdict of the insanity defence.[72] Consequently, confidence in the legal system would not be lost.

It is also argued that the defence cannot guarantee social safety,[73] as there is no longer a guarantee of long-term confinement of those insane offenders who have committed dangerous crimes.[74] However, it should be noted at this point, that some abolitionists argue that the insanity defence could possibly lead to a longer period of detention in hospital than the original sentence for the crime committed.[75]

Recent arguments for abolishing the defence claim that it violates the Convention on the Rights of Persons with Disabilities (CRPD), as the CRPD prohibits any distinction, exclusion or restriction based on disabilities, which includes mental disabilities.[76] It is claimed that the CRPD contains the

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[68] Slobogin, C. (2000). An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases. *Virginia Law Review*, 86(6), 1199-1248.

[69] Goldstein and Katz, (n 63).

[70] Brooks, A. (1985). The Merits of Abolishing the Insanity Defense. *The Annals of the American Academy of Political and Social Science*, 477(1), 125-136.

[71] Slobogin, (n 68) at 1243.

[72] *ibid*

[73] Spring, (n 58). See also, Rathke, S.C. (1982). Abolition of the Mental Illness Defense. *William Mitchell Law Review*, 8(1), 143-182.

[74] Rathke, (n 73).

[75] Goldstein and Katz, (n 63).

[76] The CRPD art. 2.

obligation of State Parties to replace and repeal legislation and other administrative measures that contain discrimination based on disabilities.[77] Further, Article 12 (2) also requires State Parties to recognise that persons with disabilities enjoy legal capacity on an equal basis with others.[78] Thus, the insanity defence as well as the law relating to unfitness to plead may violate the CRPD. Additionally, the CRPD committee had suggested that any determination of mental incapacity, including the insanity defence, should be abolished.[79] This is a result of the committee's strict interpretation of Article 12 (2).[80] Furthermore, the committee takes the view that the disposals (following successful reliance on the insanity defence), which include (involuntary) detention in a mental hospital, are contrary to Article 14, which concerns the right to liberty and security of persons with disabilities.[81] In summary, under the CRPD (as interpreted by the CRPD committee), mental disability should not play any role in the criminal law at all.[82]

Apart from the major arguments which are mentioned above, there are some minor arguments which the abolitionists have also put forward. First, the defence has been rarely used and has a very low rate of success.[83] Second, trials involving the insanity defence are often said to resemble a 'circus',[84] in the sense that they consists of a battle of witnesses, which could cause juries to become confused.[85] Lastly, it is argued that since capital punishment is rarely imposed, or has been abolished in many jurisdictions, there is no need for the defence.[86]

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[77] The CRPD art. 4(b) and 5.

[78] The CRPD art. 12.

[79] Gooding, P. and Bennet, T. (2018). The Abolition of the Insanity Defense in Sweden and the United Nations Convention on the Rights of Persons with Disabilities: Human Rights Brinkmanship or Evidence It Won't Work?. *New Criminal Law Review: An International and Interdisciplinary Journal*, 21(1), 141-169.

[80] CRPD Committee. (2014). *Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law*.

[81] CRPD Committee. (2015). *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilites: The Right to Liberty and Security of Persons with Disabilities*.

[82] Slobogin, C. (2015). Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disability on the Insanity Defense, Civil Commitment, and the Competency Law. *International Journal of Law and Psychiatry*, 40, 36-42.

[83] Morris, Bonnie, & Finer (n 59) at 118.

[84] Brooks, (n 70).

[85] Arenella, P. (1982). Reflections on Current Proposals to Abolish or Reform the Insanity Defense. *American Journal of Law & Medicine*, 8(3), 271-284.

[86] Morris, N. (1982). The Criminal Responsibility of the Mentally Ill. *Syracuse Law Review*, 33, 477-532; and Wilbur, C.D. (1922). Should Insanity Defense in Criminal Charge be Abolished?. *American Bar Association Journal*, 8(10), 631-635.

To conclude, Pre-CRPD arguments for the abolition of the defence mostly concern the perception that a) the defence is being abused to let offenders escape punishment and b) the defence is not working because of problems with terminology in the tests. While Post-CRPD arguments, which focus on the ideas of equality and universalism, argue that the defence violates these ideas.[87]

Many abolitionists agree that the doctrine of *mens rea* is enough to determine a person's criminal responsibility and that, therefore, the insanity defence is not necessary. They argue that if the doctrine of *mens rea* is applied correctly, the issue of 'blameworthiness' and 'guilt', which are viewed as preconditions for the insanity defence, will not need to be further addressed.[88] On the "*mens rea* approach" (favoured by many abolitionists) he defendant's mental illness would still be taken into consideration when *mens rea* is being considered, as it is possible to use mental illness to negate *mens rea*.[89] But if the defendant, despite his mental illness, no matter how severe it might have been, was still be able to form *mens rea* for the offence, he would then be held liable for his criminal act on this approach.[90] Regarding the disposition, it is viewed that the doctrine of *mens rea*, together with a proper disposition system would still allow the defendant to be acquitted due to the lack of intent because of mental illness, so the defendant could receive treatment under the civil commitment.[91] Further, the evidence relating to the defendant's mental illness could be taken into consideration as a migrating factor in the determination of punishment or treatment. Therefore, it is believed that a truly insane offender would not face punishment under this model.[92]

Additionally, one of the abolitionists, Slobogin, suggested that a form of "*mens rea* plus approach", which he called the 'integrationist test', could be imposed instead of the special defence of insanity. The test is based on imposing the *mens rea* approach (described above) plus other 'universal excuses (justification, provocation and duress defences), which would exempt people, whether they were mentally ill or not.[93] Although, most mentally disordered offenders would not

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[87] Read more at Quinn, G. (2009). A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities. In Quinn, G and Waddington, L. (eds.). *European Yearbook of Disability Law Volume 1*. Cambridge: Intersentia.

[88] Morris, (n 61)

[89] Spring, (n 58); and Slobogin, C. (2011). Abolition of the Insanity Defense. In Robinson, P.H., Garvey, S. and Kimberly Kessler Ferzan, K.K. (eds.). *Criminal Law Conversations.* Oxford: Oxford University Press.

[90] Morris, (n 61) at 521, 527-528.

[91] Rathke, (n 73)

[92] Gerber, (n 41) at 111.

[93] Slobogin, C. (2009). A Defense of the Integrationist Test as a Replacement for the Special Defense of Insanity. *Texas Tech Law Review*, 42, 523-542.

lack *mens rea,* their condition might result in 'mistaken beliefs about reality' - mistake as to results, mistake as to circumstances, ignorance of the law and involuntary action. On Slobogin's model they could be acquitted on the basis of these mistakes and would still be entitled to rely on justification or duress defences (if, due to their mental disorder, they genuinely believed they were justified or were being subject to duress).[94] If these general defences are imposed properly, it is claimed that this approach would ''avoid excusing mentally ill people that society does not want to excuse'' and it would still excuse those mentally disordered whose 'mistaken beliefs about reality' negate *mens rea* or lead them to believe they are justified or under duress.[95]

3.2 The arguments for the retention of the defence

Meanwhile, the supporters of the defence claim that the *mens rea* doctrine will not let the truly insane be exempted. Although, it is true that in some rare cases, the mental illness could prevent a person's ability to form *mens rea*, but more often, even the most insane person will be able to form *mens rea*.[96] Strictly speaking, the insane person often knows what they are doing and, indeed, intends to do it, but they perform the act while suffering from irrationality, due to mental disorder. Thus, this *mens rea* argument of the abolitionists has ignored the effect that mental disorders could have on a person's reasoning about their behaviour and circumstances.[97]

Further, it is argued that it is not justified to consider the issue of *mens rea* first because an absence of responsibility (due to irrationality) in the case of the insane offenders should rather be considered first before the criminal elements.[98] Moreover, it is viewed that invoking other doctrines of justification or excuse would still not result in acquitting insane offenders, as often, succeeding with those defences would require the defendant to have acted reasonably, which is not a case for insane offenders.[99] Hence, in order to acquit insane offenders, a special excuse should be provided on the ground that they are insane.[100]

Another main argument from the supporters of the insanity defence concerns the presumption of free will and choice,[101] which is believed to be an important idea behind the principle of criminal

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[94] Slobogin, (n 68) at 1205.

[95] Slobogin, (n 93) at 542.

[96] Morse, S.J. and Hoffman, M.B. (2008). The Uneasy Entente Between Insanity and Mens Rea: Beyond *Clark v Arizona*. *Journal of Criminal Law and Criminology*, 97(4), 1071-1150.

[97] Morse, (n 13).

[98] Howard, (n 8) at 51.

[99] Morse, (n 13).

[100] Moore, M. (1984). *Law and Psychiatry.* Cambridge: Cambridge University Press, 223.

[101] *Lynch v DPP* [1975] 1 All ER 913, 933-4, per Lord Simon.

responsibility. Generally, offenders are thought to be 'blameworthy' and 'culpable' (at least to some extent),[102] but such terms could not accurately describe insane offenders. Consequently, the law has tried to identify those who fall outside the boundaries of blame.[103] The insanity defence existed in the first place to distinguish between those who are 'blameworthy' and 'culpable' and those who are not.[104] Originally, the criminal law deemed that insane offenders are not capable of making genuinely free choices because their mental illness had impacted their free will[105] and they lacked the capacity to choose between good or evil.[106] Or to put it in less confusing and more modern terms,[107] mental illness has affected a person's rational capacity.[108] This lack of rational capacity is the main reason why the criminal law treats insane offenders differently.[109]

This concept of 'blameworthiness' and 'culpability' reflect the morality of criminal law, which is also another main argument of the supporters of the insanity defence. To punish or treat an incompetent person, the insane offender, as a competent person under the criminal justice system does not preserve the integrity or justice of the criminal process.[110] It would be unjust to punish and hold those who suffer from severe mental illness criminally responsible[111] since the criminal justice system is meant to punish only those who are 'blameworthy' and 'culpable'. In this sense, it would not serve the purpose of the punishment to punish the insane.[112] Thus, instead of punishment, a therapeutic track is provided for the insane offender. Interestingly, it is argued that the defence itself is 'symbolic' of society's morality,[113] as a civilised and fair society would not convict and punish a

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[102] Arguably there are some exceptions, e.g. strict liability.

[103] Goldstein, (n 37) at 9-10.

[104] Arenella, (n 85).

[105] Wales, H.W. (1976). Analysis of the Proposal to Abolish the Insanity Defense in S. 1: Squeezing a Lemon. *University of Pennsylvania Law Review*, 124(3), 687-712.

[106] Morse, (n 13).

[107] Since there are arguments that free will is not a requirement of criminal responsibility.

[108] Morse, S.J. (2011). Mental Disorder and Criminal Law. *Journal of Criminal Law & Criminology*, 101(3), 885-968.

[109] Fingarette, H. and Hasse, A.F. (1979). *Mental Disabilities and Criminal Responsibility.* Berkeley, California: University of California Press, 218; Tadros, V. (2001). Insanity and the Capacity for Criminal Responsibility. *Edinburgh Law Review*, 5(3), 325-354; and Schopp, R.F. (1991). *Automatism, Insanity and the Psychology of Criminal Responsibility*. Cambridge: Cambridge University Press, 211.

[110] Moore, M. (2011). Intention as a Marker of Moral Culpability and Legal Punishability. In Duff, R.A. and Green, S. (eds.). *Philosophical Foundations of Criminal Law.* Oxford: Oxford University Press.

[111] Law Commission UK, (n 28) at para 2.33.

[112] Arenella, (n 85).

[113] Fingarette, (n 14) 7; and Perlin, M.L. (1989). Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence. *Case Western Reserve Law Review*, 40(3), 599-732.

person who is not blameworthy. This position is also supported by the Law Commission as they stated that *"...if a person is non-culpable because of the mental disorder, then that should be the true ground for the verdict..."*[114]

In summary, for the supporters of the insanity defence, even if there had never been such a thing as an insanity defence before, and even if the *M'Naughten* rules had never existed, it would be necessary to invent something like it, for there is a strong moral impulse to exempt those who cannot act rationally from criminal responsibility.[115] In this sense, the supporters viewed the defence as being justified and "*right in principle*".[116]

4. SHOULD THE INSANITY DEFENCE BE RETAINED OR ABOLISHED? THE VERDICT

After a careful consideration of the arguments from both sides, it could be concluded that the defence should be retained. Thus, this section would provide the counter arguments for the abolition and provide arguments as to why the defence should be retained.

4.1 The defence contains illogical tests and terms and fails to distinguish between those who are mentally disordered and those who are not

It is possible to agree with this statement, but still to advocate retaining the insanity defence. It is true that some of the legal insanity tests contain illogical terms, for example, the 'disease of mind' from the *M'Naghten* rules, which is a 19th century term and not based on any medical concepts, additionally, to make matters worse, some legal precedents have given the term wider meaning that make it seem even more 'illogical', for example, psychomotor epilepsy[117]and sleepwalking[118] are 'diseases of mind'. Moreover, to craft a 'perfect' legal insanity test is almost mission impossible since there is always going to be disagreement about what should or should not be included in the test, for example, should the test only feature volitional and cognitive branches, or should it also include irresistible impulses also? Nonetheless, the tests, though criticised for not exempting all truly insane offenders, are still able to exempt some insane offenders, which in this sense, is better than nothing. It is true that the tests are with faults, but this does not mean that if the tests are bad, the insanity

[114] Law Commission UK. (2012). Insanity and Automatism Supplementary Material to the Scoping Paper. London: Law Commission, 34.

[115] McAuley, (n 23) 25.

[116] Rollin, H.R. (1975). Report of the Committee on Mentally Abnormal Offenders. London: Home Office and Department of Health and Social Security.

[117] R v Sullivan [1983] 2 All ER 673, 677-8 and Bratty v Attorney-General for Northern Ireland [1963] AC 386.

[118] R v Burgess [1991] 2 WLR 1206.

defence should be abolished. Rather, it means that these problems must be solved by reforming the defence. Therefore, this argument is very weak.

4.2 If the law allows mental disorders to be a defence then the law should allow social-adversity to be a defence also since social-adversity has more impact on why people commit crime

This line of argument is very weak since having mental disorders or coming from a poor background are two separate issues, which are incomparable. Moreover, it could be argued that the law only exempts mentally disordered people because such people lack rationality (and also 'free will') due to their mental disorder, but the same logic could not be automatically applied to a person who was affected by social-adversity. As long as he is capable of having ordinary rationality, he could be held criminally responsible for he still has a choice to choose carefully whether to commit a crime or not. Additionally, if social-adversity were really to become a defence under criminal law, imagine the chaos which might result. For example, in the case of street crimes, especially theft, which are normally driven by a poor economic background,[119] if the defence of social-adversity is valid then petty theft criminals could all raise this defence - 'I steal because I am poor' - and thus they would not be not criminally responsible or subjected to punishment. If that were allowed, then law and order in the society would be much harder to maintain. But of course, since sometimes there could be circumstances where the action could be (partially) excused or justified after all, to show compassion for the offender, social-adversity could be considered in mitigation of the sentence, but no more than that.

4.3 The disposal of the defence results in a long period of confinement and the defence itself acts as a tool for the state to confine the mentally disordered

Interestingly, this argument has some merit, as sometimes the time spent confined in a mental hospital is longer than the normal sentencing time for the crime committed.[120] Indeed, despite being 'not guilty', mentally disordered offenders can still be confined rather than receiving freedom, which is different from other 'not guilty' offenders. However, to justify the defence, it could be argued that the confinement in the mental hospital is necessary for society's safety as well as the offender's well-being. Because the purpose of confinement in the hospital is for therapeutic purposes as with proper care and medical treatment, mental disorders could be cured. More importantly, the defence is based on the concept that if it is this mental disorder, which caused the offender to commit the

[119] Williams, K. (2012). *Textbook on Criminology* (7th). Oxford: Oxford University Press.

[120] Goldstein and Katz, (n64)

crime, then if the mental disorder is cured and gone, conversely, it could be assumed that the offender is no longer dangerous to himself and the society. Therefore, confinement for therapeutic purposes is required. Nevertheless, there must be safeguards to ensure that the amount of time spent in the mental hospital should not be longer than necessary. If the offender is stable, then he should be released whether with condition(s) or not. It is true that there is no guarantee of social safety when mentally disordered offenders are released, but as Morse stated "...the essence of a free society is that it takes some risks in the name of liberty and justice"[121]. Further, without the defence and disposal, this would mean that mentally disordered offenders could be released without any treatment order and if detention is required, it would have to be done through civil detention. This would require another separate case and would take time to process, consequently, there will be a risky time gap.[122] Hence, measures for public protection could not be imposed immediately. Thus, the criminal court needs to retain this special power.

4.4 The argument that the defence is 'stigmatic'

It can be agreed that the defence might sound that way. Nonetheless, the problem with this line of argument is that it does not really concern the law but rather society's attitudes and it would not be solved by just abolishing the defence. Therefore, to solve this problem, a 'right' attitude toward the mentally disordered offender must be encouraged in society. It is important then to emphasise the rationale behind the defence, which is that the offender has no guilt since he is not criminally responsible and that for the sake of society's safety and himself, he should be put through the therapeutic system rather than punishment. Furthermore, if the defence is abolished, this also implies that insane offenders, who are non-culpable offenders, would be labelled as 'criminal'. In this case, they will be more stigmatised, and this will adversely affect the moral basis of criminal law.[123]

4.5 The defence is used to escape the punishment

This is perhaps one of the most concerning argument, at least in the public's opinion. Nonetheless, it is arguable that this argument is rather a myth since the disposal of the insanity defence does not always guarantee freedom.[124] It is true that there are options of disposal available from complete acquittal to detention in a mental hospital, but it would be a big gamble for one to raise the insanity defence to escape punishment. Of course, the worst that could happen is the detention in a mental

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[121] Morse, S.J. (1985). Retaining a Modified Insanity Defense. *The ANNALS of the American Academy of Political and Social Science*, 477(1), 137-147.

[122] Law Commission UK, (n 114) at para 2.23-2.29.

[123] Morse, (n 13).

[124] Perlin, (n 113) at 650.

hospital, which is not punishment, however, in practice contrary to the myth, this makes a lot of mentally disordered offenders choose not to raise the insanity defence since the time spent in detention in hospital might be longer than imprisonment time.[125] Statistically, between 2002 and 2011 in England and Wales, there were 233 successful pleas of insanity, which makes the average success rate around 30%.[126] Furthermore, it was estimated that there are approximately 90,000 people tried in the Crown court each year including those who are severely mentally ill. But the fact that if only around 30 people were found 'insane' at the time of committing the offence, it will make the number to only 0.03% for those raising the insanity defence at the trial.[127] Thus, the above statistic has proven that the defence has not been raised as much as it was thought to be. Therefore, this argument is rather weak and mere like a myth rather than a fact.

4.6 The defence adversely affects public opinion toward the criminal justice system since the defence produces the 'wrong' verdict

It is undeniable that public opinion plays a significant role in the insanity defence and at the same time, it also creates 'myths' relating to the defence itself.[128] Nonetheless, it is doubtful whether this argument is true since the 'wrong' verdicts often occur in high-profile cases, whether concerning the insanity defence or not, there would always be some who feel that the verdict is wrong. Hence, the problem is not the defence but rather the public's attitude toward certain cases and abolishing the defence would not eliminate this problem.

4.7 The defence allows too much involvement by psychiatrists

This problem could be easily solved by limiting the role of the expert witnesses. It is true that it is tricky to ask the expert witness whether the defendant is able to know right or wrong (under the criticised *M'Naghten* Rule). Therefore, the insanity test should be focusing on asking the 'right' question to the witnesses in relation to their expertise for example; Is the defendant suffering from a mental disorder? If so, what kind? And does the defendant's mental disorder affect any of his capacities?

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[125] *ibid* at 650-651.

[126] Law Commission UK, (n 114) at para 3.27.

[127] *ibid*, para 3.32.

[128] See Perlin, M.L. (1997). The Borderline Which Separated You from Me: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment. *Iowa Law Review*, 82(5), 1375-1426.

4.8 The defence is rarely raised

This is undeniable, as statistics have shown that this is true.[129] Nevertheless, to abolish the defence just because it is rarely used is not a convincing argument. Moreover, there are several reasons why the defence is rarely used. As mentioned above, since the disposal of detention in a mental hospital might last longer than the actual sentencing for the crime committed, some offenders would choose not to raise the defence. Apart from that, since social attitudes toward the defence could be stigmatic, some offenders would rather not raise the defence and be stigmatised as 'mad and bad'. More importantly, especially in the jurisdictions where the *M'Naghten* rules are imposed, the test does not cover some insane offenders.[130] This means that the chance of success is low, and that might be the reason why the defence is not raised frequently. After all, the defendant can choose whether to raise the defence or not. If raising the defence puts the defendant in a disadvantaged or an uncomfortable position, of course, the defendant would not raise the defence.

4.9 The capital punishment is no longer imposed (in the UK and most of the US jurisdictions anyway)

It has been argued that the insanity defence is no longer required because the defence exists in the first place to show 'mercy' to the insane offender by exempting them from capital punishment.[131] While this line of argument is true, it could be argued that there are many more moral principles behind the defence than just arguments connected with capital punishment. To abolish the defence just because there is no longer capital punishment is unjustified.

4.10 The defence fails to protect society's safety by releasing insanity acquittees

This line of argument is not generally true. On the contrary, the defence allows the state to properly deal with those who are mentally ill and dangerous since the disposal attached with the defence allows the state to confine and treat them. If there is no special defence, the defendant might be completely acquitted or convicted.[132] Either way, this means that the problem relating to the defendant's mental disorder will not be solved. Moreover, releasing them is like releasing convicted offenders, as there is no guarantee that they will not commit crimes again. Further, if there is to be any concern, since the number of insanity acquittees is much less than convicted offenders, the latter

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[129] For example, see Mackay, R. (2013). Ten More Years of the Insanity Defence. *Criminal Law Review*, 12, 946-954.

[130] Mackay, (n 53).

[131] White, (n 21).

[132] Law Commission UK, (n 28) at para 2.25.

group[133] should pose more concern. Further, the evidence available had suggested that few released insanity acquittess commit crimes again.[134] Since a civilised society could not detain both insane and non-insane offenders forever, trust must be placed in in both therapeutic approaches and punishment that offenders who are being released are already rehabilitated.

4.11 The defence violates the CRPD

It could be argued that the interpretation of the Convention makes no theoretical or conceptual sense and since the General Comments are only 'helpful interpretations', they are not binding international law. [135] Notably, Article 12 only requires the equivalent treatment under the legal system and it did not specifically state that the special defence of insanity is not allowed. Furthermore, there is no academic literature in support of the view that Article 4 of the CRPD requires the abolition of the defence.[136] Additionally, regarding hospital detention, if the narrow view of Article 14 is adopted, then the detention on the basis of disability in combination with other justifications is not violating Article 14.[137] The abolitionists' interpretation of the CRPD violate every precept of Therapeutic Jurisprudence,[138] hence, if the defence is abolished, more mentally disordered offenders would be imprisoned and problems would follow. Most importantly, legal systems traditionally require the assessment of the mind, which includes the declarations of incompetency and mental impairment and without them the legal system would be degraded.[139] Thus, if the CRPD is to be interpreted correctly according to its objective, the insanity defence is needed to ensure the dignity, right to fair trial and due process because without it, this could mean that the mentally disordered who are unable to effectively participate in the trial and are incompetent persons could be found guilty and convicted of crimes. Moreover, research has shown that the prison environment makes mentally disordered inmates more prone to be violent.[140] Hence, they are more likely to be subject to

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[133] Morse, (n 13) at 836.

[134] Thornberry, T. and Jacoby, J. (1979). *The Criminally Insane: A Community Follow-up of Mentally Ill Offenders.* Chicago: Chicago University Press.

[135] Perlin, M.L. (2017). "God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status are Compatible with and Required by the Convention of the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence. *American Criminal Law Review*, 54, 477-520.

[136] *ibid* at 479.

[137] Gooding and Bennet, (n 79) at 147.

[138] Perlin, (n 135) at 484.

[139] Dawson, J. (2015). A Realistic Approach to Assessing Mental Health Laws' Compliance with the UNCRPD. *International Journal of Law and Psychiatry*, 40, 70-79; and James, D.J. and Glaze, L.E. (2006). *Mental Health Problems of Prison and Jail Inmates*. US Department of Justice.

disciplinary measures than other inmates. And since the mental health services in prisons are limited and the rehabilitation in the penal system has not been designed specifically for the mentally disordered inmates, they typically experience more suffering than other inmates and are more prone to commit suicide.[141]

In this sense, it seems more discriminatory and unjust to send them to prisons. However, without the special defence, there would be no other option. Interestingly, the Law Commission had also dealt with similar problems with the interpretation of the European Convention on Human Rights (ECHR) when proposing for the reform of the insanity defence. The Law Commission concluded that the insanity defence as well as the disposal are not in violation of the ECHR.[142] In this sense, since the ECHR also has similar provisions to the CRPD for example Article 5 regarding the right to liberty and security and Article 6 regarding the accused's right to a fair trial, is it possible then that the CRPD could be interpreted in a similar way. Consequently, the insanity defence and disposal are not violating the ECHR and CRPD.

4.12 The Mens rea approach

The abolitionists suggest that the *mens rea* approach would be sufficient to excuse mentally disordered offenders. Nonetheless, after critical consideration, it could be concluded that it would not be enough. The main problem with imposing only the *mens rea* doctrine in the case of the mentally disordered offenders is that in most cases, they can form the required *mens rea*. For example, in murder, the *mens rea* is an intention to kill another human being. In *M'Naghten*, M'Naghten himself was able to form *mens rea*, in which he wanted to kill the Prime Minister and he deliberately fired a shot with the intention to kill. If the *mens rea* approach was applied, even M'Naghten would not be exempted from criminal responsibility and would be sent to prison, although the reason behind his intention to kill was so bizarre and irrational. A man like M'Naghten does not belong in a prison but in a mental hospital where therapy could treat his mental disorder. Therefore, if one is to pursue this line of argument that the *mens rea* approach would be enough, one should bear in mind the consequences of imprisonment of the mentally disordered instead of therapy. Since mental health care in prison is very limited, there is no guarantee that the rehabilitation principle would be fulfilled if mentally disordered offenders were imprisoned. Further, this also implies that more offenders would be sent to prisons, hence, the over-crowding problem in prisons might be another problem. Moreover, the UN Standard Minimums Rules for Treatment of Prisoners (Mandela Rules) also recommend that the mentally disordered inmates must be transferred to a suitable facility

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[141] *Ibid.*

[142] Law Commission UK (n 28).

and should not be imprisoned, because,[143] as mentioned above, mentally disordered inmates are likely to be suffering more within the ordinary penal system. Therefore, abolishing the defence and diverting them to ordinary penal system would be unjust and unfair.

4.13 The 'integrationist test'

The suggested 'integrationist test' could not replace the insanity test. Slobogin argues that the current insanity tests require impossible and unprovable judgements regarding the defendant's capacities. Nevertheless, under his proposed test, the need to evaluate the defendant's capacities is still required. And while he argues that his test would exempt only those who should be exempted and those who would be acquitted under the insanity defence could also be successful under other defences, this is not true and is arguably unjust since not all mentally disordered offenders would qualify for the general excuses.[144] For example, Slobogin argues that even M'Naghten himself could be eligible under the integrationist test if it is proven that he intended to shoot the PM in order to protect himself since the Tories are trying to kill him, hence, this mistake of fact might make him eligible for claiming self-defence.[145] While his argument may seem convincing, it should be noted that the insane are often prone to act based on "bizarre reasons" or for no intelligible reason due to their mental illness and their behaviour might not fit under the integrationist test since it is not 'reasonable' enough to qualify for general excuses. Thus, without the special defence, they would be held criminally liable and convicted. And as Moore stated *"crazy people are not responsible because they are crazy, not because they always lack intention, are ignorant or are compelled"*.[146] Thus, the special defence is needed.

4.14 The insanity defence is 'symbolic'

The defence is 'symbolic' of social morality.[147] By abolishing the defence, it is signalling that the society finds it acceptable to punish people who are out of touch with reality. How could this be justified?

In conclusion, the special defence of insanity must be retained, for its existence not only signifies that the mentally disordered are non-responsible agents under criminal law who do not deserve punishment, but it also allows mentally disordered offenders to be diverted from the criminal

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[143] Section 82.

[144] As for the details of why the universe defences could not be applied on the insane, see Reznek, L. (1997). *Evil or Ill? Justifying the Insanity Defence*. London and New York: Routledge.

[145] Slobogin, (n 93).

[146] Moore, (n 100).

[147] Perlin, (n 113).

justice system that aims to punish, to the therapeutic system where they could receive treatment for their mental disorders.

5. CONCLUSION

The defence should be retained. However, it is true that the defence has faults, thus, it clearly needs to be reformed. At present, some new tests have been developed and new proposals for reform have been made.[148] There are also some alternatives to the defence such as the verdict of guilty but mentally ill (GBMI) or the sentencing discretion.[149] However, these issues are beyond the scope of this paper.

There is a good reason why the insanity defence exists in the first place. It is not merely because it has existed for such a long time that abolition is out of the question. Its existence reflects the morality of criminal law, which only imposes responsibility on those who have rational capacity. In this sense, the defence also protects the fundamental principles of criminal law, according to which the state should only impose punishment/sanctions on the morally culpable. Further, it reflects the morality of society as it symbolises that a just society would not hold such persons blameworthy. The defence exists to distinguish between those who are blameworthy and responsible and those who are not. Moreover, its existence also allows the mentally disordered to be diverted to the therapeutic track. To conclude, the defence is needed unless, as Morse has put it *"...we truly believe that every perpetrator of a criminal act deserves to be punished, no matter how crazy. If we do not believe this, and I do not see how we can, then we must retain the defense"*.[150]

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[148] For example, the Law Commissioner had suggested the 'recognised medical condition defence' as a possible substitution for the insanity defence in its *Insanity and Automatism Discussion Paper* (n 28).

[149] Morse, (n 13).

[150] Morse, (n 121) at 147.

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