EFFECT OF MENTAL DISORDER ON CRIMINAL RESPONSIBILITY AND PUNISHMENT

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for

My Wife Rakiah with thanks for many years of encouragement and support

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Summary

The problems which exist for a discussion about the relationship between the so-called mentally-disordered offender or accused and the notion of criminal responsibility and punishment are complex. They can not be fully understood without a consideration of the definition of crime, criminal responsibility, and of theories of punishment. Problems are not simply confined to a theoretical level. Accordingly, there is a need to understand the reality of mental disorder as perceived by psychiatrists and lawyers. This thesis, in chapter 1, looks at the concept of crime and attempts to establish a comprehensive definition. This may specify the circumstances in which the mentally disordered person is likely to become involved with the state and thereby be subject to a particular or special relationship with the law. Accordingly, chapter 1 explores the concepts of crime, its elements, and its limitations.

Chapter 2 considers the various theories of punishment in order to seek to establish whether there are sufficient reasons to justify the way we deal with mentally disordered persons and whether they are rooted in concepts of fairness and justice.

The next chapter explores the notion of mental disorder and examines the medical basis for understanding the condition. It

attempts to examine whether the condition is "medical" and indeed whether it is an "illness". The relationship between the medical model and the legal model of mental disorder is studied in addition to the role played by psychiatrists.

Chapter 4 examines the lawyer's approach to the mentally disordered person and seeks to determine whether the legal definition of insanity is in any way different from the medical concept of mental disorder and the consequences that flow from the various defences of insanity.

Chapter 5 looks at the reality of the interaction between the mentally disordered person and the various institutions with which he comes into contact. Thus, state hospitals, the disposal of mentally disordered offenders or accused persons and the various sentences or restriction orders are examined.

The final chapter considers possible areas for reform, and makes certain recommendations, which if implemented might serve to remove some of the difficulties that have been identified.

The investigation includes the situation with regard to mental disorder and criminal responsibility in Iraqi criminal law as well.

The main purpose of this thesis is to find out the

appropriate theory of punishment which might be used to resolve the problem with mentally disordered people (both responsible and non-responsible) in respect of the sentencing process in U.K.

CHAPTER ONE

CHAPTER ONE

THE CRIME

1. The Concept of Crime:

Any attempt to examine the concept of crime must involve an examination of the definition of crime and an explanation of its very nature. It must also be recognised at this stage that any definition of the concept of crime will vary with the particular perspective or viewpoint which is adopted. Thus, for instance, a sociological definition of crime will be different from a purely legal one, which itself will differ from the perspective adopted by psychiatrists. Indeed, the contrast between a legal definition or understanding of criminal responsibility and a medical or psychological definition is examined later in chapter 3 and below. Another problem with attempting to define a "crime" is that if there is a so-called "correct" definition then it should allow us to recognise any act or omission to be either a crime or not a crime by simply examining whether it contains all the parts of the definition. This difficulty is examined below. Ideally "crime" should be capable of a definition that makes it reasonably clear what conduct, or situation, may be considered "criminal". It is recognised that such a definition, despite its difficulties[1], is important because "crime" represents an important and distinct area of the law which, as we shall see, has particular importance for mentally disordered people as well

as in society in general[2].

In order to elucidate the legal concept of crime, it is necessary to examine the differences between criminal and civil wrongs and indeed the differences, if any, between what constitutes a "crime" and what constitutes an "offence".

In early law, there was no clear difference between criminal and civil wrong[3]. Now the distinction is considered obvious and clear. Some experts, however, argue that it should not be so, since there is no fundamental difference between criminal and civil wrong[4]. It is suggested that conduct which harms individual people also harms society as a whole, accordingly criminal and civil wrong have the same result. Nevertheless, in spite of the fact that conduct may involve both criminal and civil wrong[5], for instance, murder, assault or arson, there are many differences between crimes and civil wrongs[6]. An examination of the distinctions between civil and criminal wrongs in general terms shows that the characteristics of a crime are as follows:-

a. <u>Acts Harmful to the Public</u>

A characteristic generally found in acts which are considered as crimes is that they are acts which have or are believed to have a harmful effect on society or the public and go beyond affecting private rights or obligations which fall in the area of civil law. The position is best stated by Allen: 'crime

is crime because it consists in wrong doing which directly and in serious degree threatens the security or well being of society, and because it is not safe to leave it redressable only by compensation of the party injured'[7].

Allen's view was attacked by Williams, who states that,'we have rejected all definition purporting to distinguish between crimes and other wrongs by reference to the sort of thing that is done or the sort of physical, economic or social consequences that follow from it. Only one possibility now remains. A crime must be defined by reference to the legal consequences of the act...A crime then becomes an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment, etc.) known to follow those proceedings', And later, 'in short, a crime is an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which make it criminal. In a marginal case the court may have to balance one feature, which may suggest that the proceeding is criminal, against another feature which may suggest the contrary'[8].

We may put these views together and say that crimes are wrongs which the judges have held, or Parliament from time to time has laid down, are sufficiently injurious to the public to warrant the application of criminal procedure to deal with them.

This does not enable us to recognise an act as a crime when we see one, but it indicates the general nature of the conduct that is of significance for criminal law.

b. The Act as Morally Wrong:

The second characteristic of crimes is that they usually are acts which are considered morally wrong. Indeed, it has been stated by Fitzgerald that a crime is immoral and harmful in itself[9].The distinction between crimes which are morally wrong and crimes which are merely legally wrong is often made. Most people would not talk of betting in a public house as a crime. Many of the problems of road traffic offences arise from the fact that the public, including juries, refuse to regard such offences as morally wrong and therefore, as real crimes like homicide and rape. The modern approach, however, adopted by Hogan and others denies this position[10]. Despite the fact that this idea is traditional, there are many types of acts which are regarded as immoral and harmful to the community in the eyes of society but which are not classified as a crimes[11]. Adultery, for instance, is no longer a crime. The criminal law, therefore, cannot be considered as implying immoral conduct. In other words, as Renton and Brown note, 'the criminality of an act or omission is not dependent upon the degree of moral guilt which it implies. An immoral offence may not be a crime, a crime may not be a breach of the moral law'[12]. Hogan, also, states that 'it is a trite observation, but nonetheless a true one, that crime or criminality is a conferred quality. No conduct is inherently

criminal, inherently deviant, or inherently immoral; it becomes so only because society makes it so by some formal process'[13].

It must be recognised that there are many acts which most societies will state to be criminal and for very good reasons. If the law did not proscribe homicide, rape, and robbery, and try to prevent them, then we would spend much of our time providing for our own self-preservation.

The enforcement of morality by the criminal law is also questioned. The view of the Wolfenden Committee on Homosexual Offences and Prostitution is that the enforcement of morality is not a proper object of the criminal law. The function of criminal law, as they saw it, is '...to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable. It is not... the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined'[14].

This view was challenged by Lord Devlin[15], who argued that there is a public morality which is essential to keep society together, and that society may use the criminal law to preserve morality. The standard of morality is that of "the man in the

jury box", based on the "mass of continuous experience half consciously or unconsciously accumulated and embodied in the morality of common sense". The argument which can be put to Devlin's view is that it is not proper for the state to enforce the general morality without asking whether it is based on ignorance, superstition or misunderstanding. In the case of Knuller Ltd v. D.P.P. in 1973, the House of Lords, also, did not favour the idea that it has power to extend the criminal law to enforce morals.The enforcement of morality, as such, by the criminal law is losing ground as an approach[16].It is important for us to realise that no code of morality commands universal acceptance. This does not mean that because we know this, then we should abandon what is implied in the distinction between malum in se and mala prohibita. Simply stated, the distinction is that there are certain offences which can only be condemned on legal grounds, types of behaviour which had they not been legally prohibited, would incur no blame and that there are other offences such as homicide which condemned not only on legal but also moral grounds.

Historically, some writers have said that crimes are divided into two categories. MacDonald classifies them into "true crimes" like murder, robbery and rape, and "public welfare offences" for which its perpetrators deserve a fine, for instance, road traffic offences[17].

Others have divided crimes by a different method, that is, they have classified them into "immoral acts" which equate with "true crimes" (in keeping with MacDonald), where it is thought that these kind of crimes are something evil in themselves and severely punishable malum in se, and public welfare offences,for example, offences which have been declared by parliament mala prohibita, which were enacted to provide a remedy without any intermixture of moral guilt[18].

These divisions or categorisations of crimes were regarded by Turner as unscientific[19], and the idea of malum in se was thought by Friedmann to belong to natural law theories which identified certain acts that were thought contrary to the "law of nature"[20]. The position is well summed up by Hume:'The criminal law will always in some measure be bent and accommodated to the temper and exigencies of the times'[21].

At present not all crimes are regarded as always and everywhere immoral and harmful. The approach varies from community to community and from time to time. For example, ethical reprobation at homicide, homosexuality, libel and slave trading is not the same in all countries[22]. Despite the fact that as a general rule crimes such as murder are regarded as good examples of immoral and harmful crimes, some circumstances which accompany such crimes may change their "criminality" or preclude the act from being criminal at all in some countries, but not in

others[23]. Thus, in the Iraqi Penal Code if someone kills his wife and her lover because of their adulterous relationship, the degree of criminality changes the punishment; this will be less severe[24]. Recently, the Iraqi Legislature have deemed this kind of act as legal. It was said in the Guardian on 6th March 1990 that 'over the weekend, the Iraqi Government announced a new legal exemption for Iraqi men; they were entitled to kill women members of their family, including mothers, grandmothers and cousins, if they suspected them of adultery'[25].

As a result, acts may be regarded as a crime by the courts or the legislatures, not by reason that they are immoral and harmful, but because they deemed as crimes in the courts or by legislation[26]. As said earlier, whether a crime is thought wrong in itself or only legally wrong will depend on the moral code current in a society.

A third and useful way to examine the concept of crime is to look at its procedures, although it is recognised that this is a limited approach because procedures of whatever nature only follow from the commission of crime. Lord Atkins in the case of Proprietary Articles Trade Association v. A.G. for Canada said that 'the criminal quality of an act cannot be discerned by intuition, nor can it be discovered by reference to any standard but one: is the act prohibited...with penal consequences'[27].

The differences between criminal and civil proceedings, therefore, becomes important and this section of the chapter looks at a few of the significant points. Before doing so it must be noted that any effort to distinguish between crimes and delict or torts faces the same type of difficulty as that involved in attempting to define crime in general terms. For English law, more so than for the Scots law of delict, torts can be crimes, although some torts are not crimes and some crimes are not torts. As Smith and Hogan point out 'it is not in the nature of the act, but in the nature of the proceedings that the distinction consists; and generally both types of proceeding may follow where an act is both a crime and a tort'[28].

Another important reason to look at the procedures involved in the criminal law is that the rules of procedure limit the activities of the institutions of society, for example, prisons, hospitals and so on, which are concerned with the prevention of crime. It should also be recognised at this stage, although the point is examined in later chapters, that society, whilst pursuing the objective of preventing crime, must also take into account other interests. As we shall see in chapters 4 and 5, society has to keep a check on the measure of state interference with individual liberty, otherwise there is a real danger that society will lose more in the way of other forms of liberty than it gains by way of freedom from crime.

The important procedural differences between criminal and civil wrongs are reflected in the consequences arising from them. A person who is held liable for a civil wrong will usually be required to compensate the victim of the wrong, whilst a person who is held to have committed a crime will invariably be liable to some form of "punishment", which as we shall see later, might include some forms of compulsory "treatment"[29]. The theory of punishment is examined in detail in chapter 2.

The state brings criminal proceedings when there is a criminal wrong, because the state wants to protect society; in civil wrong, it is up to the individual to decide whether to go to law for a remedy against the wrongdoer, as for example in breach of contract or tort[30].

The burden of proof in civil procedure is upon the pursuer (plaintiff) whilst in criminal procedure the burden of proof rests on the crown prosecutor[31], the procurator fiscal or the Lord Advocate in Scotland or the Director of Public Prosecutions or Crown Prosecution Service in England and Wales.

While there are many differences between criminal and civil wrong in terms of rules of evidence and appeal procedures, the above is sufficient to illustrate the more general differences between these branches of law.

Iraqi Law recognises some of the difficulties outlined above

with the concept of crime and the problems of labelling. The underlying theory of the Iraqi Criminal Law Code attempts to resolve difficulties of classification by looking at the "social consequences" of a particular type of behaviour. In other words, the criterion used is one of "social danger" according to the seriousness of the outcome. If the act is of very minor consequence, then it is put through a non-criminal legal process[32].

Nevertheless, it is apparent that the Iraqi system cannot avoid classifications which are in themselves incomplete, since the boundaries between social danger and non-social danger not always clear, and in some instances artificial.

It must be recognised that other factors influence the definition of crime, namely, the political and economic nature of the particular state[33].

From the above, the element which establishes whether or not conduct should be regarded as criminal is a declaration as such by the courts or legislature, not whether it is harmful or wrongful or whatever other reason which leads the courts or legislature to deem it a crime[34]. This view appears very simple but reflects the practical reality.

A point worth noting here is the distinction between the

terms "crime" and "offence". It seems that these terms have often been used synonymously in law. Some writers and judges, however, have recognised a distinction between them. For example, Lord Sand said that 'every crime is an offence, but every offence is not crime'[35].

It is thought by Williams that the artificial distinction which is made between them is fundamental because it helps differentiation between serious crimes and less serious crimes[36]. By this simple device, a person who commits a crime is called "criminal" and one who commits an offence is called "offender"[37]. It appears, therefore, that a criminal is one who commits a particular type of crime for which there usually is a prison sentence available, whereas the offender is a person who commits a particular offence for which there may be a pecuniary penalty. Despite the above argument such a distinction between the two terms has not become established and they are normally regarded as having no effective difference in meaning. As Gordon states 'the general rules of criminal law apply to all branches of criminal law, whether they are described as crimes or offences'[38]. The crux of any argument might be the use of the word "criminal". It is thought too severe as a label when it is applied to someone who commits a simple wrong act such as driving a car without licence, yet appropriate for one who kills. Clearly, there are important consequences when labelling someone either as an "offender" or "criminal". Indeed, when we consider

punishment as a method of reforming those who are involved in committing crimes, we ought to consider that the effects of using such words, which may be contrary to the reform process.

We can conclude from the above that there are difficulties in finding a comprehensive definition of crime. For present purposes, the definition used is:
"Acts or omissions for which a person is liable to criminal prosecution and punishment".

This is, of course, not circular if we state what "criminal" prosecution and "punishment" involves. This is discussed in chapter two. Of course, what sort of acts or omissions ought to be crimes remains a separate question. Obviously, in this context social harms are relevant.

While it cannot be overemphasised that no definition of crime is perfect or complete, it is useful to look at the so-called elements as standardly defined by courts since this may lead to a fuller understanding of the nature of crime. Consequently, this involves examining the concept of actus reus and mens rea.

2. The Elements of Crime:

From the latin maxim 'actus non facit reum nisi mens sit rea' (which when properly translated means 'an act does not make

a man guilty of crime unless his mind be also guilty')[39], it follows that every crime is made up of two elements, actus reus and mens rea (dole). The extent to which this rule always applies will be examined in connection with offences of strict liability later. The crime, therefore, exists only when the actus reus is accompanied by the appropriate mens rea. These elements, therefore, differ from crime to crime[40]. While looking at actus reus and mens rea, voluntariness will be considered as an independent point in this chapter in order to give, as far as possible, some proper idea of the concept of crime. As we shall see, the main problems of the general part of the criminal law is the requirement of the criminal state of mind "mens rea". As discussed below in chapters 3 and 4, mens rea creates considerable problems of reconciling the principle of equality before the law with the need to protect society. The problems of mens rea cannot be adequately discussed without a preliminary explanation of the nature of actus reus.

a. Actus Reus:

If we accept that a private thought is not sufficient to found responsibility, then it is invariably true that a crime requires an act. Lord Mansfield said that 'so long as an act rest in bare intention, it is not punishable by our laws'[41].

The reason for such a rule is based upon the impossibility of proving a mental state. For example, it can be argued that a

tribunal cannot punish for what it cannot know.

The only major qualification to the above rule comes from the fact that there are situations where an intention may not be declared in words or conduct but be inferred from acts. Another reason for the rule is because of the difficulty of distinguishing between a day-dream and a fixed intention in the absence of behaviour tending towards the crime intended.

The actus reus contains all the elements of the offence except the accused's mental element[42]. Since there is no crime without actus reus[43], the definition of every crime should therefore refer to element of actus reus.

An analysis of actus reus shows several features:-

i. The conduct (act, omission or state of affairs),

ii. The attendant circumstances, and

iii. The result[44].

i. <u>The conduct:</u>

Criminal conduct does not merely include acts, it also includes omissions and a state of affairs[45]. So what do these terms mean?

The act is a fundamental part of the actus reus and includes "possible act" or "physical act" or "bodily movement". As we

shall see later, the problems with "acts" and those individuals who are considered mentally disordered is one which has given rise to much debate. The act differs from crime to crime. For example, the act of causing death by reckless driving is driving recklessly and killing...while in case of murder or manslaughter it requires the killing of another and so on[46]. Similary, if we analyse sec.20 of the Sexual Offence Act 1956, which provides that ' it is an offence for a person acting without lawful authority or excuse to take an unmarried girl under the age of sixteen...'[47], we find that the physical act in this offence is "taking away the girl".

Another kind of criminal conduct is an omission or failure to act where there is a duty to act; these offences are less common as a basis of criminal responsibility[48]. In some instances an omission will create criminal responsibility without any positive act. It is recognised that there are difficulties in the definition of "act". Some argue that an act includes an omission, because if wanting to distinguish them, we could speak of positive and negative acts respectively. Of course we could use the word "conduct" for both. There are legislative difficulties with the prohibition of omissions, and therefore the penal law must generally settle for keeping people from doing harm, and lets public opinion and teachers of morality and religion encourage people in doing positive good. Therefore, it follows that the criminal law does not necessarily place a duty

on someone to act to prevent a consequence whenever it imposes a duty not to bring about the consequence. An omission is not a crime unless there is a duty to act imposed by law which is breached by an offender[49]. There is, therefore, no criminal responsibility for omitting to prevent an event where there is no duty[50].

Some common types of legal duty fall into the following situations:
First, where a legal duty has been imposed on parents or relatives[51]. Secondly, where the law imposes a duty on the public or an official. For example, members of the public must report to the police when they are aware of the commission of treason, or a police officer must try to prevent someone who wants to kill another person ,if he is aware of it[52]. Thirdly, omitting to implement a contract may be regarded as a criminal conduct in the law in some cases[53], but these depend almost entirely upon the consequences of the breach. The law relating to omissions is, therefore, not coextensive with the law relating to acts. It is, however, partly coincident in manslaughter and murder, but, in these circumstances, the fact of death leads the law to look upon the omission with special severity.

The last type of criminal conduct is a "state of affairs" or "event" or "status". An offence in some cases may be committed without any act or omission as mentioned above. A suitable

example in this case is provided by sec.25 of the Theft Act 1968[54], in which a person is considered guilty of an offence if, when not at his place of abode, he has with him any article for use in the course of or in connection with any burglary or theft.

ii. The Attendant Circumstances:

There are two types of circumstances. The first type is regarded a fundamental part of an actus reus. Unless, therefore, these circumstances are present there is no actus reus, and so no crime[55]. For instance the absence of consent by a woman is an essential constituent of the actus reus in the case of rape. If the woman has consented, there is no crime[56]. As another example, the killing of a person is homicide, but, if this act was done in self-defence, it is not regarded as a crime because there is no actus reus. In other words, the definition of crime includes the circumstances by which the actus reus existed. This is why, for an indictment to be good, it must show an act and, usually, the circumstances required to make it criminal, what Gordon calls"defeasing" circumstances. For example, the offence under sec.25 of the Theft Act can be committed only by somebody who is not at his place of abode. Also in the definition of theft it must be proved that someone dishonestly appropriated property belonging to another.

The second category of circumstances take form of

consequences or results.

iii. The Result:

As stated by Gordon, there are many crimes in which the consequence is separated in time and in place from the criminal conduct creating it. This he calls "result crimes"[58].

Gordon illustrates the distnction between "conduct" crimes and "result" crimes using the example of perjury. This is giving false evidence on oath, not the bringing about of any particular result[59], and is a conduct crime, whereas with a result crime the actus reus is divisible in time and place.

Smith and Hogan have criticised this approach; they say that 'the law is no less interested in the conduct which brings about the result in a result crime than in a conduct crime. A case can indeed be made out that in all crimes the law should have regard only to the conduct and not to the result'[60]. They state that 'whether or not the conduct results in harm is generally a matter of chance and does not alter the blameworthiness and dangerousness of the actor. For example, if "D" throws a stone, being reckless whether he injures anyone, he is guilty of a crime if the stone strikes "P", but commits no offence if by pure chance no one is injured. From a retributive point of view, it might be argued that "D" should be equally liable in either event. On utilitarian grounds, however, it is probably

undesirable to turn the whole criminal law into "conduct crimes". The needs of deterrence are probably adequately served in most cases by "result crimes"; and the criminal law should be extended only where a clear need is established'[61].

Smith and Hogan added that the actus reus in the result crime includes both "conduct and result"[62]. The law should have regard to the conduct and to the result in crime because, when we say that the death of a person is the essential element of the actus reus in the crime of murder and homicide, it does not mean that we should forget the conduct which brought about the result. The conduct is still important, although less so than the result. We can therefore see that the characterisation of crime may change, according to the nature of the criminal conduct. In other words, the conduct may still be regarded as a crime but without result will be characterised as a different kind of crime.

Article 28 of the Iraqi Penal Code also emphasises the importance of conduct. This is seen in the Iraqi concept of Al-feal Al- jormy (actus reus) which is defined as follows: 'Al-feal Al-jormy (actus reus) of crime is the criminal conduct to commit an act or omission which is prohibited by the law'[63].

Despite the divisions or characterisations of acts as postulated above, it is useful to remember that, in summary, the law's refusal, generally, to punish anything other than actions

involves several things. First, the law is normally concerned with positive conduct as opposed to mere inactivity. Secondly, as we have already outlined, the law only prohibits acts as opposed to thoughts or intentions. Thirdly, the law penalizes "acts" as contrasted with bodily states and forms of involuntary behaviour. This is looked at in more detail in later chapters.

At this stage it is sufficient to note that while actus reus has been shown to have at least these features in terms of any understanding of criminal responsibility, it is artificial to consider it without a proper examination of mens rea.

By defining an act as involving a voluntary movement, the definition takes some of the mental element of crime on to the physical element. The mental requirement for an act, therefore, should rule out reflexes, like yawning and sleepwalking. This will be explored in detail in the section dealing with voluntariness. The remaining section of this chapter examines the concept of mens rea.

b. Mens rea;

The concept of mens rea is complex, because there are many opinions which are given by judges and writers which are inconsistent[64].

The early notion of mens rea in England was traced as a

general element of evil intent or moral blame-worthiness required for criminal responsibility[65]. This notion conforms with the notion of mens rea as "dole" in Scotland. Hume has defined this as '...corrupt and evil intention, which is essential...to the guilt of any crime'[66]. For example in Cawthorne v. H. M. Adv., Lord Guthrie said that 'mens rea, or dole, in our criminal law is the wicked and felonious intention which impels the criminal to commit a crime. It is a state of mind which results in a criminal act, and I fail to see how there can be a distinction between the wickedness resulting in murder and the wickedness resulting in an attempt to murder'[67].

Certainly, this approach may be appropriate in some crimes which cause physical harm, like murder with aforethought. But it is not relevant with other crimes which are minor or when there are other kinds of attendant circumstances surrounding grave crimes[68], such as murder under diminished responsibility (mental impairment). this point has been developed in chapter four.

On another view, mens rea is not the desire to do wrong but the intent or carelessness to do that which causes social injury[69]. Thus, the essence of Holmes' approach to mens rea is that criminal law imposes responsibility when a person either knows or should know the disposition of his acts to cause prohibited consequences[70]. Holmes, therefore, admits that the

state of mind could be relevant to criminal responsibility. For example, if an accused has a knowledge of circumstances which make a particular act dangerous, or has actual foresight of harm, he will be liable. In brief, Holmes stated that an accused was liable if he committed a prohibited act either with an actual conscious state of mind about the harmfulness of his behaviour or if he should have understood the harmfulness of the conduct[71].

Theorists like Stephen, Sayre, Flecher, Turner and Williams believe that the mental element required by common law or statute is part of the definition of a crime.Under this approach, mens rea involves an investigation into the actual state of mind of a particular accused at the time he committed a crime[72]. In addition, according to Williams, the courts have found that the easiest way to stretch the mehaning of criminal responsibility on social or moral grounds is to 'envelop the mental element of crime in considerable confusion'[73].

Williams said that 'it is lamentable that after more than a thousand years of continuous legal development English law should still lack clear and consistent definitions of words expressing its basic concepts'[74].

It can be inferred from the above that the notion of mens rea has generally been used in two distinct senses. First, it has been used to refer to the various mental elements, for example,

intention, recklessness and negligence which are generally required as a part of the definition of most crimes. Secondly, mens rea has been used as a synonym for "criminal responsibility" as we will see from more detail about this point in the next chapter. To say that "R" did not have the mens rea for crime "F" is, in fact, to say that "R" did not have the mens rea required to commit "F". The position relating to the responsibility of the insane person must therefore be considered in light of the distinct senses being used for mens rea.

For the purposes of this thesis, the description of mens rea given by Smith and Hogan is used: 'intention or recklessness with respect of all the consequences and circumstances of the accused's act or (the state of affairs) which constitute the actus reus, together with any ulterior intent which the definition of crime requires'[75]

The Iraqi Penal Code has defined Al-kaced Al-jormy (mens rea) as follows: 'Al-kaced Al-jormy (mens rea) is that the offender directs his will to commit a crime'[75].

From this definition, it can be inferred that the offender has to direct his thought processes towards what he wants to do. The Iraqi Penal Code does not emphasise that the offender must have a guilty mind or "dole", but according to the above definition mens rea must include "capacity" and "choice"[76].

Thus it is required as a basic notion of criminal responsibility. The importance of "capacity" and "choice" will be examined later, but it is clearly crucial when we consider the insane or mentally disordered person. To summarise the position thus far, the difficulty of grasping what is meant by mens rea in general arises from the fact that it differs from crime to crime. The basic notion is that unintentional wrongdoing is excluded from criminal responsibility, just as part of the notion of actus reus is that involuntary behaviour is excluded. The exclusion from actus reus allows for the plea "I could not help it", mens rea allows for the plea "I never meant to do it". At this stage, it is important to keep separate the plea "I could not help it" from the plea "I never meant to do it", because it shows the need to be aware of the fact that the lack of ability to control one's behaviour is important for determining criminal responsibility as well. This point will be developed in chapter four.

3- Voluntariness:

So far, in discussing the elements of crimes, i.e. actus reus and mens rea, it is clear that the question of voluntariness requires examination in order that an overall understanding of the concept of crime can be gained, and also of criminal responsibility.

As discussed earlier, it is submitted that generally speaking, the fundamental principle of criminal law is that

before a person can be convicted of any crime his act or omission has to be a voluntary one. If the act is found to be involuntary, the accused cannot generally be held to be criminally responsible[77]. As a preliminary point, the criminal law's apparent refusal to penalize involuntary behaviour together with mere states of body and mind is based on the moral principle that a man should not punished for events beyond his control. It would appear to be an accepted moral principle that condemnation must only be applied to matters over which the person has control or the ability to control. The underlying notion in punishment, which is explored in more detail in the next chapter, is that rewards and punishment is some way guide actions. Simply stated, to praise or reward a person for some act encourages the person to continue to behave in this way and encourages others to follow by example. To blame or punish a person prevents him from repeating his acts and deters others from following him. Obviously, if the event or act is outside the person's control and is something about which he has no choice, then praise and blame, reward and punishment fail to have any encouraging or preventing effect. Clearly, where choice is absent there is nothing that can be guided. As we will see in the next chapter, withholding blame and punishment for events beyond the person's control is linked up with the very meaning of blame and punishment. From this we can see that voluntariness is another criterion which is important in criminal responsibility. There

are two main approaches to understanding voluntariness:-

a. The Volitional Approach:

Volition is regarded as an essential element. Stephen takes the approach in the following form '...that inward state which, as experience informs us, is always succeeded by motion, whilst the body is in its normal condition'[79].

Austin illustrates the position as follows; 'Certain movements of our bodies follow invariably and immediately our wishes or desire for those same movements: provided, that is, that the bodily organ be sane, and the desired movements be not prevented by any outward obstacle...These antecedent wishes and these consequent movements, are human volitions and acts strictly and properly so called...and as these are the only volitions so are the bodily movements, by which they are immediately followed, the only acts or actions (properly so called). It will be admitted on the mere statement that the only objects which can be called acts, are consequences of volitions. A voluntary movement of the body, or a movement which follows a volition, is an act. The involuntary movements which are the consequence of certain diseases, are not acts. But as the bodily movements are the only objects, to which the term "acts" can be applied with perfect precision and propriety'[80].

It is clear from this approach that the voluntary act is "a willed muscular movement". Consequently, involuntary movements

are not acts[81].

b. Hart's Approach to Voluntariness:

Hart attacks the above analysis of volition and believes that the idea which upon which such an approach has depended is an outdated fiction. He says that 'it is a piece of eighteenth century psychology which has no real application to human conduct'[82]. He continues,'we do not have to launch our muscles into action by desiring that they contract as the Austinian terminology of "acts" caused by "volitions" suggests'[83]. He maintained that the desire to contract our muscles is a very rare happening which does nothing to explain ordinary action[84]. He suggests that ' it assumes unrealistically that the agent is normally aware of the muscular contractions involved in action and desires them before acting'[85].

The essential feature in this approach is that the muscular contractions are not desired, despite the fact that there should be a desire present in voluntary action. Hart says that '...it presupposes the ordinary man's ordinary description of what he does and desires to do in terms, not of muscular contractions, but of such things as kicking a ball, hitting a man, or writing a letter'[86].

It can be seen, therefore, that the definition, meaning and importance of the concept of voluntariness is one which is open

to debate and this is particularly so when it is examined in isolation. Indeed, in terms of actus reus and mens rea, another problem arises.

If the principle that an accused must be proved to commit a crime voluntarily is an accepted one, it faces problems of classification. Should voluntariness be included within the actus reus of crime? Theorists and judges are divided in this area[87].

It appears that classifications are not easy, and therefore some courts have not attempted them. In R v. Dodd it was stated that the idea of the mental element in crime as belonging partly to the actus reus and partly to the mens rea is not easily justifiable on logical grounds[88]. A number of modern writers regard the voluntariness of the accused's conduct as an element in his mens rea but leave open the debate on whether as a matter of logic it ought to be so as part of the law[89].

Some academic writers support the idea that voluntariness is part of mens rea. They believe that mens rea in this sense relates to the mental attitude of the accused's conduct but not to the result of his conduct[90]. An accused who can prove that his act was involuntary must not be responsible for any result produced by it because the mens rea was lacking, despite the fact that there is an actus reus which has been proved.

Adams thinks that voluntariness and mens rea are subjected to the same principle and it is difficult to make any difference between them[91]. There can be found judicial support for this approach. Windeyer J. stated that 'voluntariness is generally spoken of as a necessary quality of a criminal act but it is perhaps more accurately regarded as a mental quality or attributes of the actor'[92].

Those who argue that voluntariness is part of actus reus, justify their opinion that mens rea is not required in crimes of strict liability, so if we regarded the voluntariness as part of mens rea, an accused charged with a crime of strict liability could be convicted for an involuntary act. On the other hand, if voluntariness is part of the actus reus, the accused must not be convicted of an involuntary act[93].

Lord Simon in Lynch v. D.P.P. supported this idea. He stated that '...there may be physical movements which are not the subject of choice - cases of so-called "automatism". On the other hand exceptionally the criminal law will exert its sanctions although the accused exercised no choice: this arises in crimes of absolute liability...'[94].

Smith and Hogan show that there is a flaw in this argument, because if voluntariness is part of actus reus, it is impossible to dispense with it[95]. They summarise their position as

follows: 'the fact is that even in offences of strict liability, a limited degree of mens rea must be proved, and a jurist may, if he chooses, classify voluntariness of the accused's act as part of the limited degree of mens rea. It is a matter of convenience only'[96]

It appears that the fundamental principle that an accused can only be held responsible for a voluntary act leads to difficulties: First, departure from such a principle must be justified, for instance, when an accused commits an involuntary act for which he has to be held liable . It is not easy to justify a departure from basic principles[97]. Secondly, an involuntary act is commonly regarded as not being an act at all and voluntariness forms part of the actus reus. In principle, therefore, there is no way in which an accused can be held responsible for any such movement since he cannot be regarded in law as having done anything[98].

Clearly there are difficulties which arise from an attempt to work within the limits of fundamental principle.Gordon puts the point forcefully; 'to say that a man acted voluntarily is in effect to say that he did something when he was not in one of the conditions specified in the list of conditions which preclude responsibility'[99].

It has to be asked whether there is any need to regard it as

part of actus reus or mens rea, since it does not refer to some additional quality which is present in every act and consequently need not be regarded as a constituent element of every crime. This does not deny the importance of voluntariness, but simply restricts its application to cases where it is directly in issue rather than to admit to any fundamental principle being present in all cases. In this way, voluntariness can be used as a general term which summarises the absence of all the relevant types of conditions which preclude responsibility. Accordingly, there is not the same difficulty in holding a person responsible for an involuntary act since such precluding conditions may be restricted so as to operate only in certain circumstances. To take an obvious example, intoxication may cause an accused to commit an involuntary act[100]. Such a condition, however, will only result in acquittal if it is not self-induced. In this way modification to existing conditions can be made without having to justify a change in the terms of the fundamental principle of voluntariness.

It is clear from the definition of Al-kaced Al-jormy (mens rea) in Article 33 of the Iraqi Penal Code that it has adopted the stance that "voluntariness" is part of mens rea[101].

The above discussion has proceeded without a proper examination of offences which fall into the category of "strict liability" or "statutory" offences.

Crimes which are said not to require intention, recklessness or negligence as to one or more elements in the actus reus are known as offences of strict liability. It has been stressed in many cases both in Scotland an England that strict responsibility for statutory criminal offences is the exception rather than the rule, and that penal statutes should be interpreted as requiring mens rea as to the elements which give rise to guilt.

In Scotland, in Duguid v. Fraser, Lord Justice Clerk Cooper said that 'our reports already contain many examples of cases in which it has been held that a malum prohibitum has been created by statutory enactment in such terms and under such circumstances as to imposes an absolute obligation of such a kind as to entail this wider liability. In all such cases it has, I think, been the practice to insist that the crown should show that the language, scope and intendment of the statute require that an exception should be admitted to the normal and salutary rule of our law that mens rea is an indispensable ingredient of a criminal or quasi-criminal act; and I venture to think that it would be a misfortune if the stringency of this requirement were relaxed'[102].

The case law in this area is very helpful and is worth examining in order to assess the scope of the law. In England,in Sweet v. Parsley, cannabis was found on property let out by the

appellant who did not know her tenants were using the premises for the purposes of smoking cannabis. She was convicted of being concerned in the management of premises used for smoking cannabis, under sec.5 of Dangerous Drugs Act 1965[103], and appealed to the House of Lords[104].

Lord Reid said that 'where it is contended that an absolute offence has been created, the words of Alderson B. in Attorney-General v. Lockwood (1842) 9 M. and W. 378 have often been quoted: The rule of law, I take it upon the construction of all statutes, and therefore applicable to the construction of this, is whether they be penal or remedial, to construe them accordingly to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the act, or to some palpable and evident absurdity'[105].

But this view is limited as a general rule and where there is no legal presumption. There are many criminal acts where the words of the act make it an offence[106], but where it is agreed that there cannot be a conviction without proof of mens rea in some shape or form.

In Sheppard the attitude of the House of Lords towards strict liability offences was expressed by Lord Diplock; he said that 'the climate of both Parliamentary and judicial opinion has

been growing less favourable to the recognition of absolute offences over the last few decades'[107].

Lord Pearce stated that ' the notion that some guilty mind is a constituent part of crime and punishment goes back far beyond our common law, and at common law mens rea is a necessary element in a crime. Since the Industrial Revolution the increasing complexity of life called into being new duties and crimes which took no account of intent. Those who undertake various industrial and other activities, especially where these affect the life and health of the citizen, may find themselves liable to statutory punishment regardless of their own acts or neglect and those of their servants. But one must remember that normally mens rea is still an ingredient of any offence. Before the court will dispense with the necessity for mens rea it has to be satisfied that parliament so intended. The mere absence of the word "knowingly" is not enough. But the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs, and the wording of the particular section and its context, may show that parliament intended that the act should be prevented by punishment regardless of intent or knowledge'[108].

A better understanding of the nature of mens rea in both common law and statutory offences is found in the judgment of Stephen in R v. Tolson (1889); he said that 'the full definition

of every crime contains expressly or by implication a proposition as to a state of mind. If the mental element of any conduct, therefore, alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition'[109].

In spite of being a traditional idea, it still has validity. Where the crime consists of doing an act which is prohibited by statute the proposition as to the state of mind of the offender which is contained in the definition of crime must be understood from the words and subject matter of the statute. As Stephen pointed out that 'the proposition may be stated explicitly by the use of such qualifying adverbs as "maliciously", "fraudulently", "negligently" or "knowingly" - expressions which in relation to different kinds of conduct may call for judicial exegesis. And even without such adverbs the words descriptive of the prohibited act may themselves connote the presence of a particular mental element'[110].

Thus, where the prohibited conduct consists in permitting a particular thing to be done, the word "permit" suggests at least knowledge of reasonable grounds for suspicion on the part of the permitter that the thing will be done and an unwillingness to use means available to him to prevent it and to have in one's possession a prohibited substance connotes some degree of

awareness of that which was within the possessor's physical control.

Sometimes the actual words used by Parliament to define the prohibited conduct are in themselves descriptive only of a physical act and bear no connotation as to any particular state of mind on the part of the person who does the act. Nevertheless, the fact that Parliament has made the conduct a criminal offence gives rise to same implication about the mental element of the conduct proscribed. For example, in M'Naughten's case (1843) one implication as to the mental element is that the offender should be sane (within the M'Naughten rules). But this part of the full definition of the offence is often left unexpressed by Parliament. Stephen in R v. Tolson suggested in circumstances where offences of strict liability are the creation of statute, the courts say that they are simply enforcing the expressed intention of Parliament. This is not always true. Smith and Hogan argue that Parliament is not concerned with the interpretation of mens rea because this is a matter they have left to the judges[111]. The judges do not ignore the words of the statute but give close attention to them - certain words are said to impose mens rea into an offence, for example, "unknowingly", but no single word is conclusive. Usually, the court's decision is influenced by what the courts think to be the social object of the statute. The courts are influenced by the degree of social danger which they believe to be involved with a particular

statute. Drugs, road accidents, pollution, therefore, are all considered in their social context.

To summarise, this chapter has been concerned with examining basic concepts of criminal law in the U.K. It is fairly clear that no definition of the concept of crime will be sufficient to satisfy the variety of perspectives which exist when examining a particular phenomenon in society. What is significant is that what amounts to a crime will vary from time to time and place to place. In other words, criminality is a conferred concept. This is also seen in offences of strict liability.

The approach adopted to assist in understanding the concept of crime was to look at the ingredients of actus reus and mens rea. While it is apparent that there are limitation to both concepts, it has to be recognised that they may create serious consequences for the mentally disordered person who finds himself in circumstances which bring him into the area of criminal law. We have observed the difficulties of ascribing the notion of mens rea to those persons who can not be in the position mentally to formulate the necessary mens rea. Thus, persons with a mental disorder may perform the actus reus of a crime and yet lack the ability to have the requisite mens rea. If they are to be restrained from continuing to harm others this may involve detention without the proof of mens rea. This appears to run counter to the basic principles of criminal law and to render

them liable to the injustice of what is in effect a "conviction" without their being responsible for their actions in the legally relevant sense. In other words, it would appear that utility is overriding justice.

We also noted that the moral principle underlying the law's reluctance to penalize involuntary acts has serious implications for underlying principles involved in punishment and, indeed, the extent to which both these are linked. In chapters 3 and 4, the argument that very few persons with mental disorders can be said not be able to "act" in a voluntary manner is explored.

The position of Iraqi law in terms of a definition of crime is restricted to the Iraqi Penal Code and therefore avoids the conceptual difficulties which have been outlined. Nevertheless, it is clear that, while Iraqi law has similar concepts to actus reus and mens rea, it, too, faces problems of classification which do not help towards finding a single universally accepted definition of crime.

From the analysis of the concept of crime, it is clear that the study of mental disorder and the criminal law must examine the nature of criminal procedure and, in particular, what it seeks to establish and must investigate the nature and purpose of punishment. Accordingly, chapter 2 looks at punishment and criminal responsibility, chapter 3 examines the legal and medical

meaning of mental disorder and chapters 4 and 5 consider the consequences for the mentally disordered person.

FOOTNOTES

CHAPTER ONE

1. Fitzgerald, Criminal Law and Punishment, 1962, p.1; Smith and Hogan, Criminal Law, 1983, p.34; Cecil Turner, Kenny's Outlines of Criminal Law, 1958, p.1; Hogan, "Crimes, Punishment and Responsibility", 1974, Crim. L.R., p.690.
2. Elliot and Wells, Case Book And Criminal Law, 1982, p.1.
3. Walker and Stevenson, MacDonald Criminal Law, 1948, Reprint, 1986, p.1; Hume, Commentaries on The Law of Scotland, 1819, vol.I, p.21; Allen, "The Nature of A Crime", 1931, 31, J.Soc. Comp. Leg, 1; Hughes, "The Concept of Crime", An American View, 1959, Crim.L.R. p.239,331.
4. Gordon, Criminal Law of Scotland, 1978, p.12; Cecil Turner, op.cit, pp.1-2.
5. Lafave, Criminal Law, 1972, p.13; Carvell, Criminal Law and Procedure, 1970, p.3.
6. Elliot and Wells, op.cit, p.2.
7. Allen, Legal Duties, 1931, p.240.
8. Williams, "On The Definition of Crime", 1955, Current Legal Problems, pp.107-11.
9. Fitzgerald, op.cit, pp.2-8; Gordon, op.cit, pp.14-15; see also, Greenhuff case (1938) Swin 236, at p.268, where it was declared that to bring any act within the jurisdiction of the court as a crime, the act must be so grossly immoral and harmful.

10. Smith and Hogan, op.cit, pp.4-7.
11. Renton and Brown, Criminal Procedure According to The Law of Scotland, 1983, p.3-6.
12. Ibid.
13. Hogan, "Crime, Punishment and Responsibility", 1974, Crim.L.R. P.690.
14. Wolfenden Committee on Homosexual Offences and Prostitution, 1957, cmnd, 247, para.13.
15. Devlin,"The Enforcement of Morals", 1959, 45, Proc. of British Academy, 129.
16. Knuller (Publishing, Printing and Promotion) Ltd. v. D. P. P. (1973) A.C 435.
17. MacDonald, Criminal Law of Scotland, 1948, pp.1-15.
18. See, Stephen, A History of The Criminal Law of England, 1883, p.75; Cecil Turner, op.cit, pp.25-28; Gordon, op.cit, pp.15-18; Mewett and Manning, Criminal Law, 1978, p.10.; Fitzgerald, op.cit, p.5; Smith, Scotland, 1962, p.125; McLaughlan v. Boyd, 1934 J.C.1; P. V. Mauley (1933) K.B. 529.
19. Cecil Turner, op. cit, p.25.
20. Friedmann, Legal Theory, 1960, pp.2-5.
21. Hume, op.cit, pp.21-23.
22. Fitzgerald, op.cit, pp.5-6; Cecil Turner, op.cit, 1958, pp.25-26; Gordon, op.cit, pp.17-18.
23. Fitzgerald, op.cit, pp.5-6.
24. Iraqi Penal Code, 1969, Article 409.

25. The Guardian, 16th of march 1990, p.23.

26. Renton and Brown, op.cit, p.3.

27. Proprietary Articles Trade Association v. A.G. for canada (1931) A.C. 310.

28. Smith and Hogan, op. cit, ch.2.

29. See chapter 5 below.

30. Fitzgerald, op.cit, p.1; Lafave, op.cit, pp.11-12.

31. Lafave, op.cit, p.13.

32. The Iraqi Code of Legal System Reform, 1977.

33. Stephen, op.cit, p.77.

34. Gordon, op.cit, pp.13-14; Renton and Brown, op.cit, p.3.

35. Smith, op. cit, p.123.

36. Williams, 1955, op.cit, pp.107-111.

37. Gordon, op.cit, pp.19-20.

38. Ibid.

39. Smith and Hogan, op. cit, p.30.

40. Carvell and Green, op.cit, p.9.

41. Scofield (1784) Cald 397.

42. Williams, Textbook of Criminal Law, 1983, p.7143. Deller (1952) 36 Cr.App. Rep.1829 in which the court of criminal appeal had decided that there had been no crime committed because no actus reus had been established.

44. Smith and Hogan, op.cit, pp.34-35; Gordon, op.cit, p.64; Rupert, Cross and Jones Introduction to Criminal Law, 1980, pp.25-27.

45. Ibid.

46. Ibid.

47. Sexual Offences Act, 1956.

48. Rupert, op.cit, pp.25-27.

49. Carvell and Green, op.cit, pp.9-10.

50. George Kerr and others (1871) 2 Couper 334; see similar principle in R. v. Watson and Watson (1959) 43 Cr. App. R.111.

51. Gibbins and Proctor (1918) 13 Cr. App. Rep. 134, in which the child died of stravation because her parents kept her upstairs insufficiently supplied with food. Her parents were convicted of murder, and sentenced to death. See similar principle in Queen v. Senier (1899) 2 Q.B.282. Also see Bannyman Alexander Gordon (1942) 28 Cr. App. Rep. 131, where the accused was convicted of manslaughter by negligence of his wife because he had not given her aid and treatment.

52. Rex v. Pittwodd (1902) 1 T.L.R. 37, in which Philip Pittwood was charged with the manslaughter of Thomas White because he did not keep the gate shut when a train was passing along the line during his duty to do so.

53. Stone and Dobinson (1977) 2 ALL E.R.341, where the accused's conduct, about the breach of duty which had to be established, was regarded reckless because he had undertaken the duty of caring for his sister who was incapable of caring fir herself; see also Nicholls (1874) 13 Cox C.C.75.

54. The Theft Act, 1968, sec.25.

55. Gordon, op.cit, p.61; McKenzie v. Whyte (1864) 4 Irv. 570.

56. Smith and Hogan, op.cit, pp.31-32.

57. Gordon, op.cit, pp.61-63; see also Hart, "The Ascription of Responsibility and Rights" 1948-49, Proc. Arist. Soc. p.171.

58. Gordon, op.cit, pp.63-93.

59. Ibid.

60. Smith and Hogan, op.cit, pp.31-32; see also Treacy v. Director of Public Prosecutions (1971) 1 ALL E.R. 110 at 120.

61. Ibid.

62. Ibid.

63. Article 28 of Iraqi Penal Code, 1969.

64. Williams, The Mental Element in Crime, 1965, p.1; Williams, 1983, op.cit, p.73; Porcell meats (Scotland) Ltd. v. McLeod 1986 S.C.C.R. 672; Carmichael v. Hannaway 1987 S.C.C.R. 236.

65. Sayre, "Mens Rea", 1932, 45, Harv. L. Rev., p.974.

66. Hume, op. cit, p.21.

67. Cawthorne v. H.M.Advocate 1968 J.C. 32 at 32-37; see also same principle in Smart v. H.M.Advocate 1975 S.L.T. 65.

68. Smith, op.cit, p.132; Lockhart v. Stephen 1987 S.C.C.R. 642.

69. Smith and Hogan, op.cit, p.47; Williams, 1983, op.cit, p.70; R.H.W. v. H. M. Advocate 1982 S.C.C.R. 152.

70. Holmes, The Common Law 1881 pp.42-55.

71. Tudhope v. McKee 1987 S.C.C.R. 663.

72. Stephen, op.cit, p.183; Sarye "Mens Rea" 1932, 45, Harv. L. Ref. p.974; Turner, The Mental Element in Crimes at Common Law, 1936, p.31, Fletcher, Rethhinking Criminal Law, 1978,

pp.398-504; Gordon, op.cit, p.215; Smith, op.cit, p.132.

73. Williams, 1983, op.cit, p.73.

74. Ibid.

75. Smith and Hogan, op.cit, p.60.

76. Article 33 of Iraqi Penal Code, 1969.

77. Mahmode, Penal Code, 1982, p.73.

78. Brattry v. A.G. FOR N. Ireland (1963) A.C. 366 at 409; R. v. Vickers (1957) 2 Q.B. 910; R. v. Bailey (John) (1983) 1 W.L.R. 760.

79. Stephen, op.cit, p.76.

80. Hart, Punishment and Responsibility, 1968, p.98.

81. R. v. Bnurr (1969) N.Z.L.R. 793 at 748, where McArthy J.says that 'in their basic approach to the question whether an act is a voluntary have adopted the Austinian concept of intention, demanding its two essentials of volition in relation to the muscle movement, and foresight of consequence. Some people consider this concept inadequate in the light of modern medical knowledge but it still dominates our law relating to intention". See also Lynch v. D.P.P. (1975) A.C. 693 at 688-690, where Lord Simon gave similar comment.

82. Hart, 1968, op.cit, p.98.

83. Ibid, p.103.

84. Ibid, p.101.

85. Ibid, p.255-56.

86. Ibid, p.105.

87. Williams, Criminal Law, The General Part, 1961, p.98; Turner, op.cit, p.23.

88. R. v. Dodd (1974) 2 S.A.S.R. 151 at 154.

89. Ibid; see also same principle in Kilbride v. Lake (1962) N.Z.L.R. 590.

90. Turner, op.cit, p.27.

91. Adams, "Voluntariness in crime,Article Examination of Kilbride v. Lake" 1969 2 Otaga L.R, 426.

92. Ryane v. The Queen (1967) 121 C.L.R. 205.

93. Clark "Automatism and Strict Liability", 1968, S.V.U.W.L. Rev. 2; Mewett and Manning, op.cit, p.61-62; Fitzagerald, op.cit, pp.116-118.

94. Lynch v. D.P.P. (1975) A.C. 653 at 689; see also the view of Barwick in Ryan v. The Queen (1967) 121 C.L.R. 205.

95. Smith and Hogan, op.cit, p.36-37.

96. Ibid (emphasis mine)

97. Examine the case D.P.P. v. Majewski (1977) A.C. 443, in order to realise what difficulty you face when you are departed from the basic principle; Brennan v. H. M.Advocate 1977 S.L.T. 151.

99. Gordon, op.cit, pp.64-65, where he also says that "voluntariness is best treated as a negative quality involving the absence of whatever factors are accepted as preventing an act from being regarded as voluntary. The person who claims that a particular act is voluntary does not have to prove that it was; it is for the person who says

that the act was involuntary to point to the presence of one of the factors which exclude voluntariness". See also Hart, 1968, op.cit, p.30, where he says that "...the expression voluntary action is best understood as excluding the presence of various excuses".

100. D.P.P. v. Majeweki (1977) A.C. 443.

101. See p.28 above.

102. Duquid v. Fraser 1942 J.C. 1 at p.5.

103. Dangerous Drugs Act, 1965.

104. Sweet v. Parsley (1970) A.C. 132.

105. Sweet v. Parsley (1970) A.C. 132.

106. See for example, sec.235 (2) of The Road Traffic Act 1972 "knowingly".

107. Sheppard (1980) 3 ALL E.R. 899 at 906.

108. R. v. Tolson (1889) 23 Q.B.D. 168.

109. R. v. Tolson (1889) 23 Q.B.D. 168.

110. Smith and Hogan, op. cit, pp.87-117. they cite many instances of judicial attempts to interpret statutory offences.

111. Ibid.

CHAPTER TWO

CHAPTER TWO

PUNISHMENT AND RESPONSIBILITY

1. Introduction:

In attempting to understand the effect of mental disorder on the issue of criminal responsibility and punishment, and the extent to which concepts such as actus reus and mens rea are linked to theories of punishment and responsibility, it is necessary to examine the scope of such theories. Accordingly, this chapter will discuss the following points:

1. Definition of punishment.
   a) Utilitarian theory.
   b) Retributive theory.
   c) Compromise theory.
2. The Concept of Responsibility.
   a) The retributivist rationale of excuses.
   b) The utilitarian rationale of excuses.
   c) Hart's rationale of excuses.

2. Definition of Punishment:

As will be shown below the meaning of punishment is far from clear. In discussing punishment some writers talk about the existing criminal law, others deny its premises and suggest substitutes for them[1]. It is argued that the term "punishment" is vague and open-textured. Mabbott says that this can be seen

from its different uses '(a) of criminals (by the state); (b) of blacklegs (by union); (c) of bad man (by God); (d) of foolish man (alcoholism for overdrinking); (e) of villages or hostages (by an occupying power); (f) of innocents (as scapegoats); (g) of children (by parents); (h) of animals (by their masters); (i) of toys (by children); (j) of one sporting team/individual (by another team/individual'[2].

Our interest in punishment in this thesis is confined to the general framework of criminal law. Punishment, like crime, cannot be precisely defined. Accordingly, an attempt is made to examine the various theories.

The different meanings of "punishment" result from differences of interest. The philosopher concerns himself with the exact justification, the lawyer with legal categories and penalties and the criminologist is occupied primarily with the empirical aspect[3].

The most influential analysis of the meaning of punishment has been put forward by Hart, who considers state or legal punishment in terms of five elements: '(i) It must involve pain or other consequences normally considered unpleasant. (ii) It must be for an offence against (legal) rules. (iii) It must be for an actual or supposed offender for his offence. (iv) It must be intentionally administered by human beings other than the

offender. (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed'[4].

While Hart's analysis is, at least, concrete, the definition can be criticised in a number of ways. For instance, it is a little narrow because of its need to include "pain"[5] which may mean a type of action such as torture, or corporal punishment. Today, there are many punitive sanctions which do not involve pain, for example prisons nearly always run a series of rehabilitative programmes for prisoners. These activities can hardly be classified under the criteria of Hart and they are often confused with punishment.According to Hart's definition of punishment, offences should be, as we have already seen in chapter one, acts or omissions for which a person is liable to criminal prosecution and punishment.

Punishment has to be carried out by a special authority which is provided by the law. So any other practice which includes these elements but where it is or has been carried out by people who are not authorised (by the state) is not punishment within the criminal law.

Feinberg is critical of Hart's definition and states that it: 'Leaves out of its ken altogether the very element that makes punishment theoretically puzzling and morally disquieting'[6].

According to Feinberg, the concept of punishment has an expressive function which is part of its meaning. He argues that 'punishment is a ...device for the expression of attitudes of resentment and indignation and of judgements of disapproval'[6].

We will see in chapter five that if compulsory treatment is substituted for punishment, it will also contain an element of resentment and public disapproval. Hart says that 'if we imprison a man who has broken the law in order to deter him and by his example others, we are using him for the benefit of society, and for many people...this is a step which requires to be justified by (inter alia) the demonstration that the person so treated could have helped doing what he did. The individual according to this outlook...has a right not to be used in this way...unless he could have avoided doing what he did'[7].

This position is one which has been shared by many jurists and legal theorists including James Stephen, Jerome Hall and even Hart himself[8]. Although we are concerned in this thesis with legal punishment, it should also be noted that Hart's definition covers only legal punishment and not all punishment is legal. Having introduced the idea that there is no one perfect theory of punishment at the beginning of this chapter, it is now worthwhile looking at some of the theories in detail in order to find out what are the appropriate justifications of punishment.

a) Utilitarian Theory:[9]

Utilitarian theories find their justifications in a future good, namely that the result of the punishment should give good consequences[10]. So, utilitarianism is regarded as forward looking.

A well known theorist of the utilitarian philosophy is Jeremy Bentham. He argues that the promotion of general happiness must be the aim of the legislator, by looking at the nature of conduct in terms of its consequences and not by the underlying motives. Bentham argues that 'the only sovereign masters, to which conscious beings are subject, are pleasure and pain'[11].

According to the utilitarian theory, the purpose of criminal jurisprudence is to punish the criminal, but ultimately and essentially it should be to repress crime and prevent its commission. In other word, the primary object is to secure protection for society and not to inflict pain on the offender. Punishment is, therefore, to be imposed only when it excludes greater evil. According to this theory the circumstances in which punishment reduces crime and therefore harm are various and are as follows:

(i) Reform:

The proper purpose of criminal procedure according to the

utilitarian theory should be to seek to reform the criminal so that he may become adjusted to the "social order". The criminal is reformed in the sense that punishment affects his behaviour and changes it, so he will not commit such offences because he believes that these offences are wrong. He may abandon his evil way by the aid of religion and moral advice in prison[12]. So, the imposition of punishment is justified by its ability to re-educate an offender and thereby to return him to society as an "adjusted" human being. The criminal is no longer seen as a "bad agent", but as a sick agent[13]. We shall see how this notion has developed in the fifth chapter[14].

(ii) Prevention:

The second consequence of punishment is the idea that punishment serves as a means of preventing crime. Traditionally, the word "prevention" has been associated with the "deterrent effect" of punishment. It should be noted, however, that "general prevention" is the deterrent effect which punishment of the criminal "as an example" has upon the rest of the population. "Individual prevention" is its effect upon the criminal himself, either as a deterrent, or if he is imprisoned, as a physical restraint. The idea behind this theory is that society has the right to protect itself and prevent crime by detaining the criminal if there is some reason to believe that it would be dangerous to set him free[15].

The main question that arises here is how punishment and its

severity can be limited.

In order to limit the punishment according to the utilitarian theory it is supposed that each category of crime in criminal law has a scale of possible punishment. Accordingly, the utilitarian theory would choose a penalty for each class of offence which prevents great harm to the public but at the same time does not inflict too much suffering on the offender[16]. So this theory compares harm to the community on the one hand and harm to the offender on the other hand. If the justification of punishment is mostly deterrence for others, mens rea will be not important to determining responsibility, punishment and the severity of punishment. Accordingly, if deterrence is the primary goal, then there will be no concern with excusing conditions, for example, people who are found not guilty by reason of insanity, provocation and so on have to be punished. It is obvious, according to this theory, that criminal conduct is seen as a physical act; this criterion conflicts with the legal ground of responsibility and punishment which should primarily depend upon the notion of mens rea. It is difficult to make a person responsible and therefore to punish him for his act unless we make an examination of his intention.

According to Wootton's approach, mens rea can be taken into account when the punishment is imposed on the offender. In this case not only must the consequences of punishment be considered

(forward looking) but one should also look back at the circumstances surrounding the act. This point will be argued in more detail later in this chapter under the heading "criminal responsibility"[17]. The underlying rationale of a utilitarian theory of punishment can be rebutted by examining the consequences of such a theory. This is done in chapter 4 and 5.

b) Retributive Theory:

It is difficult to state the basis of retributive theories precisely[18], but the theories attempt to prove a link between punishment and "moral" guilt. The theories differ in their reasons, scope and in their accounts of how punishment should "fit the crime". The retributive approach can be attributed to Kant, and may be summarised in the following way:

(i) The only acceptable reason for punishing a man is that he has committed a crime.

(ii) The only acceptable reason for punishing man in a given manner and degree is that the punishment is "equal" to the crime for which he is punished.

(ii) Whoever commits a crime must be punished in accordance with his desert[19].

Accordingly, retributivism is described as "backward-looking". Retribution is therefore "punishment" in pure form. No other motive is involved other than that of inflicting pain on the guilty. Anybody 'who has done harm shall suffer harm

regardless of any reformation or prevention'[20]. 'What a man sows, then let him reap'[21]. Lord Denning points out that it is a mistake 'to consider the object of punishment as being deterrent or reformative or preventive and nothing else...The ultimate justification of any punishment is not a deterrent, but that it is the emphatic denunciation by the community of crime, and from this point of view there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty'[22].

We can see how Lord Denning's statement illustrates the point made by Feinberg and quoted at the beginning of this chapter. It is fairly clear for such theories that the offender has to be morally guilty to be deserving of punishment.

The pure retributive theory, as it is stated above, is not reasonable, because, as Ten says, 'if indeed the legal authority has an absolute duty to punish, then it follows that punishment is required even when disastrous consequences will come about, even "when the skies will fall". For example, suppose that the punishment of an offender will lead to a vast increase in violent crime which will terrorize law-abiding citizens who would all much prefer that the punishment not be meted out. The theory would still insist on punishment. It is a strange notion of justice whose demands benefit nobody, and whose execution will keep even the virtuous and innocent awake with fear and

trembling'[23].

The retributive theory would not then lay down necessary and sufficient conditions for the justification of punishment.

The discussion above shows that the goals of punishment, claimed by the different viewpoints, are based on certain theoretical assumptions. On the one hand, some theorists ask why we punish and attempt to find an ethical or moral basis to justify punishment. On the other hand, others take a utilitarian stand point and ask whether punishment is working. Is it efficient? Does it deter or rehabilitate?. In other words, whereas the retributivist regards "moral guilt" as a necessary and sufficient condition of criminal punishment, utilitarians have considered punishment a painful necessity, justified by its beneficial consequences.

C. A Compromise Theory:

It is evident from the argument in the last two sections that unless the pure retributive and utilitarian theories are amended, there is no scope for reconciling them. The pure retributive theory maintains that some form of moral desert is either a necessary or a sufficient condition of punishment. It does not, therefore, required good consequences from punishment. Kant said that 'even if a civil society were to dissolve itself by common agreement of all its members(for example, if the

people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the blood guilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment ; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice'[24]. The pure utilitarian theory view is that moral desert cannot be a necessary or sufficient condition for justifying punishment. The utilitarian holds that such conditions are met if good consequences are produced, even if an innocent person is involved. Accordingly, it seems that if we accept the comprehensive scope of the utilitarian theory and its exclusion of retributive reasons for punishment, any compromise between the theory and retributive theory will be precluded.

Many writers have been attempted to narrow the scope of these theories. So, it is found that a compromise between the two theories is possible if the retributive theory admits that punishment should only be imposed when it produces good consequences. The compromise theory should, therefore, regard retributive justifications for punishment as necessary but not sufficient. Accordingly the compromise theory overcomes most of the objections which have been raised against retributive and utilitarian theories. It makes both conditions enter into the justification of every case of punishment, each condition is

necessary, and both of them are jointly sufficient for the justification of punishment. Punishment, as Hart argues, depends upon a number of different justificatione (deterrence,retribution, reform or any other). Hart considers that, despite the fact that the principles of justice are independent of and sometimes conflicting with utilitarianism, the requirement to use such principles in punishing people who have voluntarily committed crime does not avoid utilitarianism as general justifying aim of punishment. Hart says what we should look for are answers to number of different questions such as: what justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish?[25].

These questions, according to Hart's approach, can be categorised as follows:

(i) The first question, the utilitarian one of reducing crime, is concerned with the general justifying aim of punishment.

(ii) The second and third questions, the retributive ones, are concerned with its distribution (liability and amount).

Hart distinguishes between justifying punishment in general, which allows us to ask why we should have these rules? what is the purpose of these rules?, and justifying punishment in particular which is concerned with the application of punishment in a particular crime.The general justifying aim of punishment in Hart's view is the utilitarian one of protecting society from

the harm which may be caused by crime. Hart emphasises that the application of the general justifying aim must be restrained by the principles of justice which require us only to apply punishment to people who have voluntarily committed offences. So the principle of justice, according to Hart's approach, preclude punishment of those who have not voluntarily committed crimes. Accordingly, people who have committed a crime but have an excuse such as mental disorder have not to be punished. Hart means by his principles of justice to ensure that, in application of the general justifying aim of reducing crime, justice must not be sacrificed. He does not, however, regard the criteria emphasised by the principles of justice as absolute. So, he claims that it is possible in extreme situations that justice may have to be sacrificed. He says that `in extreme cases many might still think it right to resort to those expedients but we should do so with the sense of sacrificing an important principle. We should be conscious of choosing the lesser of two evils, and this would be inexplicable if the principle sacrificed to utility were itself only a requirement of utility'[26].

Accordingly, in Hart's approach, the values of utilitarianism may conflict with principles of justice in extreme cases and, if application of justice may cause a disaster to result, the principle of justice may have to be sacrificed. So in such situations Hart's approach allows for the possibility of utilitarian considerations overruling the principles of justice.

As a result, it may allow people who have not voluntarily committed crimes, such as mentally disordered persons, to be punished.Ten has adopted a similar approach (compromise theory) in his book Crime, Guilt and Responsibility. He says that `punishing a parson is justified if and only if:(i) He is an offender who has voluntarily violated a legitimate law (retributive condition), and (ii) punishing him is justified on utilitarian grounds (utilitarian condition)[27]. Ten means by "legitimate law" that a law falls within proper concern of the state.

Ten claims that it is unjust to punish innocent persons (persons who have an excuse which would normally exempt them from any punishment, such as mentally disordered people). Ten, therefore, recognizes,as Hart does, two main independent values of punishment (justice and utility). These two values may conflict in extreme cases, so that there can be sacrifice of one value for a big gain in the other value. For example, we will be confronted with an exception to the retributive condition if the relatively minor punishment of an innocent person is the only way to prevent grave harm to other innocent persons as a result of increased crime. Accordingly, the retributive theory needs , as Ten has suggested, an amendment as follows 'punishing an innocent person would be justified if and only if punishing him inflicts much less suffering on him than the suffering that at least one other innocent person would have experienced as an

additional victim of crime had there been no punishment'[28].

Although Hart has emphasises that the utility value may overrule the principle of justice in extreme cases, he claims at the same time that it is unfair to use the individual's liberty to the benefit of society. So the practice of punishment involves a compromise in which the pursuit of desirable general social aims is checked by the need to protect individuals from being used simply as a means to the fulfilment of these general social aims. As a result, even if punishing an innocent person would be justified due to the high probability of its avoiding much suffering for another innocent person, the value of individual liberty should be not forgotten. Thus, a balance between `liberty and utility` has to be made. With this approach it may be possible to avoid unjust restrictions on the individual's liberty. This point will be considered in more detail in chapter five where it is argued that this theory (compromise theory) may justify a limited protective sentence against particular innocent persons (mentally disordered people).

In order to understand theories of punishment properly, it is necessary to consider the idea of `responsibility` and the extent to which `responsibility` is an important feature of the theories of punishment. We have already explored the concept of responsibility in chapter one, when dealing with actus reus and mens rea.

3. The Concept of Responsibility:

There are several uses of the word "responsibility" and so it is important to distinguish the various meanings and consequences which arise from the use of the word "responsible" in the different circumstances in which it arises. The word "responsible" is difficult to define: as we shall see below, it is ambiguous and different meanings can be distinguished. Therefore it leaves a lot of arguments about its application. In the final analysis, it will be shown that there is no one preferable definition. As we shall see in chapters 3 and 4, the concept of "diminished responsibility" and insanity raise special problems in relation to "responsibility".

The section is limited to looking at criminal responsibility.

Criminal Responsibility:

The idea of criminal responsibility[29], interpreted in the narrowest sense, brings up such topics as the age for criminal responsibility, and insanity or mental illness. In other words, in its narrowest sense, criminal responsibility concerns the place in the criminal law of special groups whom we might wish to exclude from its normal application. We might also think of offences of strict liability where the offence in question is defined purely in terms of external behaviour and does not include the normal mental element of intention or mens rea.

In a broader sense, "criminal responsibility" would cover certain aspects of the criminal law as it applies to normal adults and normal crimes, namely those which relate to considerations which might be put forward to excuse such persons who have behaved in a manner which would normally attract conviction and punishment. Hart, when looking at excuses suggests that the concept of responsibility in the criminal law context reflects the relationship between the institution of society and the perpetrator of an alleged crime. Responsibility can be properly understood in terms of a theory of "ascription".

Hart's notion of ascription of responsibility is one which is linked with the general ascriptions which are to be found in law. Hart suggests that the philosophical analysis of the concept of human action has been inadequate and confusing because of the nature of legal language. He goes on to say that statements in the form of "he did it" have been traditionally regarded as primarily descriptive but the principal function of such sentences is actually ascriptive. Because of this, legal concepts can be vague and this vagueness may be diminished by judicial interpretation. Thus, Hart examine the character of defeasible concepts in criminal law. He says, when examining crime, that it is possible to create a list of defences or exceptions with which different criminal charges may be met. Hart acknowledges that 'in the case of crime, e.g.,murder, the onus of proof may be on the

prosecution to provide evidence that circumstances are not present which would, if present, defeat the accusation. Yet, nonetheless, what is meant by the mental element in criminal liability (mens rea) is only to be understood by considering certain defenses or exceptions, such as mistake of fact, accident, coercion, duress, provocation, insanity and infancy, most of which have come to be admitted in most crimes, and in some cases exclude liability altogether, and in others merely "reduce" it'[30].

Feinberg, in examining Hart's notion of defeasibility says that defeasibility is tied up with our system of litigation and rules of procedure[31]. As a result of this, various types of excuse and justification are parts of the available defences which can defeat legal claims and charges even when all the other conditions which are morally necessary for the success of the charge are present.From this preliminary analysis of responsibility, it is, therefore, possible to argue that responsibility is a defeasible concept. The consequence of this is clear, namely, that if the "defeating excuse" is accepted, then the imputation of fault is required to be withdrawn.

In the cases of duress, mistake and intoxication, for example, the law might take the view that the person is not guilty, or that the criminal acts should be punished less severely. Again taking a broader view we might think of

responsibility as covering justifications for actions which are normally criminal, for instance, the defences of necessity or superior orders.

It is worth stating briefly here the difference between "justification" and "excuse". Justification is the defence in the criminal law of showing that the act complained of was lawful and justifiable. Accordingly, in the act of homicide, for example, if the person admits that he committed the act but claimed that it was in self-defence, his act is justified because he had no "mens rea" and "actus reus" in the criminal law sense. On the other hand, an excuse is defence in the criminal law because the person had no "mens rea" when he committed the crime, although he actually performed the "actus reus". Accordingly, there is no crime, in the sense of criminal law, in the condition of "justification" (there is no mens rea and actus reus). Whereas there is partly a crime in the case of "excuse" (there is actus reus but there is no mens rea), but because the person had no mens rea when he committed the actus reus, he is not responsible (for example, mentally disordered people).

Defences of both kinds, excuses or justifications, have in common that in these circumstances persons are not blameworthy or not fully blameworthy, and , therefore, are in some sense in the same position as young children or mentally handicapped, or seriously mentally ill people[32].

This implies that "normal" criminals in normal circumstances are blameworthy, in that they are responsible for their wrongful actions. As noted in chapter one, this involves the assumption that in normal cases of crime and punishment the requirement of a guilty mind or mens rea have been met, in that the person in some sense intended to do what he did. Mens rea can be thought of as the core of responsibility in the criminal law. A central idea of criminal responsibility is that a person is guilty of a crime only if he performed the prohibited act intentionally.

Wootton offered the well known argument that 'the idea of mens rea has got into the wrong place in the determination of criminal liability, and ought to be reconsidered in order to decide the question of disposal'[33]. Wootton thinks that the harm which is incurred is the same in all cases. Therefore, if a harm outlawed by the criminal law has happened, it should be the role of the criminal law to interfere, and to deal with the harmdoer, whether that harm was caused intentionally, negligently, accidentally or involuntarily.

Wootton says that the mental element as a requirement for a criminal act in relation to a particular person should be dropped. However, Wootton would make the "mental element" important in determining the disposal for each accused. She says that it is irrational to allow dangerous individuals to escape

any punishment on the grounds that the harm they caused was not inflicted deliberately. According to Wootton's theory, "duress", "mistake", "mental illness" should be relevant only to the question of sentence.

Since the choice of sentence will depend upon whether the harm was caused deliberately, negligently or involuntarily, Wootton seems to accept that the issue of such mental states could and should be investigated. Her idea is not that mens rea should be removed completely, but that it has "got into the wrong place". This means that all excusing conditions would be taken into account after conviction, rather than before. Under her approach, as we have seen, a large number of people would be dealt with by the criminal courts who, under the present law, would not be the subject of criminal proceedings at all. In other words, the difference would be that any relevant excuse, for example, mental illness, would be considered after conviction rather than before. This approach will be explored in chapters 3 and 4. Also, she argues that criminal legislation which adopts her view, and omits the "mental requirement" as a condition of responsibility, will work more effectively in preventing crime than the present system. She has supposed that if her approach were to be adopted, it would make people take greater care in their daily behaviour[34].

There are many objections to Wootton's theory. Some of these

objections are philosophical and others practical. It seems that the most important of the philosophical objections are that she regards criminal conduct as consisting of physical acts, without any reference to mental elements. Ross says that 'there is a manifest difference between A's throwing a stone in the direction of B as part of a game, for B to catch it, and A's throwing it at a police officer during a demonstration in order to bring him down. But this difference cannot be described in purely objective physical terms. The distinction between the act itself and the attendant mental circumstances is an artificial and impossible abstraction...'[35].

Professor Malcolm has put forward a similar view when he says that 'rarely do we perceive other people's "actions" in purely physical terms. We perceive someone's speech as passionate, and his movements as threatening. We perceive people under mental descriptions (as impatient, sad, affectionate) and we respond accordingly. This form of perception is natural for us, but not perception under a purely physical description...'[36].

Also there are many practical objection to Wootton's theory:

(i) The first objection against Wootton's theory is the social stigma or label which is often placed on a criminal conviction. Under the modern law, the practical difference between acquittal and a conviction follow by an absolute

discharge is the social stigma which attaches to a criminal conviction[37].

(ii) A second objection to Wootton's theory is that it would take too much power out of the hands of the jury who decide the issue of guilt, and give too much power to the judge, in his discretion on sentence. In D.P.P. for NorthernIreland v. Lynch, Lord Edmund-Davies has made this point, in which he was concerned to disapprove the view that the excuse of duress ought to be relevant in mitigation rather than in exculpation. He says that 'apart from the obloquy involved in the mere fact of conviction, in the nature of things there can be no assurance that even a completely convincing plea of duress will lead to an absolute acquittal'[38].

His claim is that the judge may not have enough information before him to decide the issue properly. It is should be Noted, though, that Wootton would put sentencing in the hands of an expert panel.

(iii) The third objection to Wootton's approach is that which denies that the criminal law would work more effectively. Ross has argued that the general preventive effect of criminal law '...depends in the first instance on the capacity of the system to strengthen and form popular moral attitudes of disapproval of criminal acts....This capacity depends, in turn, on popular recognition of the justice of punishment, and that in turn means that the punishment

should be both directed at the guilty and reasonably related to the guilty, and this condition will certainly not be fulfilled in a legal system in which it is a matter of pure luck whether one will be prosecuted and possibly sentenced to one or other form of suffering or cure'[39].

(v) The fourth objection is that Wootton's view moves away from moral principle (justice) in convicting a man of a criminal offence before the consideration of fundamental issues such as whether he acted under mistake of fact or under duress, or as a result of mental illness, i.e. whether he is "responsible".

These criticisms of Wootton show how deeply the idea of criminal guilt is linked to the idea of blameworthiness. This supports the idea that punishment is in part an expression of condemnation, as suggested by Feinberg earlier[40]. With this in view, we must now look at the role of excuses in more detail.

The criminal law and the practice of the courts in England and Scotland have adopted mens rea as a basis of responsibility. The best example in England is shown by the decision, by the House of Lords, in R v. Morgan in 1976, that a man is not guilty of rape if he honestly believed at the material time that the woman concerned had consented to intercourse. This decision is supported by the Sexual Offences (Amendment) Act 1976[41]. Also,

the Homicide Act 1957 speaks of "mental responsibility"[42].

For Scotland, the words of Lord Justice-Clerk Cooper in Duguid v. Fraser have already been quoted to the effect that 'mens rea is an indispensable ingredient of a criminal or quasi-criminal act; and I venture to think that it would be a misfortune if the stringency of this requirement were relaxed'[43].

Also Lord Thomson says that 'murder is constructed by any wilful act causing the destruction of life, whether intended to kill or displaying such wicked recklessness of the consequences. Now all that means is this: in the first place, it is a wilful act, not an accidental act...in this case it means a deliberate stabbing with a knife'[44].

As we have seen in chapter one, the concept of mens rea has limitations and these limitations still apply, and this is more so when we try to explain "responsibility in terms of mens rea.

As stated at the beginning of this section, it is clear there is no correct or preferred view of "responsibility"-we have seen this with the theorists and judges. However, when we look at the modern approach to criminal responsibility, it helps to remove a few of the problems. The basis of this "new" approach to an understanding of criminal responsibility is to be found in

Hart's idea of "capacity responsibility"[45]. Hart criticises the analysis of criminal responsibility supplied by previous legal theorists. Hart claims that an accused can be properly held criminally responsible only if his case does not fall under an established excuse. Consequently, the notion of criminal responsibility is assumed as a "negative" idea of responsibility, i.e. a person who commits a physical act proscribed by law is guilty if and only if he was , for instance, not insane,not under duress, not ignorant of certain essential facts, not an infant, did not have an established justification for his act, and so on.

But this "negative" idea of responsibility leads us back to the traditional analysis of responsibility, because we must ask why are these excuses excuses? It is the case that there is something which leads to these excuses. Mens rea refers to those mental elements of conduct which are necessary for criminal conviction and punishment. Accordingly, to act with mens rea is to act without an excuse and vice versa. Mens rea lies at the centre of the law of excuses and the insanity plea. It is linked to the insanity defence through the so-called "conformity" principle. The "conformity principle" requires that an individual should not be held criminally responsible if he could not have conformed his conduct to the requirements of the law he is supposed to have broken. That is, the conformity principle is a recognition of conditions that make an individual unable to obey the law, not a recognition of, for example, reasons such as acting under duress[46]. This leads us on to the important topic

of excuses and justifications for excuses.

a) The Retributivist Rationale of Excuses:

According to the retributivists view, the justification for legal excusing conditions is a demand of justice. The distinction between "moral guilt" and "moral innocence" should be legally recognised. Since moral guilt is a necessary condition of criminal responsibility, it means that these who are "morally innocent" must be excused from criminal responsibility[47]. Therefore, without looking at the social consequences, those who are "morally guilty" must be punished. To demonstrate how excuses protect those who should be considered morally innocent, the retributivists argue that the justification of the accepted legal excuses lies in the fact that each excuse protects the "morally innocent". Retributivists sometimes confuse the meaning of "moral" wrong with legal or criminal wrong. The result is a confusion about what should be the goals of criminal law. For example, Bradley claimed there is a "necessary connection" between punishment and moral guilt[48]. It is important that the retributivist distinguishes immoral actions which deserve punishment from those which do not. Kant does this. Starting from the fundamental idea that communities exist in order to secure "justice", this demands that "each citizen enjoys the fullest possible liberty, compatible with the same liberty for all"[49]. Kant claims that the primary function of criminal law is to provide this freedom. He argues that the criminal cannot be

punished just because he is immoral, but only because he has broken a legal duty. This assumption depends upon the view that the law has to be obeyed because its is regulation of our behaviour is a necessary condition of civilized life. Mundle says that retributive theory allows the punishment of acts which are in themselves morally neutral and not just of those acts which are really morally wrong. Accordingly, obeying the law is a moral obligation. So, persons who breaks traffic rules commit a moral wrong[50]. Ten says that 'I shall, therefore, assume that it is improper for the state to punish conduct which is not harmful and is merely regarded as immoral by the majority in society, or by any other group"[51].

There is no universal agreement on what is to count as "moral guilt" or "moral blameworthiness" or "wickedness"[52]. These terms are used interchangeably. though the retributivists have differed in their ideas about "moral guilt", most agree that moral guilt involves "freedom of choice"[53].

According to the retributivists view, the basis of criminal responsibility must be the voluntary doing of a morally wrong act forbidden by penal law[54]. Therefore, excusing conditions are justified so that no-one shall be punished in the absence of the basic condition of "moral guilt". The general principle of criminal liability is to punish only those who have committed moral wrongs, proscribed by law intentionally or recklessly[55].

This concept has been supported by Lord Justice Denning who explain: 'In order that an act should be punished, it must be morally blameworthy, it must be a sin'[56]

Hall claims that the mental elements (mens rea) ought to be linked by the principle that they require 'the intentional or reckless doing of a morally wrong act'[57].

Hart has rejected Hall's notion in which he equates "mental guilt" with the "intentional or reckless doing of a morally wrong act"[58]. He argues that '...if this theory were merely a theory as to what the criminal law of a good society ought to be, it would not be possible to refute it, for it represents a moral preference;...but of course Professor Hall's doctrine does not fit any actual system. There are necessarily many actions (quite apart from the cases of "strict liability") that if voluntarily done are criminally punishable, although our moral code may be either silent as to their moral quality, or divided'[59].

Hart gives the example of offences as follows: 'Very many offences are created by legislation designed to give effect to a particular economic scheme (for example, a state monopoly of road or rail transport), the utility or moral character of which may be genuinely in dispute. An offender against such legislation can hardly be said to be morally guilty or to have intentionally committed a moral wrong, still less "a sin", proscribed by

law'[60].

Wasserstrom argues that 'Hart appears to require of Hall's analysis either that it be a theory about what a good system of criminal law would be like or that it be an accurate account of the characteristics of all of the actual cases of any existing system of criminal law. But this is an unreasonable disjunction. At the very least, Hart should be prepared to assess Hall's claim as neither a formal definition or analysis of the concept "criminal law" nor a proposal for a good system of criminal law. Instead, it should be possible to regard Hall's assertion or one like it, as insisting merely that one of the important, central, or illuminating characteristics of existing systems of criminal law is this insistence on moral culpability...'[61].

According to the retributive theory, however, there are only three alternatives to considering criminal liability, that either criminal liability must be "strict" based on the outward behaviour of the accused, or that it must consider the "mental condition" of accused to find moral culpability only, or not to consider moral culpability at all[62].

It seems that Hart's analysis, which defends the moral basis for the legal principles of responsibility, is the best account of excuses in the light of the general purposes of criminal law. Hart distinguishes between two kinds of principles and he takes

the moral view that a man ought to be punished for conduct of his own which was done voluntarily. So it is immoral to punish those who have not "voluntarily" committed a crime (for example, those who commit a crime under duress). Professor Hart declares that '...the principle (1) that it is unfair and unjust to punish those who have not "voluntarily" broken the law is a moral principle quite distinct from the assertion (2) that it is wrong to punish those who have not "voluntarily" committed a moral wrong proscribed by law'[63]. Also he adds that 'one necessary condition of the just application of punishment is normally expressed by saying that the agent "could have helped" doing what he did, and hence the need to inquire into the "inner facts" is dictated not by the moral principle that only the doing of an immoral act may be legally punished, but by the moral principle that no-one should be punished who could not help doing what he did...'[64].

This approach was taken by Lord Morris in Lynch when he stated '...the admissibility of a defence of duress on a charge or murder...any rational system of law should take fully into account the standards of honest and reasonable men. By those standards it is fair that actions and reactions may be tested....It is most undesirable that in the administration of our criminal law, cases should arise in which, if there is a prosecution leading to a conviction, a just conclusion will only be attained by an exercise thereafter of the prerogative of

granting a pardon'[65].

b) The Utilitarian Rationale of Excuses:

According to Bentham, 'punishment is in itself an evil, justified by its consequences which promised to exclude a greater evil- the commission of crime'[66]. Bentham sets out a list of excusing conditions in which punishment should not be inflicted, these are when it is:

(i) groundless in the sense that either the harm done was outweighed by the good consequences of the act or the act hagainst which punishment was to be directed was harmless.

(ii) inefficacious in that the infliction of punishment cannot prevent any harm.

(iii) unprofitable when the infliction of punishment produces harm greater than the harm prevented by it.

(iv) needless in which the infliction of punishment is the most expensive way of preventing the harm done[67].

It is suggested, therefore, by Bentham that there are two main categories of excusing conditions which are relevant to punishment of an individual. The first category is where the threat of punishment can produce no effect nor prevent someone from committing a crime. Thus the insane may lack the mental ability to relate to the punishment and learn from it not to repeat the offence in the future.

The second category is where the threat of punishment may not have had any effect because of the nature of the conduct itself - for example, accidental conduct[68].

Other writers have followed Bentham's view that the main justification for the established legal excuses of mistake, duress, infancy and insanity is because people whose acts result from these conditions are unable to respond to the threats of the law and that, therefore, punishing them cannot serve the deterrent aim of the law.

Williams argues that part that of Bentham's theory which relates to mental disorder contains excusing conditions, thus: 'Although deterrence is not the sole object of the criminal process, it is assumed that a person convicted of crime belongs to a class of people who are capable of being deterred by the threat of punishment. For at least one class, the insane, this assumption does not altogether hold good, partly because it is thought to be unjust to punish those with intellectual insanity, a measure of example is given'[69].

In the case of Porter, Dixon.J. said that 'it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment'[70].

Glover writes that 'it is suggested that expressions of blame for something done are pointless where the event in question did not constitute an action or else where it was an unintentional action. It is said that blame is useless as a means of altering the behaviour of the person whose involuntary movement or unintentional act it was'[71].

In reality, though, even if the threat of punishment would be useless against offenders who had an excuse, this does not mean that the punishment of these offenders would not reduce crime by deterring potential offenders who might think that they could falsely one of the excuses and escape penalty[72]. Glover argues that the infliction of punishment in these cases might be beneficial, because it might encourage more care in the future from the person who was punished and from others who hear of the punishment. He states that '...blaming a man for unintentional acts may be useful, in that this may cause him to take more trouble to avoid accidents, mistakes or inadvertence next time. Another is that men do not always decide rationally, so that previous blame for what was unintentional may strengthen someone's resolve not to do that kind of thing intentionally...'[73].

Therefore, as Bentham mentioned, if insanity were an excuse, it might be true that the threat of punishment would not be

useful in preventing the genuinely insane person from committing a prohibited act. At the same time, the punishment of an insane offender might be useful in deterring non-insane offenders from cheating courts or juries by pretending that they were insane[74]. Hart writes that 'the utilitarian rationale...seems to destroy the entire notion that in punishing we must be fair to the particular criminal in front of us and the purpose of excusing conditions is to protect him from society's claims ...we look on excusing conditions as something that protects the individual against the claim of the rest of society. Recognition of their excusing force may lead to a lower, not a higher level of efficacy of threats, yet-and this is the point- we would not regard that as sufficient ground for abandoning this protection of the individual, or if we did, it would be with the recognition that we had sacrificed one principle for another. Far more is at stake than the single principle of maintaining the laws at their most efficacious level'[75]

c) Hart's Rationale of Excuses:

Hart defends what he calls "the principles of justice" by restricting punishment to people who have voluntarily violated the law[76]. The need of excusing conditions, in Hart's view, is to emphasise 'the much more nearly universal ideas of fairness or justice and the value of individual liberty'[77].

Hart's argument rests on a "choosing system in which

individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways". Then he says that the law 'guides individual choice...by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose'[78]. From such a model, it follows that individuals who cannot be said to have "chosen" to disobey the law should not be held responsible. Hart writes that 'the criminal law respects the claims of the individual...as a choosing being, and distributes its coercive senctions in a way that reflects this respect for the individual. This surely is very central in the notion of justice...'[79].

The advantages of justice in the recognition of legal excusing conditions, as Hart claims, are: 'First, we maximise the individual's power at any time, to predict the likelihood that the sanctions of the criminal law will be applied to him. Secondly, we introduce the individual's choice as one of the operative factors determining whether or not these sanctions shall be applied to him. He can weigh the cost to him of obeying the law and of sacrificing some satisfaction in order to obey against obtaining that satisfaction at the cost of paying the penalty. Thirdly, by adopting this system of attaching excusing conditions, we provide that, if the sanctions of the criminal law are applied, the pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law'[80].

The law will fail to reflect the distinction between deliberately causing harm and causing harm accidentally which is of vast importance in the rest of social life. People will not understand why someone who has caused harm accidentally would be liable to punishment. The community will not respect the law which was assumed to benefit it.

Hart's view is that if the removal of legal excuses reduces crime, then the main benefits may lie not so much in the increase in individual freedom, as in the avoidance of harm, like physical and mental suffering.

It is argued that it is unjust to hold individuals criminally responsible for their acts and omissions unless those acts and omissions are themselves voluntary or are the foreseeable consequences of other voluntary acts and omissions. Criminal law accepts this principle in general. For example, in the case of murder, the crown must prove that death was the result of a voluntary act of the accused. Lord Denning says that 'the requirement that it should be a voluntary act is essential not only in a murder case, but also in every criminal case'[81]

As previously discussed the idea of excusing conditions does as not reflect just one theory. Hart's explanation of excuses is neither utilitarian nor is it compatible with a purely

utilitarian theory. It was found that the utilitarian theory is inadequate to give an explanation of all of the excusing conditions.

Hart argues that the aim of a "choosing system" is to prevent future crimes and not, as the retributivist argues, to punish moral offenders or to pay back harm that offenders have done. Thus, whereas retributivists base their account of excuses, in terms of the general justifying purpose, on the retributive theory, Hart's rationale of legal excuses accepts utilitarianism as the general justifying purpose of punishment[82].

A retributivist would say that no person should be punished unless he is "morally guilty" or blameworthy for his conduct. Hart's notion is that unless an individual has the capacity and fair opportunity to avoid the punishment, it would be unfair to punish him for the benefit of society. By the retributive theory, therefore, those who commit an immoral act may be legally punished, whereas the "choosing system", which is adopted by Hart, requires that there must be social benefits in punishing, in addition to the requirement that no-one should be punished who could not help doing what he did.

It appears from what has been mentioned above that the essence of Hart's rationale is close to the retributive ideal. So it can be said that Hart's rationale is a version of a modified

retributive theory. As already mentioned above, Hart's ideals of fairness or justice assert the value of individual liberty[83]. Accordingly, Hart's principle of justice will give an agent more freedom to use the excusing conditions for his benefit. Justice according to Hart's approach, therefore, is wider than the justice which is adopted by the retributivist because the latter is restricted by "legal moralism" in this matter. Hart's view, therefore, appears to be more convincing than the retributivist's theory, particularly because it allows for the possibility of crimes which are not intrinsically morally wrong.

Having examined the theories of punishment, it is clear that while a modified retributivism is to be preferred, retributivism in its pure form must be rejected because it reduces any theory of punishment to simply amounting to the infliction of pain on the guilty.

Hart's idea of a modified retributive theory at least involves fairness and justice and places value on individual liberty. The position seems to be that Hart's modified theory at least is not restricted to the notion of imposing "morality". We have seen in chapter one that the definition of crime which is closely linked to morality is rejected by modern theorists and writers' who stress the significance of criminal procedure and the imposition of punishment as its defining features.

Hart's theory is similar to the compromise theory adopted by Ten. His theory begins asking questions about justice; the answers to the questions forms his theory of punishment. In assesing one theory of punishment against another, it is argued that Hart's analysis or tests should be applied. Accordingly, we should ask what is the justification for the general practice of punishment? Then we should identify who should be punished and finally the degree of severity of the punishment. Hart's theory is less rigid than either the utilitarian model or retributive theory; it manages, or at least is a more realistic attempt, to equate punishment with the concept of justice and fairness. The view put forward by Hart is also capable of keeping pace with the changes in a modern society, particularly when the categories of so-called excusing conditions are expanding. This will be seen in chapters 3 and 4.

What we can say, at this stage, is that the various theories of punishment do reflect different political and social climates and different governmental approaches. One of the tests of any theory of punishment is whether it allows "excusing conditions" and how the justification for excuses fits with the general theory of punishment. We have seen that to understand ideas about excusing conditions it is necessary to examine the notion of responsibility, and criminal responsibility in particular. The broad view is that excuses arise in circumstances where persons are said to be not blameworthy or not fully blameworthy for

actions which are normally said to be criminal. Hart's conformity principle makes sense since the principle recognises that certain condtions affect individuals in such a way that they are unable to obey the law. Hart's analysis defends the moral basis for the legal principles of responsibility and his justification of excuses is the best in terms of the general purposes of criminal law. He is correct when he defends the principles of justice by limiting punishment to those who voluntarily break the law. The so-called "choosing system" suggested by Hart makes more sense of excusing conditions, and is more firmly grounded in the general justification of punishment. It is argued in this thesis that some persons with mental illness or mental handicaps lack the capacity to understand or ability to choose which are necessary to satisfy Hart's requirements for the infliction of punishment, but that this has to be decided in each individual case. Where the lack of capacity of understanding or choice is the result of a mental illness or mental handicap it may be legitimate to detain the "offender", and to administer treatment, until either

(i) he is no longer ill in a way which makes him dangerous or

(ii) he is no longer dangerous or

(iii) he has been detained for a period which is proportional to the gravity of the harm done by his act, even if he is still dangerous.

In some (grave) cases, provided that prediction is accurate, grounds of public welfare or utility may override Hart's criteria

of fairness. This is not compatible with a strict application of Hart's position, but it takes seriously the implications of his general justifying aim for punishment (and does, in my view, for treatment) in cases where the offender who lacks mens rea remains dangerous. In other words Hart's choice principle can apply to normal cases, but not to all cases. Nevertheless such is the seriousness of the injustice of detaining people who do not meet Hart's criteria, that we must look for ways of limiting the restriction of their liberty. This is why I suggest later that it is in the spirit of Hart's approach to limit any detention according to the mental condition of person who is acquitted or detained.

Hart himself notes the problem presented to his theory by mentally disordered persons in his discussion of Wootton's approach for the elimination of responsibility and puts the issue to one side without adequate discussion as to how his own proposals are compatible with his general principles. Hart says that Wootton makes a 'crude...dichotomy between "punishment" and "prevention"'[84]. Hart accepts the views of other critics of Wootton that she relies too heavily on the argument that the question whether a man could have acted differently is "in principle unanswerable", and that we do not usually have clear evidence to answer it. He suggest that Lady Wootton is arguing 'that a man's responsibility or capacity to resist temptation is something buried in (his) consciousness, into which no human

being can enter, known if at only to him and to God: it is not something which other men may ever know; and since it is not possible to get inside another man's skin, it is not something of which they can ever form even a reasonable estimate as a matter of probability'[85]. Although Hart concedes that Wootton may be correct in stating that 'the evidence put before courts on the question whether the accused lacked the capacity to conform to the law, or whether it was substantially impaired, at the best only shows the propensity of the accused to commit crimes of certain sorts'[86], he criticise Wootton's idea of eliminating mens rea for three reasons:

The first relates to individual freedom. Hart says that if we do not have mens rea for a conviction then there is more possibility of the state or officials interfering with our lives. Secondly, compulsory medical treatment might be regarded as an alternative form of social hygiene without paying attention to the question of responsibility. Hart's third criticism is that if we remove "mens rea" from the criminal law then the position becomes unsatisfactory[87]. He says there are some socially harmful acts which should always be seen and treated as criminal, because they can only be identified by reference to intention or some other mental element. Hart gives the example of the idea of attempt to commit a crime. He says that 'it is obviously desirable that persons who attempt to kill or steal, even if they fail, should be brought before courts for punishment or treatment; yet what distinguishes an attempt which fails from an innocent activity is

just the fact that it is a step taken with the intention of bringing about some harmful consequence'[88].

He concludes that while his three criticisms are not impossible to overcome, many people do not want to move towards a "Brave New World"[89].

His own position is, however, too cautious in giving so much weight to his requirement of the capacity to choose. This is noted by Lacey in her recent book State Punishment where she argues that 'it seems implausible that we should always be willing to accept fairness as an absolute constraint upon the pursuit of utility'[90]. Lacey considers that Hart fails to provide a principle for determining when fairness may be overriden in unusual cases. In this thesis I suggest an approach which provides such principles, but keeps closely to the fundamental importance of fairness or justice, as Hart analyses.

A major difficulty here, and this point is explored in the next chapters, is that predictions in relation to the behaviour of persons with mental disorder are no more accurate than those for person who are normal. It cannot be assumed that because someone is diagnosed as mentally ill we are able to predict his future conduct.

On the other hand, it could be argued that Hart's

responsibility criteria do not apply to those who are being detained for "treatment" rather than punishment. The answer to this is that detention to prevent harm, even if it involves treatment, is undoubtedly a form of punishment. Such treatment meets the criteria set by Hart, stated at page(55) of this chapter, namely; pain or unpleasant consequences; because of an offence against (legal) rules, an actual or supposed offender; intentional administration by an authority/state. The person is not being detained and "treated" simply for his own good. It would appear that, if mentally ill people often lack capacity and choice, then they should not be processed by the criminal law system. Yet if they are not to be ignored by the law there has to be some way of dealing with the consequences of their behaviour, and, whatever we call this mode of intervention, it raises issues similar to those involved in the philosophy of punishment.

It is clear from Hart's requirements for the infliction of punishment that mental disorder has to have an affect on an individual's capacity to understand or ability to choose. Accordingly, the meaning of mental disorder in both medical practice and criminal law has to be established. On the other hand, despite the fact that there are difficulties in finding an appropriate solution for the problem of correlating the psychiatrist's and the lawyer's understandings of mental disorder, Hart's approach (choosing system) may offer some help with this problem. According to this system, it seems that there

is an independent duty for the psychiatrist from the duty of the lawyers to diagnose the mental disorder of the accused and discover the effect of this mental disorder on the accused's capacity or choice when he committed crime. This point is developed later in chapter three.

FOOTNOTS

CHAPTER TWO

1. Hall, Studies in Jurisprudence and Criminal Theory, 1958, p.242; see also, Lacey, State Punishment, 1988, where she states that arguments of punishment can only be developed and defended within the content of an integrated philosophy.
2. Mabbott, "Professor Flew on Punishment", 1955, 30, philosophy, vol.xxx 256-265.
3. There are many meanings of punishment which are given by sociologists and psychiatrists. for more detail see Durkheim, The Division of Labour in Society, 1960, p.81-90.
4. Hart, 1968, op.cit, p.4; see also Flew,"The Justification of Punishment", 1954, 29 Philosophy, 291-307; Benn, "An Approach to The Problems of Punishment", 1958, 33, Philosophy, 325-341.
5. Lacey, op.cit, pp.46-53.
6. Feinberg, "Problematic Responsibility in Law and Moral", 1962, 71, Phil. Rev., 340-351; Hart, 1968, op.cit, p.293, where he asserts that it is one of the defining features of legal punishment that it expresses the community's condemnation of the offender's act.
7. Hart, 1968, op.cit, p.207.
8. Feinberg, "Problematic Responsibility in Law and Moral", 1962, 71, Phil. Rev., 340-351; Hart, 1968, op.cit, p.263, where asserts that it is one of the defining features of

legal punishment that it expresses the community's condemnation of the offender's act.

9. Lacey, op.cit, p.27, where she has described this as "forward-looking justification of punishment".

10. Mabbott, An Introduction to Ethics, 1966, pp.127-128.

11. Bentham, An Introduction to the Principles of Morals and Legislation, 1948, ch.1 and 2.

12. Ten, Crime, Guilt and Responsibility, 1987, ch.2.

13. Goodhart, English Law and The Moral Law, 1953, p.93; for more detail see Shohoun, "The Moral Dilemma of Penal Treatment", 1963, Juridical Review, p.135; Morris and Colin, Studies in Criminal Law, 1964, pp.146-196; Lafave and Scott, op.cit., p.25; Mabott, op.cit. pp.128-131; Kenny, Freewill and Responsibility, 1978, ch.4; Eckhoff, "Justification of Punishment", 1983, NR1, Phil. and Cr. L., 12-14

14. See, Gunn, Psychiatric Aspects of Imprisonment, 1978, where he shows that some rehabilitative processes have been successful in terms of reducing neurosis and other mental health problems.

15. Morris, "Moral Aspects of The criminal Law" 1940, 49, Yale, L. J., p.42; for more detail see, Mabbott, op.cit., pp.128-131; Lavave and Scott, op.cit., pp.22-23; Ten, op.cit., ch.2.

16. Benn and Peters, Social Principles and The Democratic State, 1959, ch9.

17. See p.69 of this chapter.

18. Kenny, op. cit., pp.69-70.

19. Kant, Philosophy of Law, 1887, pp.194-198; see also Page, Crime and The Community, 1937, p.71, where Page referred to Stephen who asserted that 'it is highly desirable that criminals shall be hated, that the punishment inflicted upon them shall be so contrived as to give expression to that hatred to justify it'.

20. Lacey, op. cit., p.17, where she explores this aspect of the retributivist theory as "backward looking".

21. Kenny, op.cit, pp.70-73.

22. Report of The Royal Commission on Capital Punishment, 1949-1953, Cmnd. 8932, para. 53.

23. Ten, op.cit., p. 75.

24. Kant, "The Right to Punish", in Murphy (ed.), Punishment and Responsibility, 1973, p.37.

25. Hart, 1968, op.cit., p.3.

26. Ibid, p.12.

27. Ten, op.cit., p.78.

28. Ten, op.cit., p.79

29. See Lacey, op.cit., p.58, where she argues that the significance of the concept of responsibility flows principally from the fact that both retributive and utilitarian theories of punishment attach a spacial importance to responsibility as a necessary condition for a justified punitive response.

30. Hart, "Ascription of Responsibility and Rights", 1949,

Proceedings of the Aristotelian Society, New Series, 171-94.

31. Feinbereg, "Action and Responsibility", in White (ed.), The Phil. of Action, 1973, pp.95-119.

32. Duff, "Mental Disorder and Criminal Responsibility", 1983, Phil. and Cr. L., 19; see also Lacey, op. cit., p.74, who argues that 'the meaning, form and function of punishment in cases of insanity, would be different from that in cases of sane offenders...'.

33. Wootten, Crime and Penal Policy, 1978, pp.220-239, Wootton, Crime and Criminal Law, 1963; Wootton, Social Science and Social Pathology, 1959.

34. See Lacey, op.cit., p.61, when she supports Wootton's position.

35. Ross, On Guilt, Responsibility and punishment, 1975, p.80.

36. Malcolm, Problems of Mind, 1972, p.100.

37. Wasik, "Duress and Criminal Responsibility", 1977, Crim. L.R., 453.

38. D.P.P. for Northern Ireland v. Lynch (1975) A.C.653.

39. Ross, op.cit., p.81.

40. See Feinberg, pp.56-57 of this chapter.

41. Sexual Offences (Amendment) Act, 1976; R v. Morgan and Ors (1976) A.C.182, where the learned judge says: 'Therefore, if the defendant believed or may have believed that Mrs. Morgan consented to him having sexual intercourse with her, then there would be no such intent in his mind and he would be not guilty of the offence of rap'; see also P. v. Worxer

(1969) 2 A.C.256.

42. Homicide Act, 1957.

43. Duguid v. Fraser 1942 J.C.1.

44. Duguid v. Fraser 1942 J.C.1; See also Clark v. H.M. Adv. 1968 J.C.53, where Lord Justice Clerk says: '...but before you can bring a criminal charge, you have got to prove that it was wilful in the sense of being deliberate or intentional...'

45. Hart, 1968, op.cit., p.227.

46. Dubin, "Mens Rea Reconsidered: A Plea for A Due Process Concept of Criminal Responsibility", 1966, 18, Stan. L. Rev., 322-395.

47. Brett, An Inquiry Into Criminal Guilt, 1963, P.77,146.

48. Bradley, Ethical Studies, 1927, p.26.

49. Kant, op.cit., pp.47-50; see also, Gross, A Theory of Criminal Justice, 1979, p.17, where he says 'if we take the view that crimes are moral wrongs, and are punished as such, we are forced to conclude on two accounts that its design, the criminal law, is barbarously unjust'.

50. Mundle, "Punishment and Desert", in Action, (ed.), The Philosophy of Punishment, 1969, p.78.

51. Ten, op.cit., p.74.

52. Brett, op.cit., p.77, 146.

53. Ross, op.cit., p.15.

54. Hall, General Principles of Criminal Law, 1960, p.167.

55. Ibid, p.166.

56. Denning, The Changing Law, 1953, p.122.

57. Hall, 1960, op.cit., p.164.

58. Hart, 1968, op.cit., p.37.

59. Ibid.

60. Ibid; see also, Gross, op.cit.,1979, p.15, in which he says that 'even if all crime can confidently be said to be morally wrong, it is a serious mistake to suppose that conduct with which the criminal law concerns itself is prohibited and made punishable for the reason that it is morally wrong....If we think that moral wrongs are the main concern, we are encouraged to adopt rules to prevent moral wrongs through no dangerous conduct is involved...'

61. Wasserstrom, "Hart and The Doctrines of Mens Rea and Criminal Responsibility", 1967, 356, Univ. of Chicago L. Rev., pp.92-126.

62. Hart, op.cit., pp.38-39.

63. Ibid; see also, Gross, 1979, op.cit., p.137, where he writes that 'it announces that criminal liability is unjust if the one who is liable was not able to choose effectively to act in a way that would avoid criminal liability, and because of that he violated the law '.

64. Ibid.

65. Lynch v. D.P.P. for Northern Ireland (1975) 1 ALL E.R. 913 at p.917,919, per Lord Morris. His Lordship referring to a pardon for non-responsibility; see also Lord Wilberforce at p.930, more detail will be shown below under a heading

"Hart's rationale".

66. Bentham, op.cit., p.158.

67. Ibid, ch. XIII.

68. Ibid, p.161.

69. Williams, 1961, op.cit., p.438; see also Gordon, 1978, op. cit., pp.350-351.

70. Porter (1936) 55 C.L.R. 182 at p.186.

71. Glover, Responsibility, 1970, p.69; see for more detail Sprigge, "Punishment and Mental Responsibility" in Milton (ed.), Punishment and Human Rights, 1974.

72. Hart, 1968, op.cit., p.19.

73. Glover, op.cit., pp.69-70.

74. Hart, 1968, op.cit., p.19.

75. Ibid, pp.43-44.

76. Ibid, pp.17-24.

77. Ibid, p.27; see also, Dublin, "Mens Rea Reconsidered: A Plea for A Due Process Concept of Criminal Responsibility", 1966, 18, Stan. L. Rev., p.343, where he suggests that such an individual liberty rationale of excuses would be based upon at leas four assumptions: (1) there should be certain limitations upon the power of the state to abridge the liberty of the individual (1) in the criminal law sanction poses the greatest threat to the liberty of the individual, it brings the full weight of state power to bear upon him, represents community condemnation of his behaviour, and though the process of incarceration, deprives him of the

richness of full human experience (3) one of the limitations upon the power of the state should be that the criminal sanction may not be involved against the individual when his behaviour has not obedience (4) a further limitation should be that individual liberty may not be abridged unless the purposes of punishment, as a practice, are served by punishment in the individual case.

78. Ibid, pp.43- 44.

79. Ibid, p.49.

80. Ibid, p.47.

81. Bratty v. Attorney General for Northern Ireland (1963) A.C.286.

82. Burgh, "Do the Guilty Deserve Punishment?", 1982, 79, J. Phil. pp.198-201.

83. See pp.63-69 above.

84. Hart, 1968, op.cit., pp.200-209.

85. Ibid.

86. Ibid.

87. See pp.75-77 above for more criticisms to Wootton's theory.

88. Hart, 1968, op.cit., p.209.

89. Ibid.

90. Lacey, op.cit., p.49.

CHAPTER THREE

CHAPTER THREE

MENTAL DISORDER IN MEDICAL PRACTICE AND CRIMINAL LAW

1. Introduction:

Mental disorder presents many problems regarding the issue of man's responsibility for his actions. As will be shown, the main problem which lies in the test of legal insanity is whether there is "mental illness" or "disease of the mind" or "mental disease" or "mental disorder". The common term "mental disorder" or its equivalent is a necessary criterion for deciding legal insanity or criminal responsibility, but it is not sufficient by itself. If the criterion of mental disorder is met, then it is necessary to ask questions about the effect of mental disorder on "capacity" or "choice" (capacity in this study is understood to be close to "knowledge capacity" or "understanding capacity" or "cognitive capacity", and similarly "choice" is related to "control" or "choosing").

The existence of mental disorder does not always exclude criminal responsibility because not every type of mental disorder affects the "reasoning power". It can be argued that criminal responsibility should be judged according to the impact of mental disorder on the "capacity" or "choice" of the individual. Namely, the individual is legally regarded as insane when the mental disorder causes impairment of "capacity" or "choice"[1].

Mental disorder is undefined[2] and the lack of general agreement on one definition for mental disorder has made matters complicated. For example, sometimes the same person might be labelled as mentally disordered by one professional but not by another. This difference of opinion about definition is considered to be explained by the special problems posed for psychiatrists due to the relative lack of independent laboratory information upon which to base their diagnoses[3]. To demonstrate the problems of the subject, some psychiatrists have suggested that it may be misleading to talk of "mental disorder" at all[4].

The aim of this chapter is not to attempt a comprehensive analysis of the problem, but will concentrate mainly on the points which have an important bearing on the problems of the insanity defences and their consequences.

Special attention will be focused on the following points:

1. The meaning and development of the concept of mental disorder.
2. Mental disorder in the context of the criminal law.
3. The role of the psychiatrist.
4. The Iraqi Criminal Law attitude to mental disorder.
5. The medical concept of mental disorder.

2. The Meaning and Development of The Concept of Mental Disorder.

According to the English Mental Health Act 1983, "mental disorder" means 'mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind'; and "mentally disordered" shall be so construed"[5].

The Mental Health (Scotland) Act 1984 states that "mental disorder" means 'mental illness or mental handicap however caused or manifested...'[6].

According to the above definitions, in practice "mental illness" is usually applied to certain mental disorders excluding mental deficiency (mental handicap) and psychopathic disorder. So, is it true that mental handicap and psychopathic disorder are not properly regarded as "mental illnesses"?

It is submitted that "mentally ill" is distinct from "mentally handicapped" in many aspects (medical, legal, and administrative practice)[7]. Mental handicap is generally exhibited from birth or from a few days after[8]. So mental handicap arises when a person's mind has not fully developed, and he is incapable of looking after himself, learning and thinking[9]. Accordingly, it is considered that mental handicap can not be cured, but it can be improved by education, social

care and exercise[10]. However, mental illness, which includes "psychoses", "neuroses" and possibly "personality disorder", defined later, can usually occur at any stage of life. It may be argued that all kinds of mental illness may respond to treatment or therapy[11]. It appears that, because mental handicap can not be cured, it is not regarded as "mental illness".

Similarly, should psychopaths be considered "bad" or "ill"? There are many psychiatrists who would not consider psychopathy as mental illness, yet in actual fact it can sometimes be treated successfully: Whitehead says that part of the meaning of "psychopathy" is "abnormality of the psyche"[12]. As a result, since mental illness includes all of psychological illness, we can regard "psychopathy" as "mental illness". Psychopathy is said to be due to the effect of childhood experience or to brain damage. It may be that an appropriate treatment can be administered and is even necessary for some psychopathic patients[13]. It has to be noted that knowledge of the causes does not always give the knowledge to cure.

The English Mental Health Act 1959 defined "psychopathic disorders" as follows: '...a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient and requires or is susceptible to medical treatment'[14].

The Mental Health Act 1983 has omitted the sentence "and requires or is susceptible to medical treatment" from the definition of "psychopathic disorder"[15]. This may have been for the purposes of the Act. From the definition alone it looks as if psychopathy is a form of bad behaviour (e.g. seriously irresponsible, etc.) but since it is undesirable abnormal behaviour which can be treated it is properly regarded as a mental illness. The Butler Committee admitted this in that they did not deny that psychopathic patients need the appropriate treatment[16]. Thus, because the psychopathic patient needs the appropriate treatment, psychopathy is properly regarded as a "mental illness". Whereas since mentally handicapped patients need training, education and social care, this does not fall within the category of "mental illness".

Despite the fact that the Mental Health (Scotland) Act 1984 does not use the word psychopath but refers to psychopaths in the definition of "mental disorder" in the same terms as the English Mental Health Act 1983, it can be taken that the term "mental disorder" includes "psychopathic disorder". In practice the Scottish Criminal Law does not deem "psychopathic disorder" as mental illness[17]. Since "psychopathic disorder", however, needs appropriate treatment, it can be regarded as falling within the category of mental illness.

Mental illness is sometimes used as a synonym for mental disorder, but mental handicap can be distinguished from mental illness, although it is regarded as falling within the category of "mental disorder" in law.

It is useful here to define the meaning of the term "appropriate treatment". "Appropriate treatment includes medical treatment, but medical treatment is only one aspect of many types of appropriate treatments. Accordingly "appropriate treatment" includes any activity which helps the patient to full recovery. So, there are many facilities that should be available, such as family doctors, special people to deal with patients , good hospital services and a suitable environment. These facilities should have some effect on the patient[18].

The Mental Health Scotland Act 1984 has a definition of "medical treatment" in sec.125: '"medical treatment" includes nursing, and also includes care and training under medical supervision'[19].

It must be noted, however, that many psychiatrists believe that there is no cure for psychopathy, but its effects may be controlled by custodial "care". It has to be asked whether this amounts to "medical" cure?

The Development of The Concept of Mental Disorder:[20]

History shows that the concept of mental disorder is not static, and this is because our ideas change with increased knowledge and on what is accepted as mental illness. The concept is modified with the changing condition of life, and mental disorders now include not only those which have an organic or physical cause, but also the purely functional disorders.

Mental disorder has been recognised for many centuries, but only in recent years have attempts been made to study and understand the condition. Although references to mental disorder were made by the early Egyptians, the true history of psychiatry (the science which studies mental disorders) started with the Greeks, and was followed by the Romans. Until then mental disorder was regarded as due to supernatural influences or due to possession by the devil.

An early reference to the treatment of the insane is found in Plato's Republic: 'If any one is insane let him not be seen openly in the city, but let the relatives of such person watch over him at home in the best manner they know of, and if they are negligent let them pay a fine'.

Hippocrates (460-375 BC) believed that the brain was the organ of the mind, and that madness arose from a disturbance of the brain. So he denied that there was anything occult or

mysterious about the occurrence of a mental disorder. He thought disturbance of the brain was caused by an imbalance of the elements (fire, air, earth and water) and of the humours (blood, phlegm and bile).

A belief that mental disorder was due to demons and witchcraft was to be found in the Middle Ages. The treatment of mental disorder was left to priests and superstitious beliefs in witchcraft grew stronger.

In the early Islamic period several causes of madness were identified: congenital, passionate and bilious. People with these disorder were distinguished from a group called the "sane insane" which included defectives and those who only demonstrated disturbances of judgement and temperament.

Lunacy legislation in England started in 1320 during the reign of Edward II and the property of lunatics was vested in Crown. Bethlehem, which was founded in London in 1247, was the first hospital in Britain to care for the insane.

In France, Pinel emphasised clinical observation and considered psychological factors among other factors in the study of mental disorders; Esquirol (1772-1840) emphasised the need to have statistics concerning patients. He was the first to define hallucinations and illusions, and his definition is still in use

today.

In 1845 Griesinger stated that "mental diseases are brain diseases", and so the causes of mental illness were identified with brain damage or injury.

The Clinical Approach:

Kahlbaum (1828-1899) was the first to recognise mental illness as a "disease". Emil Kreapelin (1856-1926) adopted this basis to build up his classification of the various forms of mental illness. Kreapelin had set criteria which had to be fulfilled in order to establish a disease entity. These criteria include the causes of the disorder, symptoms, symptomatology, course, outcome and pathological findings. In the majority of cases, however, not all these criteria could be satisfied, so he was forced to consider purely psychological symptoms, clinical phenomena, the course and outcome of various illness. Nevertheless, he succeeded in differentiating manic depressive psychosis and paranoia.

Since Kreapelin demanded the above conditions be fulfilled in order to consider mental illness as a disease, there has been considerable effort to find the possible causes and to detect pathological changes in the brain. Studies of genetic and environmental factors have failed to find a single cause for most mental illnesses. Also, studies of the anatomy and biochemistry

of the brain have had very limited success in discovering the cause of mental illness, although they have helped in the field of treatment of mental illness. After a century, understanding of mental illness is mainly based on observing the behaviour of the patient. These factors have left the concept of mental illness as a disease entity exposed to very strong criticism from sociologists, and lawyers.

Anti-Psychiatry Moves:

The last century and the first half of this century had many psychiatrists working on the problems of mental disorder and treatment. Yet, the concept of "disease" applied to the field of psychiatry is challenged. Attempts have been made to eliminate the concept altogether by declaring that a mental disease does not exist, that mental illnesses are "ideological constructs or political expedients". In place of the mental disease concept, it is argued that problems of timing, faulty learning, maladaptation, communication disorders, social disturbances, and identity crises are responsible. These views reflect the distrust of psychiatric diagnosis and the lack of "physical evidence". Szasz says that 'disease means bodily disease. Gould's Medical Dictionary defines disease as a disturbance of function or structure of an organ or part of the body. The mind (whether it is) is not an organ or part of the body'[21]Hence it cannot be diseased in the same sense as the body can[22].

Most psychiatrists, however, still agree with the application of the disease concept to most conditions. In other conditions, specifically psychopathic personality, psychiatrists and psychologists adopt contradictory positions.

A good example which illustrates the above point is alcoholism. Several experts argue that it is a disease state, others believe that the concept may be applied to some forms of alcohol abuse but not to others. Others reject the notion of alcoholism as a disease altogether. Davies says that the contradictions are because of lack of a single definition of both alcoholism and of disease, as there are more than 30 definitions of alcoholism and at least three definitions of disease.

The conclusion is that although mental disorders have been known since the beginning of history, their aetiology, pathological changes, psychological behaviour and social levels remain difficult to understand. More research is required to treat these problems, but research needs to be based on firm foundations and a reliable system of classification. The purpose of diagnosis, as the psychiatrists point out, is treatment and research and not accountability. The American Psychiatric Association's Diagnostic and Statistical Manual (DSM-III) attempts to provide clear descriptions of diagnostic categories in order to enable clinicians and investigatiors to diagnose, communicate about, study, and treat various mental disorders. The

use, however, of this manual for non clinical purpose, such as determination of legal responsibility, competency or insanity or justification for third-party payments, must be critically examined in each instance within the appropriate institutional context[23].

The mental disorders with which we are concerned in criminal responsibility are distinct from those listed by DSM-III as will be demonstrated later.

3. Mental Disorder in The Context of Criminal Law:

The Royal Commission on Capital Punishment believed that 'it has for centuries been recognised that if a person was, at the time of his unlawful act, mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the Criminal Law'[24].

The Royal Commission on Capital Punishment believed that it is not necessary to have a definition of insanity, because it was a moral question that can be decided by the jury's collective moral sense. Professor N. Walker asks: 'By what criterion could one tell whether this or that case "ought" to have included? Could the criterion be expressed in words, or was it ineffable? If in words, were they quite unsuitable for use in a judge's summing up?[25].

The McNaughten Rules, which contain the "official" English definition of insanity, set as the test of criminal responsibility whether 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 that what he was doing was wrong'. Many other jurisdictions have also adopted a legal test of criminal responsibility, such as that developed in the U.S. case of McDonald as a 'substantial disorder of thought or mood which significantly impairs judgement, behaviour, capacity to cope with the ordinary demands of life'[26]. Such tests do not, however, provide us with an accurate definition of mental disorder.

Establishing specific rules, or requiring special types of proof, would narrow the experts' and jury's roles. For example, the suggestion of a legal definition would make the trial judge exclude evidence on certain mental disorders[27], thus removing the matter from the jury. Both the expert and jury are,therefore, denied any flexibility in determining what is mental disorder. To illustrate this point, it is worth considering further the McDonald definition of mental disorder quoted above. Lord Chief Justice Tinel states that 'our purpose now is to make it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a "mental disease or defect" for clinical purpose, where their concern is treatment,

may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. Consequently, for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially impairs behaviour controls. Thus the jury would consider testimony concerning the developments, adaptation, and functioning of these processes and controls'[27]. According to this definition, evidence of anxiety disorder or personal disorder would be excluded since it is not an "abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behaviour controls". Therefore, it has been left to the court to offer instructions to the jury on the basis of the definition. The same conclusion is equally applicable to the McNaughten definition of insanity.

It can be concluded from the above that it is difficult and not necessarily desirable to ask for a precise definition of mental disorder in the context of legal "insanity", and it has been left for the law - judge, and jury - to determine. This leads us to the question of the role of psychiatrists.

4. The Role of The Psychiatrists:

Whose responsibility is it to decide whether an accused person is mentally disordered? Is it the judge, jury, or experts?

In the nineteenth century the function of medical witnesses became important in trials where there was evidence of mental disorder in the person concerned.However, we have access to very few accounts of the role of the medical witness in early criminal trials[28]. This can be attributed to the following factors:

I. Lack of sufficient advanced knowledge.

II. Neglect of the value of an expert's evidence.

III. Availability of insanity defences. In most cases no experts would have been needed. In other words, the defence of insanity was limited to a few cases where the condition of the accused, as being insane person, was very clear.

In McNaughten's case, four psychiatrists were called by the court to give testimony concerning the accused's state of mind. Only two of these psychiatrists had interviewed the accused and were summoned for the defence. The evidence of the other two psychiatrists was considered because of their reputation in the field of mental disorder, although neither of them had any contact at all with the accused. After the decision, there was a disagreement as to whether or not the evidence of these two psychiatrists should have been considered by the court. As a result the House of Lords asked the judges to answer several questions, one of which dealt with the problem of whether a psychiatrist who never saw the accused prior to the trial, but who was present during the whole trial and the examinations of all the witnesses, should be asked his opinion as to the state of

the accused's mind. It was then established that such evidence was only to be allowed if it was concerned with the general issue of mental disorder and not with that particular case[29].

Lawyers can now look at whatever appears in the Diagnostic and Statistical Manual of Mental Disorder (DSM-III)[30] and International Classification of Disease (ICD 9)[31] to formulate an exact definition of mental disorder. "DSM-III" and "ICD 9" include both organic and functional mental disorder. "DSM-III" extended the list of mental disorders to include: tobacco dependence, compulsive gambling, obsessive driving, insatiable greed, and homosexuality. As has already been indicated, DSM has been prepared for psychiatric purposes and not legal ones. The purpose of diagnoses for the clinician is treatment and research, not accountability[32]. The test of criminal responsibility does not require the expert to make a specific diagnosis of disorder or even to determine whether the disorder is functional or organic. The test refers to a general criterion of mental disorder defect. Eysenck maintained that there is very little correlation between the diagnoses made of some patients by different psychiatrists[33]. The main purpose of criminal responsibility is to find out whether "capacity" or "choice" was lost or impaired by mental disorder (insanity) at the time the crime was committed[34]. We have already discussed the way lawyers and judges understand the concept of "responsibility" in crimes in the last chapter.

There is a disagreement among psychiatrists and jurists in deciding the test of criminal responsibility in relation to mental disorder. While The Butler Committee[35] and the American Psychiatric Association believe that the test should be limited to severe mental disorder, the APA argue that insanity acquittals should be granted only for "impaired cognition" and not for "impaired control". The APA suggested standard is that the defendant be 'unable to appreciate wrongfulness of his conduct because of a severely abnormal mental condition that grossly and demonstrably impairs a person's perception or understanding of reality'[36].

It must be noted that the Butler committee and the American Bar Association's (APA) suggestion of limiting the test to severe mental disorder will exclude kleptomania, psychopathy, and exhibitionism, although these conditions affect an offender's "capacity" or "choice". The APA also state that the process of functional or organic impairment need not be a chronic or enduring one. The APA's Criminal Justice Mental Health Standard used the term "mental disease" or "defect" to label either impairments of mind, whether permanent or temporary, or mental handicap which affected the mental or emotional processes of the accused at the time of the alleged offence[37].

We must ask the question to what extent "legal" insanity can

be equated with a recognised psychiatric definition? The law has the following possible approaches in reaching conclusions about sanity of the accused:

I. It could adopt guidelines in which every recognised condition amounts to legal insanity; or

II. It could establish its own standards which may or may not match up with psychiatric diagnoses.

III. It could adopt a compromise position, which will be discussed below.

The court treats psychiatric evidence with suspicion because, apart from being speculative in many cases, psychiatry is a highly inexact discipline. The law, therefore, even though it uses outdated psychiatric terminology, i.e."insanity", is unhappy about accepting without question mental disease as a basis for the test of legal irresponsibility. Also the law is reluctant to accept legal decisions by others, i.e."doctors", because their evidence in this field is persuasive but cannot be definitive[38]. This can be supported by the case of H.M.A. v. Kidd, where it was said that '...you must have regard to the evidence which has been given by the medical witnesses, but the medical evidence by itself is not conclusive'[39].

Setting its own independent standards is an acceptable solution for the legal process. This has been made very clear in a recent Scottish case in which it has been confirmed that the

law will set its own standards. It is said in Brennan v. H.M.A.: 'What is insanity, according to the law of Scotland, for the purpose of a special defence of insanity at the time? The question has nothing to do with any popular view of the meaning of the word insanity, nor indeed is it a question to be resolved upon medical opinion for the time being. It is, on the contrary, a question which has been resolved by the law itself as a matter of legal policy...'[40].

This clearly confirms the view that has been suggested and reinforces the point that judges dislike handing over decisions to the medical profession.

It seems, therefore, the court has no option but to take a compromise position. A verdict of insanity[41] is not just a judgement about mental disorder but whether that and other facts lead the judge or jury to excuse the accused from the action taken. No definite criteria can be adopted to separate the blameworthy from the non-blameworthy. If expert psychiatric testimony stands unrefuted, it should be accepted[42]. Even where such evidence is accepted the law insists, however, that it is not just concerned to discover whether or not the accused was mentally disordered but also whether his mental state was such as to make him legally non-responsible. It has been clearly stated that '...the question is not merely whether he was suffering from a defect of reason due to disease of mind but whether the

defect was such as to render him not responsible for his action'[43].

Gordon has tried to establish a balance between the conflicting approaches of law and psychiatry. He realises that in the normal situation legal insanity is the result of mental disease and that, therefore, brings it very close to medical ideas concerning mental disorder[44]. Gordon argues that 'the doctor who says the accused committed the crime because he was suffering from paranoia is no more answering a legal question than is the doctor who says the deceased died from poison, or the handwriting expert who says a particular signature is forged; all these experts do is to give the law the facts to which the relevant legal principle is to be applied. And this is so whether that principle is about responsibility and insanity, or about the criminal nature of poisoning or forgery'[45].

This is due to a number of reasons:

a) Mental disorder constitutes only one aspect of legal responsibility or non-responsibility. Thus the psychiatrist speaks only on part of what the court is attempting to establish.

b) Psychiatric evidence may be seen as an unreliable and unsatisfactory basis for determination of questions relating to the culpability of the accused.

c) Courts may wish to exclude what are seen as excusing

conditions.

d) Formal justice can only be achieved by the consistent application of rules. Reliance upon uncertainties of conflicting psychiatric evidence minimises the law's effort to achieve formal justice.

It appears that the diagnosis of the offender as "mentally disordered" does not immediately mean that he is non-responsible because it is erroneous to say that every person who is mentally disordered is unaccountable in law[46].

There are many cases of people who are mentally disordered but there is no association between their mental disorder and the crime committed. The mental disorder of the offender must affect his "capacity" or "choice" when he committed the crime in order to determine his responsibility by courts.

Psychiatric testimony is speculative when it is related to a time and a situation where the psychiatrist was not present, because he could not assess the extent of effect that the mental disorder had on the offender's capacity or choice at the time of the crime alleged. It is therefore left for the judge or jury to decide from available evidence. It is emphasized that '...the medical evidence by itself is not conclusive. In coming to your decision you are entitled, and in duty bound, to regard the whole evidence'[47].

This is so for all mental disorder, including mental handicap, psychoses, neuroses, personality disorders[48], and physical illness with mental effects[49].

To sum up, it can be stated that while the psychiatrist may be an expert at assessing the existence of mental disorder, he is not an expert at assessing the accused's criminal responsibility. The duty of the psychiatrist is to diagnose the mental disorder of the offender and the duty of the court is to discover the effect of this mental disorder on the offender's capacity or choice at the time the alleged crime was committed or in bar of trial. Thus, it is not the place of psychiatrists to determine criminal responsibility but they may help the court to reach a conclusion where they recognise the existance of mental disorder and of physical illnesses which affect the brain.

5. Iraqi Criminal Law Attitude:

As yet, there is no Mental Health Code in Iraq. For legal purposes the Iraqi Penal Code, 1969, Article (60) states: 'A person is not criminally responsible if he lost his "capacity" or "choice" at the time of committing the crime by reason of "insanity" or "mental disorder"...if the mental disorder only impairs "capacity" or "choice" it must be deemed as "mitigating factors"[50].

There is no definition of the term "mental disorder" in the Iraqi Penal Code or any other Code in Iraq, but, from the practice of the courts, mental disorder includes psychoses, neuroses, personality disorders, mental handicap, and includes physical illness with mental symptoms[51].

The role of the psychiatrist in the Iraqi Criminal Law is illustrated in articles 230, 231, 232 of the Criminal Procedure Code, 1971[53]. According to these articles, the judge has absolute freedom to determine whether or not an accused needs to consult a psychiatrist about his mental state, even if the accused has applied to do so. The judge can accordingly decide that the accused was not responsible for an offence because he was insane at the time of the offence or he can stop proceedings by reason of the accused's insanity in bar of trial, without consulting psychiatrists. So the judge can depend purely upon his own satisfaction as to whether or not the accused is insane. He can reach this result from available evidence during the course of the trial or inquiry. In practice, we can find inconsistent decisions from the Iraqi Cassation Court in this field. The Iraqi Cassation Court has not settled on one clear direction to determine what is the role of psychiatrists in mental disorder cases. There are sharp differences between its decisions. Consequently, we can not offer a simple description of the system which is adopted by this court.

In some cases the Court of Cassation has accepted decisions of the Magistrate's court, refusing the request of the accused to be referred to a psychiatrist because he claims insanity at the time the crime was committed. A decision may also be taken in bar of trial for reasons of the court by virtue of Articles 230, 231, 232, of the Iraqi Criminal Procedure Code. These give the court the right to come to a decision, to its satisfaction, about the accused's mental condition, derived from any evidence available rather than just from a psychiatrist's evidence[53].

In other cases the Iraqi Cassation Court has dismissed decisions in which Magistrate Courts decided on an accused's non-responsibility by reason of his insanity at the time which he committed a crime, without consulting any psychiatrist. The Court of Cassation justified their decisions on the basis that the consultation with psychiatrists, in this matter, was very important for justice. So the Magistrate Courts could not make such a decision without consulting a psychiatrist[54].

The Iraqi Cassation Court, in some other cases, has gone further when it dismissed some decisions and asked the Magistrate Courts that they should ask the psychiatrist whether or not the accused was responsible for his act[55].

Despite the fact that the Iraqi Cassation Court is not settled in its decisions about the role of psychiatrists and

courts in determining an offender's mental disorder at the time of crime or in the bar of trial, it seems that its attitudes in most of the cases are in conflict with articles 230, 231 and 232 of Iraqi Criminal Procedure Code, 1971, where it states that the judge has freedom to consult psychiatrists[56].

However, as Gordon says, there is a connection between medical approaches to mental disorder and legal approaches to insanity, because legal insanity is the consequence of mental disease[57]. Therefore, an expert psychiatric testimony should be accepted as merely one aspect of legal responsibility or non-responsibility. Thus the court has to make its decisions after adopting the psychiatric evidence as a part of what the court is attempting to establish. In consequence, co-operation between both sides (courts and psychiatrists) is very important to reaching a just verdict, although the role of psychiatrist should be restricted to the issue of the mental states of offenders at the time of the alleged offence or in bar of trial. The role of the court should be connected with the extent of the effect of offender's mental disorder on his "capacity" or "choice" at the time of the alleged offence. Similarly, the court may determine the extent of the effect of mental disorder on the accused's capacity in bar of trial.

The Iraqi Criminal Law and any other criminal laws have to separate clearly the duties of the psychiatrist and the court in

this field, as already mentioned above. This attitude prevents both sides, courts and psychiatrists, from interfering in the other's discipline, and will create good co-operation between them to achieve justice and protection of society.

6. The medical concept of mental disorder:

There are several classifications which attempt to define the medical concepts of mental disorder (mental illness and mental handicap). The most important classifications are those in "ICD 9" and "DSM III"[58], and they contain a limited explanation of what mental disorder is. Trial judges or jurists who have an interest in criminal affairs have only a general idea about mental illness and mental handicap which have a bearing on crimes, i.e. mental illness which effect the capacity or choice of the sufferer[59].

It is beyond the scope of this section to deal with all types of mental disorder. Accordingly, the discussion is restricted to those conditions which are significant in circumstances where the individual sufferer comes into contact with the criminal law.

MENTAL HANDICAP: [60]

Mental handicap has been defined as a state of premature or arrested development of mind. There would appear to be variations in the words used to describe a person with a mental handicap. In

England and Wales the official term used to be "mental subnormality"; in Scotland until recently the term used was "mental deficiency"; in U.S.A. "mental retardation" has been used.

All of these terms describe the same thing but they vary in respect of their assessment of the individual. It must be noted that one term may be acceptable in one area but it may be considered offensive in another.

At present the term "mental handicap" seems to be a more acceptable label in the U.K. In 1983 England adopted "mental impairment " as its legal term whereas in Scotland in 1984 the term "mental handicap" was adopted. It must be stated from the beginning that mental handicap is a general term covering a wide range of disabilities and impairments and the categorisation of different levels of mental handicap varies.

In Scotland, nursing staff classify people with mental handicap according to their degree of independence, i.e. how much they can do for themselves. The terms are "high", "medium", and "low" dependency.

1. High dependency - applies to individuals who have a severe degree of mental deficiency to the extent that they can not protect themselves against physical dangers and depend on other people for care and protection.

2. Medium dependency - applies to individuals who have a medium degree of mental deficiency. They require some care and supervision.
3. Low dependency - applies to individuals who have a slight degree of mental deficiency such that they require some supervision but because they can benefit from education and training they should be able to adapt to society.

To decide precisely what amounts to mental handicap, importance is given to people's intelligence quotient (IQ) scores. The main systems in use in the classification of degrees of mental handicap is the World Health Organisation (WHO) system. In this system the (IQ) scores are the main factor and the degree of handicap are as follows:

Mild retardation	50 - 70
Moderate retardation	35 - 50
Severe retardation	20 - 25
Profound retardation	Less than 20

The English system, based on the classification of the Mental Health Act 1959, replaced by the Mental Health Act 1983, is divided into two levels, namely subnormality and severe subnormality. Severe subnormality is defined as a 'state of arrested or incomplete development of mind which includes subnormality of intelligence and is of a nature or degree that the patient is incapable of living an independent life or

guarding himself against serious exploitation or will be so incapable when of an age to do so'. Subnormality is defined as 'a state of arrested or incomplete development of mind (not amounting to severe subnormality) which includes subnormality of intelligence and is a matter of degree which requires or is susceptible to medical treatment or other special care or training of the patient'.

The British Psychological Society states severe subnormality is under an (IQ) of 55 and the subnormal range as being between an (IQ) score of 55 and 70.

Symptoms of mental handicap can be noticed among some of the elderly who are incapable of controlling or directing their behaviour correctly. Within the norms of society, this can be labelled as senile dementia.

Mental handicap might be inherited by birth or might be inflicted upon the sufferer during birth or shortly after it because of accidental illness, as is the case when the foetus is infected by syphilis or lack of vitamins or when the pregnant mother smokes or drinks excessively.

Some attribute mental handicap to lack of nutrition. There would appear to be many causes for the condition of mental handicap and, to some extent, attempts have been made to measure

the degree of mental handicap using intelligence tests. In some ways the condition can be assessed by recognising to what extent a person can adapt to the demands of everyday life in society.

As we shall see later, the courts do take a different attitude, in terms of disposal, towards someone who is considered mentally handicapped compared with someone who is said to be mentally ill. The fact that some mentally handicapped individuals cannot learn challenges the effectiveness of "punishment" and the usefulness of imprisonment.

As a general rule, there is some link between mental impairment and criminal behaviour. There are examples of mentally handicapped persons committing serious sexual offences. As a result of this, they may also commit murder, especially when the victim becomes frightened and resists. These kinds of offences may be committed by mentally handicapped people who are in medium or low dependency[61]. The following cases illustrates also the link between mental handicap and crime:

(A man in his late thirties, diagnosed as suffering from mental impairment. He had set fire to a storeroom containing highly flammable materials. The fire spread quickly to a building next door, where a number of people were working. He had a long history of fire - raising activities and making "hoax" telephone calls to the police and fire services. He also suffered from concurrent physical disabilities - a severe speech impediment and

a limp – which greatly lowered his selfesteem. His main interest life was in raising fires and he was regarded as highly dangerous by the hospital authorities)[62]. It is said that when mental impairment is accompanied by severe physical disability or disfigurement, it present greater problems.

The another case is:

(A man age fifty, detained in a special hospital. He had suffered brain damage as a child, which had resulted in quite severe mental impairment. From a very early age he had exhibited aggressive behaviour towards his own family and others – particularly towards children. His fire arising activities had started early in life and these had been interspersed with sexual offences and crimes of violence. He claimed that the sight of fire excited him sexually. His problems were compounded by the fact that in his early forties he had developed a concurrent psychotic illness, in which he heard voices telling him to set fires. The incident that brought him before the court on the occasion that resulted in his admission to a special hospital was an attempt to burn down a psychiatric hospital, to which he had been admitted informally)[63].

MENTAL ILLNESSES:

As has already been indicated, it is not easy to provide a precise definition of mental illness. Hence to cover all cases of mental illnesses which have a direct relationship with crime, it

is proposed to adopt the classifications which divide mental illness into three main categories[64]:

A - The Neuroses

B - The Psychoses

C - Personality Disorders

A - <u>The Neuroses:</u>

Neuroses are undesirable emotional conditions which are common and persistent. They are a group of abnormalities in which occur such psychological events as anxiety, irrational fears, compulsions, obsessions and physical complaints without organic basis.

Some victims of this illness suffer from intensive anxiety and worry over little things and are unable to decide about the slightest everyday problems. Neurotic symptoms appear often in late adolescence and early adult life. A neurotic person may just do in an exaggerated fashion things which most people do at some time or other quite normally. However, they usually behave in an abnormal and incomprehensible way. Neuroses are of emotional origin and are the outcome of the stress and unresolved conflict in the patient's life.

It has become clear from the above that neuroses are quite wide and common. It is,therefore, necessary to limit the discussion to neuroses which might have a direct or indirect

relationship with crimes. These are:

(1) Conversion reactions and dissociative reactions (hysteria).

(2) Anxiety.

(3) Obsessional and compulsive reactions.

(4) Neurasthenia.

(5) Phobias.

(1) Conversion Reactions and Dissociative Reactions (Hysteria):[65]

Some psychiatrists believe that hysterical patients are in fact malingerers. Such a hypothesis is not true because such patients are actually unaware of the basis or meaning of their troubles.

The mild type of hysteria is called hysterical personality in which the sufferer tends to behave in a histrionic manner, use exaggerated language without restraint and describe any physical of psychiatric symptoms in extravagant terms. Other symptoms of mild hysteria include a quick reaction, headache, lack of sleep. These symptoms vary from one individual to another and can not be regarded as mental illness, because they can be cured through social education.

There are two types of hysteria:

I. Conversion Reaction (hysterical spasm):

This type of hysteria may produce many kinds of symptoms. The most common are muscular or sensory. The latter involve disturbances of the physical system which may cause the victim to lose senses such as smell and sight. similarly, conversion reaction can affect the muscular system of the victim, which may lead to paralysis of the limbs or the body. The last case is quite common among soldiers under the stress of war in unconscious reaction to participating in the war and through fear of being in the front lines. Conversion reaction may appear soon after child birth, in which case it suggests that the patient is completely unwilling to face the responsibility of her child[66]. The sufferer may commit suicide. The following cases illustrate this mental illness:

(A manual labourer in his late forties was referred to an outpatient department with hysterical spasm of the right hand. This was removed within half an hour by forceful suggestion and persuasion. The same evening the man was brought back into the hospital in a police ambulance with his throat cut. He had committed suicide. Subsequent inquiry revealed that he had for some months been becoming increasingly depressed, retarded and anxious; that his efficiency at work, which demanded a modicum of manual skill, had decreased to a point at which he was in grave danger of losing his job, and that this had further oppressed and worried him, as he had a wife and family dependent upon him. The hysterical spasm had followed a trivial accident at work and

represented the desperate temporary expedient of a simple man to stave off complete defeat and gain an honourable respite from the losing battle with a severe depression which he was endeavouring to fight alone and unaided)[67].

II. Dissociative Reactions:

The most common symptoms of this rather rare illness is a splitting apart, or dissociation, of the patients activities from his conscious awareness of them. It is of significant interest to lawyers because this illness might lead the sufferer to commit crimes. The dissociative reactions include the following types of hysteria:

a) Hysterical amnesia.

b) Hysterical depersonalization.

c) Multiple personality states.

d) Hysterical fugues.

e) Hysterical stupor.

f) Hysterical delirium.

These have been reported in some cases in the U.K. as shown below[68].

a) Hysterical Amnesia:

The sufferer is characterised by loss of memory as to who he is and for his entire previous life up to the time he is being examined. The patient may forget his name or his family name or his previous life although at the same time he is quite aware

that he is missing something and is trying to find out what is missing. The sufferer may commit suicide. The following cases may clarify the nature of this mental illness and its link with suicide:

(A lady in her late fifties, in a state of considerable distress, was brought late at night to the casualty department of a large hospital. Her clothes were wringing wet up to her waist, and her handbag which had been found near her was empty. She had been discovered crawling along the ground on the banks of a nearby river.

On examination, apart from mild shock and exposure, she did not appear to be suffering from physical illness; but she was totally unable to remember who she was, where she had lived, or indeed any details of her personal life whatsoever. Nevertheless she knew that she had been brought to hospital, she knew the meaning of the uniforms of the police who had brought her, the nature of the ambulance service, and such everyday items of information as the use of a telephone, telephone directory, and so forth. She was admitted as an emergency, and the following day with little difficulty, by a simple technique of encouragement and free association the following story emerged.

She had been widowed for 18 months. Her husband, to whom she had been devoted, had been an engaging but somewhat irresponsible commercial artist, who had died prematurely and in debt, and she

had to sell their house, which was mortgaged, in order to meet his obligations. She had no surviving relatives of her own and had obtained part-time work as a seamstress in lodgings to maintain her independence and self-respect. During the preceding winter she had become ill with pneumonia, and on discharge from hospital had to change her lodgings. She had subsequently became exceedingly depressed, and to her great shame had made a suicide attempt, taking some aspirin tablets, and attempting to cut her wrists. This had earned her a second hospital admission, and eviction from her second lodgings. Immediately prior to the incident which led to her admission to this hospital, she had sought out her husband's only known relatives with the intention of asking them if they could help her. However, although she had received a superficial welcome from them, they had not inquired and she had not been able to summon the determination to tell them of her present predicament, or indeed to imply how desperate had been her plight since her husband had died. She had bought a small bottle of gin and some more aspirin tablets and had gone to the river presumably with the intention of drowning herself when sufficiently fuddled to make this possible. But after the purchase of the gin and the tablets, she could remember nothing more. Circumstances suggested that she must have begun to wade into river, but found the whole thing beyond her, and had developed an hysterical amnesia as the last psychophysiological defence against total helplessness, hoplessness and despair)[69].

In case of Russell, 1946, a women accused of committing frauds over a period of 7 years claimed hysterical amnesia in respect of the whole period[71]. It is held that the fact that she suffered from this amnesia, even if established by sufficient evidence, affored no ground for her plea in bar[70].

b) Hysterical Depersonalisation:

The victim has a feeling that his personality and the world around him have changed drastically. He cannot specify what the change is and he does not feel that he has a different personality, but he feels that he is not the same person that he was and that his environment is strange and unreal. Feelings of depersonalisation may occur in a patient who may become schizophrenic. I have never found any case in which there is connection between this illness and crimes but when the patient becomes schizophrenic, this kind of link may be found.

c) Multiple Personality State:

The patient in this state develops two or more separate personalities. While his original personality is his usual day-to-day self, his second personality is a different one into which he slips from time to time and in which his behaviour is completely different from his previous personality. This kind of mental illness, mostly, does not occur independently. When this illness is associated with schizophrenia, for example, the patient may be dangerous to society. We will see later the

connection between schizophrenia and crime.

d) Hysterical Fugues:

In this state the patient leaves his residence and travels long distances during which whole blocks of experience are missing from the mental life of the individual. The patient is usually seen after he has arrived in a city quite distant from the one he started in. This illness might be an unconscious flight from a painful interpersonal crisis in the patient's life. This mental illness generally does not appear independently. So, one cannot find an independent case for this illness in the criminal field.

e) Hysterical Stupor:

The patient in this state isolates himself from contact with people and may sit or lie quietly without paying attention to what surrounds him. Sometimes the patient is drowsy. He develops symptoms of occasional fluttering of eyelids or strange movements and posturing of the limbs and body from time to time. His capacity for perception of his environment is impaired. Thess states may last from a few minutes to several weeks or more, and they begin and end abruptly. This illness may be due to organic brain diseases or severe emotional disorder. There is no sign that there is a direct link between this illness and crimes. Mostly this illness does not occur independently but with other mental illness.

f) Hysterical Delirium:

The chief symptoms of this illness are changes in mood, changes in perception and disturbance of memory and impaired concentration. Some sufferers complain of impending disaster. Their fear may lead them to ask for relatives to be with them or for someone to hold their hand. They are fearful of being alone or in the dark. A delirium may be caused by high fever, inadequate oxygenation of the brain in pneumonia or congestive heart failure, prolonged alcoholic excess, head trauma, uraemia or many other disease processes. During my research I have never found any case which link this illness with criminal behaviour. Mostly this illness is associated with other mental illness. For example, it may occur with amnesia.

(2) Anxiety:

Anxiety is quite common and most people should have come across such a state. Psychiatrists, however, have to point out the differences in degree and quality that divide normal anxiety from abnormal anxiety. Anxiety, therefore, can be divided into two main categories:

I. Acute anxiety

II. Chronic anxiety

Both cases might appear in an individual and one of them might dominate the other. The chief symptoms of anxiety are those

of fear in various degrees. The heart may beat faster than normal. Patients' mouths become dry and their hands may perspire, accompanied by a tight feeling in the chest or around the heart. The victim becomes anxious and afraid in the presence of an object or situation that does not normally provoke anxiety. Anxious patients can easily mistake their symptoms for those of physical illness, especially when they occur without the patients being conscious of any reason for anxiety. The condition is called anxiety neuroses. Patients might undergo fits of anxiety for some minutes or hours or days[71]. The following case may illustrate this mental illness:

(Mrs J.H., a housewife of 26 with a son of four and a baby daughter of 18 months, had begun to suspect that her husband might be becoming interested in one of the girls at his work. He was coming home late, was occasionally absent for hours at a time over weekends, ostensibly to pick up a little extra money by odd jobs, and displayed less tenderness to her during the past 18 months than she had grown to expect. She developed symptoms of general anxiety and tension, which rapidly focused themselves upon an inability to go more than a few hundred yards from her house without becoming faint and fearing that she might fall dawn unconscious in the street.

Eventually she reached the stage at which she could no longer take the children out, do the shopping, or care of the house. She got a neighbour to ring her husband's place of

employment, and to call the doctor. He returned precipitately from work to find her in bed, with a very high pulse rate, gasping for breath, and convinced that she was soon to die. Her distress led to her doctor's arranging for her admission to hospital, where she settled down)[72].

It is evident from what I have already said about this mental illness that this illness may drive some sufferer to commit serious crime. For example, in the case above the woman's anxiety might drive her to kill her husband or commit serious harm to him. Prins reports 'a man of forty -seven, who asked the female storekeeper at his place of work for an item. She failed to produce it and, furthermore, failed to treat him with the respect he considered was his due. He beat her about the head with a spanner and nearly killed her'[73]. The man was found suffering from "chronic anxiety".

(3) Obsessional and Compulsive Reactions:

In this illness the patient is either afflicted with persistent distressing ideas he cannot get rid of or become obsessed with repetitive performance of physical acts to relieve tension. Both cases might be present in the same patient[74]. This illness can be divided into two categories:

I. Obsessive Reactions:

In this state the patient will be obsessed or preoccupied with

a persistent unpleasant thought and he wishes he could escape from it. For example, the patient will be preoccupied with the idea of killing one of his relatives or his family or he might be obsessed with the idea of drowning or burning. He might be obsessed as well with the idea that he has a disease such as cancer or is about to have a heart attack...etc. Common obsessive thoughts such as fear of dirt, of germs, or insects might cause the sufferers to visit a psychiatrist. Generally, this kind of illness may lead the sufferer to commit suicide.

II. Compulsive Reactions:

Sufferers of this type of neuroses feel a strong compulsive urge to perform repetitive actions. Although they are quite aware of the illogicality of their action, they can not get stop doing it. Typical example of compulsive reactions are repetitive washing of hands, repetitive hand gestures, repetitive assurances of locking the door, switching off the light or gas and many other similar acts.

Both cases might be present in one victim and one of them might dominate the other. Perhaps the best known obsessional ritual is that with many women who are obsessed with the idea that their baby is abnormal or that the baby will die, or that she may harm it. Many victims of this illness are afraid that the thought will lead to the impulse which in turn will lead to the action. Patients may try to control such obsessional thoughts. A

mother, for instance, may collect and hide all sharp objects such as knives or scissors, because of a persistent obsession that she may harm the baby with such objects[75].

A distinction has to be made between obsessive and compulsive reactions in which the sufferer admits the illogicality of his ideas and actions and does his best to get rid of them, and other neuroses such as kleptomania and pyromania, in which the patient does not try to prevent himself from doing them.

(4) Neurasthenia:

The chief symptoms of this neurosis are impaired concentration, insomnia, fatigue, loss of appetite and disturbed attention. It seems that there is no case which links this mental illness with crimes.

(5) Reactive Depression:

A reactive depression is the result of abnormal circumstances of life. This depressive illness can be divided into two main categories:

I. Psychoneurotic Depressions

II. Psychotic Depressions

While psychoneurotic depression can be attributed to psychological and social circumstances from which the patient is

suffering, such as the death of a member of his family or an emotional rejection by a person on whom he is dependent or lack of economic livelihood, psychotic depression can be attributed to deeply rooted personality problems.

The patient with a psychoneurotic depression has a mild feeling of worthlessness, failure and guilt. He is a depressed person who develops a feeling of anxiety, fatigue, poor sleeping, a mild loss of appetite, and a slight weight loss[76]. This mental illness drives some sufferers to commit serious crime. The Guardian in 1984 reported that a woman had killed her four-year-old daughter shortly after the latter had witnessed her mother killing her seventeen-month-old baby brother by strangulation. It was found that she suffered from psychoneurotic depression from the birth of her son. In this case, the prosecution accepted a plea of diminished responsibility[77]. Prins says that ' I knew of one offender/patient who became severely depressed because his wife had left him; whilst in a state of great emotional upheaval, he set fire to the block of offices in which she had once worked'[78].

(6) Phobias:

A phobic person becomes anxious and afraid when he comes in contact with an object or situation that does not normally provoke anxiety for the normal person. Many psychiatrists feel that the phobia the patient develops often has a symbolic

connection with the type of interpersonal stress that has caused it, for example, claustrophobia and agoraphobia[79]. I have not found any case which links this illness with crime.

B. The Psychoses:

There is no precise and comprehensive definition of the general term psychosis. The term is applied to identify those psychiatric states in which patients suffer from a disintegration of the structure of their mental life. This may be due to a profound withdrawal into a world of fantasy, with hallucinations and delusions. A severe disturbance of mood, which is a main symptom of psychotic disorder, causes the patient to view the world unrealistically. As we shall see later, most of these mental illnesses (psychoses) have a connection with criminal conduct.

Most psychiatrists classify psychoses into two main categories:

(1) Functional psychoses

(2) Organic psychoses

(1) Functional Psychoses:

Functional psychoses denotes the lack of clear evidence of organic cause or basis in the aetiology of the disease. Under this heading some illnesses which may have a relationship with crime are:

I. Schizophrenia

II. Depressive Psychoses

III. Involutional Melancholia

IV. Manic Psychoses

V. Manic Depressive Psychoses

VI. Puerperal Psychoses

I. Schizophrenia:

Undoubtedly, schizophrenia is one of the most dangerous and of the greatest medical and psychological problems, because it lasts longer, has unknown causes, fewer recoveries, and is the most difficult for the patient, his relatives and his family to understand and handle.

There are various types of schizophrenia, and there is a common thread of psychological similarity among them as to the chief symptoms of this disease. These are: withdrawal from social contact, detachment from reality which may vary from mild to severe depending on the degree of the case; disturbed and dissociated thinking, muttering outbursts of meaningless, laughter, hallucination, delusions and disturbances of speech.

In most cases depressive or manic features are present in a schizophrenic illness[80]. The schizophrenic illness, as we shall see later, has a wide relationship with crimes. The most important cases are:

a) Paranoid Schizophrenia

b) Catatonic Schizophrenia

c) Hebephrenic Schizophrenia

d) Simple Schizophrenia

a) Paranoid Schizophrenia:

The main symptom of this illness is the development of persecutory delusions. The schizophrenic feels that people are talking about him or plotting against him. This might cause him to commit crimes as a weapon of self-defence. A good example of this case is the McNaughten case in 1843. A patient of this sort may develop auditory hallucinations, hear voices from walls, ceiling, windows, which order him or warn him. He may develop hallucination of taste in which he tastes poisons or thinks someone has poisoned his food. It has to be added that such illness may appear gradually or suddenly. Some psychiatrists believe that paranoid schizophrenia occurs most often between the ages of 30 and 35.It is obvious that paranoid schizophrenia plays an effective role in relation to violent crime. In addition to the McNaughten case there are many other cases. For example the case of Peter Sutcliffe shows that Sutcliffe committed homicide and many other serious harms under "paranoid schizophrenia"[81]. Again, the patient may set fire to some house to get rid of the evil in it or because he has seen the image of God and heard him directing him to set fire in the house.

b) Catatonic Schizophrenia:

This illness usually occurs after the age of 25. The main symptoms of this illness are disturbances of physical movements. The patient may sit , crouch or keep standing for days in the same position, and may require spoon feeding or tubule feeding to maintain nutrition. When he gets over this episode, the patient will be very active, destructive and sometimes aggressive. Occasionally a person suffering from such kind of illness may commit aggressive violence[82].

c) Hebephrenic Schizophrenia:

The main characteristics of this illness is an exaggerated adolescent behaviour and a profound withdrawal from interpersonal relationship. Sufferers are prone to have giggling fits, and to wear inappropriate smiles. Sometimes, such patients become very depressed which may lead them to commit suicide. This kind of schizophrenia may deteriorate to serious kinds of schizophrenia (e.g. paranoid which is well-known for its connection with criminal behaviour.)

d) Simple Schizophrenia:

The mental illness is quite deceptive because it develops so slowly over a period of years that the patient's friends and family may not realise that he is psychiatrically ill until his mental state is very deteriorated. This mental illness involves a gradual withdrawal from society, with much preoccupation with

oneself. The patient's facial expression becomes vacant, and his eyes stare blankly and aimlessly when people talk with him, and he suffers from impaired concentration. Actually in my research I have never found any case which links this mental illness to crime unless it develops into paranoid schizophrenia.

II. Depressive Psychoses:

The symptoms of this illness include feelings of sadness, melancholy and despair. The patient develops a sense of misery and worthlessness. He views himself and the world around him as being absurd, worthless and inadequate. He develops a deep sense of guilt, and he believes that he is beyond moral redemption and that his personality without value. Prins says that those people 'become so convinced of the utter hopelessness of their misery that death becomes a happy escape. Sometimes before committing suicide, they first kill their children or other members of the family... under the delusion of a future without hope and the inevitability of catastrophe overtaking their nearest and dearest as well as themselves, they decide to kill in order to spare their loved ones suffering'[83].

Thus this mental illness may drive the sufferer to kill his or her loved ones then kill himself or herself. In the case of Sharp, 1927, the accused became obsessed with the idea that the only way out of his poverty was to kill two of his children so as to relieve his wife of the burden of their support[84]. This

state can progress to a state of depressive stupor in which the patient may spend the whole day sitting in a chair doing and saying nothing. Depressive stupor is the final stage of the condition called retarded depression. It differs from schizophrenic stupor in that the patient has a deeply depressed appearance. This outlook on life may lead the sufferer to commit suicide[85]. The case below illustrates how this illness drive the sufferer to commit suicide:

(This man came on the recommendation of his firm, as an alcoholic. He was a technical engineer in an oil company, responsible for a great deal of difficult and exacting work. He too was in the latter half of life, and had experienced considerable domestic stress, and labour troubles at his job, immediately before the development of his alcoholic tendencies. On examination he was morose, remorseful, wept easily, and confided that he felt unable to tackle his job, and no longer worthy of his employers confidence. His sleep, appetite, weight and bowels were characteristically affected. Moreover he was agitated, trembling, and had turned to alcohol as the only means available to him to damp down his increasing tension and despair)[86]. This man committed suicide later on under the pressure of his mental illness.

III. <u>Involutional Melancholia:</u>

Some psychiatrists believe that the main characteristics of this illness involve anxiousness, agitation, bizarre physical

complaints, paranoid ideas and delusions. It commonly occurs in women between the ages of forty-five and sixty, who have had no previous history of mental illness. Most psychiatrists feel that the emotional adjustments of women at this time of life play an important role in formulating their depressions. At this age, women often cease to menstruate which in its turn causes various physical sensations, and the female menopause also has a significant psychological impact. I have, however, never found any case which recorded the relationship of this mental illness with criminal conduct.

IV. Manic Psychoses:

In contrast to depressive psychoses, sufferers from this illness are extremely elated, exuberant and very gay. Physically, the patient is overactive and he gives the impression that he is very fit. This person is very energetic, and feels that he has not time to pay attention to physical illness, and is famous for what is called "manic flight of ideas". Psychiatrists divide this psychoses into two main categories: acute manic psychosis and hypomania.

A sufferer from acute manic psychoses exhibits chaotic behaviour, great wishful thinking and wild outbursts of feelings and exhilaration. He might become an exhibitionist and practice sex-seduction. This illness may lead to reckless and dangerous behaviour. So the sufferer might commit crimes because of his

mental state. The following case may illustrates this point:

(A twenty-three-year-old car salesman initially impressed his employer with his energy and enthusiasm. However, it was not long before his ideas and activities took on the grandiose and highly unrealistic qualities of the person suffering from hypomania. For example, he sent dramatic and exaggerated letters daily to a wide range of motor manufacturers. His social behaviour began to deteriorate rapidly; he lost weight through not eating (he never had time) and he rarely slept.(Both of these forms of behaviour are characteristic of the condition.) One night, in a fit of anger directed towards his ungrateful employer, he returned to the garage showrooms, smashed the windows and also caused extensive damage to a number of cars. He was charged with criminal damage and, when he appeared at the Crown Court , he was made the subject of a hospital order)[87].

The hypomanic patient is overactive, destructive and jubilant. He is always busily occupied with big schemes and expectations. He is extravagant with money...etc. and sexually irresponsible[88].

V. Puerperal Psychosis:

This psychotic illness occurs normally in a woman at the time of childbirth or shortly after or around it. This shows that there is a strong relationship between this illness and pregnancy and birth. A difficulty with this illness is the fact that it

might be accompanied by special problems such as a recurrence if the woman becomes pregnant again. A mother may kill her child because of severe depression, schizophrenia or other similar emotional reactions that are the result of this illness. Accordingly, this illness has a relationship with criminal conduct only when it is associated only with "depression or schizophrenia".

(2) Organic Psychosis:

The second main category is organic psychosis. The term "organic psychoses" is applied to situations where psychiatrists can discover evidence indicating that the abnormality is due to a structural defect or change in the bodily system of the patient. Such a defect causes abnormalities in the system of emotional functioning, thinking and behaviour. Organic psychoses are the result of impairment - such things as interruption of the blood supply to the brain, senile deterioration of brain tissues, head trauma, toxic damage to brain tissues, and brain tumours. Psychiatrists divide this illness into two main categories:

I. Acute organic brain disorder

II. Chronic organic brain disorder

While the second type of illness is due to a defect in brain functioning which causes permanent problems in the patient's emotional state: the former is reversible, i.e. the patient could return to his previous standard of emotional functioning.

What follows is a further discussion and elaboration of these two illnesses.

I. Acute Organic Brain Disorder:

The main symptoms of this illness can be summarised as follows: memory impairment, imbalanced judgement, poor control of emotions, hallucinations, delusions and poor intellectual functioning. It has to be indicated that it is not necessary that the patient has all these symptoms, he might have some of them. The severity of these symptoms depends on the strength of injury to the brain and on the nature of the patients personality. Therefore, this illness may be scarcely noticeable, or it may be so severe it causes disturbances in the sufferer's system of behaviour and emotions which lead him to commit some offences[89]. The main causes of acute organic brain disorders are:

a) Intoxication with drugs or poisons

b) Brain dysfunction due to alcoholism

c) Metabolic disorders such as uraemia, diabetes.

There are many other cases of this illness [See A.H.Chapman, pp271-291].

II. Chronic Organic Brain Disorder:

The basic symptoms of this illness which are permanent and irreversible, are the same as that of the acute organic brain

disorders which have already been discussed[90]. This illness can be caused by various factors, the most important of which are: brain damage before or after birth, central nervous system syphilis, toxic substances or drugs, brain damage which is the outcome of chronic alcoholism, head trauma, brain damage associated with senile brain degeneration and cerebral arteriosclerosis. There are many other reasons for this type of illness[See A.H. Chapman, pp.295-366].

Organic psychosis have many aspects such as:

a) Pre-senile dementias or senility

b) General paresis

c) Alcoholic psychosis

d) Epilepsy

a) Pre-senile Dementias or Senility:

While senile dementias attack people in extreme old age, pre-senile dementias occurs in a younger age group. Alzheimer's disease is a certain form of pre-senile dementia. It occurs mainly in people between the ages of 50-60, but may occur occasionally in younger individuals. These patients keep a good memory record of remote events,but fall short of recalling immediate memories. This can be attributed to the narrowing of the ability to perform mental activity in several fields at the same time.

This illness causes permanent defects in the patient's emotional functioning, thinking and his interpersonal behaviour. Permanent changes occur in the patient's brain, behaviour and interpersonal relationships. This illness may be caused by head trauma, senile degeneration, arteriosclerosis and infections of the brain and other reasons. It seems that there is no connection between this illness and criminal behaviour.

b) General Paresis:

The mental illness is caused by the invasion of the central nervous system by the spirochaeta which causes the destruction of the tissue of the brain itself. The chief symptoms of this illness are: loss of judgement, intellectual deterioration, memory disorder and loss of time relations. It is said that 'the sufferer may sometimes indulge in uncharacteristic violent behaviour'[91].

c) Alcoholic Psychosis:

It is submitted that psychotic drinkers become so because of some underlying factor, such as genetic predisposition, injury, infection or nutritional imbalance. It is believed that this psychopathological state is due to a direct effect of alcohol on the brain. Most alcoholic psychotics are between the ages of 30 and 60 years and have been drinking to excess for 15 to 20 years. There are many cases which demonstrate the extent to which alcohol is a factor in crimes. Prins states that alcoholic

psychoses 'may occasionally be very important in relation to the exhibition of violent behaviour'[92]. The case below may declares the link between this illness and crime:

(A man fifty-six, strangled a young chambermaid. He had recently been released from his previous life sentence; this had been imposed for murdering an elderly widow. His defending counsel stated that the defendant was 'a different man when he had been drinking'. His second victim, aged twenty-three, is alleged to have taunted him following sexual intercourse, telling him he was an "old man". The accused is alleged to have said: "This upset me. I lost control and grabbed her by the throat")[93].

d) Epilepsy:

This is a clinical condition characterised by recurrent attacks of disturbance of consciousness, the form of attacks varying from generalised convulsions to momentary "blanks" in awareness.

The illness is the most apparent compared with all varieties of psychopathological patients. The patient suddenly falls in a convulsive seizure.

There are different types of this mental illness. The most severe form of epilepsy is called GRAND MAL. It is characterised by the sudden and complete loss of consciousness, the muscular convulsion, the coma after the attack and the slow return to

consciousness as though someone has just woken up from a slumber.

The Petit Mal attack is more frequent than the previous attack and it is more common during adolescence.

The third type is called Jacksonian Seizure. It is characterised by a convulsion of some part of the body such as an arm or leg, without loss of consciousness during the attack, but there is a loss of control over the convulsing parts of the body.

Psychic Seizure is another type of epilepsy. The main symptoms of this illness are: disturbance of consciousness and there may be no memory of the attack. The patient speaks and acts as though he is conscious. There is relationship between epilepsy and crime; for example, in H.M.Adv. v. Cunnigham, the accused claimed that he was not guilty because he was suffering from epilepsy when he committed the crime[94]. The sufferer from this illness may commit serious crime (homicide) by setting fire to things. For example, Bruce Lee was said to be epileptic and he committed a number of serious crimes (fire and killing)[95].

c. Personality Disorder:

(1) Psychopathic Disorder:

This is the most disturbing and destructive personality and, as discussed at the beginning of the chapter, it is a matter of

debate among psychiatrists to whether such a personality is a form of mental illness or not. This point is argued at the beginning of the present chapter.

According to the Mental Health Act of 1983, psychopathic disorder is '...a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned'.

The main symptoms of the psychopathic personality are maladjustment, unreliability, cheating and strong-headedness. A psychopathic person may be tactful in dealing with other people and getting whatever he wants from them. He might give the impression that he feels deep regret and remorse for his deeds, and a true desire to improve his deviant behaviour and he might swear and give an oath that he will never go back to such behaviour, whenever he is trapped.

The maladjustment of the psychopath can be observed from an early age. The children are difficult to rear, head-strong and reluctant to accept training before school years. School reports show that such children are of normal intelligence but lack discipline and show a refusal to co-operate in classrooms. Their behaviour is both disturbing to the teachers and annoying to the class in general. Neither praise nor punishment would help in

changing their behaviour. They do not really listen to advice or even change their attitudes even by the experience of unfortunate consequences resulting from their previous irresponsible acts. After leaving school, they are very unsettled in their practical life. They are easily irritated and liable to leave their jobs for trivial reasons.

Psychopaths are fond of extreme ventures, and may commit crimes quite openly even when it is obvious to them that they cannot get away with it. So there are many cases which show crimes of psychopaths[96]. The cases of Makay are very helpful for illustrating the aggressive nature of this kind of mental illness. Patrick Makay committed many serious crimes (murder) by reason of his psychopathic disorder. Clark and Penycate refer to these cases in their book "Psychopath"[97]. In brief, on 8/7/1973, Makay stabbed Mnilk in the throat on a train leaving London Bridge station, on 20/7/1973, he killed Miss Hynes in her flat (she was savagely battered about the head with a piece of wood), on 12/1/1974, he killed Mrs Stephanie Britton in her house (she was brutally stabbed to death with her four year old grandson), on 13/6/1974, he attacked Mr.Frank Goodman in his shop with a piece of lead piping until he fell dead, on 23/12/1974, he attacked and killed Mrs Sarah Rodwell by a blunt instrument being used to beat her repeatedly on the head in her flat, and on 9/2/1975, he attacked and killed Mrs Ivy Davies with an axe when she closed the cafe and returned to her house in nearby Holland

Road[98].

The murder Makay said that 'I feel terrible about what happened all the more because I do not knew why or what made me do it. I find it all a confusing matter. You see, I am scared of myself. At times I often try to wonder why, but it's just plain hell'[99].

Although it is quite difficult to classify psychopathic personality into precise and distinct categories, there are certain general similarities among psychopathic types, such as:

I. The inadequate psychopath, who cannot deal with the slightest day to day problems and who can not adjust to his own environment.

II. The aggressive psychopaths, who are liable to become dangerous and aggressive on the slightest provocation, which in its turn might give them pleasure.

III. The hysterical psychopaths, who have fits of hysterical illness and who always likes to be in the centre of attention.

IV. The creative psychopaths, who may produce works of genuine art and achieve fame in some creative fields of life, though they, otherwise, behave in a remarkably antisocial and careless way.

This mental disorder may lead the sufferers to be alcoholics

or drug addicts, and sexual deviants.

(2) Sexual Deviants:

Though it is extremely difficult to set up fixed rules which determine normal or abnormal sexual relationships, the following are general rules which can be regarded as a criterion for deciding abnormal sexual behaviour:

I. If an individual feels guilty when he commits a certain type of sexual behaviour.

II. If he endangers himself or the person with whom he has a sexual relationship.

III. If such sexual behaviour is incompatible social convention.

There are sexual deviations which cause considerable public anxiety such as paedophilia (sexual activity with children). The paedophile seeks a child or young adolescent as a sex object. Incest is taboo and illegal though it occurs quite often. In many instances the incestuous adult has anti-social personality disorders or a schizoid personality structure[100]. The cases below illustrate certain kinds of sexual deviance:

(An unhappy young married woman of 32 came to the outpatient clinic with her husband, requesting a private interview. In the course of it she explained that the real object of the interview was to obtain advice about, and if possible for, her husband. He had developed an increasingly overwhelming desire to masturbate

in front of a mirror, wearing a woman's plastic raincoat, but otherwise naked. He was still capable of occasional intercourse with his wife, but only if she also, otherwise naked, would wear the raincoat at the time. He had bought a number of these raincoats,ostensibly for his wife, but had became in all other ways extremely mean about clothes for her. Without a plastic raincoat, he was impotent, and incapable even of masturbation. Wearing one , or having persuaded his wife to wear one, premature ejaculation was frequent, even when intercourse was attempted. Remonstration by his wife had been countered by her husband's threatening to leave her, and 'Hang around cinema queues on rainy nights-I'd soon pick up a girl in the right sort of coat...'. As it was, he found such queues almost irresistible. His wife feared that he might expose himself to suitably clad women, a fear which had led to her continued but miserable acquiescence in the domestic indulgence of her husband's fetishism.

She had predicted, quite correctly, that her husband himself would make no complaint at all, either about himself or the sexual aspects of their married life. Moreover she coupled her appeal for help for him with an earnest entreaty that while everything and anything possible should be done to cure, correct, change, or alter his way of life, nothing whatever should be said which might lead him to suppose that she herself had mentioned it)[101].

Accordingly people who are suffering from such kind of sexual deviance may commit serious violence against people who do not accept their practices. The case of Michael Telling below shows the dangerous behaviour of some people who have become sexually deviant:

(Telling shot his wife after she had allegedly taunted him beyond endurance with details concerning her sexual exploits with members of both sexes. After killing her, he moved her body around the house for a week or so, calling in occasionally to kiss and talk to the corpse as it lay on a camp-bed. He then placed the body in a half-built sauna in the house. Five month later he decided to take the body to Devon. Having tried unsuccessfully to bury the body (the ground being too hard for digging because of the prolonged drought), he dumped it in some bracken overlooking the River Exe. He cut off the head and took it with him. It was subsequently found in the boot of his car. Two psychiatrists found him suffering from sexual deviation)[102].

In fact, sexual offences constitute a small proportion of all crimes. The table below shows the number of offenders found guilty for sexual crimes during 1988 in England and Wales[103]:

Buggery	857
Indecent assault on a male	2,075
Indecency between males	1,299
Rape	2,055

Indecent assault on a female	9,357
Unlawful sexual intercourse with a girl under 13	249
Unlawful sexual intercourse with a girl under 16	2,341
Incest	466
Procuration, abduction, bigamy	420
Gross indecency with a child	794
Total	19,913

(3) Addictions:

An individual can be described as alcoholic, smoker and drug addict, when he gets used to such substances and he cannot give up the habit of using them. It is difficult to establish a clear cut distinction between physical and psychological addiction, as Whitehead confirmed that '...to draw sharp borders between physical and psychological addiction is mistaken, for the information available is confusing and does not entirely support a differentiation'[104].

Those who are addicted to tobacco find it rather difficult to get rid of it or give it up regardless of their awareness of the ill affects of their habits on their health. It is well established now that excessive smoking plays an important role in the cause of lung cancer, heart disease and different chest ailments.

Although moderate drinking of alcohol is not so bad,

excessive drinking can be dangerous to the individual himself and to society. It comes within the category of the organic psychoses related to addiction to drugs, such as the opiates, heroin, morphine, barbiturates, amphetamines and hashish. Users are often regarded as outcasts: and they may get involved in crimes to secure their drugs.

Addicts are more likely to commit crimes because addiction encourages the psychopathic person to commit crime[105]. In the case of R. v. Majewski (1977) the accused became involved in a fracas in a pub, in the course of which he assaulted the landlord and another customer because he had been drinking heavily on the day in question[106].

This chapter has demonstrated the difficulties with the application of medical psychiatric concepts to legal processes. Psychiatric ideas are complex and there is considerable conflict among the experts. This explains the difficulties encountered by lawyers when they are required to consider such concepts. The role of the psychiatrists in the present legal process is not properly defined and the extent to which judges ought to rely on psychiatric and medical evidence and experts is not properly understood.

Hart's approach may resolve the problems which exist in the current legal process. According to this approach the role of

the expert witness has to be regarded as a part of what the lawyers are attempting to establish. In other words, the role of psychiatrist should be limited to explaining the nature of any mental disorder, while the role of the lawyers is to find out the effect of this mental disorder on the accused's capacity or choice. So there is no role for experts in determining criminal responsibility as such.

Since there is no necessary association between mental disorder and dangerousness[107], the role of psychiatrists should be limited to diagnosing the mental disorder affecting an individual. On the other hand the role of lawyer will be concerned with predicting his dangerousness on the basis of matters such as the gravity of the crime, the antecedents of the patient and many other circumstances, although the difficulties of making such predictions are considerable. This point will be developed later in chapter 5.

It is clear that the function or role of psychiatrists is quite distinct from that of lawyers, when the question of responsibility is considered in the context of crime. This aspect will be fully developed in the next chapter when insanity as a defence, insanity in bar of trial, diminished responsibility and irresistible impulse are considered in detail. The present chapter has outlined, in general terms, the types of psychiatric conditions which may have a bearing on crime.

It is clear that, while the psychiatric concepts outlined are subject to dispute among psychiatric experts, they do reflect the extent to which psychiatrists have attempted to explain behaviour which involves the sufferer in conflict with criminal law. Although the concept of "mental disorder" is not a fixed one, we shall see in the next chapters to what extent there is a difference between the idea of "medical" insanity and "legal" insanity, and the effect of such a finding on an accused, in terms of sentencing and disposal.

We have seen in this chapter that the concept of "mental disorder" is not clear and escapes precise formulation. More significantly, however, statutory definitions are limited to descriptions of what amounts to "mental disorder", i.e. its ingredients and not a precise meaning. This survey of mental handicap and mental illness illustrates the very wide range of conditions which are classified as mental disorders or mental diseases. Apart from the psychopath, whose condition is defined partly in terms of anti-social behaviour, few mental disorders have any significant correlation with criminal acts. However, mental illness and handicap can affect a person's ability to understand and control his conduct, so that, when a mentally disordered person does commit the actus reus of a crime, the question whether or not he had the requisite mens rea for the offence has to be considered. However, given the different mental disorders, and the range of severity within these disorders each

case has to be considered individually. Certainly, it cannot be maintained that mental disorder as such makes it impossible to affect a person's conduct by the threat and deployment of sanctions. In consequence we cannot assume that utilitarian reasons for criminal process do not apply to such persons as well as to others who might be deterred by seeing them punished. Nor we can assume that the presence of a mental disorder means that a person is not capable of offences although this may be the case for some individuals and some acts.

FOOTNOTES

CHAPTER THREE

1. The classic test of criminal responsibility, the McNaughten test, is limited to instances in which the accused 'was labouring under such a defect of reason, from disease of 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 wadoing what was wrong' (1843) 8 Eng. Rep. 718. In some cases, an "irresistible impulse" test has supplemented the McNaughten rule. The irresistible impulse doctrine is applicable only to the class of cases where the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of his mental power to control or retain his act. Lord Strachan in H.M.Adv. v. Kidd 1960 J.C. 62 at p.70 defined the question of insanity as follows: '...in order to excuse a person from responsibility for his acts on the grounds of insanity, there must have been an alienation of reason in relation to the act committed. There must have been some mental defect to use a broad neutral word, a mental defect by which his reason was overpowered and he was thereby rendered incapable of exerting his reason to control his conduct and eactions'. This seems to represent a totally causal approach on the part of Scots Law and to equate relatively

closely to the kind of irresistible impulse test.

2. Memorandum to Mental Health Act, 1983.

3. International Classification of Disease [ICD 9].

4. Glover, op. cit., p103.

5. Mental Health Act, 1983, sec. 1.

6. Mental Health Act of Scotland, 1984, sec.1.

7. Whitehead, Mental Illness and the Law, 1983, pp5-6; see also Report of Better Services for the Mentally Ill, 1975, cmnd 6233, pp.1-10; Bernard Ineichen, Mental Illness, 1979, pp.1-2; for more information see Blueglass, A Guide to the Mental Health Act, 1983, p14.

8. Ibid; Shannley, Mental Handicap - A Handbook of Care, 1986, pp.1-14.

9. Report of Royal Commission on the Law relating to Mental illness and Deficiency, 1954-1957, cmnd 169, pp.25-27; Whitehead, op. cit., pp.5-6.

10. Ibid.

11. Bluglass, op. cit., p14; Ibid.

12. Whitehead, op. cit., p.16.

13. Fingarette, The Meaning of Criminal Insanity, 1972, pp.227-134; Williams, 1981, op.cit., pp.532-537; Ibid, pp.32-33.

14. Mental Health Act, 1959.

15. Mental Health Act, 1983.

16. Report of Butler Committee of Mentally Abnormal Offenders, 1975, cmnd 6244, pp.83-87, where they recommended that the 1959 Act should amended to state that no hospitalisation

should be made in respect of the psychopathic disordered unless there was a psychopathic diagnosis and there is an advantage from hospitalisation; see also Report of Better Services for the Mentally Ill, 1975, Cmnd. 6233, p.5, where they refer that the number of psychopathic patients who accepted on hospital for the medical treatment raise at present time.

17. Gordon, op. cit., p.397; H.M.A. v. Carraher, 1946, J.C. 108.

18. For more information, see Report of Butler Committee, op. cit., 1975, Cmnd. 6244; Whitehead, op.cit., pp.44-56.

19. Mental Health Act of Scotland, 1984.

20. Ress, A New Short Textbook of Psychiatry, 1988, ch.2; Hill, Essential of Postgraduate Psychiatry, 1986, ch.2 [The Disease Concept in Psychiatry] by Anthony clare; Forrest and Others, Companion to psychiatric Studies, 1978, ch.1 [Concepts of Mental Illness: an historical introduction] by Forrest; Henderson and Gillespie's Textbook of Psychiatry, 1969, ch.1 [Historical Review of the Care and Treatment of Mental Illness]; Chapman, Textbook of Clinical Psychiatry, 1967, and 1976, ch.2 [The Historical Evolution of Modern Psychiatry]; Szasz, "The Myth of Mental Illness", American Psychology, 15, 113-118; International Classification of Disease [ICD 9]; American Psychiatric Association's Diagnostic and Statistical Manual [DSM-III], 3rd.Ed., 1980; Memorandum to Mental Health Act, 1983.

21. Szasz, The Second Sin, 1974.

22. Ibid ; see also, Wootton, 1959, op. cit., ch.7, where she suggests that since no scientifically neutral definition of mental illness has been provided, we should look with great suspicion on the attempt to assimilate mental to physical disorders and to treat both alike.

23. American Psychiatric Association's Diagnostic and Statistical Manual (DSM-III), 1980.

24. Royal Commission on Capital Punishment, 1949-1953, Cmnd. 8932, para.278.

25. Walker, Crime and Insanity in England, Vol.1, 1973, pp.110-113.

26. McDonald v. United States, 312, F. 2d 847, 851 (D.C.Cir. 1962).

27. McDonald v. United States, 312, f. 2d 847, 851 (D. C. Cir. 1962); see also, Peik, "The Ray Correspondence: A Pioneer Collaboration in The Jurisprudence of Mental Disease", 1953, 63, Yale, L.J., 183; State v. Pike (1899) 149 N.H. 399, where the New Hampshire rule was applied for the first time. The judge instructed the jury 'that the verdict should be "not guilty by reason of insanity" if the killing was the offspring or product of mental disease in the defendant; that neither delusion or knowledge of right or wrong nor design or cunning in planning and executing, nor ability to recognise acquaintances, or to labour or transact business or manage affairs is, as a matter all tests of mental disease are purely matters of fact to be determined

by the jury"; see also, the judicial direction in Scottish case (H.M.Adv. v. Kidd 1960 J.C. 62), in which the judge directed the jury that '...the question in this case whether the accused's mind was sound or unsound is to be decided by you in the light of the evidence, in the exercise of your common sense knowledge of mankind, and it is to be judged on the ordinary rules on which men act in daily life. The question is to be decided in the light of the whole circumstances disclosed in the evidence'; similarly to the above case, see H.M.Adv. v. Aitken 1975 S.L.T.86 at p.87, where the judge directs the jury as follows: '...insanity is not a term which is in use inside the medical profession as a medical term, but in a way that is not a disadvantage, you might think, because the decision on criminal responsibility has to be made by you, by the jury, and not doctors, however eminent. Having heard the evidence you must ask yourself wether or not the accused is to be held accountable for what he did...'

28. Brody and Engelherdt, Mental Illness, Law and Public Policy, 1976, pp.27-28.

29. Report of Royal Commission on Capital Punishment, 1949-1953, Cmnd 8932, in which was referred to the fifth questions of the house of lords.

5th- can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, an

examination of all the witnesses, be asked his opinion as to the state of the commission of the alleged crime or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusions at the time? The answer: '... a medical witness who never saw the prisoner before...cannot in strictness be asked his opinion as to the state of the prisoner's mind at the time of the alleged crime....But where such facts are admitted or not disputed, and the question becomes one of science only, such questions may be allowed to be put in that general form...'.

30. American Psychiatric Association's Diagnostic and Statistical Manual [DSM-III], 1980.
31. International Classification of Disease [ICD 9].
32. See pp.119-121 above.
33. Eysenck, The Effects of Psychotherapy, 1960.
34. Gordon, op. cit., p.348; see also R. v. Walden (1959) 3 ALL E.R. 303 at 304, where was said that 'it was, therefore, for the jury to decide...he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts...'; see, Report of the Committee on Insanity and Crime, 1923, Cmnd. 2005.
35. Report of Butler Committee, op. cit., para. 18,14,18,36.
36. American Psychiatric Association , "Statement on the Insanity Defence", 1983, 140, Am. J. Psych. 681; Gordon, op. cit., sect. 10-22, where he refers that the Scottish

approach of insanity, as Hume stated, has to be 'an absolute alienation of reason...such a disease as deprives the position of the things about him. hinders him from distinguishing friend or foe...'. Despite the fact that the Scottish law is unsettled in this matter, as Gordon says in sect. 10-31 in his book above, there is a recent case in Scotland in which adopted same approach of insanity. The case is Brennan v. H.M.Adv. 1977 S.L.T. 151, where it is said that '...insanity in our law requires proof of total alienation of reason in relation to the act charged as the result of mental illness, mental disease, or defect or unsoundness of mind and does not comprehend the malfunctioning of the mind of transitory effect...'.

37. American Bar Association, Criminal Justice Mental Health Standard, 1983.

38. Mason and McCall Smith, Law and Medical Ethics, 1987, p.297.

39. H.M.Adv. v. Kidd J.C. 62.

40. Brennan v. H. M. Adv. 1977 S.L.T. 151.

41. Lacey, op. cit., p.73, where she considers the problems of stigmatising the offender with findings of "insanity".

42. R. v. Matheson (1958) 2 ALL E.R. 87; Taylor v. R. (1978) 22 ALL E.R. 599.

43. R. v. Rivett (1950) 34 Cr. App. Rep. 87; Gordon, op. cit., p.348; Whitehead, Criminal Responsibility and Mental Illness, 1963, p.25.

44. Gordon, op.cit., sect.10-63.

45. Ibid, sect.10-17.

46. See for example, R. v. Coelho (1914) 18 Cr. App. Rep., 210, where the jury found the accused guilty of murder, although the doctors reports emphasised that the accused had "mental illness" at the time; see also R. v. Ahmed (1962) 2 ALL E.R. 124-127; R. v. Rivett (1950) 34 Cr. App. Rep. 87.

47. H.M.Adv. v. Kidd 1960 J.C. 62; See also R. v. Waldon (1959) 3 ALL E.R. 203 at 204; H.M.Adv. v. Aitken 1965 S.L.T. p.87; R. v. Rivett (1950) 34 Cr. App. Rep. 87; see also Davis v. Edinburgh Magistrates 1953 34 at 40, where Lord Cooper said of expert witnesses that '...their duty is to furnish the judge or the jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence".

48. See sect. 6 of this chapter in which I illustrate most of these mental illnesses.

49. R. v. Kemp (1957) 1.Q.B. 399, where it was held that the offender who was suffering from arteriosclerosis was guilty but insane. The effect of his illness (which is physical and not psychiatric) was deemed to satisfy the criteria of the rules since his brain could be impact by it. In R. v. Charleson (1955) 1 ALL E.R. 859, medical evidence stated that the accused was suffering from a cerebral tumour and this was dealt with by means of a simple acquittal; in

H.M.Adv. v. Ritkie 1926 J.C. 45 and H.M.Adv. v. Cunningham, 963 J.C. 80, it was held that the accused who was suffering from diabetics may be regarded as having been legally insane.

50. Iraqi Penal Code, 1969, Article 60.

51. Decision No. 79 - felonies, 1959, Juridical Publication, 1960, where the Iraqi Cassation Court regards some physical illnesses (such as severe anaemia and syphilis) which affect the brain as "mental disorder"; Decision No. 3210 - fel. 1959, Juridical Publications,1960, and Decision No. 3191 - fel., 1973, Juridical Publication, 1974, in which Iraqi cassation court regards "paranoid states as mental illness" (it was decided that the offender who killed his son was not responsible because he was suffering from "paranoid state" at the time in which he committed the crime); Decision No. 37 - fel., Juridical Publication, 1978, where the Iraqi Cassation Court regards "Depression" as mental illness (it was decided that the offender who was suffering from "Depression" at the time of the alleged crime was no responsible); Decisions No. 3111 - fel., 1972, Juridical Publication, 1973, No. 211 - fel.,1973, Juridical Publication,1974, No. 2913 - fel., 1973, Juridical Publication,1974, and No. 3340 - fel., 1974, Juridical Publication, 1976, where "schizophrenia" was regarded as "mental illness".

52. The Iraqi Criminal Procedure Code, 1971, Articles, 230, 231,

232. Article 230 provides 'when it appears during the court proceeding or investigation that the accused is unable to defend himself due to his mental disorder, or to test his mental state to determine his criminal responsibility, the judge of investigation and the court may halt the proceeding and the accused should be detained in hospital, if he is accused of a crime in which he cannot be released by bail. In other crimes, he may be placed in a private or governmental health by request from his legal representative and on his own account or his own relatives secured by a person guarantee. An official medical committee should be examining him and submit a testimony on his own health state'.Article 231 provides 'if it is concluded from the report of the committee mentioned in article 230 that the accused is unable to defend himself, court proceeding might be postponed until he be in a position to defend himself and be placed in custody on a governmental health institution if he is accused of a crime for which he cannot be released on bail. In other crimes, he might be handed over one of his family secured with a personal guarantee which commits the latter to examine and cure him either inside or outside Iraq'.

Articles 232 provides 'if it can concluded from the report of the Medical Committee that the accused does not hold criminal responsibility because he was suffering from mental disorder during the time the crime was committed, the judge

of investigation or the court may decide that the accused in non-responsible by reason of his mental disorder. And the court or the judge of investigation may make their decision to hand him over to one of his relatives with a personal guarantee that he should be looked after, or they may make any other an adequate decision'.

53. Decision No. 93 - fel., 1952, Juridical Publication, 1954; Decision No. 210 - General Committee, 1977, unpublished.

54. Decision No. 465 - fel., 1953, Juridical Publication, 1954; Decision No. 3340 - fel., 1954, Juridical Publication, 1955; Decision No. 331 - fel., 1972, Juridical Publication, 1975; Decision No. 33440 - fel., 1974, unpublished.

55. Decision No. 2360 - fel., 1967, Juridical Publication, 1968; Decision No. 21 - fel., 1973, Juridical Publication, 1976; Decision No. 3859 - fel., 1973, Juridical Publication, 1975.

56. See p.130 above.

57. Gordon, op.cit.,pp.348-349.

58. [ICD-9]; [DSM-III].

59. Guze, Criminality and Psychiatric Disorders, 1976, p.13.

60. Shannley, op.cit., 1986, pp.1-14; Rees, op.cit., p.197; Clark and Smith, Psychiatry for Students, 1983, ch.15; Hill and Others, op. cit., 1978, pp.306-323; Tredgold and Soddy, Mental Retardation, 1970, p.3; Whitehead, op.cit., 1983, pp.5-9; Mental Health Act, 1983; Mental Health Act of Scotland, 1984; Mental Health Act 1959.

61. See for more detail, about the mentally handicap persons and their crime, Prins, Dangerous Behaviour, The Law, and Mental Disorder, 1986, p.112.

62. Ibid, p.222.

63. Ibid, p.221.

64. Chapman, 1967 and 1976, op. cit., pp.81-148, 259, 43-44, 223-267; Ress, op.cit.,pp.132-178; Gomez, Liaison Psychiatry, 1987, ch.3 and ch.5; Claridge, Origins of Mental Illness, 1985, ch.5 and ch.6; Clark and Smith, op. cit., 1983, from ch.6 to ch.10; Hill and others, op. cit., 1986, from ch.10 to ch.17; Whitehead, op.cit., 1983, pp.9-27, 41-43; Baker, Psychiatric Disorders in Obstetrics, 1967, p.46,52, 55-56, 60-90; Iandis and Bolles, Textbook of Abnormal Psychology, 1961, pp.82-101, 126-226; Guze, p.cit., pp.33-38; DSM-III, PP.293-294; Forrest and others, op.cit., pp.376-382, 448-456, 459-488, 418-420; Heidensohn, Women and Crime, 1985, pp.31-58.

65. Chapman, op.cit., p.91, where he emphasises that this term, in general, synonymous with older term "hysteria".

66. See Clark and Smith, op.cit., pp.146-147, where they refer to some other details.

67. Clark and Bridges, Psychiatry for Students, 1990, p.22.

68. See Clark and Smith, op. cit., pp.145-150, where there are some more informations.

69. Clark and Bridges, op. cit. p.72.

70. Russell 1946 J.C., 37.

71. For more details, see Clark and Smith, op.cit., pp.132-133; see also Prines, op. cit., p.99.
72. Clark and Bridges, op. cit., p.64.
73. Prins, op. cit., p.99.
74. Clark and Smith, op.cit., pp.154-156.
75. Baker, op.cit., pp.55-57, where some cases are stated.
76. See Clark and Smith, op.cit., pp.109-111, in which stated more details.
77. The Guardian, 27th November, 1984.
78. Prins, op.cit., p.220.
79. Clark and Smith, op.cit., pp.132-233, for more information.
80. Ibid, pp.93-95, See also, Prins, "Mad or Bad, Thoughts on the Equivocal Relationship Between Mental Disorder and Criminality", 1980, 3, Intr. J.L.Psy., 421-33.
81. See the detail of this case in Prins, op.cit., pp.33-38.
82. Ibid, p.96.
83. Prins, op.cit., p.93.
84. H.M.Adv. v. Sharp 1927 J.C. 66.
85. Clark and Smith, op.cit., pp.109-111, where some more details are stated.
86. Clark and Bridges, op. cit.,p.100.
87. Prins, op.cit., p.95.
88. Clark and Smith, op.cit., pp.115-166; see also Prins, op.cit, p.95, for more information.
89. Prins, op. cit., pp.102-112.
90. See p.162 above.

91. Prins, op.cit., p.106.

92. Ibid, p.107.

93. The Guardian, 19th march, 1980.

94. H.M.Adv. v. Cunnigham 1963 S.L.T. 345.

95. The Times, 3rd December, 1983.

96. See Prins, op. cit., pp. 140-162.

97. Clark and Penycate, Psychopath, 1976.

98. Ibid, pp.121-127.

99. Ibid, p.1.

100. Clark and Smith, op.cit., pp.173-175, for more detail.

101. Clark and Bridges, op.cit, pp.57-58.

102. The Guardian, 30th June, 1984; see also the case of Colin Evans in The Guardian 18th December, 1984; Evans involved in many serious sexual assaults on children.

103. Report of Criminal Statistics of England and Wales, Home Office, 1988, Cm. 847, p.38; Criminal Statistics of Scotland, 1980 - 1982, Cmnd. 9403, p.34.

104. Whitehead, op.cit., p.37.

105. Robinson v. Cal., 370, U.S. 660 (1962); Powell v. Texas, 392, U.S. 514 (1967), where the addict lacks control of his craving, and should therefore be acquitted of any offence which arises out of his subjection to it.

106. R. v. Majewski (1977) A.C. 443.

CHAPTER FOUR

CHAPTER FOUR

MENTAL DISORDER AND CRIMINAL RESPONSIBILITY

1. Introduction:

The mentally disordered accused or offender creates many problems for the criminal law. In fact the issue of mental disorder may be raised at different stages in the criminal process[1]. This chapter does not attempt to explore all the procedural stages where the issue of mental disorder or insanity arises. It is restricted to the areas of insanity as a defence, insanity in bar of trial, diminished responsibility, and irresistible impulse. The various procedural problems will be dealt with in the next chapter which examines sentencing.

Firstly, a mentally disordered accused may be deemed insane and therefore unfit to stand trial (i.e. insanity in bar of trial).

Secondly, when an offender has been convicted the court may impose a sentence which has little to do with penology, but much to do with medical treatment - for example, a hospital order.This point will be axplained in detail in chapter 5 below[2].

Thirdly, a mentally disordered accused may plead insanity as a defence to a criminal charge (not guilty by reason of

insanity). There may also be a plea of "diminished responsibility" which operates in a mitigatory fashion.

In this chapter, the main issue is the effect of mental disorder on criminal responsibility. Accordingly, the chapter outlines the present law in relation to the following:

1. Insanity as a special defence.
2. Insanity in bar of trial.
3. Diminished responsibility.
4. Irresistible impulse.

The position adopted in the Iraqi Penal Code is also referred to.

2. Insanity As A Special Defence:

The criminal law is concerned with the notion of responsibility in answering a practical question such as "is X responsible for bringing about the circumstances which are considered legally harmful?" To answer this question requires an inquiry about the state of mind of X. Once this is done, the question of responsibility is then considered according to certain principles and beliefs in the criminal law. Ascription of responsibility has the effect of making X liable to be punished for bringing about the harmful situation. The principles and beliefs are widely understood and widely held as Professor Hart has claimed that '...a primary vindication of the principle of responsibility could rest on the simple idea that unless a man

has capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him'[3].

In chapter 2 above, we discussed in detail the principle of responsibility in criminal law and the nature of excuses[4]. In chapter two we argued that the core idea in criminal responsibility was that the individual should only be said to be guilty of a crime if the act performed was done intentionally. It was also recognised that within a theory of punishment, excuses relevant to punishment require to be accommodated since certain conditions, not necessarily mentally related, may affect the individual in such a way as to prevent him from obeying the law. This stemmed from Hart's idea of fairness and general justice. We saw that Hart argued the basis for excuses on the idea of a "choosing system". The key to the choosing system is that the individual's choice is one of the operative factors which will determine whether or not sanctions should apply.

It is now necessary to consider the ways in which the mentally disordered individual is deemed to be responsible and, therefore, the extent to which the law treats the insane individual as belonging to one of the classes of conditions which fall within the excusing categories. We saw in chapter three that this is likely to vary with the type of disorder and its severity.

The major practical difference between "insanity in bar of trial" an "insanity as a defence" are that the accused in the latter situation is accepting that he did commit the act but is arguing that because of his "insanity" at the time of the offence he did not have the necessary mens rea to make his behaviour criminal. In the former position, the question of insanity arises as to the fitness of the accused to plead at a trial, i.e. at a stage subsequent to the alleged crime[5].

It has been argued by Hart,as has been already illustrated in chapter 2, that punishment of the insane may support the general deterrence function of the law[6]. Since the existence of categories of excuses weakens the effect of general deterrence, it is therefore further weakened by the defence of insanity. The defence is kept because the demands of deterrence have given way to the ideas of fairness and justice - the simplest reason being that it is unfair to punish the insane man, because he did not knowingly choose to break the law[7].

Expressions of the insanity defence in the Scottish and English jurisdictions mention either the accused's lack of "capacity" (knowledge or understanding or cognition) or his lack of "choice" (control or free-will) in relation to his behaviour or both. Thus, for example, knowledge or cognitive tests of insanity are directed to show that a person lacked mens rea in

cases where this lack of mens rea is provable and explainable on the basis of mental disorder, or some pathological condition which affected the person's reason[8].

Choosing or control tests are directed to showing that although a person had mens rea in the sense that he knew what he was doing, he was unable to exercise this knowledge to control his behaviour; he could not help acting as he did. Therefore it is argued that a "free will" is a crucial pre-condition of responsibility - this type of insanity will also produce an acquittal[9].

If the accused is found fit to plead, he may raise the defence of insanity at the time when he committed the crime.

The McNaughten Rules are adopted by English law as the test for establishing legal non-responsibility[10]. In McNaughten's case, McNaughten was suffering from Paranoid Delusion[11] and was acquitted on the grounds of insanity (see the analysis of the psychiatric classifications in chapter 3 and in particular the well known example of paranoid schizophrenia at p.156 and 157 above). The McNaughten Rules were set out by the judges in answer to questions considered by the House of Lords. They have now been accepted and acted on by the English courts, and they represent the law[12].

The central idea of the Rules is found in the answer to questions two and three[13]; '....to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the acts, 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 that he was doing what was wrong'.

Accordingly, there are two lines of defence open to an accused person:

I. If he did not know the nature and quality of his act by reason of a disease of the mind, he has to be acquitted.

II. He must be acquitted, even if he did know the nature and quality of his act, when he did not know it was "wrong".

It is clear that the Rules rely on a cognitive approach to non-responsibility.

As illustrated in chapter 3, disease of the mind need not be a disease of the brain only, but it could mean a functional disorder of the brain or a mental illness in the psychiatric sense or physical illness, for example, arteriosclerosis[14], a tumour on the brain[15], diabetes. All physical diseases may amount in law to a disease of mind, if they produce the relevant malfunctions[16]. It must be that the disease of the mind has given rise to a defect of reason. The powers of reasoning must be

weakened. A simple failure to use powers of reasoning is not within the Rules[17].

The term "nature and quality of his act" refers to the physical nature and quality of the act and not to its moral or legal quality[18]. Clarifications of this are given by learned writers: 'A kills B under an insane delusion that he is breaking a jar'[19]; and; 'The madman who cut a woman's throat under the idea that he was cutting a loaf of bread'[20].

It has to be observed that a man who was under such delusions as these, because he had no mens rea, cannot be convicted of murder[21].

The McNaughten Rules can be given a narrow or broad interpretation. Situations of delusions, in which the accused thinks he is doing something harmless, while he does something harmful, would be regarded as narrowest interpretation[22]. It is clear such a person does not "know the nature and quality of the act he was doing". The test of insanity would be far too narrow, however, if situations of delusions were the only type covered by the McNaughten Case[23]. Despite the fact that McNaughten appreciated his act was one of killing, there is a broader sense where he did not understand "the nature and quality" of his act. His act may be considered as one of self-defence because of his delusion. What is substantial here is that the delusion was a

sign of his paranoia which disabled him. McNaughten did not have the capacity to distinguish between those situations where there was no option not to kill in self-defence, and other conditions where evasive actions to save life might have been taken[24].

The McNaughten Rules should therefore be given a broader interpretation, because, as some critics argue, there are serious types of mental disorder which involve non-capacity in a weaker sense.

An accused might understand that he was doing a wrongful act but yet he lacked choice, that is to say, he lack the ability to control his conduct in conformity with the law[25]. These types of mentally disordered people, it is often said, suffer from an "irresistible impulse" to commit certain criminal acts. This point will examined later in this chapter[26]. The Royal Commission on Capital Punishment recommended that either,

i) the rules should be extended to include cases where the accused is labouring (as a result of disease of the mind) under emotional disorder which makes him capable of preventing himself from committing an act, even though he is aware that it is wrong and is capable of appreciating its nature, or

ii) the rules should be entirely abrogated and the jury given total discretion to determine whether he was so insane as not to be responsible for his actions[27].

The test of knowledge of right and wrong which is adopted by the McNaughten Rules is rejected by a number of cases in Scotland. According to Lord Justice-Clerk Moncreiff in State v. Pike (1869), the Scottish position is that '...neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognise acquaintances, or to labour or transact business or manage affairs, is, as a matter of law, a test of mental illness; but...all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury... whether the defendant had a mental disease, and whether the killing of his wife was a product of such disease, are questions of fact for the jury'[28].

Lord Moncrieff also, in Archibald Miller, gave the following direction: '...it is entirely imperfect and inaccurate to say that if a man has a conception intellectually of moral or legal obligations, he is of sound mind. Better knowledge of the phenomena of lunacy has corrected some loose and inaccurate language which lawyers used to apply in such cases. A man may be entirely insane, and yet may know well enough that an act which he does is forbidden by law... It is not a question of knowledge, but of soundness of mind. If the man has not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his unsound mind to do an

act simply because it is forbidden... If a man a sane appreciation of right and wrong he is certainly responsible; but he may form and understand the idea of right and wrong and yet be hopelessly insane. You may discard these attempts at definition altogether. They only mislead'[29]

We can again find the rejection of the rules in H.M.A. v. Kidd, where Lord Strachan gave the following direction to the jury: 'At one time following English law, it was held in Scotland that if an accused did not know the nature and quality of the act committed, or if he did know it but did not know he was doing wrong, it was held that he was insane. That was the test, but that test has not been followed in Scotland in the most recent cases. Knowledge of the nature and quality of the act, and knowledge he is doing wrong, may no doubt be an element, indeed are an element, in deciding whether a man is sane or insane, but they do not, in my view, afford a complete or perfect test of sanity. A man may know very well what he is doing, and may know that it is wrong, and nonetheless be insane. It may be that some lunatics do an act just because they know it is wrong. I direct you, therefore, that you should dispose of this question in accordance with the direction which I have given, which briefly are, that there must be alienation of reason in regard to the act committed,...the question is one for you to decide whether the accused was at the time of sound or unsound mind'[30].

It seems, therefore, that Scots law on the test of insanity as a defence is flexible and unsettled[31].

In the 1870s Lord Moncreiff adopted in many cases the criterion of the causal approach and he emphasised that the problem was one of medical fact and also that a man should have a sane knowledge in order to deem him responsible[32].

In the case of Thos. Barr Lord Moncrieff said that 'a man is said to be of unsound mind when his mind is diseased, so that, in some at least of the ordinary relations of life, he is incapable, by reason of disease, of controlling his conduct and actions... The question is, was this man's mind diseased- was he the victim of unsound thoughts, thought which was the product of the working of an unsound mind?... If...the prisoner was acting under a conclusion that was not only unsound in the sense of not being well founded, but that it was a conclusion he had formed because his mind was insane, that, no doubt, ...would amount to evidence of insanity'[33].

According to Lord Moncreiff's view (the causal approach), the insane person is not responsible if he committed an act which is a product of his insanity. The approach in the case of Thos. Barr was adopted in New Hampshire[34]. It is suggested, in some unreported cases, that the influence of the McNaughten Rules was still strong in Scot's law[35]. Lord Keith said that '...the

McNaughten Rules would be considered, but my impression is that the law is perhaps developing and is rather more flexible in that matter than it used to be, and that more regard would probably be paid to the actual evidence that was led by specialists on insanity in each particular case'[36].

Some Scottish cases show that at least some judges accepted that there was no legal test of insanity in Scots Law[37]. But the general statement of the law in a criminal case in Scotland is that in H.M.Adv. v. Kidd, by Lord Strachan[38]. On the defence of insanity, Lord Strachan gave the following directions to the jury: '... in order to excuse a person from responsibility for his acts on the ground of insanity, there must have been an alienation of the reason in relation to the act committed. There must have been some mental defect, to use a broad neutral word, a mental defect by which his reason was overpowered, and he was thereby rendered incapable of exerting his reason was alienated in relation to the act committed, he was not responsible for that act, even although otherwise he may have been apparently quite rational'[39].

Indeed Lord Strachan considered in his direction to the jury in relation to the question of unsound mind that 'the question really is this, whether at the time of the offences charged the accused was of unsound mind. I do not think you should resolve this matter by inquiring into all the technical terms and ideas

that the medical witnesses have put before you. Treat it broadly, and treat the question as being whether the accused was of sound or unsound mind. The question is primarily one of fact'[39].

This approach was followed by the Second Division in the civil case of Breen v. Breen[40], and has since been followed in a number of unreported cases[41]. In spite of the fact that it is said that this approach can be taken to represent the law in Scotland[42], it seems that the tests for insanity under Scottish law are still vague. The approach in H.M.Adv. v. Kidd represents a causal approach. To succeed in a defence of insanity, according to the causal approach, it is necessary to show that the criminal conduct was caused by mental disorder: 'the mere co-existence of mental illness and criminal conduct is insufficient'[43]. Even accused persons who suffer from severe mental disorder may at times behave in the same manner as they would have done had they not been suffering from mental disorder.

If the answer to "why did he do it?" is "because he was mentally disordered", then it means that he was not responsible. Since serious mental disorder may affect a person's entire personality this will usually be the answer when an insane man commits a crime. However not in every circumstance will it mean that he did not mean to do it.

The causal approach has many advantages: the main advantage

is that it allows the law to distinguish those who do not need punishment but medical treatment in order to stop a repetition of their offences from those who are liable to punishment because they commit offences while they have choice.

A further advantage of the causal approach is that it is flexible, and is reasonable because it lets the medical experts give their decision on the matter. The extent to which psychiatric opinion is treated with suspicion by lawyers has already been discussed in the previous chapter, and, indeed, in H.M.Adv. v. Kidd the extent of reliance upon medical evidence was clearly stated, i.e. that medical evidence was not conclusive on the question of legal non-responsibility[44].

It appears that the approach in H.M.Adv. v. Kidd is wider than the English test in the McNaughten Rules.

It has been suggested that Lord Strachan's view in Kidd concentrates on the idea of "sane understanding" which had been adopted by Lord Moncreiff[45]. Accordingly, if somebody knows the nature and quality of his act and its unlawfulness, but he has not "a sane understanding of the circumstances of his act", he will be non-responsible.

Gordon says that this is '...consistent with the more general requirements of "sane understanding" of which the Faculty

of Advocates spoke in their evidence to the Royal Commission and with Lord Moncreiff's view that mere "intellectual apprehension" is useless without a sane mind to apply one's knowledge'[46].

If whether or not an insane person is convicted depends more on which judge or jury happened to try him rather than on any accepted legal principle, it means that we will face conflict within the law applied in similar cases. It is clear that this situation does not serve justice because an insane person who is given a sentence by one court may be excused by another. For example, irresistible impulse is unacceptable in the McNaughten Rules, while it is acceptable according to Lord Strachan's view in H.M.Adv. v. Kidd.

Accordingly, the best approach would be to adopt a test of insanity akin to Lord Strachan's direction. The American Law Institute's proposed Model Penal Code's formulation of the test appears to be appropriate in this regard. Section 4.0(1) of the proposed official Draft provides that 'a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease...he lack substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law'[47].

The test which is summarised in the code involves a combination of "capacity" and "choice". Namely, an insanity

defence is acceptable when an accused does not understand the criminality of the act or if he understands that, has no ability to control his conduct according to the requirement of the law[48].

As a result, it is obvious from my analysis that the causal approach is more acceptable than any other approach in this defence. The main reason, as I have already stated , is that it is flexible when it lets the experts and court cooperate to determine responsibility of an accused. It also makes distinctions between insane people who are responsible for their acts because there was no link between their crimes and their illness and others who are not responsible,because there was a connection between their illness and their "crime". Another an important reason is that this approach makes a quite clear distinction between persons who need treatment and others who require punishment.

We will see in the next chapter that the present procedure applied to insane people who are found not guilty by reason of insanity serves a purely utilitarian aim, so it is unjust.

Insanity as a defence in Iraqi Criminal Law is provided in Article (60) of Iraqi Penal Code, which states that 'a person is not criminally responsible if he lost his "capacity" or "choice" at the time of committing the crime by reason of "insanity" or

mental disorder"...'[49].

We can infer from the definition above that the test of insanity in Iraqi Law is quite similar to the American model penal code and the Scottish test in the H.M.Adv. v. Kidd. Accordingly, it seems that the Iraqi Law has adopted a causal approach and "sane understanding" in the test of insanity. When the definition specifies, '...if he lost his "capacity" or "choice" at the time of committing the crime by reason of "insanity" or "mental disorder"...', it emphasises that the criminal conduct had to be caused by mental disorder. Also the Iraqi Penal Code provides: '...if he lost his "capacity" or "choice"...'. Accordingly, Iraqi Law admits that somebody could have capacity "knowledge" if he knows his act to be "wrong", but still be non-responsible because he lost his choice or"control". His knowledge or understanding in this situation is not "sane understanding" because his control is lost by reason of his mental disorder.

It is clear that there is conflict between this definition and those provided in articles 230, 231, 232 of the Criminal Procedure Code[50]. Whereas the insanity test according to Iraqi Penal Code deems the role of the medical experts to be important in making decisions[51], the Criminal Procedure Code deems that the judge has absolute freedom to determine whether or not an accused needs to consult a psychiatrist about his mental state,

even if the accused applied on his own behalf[52]. Thus, according to the Criminal Procedure Code, the judge can depend only upon his own satisfaction as to whether or not the accused is insane, while in the Penal Code the role of the medical experts is very important in establishing the mental state of the accused[53].

As already stated above the Iraqi Cassation Court has not settled on one clear direction to determine what is the role of psychiatrists in a mental disorder case[54]. It has also not settled on one clear direction in determining insanity, despite the fact that the insanity test which is provided in article (60) of Penal Code is very clear.

In some cases it has decided, that, if an accused is merely suffering from mental disorder, that is enough for non-responsibility[55].In other cases, the Cassation Court has adopted the test of insanity referred to in the penal code. For example, the court decided that one accused was not responsible when he killed his wife by reason of his mental disorder at the time of committing the crime[56].

Further although the court has, in some cases, adopted the insanity test provided by the Iraqi Penal Code, it has not spelt out the details of the test clearly. The court should at least declare the kind and nature of mental disorder which the accused

had, the effect of mental disorder on his conduct, for example, which elements of his personality was affected (capacity or choice), and state the causal link between the accused's mental disorder and his crime. The Iraqi Cassation Court ought to apply the Penal Code in which a clear direction to the "insanity test" is provided and is sensible and acceptable. If the court does not apply the law in any case, its decisions may be unjust in the context of the "insanity defence".

3. Insanity in Bar of Trial:

The plea of insanity in bar of trial is considered here because of its close association with the defence of insanity.

There are things to be decided by courts when the plea of insanity raised - the accused's fitness to plead, whether he committed the act charged, whether he was insane at the time. If the courts determine the first in the negative, they cannot proceed to deal with the other two[57]. In H.M.Adv. v. Wilson, Lord Wark directed the jury by saying that '...you must be satisfied that the accused was fit to plead, and that is the first question which you have to consider. If you arrive at the conclusion upon that question that he is not fit to plead, in a sense which I shall explain immediately, then you need not do anything in the case - you will simply find that he is not fit to plead, and that is an end of your duty. On the other hand, if you think he is fit to plead, then you have to go on to consider the

merits of case'[58].

The main aim of this defence, as Gordon says, is to provide a fair trial. He states that 'the principle behind the plea in bar is that every one is entitled to a fair trial, and that the exercise of that right presupposes that the accused is capable of instructing counsel and of understanding the proceedings'[59].

What should be obvious from this is that fairness is the central question: the criteria relate to ability to understand procedure and instruct counsel. In England, the question of fitness to pleaed is considered by the jury[60], while in Scotland, normally, the plea will be dealt with by the judge at the first stage of the proceedings, although it is possible for him to leave the question to the jury[61]. If the case was brought under solemn procedure and the plea is successful then the judge must order the detention of the accused in a state hospital unless there are exceptional circumstances, in which case detention can be in another specified hospital. The order will be without restriction of duration and the effect of detention is that the accused is detained in hospital until released by the Secretary of State. Where the procedure is summary, a hospital order with or without restriction can be made[62]. If the court, in the latter case, does not impose a restriction order on the accused's discharge, it may release him without reference to the Secretary of State.

The criteria of insanity in bar of trial used in England are very similar to those used in Scotland. They are as follows:

I. Ability to understand the proceedings at the trial and to make a proper defence.

II. Ability to challenge a juror.

III. Ability to understand the substance of the evidence.

The definition does not always restrict the assessment of fitness to plead to mental disorder but allows other factors relating to capacity to understand, for example,being dumb and deaf. However, most successful pleas on insanity in bar of trial have arisen in cases where there was substantial evidence of mental handicap. It is interesting to note that the courts, nonetheless, often require an element of mental disorder before accepting the plea[63].

In H.M.Adv. v. Wilson, the accused was charged with robbery and murder. The evidence which was available was that he suffered from a state of feeble-mindedness, and considerable difficulty was encountered in communicating with him. In addition to this, he was almost completely deaf and dumb. The accused's counsel contended that he was fit to be tried. In charging the jury Lord Wark gave the following directions on the issue of fitness: 'Now what exactly is meant by saying that a man is unfit to plead? The ordinary and common case, of course, is the case of a man who

suffers from insanity, that is to say, from mental alienation of some kind which prevents him from giving the instructions which a sane man would give for his defence, or from following evidence as a sane man would follow it, and inspiring his counsel as the case goes along upon any point that arises. Now, no medical man says, and no medical man has ever said, that this accused is insane in that sense. His reason is not alienated, but he may be insane for the purposes of the section of the Lunacy Act to which counsel referred, although his reason is not alienated, if his condition be such that he is unable either from mental defect or physical defect, or a combination of these, to tell his counsel what his defence is and instruct him so that he can appear and defend him; or if, again, his condition of mind and body is such that he does not understand the proceedings which are going on intelligibly follow what it is all about'[64].

In Russell v. H.M.Adv. the accused was charged with a series of frauds extending over a period of more that three years. The accused, at the first diet, lodged a plea in bar of trial that she was suffering from hysterical amnesia and was on that account unable to plead to the libel or give instructions for defence. The judge at her trial held a preliminary inquiry into the issue of her fitness to plead. He repelled the plea because she was mentally normal at the time of the trial. The judge made his decision without hearing evidence from medical witnesses to the effect that she had no recollection of events from the period

during which the frauds were allegedly committed. The accused was convicted and appealed on the grounds that the judge misdirected himself in refusing to support the plea in bar of trial. Lord Justice Clerk Cooper in this case said that 'the onus is always on the accused to justify a plea in bar of trial, and to do so not to the satisfaction of expert witnesses but to the satisfaction of the court'[65]. He continued that 'the court has balanced against each other two major considerations, (1) fairness to the panel, who should not be tried if and so long as he is not a fit object for trial, and (2) the public interest which requires that persons brought before a criminal court by a public prosecutor should not be permitted to purchase complete immunity from investigation into the charge by the simple expedient of proving the existence at the diet of trial of some mental or physical incapacity or handicap. When fairness to the accused requires that the trial should not then and there proceed, the public interest equally requires that the accused should not there and then be virtually acquitted untried'[65].

Russell's case was followed by the English Court of Criminal Appeal in the case of R. v. Podola[66]. The question of amnesia in relation to a defence of insanity at the time was fully discussed in H.M.Adv. v. Kidd. In that case Lord Strachan directed the jury that amnesia, if established on the evidence, was an important element to be considered in deciding whether the accused was sane or insane at the time of the defence, and could

have the effect of lessening the burden on the accused in establishing his special defence of insanity. The case of H.M.Adv. v. Brown[67] helps us to understand the position adopted by the court with the plea of insanity in bar of trial. In this case the accused was charged with the murder of a woman who had eaten a piece of shortbread containing poison which the accused had sent to the deceased's employer for his consumption. The Procurator Fiscal produced, at the first diet before the sheriff, a certificate signed by two doctors certifying that the accused was not fit to plead to the indictment because of unsound mind. At the second diet after the Sheriff reserved the matter for the High Court, the Procurator Fiscal informed the court that the accused's mental condition had not changed. The counsel for the accused objected to the intervention, stating that his client had instructed him and wished to be tried. Lord Justice-General Dunedin said that 'it seems to me quite clear from the decided cases that from a very early period the court considered it always competent, if they thought it expedient, to make an inquiry into the state of a prisoner's sanity with the view of seeing whether the prisoner should be allowed to plead, which, of course, is the first step to be taken in order to his being put on trial... It is not a rule binding on the court to order an investigation where a prisoner's sanity is put in question. It is a question of expediency...the court...must always decide in each particular case, and upon the circumstances of that particular case, as to the expediency of going on with a preliminary

investigation...'[68].

Lord Dunedin gave the following directions to the jury: 'If you come to the conclusion that the ravages of the disease are such that it cannot be said that this man is in the same condition that a sane man would be, and that he is not able to tell fully about his actions, then you are bound to state that he is insane, and not proceed to the other portion of the case... The first question you must answer is, is the prisoner now insane? If you answer that question in the affirmative, you must not, whatever you think, proceed to any of the other questions'[68].

The requirements, therefore, are not specifically related to mental disorder as medically defined (an accused is unfit if he cannot understand the nature and course of trial, conduct his defence and instruct his counsel), so why should treatment (medical) be the logical outcome? Gordon says that a 'person who is found insane and unfit to plead is dealt with in the same way as a person acquitted on the grounds of insanity'[69]. In other words, the only disposal available on a plea in bar is an order for detention in a mental hospital. The accused may, of course, come to trial later.

It is clear that the present procedure for dealing with the defence of "insanity in bar of trial" is a radical solution and

may lead to injustice because an accused person will find himself under detention in a mental hospital for an indefinite duration, possibly of the rest of his life, despite the fact that there is not enough evidence to prove either that he committed the crime or that he was dangerous to himself and others. It was said by the Thomson Committee that '...we find it difficult to endorse as satisfactory the present procedure which can result in an accused person being sent to a mental hospital by a criminal court without proof that he committed the act which is the subject of the charge'[70]. So, why should such incapacities (mental illness, mental handicap...and so on) have to preclude trials? If there is any care for rights and humanity, it must give those persons who are presently regarded as "insane in bar of trial" a fair opportunity to secure an acquittal and thus avoid such detention.

The questions which arise from the case of H.M.Adv. v. Brown are: Is it any advantage to the accused to dispense with a preliminary inquiry into his fitness to plead if, after the evidence has been led, the jury must decide this issue before considering the rest of the evidence? What should the jury do if they consider that the accused is unfit to plead but that on the evidence he has a good defence? [71]. What if we could prove an accused's guilt beyond all reasonable doubt despite his disordered lack of knowledge or understanding (for example, when we have an admission from an accused before he become insane or

there is enough evidence available in the case). Accordingly, why should he not be tried and convicted? It is said that, in order to make an accurate verdict more appropriate, the trial should be subject to certain qualifications[72]. So, there is a concern with the accused's capacity to understand the procedure of trial because the court regards the accused as a rational person who can defend himself. The court presupposes that, if the accused is insane, he can not understand and participate in the procedure of the trial. It is emphasised that the verdict may still be accurate, but the trial becomes a travesty. If the accused can not understand what is the indictment against him or what is required of him there is no benefit in or reason for trying him[73].

There are, however, some accused persons who may understand all of the proceedings of the trial without accepting them, they may refuse the sentence which is issued against them, they may reject the court's authority and what the law requires, they may not answer any question or deny any indictment against them, and they may intend to make their trial a travesty, and all of these do not make them unfit to be tried and convicted. So what is the difference between such accused persons and others who are found insane in bar of trial? Even if there is some unfairness in the procedure of trying an insane accused, it does not justify us in ignoring the criterion of justice which requires to us to determine whether an accused is responsible or non-responsible,

in order to avoid an unjust detention for an indefinite duration. In other words, if there is limited unfairness in the trial procedure against an insane accused, it does not generally affect the trial result (conviction and sentencing) because the court has to take into account all of the evidence and circumstances when it makes its decision. Namely, can it be proved beyond reasonable doubt that an accused is guilty of offence with which he is charged?

As a result, the great injustice which results from the detention of an insane accused for indefinite duration in mental hospital should be removed even if at the expense of a limited unfairness in the trial procedure of an insane accused.

It is worthwhile here considering some suggestions which have been made as to how such unfairness might be avoided. It is said that an accused insane in bar of trial could be acquitted and discharged, if the matter of fitness to plead might be postponed until after the substantive issue of guilt or innocence has been determined[74]. This solution is obviously odd, because how the court can determine the issue of fitness to plead after the conviction?

Another solution is that which is laid down by section (4) of the English Criminal Procedure (Insanity) Act, 1964, which provides that a judge may postpone the issue of fitness to plead

until the end of the prosecution's case. If the judge finds out that there is no evidence or no case to answer against an accused, he orders his acquittal and release. Otherwise, an accused who has a case to answer should still be liable to such a restrictive detention simply because he is not in a fit condition to answer the case against him. Actually, this solution is a partial solution to the dilemma because those insane persons who are found unfit to plead might be in a worse condition than other persons who were found guilty and sentenced. In other words, the fate of someone found unfit to plead may thus often seem worse than the fate of someone who is punished for an offence of which he or she has been convicted. The offender in the latter case will serve a prison sentence of limited duration, while the accused in the former case may be kept in detention for the rest of his life.

In my view, accordingly, the most appropriate solution is to abolish the defence of insanity in bar of trial. This solution will give the accused an opportunity to raise the more obvious substantive defences which may lead to his acquittal and it is more helpful for the courts because the trial will be held while witnesses are available and their memories still accurate[75].

As a result, if this defence is abolished, the consequences of full trial of an insane accused will be that he is found "not-responsible", or "responsible". In the former case, either the

accused may be found not guilty because there is no case to answer or evidence against him, so that he should be released, or he may be found not guilty by reason of insanity when it is held that he committed the act but was at the time so disordered as not to be responsible for it. In this case , according to the present law and practice, the insane accused must be detained for an indefinite duration. We shall see, however, in the next chapter how these people might otherwise be dealt with. On the other hand, when the court finds out that an insane accused is guilty, it should sentence him. We shall consider the methods of proceeding against these insane offenders in the next chapter as well.

The attitude to insanity in bar of trial in the Iraqi Criminal Law is similar to that in Britain. Articles 230 and 231 of the Iraqi Criminal Procedure Code[76] state what the judge should do when he finds an accused insane in bar of trial. Article 230 provides: 'When it appears during the court proceeding or investigation that the accused is unable to defend himself due to his mental disorder or to test his mental state to determine his criminal responsibility, the judge of investigation and the court may halt the proceedings and the accused should be detained in hospital, if he is accused of a crime in which he cannot be released by bail. In other crimes, he may be placed in a private or governmental health institution according to request from his legal representative and on his own account or his

relatives secured by a personal guarantee. An official medical committee should examine him and submit a testimony on his state of health'

Article 231 provides: 'If it is concluded from the report of the committee mentioned in Article (230) that the accused is unable to defend himself, court proceedings may be postponed until he be in a position to defend himself and be placed in custody on a governmental health institution if he is accused of a crime for which he cannot be released on bail. In other crimes, he may be handed over to one of his family secured with a personal guarantee which commits the latter to examine and cure him either inside or outside Iraq'.

4. Diminished Responsibility:

Diminished responsibility had been part of the common law of Scotland for many years before its introduction into English law. The case of Dingwall[77] is recognised as the real origin of modern Scots Law on this subject. A major change was introduced by a decision made in this case in which the accused was an alcoholic who stabbed his wife after a quarrel because she had hidden his money and his liquor. He was kind to her when he was sober; he had suffered from occasional attacks of delirium tremens; he was sober at the time of the killing but claimed that he remembered nothing about it. In suggesting to the jury that they might bring in a verdict of culpable homicide rather than

one of murder, Lord Deas mentioned the accused's mental condition as one among a number of mitigating factors; he states '...if weakness of mind could be an element in any case in the question between murder and culpable homicide, it seemed difficult to exclude that element here... The state of mind of a prisoner...might be an extenuating circumstance, although not such as to warrant an acquittal on the ground of insanity'[78].

Lord Deas dealt with diminished responsibility in a number cases after Dingwall, for example John McLean[79], Andrew Granger[80], and Thos. Ferguson[81]. Accordingly, Lord Deas is regarded as the founder of the doctrine in its modern form.

The most important case on diminished responsibility after Dingwall, and the one which seems to be responsible for the term itself, is H.M.Adv. v. Savage[82]. The direction on the law which was given there by Lord Justice Clark Alness has been adopted as the basis of the modern law. Lord Alness told the jury that '...there may be such a state of mind of a person, short of actual insanity, as may reduce the quality of his act from murder to culpable homicide...Formerly there were only two classes of prisoner - those who were completely responsible and those who were completely irresponsible. Our law has now come to recognise in murder cases a third class ...'[83]

Lord Guthrie had earlier explained the meaning of diminished

responsibility in legal terms. He said : 'The man's mind must have been affected to such an extent at the date of the crime that his responsibility for crime is diminished from full responsibility to partial responsibility '[84]. This is of course not very helpful since all it seems to do is say that where responsibility is less than full then it will be partial . It acknowledges that the mind should be affected but tells us nothing about how that effect should be created - does this include those who are affected by external factors or merely those whose mind is affected by internal disease processes, for example ?(see chapter 3).This definition was further examined by Lord Alness in Savage. For there to be diminished responsibility, he said: '...there must be an aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility - in other words the prisoner in question must be only partially accountable for his actions ... there must be some form of mental disease'[85].

So, the Savage definition above is the authoritative basis of the modern law. It was accepted by a full Bench of the High Court in Carraher v. H.M.Adv.[86]. Lord Justice-Clerk in Carraher, said that 'our law does recognise, and it is a comparatively recent introduction into our law, that, if a man suffers from infirmity or aberration of mind or impairment of

intellect to such an extent as not to be fully accountable for his actions, the result is to reduce the quality of the evidence in a case like this, which, if you think so, would be otherwise murder, to reduce it to culpable homicide'[87]. Here we have a statement that disease of some kind must be present but what is "mental disease"? Is it, for example, a disease of the body which affects the brain, or of the type which demonstrates itself in behaviour changes and is categorised by psychiatry?. In Carraher v. H.M. Adv. above and in H.M. Adv. v. Braithwaite, Lord Cooper commented on diminished responsibility and referred to 'some infirmity or aberration of mind or impairment of intellect to such an extent as not to be fully accountable for his actions'[88]. He then went on to explain that the defence is not identical to irresistible impulse or of uncontrollable temper, saying that if short temper were to reduce the charge then 'the world would be a very convenient place for criminals and a very dangerous place for other people if that were the law'[89]. Therefore, under Scots law, it would seem that for a man's responsibility to be diminished in legal terms, he must show evidence of a disease of the mind "bordering on, but not amounting to" insanity.

The plea of diminished responsibility was introduced into English law by section 2 of the Homicide Act 1957, which provides:

'(1) Where a person kills or is a party to the killing of

another, he shall not be convicted of murder if he was suffering from such subnormality of mind (whether arising from a condition of arrested or retarded development of mind any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(2) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter...'[90].

It appears that the effect of a successful defence of diminished responsibility will reduce the offence to one of manslaughter[91]. Diminished responsibility covers all the grounds which the McNaughten Rules cover, as well as going beyond them.

Therefore, a person may be aware of the nature and quality of his act and understand that it is wrong according to law and yet be unable to prevent himself from doing it. As such, this person does not border on insanity within the McNaughten Rules, but he can rely on the defence of diminished responsibility[92]. In consequence, diminished responsibility has been pleaded with success in cases where there was no chance of a defence of insanity succeeding [93]. Williams has claimed that s.2 of the 1957 Act placed psychiatrists in a position of having to testify

in terms which go beyond their professional competence [94]. The English defence requires evidence of two factors:

I. Abnormality of mind. "Abnormality of mind" has been widely understood as a state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal [95]. This term can clearly cover disordered personalities including psychopathy [96].

II. Resulting substantial impairment of mental responsibility. It is submitted by Wootton that "mental responsibility" is an unfortunate term and is obscurely worded [97].

Clyne states: 'Frankly, I cannot pretend to offer any meaning for the proposition that, when A committed a certain action, he was "mentally responsible"; still less would I presume to give any meaning to the related proposition that his "mental responsibility" was diminished...'[98].

Williams points out that responsibility is a legal and ethical term, not something which is a clinical fact [99]. There are several difficulties, and they centre on the meaning of the words'... substantially impaired his mental responsibility...'.

Opinions differ concerning the meaning of the word "responsibility" in this particular context, together with the word "mental". It seems clear that the section cannot be referring to substantial impairment of legal responsibility, in

the sense of liability to conviction, since legal responsibility is something which is ascribed by one individual to another, and hence cannot meaningfully be described as "mental"[100]. A further possibility is that the word "responsibility" here refers to the meaning of the word where we, in a tone of praise, call someone a "responsible person". We, mean by this that he is a person who realises his duties and obligations, and is perceptive to the duties and obligations, of others. Before he acts, he considers the effect that such actions may have on others, and he will be prepared to modify his actions if they might cause unnecessary harm. Fortunately, there is a well known judicial statement on the problem to help us. The leading case on the interpretation of the section is Byrne, and in that case Lord Parker explained that 'the expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will-power to control his physical acts'[101].

In the end we may wish to agree with Clyne, who gives up the idea of ascertaining a true meaning of the section, and suggests that what section 2 requires of a jury is that they ask themselves whether the accused's '...mental responsibility was diminished to such a degree to that English law ought to find him not guilty of murder, though it should find him guilty of manslaughter'[102]. Clyne arrives at the view, therefore, that

the jury ought to return a verdict of manslaughter if, having regard to the accused's mental state, they think that they should[103].

The implications of the English definition would seem to be different from the Scottish situation. In England, diminished responsibility is now interpreted more favourably to the accused than in Scotland[104]. In Scotland it would appear that an element of disease is essential to the plea, whereas in England the plea may succeed where the reduction of responsibility is caused by external factors which have affected the mind. This seems to relate more closely to a common sense approach to the whole question of responsibility since most people would recognise that not all situations where mitigation is desirable relate to mental disorder in the sense of some disease process. Such characteristics seem to be more in line with the insanity defence, and indeed concentration on the existence of disease must make the differentiation between diminished responsibility and insanity for legal purposes rather difficult. Moreover, the English definition would seem at first sight to be able to cover those who are addicted to drugs or alcohol which will substantially impair mental responsibility but which may not be classified as a disease of the mind[105]. This possibility was accepted in the case of R. v. Fenton (1975) although Fenton was not successful in establishing this[106].

It should be noted that diminished responsibility does not protect the accused from conviction. It is restricted to reducing the charge from murder to culpable homicide (in Scotland) and to manslaughter (in England)[107].

The doctrine of diminished responsibility has been criticised by some writers. Gordon says that 'any discussion of diminished responsibility is likely to be bedeviled at the outset by the inaccuracy of the term itself, which suggests wrongly that diminished responsibility affects responsibility in the sense of guilt, and not merely sentence. This fundamental error crept gradually into Scot's law between 1867 and 1923 and seems now to have been taken over by English law'[108].

It is said that diminished responsibility developed as a "doctrine" in the context of murder because the only way of giving effect to mental abnormality short of insanity in murder cases was by acquitting the accused of murder and convicting him of culpable homicide. Its position in that context is like the position of provocation. In both cases the persons are responsible and liable to conviction, but in both cases there are mitigating circumstances[109]. The particular circumstances of the case mean that, even although there is an intention to kill, that intention arises from the particular circumstances and deprives the crime of the degree of gravity necessary for murder. In fact, it is virtually a kind of murder in the second degree.

Essentially it operates as mitigating the gravity of an offence and opening the possibility of more flexible sentencing.

The effect of diminished responsibility on sentence had to be "justified", to be "rationalised" and "to be given some conceptual basis in the law of murder" because of the fixed penalty for murder[110]. The debate is often moved to the arguments for and against fixed penalties. Williams said that 'except in cases of murder the judge has a discretion in sentencing that enables him to deal sensibly with the mentally disordered. For murder...the government...decided instead to extend the discretion of the judge by allowing a defence of "diminished responsibility"[111].

The idea behind the plea of diminished responsibility is to identify a state of mind which could provide some explanation or excuse for behaviour, but which was not actually insanity. In recognition of this, the nature of the crime committed could be changed by identifying a modified mens rea, and reflecting this in the punishment imposed. Lord Deas said in the case of John McLean that '...without being insane in the legal sense...a prisoner may yet labour under that degree of weakness of intellect, or mental infirmity, which may make it both right and legal to take that state of mind into account, not only in awarding the punishment, but...even in considering within what category of offences the crime shall be held fall'[112].

This approach has been criticised. On one hand it is said, if a man is incapable of forming the criminal intention to commit one crime, how can he be capable of forming the criminal intention to commit another?[113]. On the other hand, if this is the idea behind the plea, then by developing a consistent approach to the criteria used to establish the existence of diminished responsibility, the state of mind of the accused could be taken into account in every case[114]. Gordon suggests a further difficulty which would arise if diminished responsibility were to be extended beyond homicide. He claims that diminished responsibility only operates in relation to offences which were interrelated in the same way as murder and voluntary culpable homicide; that to say that they both had the same actus reus, or that the actus reus of the lesser offence was necessarily included in the actus reus of the more serious offence[115]. It might never be acceptable in criminal law for diminished responsibility to operate to reduce one crime to another, where those crimes were totally different in nature.

Accordingly, this powerful objection to the plea of diminished responsibility explains why diminished responsibility has not operated in all offences other than homicide. It has been suggested that it could do so sometimes. MacDonald thinks that it is possible to operate it in assault[116]. Lord Keith considered that it could operate beyond the scope of homicide[117], and

Professor Edwards has suggested that it might operate to reduce, for example, rape to indecent assault[118].

With the limited number of existing offences the opportunity to reduce offences by diminished responsibility is restricted. It is impossible in all cases to reduce the offence to the lower category. An example of this is the case of theft, where the only other alternative is to reduce the sentence. It seems that diminished responsibility can only operate where there exists a suitable lesser offence with which the accused may be convicted. However, the law has developed the plea exclusively in the case of murder.

It appears from what has been said above that diminished responsibility is considered as something affecting the question of guilt rather than punishment. Gordon, however, would suggest that the plea is really only logical if one considers it as a form of diminished punishability rather than diminished responsibility[119].

The Butler Committee emphasised that the mandatory life sentence for murder should be abolished[120], but should be used where there were no mitigating factors. That is to say, when the judge finds some mitigating factors, for example, mental weakness, he can reduce the sentence. According to this view judges will have a wide discretion as to sentence in murder

cases.

Article (60) of the Iraqi Penal Code provides that '...if the mental disorder only impairs "capacity" or "choice" it must be deemed as "mitigating factors"[121]. According to Iraqi law, the impairment of "capacity" or "choice" by reason of mental disorder is considered as a factor of "diminished punishability" and not "diminished responsibility". The judge, therefore, has to apply these mitigating factors when they are proved. As long as, according to Iraqi law, the category of the offence does not change, there is "diminished punishability" and not "diminished responsibility".

Diminished responsibility is a confused area of law and it might be better to have it as a mitigating circumstance but this means that the insanity defence must take into account the ability to control conduct.

5. Irresistible Impulse:

In spite of the fact that "irresistible impulse" was recognised before the case of McNaughten[122], it is clear that the McNaughten case allow for defects of knowledge, but not for defects of the emotions or the will. Until 1957 the defence was rejected in England. The suggestion that a man who acted under an impulse which he could not control was not criminally responsible was said to be 'a fantastic theory...which if it were to become

part of our criminal law, would be merely subversive'[123]. It is argued that there is difficulty in distinguishing between an impulse which proves irresistible by reason of normal motives of greed, jealousy and revenge; and so, such an excuse has not to be allowed[124].

Accordingly, it is almost impossible for a court to tell genuine cases from false ones. The possibility of defendants shamming irresistible impulse as a way of escaping the penalties of the law was a real possibility as Stephen declared that 'there may have been many instances of irresistible impulse of this kind, but I fear that is a disposition to confound with unresisted impulse...'[124].

Thus, it appears that the main difficulty in accepting a control test is one of proof. Before it can be accepted it must be shown that A's ability for self control has been so seriously reduced as to make his condition comparable to that of someone acting under superior external force. It has to be shown not just that he did not resist his desire to kill or rape or steal or forge, but that he could not have done so: and indeed that he and his like cannot do otherwise to resist their impulses by threat of punishment[126]. Reference is made to chapter 3 where various types of psychiatric conditions which may affect the person's ability to control his behaviour are discussed. Good examples are those who are suffering from personality disorder (psychopathic

disorder, sexual deviants, addictions...etc., kleptomania and pyromania).

Lord Chief-Justice Parker accepted that such difficulties still remained. He said that 'in a case where abnormality of mind is one which affects the accused's self control, the step between "he did not resist his impulse" and "he could not resist his impulse" is, as the evidence in this case shows, one which is incapable of scientific proof. A fortiori: 'there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses. These problems, which in the present state of medical knowledge are scientifically insoluble, the jury can only approach in a broad common-sense way'[127].

Wootton claims that no "empirical validation" or "objective criterion" is available to check whether a court's assessment of the truth of an accused's claim of irresistible impulse was correct or not[128]. This is true, but the objection is not limited to irresistible impulse. As Ross puts it: 'In many cases irresponsibility cannot be established with scientific objectivity, in the way that one can point to the occurrence of cancer. But this should cause no anxiety in the moral philosopher or the jurist. For each must know that this is far from being a peculiarity of the concept of responsibility, and indeed is, on the contrary, the normal condition for the moral and juridical

judgement and treatment of men'[129].

The Royal Commission favoured the addition of a clause, suggested by the British Medical Association, that there should be a defence of insanity when a person has no ability to control himself from committing an act that he understands to be wrong. Further, it is more desirable to abandon any test such as the McNaughten Rules and leave it to the jury to decide whether the accused, when he committed the offence, was mentally disordered or not, in order to determine his responsibility accordingly [130]. In fact, though, this guidance does not offer very clear assistance to the jury in reaching a suitable decision. Accordingly, as Gordon has said, the existence and strength of any insanity impulse should be a question of medical fact [131].

It is obvious from Article [60] of the Iraqi penal code which provides that '... if he lost his "capacity" or "choice"..." [131] that any person who loses only his choice (control) by reason of mental disorder, is deemed not responsible when he commits a crime. There are some cases adopted by the Iraqi Cassation Court in this direction [132].

From the examination of the courts' attitudes towards cases involving insanity as a defence, insanity in bar of trial, diminished responsibility and irresistible impulse, it appears that the law is unclear about the legal definitions of insanity

in terms of what is meant by them. In addition, the courts are trying to apply notions of common sense justice by considering questions of mental disorder at all stages of the criminal process, especially disposal, but the concepts in the criminal law lead to decisions which seem to be illogical. There is illogicality and also a paradox in a situation where a man may be found "not guilty by reason of insanity" yet can be ordered to be detained without limit of time in a special or state hospital under conditions which may appear to him and his family to be hardly different from those of imprisonment.

Other mentally disordered persons may be kept in hospital, ostensibly in their "best interests", for periods of time far beyond those for which their acts would normally be punished by fixed sentences of imprisonment.

It seems that the mentally disordered offender is being doubly "punished" both for his mental disorder and for what he has done which has been deemed an offence or crime.

There is a conflict between what the Iraqi court applies in deciding issues of insanity. The judges require satisfaction to their own standards and thereby ignore the provision in the Penal Code, namely that insanity is a matter of advice from medical experts, i.e. the causal approach. There is no doubt that there are conflicting areas in the various theories of punishment, and

this is certainly reflected in the difficulties that are to be found in cases of insanity, insanity in bar of trial, diminished responsibility and irresistible impulse. The various psychiatric definitions and classifications considered in chapter 3 appear at times to be either ignored by the judges or at times readily adopted without any consistent basis.

At this stage, it is safe to conclude that the law is really in a muddle and refuses to deal with the inconsistencies. According to Hart's approach (choosing system), individuals should not be punished when they have committed crimes involuntarily. Hart argues that in such cases treatment is being used as substitute for punishment. So, in order to avoid the injustice involved in the present procedure, Hart's view seems to be that treatment should be separated from punishment. Accordingly Hart's approach might cut through the muddle and inconsistencies for the law. The sentencing process may well show a more enlightened thinking. The next chapter looks at the sentencing process in relation to such mental conditions and the special defences.

FOOTNOTES

CHAPTER FOUR

1. Wootton, 1978, op.cit., p.227.
2. See chapter 5 below.
3. Hart, 1968, op.cit.,p.181.
4. See chapter 2 above.
5. But only on the grounds of insanity entail compulsory hospitalisation; I owe this point to Professor S. McLean of Glasgow University.
6. See chapter 2 above.
7. Hart, 1968, op.cit., ch.1; also see ch.2 above.
8. Report of Butler Committee, op.cit.,para. 18.17.
9. Gordon, op.cit., pp.347-352; In U.S. v. Currens, 290f.2ed.751 (D.C.Cir 1981), the control test was adopted.
10. Ibid, p.353, where he refers that this rule here has been followed in Canada, New Zealand, India, pakistan, Ceylon and in parts of Australia and the U.S.
11. Walker, Crime and Insanity in England, Vol. 1, 1968, p.91, where he cited McNaughten statement after he was arrested as follows: 'The Tories in my native city have compelled me to do this. They follow and persecute me wherever I go, and have entirely destroyed my peace of mind. They followed me to france, into Scotland and all over England: in fact they follow me wherever I go... They have accused me of crimes of which I am not guilty; in fact they wish to murder me. It

can all be proved by evidence'.

12. Smith and Hogan, op.cit., p.168.

13. McNaughten (1843) 8 Eng. Rep. 718, where the second and third questions are: '2nd...what are the proper questions to be submitted to the jury when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence? 3rd... in what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?'

14. Kemp (1957) 1 Q.B 399, where stated that D made an entirely motiveless and irrational attack on his wife with a hammer. He was charged with causing grievous bodily harm to her with intent to murder her. It appeared that he suffered from arteriosclerosis which caused congestion of blood in his brain. As a result he suffered a temporary lapse of consciousness during which he made the attack. It as conceded D did not know the nature and quality of his act and that he suffered from a defect of reason.

15. In R. v. Charlson (1955) 1 ALL E.R. 859. Medical evidence showed that the accused was suffering from a cerebral tumour and this was dealt with by means of a simple acquittal.

16. See the detail in chapter 3 above regarding the diseases and malfunctions of the brain and body.

17. Smith and Hogan, op. cit., p.169.

18. Codere (1916) 12 Cr. App. Rep. 21.

19. Stephen, A Digest of The Criminal Law, 1950, p.6.

20. Cecil Turner, Kenny's Outlines of Criminal Law, 1965, p.76.

21. In Windle (1952) 2 ALL. E.R, 1, is shown that the courts are concerned only with the accused's knowledge of legal wrongness. Lord Goddard said that 'courts of law can only distinguish between that which is in accordance with the law and that which is contrary to law ... The law cannot embark on the question and it would be an unfortunate thing if it were left to juries to consider whether some particular act was morally right or wrong. The test must be whether it is contrary to law... In the opinion of the court there is no doubt that in the McNaughten Rules "wrong" means contrary to law and not "wrong" according to the opinion of one man or of a number of people on the question whether a particular act might or might not be justified'; see also Schwartz v. R. (1976) 67 D.L.R (3d) 716.

22. Mason and McCall Smith, op.cit., pp.301-303; Ten, op.cit., pp. 123-125; David and Richards, The Moral Criticism of Law, 1977, p.210; Kenny, "The expert in court", 1983, The Law Qua. Rev., p.212. An example often cited is that the accused is squeezing an orange or a lemon.

23. Gorden, op.cit., p.355; Report of Royal commission, op.cit., para.289.

24. Ten, op.cit., pp.123-125; Mason and Smith, op. cit., pp.301-303.

25. Ibid.

26. See this chapter pp.235-240

27. Report of Royal Commission, op.cit., sect.296.

28. State v. Pike (1867) 49 N.H. 399.

29. Archibald Miller (1874) 4 couper 86,; see also Macklin (1876) 3 Couper 357 at 359, 360.

30. H.M.Adv. v. Kidd 1960 J.C. 61.

31. Gordon, op.cit., p.347.

32. Archibald Miller (1874) 4 Couper 86, Which I have already mentioned above.

33. Tos. Barr (1876) 3 Couper 261 at 264-265.

34. Tos. Barr (1876) 3 Couper 261.

35. See, for example, H.M.Adv. v. Andrew Brown 1866 5 Irv. 215; George Bryce 1864 4 Irv. 506.

36. See Report of Royal Commission, op. cit., Q.5189 and Q.5465 of Lord Cooper's.

37. In H.M.Adv. v. Brown (1907) 5 Adam 312, Lord Justice-General Dunedin dealt with the question of insanity at the time of the crime by telling the jury that they could acquit the accused on the grounds of insanity if they found that he was not h"really responsible for his actions". In the same sense see H.M.Adv. v. Cameron, Perth High Court, June 1946 (unreported) in which Lord Birnam directed the jury; if on the evidence they came to the conclusion that the accused had been insane at the time of the crime they should find accordingly; we can find the same principle in H.M.Adv. v.

Mitchell 1951 J.C.53, where Lord Justice Clerk Thomson said that in the circumstances there was no need for any detailed direction on insanity, and told the jury merely that since in a seizure, they need only ask themselves if in fact he was in a fit when he committed the crime.

38. H.M.Adv. v. Kidd 1960 J.C. 61.
39. H.M.Adv. v. Kidd 1960 J.C. 61.
40. Breen v. Breen 1961 S.C. 158.
41. Gordon, op. cit., p.374.
42. See, for example, Brennan v. H.M.Adv. 1977 S.L.T. 151, where it was defined "disease" as "absolute alienation of reason in relation to the act charged". This view is different from the view in H.M.Adv. v. Kidd.
43. Gordon, op.cit., pp.361-362.
44. See chapter 3, pp.121-129.
45. See this chapter p.202.
46. Gordon, op.cit., p.376.
47. The American Model Penal Code.
48. Mason And Smith, op.cit.,pp.299-305.
49. The Iraqi Penal Code,1969.
50. The Iraqi Criminal Procedure Code, 1971.
51. See this chapter pp.221-222
52. See chapter 3, pp.129-133 "The Iraqi Criminal Law Attitude".
53. Ibid.
54. See chapter 3, pp.129-133.
55. Decision No. 311-felonies, 1973, Juridical Publication.

1975, where the court deems that the mental illness "Paranoidstates" from which the accused was suffering is enough for non-responsibility; for same sense see, Decision No. 211fel., 1973, Juridical publication, 1976, p.378; Decision No.2289-fel., 1975, (unpublished; Decision No.3210-fel., 1972, Juridical Publication, 1975, p.473.

56. Decision No. 2143-fel., 1969, Juridical Publication, 1971.p.378. See also, Dusky v. United States (1960) 352 U.S.402, where the legal definition of insanity in bar of trial was expressed by United States supreme court as follows: 'The test must be whether he (the defendant) has sufficient present ability to consult his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.

57. Gordon, op.cit., p.378.

58. H.M.Adv. v. Wilson, 1942 J.C. 75 at p.78.

59. Gordon, op.cit., p.377.

60. Criminal Procedure (Insanity) Act, 1964, sect. 4(4).

61. Criminal Procedure (Scotland) Act, 1975, Sect.25 and 174(1); To understand what are the problems with this plea, see the arguments in the Report of Butler Committee, op.cit., Report of Thomson Committee on Criminal Procedure in Scotland, 1975, Cmnd. 6218.

62. Criminal Procedure (Scotland) Act, 1975, sect.174 (4), 375 and 376; also see similar provisions in Criminal Procedure

(Insanity) Act, 1964, sect. 5 (1) and 3.

63. H.M.Adv. v. Wilson 1942 J.C.75; See also H.M.Adv. v. Brown (1907) 5 Adam 312, 346, where Lord Justice General Dunedin told the jury they must decide wether the accused could "maintain in sober sanity his plea of innocence and instruct those who defend him as a truly sane man would do"; in H.M.Adv. v. Cameron 19461 S.N.73, Lord Birnam told the jury merely that they must decide whether the accused was sane or not.

64. H.M.Adv. v. Wilson 1942 J.C. 75.

65. Russell v. H.M.Adv. 1946 J.C. 37.

66. R. v. Podola (1960) 1 Q.B.325.

67. H.M.Adv. v. Brown 1907 S.C.J.67.

68. H.M.Adv. v. Brown 1907 S.C.J.67.

69. Gordon, op.cit., p.378.

70. Report of Thomson Committee, op.cit., p.214.

71. The Criminal Procedure (Insanity) Act, 1964, where it is allowed that the issue of fitness to be postpones until any time up to the opining of the case for the defence. It seems that this section gives more flexibility to apply justice.

72. Ashworth, "concepts of Criminal Justice", 1979, Crim. L.R. 412.

73. Lucas, On Justice, 1980, ch.4.

74. Report of Thomson Committee, op. cit., ch.2, para.o7-10; Lord Devilin's comments in Roberts (1954) 2 ALL E.R. 340.

75. Weiner, "Interfaces Between The Mental Health and Criminal

Justice System", in Teplin (ed.), Mental Health and Criminal Justice, 1984, p.25, where it is stated that this direction has now been adopted in part in many states in U.S.

76. Iraqi Criminal Procedure Code, 1971.

77. Alex Dingwall (1867) 5 Irv. 466.

78. Alex Dingwall (1867) 5 Irv. at pp.479-480.

79. John McLean (1876) 3 Couper 334.

80. Andrew Granger (1878) 4 Couper 86.

81. Thomas Ferguson (1881) 4 Copuer 86.

82. H.M.Adv. v. Savage 1923 J.C.49.

83. H.M.Adv. v. Savage 1923 J.C.49.

84. H.M.Adv. v. Edmonstone 1909 2 S.L.T. 223.

85. H.M.Adv. v. Savage 1923 J.C. at pp.49-51.

86. Carraher v. H.M.Adv. 1946 J.C. 108.

87. Carraher v. H.M.Adv. 1946 J.c. 108.

88. H.M.Adv. v. Braithwaite 1945 J.C.55.

89. H.M.Adv. v. Braithwaite 1945 J.C.55.

90. The Homicide Act, 1957.

91. Mason and McCall Smith, op.cit., op.cit., pp.305-307; Smith and Hogan, op.cit.,pp.184-187.

92. Rose v. R. (1961) A.C. 496.

93. Smith and Hogan, op.cit., p.187.

94. Williams, Textbook of Criminal Law, 1978, pp.623-624.

95. R. v. Byrne (1960) 2 Q.B.396.

96. Hogget, Mental Health Law, 1984, p.161.

97. Wootton, "Diminished Responsibility: A Layman's View", 1960,

76, L.Q.R., 224; Sparks, "Diminished Responsibility in Theory and Practice", 1964, 27, M.L.R., 9.

98. Clyne, Guilty but Insane, 1973, p.26.

99. Williams, op.cit., pp.623-624.

100. Ibid.

101. R. v. Byrne (1960) 2 Q.B.396.

102. Clyne, op.cit.,p.26.

103. Walton, (1977) 3 W.L.R. 902; R. v. Matheson (1958) 2 ALL E.R. 87; R. v. Kiska (1979) Crim.L.R. 465, where some support is given to this view by the jury's power to reject the medical evidence in case of diminished responsibility.

104. Smith and Hogan, op.cit., pp.155-156.

105. I owe this point to Professor S. McLean, Glasgow University; See also, Mason and McCall Smith, op.cit., pp.305-307.

106. R. v. Fenton (1975) Crim. L.R. 712.

107. H.M.Adv. v. Cunningham 1963 J.C.386; Brennan v. H.M.Adv. 1977 Q.B. 364.

108. Gordon, op.cit., p.380.

109. Ibid, p.381; see also Hart, 1968, op.cit., p.15, where said that 'the special features of mitigation are that a good reason for administering a less severe penalty is made out if the situation or mental state of the convicted criminal is such that he was exposed to an unusual or mental state of the convicted criminal is such that he was exposed to an unusual or specially great temptation, or his ability to control his actions is thought to have been impaired or

weakened, otherwise that by his own actions, so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed.

110. Williams, op.cit., p.622; See also Hart, 1968,p.15, where he said that 'sometimes legal rules provide that the presence of a mitigating factor shall always remove the offence into a separate category carrying a lower maximum penalty. This is "formal" mitigation, and the most prominent example of it is provocation...provocation is not a matter of justification or excuse for it does not exclude conviction or punishment but "reduces" the charges from murder to manslaughter...'; see also Maher, "Sane but abnormal" in McLean (ed), Legal Issues in Medicine, 1981, p.195, where Maher said that '...diminished responsibility was one of the factors considered by the judge in using his discretion in determining the sentence for a convicted person'.

111. Gordon, op.cit., pp.381-382; see also Dingwall Alex (1867) 5 Irv. 466; Thos. Ferguson (1881) 4 Couper 552; Andrew Granger (1878) 4 Couper 86, where Lord Deas treated the accused's mental state as a mitigating factor entitling the jury to convict of culpable homicide instead of murder. And when Lord Deas spoke about Dingwall in latter cases, he referred to all the mitigating factors, and not only to the accused's mental state, as the reason for the reduction of the crime to culpable homicide.

112. John McLean (1876) 3 Couper, 334.

113. Gordon, op.cit., sect.11-03.

114. I owe this point to Proffessor S. McLean, Glasgow University.

115. Gordon, op.cit., p.383.

116. McDonald, op.cit., ch1.

117. Keith, "Some Observations on Diminished Responsibility" 1959, Jur. R., 10, at p.113.

118. Edwards, "Diminished Responsibility - A Withering Away of The Concept of Responsibility", in Mueller (ed.), Essays in Criminal Science (1961), 301, at p.305.

119. Gordon, op.cit., p.381; see also Kirkwood v. H.M.Adv. 1939 J.C. 36 at p.40; see also H.M.Adv. v. Higgins 1913 7 Adam 229 at pp.232-233, where Lord Johston said that 'to say that man is mentally capable of murder and this man only mentally capable of culpable homicide, that man is capable of a capital offence but this one only of an offence not capital is a proposition which would, I think, unsettle the administration of criminal law... I can understand limited liability in the case of civil obligation, but I cannot understand limited responsibility for a criminal act. I can understand irresponsibility, but I cannot understand limited responsibility - responsibility which is yet an interior grade of responsibility'; Sparks, "Diminished Responsibility in Theory and Practice", 1964, 27, M.L.R. 9.

120. Report of Butler Committee, op.cit., See also, Dell,

"Diminished Responsibility Reconsidered", 1982, Crim. L. R. 809; Walker, "Butler v. C.L.R.C. and others", 1981, Crim. L. R. 595.

121. The Iraqi Penal Code, 1969.

122. Prichard, On the Different Forms of Insanity in Relation to Jurisprudence, 1842, where Prichard said that 'in this disorder that the will is occasionally under the influence of an impulse, which suddenly drives the person affected to the perpetration of acts of the most revolting kind, to the commission of which he has no motive. The impulse is accompanied by consciousness; but it is in some instances irresistible; some individuals who have felt the approach of this disorder have been known to take precautions against themselves; they have warned, for example, their neighbours and relatives to escape from their wrath until the paroxysm should have subsided'.

123. Kopsch (1925) 19 Cr. App. Rep. 50, Lord Hewart at p.51.

124. Smith and Hogan, op.cit.,p.117.

125. Stephen, "On the Policy of Maintenaining The Limits at Present Imposed on The Criminal Responsibility of Madman" in papers read before the Juridical Society, 1855.

126. Report of Butler Committee, op.cit., ch.18, where it is critical of the notion of irresponsible impulse. It asks, 'How can one tell the difference between an impulse which is irresistible and one which is merely not resisted?'

127. R. v. Byrne (1963) 3 ALL E.R.1, at p.4.

128. Wootton, 1963, op.cit., pp.73-74, where she said that '...neither medical science nor any other science can ever hope to prove whether a man who does not resist his impulses does not do so because he can not or because he will not. The propositions of science are by definition subject to empirical validation; but since it is not possible to get inside another man's skin, no objective criteria which can distinguish between "he did not" and "he could not" is inconceivable'.

129. Ross, op.cit.,p.96; see more information of comment in Wootton's view in Ross, op.cit.,pp.93-96.

130. Report of Royal Commission, op.cit., sect. 296; see also the Atkin Committee (quoted by Kenny, op.cit.,p.39) recommended in 1923 that a prisoner should not be held responsible when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist.

131. Gordon, op.cit., p.359; See also Henderson and Gillespie's, Textbook of Psychiatry, 1978, pp.551-572, where they point out that 'there is no mental disorder, however partial, that does not have its reverberations throughout the rest of the affected mind. Consequently the purely intellectual criterion of responsibility falls to the ground, for the intellect as intellect may be unimpaired, but an emotional disturbance will alter, or impede or nullify its effect on conduct. Conversely, intellectual defect means deficient

emotional control'.

132. Iraqi Penal Code, 1969.

CHAPTER FIVE

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THE SENTENCING PROCESS AND MENTAL DISORDER

1. Introduction:

The previous chapters have dealt with a study of the legal rules and theories of responsibility and punishment in relation to offenders or accused persons who are mentally disordered. However, the reality of the effects of these rules and concepts have not been dealt with. Accordingly, this chapter will study the sentencing processes which are currently in operation in relation to such offenders or accused persons. It will cover the scope of the types of sentences that will be imposed and the powers of the courts, and their limitations, to vary such sentences. The Mental Health (Scotland) Act 1984 and Criminal Procedure (Scotland) Act 1975[1] have secured the powers of the courts when dealing with mentally disordered people. The question of an accused person's mental condition, in criminal procedure, is important for several reasons:

a) People who were insane at the time of committing crimes cannot be convicted of, or sentenced for, them.

b) People who are insane in bar of trial cannot be tried upon a criminal charge.

c) People who become mentally disordered after being convicted may be dealt with by a hospital or guardianship order...etc. instead of being sentenced in the normal way.

d) People who become mentally disordered after being sentenced can be dealt with under a "transfer direction".

In this Chapter attention will be focused on the following points:

1. Mentally disordered offenders in relation to criminal procedure.
2. Insanity and criminal procedure.
3. The Iraqi Criminal Law and sentencing process.
4. Dangerous mentally disordered people.

2. Mentally Disordered Offenders In Relation to Criminal Procedure:

Before any specific psychiatric orders can be made by a court under the Mental Health (Scotland) Act 1984 and the Criminal Procedure (Scotland) Act 1975 (the Mental Health Act 1983 includes similar provisions), the court must take into account many factors, for example:

I. An offender has to be convicted by the court of a crime other than "murder". That is to say, the sentence for the crime must not be fixed by law.

II. Medical evidence must be taken by the court. This evidence, written or oral, must be provided by two medical practitioners. One of them has to be approved by an Area Health Authority as having special experience in the diagnosis or treatment of mental disorders.

III. The court has to be satisfied that the offender has a mental disorder of a nature or degree which warrants detention in hospital, other than for probation orders.

IV. The court must choose an order which is appropriate for the offender according to all the circumstances, including the nature of the offence and the character of the offender.

There are five specific psychiatric orders, as well as the possibility that the offender who is sent to prison may later be transferred to hospital. Each is examined in turn according to the above Act. An assessment of the implications of the law and of the policy of the courts when they are dealing with dangerously mentally disordered offenders is made[2].

a) Probation Orders:

The present law and procedure on probation orders are set out in sections 184, 185, 384, 385 of the Criminal Procedure (Scotland) Act 1975[3]. Probation orders may be made in court for any offence other than one with fixed penalty (i.e.murder). There is no power to order probation without conviction. In terms of these provisions, the court may impose a probation order with a condition requiring the offender to submit to treatment for his mental condition when it is satisfied, on the evidence of an approved registered medical practitioner, that the mental condition of an offender is such as requires and as may be susceptible to treatment, but is not such as to justify his

detention in a hospital. Such orders may be from six months to three years. The time has to be specified in the probation order and it must be one of the following kinds:

'a. Treatment as a resident patient in a hospital within the meaning of the 1984 (Scotland) Act other than a state hospital;

b. treatment as a non-resident patient at such institution or place as many be specified in the order; or

c. treatment by or under the direction of such registered medical practitioner as may be specified in the order'[4].

The obligation of the supervising officer responsible for the probationer is to carry out the supervision to such extent only as may be necessary for the purpose of the discharge or amendment of the order. According to the probationer's consent, the medical practitioner may make arrangements for him to be treated in another institution or place not specified in the order. The medical practitioner, in these circumstances, has to inform the supervising officer in writing. The medical practitioner should also inform the supervising officer of his opinions as follows:

'a. the treatments should be continued beyond the period specified in the order; or

b. that the probationer needs different treatment; or

c. that the probationer is not susceptible to treatment; or

d. that the probationer does not require further treatment'[5].

If the court receives evidence from an approved registered medical practitioner, if the offender consents, and if the court is satisfied that the offender's mental condition requires and is susceptible to warrant his detention following a hospital order, the court may add a restriction involving submission to medical treatment for the whole or part of the probation period.

While the probation order may be relevant in many cases where neither the offence nor the mental disorder is so grave to involve a hospital order, decisions of the English Court of Appeal indicate that it may also be used in cases which might otherwise justify an imprisonment, for example, wounding with intent[6], and arson with intent to endanger life[7]. These offences warant a sentence of three years imprsonment. Probation orders must have the consent of the convicted person, so that medical treatment is in effect voluntary, although it is a condition of probation. It appears that this order allows a flexible combination of medical care and supervision. Accordingly, this order can be changed according to the patient's condition. So the probation order may be changed to a guardianship order or a hospital order when it is found out that this order is not appropriate for the patient or the patient does not consent to cooperation with the medical authorities[8]. The Thomson Committee suggested that greater use should be made of this order[9].

b) Hospital Orders:

Sections 175 (1) and 376 (1) of the Criminal Procedure (Scotland) Act 1975[10], provide that where a person is convicted in court of an offence the sentence for which is not fixed by law, i.e. murder, the court may in certain circumstances issue a hospital order, namely, if the court finds that the hospital order is the most suitable method of disposing of the case. The court, before making such an order, must be satisfied on the written or oral evidence of two doctors, one of whom must be a practitioner approved by a Health Board as having special experience in the diagnosis or treatment of mental disorders[11]. The grounds for making a hospital order are that offender is suffering from mental disorder, i.e. mental illness or mental handicap, of a nature or degree which makes it appropriate for him to be detained for medical treatment in a hospital. It must also be shown that it is necessary for his health or safety or for the protection of others that he should receive such treatment and that it cannot be provided unless he is detained under part V of the Mental Health (Scotland) Act 1984, i.e. unless he is compulsorily detained. In the case of minor disorders (mental impairment and psychopathic disorder), the person must satisfy the "treatability condition"[12]. Namely, if the person suffers from a persistent mental disorder shown only by abnormally aggressive or seriously irresponsible conduct, he may be detained in such a case if medical treatment is likely to improve or prevent a deterioration of his condition. Therefore,

the court must find it likely that treatment will make some change in the offender's mental condition either in the sense that the condition can be cured or remedied or that it can be prevented from becoming worse. Where the person suffers a mental handicap, he may be detained only where the handicap amounts to mental impairment and medical treatment in hospital is likely to improve or prevent a deterioration of his condition. It should be noted, though, that "mental impairment" has a technical legal definition relating to irresponsible conduct and not just to mental handicap, as explained later. Where it amounts to severe mental impairment, however, the requirement that the treatment is likely to improve or prevent deterioration does not apply[13], since there is no treatability test in respect of an offender suffering from mental illness or severe mental impairment. Unless the responsible medical officer states that the offender's condition is treatable or that he is unlikely to be able to care for himself, to obtain the care he needs or to guard against serious exploitation if he is discharged, such a patient will be discharged at the end of a period of detention (for example, after six months from the making of the order).

A hospital order cannot be made unless the court is first satisfied that the hospital is available for his admission within 28 days of making the order[14]. Judges have expressed considerable disquiet at the difficulties of finding a hospital bed for the mentally disordered[15]. In Harding, Lawton J. warned

people who refused admissions to secure units when he said that 'anyone who obstructed the execution of a hospital order or procured others to obstruction might be guilty of contempt of court'[16]. At any rate, since the hospital order is made after the making of satisfactory arrangements for the offender's admission to hospital, failure to make a bed available can not obstruct the execution of the order.

The effects of an ordinary hospital order under section 175 or 376 of the 1975 Act are almost similar to treatment under the civil provisions of the Mental Health (Scotland) Act 1984[17]. All the rules relating to the duration and renewal of detention, reclassification, leave of absence, absconding and discharge by the authorities are the same. There are only two significant differences: first, the nearest relative of a hospital order patient cannot order his discharge and second, the patient does not have the right to apply to a court within six months following the hospital order being made[18]. The first occasion on which either the hospital order patient or his nearest relative can apply to a court is between six and 12 months of the making of the order.

In principle, the court should determine whether punishment or treatment is relevant and make its choice accordingly. In R. v. Gummell (1966)[19], it was decided that an offender who deserved punishment could be sent to prison, even though he

qualified for a hospital order and a suitable bed was available. Once it has been decided that treatment is relevant, the court can then consider whether a restriction order should be added to the hospital order. The restriction order is considered in detail later in this chapter.

Of course, as I have argued, some treatments are in effect punishments from the point of view of the offender, so that the choice is not as clear as might appear. In reality, a life sentence is not literally for life and is normally shorter than an hospital order with restriction order.

c) Guardianship Orders:

Like hospital orders, guardianship orders may be made for the same offences and with the same medical evidence. The guardianship order is made by the court after the court is satisfied from the evidence of a Mental Health Officer that guardianship is approprate and in the interest of the offender's welfare[20]. All circumstances, such as the nature of the offence, the character and antecedents of the offender and the other available methods of dealing with him, have to be taken into account when the court determines on the guardianship order. "Mental handicap" is restricted to impairments which are associated with seriously irresponsible conduct. Mentally handicapped offenders do not usually benefit from hospital treatment, but could be advantaged by prolonged guidance in the

community.

The guardianship order is basically like the hospital order in duration, procedure for renewal, power, and rights of application to a tribunal[21]. However, the effect is quite different. In respect of the comparison with the probation order provisions there is an important difference between the effects of the two orders. Under a probation order the offender can be brought back to court when he does not co-operate with the medical authorities, while under a guardianship order there is no sanction such as this. The appropriate effects of these orders are considered later in this chapter and in the last chapter. Guardianship orders, however, involve certain obligations and disabilities which are not found in probation orders. While the offender accepts the probation order on a voluntary basis, the guardianship order is imposed compulsorily. The guardianship order may not be made unless the guardian is willing to receive the accused. The guardian has three powers over the patient. He may decide when and where the patient should go for treatment, occupation, education and training, and where the patient should live and he may permit any named doctor, social worker or any other person to see the patient. The mentally disordered offender is placed in the guardianship either of the local services authority or of some other individual approved by them[22].

It appears that few orders have been made in recent years,

despite the fact that the guardianship order, in some circumstances, as is shown later, is more effective than a probation order (for example, the guardianship order can be used where the offender does not consent).

The Butler Committee recommended greater use of guardianship orders. They stated that 'it is our view that guardianship orders offer a useful form of control of some mentally disordered offenders who do not require hospital treatment; as we said, they are particulary suited to the needs of subnormal offenders including those inadequate offenders who require help in managing their affairs'[24].

d) Interim Hospital Orders:

With an ordinary hospital order the court has only one opportunity to make a hospital order or to pass an ordinary sentence on a convicted person. If the court makes a mistake in its decision, there is no means of returning the person to the court for a more suitable disposal. For example, if a court makes a hospital order on the basis of the medical reports before it, and, after the offender's arrival in hospital, it turns out that he had never been mentally disordered, he has to be discharged and freed from punishment, even if the alternative would have been a long period of detention. Parliament has now provided for an interim hospital order in the case of offenders whose disorder is so grave as to justify their detention in mental hospital[25].

When the court has actually convicted the accsed of an offence which would qualify for a full hospital order, an interim hospital order is also available. In the first instance, therefore, the court may make an interim hospital order. The court, thus, transfers the offender to a mental hospital for such purposes as the court may specify[26].

There must be medical evidence from two doctors, of whom one must be employed in the hospital to which the accused is to be sent. They must state that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment. There must be a place available for the offender within 28 days of the order, and the court may give such directions as it thinks fit for the conveyance of the offender to and his detention in a place of safety awaiting his admission to the hospital[27].

An interim order will last in the first instance for a duration of not more than twelve weeks. The court may renew the order for not more than twenty-eight days at a time up to a maximum of six months on the written or oral evidence of the responsible medical officer[28].

The court retains power of disposal for the crime in question, once an interim order is at an end. It may make a

hospital order, if the evidence is available, or the court may choose to impose a penalty, if the evidence is not available[29].

e) Restriction Orders:

In certain circumstances a court is entitled to add to a hospital order special restrictions on the offender's discharge. The restriction is either without limit of time or for such duration as may be specified in the order[30]. The restriction order will be made after the medical practitioner gives such evidence orally[31]. The court must be satisfied that the restriction order is necessary to protect the public from serious harm. When the court imposes the restriction order, it has to look at the nature of the crime, the antecedents of the offender, and the risk of his committing further offences if set free[32].

The aim of restriction orders is essentially protective. The justification for making the restriction order, therefore, depends on the degree of risk of serious harm to others. Restriction orders should not be made when the offender may commit crimes, but, according to the medical reports, these crimes would not amount to "serious harm". On the other hand, what degree of risk of serious harm from further offending should the court require, if there is little doubt from the nature of the present offence and of the antecedents of the offender that he is capable of causing serious harm? The matter will be more important when the medical reports indicate that the offender may

commit serious crime if not put in secure conditions. There is plenty of evidence that the prediction of dangerousness is uncertain and can be mistaken (this point is developed later). This helps to explain the view, considered earlier, that many lawyers and judges take of cases involving psychiatric reports.

Lord Parker determined in the leading English case of Gardiner[33] that the restriction order should be imposed in "case of crimes of violence and of the more serious sexual offences". This opinion corresponds with both the 1984 Act and the 1983 Act, as long as minor offences do not recur. It has been re-examined in some other decisions during the last few years. The Court of Appeal in Toland[34] upheld the restriction order imposed on a young burglar who had twice absconded from a local mental hospital.It is true that the case is not in the same category as the case of a violent sexual offender to which Lord Parker referred. This justification does not lead to the conclusion that the offender presents a risk of serious harm. There are many other cases in which the court has stated that it is appropriate to impose a restriction order in relation to convictions for modest offences, such as obtaining by deception[35], damaging two window panes[36], or stealing a purse[37]. Lord Justice Mustill in Regina v. Birch said that 'the seriousness of the offence must not be equated with the probability that restriction order would be made: a minor offence by a man who was mentally disordered and dangerous might properly

leave him subject to a restriction'[38]. Amongst the most obvious was Nigel Smith who was a "petty fraudster" with no history of violence or even mental disorder, who found himself not only in a mental hospital, but also under a restriction order of unlimited duration[39]. The Butler Committee was critical of this direction. Its Report stated that 'evidence given to us by The Home Office has indicated the probability that these orders are imposed in numbers of cases where their severity is not appropriate....There is no indication of the seriousness of the offences from which the public is intended to be protected by the restriction order provisions, and some courts have evidently imposed restrictions on, for example, the petty recidivist because of the virtual certainty that he will persist in similar offences in the future'[40].

It is clear that the purpose of the inclusion of the words "serious harm" into both the 1984 and the 1983 Act was to narrow the types of offence for which the restriction order is justifiable. It is generally agreed that "serious harm" should be limited to serious crimes of violence and grave sexual offences, together with other offences of a similar level (including serious cases of possessing weapons, serious forms of arson, aggravated burglary and burglary with intent to rape or injure). To be more precise it is suggested that the "serious harm" required by a restriction order should parallel the judicial approach to life imprisonment. For some the predicted offence

should be of the kind which justifies a sentence of more than seven years imprisonment. Others suggest that the threshold for restriction orders should be five years imprisonment. It is argued, here, however that since the restriction order involves a deprivation of liberty, it should be limited to really serious cases. In Regina v. Birch Lord Justice Mustill said that 'a restriction order should not be imposed merely to mark the gravity of the offence which was an element in the assessment of risk, nor as a means of punishment. The question in this case was whether in the light of the statutory factors, namely the nature of the offence, the defendant's antecedents and the risk of further offences, the restriction order was necessary for the protection of the public from serious harm'. This point is developed later.

Part V of the 1984 Act does not apply to patients who are under a restriction order. Such patients are not subject to the same provisions for the duration, renewal and expiration of the detention as patients detained civilly. The Secretary of State is entitled to expire the detention of patients and to move them from one hospital to another. When a limited restriction order expires, but the hospital order remains in force, the patient is treated as if he had been admitted to hospital as an ordinary patient on the day the restriction order expired'[42].

In present times, the power of the Home Secretary or

Secretary of State for Scotland to discharge patients subject to restriction orders is not exclusive. In Scotland, for example, the patients have the right to appeal to the Sheriff Court against the imposition of the restriction order. The appeal may be made at any time during the second six months of detention, and in any subsequent duration of 12 months. The Sheriff Court or the Secretary of State may discharge the offender conditionally or absolutely[43].

At any time, The Secretary of State can recall a patient who is conditionally discharged[44]. The powers of the Secretary of state to discharge and recall patients or to lift a restriction order are unaffected by these appeal provisions[45]. The European Court of Human Rights in X. v. United Kingdom emphasised that patients must not be recalled unless a ground of detention exists[46]. Hoggett said that 'in any event, the case must now be referred to a tribunal, which would have to discharge, if the grounds were not there'[47].

It is argued that the restriction order is not a therapeutic disposal. Rather, it is punishment equal to a sentence of life imprisonment, because the restriction order for the patient may take a much longer time than is justified by his mental condition[46]. Accordingly, it is suggested that the restrictions should not last longer than a duration in balance with the acuteness of the crime for which they were imposed at least[48].

The situation with offenders who are transferred from prison to hospital supports this idea. When their imprisonment would have ended, their restriction orders have to end. It does not matter what is their mental condition.

f) Transfer Directions:

The transfer from prison is called in the 1984 Act "Transfer Direction"[49]. The power to transfer offenders from prison is in the hands of the Secretary of State. To exercise his power, he must have reports from two doctors, one of them approved. The prisoner must be suffering from either mental illness, psychopathic disorder, severe mental impairment or mental impairment. As for an ordinary hospital order, the other conditions are also the same. The transfer from prison and the hospital order have the same effect, but the prisoner in the former may be subjected to restriction of discharge by the Secretary of State. Within one month, the patient can appeal to the Sheriff to revoke his transfer to a hospital. If successful, he will be sent to any prison or other institution in which he might have been detained before his transfer was ordered.

Ordinary restrictions are placed when the sentence is still not at an end. Therefore, when the sentence expires, the restrictions have to cease. In this situation, the patient is entitled to be discharged unless an ordinary hospital order is necessary for him. As the restriction order, the transfer

direction has the same effect. The transfer order is subject to an appeal. Therefore, it may be appealed to the Sheriff within the first six months. The Sheriff Court has the power to advise that a prisoner is fit for discharge and he is no longer a suitable case for treatment. Accordingly, the Secretary of State has the power to choose one of three things:

I. Unless the patient has ended his sentence and he is ready for discharge, the Secretary of State can leave the patient in hospital for the time being.

II. The Secretary of State can send the prisoner back to a prison to complete his sentence.

111. The Secretary of State can discharge the patient under supervision or licence.

3. Insanity and Criminal Procedure:

The question of how to deal with people who are found by the court to be insane at the time of the crime but who are sane at the time of disposal, is an issue which gives rise to a great deal of controversy. Such people, according to present procedure, have to be committed to a hospital by the court, although acquitted by a jury, and remain there until the Home Secretary or the Secretary of State for Scotland authorises their discharge[50]. In contrast, people will be acquitted and released when they succeed in an ordinary defence of lack of mens rea.

The criteria to be applied by the jury in Scotland in

reaching a special verdict are laid down by Lord Strachan in H.M.Adv. v. Kidd[51]. A person who has been acquitted by a jury after an insanity defence was successful, is ordered by the court to be detained in the state hospital, or, if there are special reason why conditions of special security are not required, in some other specified hospital. This has the same effect as a hospital order with a restriction on discharge without limit of time[52]. The person will remain in hospital until released by order of the Secretary of State for Scotland or appeal to the Sheriff[53].

In summary procedure in the Sheriff Court, when a person is acquitted on the grounds of insanity, he is detained in a mental hospital but in this situation the restriction or discharge is within the discretion of the court. Under summary procedure, alternatively, the person may be placed under the care of the local authority as guardian or some other person approved by the authority instead of be detained in a mental hospital[54].

In terms of legal advice, between a lawyer and client, a defence lawyer would advise a client not to enter an insanity plea unless the nature of the charge is very serious or stigmatising[55]. It is submitted that a prison term under a guilty plea, or for a psychiatric probation order or hospital order[56] is from the accused's point of view preferable to automatic long term detention in some unit for the criminally

insane[57].

It is said that the dangerousness of people who plead insanity who have perpetrated violence has already been demonstrated, and it may be assumed that the dangerousness continues, for some time later. The basis of this assumption is that past behaviour is the best indicator of future behaviour. Moreover, an acquittal by reason of insanity is a finding that the defendant suffered from a mental disorder at the time of the defence, but what about the state of mind of the defendant at the time of acquittal? The verdict refers to the time of the act, but it presumes that the mental disorder continues up to the time of commitment[58]. Clearly it is the protection of the public that is given priority. Ten states that '...it is also important that mentally ill offenders who acted without mens rea should not be automatically released in the same way that other offenders who are excused are released. A mentally ill offender lacking mens rea may cause serious harm to others if he is immediately released without medical examination. Mental illness should therefore be a distinct excuse different from other excuses'[59].

Psychiatrists content with the present procedure have, nonetheless, recognised the problems that these cases cause. In general, the present practice of sending a person who has committed a crime to a mental hospital even if he is sane at the time of sentence is favoured by the psychiatrists. This view is

justified by the need to keep such people under observation and treatment for a time in case they are suffering from a recurring illness, for example epilepsy or certain types of depression. Therefore, in such cases, as it would appear, sending a sane person to a mental hospital is not so illogical[60].

The compulsory nature of the order after special verdicts has often been criticised as unnecessary. There is an assumption that those who go to trial and raise the special defence are sane at least at the time of their trial. Therefore, there is the inevitable problem that the accused who is pleading that he was insane at the time of the offence is at the time of his trial by the definition sane or he would have been dealt with by the plea in bar, although, as we have seen, the criteria for insanity as a defence are not identical to those for in bar of trial. Given the remote possibility that the accused has recovered by the time of his trial, and has in the interest of justice raised the question of his sanity at the time of the offence, the inevitable outcome of a successful special defence is compulsory hospital treatment. The now sane offender is in the position of having to plead not guilty and accept possible indefinite detention for medical treatment, which, under the terms of the 1984 Mental Health (Scotland) Act, can be instituted without his consent in some cases. Of course, it is unlikely that an accused person will have made a spontaneous recovery and this type of situation will probably arise infrequently. Nonetheless, it could happen[61].

As mentioned earlier, in chapter 3, there is a difference between "medically insane" and "legally insane"[62]. Therefore, according to the concept "legally insane", some physical illnesses are regarded as "mental disorder" when they affect the brain, for example, diabetes. Accordingly, no mental hospital would admit a diabetic merely because he had a low blood sugar reaction and it might be felt to be "an affront to common sense" to regard such a person as insane[63]. Again it is clearly the protection of the public that is the prime consideration in practice.

On the other hand, if a person who is not guilty of crime poses a danger, not because of mental disorder, but because of his personality, then he has to be returned to society and only arrested if he commits criminal act[64]. It must be noted that the danger posed by people who are acquitted by reason of insanity is small in comparison to the many hazards in our daily lives - guns, cars, etc. In general, the rate of recidivism among those discharged from prison is more than double that of people acquitted by reason of insanity. Hoggett said that 'mental disorder as such is not the criterion. There are plenty of sane people who are dangerous and plenty of insane people who are not. If we are going to deprive people of either proportionality or the normal principles of guilt and innocence in order to protect society against serious risk, we should be concentrating on the

accurate identification and discovery of that risk and on nothing else'[65].

Therefore, it is unjustifiable to transfer to a mental hospital someone who is sane and requires no treatment. Further, if he is not a danger to the community at large, the committal, as well as being unfair to the person, serves no useful purpose. It is said that the practice of compulsory treatment, however, would seem to link the plea more closely with the old terminology of guilty but insane[66].

Thus, while accepting that a hospital disposal may remain the most common and most appropriate sentence, the Thomson Committee recommended that hospitalisation should be a discretionary sentence rather than a mandatory one. In their view, the solution would be for the accused to be sent to a mental hospital (not necessarily the state hospital) for observation and treatment if this is deemed necessary. If it appears to the judge from psychiatric evidence that he is not suffering from any mental disorder and that the condition which obtained at the time of the offence is not likely to recur, he should go free[67].

4. <u>The Iraqi Criminal Law and Sentencing Process:</u>

As is stated in chapter 4, the Iraqi Criminal Law adopts the test of "insanity as a defence". This is clear from Article (231)

of the Iraqi Code of Criminal Procedure and the practice that the courts have of postponing a trial when they find the accused insane in bar of trial until he recovers[68]. Accordingly the accused has to be sane to entitle the courts to continue a trial. Article (232) of the Iraqi Code of Criminal Procedure provides that 'if it can be concluded from the report of the Medical Committee that the accused does not have criminal responsibility because he was suffering from mental disorder during the time the crime was committed, the judge of investigation or the court may decide that the accused is non-responsible by reason of his mental disorder, and the court or the judge of investigation may make their decision to hand him over to one of his relatives with a personal guarantee that he should be looked after, or they may make any other adequate decision'.

Accordingly, the court, when finding an accused not responsible by reason of insanity, must commit him to one of his relatives to treat and look after him. His relatives, however, have to give a financial guarantee that he will not commit any crime. If his relatives fail to do that, the court applies Article (105) of the Iraqi Penal Code[69] which provides that any dangerous offender found mentally disordered has to be detained in a mental hospital for an unlimited duration and after this , the court has full power to discharge him according to a medical report. Although this Article applies only to offenders who were convicted, in practice the courts apply it to the insanity

acquittee because there is no other way to deal with the non-responsible criminally accused who are refused assistance and help by their relatives.

At first sight, it seems that the Iraqi Law provides a good solution when it commits the insanity acquittee to his relative but, in reality, this procedure is improper. As already stated in chapter 3, there is no Mental Health system in Iraq to arrange how to deal with mentally disordered people in general and with mentally disordered offenders in particular. So, for example, there is no rule followed by the courts when they find the insanity acquittee does not need to have any treatment or care because he has recovered at the time of disposal, there is no clear direction in the law to deal with the insanity acquittee who is found to need treatment and care in order to protect the society from his dangerousness when his relatives abstain from looking after him, and there is no Mental Health Code to assist mentally disordered people as a general group, unlike the Mental Health system in Britain. The definition of dangerousness is provided by Article (105) of the Iraqi Penal Code[70] in which the mentally disordered offenders can be recognised as dangerous from the nature of their crimes and from their antecedents.

Article (105) provides that any dangerous offender found to be mentally disordered must be detained in a mental hospital for an unlimited duration and after six months the court has full

power to discharge him. The court makes the decision about discharge on the basic of medical reports. This principle also applies to mentally disordered people,if, after they have completed their sentence, they have been found still dangerous by reason of their being mentally disordered. Accused persons who are discovered by the court to be responsible, because they had mens rea when they committed the crime[71], must be convicted and punished. If, however, they are suffering from impairment or a limited mental disorder at the time where they committed the crime, they have to be given a reduced sentence according to the notion of "diminished punishability"[72]. Those mentally disordered offenders are directly sent to prison after they are convicted and sentenced. It is clear that "impairment" here has a different meaning from the Scottish and English Acts.

Since, there are no legal procedures to deal with such prisoners, the prison adminstration has full power to deal with them according to their mental condition. So, sometimes, some mentally disordered prisoners are sent to the mental hospital for treatment under high restriction security. On other occasions the prison adminstration seeks to have them `cured` in prison or alternatively denies them treatment. This type of arbitrary procedure has serious implications for an individual`s liberty.

We will see later what are the appropriate procedures to be followed in order that justice be maintained as much as possible.

It is obvious that the Iraqi law is better than British law in relation to the powers of the courts to release the patients after they recover from their mental disorder. But there are many difficulties in the practice in Iraq when we deal with the mentally disordered persons (non-responsible and responsible), because there is no mental health code nor enough rules in criminal law to deal with them. So, it may be that real injustice arises in practice. Thus, there must be some legislation dealing with the disposal of mentally disordered persons in order to protect human and civil rights. The arguments and recommendations later will illustrate what kind of procedures are more suitable.

5- Dangerous Mentally Disordered people:

Questions about dangerous mentally disordered persons (both responsible and non-responsible) arise in criminal procedure for several reasons:-

a- Mentally disordered persons who are not guilty by reason of insanity (non-responsible) may be detained in mental hospital for indefinite duration (compulsory treatment).

b- Mentally disordered people who are found unfit to plead are subjected to similar procedure to (a) above.

c- Mentally disordered people who are convicted may be dealt with by restriction order or life imprisonment rather than sentenced in the normal way like any other ordinary offender.

d- Mentally disordered persons who are sentenced or in prison may be dealt with by `Transfer Direction` with or without a restriction order[73].

In order to reach an appropriate procedure in criminal law to deal with the dangerous mentally disordered, it seems to me that it is worth while dividing these people into two groups.The first group are `non-responsible mentally disordered persons (Mentally disordered individuals who are found not guilty by reason of insanity and, if the plea is retained, those found insane in bar of trial) and the second group are those responsible mentally disordered offenders (mentally disordered offenders who are found guilty or sentenced or in prison).

Since we are talking here about the sentencing process in respect of mentally disordered persons, it is worth finding out the distinction between `Detention` in general and `Detention` in the particular sense. In general `Detention` means any compulsory procedure which leads to the deprivation of liberty. Accordingly, it can be a remand in jail for reason of investigation, prison, hospital order...etc. On the other hand compulsory treatment has two aspects. One of them has the same effect as "prevention" since it can include treatment in order to prevent the patient's condition deteriorating (e.g. medicines, psychotherapy, electric therapy...etc). Another aspect of compulsory treatment is more like punishment because it takes the form of detention (e.g.

psychiatric orders, custodial care...etc.). The second aspect of compulsory treatment is more important in this study. It is, as has already been seen, used in law and practice and in some theories as a substitute for punishment. I will try to suggest some means of separating punishment from treatment. In general mentally disordered persons should not be detained (subjected to compulsory treatment in the second sense) unless they have a serious mental disorder which may result in serious harm to the public. So, if such detention is permitted then this must involve both clear proof of dangerousness and some limit on its duration that takes into account the interests of the detained/treated person.

It is obvious from the argument in chapter four about the defence of insanity in bar of trial that it can be unjust to keep this kind of defence. This is because mentally disordered people under this kind of defence may be detained in a mental hospital for a long time, although they may be innocent or may serve longer than the normal duration of punishment for their crime. So the trial should carry on even if the accused is suffering from mental disorder[74]. In this case we can resolve the problems with this sort of mentally disordered person. Namely, the result will be either these persons are found responsible or not responsible. It is clear from the present procedure (in law and practice) that there is a conflict. On the one hand, how can it be justifiable that, when the court acquits somebody by reason of

being "non-responsible", it detains him for an unlimited duration in a mental hospital, while on the other hand an offender who deserves "diminished punishability" by reason of his limited mental disorder is sentenced by the court to life imprisonment or indefinite restriction order.

From the jurisprudential argument below, a suitable solution for this dilemma might be as follows:

a- Non- responsible mentally disordered people :

It is argued in chapters one and two that mens rea is at the centre of the idea of criminal responsibility. So since the mentally disordered person lacks mens rea (he lacks knowledge or control over some particular aspect of his conduct) at the time he committed the crime, he must be non responsible[75]. Thus, if people can justly be held responsible for crime, they will be punished for what they have done. Equally people who lack mens rea can not be held responsible. Therefore it is improper to punish them. According to Hart's approach, as we have already seen in chapter two and as considered further later, such people are not responsible because they have not any choice and fair opportunity to avoid crime[76].

It is explained in this chapter and chapter four that people who are non-responsible by reasons of their insanity have at present in serious cases to be transferred to mental hospital under restriction order (compulsory treatment) automatically. It

is obvious that compulsory treatment in this sense equals 'punishment. It is said that any therapeutic programmes against the will of a person are mostly regarded as a punishment. Sleffel says that 'to be taken without consent from my home and friends; to lose my liberty ; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of normality hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grow wise enough to cheat them with apparent success-who cares whether this is called punishment or not?'[77]. The question must be asked, therefore, as to whether such procedures can be justified

It is said that past behaviour is the best indicator of future behaviour. In other words, the behaviour of mentally disordered persons who have committed serious crime has already been proved[78]. So, it is obvious that the aim of the compulsory treatment is basically protective of the public (protective sentencing).

It is often assumed that mentally disordered persons are more dangerous than other offenders[79]. In reality, however, there is no necessary association between mental disorder and dangerousness[80]. There are many sane people who are dangerous and many insane people are not. Thus, the use of the criterion

that dangerous behaviour in a mentally disordered person is more probable and more predictable than in the case of an ordinary offender is problematic as a guiding principle. It might be that there is a link between mental disorder and dangerousness but not inevitably . Bean says that 'there are three possibilities; first that a patient may be dangerous and mentally disordered yet, when cured of his disorder, he may nonetheless remain dangerous. Second, the patient may remain mentally disordered but,over time, cease to be dangerous. Third, the patient may continue to be mentally disordered and continue to be dangerous or, conversely, cease to be mentally disordered and likewise cease to be dangerous'[81].

It is noted that accidents with cars and guns, for example, play a large part in our daily lives by comparison to the danger posed by people who are acquitted by reason of insanity . In general, it is said that the rate of recidivism among those discharged from prison is more than double that of people acquitted by reason of insanity[82]. For legal purposes, it is undoubtedly very hard to define and identify dangerous offenders sufficiently. The objections of critics relate to the concept of dangerousness itself and to the idea that human behaviour is predictable. Kozol and et al. say that 'it is impossible to divide people sharply into the dangerous and the safe...there is no test for dangerousness; there are no clear-cut criteria'[83]. Professor N. Morris states that ' since we cannot make reliable

predictions of dangerous behaviour, considerations of justice forbid us to confine people against their wishes in the name of public safety for longer periods than we can justify on other grounds'[84].

It is said that innocent people will be deprived unjustly of their liberty, since predictive judgments are inherently questionable. So the requirement of proof beyond reasonable doubt that preventive measures are necessary cannot be met[85]. This is so in the nature of the case. The predictive judgment depends mainly on the soundness and reliability of an assessment of a person's disposition to inflict harm. Thus, it cannot depend on our being certain that the person will commit some specific crime. "Proof beyond reasonable doubt" relates to our degree of certainty that someone committed such a crime in the past. It cannot be applied to some unascertained offence in the future. Accordingly, what level of probability that non-responsible mental disordered person will cause serious harm should be required?.

There are two kinds of mistake which may be made in the course of deciding whether or not a non-responsible mentally disordered person should be considered dangerous. First, he may be detained for a long duration, although, in reality, if he was discharged would commit no further crimes. Secondly, he may be discharged and cause serious harm. Professor N. Morris states

that there are two false positive predictions for every one correct positive prediction. It follows that there are two false predictions that a non-responsible mentally disordered person will commit a serious harm if he were discharged for every one correct prediction[86]. Similary, it is accepted by the Floud Report that the false positive rate for predictions of serious harm is at least 50 per cent[87].

Walker says that 'we have not succeeded in providing criteria which would ensure that a prediction of future violence would be right more often than it would be wrong. With the present criteria, it would more often be wrong'[88]. Accordingly, there is no justification for detention (compulsory treatment) when we know that many-and perhaps most-of such predictions are false. It is clearly unjust to detain "false positives" in order to restrain "correct positives". Accordingly, protective sentencing requires a moral and not merely an empirical justification. As Floud and Young argue ' if it is rational to decide the morality of punishing people for the harmful consequences of their past behaviour with reference to their intentions and motives and state of mind and circumstances, it cannot be irrational to take these considerations into account when deciding on the morality of preventing them from causing harm by their behaviour in the future[89].

Thus protective sentencing raises the problem of justice.

Hart emphasises that if detention (compulsory treatment) is used as a substitution for the punishment which the non-responsible mentally disordered person would otherwise receive, it contains the idea of society's moral disapproval and resentment which is a feature of punishment[90].

Some critics have said that we place in quarantine people who are known to be carrying diseases, such as typhoid and smallpox. Such patients have been detained in hospital by Justices of the Peace until they have recovered from their infections diseases according to section 38 of Public Health (Control of Disease) Act 1984[90A]. How does this differ morally from restraining a non- responsible mentally disordered person who is dangerous in order to secure the protection of society? It is said that carriers of disease are dangerous to others and we do not hesitate to place restrictions on their freedom of action. It is said that public health is not more important than public safety. What then differentiates the protective sentencing of non- responsible mentally disordered persons from the quarantining of disease carriers and makes it morally questionable?[91].

Even if we submit that the quarantining of disease carriers is not morally wrong, as those critics say, it is not very difficult to reply their questions. As stated above, the maximum proportion of "correct positive" to "false positive" in the

situation of non-responsible mentally disordered persons who will commit serious harm is at most 50%, while the likelihood may be up to 100% of patients who are carrying diseases affecting public health. The injustice is clearer in the former case than the latter. On the other hand the protective detention (compulsory treatment) is used as a substitute or extension of punishment so it contains the idea of society's moral disapproval. There is no feature like this in the situation of quarantine for disease carriers. Ten says that ' the difficulty is that, unlike the person who is quarantined, he lives under the shadow of the offence that he has already committed which is the moral basis for his punishment, and also unavoidably part of the basis for his allegedly non-punitive protective sentence'[92].

Let us then adopt the optimistic assumption, for the remainder of this argument, that the false positives, as Floud and Young state, are 50%. After first testing this rate in relation to ordinary dangerous offenders, I shall turn to the situation of non- responsible mentally disordered persons to infer how we can deal with them according to Hart's approach.

It is obvious that courts, according to the sentencing policy, have a wide discretion when they impose punishment on an offender. There is a maximum limit of punishment in each crime. It is rarely that the courts impose the maximum limit of punishment on ordinary offenders when they have committed crimes

for the first time, but when they find out from some circumstances that the offender is dangerous and he may commit serious harm against public in future (e.g. offenders who commit murder with malice aforethought), they may impose the maximum punishment as a "protective sentence". According to the statistical studies above, imposing protective sentences like this on ordinary dangerous offenders means that half of them will be detained much longer than is actually warranted, because they would not commit serious harm in future, if they were released. On the other hand, if there were no protective sentences, half of them would commit serious harm against the public. As a result, it is clear that there is injustice to half of those offenders who would not commit any serious harm, if they were discharged. The latter offenders are called "unlucky offenders"[93]. Since we can not know which are "unlucky offenders" and which are "the dangerous offenders", it is necessary for both offenders to suffer to protect one potential victim.

According to the utilitarian point of view, it is acceptable to impose a protective sentence on an offender if we are sure that this would prevent him from committing a serious crime and the harm that would be caused by punishment is less than the harm of the crime. The incapacity of the offender to commit serious crime while detained is part of the utilitarian justification of punishment. It is obvious that the utilitarian justifications do not cover all of the relevant considerations[94]. One might,

therefore, justify the practice by saying that the harm caused by imposing protective sentences on two offenders might, on utilitarian grounds, be regarded as a lesser evil than allowing harm to come to the potential victim. Any protective sentencing, as is already mentioned, raises the problem of justice. The reason is that the predictions of dangerousness are not very reliable[95]. So there is a problem concerning distributive justice. Floud and Young in their report say that 'they (predictions of dangerousness of offenders) should be judged according to their purpose, which is to state the conditions for assessing and effecting a just distribution of certain risks of grave harm: the grave harm that potentially recidivist serious offenders may do their unknown victims and the grave harm which is suffered by offenders if they are subjected to the hardship of preventive measures which risk being unnecessary because they depend on predictive judgements of their conduct which are inherently uncertain'[96]. It is said that the protective sentencing here keeps the balance between punishing the unlucky offender and protecting a potential victim. In other words there would surely be additional victims of serious crimes equal to these who are 'unlucky offenders', if there is no protective sentencing.

If we think about this proportionality, we can find that it is difficult to accept the balance. On the one hand, it is difficult to limit the proportionality of the victims in a

specific sense, because any victim has his special circumstances which affect his situation. That is to say, some persons have ability to prevent such harm by themselves and others can be protected by other people or the police. On the other hand , since the offenders will receive the protective sentencing in any case, they will also receive the society's moral disapproval which is a feature of punishment[97]. So, this feature which affects the "unlucky offender" in addition to the harm of punishment, is not received by the victim of crime. These inexact matters have a negative effect on distributive justice.

Even if we assume that the distributive justice in this case is correct, the "unlucky offenders", according to Hart's approach (choosing system), should have a fair opportunity to avoid the protective sentencing. Accordingly, the protective sentencing should apply to those who have committed at least two similar serious offences. Then any offender who commits a first offence can be reminded of the existence of such protective sentencing. So the risk of being an "unlucky offender" is one that he may choose to avoid.

The commission of crimes, however, by mentally disordered persons lacks the features of choice or control which are essential in criminal responsibility. It is impossible, therefore, according to Hart's theory, to subject them to the same principles that apply to ordinary offenders. My main thesis

is that some persons with mental disorder do not have the ability to "understand" or "choose" and these persons can not be justifiably punished according to Hart's approach to punishment. It can be argued that small numbers of mentally disordered persons who can, with a high degree of probability, be predicted to cause serious harm in the future, require some preventive detention (compulsory treatment) as we shall see later. In such specific cases justice must give way to the protection of the public. At the same time the treatment should be relevant to the own interests of the patient and for his benefit. In Chapter Two, it was said that Hart's approach is a version of a modified retributive theory. Hart merges utilitarian and retributive theory aims in his approach[98]. He emphasises that the general justification aim of punishment is reducing crimes (utilitarian aim) and desert of punishment, including its distribution, is the retributive aim. According to Hart's view the desert of punishment has two faces: One of them is the principles which may justify punishment as a general justification aim. One can call this face the "public face" which is justifying the general aim of the punitive system (the utilitarian one of protecting society from the harm caused by crime). The other face is the principles of justice which restrict the application of punishment to only those who have voluntarily broken the law. One can call this face the "personality face". Thus, according to Hart's approach, the desert of punishment and its distribution are a result of combining of "justice" and "utility" (public and personality

faces)[99]. But, according to Hart's approach, punishment in an extreme situation may reflect the public face only. Then justice (the personality face) may have to be sacrificed. So in extreme situation Hart allows for the possibility of utilitarian considerations overriding the principles of justice and the scope of punishment will be extended to cover the detention of those who are innocent persons such as mentally disordered people in mental hospital. It can be inferred from this analysis that society has a right to protect itself from dangerous mentally disordered persons, both "responsible" and "non-responsible".

But, what kind of prevention or detention can be imposed on non-responsible mentally disordered persons who are found dangerous, if we realise that Hart also emphasises the point that we must not use the individual's liberty for the benefit of society?. In order to practice the utilitarian aim (public face) to produce such a protective sentence, as I suppose, we must make a balance between this aim (utilitarian aim) and the individual's liberty. In general a person should not be deprived of his liberty unless that is essential and, if this happens, he should not be deprived of his liberty for a longer duration than is necessary. Accordingly the law should facilitate treatment where it is possible and available.

Nonetheless, the courts in approprate cases, must be able to impose protective detention since, as we have already seen,

society is entitled to protect itself from non-responsible dangerous patients in the narrow sense (those who will cause serious harm in high probability). In this case, one can make a limited sacrificed of the liberty of those patients for purpose of treatment in order to protect society[100]. Accordingly the balance between the utilitarian aim and individual's liberty is kept. How,though, can we define the notion of dangerousness in a sufficiently tight and narrow manner? And what kind of treatment is appropriate for a dangerous patient in order to affect his liberty only to the minimum extent necessary?

When we describe a patient as "dangerous", it means that there is a substantial probability of his committing further crimes involving serious harm to others. So, the first task has to be to define "serious harm" as specifically as possible. It is clear now that an assessment of an individual's disposition to cause serious harm is a requirement of justice in protective detention. The quality of such assessments is the important test of a predictive judgment. In any event, any judgment predicting a high probability that the dangerous patient may commit serious harm, must take into account his circumstances as well as his character. That is to say, the risk of serious harm can be inferred from the gravity of the crime for which he was tried, the history of patient and the likelihood of his mental condition disposing him to cause further harms[101]. Some writers think of serious harm as serious physical injury only, while for other it

would also include psychological harm or the loss of or damage to property[102].

For present purposes, however, it is not the classification of harms according to type that is at issue, but, rather, whether protection against the risk of their being perpetrated is regarded as more important than the liberty of individual[103]. In other words, any type of harm is a serious harm, if it is demonstrably grave enough to justify protecting society (by limited compulsory treatment for example) from someone who can be shown in high probability to be likely to cause it. In such cases a therapeutic disposition ought to be considered as long as it necessary for public protection. It is obvious that most non-responsible patients are not dangerous for many reasons. Some of those patients are not mentally ill in the medical sense but are insane in the legal sense[104] - for example, those who are suffering from physical illnesses(diabetes...etc.) which affect the brain temporarily. So there is entirely no reason to detain them in the mental hospital. Other mentally disordered persons may recover after they committed their crimes and during the trial. Again, someone might be found not dangerous enough to inflict serious harm in high probability. In these cases, it is unjust to transfer the patient to mental hospital under indefinite detention. If this happens, as has been argued above, his liberty will be absolutely used in the benefit of society. So, in this situation and the like, he should be released and

subjected to ordinary treatment which can include, psychoanalysis, education, job training, family counselling, behaviour modification and drug therapies.

Otherwise, in the few cases where non-responsible patients are found "dangerous" and there is high probability of them committing serious harm in future, justice must give way to the protection of public.This means that detention (compulsory treatment) is required. We must bear in mind that it is unjust to deprive non-responsible patients of their liberty in an absolute way in order to protect society. Accordingly, we should look for some sort of detention (compulsory treatment) in which we can keep the balance between the utilitarian aim (protection of public) and an individual's liberty. In other words, the least restrictive order has to be chosen as, also, a care setting which is appropriate both to the requirement of the patient for treatment and to the right of the society for protection. So, I suggest that, when the court believes from the psychiatrist reports and other circumstances that there is a danger that a non-responsible patient may inflict serious harm in high probability, a limited detention in the mental hospital is required in order to protect the public.

The possibility to be considered initially is the probation order. As we have already seen above[105], the probation order is a flexible order which will often be suitable when the consent of

the non- responsible patient and the co-operation of a probation officer and a psychiatrist are obtained and the court can review its decision in a suitable time[105]. This kind of compulsory treatment has the least effect on an individual's liberty. In a limited number of cases it is possible that the probation order will not be regarded as sufficient to prevent the non-responsible patient from causing serious harm. In these cases the court, after it is satisfied from psychiatrist reports and other circumstances that patient may commit serious harm in high probability, should consider a guardianship order. The guardianship order may also be considered in cases where the patient rejected the probation order and his condition requires that he receives some kind of treatment, care rehabilitation, or training in the community.

It is obvious that the dangerousness of non-responsible patients arise by reason of the illness itself. So those people should be dealt with like any other patients who are suffering for some other kinds of illness, such as cancer. Accordingly, these patients have to have the same fundamental rights as other who are suffering from other sorts of illness[106].

Finance should not be a barrier to such orders, as they are unlikely to cost much more than hospital orders. The cost of a restriction order on a mentally disordered patient in hospital is in the region of £30,000 per year or about £600 per week[107].

So, in order to avoid the use of restriction orders for patients who still need treatment and care, guardianship orders under observation of professional doctors and social workers may be more suitable than other orders.

In order to let people accept the idea of guardianship, they must be encouraged to accept it. For example, they have to be given a special training, high wages and many other facilities such as a special car and a special house...etc. So, the amount of money which is spent for treatment under restriction orders can be spent in this field. At present the grounds for guardianship are met by a person when:

"(a) he is suffering from mental disorder of a nature or degree which warrants his reception into guardianship; and

(b) it is necessary in the interests of the welfare of the patient that he should be so received."[108].

These would have to be extended to include " necessary for the protection of others"

At present the powers of the guardianship are limited to:

"(a) power to require the patient to reside at a place specified by the authority or person named as guardian.

(b) power to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training;

(c) power to require access to the patient to be given, at any place where the patient is residing, to any medical

practitioner, mental health officer or other person so specified"[109].

These powers could be extended to include measures necessary for the protection of others.

In addition, the powers of access to those placed under a guardianship order must be increased. At present those who have access are limited to medical practitioners, mental health officers or "person so specified". It can be argued that the latter category of persons could be extended to include relatives, friends and others who may be able to bring a more "social dimension" to the therapy or general maintenance of those under guardianship orders.

It should of course be borne in mind that there is scope to include suitable places of residence which are not designated as hospitals or special institutions. Accordingly, it may be possible for such people to reside in places which reflect a more socially normal environment where they can receive treatment and care. There is at least the possibility of a longer term amelioration of the mental condition and thus of the patient's behaviour. This is one possible way in which a more just, but less restrictive, control over dangerous mentally ill people could be put into practice.

Finally, in very rare cases, some people might not accept patients under their guardianship for many reasons such as the patient being very dangerous to himself and others. So, in this situation, there is no alternative way to deal with them other than by a "hospital order". As we have already seen[110], the patient will be detained under more secure conditions. It should be borne in mind that the living conditions of patients must be made of no lesser a standard than that of a disease carrier who is quarantined by reason of his disease. This is necessary in order to avoid any unusual restriction on the patient's liberty. Any other kinds of order (such as restriction orders for unlimited duration) should not be used, because these will affect the balance between "utility and liberty".

Since a prediction of non-responsible patients committing serious harm is a social policy judgment to be made by the community, so, I would argue, a jury in the court at first stage should determine whether the patient is dangerous enough to inflict serious harm or not according to the evidence of psychiatrists and other circumstances such as the patient's conduct at home or in public areas. The jury should also determine whether the patient needs a limited compulsory treatment or not.

It is worthwhile making the distinction between medical decisions and public policy decisions. Medical decisions must

consider the description and diagnosis of mental disorder, the formulation and carrying out of treatment plans, and the improving of the patient. Public policy decisions, on the other hand, which should be taken by court or jury, as I have mentioned above, should include the question of what kinds of conduct justify intervention by society, and whether the compulsory treatment should be imposed, and when the patient should be discharged[111].

The procedures (under the three orders) must provide for full rights of appeal by the patient or on his behalf to challenge evidence and any decisions involving his liberty. At a second stage, therefore, the patient must have rights to appeal against any kind of order. Since the procedures of the English Mental Health Review Tribunals are quasi-judicial in character, I think such appeals should be taken to Tribunals. Floud and Young say that 'the rules governing their work deal, inter alia, with following matters: representation of the offender, his appearance before the Tribunal and presence during the hearing of his case; disclosure to him or his representative of evidence before the Tribunal; the admissibility of evidence; the administration of the oath and the power of subpoena; privacy of Tribunal proceeding; hearing procedure; decisions and the giving of reasons to the offenders'[112]. While there are no Review Tribunals in Scotland at present, there is appeal to the Mental Walfare Commission for Scotland. It seems that there is no

difference between Tribunals and MWC in this matter.

The patient under one of three orders above must have a right to appeal at any time he wants. The Tribunals or the MWC should re-examine all such cases from time to time according to the medical reports. For example, they should re-examine the cases every three or six months even if there is no appeal against the orders by the patient or on his behalf.

When the Tribunal or the MWC decides that the patient is no longer suffering from any mental disorder which has driven him to be dangerous, it should be able to release him without any interference from any other authorities such as the Secretary of State in Scotland or the Home Secretary in England . In this situation, more flexibility in favour of the patient's liberty may be kept .

b- Responsible Mentally Disordered people

In chapters one and two I argued that a person who has committed crime with mens rea (someone who understands the legally relevant aspects of his conduct or has physical control over his movements to obey the law) has to be responsible for it[113]. Hart says that such people are responsible because they may choose to avoid committing the crime. Accordingly they deserve punishment.

There are two courses which a court can take when it considers that a mentally disordered offender is dangerous and it wishes to ensure that he remains in custody until he represents less of a risk to others:

First, the court can add a "restriction order" to the hospital order, with or without a limited of duration of discharge, if doctors state that the offender is mentally disordered, that his condition is treatable, for whom a bed in hospital is available, and if the court considers that this step is necessary for the protection of the public against serious harm[114].

Secondly, a life sentence may be used as an alternative course, if the crime which is committed is one of those for which life imprisonment is allowed if the offender's mental state amounts to mental disorder, and if there is difficulty in finding a bed in hospital. N. Walker states that the life sentence is limited to: aggravated burglary, arson, buggery, criminal damage intended to endanger life, grievous bodily harm, intercourse or incest with a girl under 13 years of age, kidnapping, manslaughter, murder, and rape[115].

British law depends on the discretion of the courts more than on any carefully considered principles. It does so in an unpredictable way. We have already seen in section 3 above that the restriction order has been imposed in many trivial cases because the court is satisfied that the restriction order is necessary to protect the public from serious harm[116]. Some

decisions show that the court has to be satisfied from the three conditions below before it imposes life imprisonment:

a) Where the offences are in themselves grave enough to require a very long sentence. Recent decisions show that the crime has to justify a sentence of at least seven years imprisonment[117].

b) Where it appears from the nature of the offence or from the defendant's history that he is a person of unstable character likely to commit such offences in the future. It is emphasised that there has to be medical evidence of mental disturbance[118]. By reason of failure to meet this requirement, many life sentences have been quashed[119].

c) Where if such offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence[120].

In fact these procedures involve a conflict between the logical practice of the sentencing process on the one hand and the practice of theories of punishment on the other.

Further, in the logical practice of the sentencing process itself there is a conflict between criteria of "diminished punishability"[121] (according to this principle offenders should get a mitigated sentence by reason of impairment of mind (diminished responsibility)), and the actual practice where the court can use a life sentence against them after they have been

convicted of crimes. It is difficult to accept such practices as these.

On the other hand there is a conflict between utility and justice. It is clear that when the court imposes a restriction order for indefinite duration or life imprisonment on the mentally disordered offender in order to protect the public from serious harm[122], his liberty will be absolutely used in the benefit of the public. Accordingly this kind of practice will lose the balance between utility and justice because the offender may be detained longer than he would serve in prison. So, what is the appropriate means of avoiding these conflicts?

It is suggested that the restriction order, even if it is used for the purpose of care and treatment, should not last longer than a duration in proportion to the gravity of the crime and the history of the offender. It is wrong and unjust to deal with a mentally disordered offender more severely than warranted the gravity of the crime which he committed[123]. Hoggett says that 'people who break their responsibilities towards society are normally punished but their punishment must be in proportion to the offence. Punishment should fit crimes whether trivial or serious. If then we are going to hold a man responsible, we should accord him the right to minimal proportionality, as the judges seem prepared to do'[124].

It seems to me that this approves involves a mixed procedure between punishment and treatment. In other words, the treatment is being used as substitute for punishment at a time when we should separate them. Hart does not agree that punishment should be substituted by compulsory treatment. He criticises Wootton when she says that punishment and compulsory treatment are just alternatives methods of dealing with a person in the society. Hart nevertheless defends the need to keep mens rea. Hart argues that, if as Wootton says, the formal distinction between hospital and prisons disappears, then there is a moral objection. His moral objection is, as has been already mentioned in chapter two, that "treatment" contains an element of resentment and public disapproval[125].

Hart also says that some writers and courts admit that to substitute compulsory treatment for punishment is a compromise. It is a compromise because:

i- The courts power to order compulsory treatment is discretionary and even if the courts have medical evidence, they can still use conventional punishment if they want to.

ii- The law still keeps the idea of penal methods, such as prison, because these are seen as a payment for past behaviour and not just as an alternative to medical treatment.

Hart says that the courts may order medical treatment or

punishment, but that they do not combine them. This is because the courts do not think of punishment and treatment as different forms of "social hygiene" which can be used according to their effects on the person concerned.

The other reason it is considered to be a compromise is because the courts mostly use this power at the stage of sentencing, after the conviction stage of the criminal process. As has been already seen in chapter one, mens rea has to be proved for the purpose of conviction and we have seen the link between mens rea and criminal responsibility[126]. Hart emphasises that punishment is used to deter the individual and other people by example. So its severity is adjusted accordingly. Medical treatment ,however, is not used to deter people in this fashion. Punishment such as imprisonment contains an element of society's disapproval of those who break the law. Hart says that we lose both these elements (deterrence and disapproval) by substituting compulsory treatment for punishment. This argument attaches importance to the idea that the criminal law is effective when there is public disapproval and deterrence by example.

It is clear from the above that Hart does not lend his full support to the substitution of compulsory treatment for punishment, although he acknowledges some of the merits of statutes such as the Mental Health Act[127]. It is worth

emphasising here that Hart does not say that compulsory treatment in this sense is not punishment. For if he meant that, how could he defend his ideas about individual liberty?. It is obvious that sometimes compulsory treatment in this sense is worse than ordinary punishment[128]. Any detention order, even if the intention is to care for and treat mentally disordered people, involves a deprivation of liberty. So Hart's idea seems to be that treatment should not be used as punishment.

In spite of the fact that limited compulsory treatment affects the individual's liberty, it must not be used as a substitute for punishment. It should be used "treatment"to cure patients and, as much as possible, not to punish them. The one approach might be for the patient offender to be removed from a system which essentially deals with people in a criminal context and managed by a system which has little reference to crime, criminals, criminal courts and criminal procedure. For example, once an offender has been examined by psychiatrists along with a team of other professionals, e.g. lawyers, psychologists, social workers, and is found to be suffering from some form or degree of mental illness, then at this stage a decision should be made as to whether a criminal process should apply, or whether a "non-criminal" system should be followed. Obviously, a crucial question is who decides what system the "offender" should undergo?. Some would argue that if the offender is in a position to, i.e. has the mental capacity, understand the significance of

the different procedures, then it is clear that the decision ought to be left to the offender. In other instances, the decision ought to be left to a committee of professionals. The net effect would be to "decriminalise" the potential circumstances in which a mentally disordered offender may find him or herself.

This approach is, however, a questionable one. It is unjust to "decriminalise" the procedure against somebody who was responsible for his crime even if he becomes mentally disordered after conviction or sentencing. Those responsible offenders had mens rea (choice) when they committed crimes, so they have to be punished. It is said that '...to convict and punish him is to report his status as a responsible agent who can and should answer for his action'[129].

The amount of <u>punishment</u> should be fixed according to many circumstances, for example, the degree of mental disorder, the gravity of the crime, the antecedents of the offender and so on. The <u>treatment</u> of a mentally disordered offender is a different matter. It must be separated from the procedure of sentencing. Thus, mentally disordered offenders who are responsible for their crimes must be convicted and sentenced. In this case, those offenders and those who have already been in prison are the same.

It is submitted that prison is unsuitable for mentally

disordered offenders because it may be a damaging environment for them and they may be discharged without treatment or even in worse mental condition than before[130]. In consequence, they must be given special attention. There should be procedures to allow such people get appropriate treatment. One possibility is that mentally disordered offenders may get their treatment in prison. The problems which can be recognised in such system are:
First: There is mostly little support from prison authorities for the efforts of mental health professionals[131].
Secondly: It is clear that the environment of prisons is not apt or helpful to cure the mentally disordered prisoner.
Thirdly: If the mentally disordered prisoner is not directly under medical supervision, he may cause serious harm against other prisoners.

Another approach to the cure of this kind of prisoners is to apply a "Transfer Direction Order"[132]. It seems that this procedure is more appropriate in cases of persons who are serving sentence of less than a year or who are awaiting trial for trivial crimes. Prisoners under a longer sentence (more than one year), however, need a higher degree of security than a hospital or clinic has the ability to keep or desire to be responsible for. N. Walker states that '...no hospital or clinic is willing to accept them as patients.... The unwillingness of hospitals is excusable when...the individual offender will interfere with the smooth running of the hospital or the peace of mind of other

patients'[133].

Thus, in order to avoid these difficulties, I propose that the most acceptable solution in this field is to adopt a mixed or dual system of management involving elements of both prison and hospital. Accordingly there should be two kinds of staff; the staff which deals with "offenders" as patients who need to be cured has to be from the mental health system, and the other staff which keeps the high security has to be from prison system. This system, must, however, be concentrated on the treatment of prisoners. A prisoner must not be held in the mixed system longer than the period of his sentence. The responsibility of each type of staff will be independent. Accordingly,the specific aims of each system will be achieved (the Mental Health System and the Prison System).

In order to avoid the long procedure which is practised by the Secretary of State in Scotland and the Home Secretary in England, the decision to transfer the mentally disordered prisoner to the mixed system must be made by courts at the first stage according to the medical evidence and other circumstances. In addition, the courts have ability to fulfil the requirement of justice better than any other authorities through these procedures.

At the second stage, the mentally disordered prisoners must

have full rights to appeal against these decisions to a Tribunal or MWC at any time they want. These decisions must be reviewed by the Tribunal or MWC from time to time(e.g. every three or six months). The tribunal or MWC must have power to make one of the decisions below:

i- The tribunal or MWC can expire the detention of the prisoner in the mixed system when it establishes that the mentally disordered prisoner is no longer suffering from any mental disorder. In this situation the prisoner must be returned to an ordinary prison to complete the duration of his sentence.

ii- If the period of the prisoner's sentence has expired, he must be discharged from the detention in the mixed system without further restriction, but the Tribunal or MWC must also have power to transfer him to an ordinary mental hospital under limited compulsory treatment (probation order, guardianship order and hospital order) when it is satisfied that he is still suffering from a mental disorder from which he may in high probability commit serious harm against others. In others words, once mentally disordered prisoners have completed their sentences, they are no longer to be treated as responsible for their crimes. So, there is no reason to detain them under the mixed system or the prison system. If, though, there is a high probability of serious harm being caused to society by a patient who is still suffering from mental illness,there is good reason for justice to give way to utility (protection of public).

In this case the safety of society leads to sacrifice of a part of an individual's liberty. As a result, the procedures which have to be applied to non-responsible mentally disordered people, as they have already been explained above, must be applied to responsible mentally disordered people who have completed their sentencing in the mixed system but have still been found mentally disordered and dangerous to themselves and others.

From this argument, it appears that the present British system in respect of the sentencing process of mentally disordered people - both responsible and non-responsible - is not just.

It must be recognised that the disposal and management of "mentally disordered" offenders are sources of public and professional concern. Indeed, however variously they may be labelled as "offenders", "criminals" or "patients", these individuals present a number of problems for the legal, penal and psychiatric professions. In the final analysis, what is required is a system which manages such people in a background which exists to protect and promote the welfare and sense of responsibility of all members of society.

Since a modified Hartian approach requires a separation between treatment and punishment, as we have already seen above,

the mixed system fits both with theories of punishment in general and Hart's ideas in particular.

FOOTNOTES

CHAPTER FIVE

1. Mental Health (Scotland) Act, 1984; Criminal Procedure (Scotland) Act, 1975; see also Mental Health Act, 1983; Criminal Procedure (Insanity) Act, 1964.
2. Renton and Brown, Criminal Procedure According to The Law of Scotland, 1983, pp.545-556; Bean, Mental Disorder and Legal Control, 1986, pp.87-108; Ashworth, "Criminal Justice and Deserved Sentences", 1989, Crim. L.R., 340-355; Hoggett, op.cit., pp.162-187; Ten, op.cit., pp.134-140; Gordon, op.cit., pp.384-386; Walker, op.cit., pp.323-355; Nicholson, The Law and Practice of Sentencing in Scotland, 1981, p.61-69; Ashworth and Gostin, "Mental disordered offenders and the sentencing Process", 1984, Crim.L.R., pp.195-212; Report of Thomson Committee, op.cit., pp.243-247; Report of Butler Committee, op.cit., pp.185-209; Gostin, A Human Condition, The Law Relating to Mentally Abnormal Offenders, Observation, Analysis and Proposals for Reform, 1977; Mental Health (Scotland) Act, 1984; Mental Health Act, 1983; Criminal Procedure (Scotland) Act, 1975; Powers of Courts Criminal Act 1973.
3. 1975 Act, Sect. 184, 185, 384, 285; see also Powers of Criminal Courts Act, 1973, Sect. 2 and 3.
4. Report of Thomson Committee, op.cit., p.243.
5. Ibid, pp.243-244.

6. Hayes (1974) C.S.P. F1.2(a)
7. Hoof (1980) 72 Cr. App. Rep. 126.
8. 1975 Act, Sect. 186; see also, 1973 Act, Sect. 2-6.
9. Report of Thomson Committee, op.cit.,p.246.
10. 1985 Act, Sect. 175(1), 376(1), see also 1983 Act, Sect. 37(1).
11. 1984 Act, Sect. 17(1), 36(a); see also 1983 Act, Sect. 12.
12. 1984 Act, Sect. 17(1)(a)(i); see also 1983 Act, Sect. 37(2)(a)(i)
13. 1984 Act Sect. 17(1)(a)(i); see also 1983 Act, Sect. 37 (2)(a)(i).
14. 1975 Act Sect. 175(3), 376(6);See also 1983 Act, Sect. 37(4).
15. See, Scarman, L.J. in McFarlande (1975) 61 Cr. App. R. 320 and McCullough, J. in Gordon (1981) 3 Cr. App. R. 352.
16. R. v. Harding (1983) Crim. L.R. 621.
17. 1975 Act, Sect. 175, 376; see also, 1983 Act, Sect.40.
18. 1984 Act, Sect. 60 (2), 33; see also 1983 Act, Sect. 23.
19. R. v. Gummell (1966) 50 Cr. App. R. 242.
20. 1975 Act, Sect. 175 (5), 376 (8); 1983 Act Sect. 37 (2)(a)(ii).
21. See p.260 above.
22. 1975 Act, Sect. 175(5), 376(8); see also, 1983 Act, Sect. 37(2), 40(2).
23. Report of Butler Committee, op.cit. p.200.
24. Ibid, op.cit., p.202.

25. 1975 Act, Sect. 174, 375.

26. 1975 Act, Sect. 174(A)(2), 375(A)(3), 1983 Act, Sect. 38.

27. 1975 Act, Sect. 174(A)(3), 375(A)(4); 1983 Act, Sect. 38.

28. Ibid.

29. 1975 Act, Sect. 174(A)(9), 375(A)(10); 1983 Act, Sect.38.

30. R. v. Haynes (1982) Crim. L.R. 245 and Gardiner (1967) 51 Cr. App. R. 187., where the court of appeal stated that unlimited orders could be made unless the doctors could confidently predict a recovery within a limited period; see also Report of Butler Committee, op.cit., where it is considered that the power to prescribe a time limit was illogical and should be abolished.

31. 1975 Act, Sect. 178(1,2), 379(1,2), 1983 Act, Sect. 41(2).

32. 1975 Act, Sect. 178(1,2), 379(1,2); 1983 Act, Sect. 41(1).

33. Gardiner (1967) 51 Cr. App. R. 187.

34. Toland (1973) C.S.P. F2.4(C).

35. Smith (1976) C.S.P. F2.4(b).

36. Eaton (1976) Crim.L.R. 390.

37. Allison (1977) C.S.P. F2.4(d).

38. Regian v. Brich, The Guardian, 5/5/1989.

39. McFarlande (1975) 60 Cr. App. R. 325.

40. Report of Butler Committee, op.cit., para.14:24.

41. Regina v. Birch, The Guardian, 5/5/1989.

42. 1984 Act, Sect. 62(1),(2); 1983 Act, Sect.41,42.

43. 1984 Act, Sect. 62,63,64; 1983 Act, Sect. 41,42.

44. 1984 Act, Sect. 64; 1983 Act, Sect.42.

45. 1984 Act, Sect.68; 1983 Act, Sect. 42.

46. See X. v. U.K. (1981) European Court of Human Rights.

47. Hoggett, op.cit., p.240; see also Newdick, "Mental Health Patients Rights and Ministerial Discretion", 1982, 45, The Modern, L.R., 459-464, where he argues the problems of the justification and procedure of a recall patient.

48. Gostin, op.cit., pp.91-97; See also Report of Butler Committee, op.cit., where they suggested directly contrary to the Gostin's approach. They were more troubled that dangerous offenders had to be released from prison at the end of their sentences and recommended the extension of the principle of indeterminate detention to him.

49. 1984 Act, Sect. 70,73; 1983 Act, Sect.47, 49, 50.

50. 1975 Act, Sect. 4(3); 1964 Act, Sect.5.

51. See the details in chapter 4 pp.194-211.

52. This point is developed later.

53 1975 Act, Sect. 174(3); See also Smith v. H.M.Adv. 1980 S.L.T.56; H.M.Adv. v. Kidd 1960 J.C. 61, where the reason for this practice was clear in Lord Strachan's statement to the jury: '...if he was insane he was not responsible, and he would not then be convicted, but he would not of course be set at liberty. If he committed the acts as charged and was insane, he would be detained in a way with which you are not concerned'; see also 1964 Act, Sect. 5 .

It is interesting to compare the British system with that of most jurisdictions in the U.S.A., where the insanity verdict

grants the defendant an acquittal, but commitment to hospital is a matter for civil proceedings in court. For example, the Michigan Supreme Court in 1974 in People v. McQuillan held that after an initial periods of 60 days, during which the insanity acquittee was to be evaluated, further confinement had to conform with the procedures and standards of the civil commitment process.

54. See Smith v. M. 1983 S.C.C.R. 67, where the accused was free from mental disorder at the time of disposal, and was acquitted without further order. It is submitted that where a defence of insanity is made out in a summary court it is open to the Sheriff to make an order under section 376(1) provided of course that the accused is at the time suffering from a mental disorder warranting his compulsory admission to a mental hospital.

55. Walker, Sentencing, Theory Law and Practice, 1985, pp.346-347.

56. This terms is developed later.

57. See Slovenko, "Disposition of the Insanity Acquitee", 1983, 11, J. Psychiatry and Law, 97 at 98, where he gave an example that 'Michael Jones, diagnosed as a paranoid schizophrenic, was arrested in 1975 for trying to steal a jacket from a District of Columbia department store. After being found "not guilty by reason of insanity" of an attempted petty larceny charge...he was committed to st. Elizabeth's Hospital, where he has remained for seven years.

If he had been convicted, his maximum sentence would have been one year.

58. Jones v. U.S., 51 U.S.L.W. 504 (1983), where it is stated that 'a verdict of not guilty by reason of insanity is sufficiently probative of mental illness and dangerousness to justify commitment of the acquittee for the purposes of treatment and the protection of society'.

59. Ten, op.cit., p.131.

60. Report of Thomson Committee, op.cit., pp.219-220.

61. I owe this point to Professor S. McLean, Glasgow University.

62. See ch. 3 above.

63. Smith and Hogan, op.cit., p.170.

64. Weiner, "APA statement on the insanity Defence, A Review and Commentary", 1984, J. Psychiatry and Law, p.8.

65. Hoggett, Mental Health Law, 1984, p.186.

66. I owe this point to Professor S. McLean, Glasgow University.

67. Report of Thomson Committee, op.cit., p.221; see also Report of The Criminal Law Revision Committee, (Third Report), 1963, Cmnd 2149, para. 34, where they recommended that the court should be empowered to order the immediate release of the defendant, if satisfied that this detention in hospital was unnecessary; see also Report of Butler Committee, op. cit., pp.231-233, where the committee's view was that the courts should have a wide choice of disposals in such cases, but that the choice should not include custodial or financial penalties.

68. Iraqi Penal Code, 1969; see also Decision No. 2289-fel. J.P., 1975; Decision No. 3242 Fel. J.P. 1975.

69. Ibid, Article 105.

70. Ibid.

71. See chapters one pp.25-29 and two pp.69-80.

72. see chapter four pp.222-235.

73. See this chapter pp.272-273.

74. See chapter four pp.211-223 for more detail.

75. See chapters one pp.25-29 and two pp.69-80 for more detail.

76. see chapter two pp.65-69 for more detail.

77. Sleffel, The Law and The Dangerous Criminal, 1977, p.163.

78. Lerinson, and Romsay "Dangerousness, Stress and Mental Health Evaluation", 1979, 20, J. Health and Social Behaviour, 1978-187.

79. Ten, op.cit, pp 134-135; Floud and Young, op.cit, pp. 73-75, where he refers that the court of appeal has reiterated the view from time to time that where there is no question of mental disease or anything requiring mental treatment at all, such a sentence is quite wrong in principle; see also the similar principle in cases: Kelly (1980) Crim. L.R. 320; Hercules, (1980) Crim. L.R.27.

80. Floud and Young, op.cit, p.20.

81. Bean, op.cit, p99.

82. Slovenko, op. cit., pp.97-99.

83. Kozol.Boucher and Garofalo, "The Diagnosis and Treatment of Dangerousness", Crime and Delinquency, vol. 18, No 4, pp.

37-92; Fisher (1981) 3 Cr.App.R.121; Thompson (1983) Crim.L.R.823, where it is referred that predictions are no more faithful in the case of mentally disordered people than for other offenders.

84. Floud and Young, op.cit, p.20.

85. Ibid, p.47.

86. Morris, Madness and the Criminal Law, 1982, p.165.

87. Floud and Young, op.cit, p.31,58.

88. Walker, Punishment,Danger and Stigma, 1980, p.97.

89. Floud and Young, op.cit, p.10.

90. Hart, 1968, op.cit, pp.195-202; see also chapter two, p.57 above.

90A. Public Health (Control of Disease) Act 1984; see also Sect. 5.13 of Review of Law on Infectious Disease Control (Consulation Document).

91. Floud and Young, op.cit, pp.39-40

92. Ten, op.cit, p.138.

93. Ibid, p.136.

94. See chapter two, pp.61-62 above for more detail.

95. Ibid.

96. Floud and Young, op.cit, p.xvii

97. See chapter two pp.57-57; see also, Ten, op.cit, p.138, where he says that 'the protective sentence is so closely linked with the past offence 'which is said to deserve punishment, and with avoidance of a future culpable act, that it is difficult to view the sentence as something

completely different from punishment.'

98. See chapter two, p.65-69 above.

99. Ibid, p.65.

100. See the recent case, Regina v. Birch, Guardian, 5/5/1989, where Lord Justice Mustil says that 'the harm need not be limited to personal injury, nor need it relate to the public in general.It would suffice if a category of persons or even a single person were adjudged to be at risk, although the category of persons so protected would exclude the offender himself.'

101. Regina v. Birch, Guardian, 5/5/1989

102. Floud and Young,op.cit; for more detail, see p.270 above.

103. Ibid, p.154, where they defined serious harm as ' death, serious bodily injury, serious sexual assault, severe or prolonged pain or mental stress, loss of or damage to property which causes severe personal hardship, damage to the environment which has a severely adverse effect on public health or safety, serious damage to the security of the state.'

104. See chapter three, pp.120-122 above.

105. Weiner,'Interfaces Between the Mental Health and Criminal Justice System', in Teplin, (ed.), Mental Health and Criminal Justice, 1984, pp.34-35, where he says that 'in many of the states that require court on broad approval of the is charge decision, conditions can be required as part of the release. Thus the person can be required to

participate in mandatory out patient programs, drug or alcohol rehabilitation programs, or other types of treatment that are likely to querente his or her successful adjustment in the community.'

106. Warding and Curran,'Mental Health Legislation and its Relationship to Program Development, An International Review', vol.16:1, 1979, Han.J.Leg., p.55, where they says that we should avoid to detain those patients in the same way as criminals who must be removed from the community.

107. Bean, op.cit, p.99.

108. 1984 Act, sect.36.

109. 1984 Act, sect.41

110. See pp.260-263 in present chapter for more detail.

111. Sleffel, op.cit, p.169

112. Floud and Young, op.cit, p.96

113. See chapter one pp.25-29 and chapter two p.69-80 for more detail.

114. See pp.267-272 above.

115. Walker, 1985, op.cit, p.358

116. See the details on pp.267-272 above.

117. Gray (1983) Crim. L.R.691.

118. Ashdown (1973) C.S.P. F3, 2(e); Thornton (1974) C.S.P. F3, 2(e).

119. Picker (1970) 54 Cr.App.R. 330, Prither (1979) 1 Cr.App.R.209; see also Havilland (1983) Crim.L.R.489, where it is suggested that medical evidence is not essential.

120. Hodgson (1967) 52 Cr.App.R.113.

121. In chapter four,p.235 above, where I have suggested that "diminished responsibility" must be replaced to "diminished punishability".

122. See more argument about the meaning of "serious harm" in pp.298-300 above.

123. See Athworth,"Mentally DIsordered Offenders", 1984, Crim. L.R., P.208.

124. Hoggett, op.cit, pp.185-186; see also, Athworth, "Criminal Justice and Deserved Sentence", 1989, Crim.L.R., PP.340-355; Arrowsmith. (1976) Crim.L.R. 636; Walsh, (1981) 3 Cr.App.R., 359; Gouws (1981) 3 Cr.App.R., 325; Fisher (1981) 3 Cr.App.R.122.

125. See chapter two,pp.56-57, 89-90 above.

126. See chapter one pp.25-29 and chapter two pp.69-80 above for more information.

127. Hart, 1968, op.cit, pp.197-209

128. See Regina v. Birch, Guardian, 5/5/1989, where argued that the compulsory treatment is not a therapeutic disposal, it is punishment equal to a sentence of life imprisonment because the defendant may be detained longer than he would serve in a prison sentence.

129. Daff, 'Mental Disordered and Criminal Responsibility', 1983, Phi. and Criminal Law, 19.

130. Gordon, (1981) 3 Cr.App.R.352, in which McCullough stated that imprisonment 'might not just be wrong in the sense that

it did not provide the best solution for her, but might positively cause harm, because imprisonment might lead to her deterioration'; see also, Bean, op.cit. p.92.

131. Weiner, op.cit. p.37.

132. See pp.272-273 above for more detail.

133. Walker, 1985, op.cit., p.348.

CHAPTER SIX

CHAPTER SIX

CONCLUSIONS

In this thesis, I have argued that, to understand the meaning of "criminal responsibility", which in a broader sense would cover certain aspects of the criminal law (such as mens rea) as it applied to normal adults and normal crime, it is first necessary to analyse the concept of crime. From the analysis of the concept of crime presented in chapter 1[1], it is clear that a study of mental disorder and the criminal law has to consider both the nature and aim of punishment and the nature of criminal procedure.

A comprehensive definition of crime is difficult because the courts or legislature determine the elements which establish the nature of criminal conduct. There is no objective criterion in terms of the conduct being harmful or wrongful. The significance of this is that what amounts to a crime will vary from time to time and place to place. Therefore, in order to understand the nature of crime, a proper understanding of the elements of crime, rather than its specific content, is required. We saw that it is invariably true that a crime requires an act or "actus reus", which contains all the elements of the offence except the accused's mental state. Further, actus reus normally needs to be accompanied by mens rea for there to be a crime[2].

We have also seen that the concept of mens rea has been used in two different senses. Firstly, mens rea has been used to refer to the different "mental elements", e.g. intention, recklessness and negligence. Most crimes generally require these mental elements in their definition. Secondly, also mens rea has been used as a synonym for "criminal responsibility"[3]. A fundamental principle of criminal law is that before a person can be convicted of any crime his act or omission has to be a voluntary one. Although in Chapter one, we saw that the classification of voluntariness in relation to the first sense of mens rea faces problems, its relevance to the second sense is clear.

Thus it appears that mens rea in the second sense can be thought of as at the centre of the idea of criminal responsibility. Mens rea in the second sense explains its importance in the first sense, which refers to those mental elements of conduct which are necessary for particular criminal conviction and punishment. Accordingly, to act with mens rea is to act without an excuse and vice versa. Justifications are, however, separate[4]. So mens rea lies at the centre of the law of excuses, including the insanity plea.

Before we came to the crucial point in this thesis, namely the effect of mental illness on the issue of criminal responsibility and its consequences for the sentencing process,

it was necessary to examine which theory of punishment and excuses is appropriate for defences of insanity. In Chapter two, I argued that punishment, as Feinberg wrote, 'is a ... device for the expression of attitudes of resentment and indignation and of judgement of disapproval'[5]. It is quite difficult to define punishment precisely.

Justifications of punishment according to utilitarian theories are to be found in a future good, in this case the result of the punishment, the relevant good consequences. So, if threat of punishment has no effect in deterring the offender or others from committing an offence, it will be of no use as a punishment. Accordingly, if insanity were an excuse, it might be true that the threat of punishment would not be as useful in deterring non-insane offenders from pretending that they are insane in order to cheat juries or courts. It is argued that the justifications of good consequences according to these theories are such that the innocent individual might be made to suffer if this deters others or is protective of society[6].

According to the retributive theory, "moral guilt" is regarded as a necessary and sufficient condition for criminal responsibility regardless of any reformation or prevention. Anybody who has done harm shall suffer harm. This means that the basis of criminal responsibility must be the voluntary doing of a morally wrong act forbidden by penal law. Accordingly, excusing

conditions are justified in that no one should be punished in the absence of the basic condition of "moral guilt"[7]. The general principle of criminal liability is to punish only those who have committed moral wrongs proscribed by law as intentional or reckless.

Having surveyed the competing theories, I concluded, in Chapter two, that Hart's rationale is an acceptable version of a moderate retributive theory which incorporates the ideas of fairness and justice and asserts the value of individual liberty.

It is argued by Hart that it is unjust and unfair to use individuals to the benefit of the society unless they have the capacity and a fair opportunity to obey the law. It is said that if acts and omissions are not themselves voluntary or are not the foreseeable consequences of other voluntary acts and omissions, it is unjust to hold individuals criminally responsible for them. The need of excusing conditions, in Hart's view, is to emphasise 'the much more nearly universal ideas of fairness or justice and the value of individual liberty'[8].

Hart's argument rests on a "choosing system" in which individuals can find out, in general terms at least, the costs they have to pay if they act in a certain way. According to this idea, individuals should not be held responsible when they cannot have "chosen" to disobey the law. In light of Hart's view, if the

removal of legal excuses reduces crime, as utilitarian theory claims, then the essential benefits may lie in the evidence of harm, like physical and mental suffering, being reduced and not on the increase in individual liberty. The existence of legal excuses is one of the aspects of freedom. It was found that, according to Hart's theory, the utilitarian theory is inadequate to give an account of all the excusing conditions.

The purpose of a "choosing system" as Hart said, is to prevent future crimes in a fair manner and not to punish immoral offenders or to pay back harm that offenders have done, as retributivists claimed. Whereas, Hart's approach to justice gives an individual more freedom to use the excusing conditions for his benefit, and because the retributivist approach is restricted by "legal moralism" in this matter, so the principle of justice according to Hart's rationale is wider than the justice which is adopted by the retributivist[9].

I argued in chapter two that Hart's analysis should be applied because it is less rigid than either the utilitarian approach or the retributivist theory; it incorporates the idea that punishment should be useful and also makes a realistic attempt to reconcile punishment with the concepts of justice and fairness. But, in extreme cases, Hart admits that justice should give way to the utilitarian aim. So in this situation an innocent person can be punished to protect society, Hart's emphasis on

individual liberty, however, allows us to seek a balance between "utilitarian aim" and "liberty" when we impose any punishment or detention on an innocent person. A wide practice of this idea, as illustrated in this thesis, was with mentally disordered people who are found "not guilty by reason of insanity" or "insane in bar of trial" or insane after conviction or in while prison[10].

Before turning to find out how much Hart's theory bears on criminal responsibility (insanity defences) and punishment (the sentencing process), I examined the meaning of mental illness in the legal and medical senses and the role of psychiatrists in the determination of criminal responsibility. We saw, in Chapter 3, that some undesirable mental conditions respond to treatment or therapy and can therefore be called "mental illness". So, since psychopathic disorders need the appropriate cure, and can be affected by treatment, psychopathy can be regarded within the group of mental illnesses[11]. Mental handicap, on the other hand, cannot be cured, although it can be improved by education, and social care, so that it can not be regarded within the group of mental illness but may be regarded as a form of mental disorder[12].

We saw that a verdict of insanity is not a judgement about mental illness or handicap but about whether these and other facts lead the judge or jury to excuse the accused from the

action taken. Therefore, while the psychiatrist may be an expert at assessing the existence of mental disorder, he is not an expert at assessing the accused's criminal responsibility. The duty of the psychiatrist is to diagnose the mental disorder of the offender and the duty of the court is to determine the effect of this mental disorder on the offender's capacity or choice at the time the alleged crime was committed or on the offender's ability to defend in bar of trial and to say whether this is sufficient to excuse him. So the court only determines "responsibility" for the accused[13]. I examined the meaning of mental disorder in the medical sense and the link between them and crimes[14]. As a general rule in the U.K. and Iraq, the role of the psychiatrist in the present legal process is not properly defined and the extent to which judges ought to rely on psychiatric and medical evidence and experts is not properly understood. In other words, there is no formal method within British system for deciding whether certain kinds of expert evidence are or are not acceptable for reception in legal proceedings. It is argued by Kenny that experts, according to the present system, may usurp the functions of the jury or judge, by "testifying to the naked conclusion", instead of providing information about the accused to assist the jury or judge in making the ultimate judgment about responsibility and sentence. Equally, they may usurp the functions of the legislature by testifying on the basis of convictions of general policy, e.g. that people who are mentally ill in a certain way should not be

sent to prison[14A]. Also, Hodgkinson believes that the expert may fail to tell the whole truth or to point out contradictory information. He says as well that 'the difficulty is that the courts haven't yet clearly defined the duties of an expert witness, and it is time this was done. Just as barristers have a professional duty to inform the court of any previous court decisions or statutory duties which run counter to the argument they are advancing, if these have not otherwise been drawn to the court's attention, so expert witnesses could be placed under an analogous duty where scientific fact or likelihoods would otherwise be denied the court'[14B]. In the light of such considerations, I have argued that the criminal law should accept psychiatric testimony purely as one aspect of evidence relevant to legal responsibility or non-responsibility.

Hart submits that the existence of excusing conditions weakens the effect of general deterrence. Arguments for having the defence of insanity are, therefore, further weakened[15]. However, I agreed with Hart that the defence of insanity is and ought to be kept because the demands of deterrence should give way to the ideas of fairness and justice - the simplest reason being that "it is unfair to punish the insane person, because he did not choose to break the law". We saw that the English test of insanity (the McNaughten Rules) is not appropriate because it does not include the case of mentally disordered people who lacked the ability to control their conduct (irresistible

impulse). A person may understand very well what he is doing and may know that it is wrong and be nevertheless legally insane[16].

In Chapter four it was noted that despite the fact that the Scots Law on the test of insanity as a defence is flexible and unsettled, it is clear from the case H.M. Adv. Kidd that the causal approach which is that "the insane person is not responsible if he committed an act which is a product of his insanity" is the best test adopted[17]. Lord Strachan's view in this case concentrates on "sane understanding". Accordingly, if somebody knows the nature and quality of his act and its unlawfulness, but he has not "a sane understanding of the circumstances of his act", he will be non-responsible. It appears that the causal approach is wider than the English test in the McNaughten Rules because the former includes something like the test of "irresistible impulse". The McNaughten Rules concentrate only on the "capacity" (knowledge or understanding), while the causal approach includes "capacity" and "choice" (freewill or control).

The Iraqi Penal Code in Article (60) adopts the "causal approach" to the test of insanity, although the Iraqi Courts are unsure about which direction to take[18]. On the other hand diminished responsibility in England is interpreted more favourably to the accused than in Scotland. In Scotland it would appear that an element of disease is essential to the plea,

whereas in England the plea may succeed where the reduction of responsibility is caused by external factors which have affected the mind[19].

Since the defence of "insanity in bar of trial" leads to injustice, because an accused will be detained in mental hospital for a long time, possibly for the rest of his life, although he may be innocent and not dangerous to society, I suggested this defence should be abolished. It is obvious that there is no reason for fairness to give way to the protection of the society in such a situation because there is no dangerous offender and no serious harm which may justify the sacrifice of justice. According to this solution such people will be either found responsible and deserve full punishment or diminished punishability or not responsible and they will not deserve punishment by reason of insanity or there is no case to answer against them[20].

The effect of diminished responsibility operates essentially as mitigating the gravity of an offence and opening the possibility of more flexible sentencing in "murder"[21]. I favour this because it is the absence of control rather than its cause which matters. A powerful objection to the plea of diminished responsibility, however, is that it has not operated in offences other than homicide. With the limited number of existing offences to which it applies the opportunity to reduce offences

by diminished responsibility is restricted. However, it is impossible in all cases to reduce the offence to the lower category. An example of this is cases of theft where the only other alternative is to reduce the sentence rather than the charge. It seems that diminished responsibility can only operate where there exists a suitable lesser offence with which the accused may be convicted[22]. Thus I agree with Gordon and the Butler Committee when they suggest that the plea is really only logical if one considers it as a form of "diminished punishability" rather than "diminished responsibility"[23]. The Iraqi Law in this matter agrees with Gordon and the Butler Committee view[24].

It is clear from both law and practice that British legal systems adopt pure utilitarian aims (protection of society) in the sentencing process of mentally disordered people whether responsible or non-responsible. We have seen that the court may take two courses to deal with a mentally disordered offender who is convicted by the court of an offence, other than murder punishable with life imprisonment. Firstly, in order to protect the public from serious harm, the court can add a "restriction order" to the hospital order for limited or unlimited duration. The Home Secretary and the Secretary of State in Scotland are the ones who have the power to release such offenders. Secondly, a life sentence may be used as an alternative course, if the crime which is committed is one of those for which life imprisonment

may be imposed, if the offender's mental state amounts to mental disorder and if there is difficulty in finding a bed in hospital[25].

In principle, the court should decide whether punishment or treatment is appropriate and make its choice according to its findings. The example was given of a case where it was decided that an offender who deserved treatment could be sent to prison, even though he qualified for a hospital order and a suitable bed was available[26].

In reality, in the present British system there is no clear guideline for "serious harm" in order to justify the "restriction order". Sometimes, it is considered that "violence" and "more serious sexual offences" are the criteria to determine "serious harm"[27]. On other occasions, the maximum term of imprisonment has been regarded as a good criterion to decide "serious harm"[28]. Some recent cases have decided that neither the gravity of the crime nor the maximum term of imprisonment are important to determine "serious harm"[29]. So the restriction order or life imprisonment may be imposed by the court artificially even where there is no sign of "serious harm" which might be inflicted by mentally disordered offenders[30]. Thus, it is obvious that the restriction order is not a therapeutic disposal but is used as a form of punishment. Further, it is sometimes worse than punishment, especially when mentally

disordered offenders spend a longer time in detention in mental hospital than the duration of punishment which would ordinarily be given.

It is also recognised that a person who has been acquitted by a jury after a successful insanity defence is usually ordered by the court to be detained in a mental hospital. In serious cases detention in a mental hospital normally involves an unlimited restriction order, so the person will remain in mental hospital until released by order of the Home Secretary or the Secretary of State for Scotland. This does not happen until he is considered not dangerous to the public as judged by the medical reports. It is said that past behaviour is a good indicator of future behaviour and, accordingly, it is presumed that the mental disorder of the accused continues up to the time of committal and it is supposed that mentally ill persons are more dangerous than other offenders[31].

On Hart's approach this open-ended detention would appear to be unjust. Further, it is not obvious that it is necessary for the protection of others. Accordingly, protective sentencing raises the problem of justice.

In order to suggest a remedy for this problem of justice, in Chapter five, two main groups were identified:

1. Non-responsible mentally disordered persons who are found

"not guilty by reason of insanity".

2. Responsible mentally disordered person who are found guilty or sentenced or in prison.

It was argued that there is a conflict in the present procedures both in law and in practice. On the one hand, how can it be justified for the court to acquit somebody by reason of being non-responsible and yet detain him for an indefinite duration in a mental hospital, while on the other hand an offender who deserves "diminished punishability" by reason of his limited mental disorder may be sentenced by the court to life imprisonment or added a "restriction order" to the hospital order without a limited of duration? Hart emphasises that a person must not be convicted if he has no choice and fair opportunity to avoid crime. Accordingly people who are insane at the time of the crime must be acquitted because they did not commit crime voluntarily (with choice and fair opportunity). Hart, also, admits that an open-ended detention after the verdict "not guilty by reason of insanity" is similar to punishment in respect of many features such as its being unpleasant to the individuals to whom it is applied[32]. So it is unjust to transfer such people to mental hospital under open-ended detention in order to protect society without any care for the individual's liberty, especially since predictions of dangerousness are not reliable. Dr. Brice Dickson, a senior law lecturer at Queen's University, Belfast, said: 'Unless the rights of all individuals are guaranteed equal

protection, there is little prospect of a lasting solution being found'[33].

At the same time Hart argues that in some cases - those in which small numbers of mentally disordered persons may in a high degree of probability commit crime in future - justice or fairness must give way to the protection of society (utility)[34]. In this situation "utility overcomes justice". But, since the individual's liberty is an important feature in Hart's approach, it is necessary to find the balance between "utility" and "liberty" when we impose any kind of detention on (non-responsible) mentally disordered persons. Society is, therefore, only entitled to protect itself from non-responsible dangerous patients - that is to say only in cases where there is a high degree of probability that they may commit crimes involving "serious harm" against others. Thus, a definition of "serious harm" is required. In this context, any form of harm can be serious harm, if it is felt to be grave enough to justify protecting the public from a person who can be shown in high probability to be likely to cause it. Thus, the gravity of the crime, the antecedents of the patient and other circumstances are important to recognising the high probability of "serious harm" in future.

As a result, it may be found that many of the mentally disordered people who are transferred to mental hospital for an

indefinite duration after they have been acquitted by the court should be released, because, either they are not mentally disordered in the medical sense (for example, persons suffering from diabetes), or because they have recovered after they committed the crimes, or there is no high degree of probability that they will inflict serious harm. So, in such cases the detention is quite clearly "unjust". Such mentally disordered people should be released and given ordinary treatment, such as psychoanalysis, group therapy, medical care for physical conditions, education job training and family councelling.

In the remaining cases, we should bear in mind that the liberty of the individual is important as well as the protection of society, so the balance between "utility" and "liberty" needs to be kept even when the patient may cause "serious harm" in high probability. Thus, I have suggested that "compulsory treatment" may be imposed. This should be the least restriction possible in terms of the patient's condition. Thus, in the first instance, only a probation order should be imposed and the power of the court limited to this. Then, if this kind of order does not prove satisfactory, the other types of order should be considered in turn. At this stage the decision should be made by the Tribunal or the Mental Welfare Commission for Scotland, not by the court. The patient must have a right, at regular intervals, to ask the Tribunal or the Mental Welfare Commission for Scotland to review its decision, because in such cases it is acting as a substitute

for a court. In addition, the Tribunal or the Mental Welfare Commission must re-examine all cases every three or six months even if there is no appeal by the patients or on their behalf. The Tribunal or the Mental Welfare Commission may release patients when it is satisfied that they are no longer suffering from the mental disorder according to which they were described as "dangerous", such as "paranoid schizophrenia"[35]. This should not require intervention from the Home Secretary or the Secretary of State in Scotland.

On the other hand, the position with responsible mentally disordered offenders who are convicted because they committed crimes voluntarily is different. The present law and practice have dealt with such offenders, either by transferring them to mental hospital under an indefinite restriction order or by imposing life imprisonment in order to "protect society" from serious harm[36]. This sort of procedure includes the pure utilitarian aim of punishment despite the fact that there is no reason to protect others in most cases and so no reason for justice to give way to utility. In reality there is conflict between such procedures and the criteria of "diminished punishability" which is required in case of impairment of mind at the time when the crime was committed. In addition, it is very clear that compulsory treatment is used as alternative to punishment, so it contains an element of resentment and public disapproval. It may be said that it is unjust to let a mentally

disordered offender suffer more than in proportion to the gravity of the crime which he committed.

Accordingly, since such a person is responsible for his crimes (he is found guilty because he had mens rea or "choice" when he committed the crime), so he deserves punishment equal to the gravity of his crime. And, since, he is suffering from mental disorder (severe or merely impairment), he needs treatment at the same time. I have suggested that in order to avoid injustice in procedure and to separate punishment and treatment as much as possible, a "dual system" of management involving elements of both prison and hospital should be adopted. The treatment of such prisoner requires involvement from the Mental Health System and the provision of secure conditions requires involvement from the prison system. The responsibilities of each system should be independent. The duration of the dual system must be equal to the gravity of the crime, but not longer. When the prisoner completes his sentence in the dual system, he must be discharged as this is required by the criterion of justice. But, if there is high probability that he may commit serious harm against others when he is released, he may be transferred to mental hospital under one of the three orders above. Since prisoners who are already in the prison are also responsible for their crime, so they, too, should be subject to the same principle, when they become mentally disordered in prison.

The power to make this kind of decision has to be in the hands of courts because the courts are more able to fulfil the requirements of justice than any other authorities. The prisoner in such a system should have full rights of appeal against such detention to the Tribunal or the Mental Welfare Commission at any time. As with non-responsible patients, the Tribunal or the Mental Welfare Commission should have to review cases every three or six months even if there is no appeal from the prisoner or his behalf. The Tribunal or the Mental Welfare Commission either has to release the prisoner because his sentence has expired and there is not a high probability that he may commit serious harm in future or else return him to the prison where he has recovered from his mental disorder and his sentence has not expired. The Tribunal and the Mental Welfare Commission should also have power to transfer the prisoner to mental hospital under limited compulsory treatment (probation order, guardianship order or hospital order) when his sentence has expired but he is still suffering from a mental disorder which may drive him in high probability to commit serious harm against others. In this case we have to apply the procedures already suggested for non-responsible persons (not guilty by reason of insanity) for the same reasons.

All of the decisions have to be made by the courts and the Tribunal or the Mental Welfare Commission according to medical reports and the patient's circumstances.

We saw, also, that there is no Mental Health System in Iraq to arrange how to deal with mentally disordered people in general and mentally disordered offenders in particular. So, the court and prison administrations use an artificial power to deal with such people, whether responsible or non-responsible. In order to keep human rights in Iraq in respect of mentally disordered people (responsible and non-responsible), there is an urgent need for a "Mental Health Code" to deal with mentally disordered people in general and mentally disordered offenders in particular, and according to my recommendations above. The main purpose of the legislation should be to control dangerous practices and the improper use of treatment by both of Mental Health and the Prison Administrations.

A recent report issued by the Home Office, referred to in The Independent newspaper on 20th September 1990, has recognised the problem that exists with the number of sentenced prisoners who are suffering from acute mental illness. It said that there is a shortage of alternatives such as long-term secure units which could accommodate such people and acknowledged as well that the prison system is inadequate for psychiatric care[37].

Accordingly, this report reinforces the need to adopt my recommendation above that a dual system be established to deal with such prisoners. It is clear from my analysis that the mixed system is required by some theories of punishment as well.

FOOTNOTES

CHAPTER SIX

1. See p.17 ch.1. where crime is defined as 'actus or omission for which a person is liable to criminal prosecution and punishment'.
2. Offence of strict liability are defined purely in terms of external behaviour and not include the normal "mens rea", so courts have to be satisfied that Parliament so intended before it dispenses with the necessity for mens rea. The more absence of word "knowingly" or such like is not enough.
3. See p.28 ch.1 for more details.
4. See p.72 ch.2 for more details.
5. See p.57 ch.2 for more details.
6. See pp.84-89 ch.2 for more details.
7. See pp.79-85 ch.2 for more details.
8. Hart, 1968, op.cit. p.27.
9. See pp.88-99 ch.2 for more details.
10. Ibid.
11. See p.112 ch.3 for more details.
12. See pp.112-114 ch.3 for more details.
13. See pp.128-130 ch.3 for more details.
14. See pp.134-177 ch.3 for more details.

14A. Kanny, The Expert in Court, L.Q.Review, 1983,99,pp.197-216.

14B. Hodigkinson, Expert Evidence and Responsible Doubt, L.Q.Review, 1988, 104, pp.188-202; see also Rodwell, A case of our Expert Opinion Against Theirs, Report, The

Independent, 19th April 1991.

15. See pp.88-93 ch.2 for more details.

16. See pp.233-240 ch.4 for more details.

17. See p.207-208 ch.4 for more details.

18. See p.207-208 ch. 4 for more details.

19. See pp.222-235 ch.4 for more details.

20. Ibid.

21. Ibid.

22. Ibid.

23. Ibid.

24. Ibid.

25. See pp.307-308 ch.5 for more details.

26. R. v. Gummell (1966) 50 Cr.App.R.242.

27. See p.268-270 ch.5 for more details.

28 See p.270-271 ch.5 for more details.

29. See for example, Regina v. Brich, the Guardian 5/5/1989.

30. Ibid.

31. See pp.267-273 ch.5 for more details.

32. Hart, 1968, op.cit., p.3.

33. David McKittrick, "Human Rights in Ulster 'curtailed'", in The Independent Newspaper, 24/10/1990.

34. See pp.304-306 ch.5.

35. See p.138-140 ch.3 for more information about serious mental illnesses.

36. See pp.206-208 ch.5.

37. The Independent, 20th september 1990.

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ABBREVIATIONS

A.C.	Appeal Cases
Adam	Adam's Reports
All E.R.	All England Law Reports
B.J.Crim.	British Journal of Criminology
Cald	Caldecott's Magistrates' Settlement cases
C.L.R.	Commonwealth Law Reports (Aus.)
Coupar	Couper's Justiciary Reports (Scot.)
Cox C.C.	Cox's Criminal Cases
Cr.App.	Criminal Appeal
Cr.App.R.	Criminal Appeal Reports
Cr.App.Rep.	Criminal Appeal Reports
Crim.L.R.	Criminal Law Review
C.S.P.	Thomas, Current Sentencing Practices
D.C.Cir.	District of Columbia Court of Appeals Cases
D.L.R.	Dickinson Law Review (Pennsylvania)
Eng.Rep.	English Reports
Irv.	Irvine's High Court and Circuit Courts of Justiciary Reports
J.C.	Justiciary Cases (Scot.)
K.B.	King's Bench
N.H.	New Hampshire
N.Z.L.R.	New Zealand Law Reports
Q.B.	Queen's Bench Reports
Q.B.D.	Queen's Bench Division

S.A.S.R.	South Australian State
S.C.	Session Cases (Scot.)
S.C.C.R.	Scottish Criminal Case Reports
S.C.J.	Session Cases (Scot.)
S.L.T.	Scots Law Times (Scot.)
Swin	Swinton's Justiciary Reports (Scot.)
T.L.R.	Times Law Reports
W.L.R.	Weekly Law Reports
U.S.	United States Supreme Court Reports
U.S.L.W.	United States Law Week