3 Legal Approaches to Criminal Responsibility of Mentally Disordered Offenders in Europe

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And when he's not himself does wrong Laertes,
Then Hamlet does it not, Hamlet denies it.
Who does it, then? His madness…

Shakespeare [1]

3.1 Introduction

3.1.1 A Moral Tradition

In these times of political and monetary turmoil in Europe, when mutual cultural differences are being highlighted, binding statements about our joint history and traditions are often heard in response. When explaining how different European jurisdictions approach the criminal responsibility of mentally disordered offenders, it may be a similar wisdom to start off with our common ground. In this case in the famous words of the—nota bene—American judge Bazelon in *Durham v. United States* [2]:

> The legal and moral traditions of the western world require that those who, of their own free will and with evil intent, commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility.

A first nuancing to be made is that this tradition is not exclusively Western, as also in the Eastern world, similar ancient traditions are known [3]. The tradition

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may not even be exclusively human, as it can also be seen in action in other primates. For example, it is observed that a Rhesus monkey with a condition that resembled human Down's syndrome would as an exception not be punished by the group for violating the rules of their strict society, like threatening the alpha male. 'It was as if everyone realized that nothing they did would ever change her ineptness' [4].

3.1.2 Aim, Scope and Approach

More importantly however in this context is the nuancing that a shared moral tradition waters down into different legal systems in a wider variety of forms and substances than Bazelon's quote suggests. The aim of this chapter is to explain a few major distinctions in the legal approaches to criminal responsibility of mentally disordered offenders in European jurisdictions.

By 'European' we do not mean to limit the continent to the members of the European Union but rather to a broad scope like the members of the Council of Europe, best known for its European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Even though both 'Brussels' and 'Strasbourg' may produce binding legal obligations in the realms of criminal law and mental health law, so far the national approach to criminal responsibility of mentally disordered offenders has generally been left to the members' discretion. However, the nonbinding United Nations Convention on the Rights of Persons with Disabilities (2006) states that also psychiatric patients should be treated (in laws) as full participating members of society able to make their own choices, which would mean that legal insanity is in itself discriminatory and thus unlawful.

With regard to deprivation of liberty, Article 5 (1, e) of ECHR mentions the lawful detention of 'persons of unsound mind' and of course that of a person after (criminal) conviction by a competent court (1, a). In some cases of (preventive) detention of mentally disordered offenders, the European Court of Human Rights in Strasbourg has considered both provisions applicable, allowing for detention of longer duration than the maximum penalty on the committed offence and an obligation to provide treatment [5]. With regard to this population, the European Union's legislating efforts have mainly focused on procedural safeguards for 'vulnerable persons suspected or accused in criminal proceedings'. Vulnerability should be presumed in cases of 'persons with serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders, hindering them to understand and effectively participate in the proceedings' [6]. These directives touch upon the subject of competency or fitness to stand trial, a concept which can generally be distinguished from criminal responsibility as derived from procedural instead of substantive criminal law and focusing on the time of the trial (or earlier stages in the procedure) instead of the time of the offence. In this chapter the discussion on legal insanity will be limited to the latter, thereby also excluding all kinds of doctrines of incompetence and unaccountability known in civil or administrative law.

Our intention is not to present a complete overview of provisions in all applicable jurisdictions as, for example, Salize and Dressing [7] have done for placement and treatment of mentally disordered of the EU members, but to describe a few major distinctions. Therefore, first of all some common historical roots will be explored. Just as Aristotle has argued that matter is made into a substance by the form that it has, the matter of criminal responsibility will then be addressed first in its form—the legal context—and second as substance—the contents of the legal doctrine. Finally, the implications for the behavioural scientific disciplines that are generally asked to assess criminal responsibility will be discussed, as well as recent debates about the doctrine.

3.2 Common Historical Roots

3.2.1 Hebrew, Greek and Roman Roots

As the Western world is said to have a Judeo-Christian tradition, then so has the moral tradition of legal insanity. Our knowledge of this tradition dates back to the earliest recordings of Hebrew law. The Babylonian Talmud (written around 500 AD) mentions:

> Idiots, lunatics and children below a certain age ought not to be held criminally responsible because they could not distinguish good from evil, right from wrong and were thus blameless in the eyes of God and man. It is an ill thing to knock against a deaf mute, an imbecile or a minor. He that wounds them is culpable, but if they wound others they are not culpable… for with them only the act is a consequence while the intention is of no consequence. (cited in [3, p. 4])

In Hebrew law, criminal acts were dealt with in a civil law manner. Similarly, many mediaeval Western European legal traditions—for example, both the English and the Germanic—reacted to crimes through compensation or restitution. Kinsmen of the insane offender were held liable for compensating the victim and were also held responsible for preventing future harm by the offender [8, 9].

A similar moral tradition can be found in the other ancestor of Christian, Western law, both the mythological and philosophical thought of classical Greece and Rome. As a starting point, usually the Greek Philosopher Plato's (427-347 BC) draft of Utopian laws is mentioned:

> Someone may commit an act when mad or afflicted with disease… [and if so,] let him pay simply for the damage; and let him be exempt from other punishment. Except that if he has killed someone and his hands are polluted by murder, he must depart to a place in another country and live there in exile for a year [10].

The idea of a 'moral excuse' can actually be traced back to that other great Greek philosopher Aristotle [11]. Even though there is no historical evidence that these laws were in fact ever practiced in any part of ancient Greece, connections can be shown with the main source of Roman law, The Justinian Digest—a collection of

texts from legal scholars (100 BC-300 AD, compiled in 533 AD) [8]. A certain Modestinus states that someone falling in the category of 'lunatics' (*furiosi*, *mente capti* and *dementes*) who had committed an offence could not be punished, because he was 'excused by the misfortune of his fate', stemming from the belief that a madman was already punished by virtue of his mental condition (Justinian Digest 48, 9, 2 Modestinus, cited in translation in Parlopiano [12, p. 186]). The rationale is perhaps a reference to the classical notion that madness was a divine punishment—just as Juno had jealously punished Hercules with madness. In other parts of the Digest, damage done by the insane is compared to that done by an animal or a tile falling from the roof (9, 2, 5.2 Ulpian), 'as if it happened by some chance… and not as if done by a person' (26, 7, 61 Pomponius).

3.2.2 Church Influences

Even though the Justinian Digest dates already from after the fall of the Western Roman Empire, Roman law would heavily influence legal scholarship across Europe in the ages thereafter. It would pragmatically be used to be referred to when local legal customs were lacking in a particular area. It has therefore been argued that many jurisdictions today have an insanity defence that can be traced back specifically to the earliest to survive insanity defence case in Roman law; that of Aelius Priscus [8]. For example, in the famous English case of James Hadfield who in 1800 attempted to kill King George III, the Latin phrase 'furiosus solo furore punitur'—a madman is only punished by his madness—was quoted at the trial by Sir Edward Coke [9, p. 39].

Nevertheless, even though the Catholic Church was in a way a custodian of Roman law, theology and criminal law as divine and earthly justice influenced each other from Medieval Times with the idea of the sin tribunal as expressed in the Last Judgment as mediator [13]. Punishment as penance, for example, led the Church Synod of Worms (868 AD) to a ruling suggesting that an individual who killed someone while insane and later returned to sanity would still be in need of, however less, penance. This was interpreted as referring to a situation of an individual whose earlier actions had brought about their insanity—a concept which is widely adopted in modern legal doctrine as a correction to the moral tradition and is called vicarious responsibility, culpa/dolus in causa or prior fault, mainly related to prior substance use [12].

An exceptional interruption of the moral tradition in the Late Middle Ages was also the result of the Church influence that turned heresy into an offence. Some mentally disordered offenders were given harsher punishment than ordinary offenders but only because they were mistaken for persons possessed by demons, even by doctors [14]. It underlines the importance of the medical state of the art in assessing insanity and assisting criminal justice. The Dutch doctor Johannes Wier is known to be the first to separate the mentally ill from the possessed in the sixteenth century, as a predecessor of French doctor Philippe Pinel who is said to have freed the mentally ill from criminal chains in the dungeons of Bicêtre in the late eighteenth century [15].

Even though in the era of the Reformation, through the two kingdoms doctrine, criminal law becomes less theocratic, it becomes even further influenced by religious thought and separated from civil and police law sanctioning in which punishment was merely a reaction to crimes which could not be compensated. 'Principles of modern criminal law, as central as the guilt principle and the personality of punishment, are, from a historical point of view nothing but derivatives of the idea of divine justice' [13, p. 169]. This idea of personal ethical blame explains how guilt, intent and voluntariness—free will—of the perpetrator became central concepts in the criminal law of today, thereby 'colouring' the concept of criminal responsibility. Walker [9] describes how in England certain crimes which were punishable—even by death—because they could not be wiped out by compensation, could at first not entirely be excused, but through Church influence later could, by absence of intention and/or voluntariness, 'not out of own free will'.

3.3 Differences in Form of the Responsibility Doctrine

3.3.1 Context Within Criminal Law and Procedure

Despite many regional differences, similar historical commonalities as described for legal insanity have led to some sort of doctrinal consensus that criminal liability generally requires both 'harm and fault'. Derived from the Latin phrase '*actus non facit reum nisi mens sit rea*'—loosely translated as 'an act does not make a man guilty unless his mind is (also) guilty'—a criminal offence is the combination of a bad act ('actus reus') and 'a guilty mind' ('mens rea'). Of course there are exceptions to the basic rule, for example, some jurisdictions know 'strict liability offences' which do not require an assessment of 'mens rea'. Mens rea is acknowledged to have both a descriptive meaning—the fault element of an offence—and a normative meaning—blameworthiness. In most (Continental) European jurisdictions, this second distinction leads to the following system of assessing criminal liability: first, the elements of the statutory offence definition, both relating to actus reus and mens rea; second, the wrongfulness of the conduct; and third, the blameworthiness of the offender. The latter two generally correspond with the liability-negating circumstances of 'justifications' and 'excuses' [16]. It explains that the concept of criminal responsibility is not exclusively related to mental disorder. Criminal non-responsibility may, for example, also refer to the legally underaged or be related to other excuses or justifications. In this system 'insanity'—or the lack of criminal responsibility due to a mental disorder—is seen as an excuse negating the blameworthiness of the offence. Through this system it can easily be explained that insanity does not generally lead to a complete lack of mens rea, as, for example, the element of 'intent' can usually still be fulfilled: mentally disordered can act intentional and yet not be blameworthy.

In jurisdictions stemming from the English common law tradition, in which some offences—like murder—are not regulated in statutes but in case law, especially the presence of an adversarial justice system, leads to a different criminal

procedure, also concerning insanity. In inquisitorial justice systems, common on the continent, judges play an active investigative role in establishing the three requirements for liability, while in adversarial systems, they are mainly the referee in the contest between equivalent rivals: the prosecution and the defence [17]. From the perspective of forensic psychiatry, this difference has relevant consequences. In adversarial justice systems, for example, the emphasis on equality of arms and an active defence by the accused evokes a more prominent position of the unfitness to stand trial doctrine [18]. In addition, in an adversarial system, expert witnesses—including in forensic psychiatry—are usually appointed by the parties, which could lead to a battle of the experts, while in an inquisitorial system, they are generally appointed by the court. For example, in England, as one of the mentioned solutions for the battle of the experts, a Law Commission [19] advised to have a third expert appointed by the court.

The contest between parties in adversarial justice also entails positioning through the use of formal pleas and defences. The defendant can plead guilty or not guilty but also use an insanity plea or an insanity defence. Similar to the described liability system common in inquisitorial systems, the offence itself is not contested, but the moral responsibility (or agency) is, placing the insanity defence amongst the 'supervening' defences [20]. Compared to inquisitorial systems, raising this defence has more procedural consequences, as, for example, it generally entails the 'burden of proof' to persuade the decision-makers—usually juries—of your plea [21]. Even though the insanity defence can be viewed as the functional equivalent of the excuse of non-responsibility in other jurisdictions, it is probably because of this different procedural embedding that some argue that, for example, in England and Wales the issue of criminal responsibility is absent ([7]; the issue of diminished responsibility is discussed in §3.4.3).

However there are jurisdictions in which the issue is truly absent, but this has to be understood against a different background. For example, the fact that Sweden has abolished its responsibility doctrine in 1965 is ultimately rooted in the debate between classical criminal law theorists—emphasizing free will and rational choice as the cause of crime—and modern theorists, adopting determinism and biopsychosocial causes of crime. While this debate was prevalent all over Europe (and beyond), in most other countries, modernists did not manage such a grand victory.

3.3.2 Context Within Sentencing Law and Mental Health Law

Abolishing the criminal responsibility doctrine poses new problems, amongst which the question of how mentally disordered offenders will then be led to the appropriate place for protection of society and/or treatment. As establishing non-responsibility generally leads to a kind of 'not guilty' verdict, some sort of acquittal generally follows. This has always been unsatisfactory for persons that were considered dangerous because of their mental disorder. Plato already stressed that it was the duty of the family to keep the acquitted under control: 'if anyone be insane, let him not be seen openly in the town, but let his kinsfolk watch over him as best they may,

under penalty of a fine'. As described in §3.2.1, similar laws existed in many regions throughout Europe, until prisons began to be provided not only for punishment but also for protection of the public. Around the turning of the twentieth century, this distinction between detention as punishment—proportionate to the extent of guilt—and as a safety measure, of indeterminate duration as dependent on dangerousness, became the compromise between classical and modern theorists [22]. As for non-responsible mentally disordered offenders, punishment is impossible; in many jurisdictions—which have adopted this twin track system of sanctioning—safety measures are provided nonetheless for this group to ensure public protection. French philosopher Foucault has convincingly argued that around the same time the developing functioning of Western medicine as a public hygiene—often equalling dangerousness with disorder or degeneracy—ensured that safety measures could be used as a 'social defence' against 'nonsocial' groups in society [23]. Especially the concept of diminished responsibility was used to widen the scope of such measures. In the century that followed, when psychiatric hospitals with sufficient security began to be provided along with mental health law which allowed for (civil or criminal) commitment of mentally disordered, that became the royal way for disposing of the acquitted that were deemed dangerous. In many jurisdictions the responsibility doctrine plays an important role in selecting cases for either safety or hospital (treatment) measures.

This was also the case in Sweden up until abolishing the responsibility doctrine. As an alternative, not the mental state at the time of the crime but the time of the criminal proceedings (trial) is indicative for placement in a psychiatric hospital and thus for not receiving punishment. Especially in jurisdictions that have not adopted this twin track system of penal sanctioning, placement in a psychiatric hospital is not necessarily dependent on establishing diminished or non-responsibility. For example, the (civil) hospital order in England and Wales can be imposed by a criminal court as well, without an acquittal on the basis of the insanity defence. As the moral tradition then has no instrumental function with regard to the desired outcome, it is no wonder that the insanity defence is highly seldom successfully raised. For forensic psychiatrists, not connecting the responsibility criterion to hospital placement has the advantage that assessment is not concerned with the time of the crime (retrospective diagnosis) and, when there are a separate trial of fact and a sentencing trial, nor with proof of the offence. Such two-phase trials exist, for example, in Sweden and England and Wales.

3.4 Differences in Substance of the Responsibility Doctrine

3.4.1 The Definition of Insanity: Legal Versus Medical Competence

As the doctrine of criminal responsibility in relation to a mental disorder can be regulated in specific provisions in many different ways, nevertheless one common element can be observed: insanity has to be defined. The applicable mental states

are either summed up in the provision itself or explained in other provisions or supplements. The Austrian provisions are a random example of the former, as 'Geisteskrankheit', 'geistigen Behinderung', 'tiefgreifenden Bewußtseinsstörung' and 'dieser Zustände gleichwertigen seelischen Störung' are mentioned.

For the members of the European Union in 2005 Salize and Dressing conclude: 'Most terms as used in codes or acts are non-specific, descriptive in nature and to a large extend outdated. The legal terms have little relation to modern international classification systems for mental disorders' (334). References in this chapter to legislation in the respective countries are predominantly from their book. As they are both psychiatrists, that last remark seems to reveal disappointment. However, it is important to note that in many jurisdictions, the legal definition of mental disorder is intentionally not related to the psychiatric terminology. The argument may be of course that psychiatric classifications are often altered, but more important is the broadness of the criterion and question of who is competent to establish legal insanity. Legal terminology is usually related to a competence of the court to, either with or without psychiatric advice, establish legal insanity. Competence commonly entails discretion to ignore the behavioural scientific advice and make another decision. This discretion is much less logical when the terminology used in legislation is narrow and similar to that of psychiatry.

This is, for example, the case in Norway, which became clear to the world as this was at the heart of the debate in the infamous case of terrorist Anders Breivik. The District Court of Oslo [24] issued an English translation of their verdict, including a translation of their provision for 'criminal capacity': 'A person who was psychotic or unconscious at the time of committing the act shall not be liable to a penalty. The same applies to a person who at the time of committing the act was mentally retarded to a high degree'. Especially the term 'psychotic' is medical language. It not only led to a discussion about whether his extremist right-wing worldview was delusional but also to a strange interaction between psychiatry and law. As a first set of behavioural scientists had assessed him as psychotic, the court—apparently not convinced—asked a second set which concluded to the contrary. The court followed the second opinion, but in motivating their verdict made use of medical reasoning beyond its competence [25].

In the Danish provision, the term 'mental illness' is used as an equivalent to 'psychotic'. However after a medical finding of psychosis, it is interestingly still for the court to decide on the responsibility. Using legal terminology not only underlines legal competence but enables the court to include other legal or societal elements in its decision. For example, in Germany and the Netherlands, the term 'attribution' is used, which has a broader meaning within criminal law in light of the question whether offence behaviour can be attributed to the accused. Nevertheless, in these countries there has been enough discussion about medical competence, as the common term 'Zurechnungsfähigkeit' or 'toerekeningsvatbaarheid' seems to suggest a rather fixed capacity of the personality. Of course, non-responsibility is strictly related to the particular offence and not a permanent trait.

Even though the terminology in the different provisions across Europe varies widely, in practice generally major mental disorders such as a 'psychotic state',

affective disorders and organic mental disorders seem to fall within their scope [7]. The variation is more extreme when it comes to personality disorders, paraphilia or substance abuse disorders. For example, in Hungary, personality disorder is explicitly mentioned as a condition, which could lead to non-responsibility [3]. When criminal responsibility is not regarded a dichotomous concept but one of degree (see §3.4.3), there is more leeway to include such disorders in the doctrine. That is similar when the question of disposal or commitment to a hospital is not related to responsibility. For example, in England and Wales, immoral conduct, paraphilia and substance abuse disorders are explicitly excluded, while personality disordered offenders are in theory eligible for a hospital order but in practice often excluded on the basis of the criterion that there is no 'appropriate treatment'—which replaced the former 'treatability' criterion. Opinions about the treatability of personality disordered offenders seem to differ, however, as, for example, in the Dutch TBS (entrustment) order they are overrepresented and treated with a high success rate.

The legal necessity of forensic (psychiatric) assessment also differs if the question of responsibility and disposal are not connected. Most jurisdictions legally require forensic assessment when a defendant is presumed to be mentally disordered. The ECHR, for example, in *Winterwerp v the Netherlands* [26], requires a medical assessment for (criminal) or civil commitment. As the moral tradition of criminal responsibility has more ancient roots than modern psychiatry, medical assessment has not always been a requirement of course. The concept of madness has moved over the ages from a 'religio-astrologic' to a 'scientific-organic' perspective [27]. What madness is has long been in the realm of common knowledge and was therefore also assessed by layman. The development of legal standards of proof and the scientific revolution—including the rise of modern society—have coincided to a system in which legal decision-making, for example, concerning insanity requires expert evidence [28]. As psychiatric diagnosis has become more subtle and the term insanity is no longer reserved for the overtly irrational, the medical competence has been strengthened resulting sometimes in more tension with its legal counterpart. In some jurisdictions, for example—especially Denmark is really strict—it is out of the question that behavioural scientists also advise on anything other than disorder (and disposal), like the (causal) relation between the disorder and the offence and the degree of guilt or responsibility. In most countries, the system is such that they can advise on these medicolegal concepts but that the court can substitute its own view on the matter. In practice, the advice is generally followed. In Portugal, however, a court cannot substitute its own view, but only ask additional questions or order a new assessment, extending even further the competence of medical experts (questionably beyond their expertise).

3.4.2 The Test of Insanity: A General Versus a Specific Relation Between Disorder and Offence

A second element which may appear in provisions of the responsibility doctrine is a specification of the (functional) capacities that the disorder should have

impaired at the time of the offence in order to establish legal insanity. This is often called a 'test'. While most European jurisdictions have such tests in place, two other approaches exist. As mentioned above, the Norwegian criminal code, for example, only requires psychosis and no further relation to the offence. In assessment of legal insanity, this is called the 'medical principle'. It becomes more medicolegal when a relationship between disorder and offence is required. The Dutch provision (art. 39 of the Criminal Code) is an example of requiring a general (not specified) relation between the disorder and the offence: 'A person who commits an offense for which he cannot be held responsible due to defective development or diseased disturbance of his mental faculties shall not be punishable'. As there was no consensus in parliament (at the end of the nineteenth century and ever since) as to which specific abilities should be impaired, the law allows for all sorts of causal relations between the disorder and the offence which have been formed in legal doctrine, case law and assessment practice. Such a general relation can also be observed in the citation from judge Bazelon at the beginning of this article, who speaks of acts as the product of a mental disease, also referred to as the 'product test'.

Aristotle already postulated such a test, implying that acts done in the midst of madness should be considered involuntary and that 'a fool and a madman' would have 'impaired ability to deliberate' [29]. In the Digest criteria like 'not capable of wrongful intent', 'not consisting in the will of the culprit' and 'without knowing what he is doing' have been formulated (56). Especially in English case law, the development of tests of insanity can be traced. In a case from the year 1313, the disordered offender was compared to a child or a 'nonperson', not able to distinguish good from evil because the moral implications of the act were not understood: it was later referred to as the 'good and evil test' [30]. In the case of *Rex v. Arnold* (1724), a mentally disordered offender was compared to a 'wild beast' that has no sense of 'its' own conduct. This 'wild beast test' was more about cognitive than moral capacity. Acceptance of mere moral defects for the insanity defence, such as the nineteenth century concept of 'moral insanity', has mostly been avoided throughout history. However, in the famous case of Edward Oxford who shot at Queen Victoria (1840), the used 'right and wrong test' seemed to stress mere moral capacity, even though the offender was officially acquitted for a 'lesion of the will'. It could not prevent the newly found psychiatric diagnosis of 'homicidal mania' to be grounds for many an acquittal in the years following, until it was finally discarded as not being a mental disorder [27]. In the soon to follow landmark case of Daniel M'Naghten (1843), who shot at the Prime Minister but killed his secretary, a test was stated in which an offender was not culpable 'if he was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong'. The moral aspect is more or less dissolved in the cognitive capacity of knowing that something is against the law, instead of morally wrong. This phrasing still forms the basis for many insanity doctrines in criminal law throughout the (Western) world. In addition to tests of cognition, often tests of volition or the ability to control one's actions may be added, like the 'irresistible

impulse test'. Eigen [27] proves that also this test has far more ancient roots in English case law.

In current European provisions, it is common to find both a test of cognition and volition or control. The Belgian provision only seems to include control. Nevertheless Salize and Dressing [7] consider the definition of medicolegal concepts amongst members of the European Union 'ill-defined and lacking in standardization', but that may be explained also by the fact that they include dangerousness or risk for recidivism in their assessment.

3.4.3 The Scale of Responsibility: Gradual Versus Dichotomous

A greater diversity than in the definition and test of insanity can be observed in relation to the scale of legal insanity or responsibility. Most European jurisdictions consider it to be a gradual concept, while some (like Austria, Belgium, Bulgaria, France) assess it as a dichotomous concept.

It is logical that when a general causal criterion is used, like in the Netherlands, there is room for (gradations of) diminished responsibility. The Dutch legislator however chose, in order to ensure consensus between classical and modern theorists, not to mention diminished responsibility in the criminal code, but in practice it plays an important role [22]. It is remarkable that jurisdictions that have tests of cognition and/or volition in place differ in their view whether that is an all-or-none test or that diminished cognition and volition at the time of the crime are also possible.

Of course the issue of diminished responsibility is of importance to sentencing. Where non-responsibility leads to the exclusion of punishment, diminished responsibility generally leads to a lesser punishment due to the principle of punishment to the extent of guilt. In some jurisdictions, like Spain, diminished responsibility is necessary to be eligible for (certain) safety measures. In the Netherlands diminished responsibility functions de facto as a criterion for the TBS order, which explains the high percentage of personality disordered TBS patients in the system. In other jurisdictions, like Austria and Denmark, disordered offenders not qualifying for complete legal insanity may still be eligible for criminal or civil commitment into a (forensic) psychiatric hospital.

In jurisdictions within the United Kingdom, diminished responsibility is not related to the insanity defence at all—it is not a matter of degree but of a different nature. It serves as a mitigating factor in sentencing, mainly in the special case of murder to avoid a mandatory life sentence. This is substantively engineered by changing the mens rea element of murder into manslaughter [31]. This was derived from the humanitarian approach, originally in Scottish case law, to pardon mentally disordered offenders in capital cases [9]. The citation from Plato in §3.2.1 suggests a diminished responsibility of a similar principle, as the consequences for the perpetrator are less severe in case of a killing by a madman, as he does not seem to be considered completely blameless. Even though it has been suggested that dichotomous concepts are 'peculiarly foreign' to psychiatry, it is understood that the

dichotomy is also being preserved by the judiciary to avoid more influence of psychiatrists on legal decision-making [32]. The gradual or dimensional approach to responsibility may indeed have more 'face validity' but automatically adopts problems in the reliability of assessment. Indeed the Dutch experience has shown that even something like 'percentage responsibility' can be developed in practice in which there are far too many gradations than can scientifically be distinguished [33, 34]. At present the debate focuses on five versus three gradations [22]. Maybe they can look to Portugal for a compromise, as they have four.

3.5 Discussion

As universal as the diagnostics of medical concepts are, as culture-specific are the diagnostics of medicolegal concepts. Even though the moral tradition of not holding mentally disordered offenders criminally responsible seems to have similar roots across Europe, the legal context and the national perspective on its contents create a wide variety of doctrines and consequent assessment practices. This may hinder the exchange of knowledge and best practices amongst European forensic behavioural scientists and the equal treatment of mentally disordered offenders throughout Europe. However, as placement of patients is usually done on treatment needs and the level of dangerousness and not on the basis of (the degree) of responsibility, the doctrine may serve more as a distinguishing criterion in theory only, suggesting that there may be more commonalities at the level of routine practice [7]. Nevertheless, the precariousness of the doctrine and its connection to central aspects of criminal law seem to justify that a national support base is needed.

For most jurisdictions it can surely be argued that, as mentioned in an Editorial by the Harvard Law Review [35], 'a basic ambivalence in society towards mentally disordered offenders' exists. The tradition is being criticized for leaving possibly severe crimes unpunished and a demand for restoration unanswered, possibly even leading to people taking the law into their own hands. When, as described, Plato suggests exile as a sanction for murder while insane, he seems to take such considerations into account. Other critiques—mentioned and disputed by Morse for example [36]—include the diagnostic challenge (if not impossibility) of reconstructing the offenders state of mind during the offence, the distraction from meeting the needs of psychiatric patients in prison and the suggested relation to the heavily debated concept of free will. Abolishing the doctrine, relabelling it or limiting its use, are possible reactions to these critiques. For example, a few states in the United States have abolished the insanity defence, while other states have used a milder solution through rewording the verdict 'not guilty by reason of insanity' into 'guilty but mentally ill', to preserve the expressive function of attributing guilt [3]. But from the other end of the ambivalence, the abolishment in Sweden is intuitively felt to be too much of a break from the moral tradition to be satisfactory, and changes to the system are in progress [37].

What goes for Europe in general seems to be applicable to criminal responsibility in Europe as well: we are united by a distant moral tradition and divided by justified cultural subtleties.

Take-Home Messages

- The moral tradition of not holding mentally disordered criminally responsible for certain offences seems to have similar roots across Europe in Hebrew and Roman law and Greek philosophy, while the church influenced its further development.
- Responsibility doctrines in European jurisdictions differ according to their context within criminal law and procedure and their possible relation to sentencing law and placement of mentally disordered offenders in a (forensic) mental hospital.
- Responsibility doctrines in European jurisdictions differ on culture-specific issues as the definition of legal insanity, the tests of insanity (the required incapacities) and the view on the scale of responsibility.
- These differences may hinder the exchange of knowledge and best practices concerning forensic assessment amongst European forensic behavioural experts, but placement of patients is usually done on treatment needs and the level of dangerousness and not on the basis of (the degree) of responsibility.

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