The Insane Offender in Maltese Criminal Law *

A HISTORICAL AND CRITICAL REVIEW

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WE need not go very far back in Maltese history to trace the origin of the present statutory measures with regard to the relation of mental derangement to offences against the law of the land, and to study the progressive steps by which they have advanced. Indeed it was only during the last century that express legal provisions on the subject were enacted. This is not to be wondered at if it is borne in mind that previous to the nineteenth century the conception of mental disorder was still vague, with the consequence that instances of mental illness were often mistaken for wilful wickedness and perversion. It is also to be remembered that even if the law had made allowances for the insane offender, the treatment he would have received as a patient would not have been much different from that meted out to the sane criminal, except, perhaps, in cases where the death penalty was involved.

Previous to the cession of Malta to the Order of Saint John of Jerusalem, the Island must have been governed by the laws of the different invaders who occupied Malta at various periods of her history (1). The Phoenicians, Greeks, Carthaginians, Romans, Arabs, Normans, Suabians, Angevins, Aragonese and Castilians succeeded one another in the possession of the Island. Unfortunately, few documents and monuments have come down to us relating to the history of Maltese legisation from the earliest times to part of the Middle Ages (2) though it is known that Roman and Sicilian laws have left their mark on our legal codes.

(*) *I wish to thank Dr. A. Ganado, B.A., LL.D., for advice and criticism in the preparation of this paper, and for the loan of the various documents which are marked (A.G.) in the footnotes.*

(1) Debono, P. "Sommario della storia della legislazione in Malta", Malta, 1897, page 6.

(2) Debono, P., op. cit., page 127.

Domination of the Order of St. John of Jerusalem

Malta did not possess a municipal code of her own until the advent, in the sixteenth century, of the Knights of the Order of St. John of Jerusalem who made Malta their home till the end of the eighteenth century.

A number of statutes and ordinances were enacted by successive grandmasters. The first body of laws to be printed was the Code of Manoel de Vilhena (1723). The Code de Rohan, published in 1784, represented an advance over previous collections of laws, but it made no reference to the question of the legal responsibility of the insane offender.

A commentator of the Code de Rohan, writing as late as 1843, pointed out the need for its "almost total reform", but he had no suggestions to offer regarding the omission in the Code of provisions relating to the imputability of the insane (3). This omission, however, should not be interpreted as meaning that no special regard was paid by the courts to insane offenders. That some advantage could be reaped by insane persons in a criminal court of law is shown by the fact that accused persons sometimes tried to evade the law by feigning insanity, and to obviate such a contingency the Code de Rohan laid down the punishment to be meted out to an accused person who simulated insanity when he was up for trial before the court (4).

The reason why the Code de Rohan contains no specific reference to the culpability of the insane is to be found, perhaps, in the fact that the code was supplemented by the Roman laws which constituted the common law of the land. Unfortunately, no sources of information are available as to how such laws which dealt with the question of the criminal responsibility of the insane were applied in Malta.

French Occupation

Following the surrender of the Island by the Order to the French in 1798, Napoleon, in his first order of the 13th June, 1798, instructed the Commission of Government, which he had

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(3) Micallef, A. "Diritto municipale di Malta compilato sotto de Rohan or nuovamente corredato di annotazioni". Malta, 1843.

(4) "Del Dritto Municipale di Malta", 1784, Libro II, Capo 1, articolo 33.

set up, to organise the Civil and Criminal Courts of Justice on the lines of the French system (5).

The French occupation of the Island was, however, a brief and stormy one. The Maltese rose against the French in September 1798, and two years later the French capitulated.

The attempt, therefore, to introduce legislative measures based on the French model had to be abandoned and the administration of justice continued to be conducted as in the past (6).

British Domination

After the expulsion of the French from the Island, the old laws of Malta, which obtained under the Order, were retained by the British Government (7).

In 1823, Dr. Ignazio Gavino Bonavita (later Sir I. G. Bonavita, President of H.M. Court of Appeal), wrote a memorandum on the criminal legislation of Malta which was later on submitted to Sir J. Richardson. He offered various suggestions for the revision and reform of the laws of his time but he did not occupy himself with the question of the imputability of the insane. We know, however, that he approved of the special consideration shown by the Court to "somnambulists, infants and those who were deprived of their reason" (8).

In 1824, Sir J. Richardson, a distinguished English judge, was commissioned to inquire into the laws of the Island and he reported two years later (9). He was the first jurist to attempt the introduction into our criminal code of specific statutory provisions bearing on the legal aspects of mental disorder. He devoted a whole chapter of his report to the consideration of the criminal responsibility of the insane. His proposals on this subject, though they were not adopted in their entirety at the time, have formed the basis of subsequent legislative measures on the matter.

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(5) Scicluna, H.P. "Documents relating to the French occupation of Malta in 1798-1800", Malta, 1923.

(6) Micallef, A. op. cit., Vol. I, page XI.

(7) Borg, G. "The Influence of the Laws of England on Maltese Legislation" in "Scientia" of April-June 1942.

(8) Property of Dr. A. Ganado, B.A., LL.D.

(9) Richardson, J. "Report on the Laws of Malta", 19th August, 1826. This report was never published (A.G.).

Richardson opined that "idiots and persons of unsound mind" were, like infants of both sexes under the age of seven years, incapable of committing offences. The court was to decide from all the evidence adduced at the trial whether the accused was "capable" or not at the time of committing the alleged offence. If, at any time before the trial, the court had reason to believe that the accused was at that time "incapable" by reason of insanity or idiocy, the trial was to be adjourned. The same procedure was to be adopted if the "incapability" of the accused appeared during the trial, unless there was reason to believe that by proceeding with the trial the party would have been acquitted, in which case the trial was to be continued with a view to such acquittal.

Richardson envisaged the possibility that the refusal to plead on the part of the accused might not always be due to viciousness, but could well be the result of unsoundness of mind. He therefore proposed that when the sanity of mind of the accused was in doubt, the court was to inquire into the mental state of the accused by the examination of witnesses or "skilful persons" on oath and decide whether the refusal was due to insanity or obstinacy. In the former case, he suggested that the trial be adjourned as aforesaid, but, in the latter case, the trial was to be proceeded with as in other instances of refusal to plead.

The disposal of the insane criminal also engaged his attention and he proposed that in the event of acquittal or adjournment of the trial on the grounds of insanity or mental deficiency, the person concerned was to be detained and taken care of at the discretion of the executive government.

In 1831, a commission was set up to draw, among other codes, a Code of Criminal Law and a Code of Criminal Procedure. The commission was instructed to base its work upon the report of Sir J. Richardson and upon the "principles and rules of the most approved codes of foreign countries" (10). The new Neapolitan Code, which had been promulgated in 1819, in the Kingdom of the Two Sicilies, and which in its turn was based on the reformed French Code, was adopted as a model (11). At first the Criminal Code prepared for the consider-

(10) V. Government Gazette, 23rd November, 1831.
(11) Laferla, A. "British Malta", Volume I., pages 154-155.

ation of the Ionian Legislature was selected as the basis of their proceedings, but the Neapolitan Code was subsequently chosen by the Commissioners "owing to its being in the Italian language (the written language of these Islands) and for many other weighty considerations" (12). The commission reported to Government in 1835, and, in the following year, the first Draft Code of Penal Laws to be drawn up under British rule was published.

Article 61 of the Criminal Code of the Two Sicilies laid down that there was no crime when the person committing the act was in a state of unsoundness of mind ("demenza") or fury ("furore") at the time of the act.

In our draft penal code, it became article 60 and was rendered as "No person is liable to punishment for an act committed or omitted by him when he is of unsound mind or in a state of fury". Apart from minor alterations in wording, the Commissioners thought fit to add the words "or omitted by him", which represented an imprvement over the Neapolitan article. As a corollary to the principle laid down by them, i.e. that where there is no crime, there is no imputability, it was established that any allegation of insanity was to be decided upon by a jury before the accused was submitted for trial (13).

In his comments on this draft code, Dr. A. Dingli proposed the addition of provisions regulating the extent of the culpability of individuals charged with offences committed during a state of somnambulism. In general he considered that the somnambulist was not responsible for his acts committed during sleep. He maintained, however, that if a somnambulist, who was aware of his mental abnormality, failed to take all reasonable precautions to prevent himself from committing an offence during sleep, he became liable to some form of punishment (14).

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(12) Jameson, A. "Report on the Proposed Code of Criminal Laws", Government Printing Office, Malta, 1844, page 3.

(13) "Rapporto sui progetti di leggi penali e di organizzazione e procedura penale per l'isola di Malta e sue dipendenze", dated 30th September, 1835, pages XXXVII to XXXVIII.

(14) "Osservazioni sul progetto delle leggi penali" (A.G.) The culpability of the somnambulist was a controversial question at the time. See on this point A. Chauveau & E. Faustin's "Teorica del Codice Penale", Napoli, 1858, cap. XIII, pag. 240.

The draft code was submitted to the Royal Commissioners of Enquiry of 1836, who suggested its revision by the Maltese Commissioners before its promulgation.

In the meantime, an ordinance of the Governor in Council for the trial of collateral issues in the Court of Special Commission and for the due care of insane offenders was issued on the 2nd August 1838 and promugated on the 31st October of the same year. This ordinance laid down that in the case of offenders, who by reason of insanity were found in an unfit state to be arraigned or tried or judged, such allegation of insanity was to be tried by a jury. If the offender was declared to be insane at the time of the trial or of the alleged offence, the Court was empowered to order him to be kept in strict custody until the pleasure of H.E. the Governor was known. This proviso was subject, in the case of an offender who was found insane but who had not been tried for the offence charged against him, to the right of putting him on trial for such an offence whenever the competent court, on the application made to it by the public prosecutor or the prisoner, thought him in a fit state to be so tried (14a).

The revision of the first draft penal code took place in 1842, the project being published in 1844.

Article 60 underwent no change except that it was renumbered article 32. New provisions were introduced:—

1. The plea of insanity could be made at any time during the trial (art. 379).

2. Any allegation of insanity was to be decided upon by the Court, or, in cases of trial by jury, by the jury (art. 516).

3. The opinion of the majority of the members of the jury was to form the declaration of the jury (art. 517).

4. When the plea of insanity was raised during the trial, the Court was to suspend the proceedings of the trial until the allegation of insanity had been decided upon (art. 519).

(14a) Our Courts had been acting on these principles long before the promulgation of this ordinance. In fact among the records of the Permanent Committee of the Charitable Institutions (vol. containing correspondence between 1. 1. 1816 to 31. 12. 1829) I have found a letter of the 30th September 1818 from the Chief Secretary to the Governor instructing the Permanent Committee, on the direction of H.E. the Governor, to detain into the "madhouse" until further orders, the accused V. Romeo who was found insane by the Criminal Court and ordered to be "confined in a proper place of security".

5. Upon the declaration of the insanity of the accused, the Court was to order that he be kept in strict custody in the asylum for the insane, giving immediate information thereof to the Head of the Government, who was to make such arrangements for the care and custody of the insane person as he deemed fit (art. 520) (15).

The influence of Richardson's recommendations of 1826, is clearly evident in these provisions. By means of articles 379, 519 and 520 three principles were established: first, that a person may be insane at the commission or omission of his act and also at the time that he is brought up for trial, but that his insanity may not be apparent at the commencement of the trial and may manifest itself later on during the court proceedings: secondly, that a person may be sane at the beginning of the trial, but may become insane during the trial: thirdly,

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(15) The Italian text reads as follows:—

"379. Qualunque eccezione d'incompetenza della corte, di nullità dell'atto di accusa, di errore incorsovi, e qualunque altra eccezione preliminare fuori della contemplata nell'articolo 376, dovrà essere data e dalla corte decisa dopo la lettura dell'atto di accusa, e prima della risposta dell'accusato sulla reità imputatagli.

Le eccezioni contemplate nel titolo settimo del libro secondo di queste leggi di procedura criminale (cioè casi di demenza e di pregnanza) potranno essere date in qualunque tempo, come si dispone in tale titolo.

(Art. 376. Posto l'accusato alla sbarra, qualunque sospicione di giudice sarà proposta e dalla corte decisa prima della lettura dell'atto di accusa.)

516. Qualunque allegazione di demenza... sarà preventivamente decisa dalla corte; nei casi di competenza della corte con un jury la decisione sarà data da un jury.

517. Il jury sarà costituito e procederà colle regole stabilite in queste leggi pel jury: ma la determinazione della maggiorità formerà la dichiarazione del jury.

519. Quando l'allegazione si facesse nel decorso di un giudizio, la corte sospenderà l'ulteriore procedura su quel giudizio fino alla dichiarazione collateralmente contestata. Nel caso che l'allegazione dovesse essere decisa da un jury, la corte potrà per la medesima incaricare lo stesso jury già costituito pel giudizio dell'atto di accusa.

520. Dichiarata la demenza dell'imputato in qualunque dei casi contemplati negli articoli precedenti di questo titolo (Titolo VII), la corte potrà decretare che egli venisse trattenuto in rigorosa custodia nell'asilo dei lunatici, con rendersi tosto informato di ciò il capo del governo, il quale darà quelle disposizioni che egli credesse convenevoli per la cura e custodia del demente."

that it was not enough to ascertain that no insane person should be punished for acts beyond his control, but that it was equally important to safeguard the community from further possible hazards on his part, and to provide him with the necessary care that an insane person requires for the benefit of his health. Hence his admission to the mental hospital.

The project of 1842 was submitted to a Scottish advocate Mr. A. Jameson, who drew a report on it in 1843 (16).

He made no suggestions for the amendment or suppression of the sections of the Code bearing on the question of insanity, but he proposed the addition of the following new paragraph to article 32:— "This exception shall not apply to the case of persons who have committed offences in a state of intoxication unless the same has been occasioned without the fault of the offender or results from other persons unconnected with the offence."

Jameson must have envisaged that art. 32 could be adduced as an excuse by drunken persons to escape punishment for offences committed by them while under the influence of alcohol, and in order to forestall such a possibility he proposed the addition of the above paragraph. Jameson's suggestion implied a distinction between the wilful and the accidental drunkard, holding the former to be responsible and the latter to be non-responsible for his acts committed during intoxication. The end result of alcoholic intake on the minds of both types of drunkards is identical, viz., loss of inhibitory control, but the wilful drunkard is supposed to realise the consequences that may follow the drinking bout on which he is bent and to possess the will power to desist from drinking; in the case of the accidental drunkard, as envisaged by Jameson, none of these factors enter into operation, and therefore he cannot be held responsible for acts committed in a state of inebriety produced without his knowledge and the concourse of his will.

Undoubtedly, Jameson's proposal would have rendered art. 32 more precise and more practically efficient, but it would have made it unnecessarily complicated.

When Dr. Ant. Micallef, who was then Crown Advocate,

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(16) Jameson, A. "Report on the proposed Code of Criminal Laws", 29th September, 1843. Printed Malta, 1844.

examined Jameson's report (17), he was of opinion that Jameson's additional paragraph to art. 32 should be suppressed, but suggested its insertion as a provision "ad hoc". But while he disagreed with Jameson's proposal, he did not escape its influence for he re-introduced the same idea in a different form. In fact he recommended the recasting of art. 32 as "No person is liable to punishment for an act committed or omitted by him when he was in a state of unsoundness of mind or fury or any other involuntary alienation of mind ('o di qualsiasi altra alienazione di mente involontaria')". By this additional phrase he meant involuntary drunkenness as he himself explains:— "inebriety in its extreme degree is a true alienation of mind which cannot be considered to be imputable.... when it is completely of an involuntary character."

Dr. A. Micallef's revision of the Code went up for discussion by the Council of Government in 1845, after which it was reported upon a second time by Jameson in 1846 (18), and subsequently approved by the Council of Government. In this revised draft code, published in 1848, Jameson's and Micallef's proposals were not incorporated. Articles 32, 379, 516, 517, 519 and 520 were renumbered 30, 387, 520, 521, 528 and 524 respectively, but underwent no further change.

The uncertainty as to what the legislators had in mind when they drafted article 30 had not been allayed. The interpretation of this article was the cause of protracted and heated arguments in the Council of Government when the draft code came up for discussion in 1850 (19). Dr. A. Dingli (at the time an elected member of the Council, afterwards Sir Adrian Dingli, Chief Justice and President of the Court of Appeal), said that under "demenza" some authors included "total drunkenness" ("ubriachezza assoluta"). He was not sure whether art. 30 was intended to cover this mental condition besides insanity. As it stood the article in question was ambiguous as it could be interpreted either way — both to include or to exclude drunkenness as an excuse for non-imputability. He

(17) "Osservazioni dell'Avvocato della Corona sul Rapporto del Sig. Jameson intorno al progetto di Leggi Criminali". 1844 (A.G.).

(18) Jameson, A. "Report on the Revised Draft of the Proposed Code of Criminal Laws for Malta". 22nd May, 1846 (A.G.).

(19) Sittings of 14, 21, 23 February, 1850. In "Potafoglio Maltese".

also criticised art. 30 because it made no distinction between persons who were totally insane, and weak-minded persons who were not "completely insane" ("assolutamente imbecilli"). He, therefore, moved an amendment to art. 30 with the intention of making it clear that cases of total, but transitory, mental confusion due to drunkenness were liable to punishment, unless the accused became drunk on account of causes independent of his will. He also proposed recasting art. 30 in such a way as to introduce the principle of partial responsibility.

The Principal Secretary to Government (Sir Henry Lushington) opposed Dr. Dingli's amendments but he suggested that H.M. Judges should be consulted on the matter and asked to state whether they considered art. 30 to be sufficiently clear and also to explain what was meant by the words "demenza" and "furore". His suggestion was agreed to and the Judges attended the sitting of the 21st February to give their opinion.

Sir Ignazio Bonavita (President of the Court of Appeal) and Judges Satariano, Chapelle and Grungo declared that art. 30 was sufficiently clear for the cases contemplated by the law and they considered that Dr. Dingli's amendments were unnecessary and prejudicial. They said that the words "demenza" and "furore" were to be understood in the sense attached to them in the Codes of France and Naples, on both of which the Draft Code under discussion was based. They added that these words were intended to be given the widest meaning and to comprise every state of mental alienation on account of which the accused was deprived of the power of knowing and willing, which are the indispensable elements for the constitution of a crime and for rendering a person accountable for his actions.

Evidently, this declaration implied that the effects of alcoholic intoxication were to be regarded as a form of mental derangement which rendered the offender legally irresponsible. Judge Paolo Dingli dissented from this view. He stated that their definition of "demenza" was not in conformity with the connotation hitherto attached to this word in the Maltese Law Courts, where, as far as he knew, "demenza" had never been employed to indicate the deprivation of the power of reasoning due to drunkenness. This form of mental alienation had always been known as drunkenness or inebriety. He opined, therefore, that if art. 30 was intended to cover cases of insanity

only, its meaning was quite clear, but if it was meant to comprise also cases of inebriety it was not sufficiently clear.

Judge G.P. Bruno was of a similar opinion. He considered that art. 30 was not intended to cover such states of mind as drunkenness, sleep, somnambulism, violent passions and deaf-mutism. However, he did not declare himself in favour of Dr. Dingli's amendment.

This disagreement among the Judges made it abundantly clear that art. 30 could be made to include or to exclude drunkenness according to the interpretation given to it by the presiding judge at a trial. It justified Dr. Dingli's stand, who, in his reply to Sir I. Bonavita, pointed out how the Judges had involved themselves in contradictory statements. In fact, while they declared that "demenza" and "furore" possessed the same meaning in the Draft Code as was attached to them in the French and Neapolitan Codes, the explanation of these terms given by some of the Judges was couched in such a way as to include the effects of drunkenness under the designation of insanity. This view was inconsistent with the principles contained in the French and Neapolitan Codes, according to which drunkenness did not confer non-imputability on the offender in cases of intoxication (20).

In order to clarify these points, Dr. Dingli proposed a further consultation with the Judges, but his proposal was not accepted. Art. 30 was put to the vote and passed as originally recommended. Articles 387, 520, 521, 524 and 528 were adopted without discussion.

The Criminal Code was finally promulgated in 1854. It contained the following provisions relative to the issue of insanity in criminal cases (21) :—

"Art. 32. No person is liable to punishment for an act done or omitted by him when he is of unsound mind or in a state of madness.

Art. 531. Any allegation of insanity, or of any other point of fact, by reason whereof, if true, the person accused ought

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(20) See also Canofari, F. "Commentario sulla parte seconda del Codice per lo Regno delle Due Sicilie". Napoli 1819 :and Roberti, S. "Corso completo del Diritto Penale del Regno delle Due Sicilie". Napoli, 1833.

(21) "Criminal Laws of the Island of Malta and its Dependencies". Government Printing Office, Malta, 1854.

not to be, whether at the time or at any future period, called upon to plead to the indictment, or to be put on his trial, or to undergo punishment, shall be previously decided upon by a jury.

Art. 532. The determination of the majority (of the jury) shall form the declaration of the jury (22).

Art. 533. In the cases contemplated in Art. 531, the allegation shall be made in writing on the part of the person accused, and, if such allegation be disputed by the Crown Advocate, he, the said Crown Advocate shall signify the same in writing.

Art. 534. It shall be lawful for the Court to commit the decision on any such allegation to the jury already impanelled for the trial of the indictment.

Art. 535. Upon the declaration of the insanity of the accused in any of the cases contemplated in the preceding articles of this title (Title VII of Second Book) it shall be in the power of the Court to decree that he be kept in strict confinement in the asylum for lunatics giving immediate information thereof to the Head of the Government who will give such directions as he may deem proper for the care and custody of the insane person.

Art. 536. When the Crown Advocate shall not dispute any of the allegations contemplated in this title, the Court shall proceed as if the truth of the allegation had been declared.

Art. 537. In all cases where by reason of any declaration contemplated in the preceding articles of this title, the trial of a case may have been stopped or its continuation interrupted, or execution suspended, the proceedings of the trial shall be resumed or the sentence be executed, as the case may be, as soon as the impediment shall cease."

A part of art. 390 and the whole of art. 430 also dealt with the question of insanity. They laid down as follows:—

"Art. 390. All preliminary exceptions shall be made, and by the Court decided after the reading of the indictment and before the answer of the accused as to the guilt imputed to him. Nevertheless, in all cases where the jury shall have declared that some point of fact, punishable according to law, has been

(22) This was an exception to the rule that a two-thirds majority was required to form the declaration of the jury.

proved against the accused, it shall be competent to the accused, at any time before the Court decides on the application of the law to the guilt so declared, to make exceptions whether in respect to the incompetence of the court, or to the nullity of the indictment, or to a previous conviction or acquittal and also any of the exceptions contemplated in the seventh title of the second book of these laws of criminal procedure" (among which is included the plea of insanity).

"Art. 430. When the accused person shall have been declared not guilty on the grounds of insanity at the time of the alleged offence, it shall be in the power of the Court to decree that he be kept in strict confinement in the asylum for lunatics giving immediate information thereof to the Head of the Government, who may give such directions as he may deem proper for the care and custody of the insane person.

In such cases there shall be subjoined to the declaration of 'not guilty' the grounds, namely insanity, on which such declaration was made, and if the jury shall omit to subjoin such grounds, the express question shall be put to them whether it was on that account that they declared the accused not guilty; and the jury shall answer affirmatively or negatively according to their opinion".

No further changes in the provisions bearing on the issue of insanity took place until the beginning of the twentieth century when Ordinance XI of 1900 was promulgated on the 4th of July. This ordinance introduced important amendments and additions.

By article 10 of this ordinance, article 32 of the Criminal Laws was revoked and substituted by the following :—

"33. No person is liable to punishment for an act done or omitted by him,

1st. If such person was of unsound mind or maniac.

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Among other provisions, article 67 laid down the following procedure to be adopted by the Court of Instruction when there were an allegation or reasonable grounds to suspect that the accused was insane at the time of the offence or during the instruction :—

"362a. The Court shall appoint one or more referees to

examine the party accused or the facts constituting the mental infirmity of the latter.

"Whenever the report of the referees establishes the mental infirmity of the party accused at the time of the offence, the Court shall order the transmission of the acts of instruction to the Crown Advocate within the term prescribed in the last paragraph of the preceding article (23) and shall give the order indicated in article 535.

"The Crown Advocate, having received the acts of instruction, and wishing to dispute the mental infirmity of the party accused, may within the terms established in the first paragraph of article 373 (24), remit the said acts to the Court of Instruction and require in writing that the instruction be continued on the merits of the charge; or he may, by way of a petition filed within the said term, bring the matter before Her Majesty's Criminal Court, in order that action may be taken in the manner established in articles 531 and 532.

"If the report of the referees establishes the mental infirmity of the party accused at the time of the instruction, the court shall resume the instruction on the merits of the charge.

"In the cases contemplated in the two preceding paragraphs the instruction may be also continued in the absence of the party accused; and if he is not assisted by counsel, the provision of article 440 shall obtain (25)".

Article 76 revoked the provisions contained in the first and second paragraphs of article 390 and substituted the following instead:—

"390. The following exceptions shall be alleged and decided by the Court after the reading of the indictment and before the answer of the party accused as to his being guilty or not:—

1. Incompetence of the Court.
2. Nullity or error in the indictment.
3. Extinction of action.
4. Previous conviction or acquittal.
5. *Insanity of mind of the accused at the time of the trial.*

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(23) i.e. within three days.

(24) i.e. within six days, which term may be prorogued first by the Court, then by the Governor.

(25) i.e. the appointment of a defence counsel by the Court.

6. Any other point of fact in consequence of which the trial could not be held at the time or any future time.
7. And, saving the provision contained in the first paragraph of article 387, any other preliminary exception.

"The insanity of mind of the party accused at the time of the offence or any other point of fact which may exclude the imputability of the party accused shall not be alleged after the declaration of the jury."

"However, the exceptions contained in the preceding paragraphs barring the exception against the judge and of error in the indictment, may be alleged after the declaration by the jury and before the sentence, whenever the necessity arises from any fact or circumstance of fact expressly declared by the jury.

"Any point of fact which, without excluding the imputability of the accused or his capacity to be sued, precludes him from undergoing the punishment, may be alleged even after the declaration of the jury.

Article 430 was revoked by article 78 and the following was substituted therefor :—

"430. When the party accused shall have been declared not guilty on the ground of his mental insanity at the time of the offence, such ground shall be stated in the declaration of the jury.

"If the statement of such ground was omitted, the Court shall put to the jurors a specific question on that point, and the jurors shall answer in the affirmative or in the negative, as they shall have determined.

"If the majority of the jurors shall answer affirmatively, the provision of article 535 shall obtain."

By article 90 of the ordinance in question the following heading and provisions were added after article 556 of the Criminal Laws :—

"CHAPTER II
Of referees.

556a. In all cases where for the examination of a person or of an object special knowledge is required, a reference to experts shall be ordered (25a).

The choice of the referees appertains to the Court.

As a rule the number of referees shall be uneven.

The Court, whenever it be necessary, shall give them the necessary directions, and allow them a term for the drawing up of the report.

556b. Referees shall be excepted against only on the same grounds for exception against a judge.

The exception shall be pleaded in the form and terms laid down by the Laws of Organization and Civil Procedure in regard to the exception against referees in civil causes.

556c. Referees shall be summoned in the form established for witnesses, and shall swear to perform faithfully and honestly the duties assigned to them.

556d. Referees, on completing the task and experiments required by their profession or art, shall make their report, orally or in writing, according to the orders received from the Court.

The report shall in any case state the facts and the circumstances on which the referees shall have based their conclusions.

If the referees, during their operations, shall have received information of fact from other persons, such persons shall be named in the report, and shall be examined in the hearing of the cause like any other witness.

In matters within the competence of the Court of Judicial Police, the said persons may be examined by the Court on oath, even during the operations of the referees.

(25a) It may be pointed out that for many years before the promulgation of this ordinance our tribunals had made it a practice of appointing medical referees to report on the mental state of the accused when a doubt as to his sanity of mind arose. See in this respect the decree of the Criminal Court of Magistrates of the Islands of Gozo and Comino dated 16th July, 1838, from which we learn that two doctors were appointed to examine the mental condition of the accused M. Angelo Micallef. Prof. V. Vassallo drew my attention to this document which is to be found in the archives of the mental hospital at Attard.

The report, if made orally, shall be taken down by the Registrar or by the person acting in his stead.

556e. Each party, the Court, and in the cases within the competence of Her Majesty's Criminal Court, each and every juror may require from the referees further information on their report, and in regard to such other points as they may hold useful for the purpose of making their opinion clearer.

556f. Whosoever is to judge is not bound to abide by the conclusions of the referees against his own conviction.

556g. The provisions contained in the fourth and fifth paragraphs of article 394 apply to referees (26)."

When the Code was renumbered in 1901, the numbers of the above articles were changed as follows :—

1854	*Ord. XI of 1900*	*1901*
32	33	35
531	—	586
532	—	587
533	—	588
534	—	589
535	—	590
536	—	591
537	—	592
390	—	442
430	—	482
—	362a	396
—	556a	613
—	556b	614
—	556c	615
—	556d	616
—	556e	617
—	556f	618
—	556g	619

During the debate in the Council of Government on the Criminal Laws Amendment Ordinance of 1909", the Crown Advocate introduced, in the sitting of the 23rd June, an amend-

(26) These paras. dealt with the procedure to be followed when, without adequate motive, the referee failed to appear in Court or left the Court before being ordered to do so; and when he happened to be related to the accused party.

ment to article 590 (previously 535) of the Criminal Code. This amendment laid down that the expense of the care of a criminal patient was to be defrayed by the Government subject to recovery from any property belonging to such patient or from any person liable for the maintenance of the patient. The expense to be charged was to be assessed at the rates obtaining at the time at the hospital. This provision was to be applied to the case of criminal patients confined to the mental hospital by an order of either H.M. Criminal Court or the Court of Judicial Police.

During the debate that followed the motion of the Crown Advocate, a discussion arose about the unsatisfactory conditions under which criminal patients were alleged to have been cared for in the mental hospital; and four of the elected members voted against the amendment of the Crown Advocate as a sign of protest against the "prison conditions" prevailing in those wards of the hospital where the criminal patients were housed. In spite of this opposition by the elected side of the Council, the Crown Advocate's amendment was carried by a majority of six votes, as all the official members present voted in its favour. It appeared as article 58 in Ordinance No. VIII of 1909 enacted by the Governor on the 24th September of that year.

A further amendment of the same article (which was renumbered 599 in 1911) was introduced by the Crown Advocate (Sir V. Frendo Azzopardi Kt., C.M.G., LL.D.) at the sitting of the Council of Government of the 5th June 1914. He proposed to alter the words "it shall be in the power of the Court to decree" into "the Court shall order" to make it clear that that wording was not permissive but imperative. He wanted to leave no doubt that when a verdict of insanity was returned by a jury it became imperative for the Court to order the detention of the accused person in the lunatic asylum. He said that he would have left the law untouched but for the fact that some persons might conceive the possibility of an insane criminal being permitted by the Court to be left at large to the danger of the community (27).

The Crown Advocate's motion was carried nem. con. and by Ordinance XII of 1914, para. 14, the article in question was amended accordingly.

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(27) Debates of the Council of Government 1914-17, Vol. 38, page 38.

It will be remembered that Jameson was the first jurist to forsee in 1843 that article 35 (previously 32) lent itself to such a wide interpretation that it could be made to cover cases of drunkenness. In fact, subsequent events showed that Jameson's misgivings on the subject were amply justified. We have seen how vague and contradictory were the answers of the judges in 1850 on the relationship between inebriety and insanity. Considering the confused state of the legal mind on the question of insanity at this period, it is relevant to point out that a few years earlier Dr. T. Chetcuti, the director of the mental hospital, had endeavoured to convince the legal men of his time of the necessity of utilizing the contribution that psychiatry could offer in the elucidation of criminal behaviour(28).

It is difficult to imagine why either Jameson's or Micallef's suggestions were not adopted, much more so when the Neapolitan Code, on which the draft of 1844 was based, contained specific provisions on inebriety. It was only in recent times that provisions relating to drunkenness were introduced in our criminal code, although the principle that drunkenness was not held to excuse the commission of any crime had been accepted many years earlier.

Ordinance XIII of 1935, published on the 12th March, provided for the insertion of the following article after article 35 of the principal law :—

"35a. (1) Save as provided in this article, intoxication shall not constitute a defence to any criminal charge".

This ordinance not only established a principle regarding the culpability of the drunkard, but also recognised the fact that sometimes drunkenness passes into a pathological state in which the individual ceases to be responsible for his conduct.

Hence it laid down that intoxication shall be a defence to a criminal charge if by reason thereof (a) the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing, and (b) the person charged was insane, temporarily or otherwise, at the time of such act or omission (art. 35a (2) (b).

It stated further that when a defence is established under

(28) Chetcuti, T. "Discorso recitato il 16 ottobre 1847", Malta, 1847.

subpara (b), the provisions of what are now articles 616 to 619, and 621 to 624 shall apply.

For the purpose of this article, intoxication is deemed to include a state produced by narcotics or drugs.

The following comparative table shows the changes in the numeration of the articles bearing on the question of insanity since the appearance of the original Code of 1854:—

1854	*1901*	*1914*	*Present Code*
32	35	35	34
—	—	—	35
390	442	448	461
—	396	401	414
430	482	488	500
531	586	595	616
532	587	596	624
533	588	597	617
534	589	598	618
535	590	599	619
536	591	600	621
537	592	601	622
—	613	623	646
—	614	624	647
—	615	625	648
—	616	626	649
—	—	—	650(29)
—	617	627	651
—	618	628	652
—	619	629	653
445	497	503	519

Present Position

The principle underlying all the provisions of our Criminal Law is expressly sanctioned by article 34(a) of the Criminal Code which lays down that no person is liable to punishment if,

(29) This article was added by Ord. XXX of 1934, para. 23. It states: "In cases within the jurisdiction of the Court of Judicial Police as Court of Criminal Judicature, it shall be lawful for the official expert, if so empowered by the Court, to examine witnesses on oath, regarding facts connected with his investigation, and he may be called upon by the Court to be present at the hearing of the cause in order to advice the Court provided that all witnessess shall be heard and the advice given in the presence of the accused".

at the time of the act or omission complained of, such person was in a state of insanity or frenzy. The legislator, in order to guarantee the application of this principle in accordance with the tenets of natural justice, has established special rules of procedure for cases in which the insanity of the accused is raised. Since the promulgation of the Criminal Code, in 1854, these rules have been greatly improved upon.

The present state of the law as illustrated by jurisprudence is as follows :—

(a) At the inquiry (Court of the Judicial Police sitting as a Court of Criminal Instruction).

If it is alleged by the accused or by the prosecution, or if there is reason to believe that the accused was insane at the time of the offence or that he is insane at the time of the inquiry, the Court shall appoint one or more experts to examine the accused and the facts relating to the alleged insanity (art. 414 (3)). Normally the Court orders that the accused be taken to the mental hospital to be kept there under observation until such time as the experts are ready to file their report in Court; such time is in the Court's discretion.

If from the report of the experts it appears that the accused was insane *at the time of the commission of the offence*, the Court shall order that the record of the inquiry be transmitted to the Attorney General within the term of three working days, and shall order the accused to be kept in strict custody in the mental hospital and shall cause information thereof to be forthwith conveyed to the Governor, who will give such directions as he may deem fit for the care and custody of such insane person. In such cases the expenses of maintenance of such person are borne by the Government, saving the right of recovery of such expenses as will be explained further on (art. 414 (4), 619 (1) (4)).

The accused has the right of appeal against the Court's decree (30).

The Attorney General may disagree with the report of the experts. Thus the law provides that if, upon receipt of the record, the Attorney General decides to contest the finding of

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(30) See Criminal Appeals: — Police vs. Bigeni. 16. 12. 1946; Police vs. Briffa 9. 6. 1947; Police vs. Bonnici 31. 7. 1948; Police vs. Bezzina 16. 4. 1913; Police vs. Cassar 10. 6. 1939.

the experts that the accused was insane, he may, within the term prescribed by the law, either send back the record to the Court of Criminal Inquiry with a written request that the inquiry into the merits of the case be proceeded with, or file an application before His Majesty's Criminal Court submitting the issue to that Court for determination by a jury (art. 414 (5)).

On the other hand, if, from the report of the experts, it appears that the accused was insane *at the time of the inquiry*, the Court shall proceed with the inquiry into the merits of the charge. In this case, as also in the case referred to in the previous paragraph, the inquiry may, by way of exception, be continued in the absence of the accused; but, if he is not assisted by an Advocate or Legal Procurator, it devolves upon the Court to see to the adequate defence of the accused person (art. 414 (7)).

Whenever, during proceedings conducted before the Court of Criminal Instruction, the question of the insanity of the accused is raised, the term for the conclusion of the inquiry, the term for the transmission of the record to the Attorney General, the term for completing a fresh inquiry, or the term for rectifying the record of inquiry, as the case may be, shall be held in abeyance (art. 414 (1)).

(b) At the trial.

On the termination of an inquiry, the record is transmitted to the Attorney General. If he is of opinion that there are sufficient grounds for subjecting the accused to a criminal trial, he shall present a bill of indictment against him before His Majesty's Criminal Court. This Court sits with a jury.

According to law, the accused must be present during the trial (art. 455 (1) (2)). Should he be absent on account of illness, the trial is not proceeded with and an adjournment is granted. In Rex vs. Micallef, the accused, who had been for observation for mental disorder at the Hospital for Mental Diseases, was so ill that he could not appear in Court on the day appointed for the hearing of the case. The medical experts informed the Court on oath that his life could be endangered if he were to be brought to Court to stand trial. The Court held that though there was no rule of law providing for such a case, the Court could issue directions on humanitarian grounds and give a long adjournment, provided that the case was to be immediately restored to the list

when the experts or the Attorney General declared that the accused's physical condition had improved to such an extent as to allow of him being brought to Court (31).

Article 34 merely mentions that no person shall be liable to punishment if such person was in a state of insanity or frenzy *at the time of the commission or omission of the act complained of*. No reference is made to a person who is in a state of mental disorder *at the time of the trial for the alleged offence*. This rule, however, is supplemented by another provision of law (art. 616) which has been interpreted in the sense that no person can be called upon to plead to the indictment, or be put on his trial, or made to undergo punishment if he is insane at the time of the trial (32).

When a person is being submitted to a trial by jury, the plea of insanity of the accused *at the time of the trial* may only be raised and shall be decided by the Court *in limine litis*, that is after the reading out of the indictment and before the accused pleads to the general issue of guilty or not guilty (art. 461 (1) (a)). The plea of insanity of the accused *at the time of the offence* can be raised at any time up to the verdict of the jury (art. 461 (2)), but if the necessity arises from any fact or circumstance of fact expressly found by the jury, the plea of insanity either at the time of the offence or during the trial may be brought forward even after the verdict of the jury but before the final judgment of the Court (art. 461 (3)).

It has been held that when the plea of insanity of the accused at the time of the offence is set up after the preliminary stage and in the course of the speech for the defence, it is to be dealt with together with the pleas on the merits (33). But it is not admissible for the accused to raise this plea after the Court's address to the jury and after the jury have formed their verdict,

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(31) Harding, W. "Recent Criminal Cases Annotated", para. 10, Rex vs. Pawlu Micallef, 12 November 1940. The patient was eventually brought to Court on the 23rd September 1941, when he was declared by the jury to be of unsound mind both at the time of the offence and at the time of the trial.

(32) Cremona, G. "Raccolta della Giurisprudenza sul Codice Penale", Malta, 1935, page 62.

(33) Harding. op. cit., para. 12.

though it has not as yet been pronounced in Court (34).

The question of the insanity of the accused whether at the time of the offence or at the time of the trial may also be raised *ex officio* by the Court (35). When the plea of insanity is raised by the defence or set up by the Court, should the Attorney General not contest the allegation made, the Court shall proceed as if the truth of the allegation had been proved (36). On the other hand, when the plea of insanity was set up by the Prosecution in the case "Rex vs. Micallef", 12th November, 1940, the Court held that it could not proceed as if the truth of the allegation had been proved (on the basis of art. 621), and empanelled a jury to hear the evidence and to try the issue of insanity (37).

In the opinion of Mr. Justice Harding, it would appear desirable *in jure condendo* that the provision of art. 621 should be extended to all cases in which the medical experts find for the insanity of the accused, and both the Prosecution and the Defence accept the findings, irrespectively of whether the plea at issue is set up or raised by the Prosecution or the Defence or the Court itself. A proviso should nevertheless be added, according to the learned judge, empowering the Court to pursue the investigations further if it deems such a course necessary; for instance, if it is of opinion that the findings of the experts should be further elucidated, or if it considers that additional questions should be put to the witnesses heard by the experts (38).

When the accused is found to be insane, the Court shall order that he be kept in strict custody in the Hospital for Mental Diseases and shall cause information thereof to be forthwith conveyed to the Governor, who will give such directions as he may deem fit for the care and custody of such insane person. The expense for his maintenance and care is defrayed by the Government, saving its right to recover such expense from the property belonging to such insane person, or, in default, from

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(34) "The King vs. Nazzareno Abela", H.M. Criminal Court, 19. 1. 1927 (Law Reports Vol. XXVI, part 4, page 764).

(35) Cremona, op. cit., page 674; Harding. op. cit., para. 3, 14.

(36) Harding. op. cit., para. 3, fnt. 7. Also art. 621 of the Criminal Code.

(37) Harding. op. cit., ibidem.

(38) Harding. op. cit., ibidem.

any person liable for his maintenance. The said expense is charged at the rates laid down in the regulations for the Hospital for Mental Diseases, for the time being in force (art. 619 (1) (2) (3)).

Once a person is declared insane in a criminal trial he ceases to be treated as a criminal and he passes beyond the pale of the Courts of Law and is placed under the tutelage of the Head of the State. The Crown Advocate (Sir V. Frendo Azzopardi, Kt., C.M.G., LL.D.) at the sitting of the Council of Government of the 5th June, 1914 quoted the view expressed by the Supreme Court of Appeal, in a case that had come up for trial some time previously, in the following ruling :— "Nel caso in cui un accusato viene in esecuzione di sentenza di una Corte Criminale rimesso per causa di demenza nell'asilo dei lunatici, le funzioni della Corte cessano col detto provvedimento e nè la detta Corte, nè la Corte Civile hanno più giurisdizione per prendere cognizione di domande relative alla cessazione della demenza" (39). Only His Excellency the Governor has the power to order the discharge from the mental hospital of persons sent there by order of the Court. If the patient no longer requires further detention or if he recovers, the Board of the mental hospital is empowered to recommend his discharge to the Governor.

If the accused is found not guilty on the grounds of his insanity at the time of the offence, such grounds must be stated in the verdict of the jury. If such ground is not stated in the verdict, the Court is bound to put the jurors a specific question on that point, and the jurors must answer affirmatively or negatively as they shall have adjudged (art. 500 (1) (2)).

For every verdict of the jury, there must be the concurrence of at least six votes out of nine (art. 479); but an allegation of insanity is to be determined by the jury by a majority of votes (art. 624). *Quid* when the plea of insanity is set up in the course of the speech for the defence and is to be dealt with together with pleas on the merits? This point came up for decision in Rex vs. Mifsud, 12th December, 1940. The issue of insanity was dealt with together with the merits of the case. The jury returned a unanimous verdict of guilty on all counts. The defence set up the plea of nullity of the verdict on the grounds that, according

(39) Debates of the Council of Government, Vol. 38, page 39.

to law, the plea of insanity must form the subject of a separate and preliminary decision. The Court held that a separate verdict was only to be delivered when the issue of insanity was raised as a special plea in bar. In this case it was enough that the jury had returned a verdict of guilty on the merits by a two thirds majority, as such a verdict necessarily implied that there was a *legal* majority which rejected the plea of insanity, and a *legal* majority included the simple majority which was sufficient in decisions on the issue of insanity (40).

The Court may refer the determination of an allegation of insanity to the jury already impanelled for the trial of the offence but, if necessary, it may impanel a new jury (art. 618, 623).

In all cases, where upon an allegation of insanity being proved, the trial cannot take place or is interrupted, or the execution of the sentence is stayed, the trial is to be resumed or the sentence carried into effect, as soon as the impediment ceases (art. 622).

As to the form in which the allegation of insanity is to be made, the law lays down that it is to be brought before His Majesty's Criminal Court by an application. On any such application, the Court shall make an order, appointing a day for hearing the application and the Attorney General, causing them to be served with a copy of such order. When the allegation is set up by the Defence or by the Court, and the Attorney General intends to contest such allegation, he must do so in writing (arts. 616 (3) (4), 617).

The provisions with regard to mental referees are to be found in Sub-title II, Title I, of Part III of the Code.

Only the Court has the right to appoint and to choose the mental experts (art. 646 subsec. 2). They are usually of an uneven number and they are given a specified time (which may be extended) within which to submit their report (art. 646 Subsec. 4 and 5). They must swear to perform their duties faithfully and honestly (art. 648). It has been recommended by the Court, that whenever in the course of their enquiries, the experts obtain any information, the persons giving such information should be heard as witnesses and their information recorded in the form of statements. It was also recommended

(40) Harding. op. cit., para. 12.

that a regular "procès verbal" of the interrogatory of the patient, made by the experts, should be kept (41), but is not to be filed with the report (41a).

The report of the referees is read publicly and the referees may be submitted to a cross examination under oath. Those persons, also, who may have given information to the referees are also examined in the hearing of the trial like any other witness (art. 649 subsec. 3).

The Court may allow the medical experts to obtain on oath all relevant information about the accused from witnesses residing outside its jurisdiction. In Rex vs. Ed. Wilson Hall (1924) it was held "that it is the Court's duty to see that every provision be made so that the experts may have at their disposal all such informations as may enable them to give, in the interests of justice, a correct opinion" (42).

The Court, the prosecution, the defence and members of the jury have the right to ask for further elucidation from the referees on their report or on such other points as they may deem necessary in order to make the opinion of the experts clearer (art. 651).

The members of the jury are not bound to abide by the conclusions of the experts against their own conviction (art. 652).

DISCUSSION

Partial Responsibility

The first attempt at the introduction of the principle of partial responsibility in Maltese Criminal Law was made in 1850 by Dr. A. Dingli (at the time an elected member of the Council of Government, afterwards Sir Adrian, Chief Justice and President of the Court of Appeal).

It will be recalled that one of the criticisms levied by him in the Council of Government against article 30 (draft 1848), was its failure to distinguish between persons who were totally insane and a certain class of 'weakminded persons' whom he regarded as being semi-insane and therefore partially respon-

(41) Harding, W. op. cit., para. 31. Rex vs. G. Cauchi (1942).

(41a) Rex vs. Connell (1945). This decision very wisely revoked a previous ruling, given by the Court in Rex vs. Cauchi (1942), that the "procés verbal" was to be filed with the report.

(42) Harding, W. op. cit., para. 25.

sible for their actions; consequently these persons were, in his opinion, liable to some sort of punishment. After pointing out that the codes of Parma and Sardinia recognised the principle of partial insanity and responsibility, he proposed to amend article 30 (1848) in such a way as to cover offences by the "partially insane". Offenders who were in a state of "complete imbecility" were not to be held responsible for their acts or omissions, but weakminded persons who were not "totally imbeciles" were to be subject to the same punishments prescribed by the law for minors of 14 years of age.

His proposals were not adopted by the Council of Government and the question of partial responsibility was not broached again until 1909, when it was raised for the second time by Dr. A. Mercieca (later Sir Arturo, Chief Justice and President of the Court of Appeal) during the discussion in the Council of Government on the amendment to the Criminal Laws (43).

Dr. Mercieca's arguments in support of his amendment to article 35 (previously 32) embodying the principle of partial responsibility may be summarised as follows:—

a) There is an intermediate stage between responsibility and non-responsibility — one of incomplete or partial responsibility. Maltese law, however, makes no provision for those cases in which mental illness produces only a partial impairment of the individual's intellectual powers.

b) Partial insanity minimises culpability but does not exclude it.

c) The principle of partial insanity, which implies partial imputability, has been accepted by the principal continental codes.

d) According to Maltese criminal law a criminal who is declared to be insane is sent by the Court to the mental hospital for an indefinite period of time which in practice means almost permanent detention. This would be avoided in cases of partial insanity if the principle of partial responsibility were to be accepted, as such cases would be awarded a diminished punishment instead of being remitted to the mental hospital.

The Crown Advocate, Dr. V. Frendo Azzopardi (subsequently Sir Vincent, Chief Justice and President of the Court of Appeal), opposed Dr. Mercieca's amendment. He main-

(43) Debates of the C. of G., sittings nos. 42 and 43, Vol. 33.

tained that it was difficult to admit the existence of such a state as one of "half madness" or "half soundness of mind", and to establish to what extent the mind of the accused might be sound and to what extent it might be unsound. He opined that if the principle of partial insanity and responsibility had to be accepted, the result would have been to send a partially insane criminal to the mental hospital for part of his term of punishment and then to prison for the remaining period of his sentence. Finally he stated that Dr. Mercieca's amendment meant condemning a man to prison to avoid sending him to hospital, thus subjecting him to punishment instead of treatment.

The elected members, Mr. F. Azzopardi (leader of the elected bench at the time) and Dr. A. Pullicino objected to Dr. Mercieca's amendment on the grounds that a partially insane man is a sick man and that it is unjust to condemn an ill man to prison. The only fair way of dealing with such a case is to have him sent to the mental hospital where he can receive the necessary treatment.

Dr. Mercieca's amendment was put to the vote but it was defeated, three members voting for it and fourteen against it.

From the psychiatric point of view, one cannot but agree with the opponents of the theory of partial responsibility, and uphold the views of Dr. V. Frendo Azzopardi, Mr. F. Azzopardi and Dr. A. Pullicino.

The mind functions as a whole and the least impairment of its processes influences the total personality. Once, therefore, we admit the existence in the individual of some impairment of mental function we have also to admit that his motivation is likewise affected, irrespective of the fact that his exterior conduct is indistinguishable from that of a normal person.

By prescribing a diminished punishment for the "partially insane" offender the theory of partial responsibility exposes the community to the risk of further criminal attacks on the part of the "partially insane" person, whose relatively short stay in prison does nothing to reform or cure him. The preventive aspect of crime is ignored and the right of society to protect itself from dangerous, irresponsible members is neglected. This theory, therefore, not only serves no useful purpose, but constitutes a positive danger to the security of the community.

Maltese law in conformity with current psychiatric thought has, wisely enough, never accepted the theory of partial responsibility. On the contrary, Maltese jurisprudence has established the principle that in mental illness there is a "total" disturbance of mind implicating the whole personality and involving all the acts of the individual's psychic life (44).

English Law on the Criminal Responsibility of the Insane

Considering the influence that English legislation has had on our Criminal Code (45), it is of interest to examine the differences that exist in the criteria of the criminal responsibility of the insane in the two countries. It is gratifying to find that, to our great benefit, Maltese law escaped the influence of English legislation on this subject (46).

The present English laws dealing with the culpability of the insane were laid down in 1843 in connection with the Mc Naughten case. According to the Mc Naughten rules, the fact that the accused is insane is not sufficient to obtain an acquittal. The accused must not merely be insane but he must be unable, in consequence of his disease of mind, to understand the nature of what he does and to know that his act is wrong for the acceptance of a verdict of not guilty on the grounds of insanity. In England, therefore, knowledge constitutes the test of legal responsibility. This view leaves out of account the factors of emotion and control which are certainly more important than knowledge of the nature and quality of the act committed, and which are the factors that are characteristically impaired in mental illness. In fact, a mental patient may well be aware that his acts are morally and legally wrong (as, for instance, the melancholic who commits an "altruistic murder" for which he surrenders himself to the police), but he is certainly incapable of controlling the morbid trend of thoughts and perceptions which motivate his behaviour and which ultimately cause him to clash with the law. But in England owing to

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(44) Rex vs. Briffa (1947).

(45) Borg, G. "The influence of the laws of England on Maltese legislation", in "Scientia" of April-June 1942.

(46) See C.S. Kenny's "Outlines of Criminal Law" and "Mental Abnormality and Crime" edited by I. Radzinowicz and J.W.C. Turner for an account of the question of insanity in English Criminal Law.

the existence of a legal test of insanity which ignores the affective and instinctual components of the human personality, an insane person may well be found legally responsible for his acts, when morally no psychiatrist would judge him so.

Such a situation arose recently, to mention but one instance, during the trial of Neville Heath (1946). N. Heath was declared by the psychiatrist brought as a witness by the defence to be suffering from a psychopathic state in which, owing to a diseased condition of mind, he was incapable of controlling his actions: yet he was quite aware of the nature of his actions and because of this awareness on his part the plea of non-responsibility on the grounds of insanity was rejected, and he was found guilty of murder and executed.

The superiority of Maltese law on this point over English law is obvious. In Malta there are no tests of legal responsibility in the case of insane persons arraigned before a court of law. Our legislators did not lay down any rules by which the line between sanity and insanity is to be drawn. They recognised the fact that this demarcation line is a delicate one and they left it to the medical experts to decide when a man ceases to be master of himself on account of mental disorder.

It is enough for the psychiatrist to show that the offender is mentally ill to exempt him from punishment. Admittedly the jury may not accept the psychiatrist's diagnosis of insanity and may judge the accused person to be sane in spite of the expert's opinion to the contrary, but the illogical situation of finding a person insane and at the same time legally responsible for his acts can never arise in a Maltese court of law.

English legislation and jurisprudence on the criminal responsibility of the insane is a century behind the times. The legal views on the subject have made no advance since 1843, when the Mc Naughten rules were first enunciated. There is, therefore, no justification for quoting English jurisprudence in our law courts when the issue of insanity arises, for English jurisprudence is not only outdated but is conceived on different lines from the Maltese provisions on the subject. Besides being obsolete it is also incompatible with the letter and spirit of our law. While Maltese legislation on the subject of insanity is clear in its simplicity and substantially in conformity with current psychiatric thought, English law and jurisprudence are con-

fusing, contradictory and at variance with psychiatric progress.

Another advantageous point of Maltese law over English law, closely connected with the one we have just discussed, concerns the calling of medical experts to testify as to the sanity or otherwise of the accused. According to our law, the appointment of medical referees to examine the accused when there is a serious doubt as to his mental condition, pertains to the Court alone. It has been maintained that it is not only the right but also the inescapable duty of the judicial authority to ascertain the state of mind of the accused, both at the time of commission or omission of the act complained of and at the time of trial. To deny such a right to the judicial authority is to ignore one of the fundamental principles of criminal justice and to run the risk of a conviction of a non-responsible person and of the nullification of the trial (47).

In England the onus of the proof of insanity is on the defence in accordance with the presumption that persons are legally sane until the contrary is proved. It is counsel for the defence, therefore, who has to produce a medical expert to testify to the existence of insanity in the accused. If the prosecution does not accept the evidence of insanity, it has the right of calling its own medical expert to examine the accused and give their opinion as to his state of mind. This arrangement can be a source of embarrassment to the administration of justice when the prosecution puts its own experts in the witness box to rebutt the evidence of insanity adduced by the experts called by the defence. The experts of both parties may be in perfect agreement that the accused is mentally ill from the medical viewpoint, but owing to the interpretations of insanity which the defence, the prosecution, and the judge may place upon the law, there may result a difference of opinion between the experts of the two parties as to whether the accused is insane within the meaning of the law.

The public discussion of such a complicated medico-legal question cannot but create confusion in the mind of the jury. It is also inevitable for the jury not to look upon the medical experts of either the defence or of the prosecution as biased and interested parties.

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(47) Cremona, G. "Raccolta della giurisprudenza sul codice penale". Malta, 1935, page 62.

Our own legal provisions with regard to the appointment of medical referees can not give rise to such perplexity and doubts in the mind of a jury. The psychiatrists are appointed by the Court and this ensures their absolute independence of both the defence and the prosecution. The psychiatrists are, therefore, as independent and as neutral as the judge. They are above any possible suspicion of bias either in favour or against the accused, and, what is equally important, there is an assurance that justice will not only be done but will be "manifestly and undoubtedly seen to be done."

Phraseology of Article 34 para (a)

While fully acknowledging the sagacity, in general, of Maltese legislation on the question of mental disorder in criminal matters, we cannot help making a few critical remarks on some of its clauses. These concern (1) terminology, and (2) the power of the jury and of the Attorney-General to oppose the diagnsis of sanity or insanity made by the psychiatrist appointed by the Court.

The phrase "in istato di demenza o furore" was taken verbatim from the Neapolitan Code (48). It was officially translated into English in the draft code of 1848 and in the code promulgated in 1854 as "of unsound mind or in a state of madness". In the Ordinance XI of 1900 it appeared as "of unsound mind or maniac". The present rendering is "in a state of insanity or frenzy". The Maltese version is "ġenn jew fereżija".

We confess that we cannot see any difference between unsound mind, madness, mania, insanity or frenzy.

The origin of the Italian words can be traced back to Roman Laws which refer to mental illness as "dementia" and "furor". In Roman jurisprudence these two words had already lost any difference in meaning they may have originally possessed, as they had become interchangeable terms to denote mental disorder. Canofari (49) and Roberti (50), in their respective com-

(48) It is interesting to note that the French penal code of the time referred only to "demence".

(49) Canofari, F. "Commento sulla parte seconda del Codice per lo Regno delle Sue Sicilie", Napoli, 1819, Vol. I, pagina 159.

(50) Roberti, S. "Corso completo del Diritto Penale del Regno delle Due Sicilie", Napoli, 1833, Vol. II, page 70.

mentaries of the Neapolitan Code described "furore" as a more severe form of insanity than "demenza", in which the individual was liable to become violent and dangerous to self and to others. During the discussion on article 30 (1848) at the sitting of the Council of Government of the 21st February 1850, Judge P. Dingli and Judge G.P. Bruno had stated that the words "demenza" and "furore" were employed in our law courts indiscriminately to signify insanity. Dr. G. Falzon, writing in 1870, held that under these two words were included "oltre la demenza propria, anche la imbecillità, follia, insania, pazzia, stoltezza, ecc., ed altri gradi di malattie mentali importanti la perturbazione delle facoltà intellettuali..... sia completa o parziale questa perturbazione, sia permanente o passeggiera" (51). A recent commentator of our Criminal Code states that the word "demenza" is used in a general sense to designate the various forms of mental disorder. He suggests that the word "furore" may have been meant to denote that state of mind known to psychiatrists as "mania" (52).

At the present time, however, when the nature of mental disorder is better understood than it was when art. 30 (1848) was first drafted, the retention of the words "insanity" and "frenzy" (and "ġenn" and "ferneżija" in Maltese) to denote the same pathological condition is unnecessary. Both these words are popular terms which are used synonymously in common parlance. A more accurate vocabulary based on psychiatric principles would have been 'psychoses", "neuroses", "amentia", and "personality disorder", since these conditions have a different pathology and causation. It may be argued, however, that the legislator is not concerned with distinctions of a medical kind. That may be so, but such an argument does not justify the employment of a language which appears to create verbal differences where no essential medical and legal distinctions are involved. If a person is mentally ill it makes no difference to his culpability whether his clinical state is one of mania, stupor, apathy, or depression just as it is immaterial whether the diagno-

(51) Falzon, G., "Annotazioni alle leggi criminali", Malta, 1870, page 219.

(52) i.e. motor excitement, elation and push of talk. See Vella, S. "Illustrazione del Codice Criminale Maltese", Malta, 1927, pages 59 to 60.

sis is one of schizophrenia, manic-depressive psychosis, paranoia, etc.

A change in terminology is, therefore, desirable to render the wording of section 34 para (a) of the present edition of the criminal code in conformity with current psychiatric thought. We would suggest replacing the phrase "such person was in a state of insanity or frenzy" with "such person was suffering from mental disorder". Maltese jurisprudence has recognised the fact that apart from mental deficiency and the major forms of mental illness, such disorders of the personality as "adolescent instability" (53) and "psychopathic personality or state" (54) also exonerate the accused from culpability. The suggested term "mental disorder" is therefore more suitable because it covers all forms of mental abnormalities as article 34 para (a) is meant to do, and thus conveys the intention of the legislator better than the present phraseology.

The Right of the Jury and the Attorney General to oppose the Mental Experts' Opinion

It has been shown that when there is a suspicion or when it is alleged that the accused was suffering from mental disorder at the time of the commission of the crime or during the time of the trial, the Court appoints one or more mental referees to examine the accused and report on his mental condition. This is fair and reasonable, but at the same time the Court empowers the Attorney General and the jury (in the case of H.M. Criminal Court) to dispute and even to turn down the conclusions of the psychiatrists who have studied the accused. A curious anomaly is thus created. We must remember that members of the jury are not chosen because of their medical knowledge—indeed it is possible that there may not be a doctor among them—and yet they are supposed by the law to possess the acumen and ability to weigh and judge the medical evidence submitted to them for or against mental disorder, and to return a verdict on the state of mind of the accused. This applies also to the Attorney General.

In the diagnosis of the mental condition of the prisoner, the law, as it stands, gives more weight to the opinion of a non-

(53) Rex vs. Clo. Farrugia (1939).
(54) Rex vs. E. Schraner (1949).

medical section of the community than to the conclusions of the psychiatrists who have applied their training and devoted their time and energy to the study of mental phenomena. The legal view may be consistent with the tenets of democracy but it is certainly inconsistent with the progress of psychiatric knowledge and the general experience of mankind. Besides it runs counter to the accepted principle that the duty of the jury is to judge about the facts of the case; yet when a jury is asked to decide whether a person is sane or not they are being given the faculty not to make a declaration about facts but to interpret the significance of the proofs adduced as evidence of sanity or insanity, to judge as to the sufficiency of these proofs, and to decide whether the evidence submitted to them supports a diagnosis of mental normality or abnormality. This position is as untenable, from the medical view point, as that of the patient who consults a specialist about his illness and then calls in his neighbours to obtain their sanction as to whether he should abide by the consultant's advice or not.

This is not to claim that the psychiatrist is infallible, but if the psychiatrist is liable to make a misdiagnosis, one reasonably expects a layman to be even more unreliable and prone to commit mistakes in assessing the mental state of a person. The conception of mental disorder entertained by the layman in Malta is far from being a scientific one. The consequence is that a lay jury may very well fail to appreciate, and to be convinced by, the psychiatrist's opinion about the mental state of the accused. As has already been remarked the psychiatrist is appointed by the Court and is therefore, like the judge, impartial and objective in his attitude towards the accused. He is not influenced by the harangues of either the prosecuting counsel or of the defence. The jury, on the other hand, cannot be so detached towards the accused. Their opinions can be easily swayed one way or another, and they are liable to fall a prey to the emotional appeals of either the prosecution or the defending counsel. There is, therefore, the danger that they may oppose the conclusions of the psychiatrist which he has reached by means of methods of study and investigations of which the jury are completely ignorant. Thus in the cases Rex vs. Paris (1907), Rex vs. Pizzuto (1919), and Rex vs. Busuttil (1940), while the medical referees concluded that the accused in each instance was mentally

normal, the jury returned a verdict of insanity and the offenders were committed to the mental hospital.

The situation becomes even more clumsy when the plea of insanity is set up in the course of the speech of the defence. This happened in Rex vs. Mifsud (1940) when the issue of insanity fell to be dealt with by the jury without the latter having had the benefit of hearing any expert opinion on the state of mind of the accused. The plea of insanity was rejected by the jury in this case and sentence of death was passed by the Court (55).

Evidently an alteration of the law is needed to relieve the jury of the duty of deciding the question whether the accused is sane or not. The responsibility of reaching a decision on the mental state of the accused should rest exclusively with the mental experts who alone possess the necessary experience and skill to come to a correct conclusion.

It it said of Chief Justice Coleridge, of England, that he was first heard of through a famous murder trial, in which, while he was closing to the jury, the lights went out, and when re-lighted he added the forcible words; "The life of the prisoner is in your hands, gentlemen. You can extinguish it as easily as that candle was extinguished but a moment since; but it is not in your power to restore that life once taken as that light has been restored — Judge DONOVAN, **Tact in Court.**

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(55) Harding, W. op. cit., para. 12.