Singapore Journal of Legal Studies
[2008] 241–263

THE INSANITY DEFENCE IN THE CRIMINAL LAWS OF THE COMMONWEALTH OF NATIONS

STANLEY **YEO***

This article compares the M'Naghten Rules and some of the principal variations found in the Commonwealth of Nations for the purpose of formulating the best possible provision on the defence of insanity. The discussion is enhanced by evaluations of the concept of diminished responsibility operating in the Commonwealth, and of the provision on insanity in the Statute of the International Criminal Court.

I. INTRODUCTION

The M'Naghten Rules propounded in 1843 by the judges of the Queen's Bench in England[1] have served as the template for the defence of insanity in the criminal law throughout much of the Commonwealth of Nations (hereinafter described as "the Commonwealth"). As might be expected, variations to the Rules have been developed either through the courts or legislatures as a result of disagreement or dissatisfaction over some feature or other of the Rules. Lately, the advancement of scientific knowledge of mental functioning has created new variations. Yet, in spite of these alternative formulations, the M'Naghten Rules continue to form part of English law and some other Commonwealth jurisdictions such as Sierra Leone and the Australian state of New South Wales.[2] Is retention of the Rules defensible in the light of these variations or are there aspects which warrant revision? This article seeks to answer this question through a comparative study of the M'Naghten Rules and some of the principal variations found in the criminal laws[3] of member states of the Commonwealth.[4]

---

* Professor of Law, National University of Singapore. I am grateful to Gerry Ferguson for his very helpful comments on an earlier draft of this article.

1 The M'Naghten Rules were in response to a series of questions put to them by the House of Lords. These rules are found in *M'Naghten's Case* (1843), 10 Cl. and Fin. 200. They are also referred to hereinafter as "the Rules".

2 Australia is a Federation comprising a number of states and territories. Apart from New South Wales, all the other states and territories as well as the Australian Commonwealth (exercising federal jurisdiction), have their own criminal legislation which contain formulations of the defence of insanity.

3 This article will not discuss procedural matters relating to the defence of insanity such as the fitness to be tried, the burden of proof, and disposition of the case should the defence succeed. However, the point may be made that a judge's or legislator's view on whether the defence should be broadly or narrowly constructed may be influenced by the nature and scope of the procedural, evidentiary and dispositional laws dealing with the insanity plea.

4 It will not be practically feasible to cover every one of the 53 formulations belonging to the member states of the Commonwealth. However, it can be safely stated that, allowing for some slight

The primary objective of this study is to draft the best possible statutory formulation of the defence of insanity which could be adopted throughout the Commonwealth or, even better, the world. Among the criminal defences, that of insanity is probably the best suited for such universal adoption since, conceptually, the effect of insanity on criminal responsibility is an issue which is common to all human societies, transcending political boundaries and social, cultural, economic and religious differences. Attesting to this is the placing of such a defence under *Part 3: General Principles of Criminal Law* of the Statute of the International Criminal Court[5] (ICC) which has been ratified by 108 nations as of July 2008.

Two caveats need to be made here. First, there is some evidence (mainly from the United States) that the precise wording of the defence of insanity is largely irrelevant and that judges and juries largely ignore the precise wording of the test and apply a more general, intuitive standard. However, that evidence is neither extensive nor very conclusive.[6] Moreover, even if juries ignore the precise wording sometimes, that fact does not relieve lawmakers from the obligation of fashioning the best test possible for all other cases. Secondly, whatever words are ultimately chosen, one must acknowledge that judges in different countries can and will, within some limits, give those words either narrow or broad interpretations depending on their own judicial philosophy and legal culture.

The discussion will commence with a presentation of the M'Naghten Rules and some of the principal variations to be found in the Commonwealth. This will be followed by a detailed evaluation of the elements of the Rules and their variations. These elements are (i) the description of the mental disorder required by the defence; (ii) the required degree of defect produced by the mental disorder; (iii) the cognitive defect relating to the nature of the conduct; (iv) the cognitive defect relating to the wrongness of the conduct; and (v) the conative defect of controlling the conduct. Next, a brief evaluation will be made of the reasons for the introduction in some jurisdictions of the closely related defence of diminished responsibility. This will be followed by an examination of the ICC provision on insanity to gauge the extent to which it supports the proposals made in this study. Some observations on the law in Singapore will then be made, with the article concluding by outlining a model formulation of the insanity defence.

II. The M'Naghten Rules and Variations

The M'Naghten Rules and some of their principal statutory variations will be reproduced here to serve as an aid to the discussion that follows of the specific elements of the defence of insanity.

In *M'Naghten's Case*, the judges of the Queen's Bench were asked the question: "In what terms ought the question [of insanity] to be left to the jury as to the prisoner's

variations in wording, all of these formulations are represented in those that have been selected for study.

5 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9*, 17 July 1998 (entered into force 1 July 2002), reprinted in 37 I.L.M. 999 (1998), available online: International Criminal Court <http://www.un.org/icc>.

6 Gerry Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989) 14 Queens L.J. 135 at 143.

state of mind at the time when the act was committed?" They replied:

> … to establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.[7]

Another question posed was: "If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" to which the judges replied:

> …[if he is] under such partial delusion only, and is not in other respects insane, we think that he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.[8]

The answer to the first question may be described as the primary rule and the answer to the second as the supplementary rule in *M'Naghten's Case*.

Several jurisdictions have adopted the primary but not the secondary rule. For example in the Eastern and Central African states of Botswana, Kenya, Tanzania and Uganda, the insanity provision found in their criminal codes reads:

> A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind, incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects mentioned in reference to that act or omission.[9]

The proviso of this section effectively declares that cases of partial delusions are not to be treated separately, but are to stand or fall depending on whether they fit under one or the other of the two incapacities mentioned in the main part of the section. The issue raised here is whether the supplementary rule is essential or can be dispensed with.

The provision on insanity under the *Criminal Code* of Ghana gives partial delusions a role but not in the same way as the supplementary rule in *M'Naghten's Case*. Section 27(b) of that Code reads:

> When a person is accused of crime, the special verdict provided for by the *Criminal Code* in the case of insanity shall only be applicable … if he did the act in respect of which he is accused under the influence of an insane delusion of such a nature as to render him, in the opinion of the jury or of the Court, an unfit subject for punishment of any kind in respect of such act.[10]

What is to be made of this treatment of delusions and criminal responsibility?

---

7 *Supra* note 1, at 210, *per* Tindal C.J.

8 *Ibid.*, at 208.

9 Botswana *Penal Code*, Cap. 8:01, 1964, s. 11; Kenya *Penal Code*, Cap. 63, 1930, s. 12; *Tanzania Penal Code*, Cap. 16, 1945, s. 13; Uganda *Penal Code,* Cap. 120, Vol. 6, *Laws of Uganda*, Rev. Ed. 2000, s. 12.

10 S. 91(2) of the Bahamas *Penal Code* (No. 15, 1873) (Chapter 84), is expressed in identical terms.

Another variation of the M'Naghten Rules pertains to the cognitive defects recognised by the primary rule, with one or the other of the defects being absent from the variation. For example, under the *Criminal Code* of Ghana, only the defect relating to the nature and quality of the act is recognised but not that relating to the wrongness of the act. Section 27(a) of that Code reads:

> When a person is accused of crime, the special verdict provided for by the *Criminal Procedure Code* in the case of insanity shall only be applicable (a) if he was prevented, by reason of idiocy, imbecility, or any mental derangement or disease of the mind, from knowing the nature or consequences of the act in respect of which he is accused …[11]

Conversely, under the South African provision on insanity, the defect pertaining to wrongness is referred to but not that concerning the nature and quality of the act. Section 78(1) of the South African *Criminal Procedure Act* reads:

> A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable
> (a) of appreciating the wrongness of his or her act or omission; or
> (b) of acting in accordance with an appreciation of the wrongness of his or her act or omission,
> shall not be criminally responsible for such act or omission.[12]

Is it appropriate not to recognise one or the other of the cognitive defects specified in the primary rule in *M'Naghten's Case*?

The South African provision represents yet another variation of the primary rule in *M'Naghten's Case* which is that clause (b) recognises conative defects as supporting the insanity defence. The type of case contemplated here is of a person whose cognitive capacities are intact but is unable, due to a mental disorder, to control or refrain from doing the criminal conduct. The primary rule in *M'Naghten's Case* would deny the defence to such a person since only cognitive defects are recognised. A clearer expression of this variation is contained in the criminal code of the Australian state of Queensland, the relevant part of which reads:

> A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity … to control the person's actions ...[13]

Should conative defects caused by mental disorder also be permitted to support the defence of insanity? This and the other questions raised above will be answered when dealing with the specific elements of the defence of insanity.

Before discussing the elements of the defence, it is acknowledged that it would be possible to devise a formulation for the defence which succeeds solely on proof that the accused suffered from a mental disorder at the time of the alleged crime. An example can be found in the case of *Durham v. United States* where the Court of Appeals

---

11 *Criminal Code* (No. 29 of 1960). See also s. 91(1) of the Bahamas *Penal Code, ibid.*

12 *Criminal Procedure Act 1977* (No. 51 of 1977).

13 S. 27.

of the District of Columbia held an accused person "not criminally responsible if his unlawful act was the product of mental disease or mental defect".[14] However, such a formulation would virtually place the decision-making as to criminal responsibility in the hands of the clinical experts. As will be contended below, the public policy considerations underlying the insanity defence of control and treatment of harmful conduct are best left to the courts to determine.

III. Describing the Mental Disorder: 'Disease of the Mind' and Variations

The judges of the Queen's Bench left undefined the term "disease of the mind" appearing in the primary rule they formulated in *M'Naghten's Case*. On a strict interpretation, the word "disease" does not cover mental deficiencies arising from arrested or incomplete mental development. Consequently, a person who was born with abnormally low intellect so as to be deprived of normal cognitive faculties would not be able to rely on the defence of insanity. Surely, this could not have been intended by the judges in *M'Naghten's Case*, leading Professor Glanville Williams in his treatise on the *Criminal Law: The General Part* to contend that the M'Naghten formulation must be taken to include not only insanity proper but also mental deficiency (or mental defect).[15] In line with Professor Williams' contention, many courts have interpreted the term "disease of the mind" broadly so as to cover any case where the accused's mental faculties were impaired so severely as to manifest either of the cognitive defects referred to in the M'Naghten formulation. For example, the Supreme Court of Canada has defined that term as "any illness, disorder or abnormal condition which impairs the human mind and its functioning".[16]

Mindful of the narrowness of the word "disease", legislators of some Commonwealth jurisdictions have added other terms alongside "disease of the mind". For example, the criminal codes of Southern Nigeria and Queensland use the expression "mental disease or natural mental infirmity".[17] Similarly, the New Zealand *Crimes Act* has the expression "natural imbecility or disease of the mind".[18] The word "natural" appearing in these formulations seeks to distinguish the aetiology of the mental malfunctioning from a disease. Unfortunately, the word "natural" has been subjected to judicial interpretation which have not always been helpful. For instance, the term "natural mental infirmity" has been interpreted by the West African Court of Appeal as constituting "a defect in mental power neither produced by [the accused's] *own*

---

[14] 214 F. 2d. 862 (D.C. Cir. 1954). This ruling was eventually overturned in *United States v. Brawner* 471 F. 2d. 969 (D.C. Cir. 1972) in favour of the "substantial incapacity" formulation of s. 4.01 of the American Law Institute's *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (1985). Another example is s. 67 of the draft *Penal Code 1837* of the Indian Law Commissioners which reads: "Nothing is an offence which is done by a person in consequence of being mad or delirious at the time of doing it". This provision did not find its way into the final version of the *Indian Penal Code* 1860 (Central Act 45 of 1860).

[15] 2nd ed. (London: Stevens, 1961) at 147.

[16] *R. v. Cooper* (1979) 51 C.C.C. (2d) 129 at 144, *per* Dickson J. interpreting that term which then appeared in the provision on insanity in the Canadian *Criminal Code*. While the term has since been replaced by "mental disorder", s. 2 of the Code defines the new term as a "disease of the mind".

[17] Southern Nigeria *Criminal Code Act, 1961*, s. 28; Queensland *Criminal Code Act 1899* (Reprint No. 6H), s. 27.

[18] Section 23. Prior to 1992, the Canada *Criminal Code* (R.S.C., 1985, c. C-46) also used this expression.

default nor the result of disease of the mind".[19] The precise extent of this exclusionary rule against self-affliction is uncertain. Consider the case of X who suffers from a mental defect after a motor accident caused by his or her own negligence. Should X be denied the defence of insanity were he or she to subsequently commit criminal conduct which was brought about by the mental defect? It has also been held that 'natural imbecility' involves an "imperfect condition of mental power from congenital defect or natural decay as distinguished from a mind once normal which has become diseased".[20] This statement has been criticised for its circularity and for leaving the status of natural imbecility uncertain. The better course would be to avoid the term "natural" altogether and to describe mental disorders that are not caused by diseases as simply a "mental defect".[21] This is the stance taken by the South African provision on insanity.[22]

Other statutory formulations of the defence of insanity have steered clear of the words "disease" or "natural" and used instead terms which are broadly expressed. For example, the penal codes of India, Malaysia, Northern Nigeria and Singapore use the expression "unsoundness of mind"[23] and, in the Australian state of Victoria, "mental impairment" is used.[24] These expressions have been deliberately left undefined so as to enable the courts to interpret and apply them to the particular case at hand.

Still other statutory formulations seek to provide guidance to the courts by using the term "mental impairment" and then spelling out what constitutes "mental impairment". A good example is the following provision in the criminal code of the Australian state of Western Australia:

> *Mental impairment* means intellectual disability, mental illness, brain damage or senility.
>
> *Mental illness* means an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.[25]

---

[19] *R. v. Omoni* (1949) 12 W.A.C.A. 511, adopting a passage from *Stephen's Digest of Criminal Law* (1878) (Emphasis added). This ruling was approved of by the Nigerian Federal Supreme Court in *The Queen. v. Tabigen* 5 Fed. Sup. Ct. 8 (Nig. 1960).

[20] *R. v. Cooper* (1978) 40 C.C.C. (2d) 145 at 159, *per* Dubin J.A. (Ont. C.A.) interpreting that term when it was part of the insanity provision of the Canada *Criminal Code, supra* note 18.

[21] *Cf.* Ferguson, *supra* note 6 at 137 who suggests that the term "mental disability" may be more appropriate because "mental defect" has a dehumanising ring to it. Despite this rather attractive suggestion, the use of "mental defect" has been promoted in this article because of its popularity among recent statutory formulations of the insanity defence.

[22] *Criminal Procedure Act*, *supra* note 12, s. 78(1) and reproduced in Part II of this article. Importantly, s. 78(1) refers not only to "mental defect" but also to "mental illness". The latter term (or a closely similar one such as "mental disease") is needed to cover cases of brain damage acquired through trauma or substance abuse. This is because "defect" suggests only innate, as opposed to, acquired disabilities.

[23] *Indian Penal Code, supra* note 14, s. 84; Malaysia *Penal Code* (Act 574, Rev. Ed. 1997), s. 84; Northern Nigeria *Penal Code* (*The Penal Code (Northern States) Federal Provisions Act of 1959*), s. 51; Singapore *Penal Code* (Cap. 224, 1985 Rev. Ed. Sing.), s. 84.

[24] Victoria *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (No. 65 of 1997), s. 20.

[25] S. 8 interpreting the term "mental impairment" appearing in s. 27 which is the provision on insanity in the code. The definition of "mental illness" is derived from the common law formula pronounced in the South Australian Court of Criminal Appeal case of *R. v. Radford* (1985) 42 S.A.S.R. 266 at 274 per King C.J. See also the Australian Commonwealth *Criminal Code*, s. 7.3(9). Examples of "extraordinary

In all the formulations thus far presented, the type of mental disorder recognised for the defence of insanity remains a legal rather than a clinical concept. A rare example of an attempt to formulate mental disorder in clinical terms was, until recently, contained in the insanity provision of the *Crimes Act* of the Australian Capital Territory. That provision used the term "mental dysfunction" which it defined as "a disturbance or defect, to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion."[26] This definition accords with the modern psychiatric definition of mental illness as "a pervasive inability to engage in reality".[27]

The argument has been made that a formulation which accords with contemporary clinical research provides better guidance to clinical experts as to what will serve to excuse an accused from criminal responsibility.[28] As against this, a strong case can be made for retaining the mental disorder element of the insanity defence as a legal concept. Descriptors like "mental disease or defect", "unsoundness of mind" and "mental impairment" (whether or not accompanied by further elaboration) have the attraction of maintaining at their core the acknowledgement that public policy considerations concerning criminal responsibility, and not clinical science, underpin the defence of insanity. These public policy considerations include concerns about how wide the insanity defence should be, and the need to protect the public "by the control and treatment of persons who have caused serious harms while in a mentally disordered or disturbed state".[29] The courts rather than clinical experts are in the best position to evaluate these concerns. The fact that all the current formulations of the defence of insanity found in the Commonwealth adopt this stance, lends strong support for this position.

IV. The Extent of the Defect Caused by the Mental Disorder

Before examining the various forms of cognitive or conative defects that are stipulated by Commonwealth formulations of the insanity defence, two preliminary issues need to be considered which concern the degree or extent of the mental disorder required by the defence. The first of these is whether the defence should require an accused to be "incapable of knowing" the nature or wrongness of his or her conduct, or whether it should be simply "not knowing" of such nature or wrongness. The M'Naghten formulations use the latter test as do some other formulations such as those found in the criminal codes of Ghana and the Australian Commonwealth. By far the more popular test is the one of incapacity which appears in the criminal codes of Eastern and Central African states of Botswana, Kenya, Tanzania, Uganda, as well

---

stimuli" referred to in the definition of "mental illness" would be the effects of trauma or substance abuse.

26 S. 428B. This provision has since been replaced by s. 28 of the Australian Capital Territory's *Criminal Code 2002* (A2002-51). The new provision uses the term "mental impairment" which the code defines in much the same way as the Western Australia *Criminal Code Act 1913.*

27 Finbarr McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Dublin: Sweet and Maxwell, 1993) at 35.

28 Bernadette McSherry, "Mental Impairment and Criminal Responsibility: Recent Australian Legislative Reforms" (1999) 23 Crim. L.J. 135 at 141.

29 *R. v. Rabey* (1978) 37 C.C.C. (2d) 461 at 473, *per* Martin J.A. (Ont. C.A.).

as of Northern and Southern Nigeria, South Africa, Canada, India, Malaysia, New Zealand, Queensland and Singapore.

The test of incapacity greatly restricts the availability of the defence compared to the test of a lack of knowledge. The element of incapacity is narrower than lack of knowledge because it is possible for a person to generally possess the cognitive capacity to know the nature of his or her act or that it was wrong, but not to have known of it at the time when the crime was committed. This distinction was vividly described by an Indian court in the following terms:

> The capacity to know a thing is quite different from what a person knows. The former is a potentiality, the latter is the result of it. … What the law [by virtue of section 84 of the *Indian Penal Code* which uses the term "capacity"] protects is the case of a man in whom the guiding light that enables a man to distinguish between right and wrong and between legality and illegality is completely extinguished. Where such light is found to be still flickering, a man cannot be heard to plead that he should be protected because he was misled by his own misguided intuition or by any fancied delusion which had been haunting him and which he mistook to be a reality.[30]

Although the discussion has thus far been in relation to cognitive defects, it can be extended to those formulations of the defence which also refer to an incapacity to control one's conduct. Strictly interpreted, such a provision denies the defence to a person who generally possessed the power of self-control over his or her conduct but who, due to a mental disorder, lacked such control on the occasion of the alleged crime.

The courts and, indeed, most commentators, appear to have ignored the much more pervasive nature of the concept of "capacity". The view has been expressed, quite correctly, that this is a just and sensible approach to take since insisting on incapacity as opposed to lack of knowledge or control would narrow still further what is already a very restrictive defence.[31] So long as the courts take this approach, there is no problem with using the word "incapacity" in formulations of the defence of insanity. The remainder of this article will use this word since it is found in a majority of formulations studied. Ideally, however, the word "incapacity" should be avoided so as to enable the defence to succeed so long as the accused was dispossessed of the relevant mental faculty at the time of the offence, even if he or she might have possessed such a faculty on other occasions. A formulation of the defence which avoids using the word "incapacity" will be made at the close of this article.

The second preliminary issue concerning the degree of mental disorder involves the extent to which the relevant mental faculty had been destroyed by the mental disorder. Does the law require a total incapacity by the accused to appreciate the nature or wrongness of his or her conduct or to control it, or will some lesser degree of incapacity suffice? The answer is that a very high degree of mental impairment is required to sufficiently eliminate these capacities. Consequently, a "substantial" degree of mental impairment will not be enough to support the defence of insanity if

---

30 *Lakshmi v. State* (1959) 60 Cri. L.J. 1033 at 1034, *per* Beg J. (Allahabad H.C.).

31 Gerry Ferguson, "The Insanity Defence in Canada, Malaysia and Singapore: A Tale of Two Codes" (1990) 17 J. Mal. & Comp. L. 1 at 12.

the accused could still appreciate or control his or her conduct.[32] This point will be considered further below when dealing with the concept of diminished responsibility.

V. Cognitive Defect in Relation to the "Nature and Quality" of Conduct

We now turn to the first of the cognitive defects identified in the primary rule in *M'Naghten's Case*, namely, that the mental disorder had the effect of causing the accused "not to know the nature and quality of the act" he or she was doing. There is some ambiguity over the meaning of the expression "nature and quality". Some cases have interpreted it to refer only to the physical character of the conduct.[33] According to this view, accused persons will be able to successfully rely on the defence of insanity provided they did not know the surface features of the act, such as where they were cutting a person's arm in the belief that it was a loaf of bread, or placing a baby on the fire thinking it was a log of wood. If this was the extent of mental malfunctioning required, it could properly be said that the defence of insanity demands a total incapacity to know what one was doing.

However, it is open to courts to interpret the expression "nature and quality" as comprising the impairment of *either* the surface features of the act *or* its harmful consequences. Under this interpretation, a person who knew the surface features of an act but was too mentally disordered to know the harmful consequences of that act would be covered by the defence. For example, a mentally disordered person may not know that the ferocity of an assault will kill or seriously injure a victim. Since such a person knows that he or she is assaulting a human being but does not know the extent of harm the assault will cause, the cognitive capacity is partial rather than total. The question then arises: is such partial incapacity sufficient to warrant an acquittal on the ground of insanity? The answer must be in the affirmative since such a person's incapacity will cause him or her not to be deterred by the threat of punishment and the case clearly points to a need for clinical intervention. The High Court of Australia has given this interpretation to the expression "nature and quality" appearing in the M'Naghten Rules.[34]

The above ambiguity has been avoided in jurisdictions having statutory formulations of the insanity defence which use words like "appreciate"[35] or "understand"[36] in place of "know". These words indicate a deeper level of cognition which includes

---

[32] This stands in contrast to s. 4.01 of the American *Model Penal Code, supra* note 14, which states that: [a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

[33] For example, see *R. v. Codere* (1916) 12 Cr. App. R. 21; *R. v. Landry* (1991) 62 C.C.C. (3d) 117.

[34] *R. v. Porter* (1933) 55 C.L.R. 182 at 189, *per* Dixon J. who instructed the jury to acquit the accused on the ground of insanity if they concluded that his mental disorder "was such that he could not appreciate the physical thing he was doing and its consequences". See also *Sodeman v. R.* (1936) 55 C.L.R. 192 at 215. These were cases originating from Australian states where, at the time, the M'Naghten Rules applied.

[35] For example, see the Canada *Criminal Code*, *supra* note 18, s. 16(1); South Africa *Criminal Procedure Act*, *supra* note 12, s. 78(1).

[36] For example, see New Zealand *Crimes Act 1961* (No. 43 of 1961), s. 23(2); Southern Nigeria *Criminal Code Act, supra* note 17, s. 28(2).

not only knowledge of the surface features of one's conduct but also the effect or significance of such conduct. Thus, it has been held in Canada that:

> the requirement [of 'appreciates' in section 16 of the Canadian *Criminal Code*] is … an ability to perceive the consequences, impact, and results of a physical act. An accused may be aware of the physical character of his action (i.e. choking) without necessarily having the capacity to appreciate that, in nature and quality, the act will result in the death of a human being.[37]

For the sake of clarity, the formulations of the defence of insanity should use words like "appreciates" and "understands" instead of "knows" when describing the accused's perception of the nature and quality of his or her conduct. Should this be done, it would be quite proper to dispense with the rather ambiguous word "quality"[38] if it was intended by the judges of the Queen's Bench to denote both the physical nature of the act and its consequences. This is because an appreciation of the nature of one's conduct will invariably include an understanding of its physical nature and consequences.

So as to leave the matter in no uncertain terms, the best stance would be for a formulation of the insanity defence to refer to the accused's "appreciation of the nature or consequences" of his or her conduct. This would prevent the issue being left to judicial interpretation and would be a decided improvement of the *M'Naghten Case's* expression of "knowing the nature or quality" of the conduct.

It was noted in Part I of this article that the South African formulation of the insanity defence does not include the defect of not appreciating the nature of the act. This is an obvious oversight. However, it has been suggested that such a case would be covered under the part of the South African formulation which allows the defence to succeed if the mental disorder caused the accused to be "incapable of acting in accordance with an appreciation of the wrongfulness of his act".[39] Surely, it is said, a person who cannot appreciate the nature of his or her act cannot also appreciate that it is wrong. While this may be so, it would be preferable, for the sake of clarity, for both types of cognitive defects referred to in the primary rule in *M'Naghten's Case* to be mentioned in any formulation of the defence of insanity.

VI. Cognitive Defect in Relation to the "Wrongness" of Conduct

Under the M'Naghten Rules, accused persons may successfully rely on the defence of insanity even if they knew the nature and quality of their acts but did not know that they were "doing what was wrong". The meaning of the word "wrong" is ambiguous and has resulted at common law in a longstanding debate. The English

---

37 *R. v. Cooper* (1979) 51 C.C.C. (2d) 129 at 147, *per* Dickson J. Subsequently, in *R. v. Abbey* (1982) 68 C.C.C. (2d) 394, Dickson J., speaking for the whole Supreme Court, explained that the only relevant circumstances or consequences that must be "appreciated" are those that form part of the *actus reus* of the crime charged. Accordingly, a failure to appreciate the penal sanctions attaching to the crime will not support the insanity defence. See further, Ferguson, *supra* note 31 at 13-14.

38 After some initial uncertainty, it was held by the English Court of Appeal in *R. v. Codere* (1916) 12 Cr. App. R. 21 that this word refers to the physical rather than moral quality of the act.

39 Carel Rainer Snyman, *Criminal Law,* 4th ed. (Durban: Butterworths, 2002) at 170.

courts have given it the restricted meaning of "contrary to law"[40] whereas their Australian counterparts have held that it refers to "moral wrongness".[41]

As for statutory formulations, the trend has been for courts to interpret the term "wrong" or similar words to mean moral wrongness. For example, the Supreme Court of Canada has held that this term appearing in the Canadian *Criminal Code* renders a person not criminally responsible who, due to a mental disorder, was incapable of knowing that an act was morally wrong even if he or she was capable of knowing that the act was legally wrong.[42] Another example is the Queensland and South Nigerian formulations which provide that the defence succeeds if, as result of mental disorder, the accused was deprived of "the capacity to know that the person ought not to do the act or make the omission".[43] This clause has been held to raise the question of whether or not, at the time when the accused committed the incriminating conduct, he or she knew that such conduct "was wrong according to the ordinary standards adopted by reasonable men."[44] Similarly, it has been suggested by commentators that the part of the South African provision which reads "incapable of acting in accordance with an appreciation of the wrongness of his or her act or omission" refers to moral and not legal wrongness.[45] By far the clearest statutory formulation subscribing to the moral wrongness test is the one contained in the New Zealand *Crimes Act* the relevant part of which states that a person is not criminally responsible who, as a result of mental disorder, was "incapable of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong".[46]

A criticism of the moral wrongness test is that it is vague because it varies "according to the opinion of one man or of a number of different people on the question whether a particular act might or might not be justified".[47] However, a closer examination finds the criticism to be not as strong as it appears since the test as expressed by the courts supporting it is not entirely subjective. As the Supreme Court of Canada has declared:

> "[M]oral wrong" is not to be judged by the personal standards of the offender but by his awareness that society regards the act as wrong. … The accused will not benefit from substituting his own moral code for that of society. Instead, he will be protected by [the Canadian provision] if he is incapable of understanding that the act is wrong according to the ordinary moral standards of reasonable members of society.[48]

Having this objective component has been criticised for raising its own concerns. It has been queried how the appropriate moral standard is to be proved in a socially

---

40 *R. v. Windle* [1952] 2 Q.B. 826.

41 *Stapleton v. The Queen* (1952) 86 C.L.R. 358.

42 *R. v. Chaulk* (1990) 62 C.C.C. (3d) 193 at 230, *per* Lamer C.J.C.

43 Queensland *Criminal Code Act 1899, supra* note 17, s. 27; Southern Nigeria *Criminal Code Act, supra* note 17, s. 28.

44 *Stapleton v. The Queen* (1952) 86 C.L.R. 358 at 375, *per* Dixon C.J., Webb and Kitto J.J. (H.C.A.). For a discussion of the Southern Nigerian law, see Cyprian O. Okonkwo, *Okonkwo and Nash Criminal Law in Nigeria,* 2nd ed. (London: Sweet & Maxwell, 1980) at 137-138.

45 Snyman, *supra* note 39 at 171; Jonathan Burchell, *Principles of Criminal Law,* 3rd ed. (Capetown: Juta & Co Ltd, 2005) at 380-381.

46 S. 23(2)(b).

47 *R. v. Windle* [1952] 2 Q.B. 826 at 834, *per* Lord Goddard C.J. (C.A.).

48 *R. v. Chaulk*, *supra* note 42 at 232-233, *per* Lamer C.J.C.

diverse country.[49] Furthermore, is the court to determine wrongness according to the views of the majority, or will that of a significant minority suffice?

While these concerns cannot be dismissed lightly, one should bear in mind that the accused has been charged with a crime which, in most cases, would comprise conduct which was morally wrong in the eyes of most reasonable members of his or her society. Additionally, the crux of the matter is that the accused has been found, on account of mental disorder, to be lacking the capacity to reason about the rightness or wrongness of his or her conduct which "sane" people would be capable of doing. It is submitted that no person should be convicted and punished for a crime whose mental faculties were so disordered as to prevent them from living "socially integrated lives and to choose conduct which conforms with both moral and legal norms".[50]

While the legal wrongness test would undoubtedly bring certainty to the law, it is likely to create injustice especially in developing societies where the dissemination and instruction of the criminal law to the populace may not be very effective. Neither should the defence be restricted to one particular set of moral norms. The following observation on the state of affairs of African nations (many of which are member states of the Commonwealth) is apposite:

> Put simply, there is for any African who is not wholly integrated into a westernized urban environment a difficulty in appreciating the state of the law enacted by a remote central government. With the diversity of African and westernized cultures and the constant conflict-modification process of social evolution, there will be similar difficulty in becoming aware of any single moral norm with which to accord one's behaviour. When, as we have seen, it is these very facts of culture change and conflict which are at the root of much mental disorder in Africa, the conclusion follows inevitably that the defence will probably be more widely available in Africa than in any more homogenous culture.[51]

It is submitted that this observation applies with equal force to other developing societies in the Commonwealth.

On balance, the best stance is for a formulation of the insanity defence which recognises both the narrow test of legal wrongness and the wider one of moral wrongness. Under this approach, accused persons will be able to successfully rely on the defence of insanity if they can show that, due to a mental disorder, they lacked either the capacity to know that their conduct was legally wrong, or that it was morally wrong. This is the stance taken in the *Indian Penal Code* which is also subscribed to by the Malaysian, Northern Nigerian and Singaporean codes. The relevant part of the formulation states that "[n]othing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing … that he is doing what is either wrong or contrary to law".[52]

---

[49] Edwin Tollefson and Bernard Starkman, *Mental Disorder in Criminal Proceedings* (Toronto: Carswell, 1993) at 31.

[50] Andrew P. Simester and Warren J. Brookbanks, *Principles of Criminal Law,* 2nd ed. (Wellington: Brookers, 2002) at 329.

[51] Alan Milner and Asuni Tolani, *Psychiatry and the Criminal Offender in Africa* (1969), reproduced in HJ Mensa-Bonsu, *The General Part of Criminal Law: A Ghanaian Casebook*, Vol. 2 (Accra: Black Mask, 2001) at 194.

[52] *Indian Penal Code 1860, supra* note 14, s. 84; Malaysia *Penal Code, supra* note 23, s. 84; Northern Nigeria *Penal Code, supra* note 23, s. 55; Singapore *Penal Code, supra* note 23, s. 84. This has been

It is appropriate at this juncture to consider whether there is a need for formulations of the insanity defence to include a separate provision covering partial delusions. As noted in Part I, a supplementary rule of this nature was pronounced in *M'Naghten's Case* and has been statutorily provided for in several jurisdictions. The experience of some of these jurisdictions is that cases involving partial delusions are readily dealt with under the primary rule concerning cognitive defects. The issue is always whether such a person possessed the mental capacity to think rationally of the reasons which, to normal people, make his or her conduct right or wrong. Consequently, these jurisdictions have found the supplementary rule superfluous and repealed it.[53] Another reason for not formulating such a rule is that it promotes the scientifically outmoded assumption that a person can be sane in every respect except for a specific delusion.

These reasons for repealing a supplementary rule on partial delusions apply equally to section 27(b) of the Ghanaian *Criminal Code* which was reproduced in Part I. The clause does not specifically describe how the insane delusion is to be regarded by the triers of fact; it simply leaves them to decide whether the delusion was "of such a nature as to render [the accused] … an unfit subject for punishment of any kind". The Supreme Court of Ghana has interpreted the words "of such a nature" to mean "a delusion which is the product of a mind that is in such a state as to be incapable of appreciating the difference between right and wrong".[54] This judicial pronouncement introduces the cognitive defect concerning wrongness which is not referred to in section 27(a), the primary provision on insanity in the Ghanaian code.[55] In this way, although referring to insane delusions, section 27(b) is no more than an expression of the second form of cognitive defect pronounced in the primary rule in *M'Naghten's Case*.

VII. Conative Defect in Controlling of Conduct

The M'Naghten Rules and some statutory formulations such as those of Canada, India, Malaysia, Northern Nigeria and Singapore do not recognise conative defects as supporting a plea of insanity. The cases being considered here involve persons who, on account of a mental disorder, may appreciate what they are doing and that it was wrong but are unable to control their actions. The courts of jurisdictions like the Australian states of New South Wales and South Australia which have adopted the M'Naghten Rules have likewise confined the scope of the defence to the two forms of cognitive defects described in the primary rule.[56] Conversely, other jurisdictions like

---

described by commentators as the "disjunctive view": see Stanley Yeo, Neil Morgan and Chan Wing Chong, *Criminal Law in Malaysia and Singapore* (Singapore: LexisNexis, 2007) at para. 24.21 and the references cited there. Unfortunately, the Singaporean courts have not interpreted s. 84 in this manner. Instead, they have adopted the "conjunctive view" which requires defendants to prove both that they did not know that their conduct was morally wrong, and that it was contrary to law: see further *infra* Part X.

53 For example, Canada following the decision of the Supreme Court of Canada in *Chaulk v. R.*, *supra* note 42; and New Zealand. Alternatively, they have provided a clause stating that cases of delusions are not to be dealt with separately but under the general provision on insanity: see Australian Commonwealth *Criminal Code 1995* (No. 12 of 1995), s. 7.3(7).

54 *Akpawey v. The State* [1965] G.L.R. 661 at 668-669, *per* Ollennu J.S.C.

55 It is reproduced in Part II of this article.

56 *Sodeman v. R.* (1936) 55 C.L.R. 192; *Attorney-General for South Australia v. Brown* [1960] A.C. 432.

Ireland[57] and South Africa[58] (before they enacted provisions on insanity[59]) which had also adopted the M'Naghten Rules, have treated them as non-exhaustive pronouncements of the law and proceeded to recognise conative defects. Perhaps aware of these expansionary developments, some jurisdictions with statutory formulations have added a rider confining the defence to the cognitive defects mentioned in those formulations so as to effectively exclude conative defects. Examples of this may be found in the provisions of the Central and Eastern African states of Botswana, Kenya, Tanzania and Uganda.[60] On the other hand, other jurisdictions have expressly included conative defects in their statutory formulations of the defence. Two examples of this, from Queensland and South Africa, have been given in Part I of this article. Interestingly, experience of its usage is extremely varied ranging from very few cases in Australia[61] in contrast to South Africa where virtually all cases of insanity have been decided in terms of such defects.[62]

Those who do not favour recognising conative defects have contended that there is, to date, no objectively verifiable scientific test which can differentiate between a person who could not control his or her conduct and one who would not.[63] In reply, it can be argued that this is not so different from other issues in the criminal law involving questions of degree such as loss of control in provocation, or in respect of legal concepts such as "knowledge" and "negligence". Additionally, given that the burden of proving the elements of the insanity defence lies with the accused,[64] it would be incumbent on a court to require strong proof from the accused that he or she had a sufficiently severe conative defect which rendered him or her not criminally responsible.[65] On balance, it is submitted that the defence should recognise conative defects alongside cognitive ones. It is noteworthy that the majority of Commonwealth jurisdictions studied here have taken this position,[66] with several of them having done so quite recently.[67]

Before leaving this issue, it is observed that the South African formulation of the defence differs in one material respect from all the other formulations which have recognised conative defects. The difference is that, unlike the other formulations which describe such defects in terms of incapacity to control without more, the South African provision connects the conative defect to a cognitive matter. The relevant

---

57 *Doyle v. Wicklow County Council* [1974] I.R. 55.

58 *R. v. Hay* (1899) 9 C.T.R. 292.

59 Irish *Criminal Law (Insanity) Act 2006* (No. 11 of 2006), s. 5(1); South Africa *Criminal Procedure Act 1977, supra* note 12, s. 78(1). These provisions recognise both cognitive and conative defects as supporting the defence of insanity.

60 Reproduced in Part II of this article.

61 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law,* 2nd ed. (Sydney: Lawbook Co, 2005) at 221.

62 Snyman, *supra* note 39 at 170-171.

63 Abraham S. Goldstein, *The Insanity Defense* (New Haven: Yale University Press, 1967) at 67-68.

64 This is the case for all the jurisdictions studied in this article.

65 See Okonkwo, *supra* note 44 at 138 for a discussion of Southern Nigerian cases which have insisted on such proof. See also Krishna Vasdev, *The Law of Homicide in The Sudan* (London: Butterworths, 1978) at 114-115 for the practice of the Sudanese courts when considering the insanity defence provision under s. 50 of the Sudan *Penal Code 2003* [ID 100840].

66 To the jurisdictions already mentioned could be added the Australian Commonwealth, the Australian Capital Territory, Western Australia, Ireland, New Zealand and Southern Nigeria.

67 For example, the Australian Commonwealth in 1995, and Ireland in 2006.

wording states that the accused was rendered "incapable of acting in accordance with an appreciation of the wrongness of his or her act or omission". What is therefore envisaged is of a person who appreciated the wrongness of the conduct (a matter of cognition) but could not control himself or herself from committing it (a conative defect). The reason for making this connection between conation and cognition is unclear. Perhaps it stems from viewing the insanity defence as somehow affecting the fault element (or *mens rea*) of an offence since such a view would invariably require matters of cognition to be taken into account. However, there is no good reason why the defence should not also account quite separately for the fundamental principle of the criminal law that a person is not to be held criminally responsible for involuntary conduct.[68] The recognition, in formulations of the defence, of conative defects as a distinct category from cognitive defects does just that. More significantly, the South African formulation assumes, contrary to modern psychological discourses, that a person suffering from a conative defect would have his or her cognitive faculties unaffected.[69] On the whole, therefore, it would be preferable for the formulation to have referred to conative defects alone.

VIII. Diminished Responsibility

Any study of the insanity defence would be incomplete without at least a brief reference to the concept of diminished responsibility. The concept exists in some Commonwealth jurisdictions in the form of a partial defence to murder which, if successfully pleaded, reduces the offence to a lesser form of culpable homicide. It was first developed by the Scottish courts and subsequently took statutory form in the English *Homicide Act*, section 2(1) of which reads:

> Where a person kills or is a party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for the acts or omissions in doing or being a party to the killing.[70]

Similar provisions were subsequently introduced into the criminal laws of some Commonwealth jurisdictions such as the Australian Capital Territory, the Bahamas, Ireland, New South Wales, Queensland and Singapore.[71]

---

68 Andrew P. Simester & G. Robert Sullivan, *Criminal Law: Theory and Doctrine,* 3rd ed. (Oxford: Hart Publishing, 2007) at 97-98.

69 Bronitt and McSherry, *supra* note 61 at 222.

70 For a fuller discussion of this defence, see R.D. Mackay, *Mental Condition Defences in the Criminal Law* (Oxford: Clarendon Press, 1995) at 180-206; Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004) at 152-160.

71 Australian Capital Territory *Crimes Act 1914*, s. 14; Bahamas *Penal Code*, *supra* note 10, s. 326; Irish *Criminal Law (Insanity) Act*, *supra* note 59, s. 6; New South Wales *Crimes Act 1900* (Act 40 of 1900), s. 23A; Queensland *Criminal Code Act 1899, supra* note 17, s. 304A; Singapore *Penal Code*, *supra* note 23, Exception 7 to s. 300. The defence also operates in Australian jurisdictions of the Australian Capital Territory and the Northern Territory.

Probably the best formulation of the defence is the one currently contained in the New South Wales *Crimes Act*. This is section 23A, the salient parts of which reads:

> A person who would otherwise be guilty of murder is not to be convicted of murder if:
> (a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and
> (b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

This formulation was the result of the deliberations of a law reform body[72] specially set up to consider criticisms of various aspects of the original provision borrowed from England which were ambiguous or created difficulty in practice. One of these criticisms was that clinical experts often disagreed with the causes of abnormality of mind prescribed by the provision. The revised provision resolves this problem by replacing these causes with the broad requirement that the abnormality of mind had to have arisen from "an underlying condition".[73] There was also uncertainty over what constituted an abnormality of mind which the English Court of Appeal in *R. v. Byrne* had to clarify by spelling out the types of incapacities which could be produced by such an abnormality.[74] The revised provision incorporates this judicial pronouncement.[75] Another uncertainty with the original provision lay with the meaning of "mental responsibility", a previously unknown concept. The revised provision ratifies this by replacing "mental responsibility" with the clearly comprehensible stipulation that the trier of fact is to determine whether the accused's abnormality of mind was so substantially impaired as to warrant him or her being convicted of manslaughter rather than murder. Any jurisdiction which is minded to introduce a defence of diminished responsibility should seriously consider this decided improvement on the original English formulation.[76]

But, are there good reasons for having such a defence? To answer this question, we need to inquire whether the major reasons which led to its introduction in some jurisdictions still hold true. One reason was that the forms of mental disorder recognised by the insanity defence were too narrow and that a broader concept such as "abnormality of mind" was needed to cover cases deserving of the law's compassion. Another reason was that, as the insanity defence in many of these jurisdictions did

---

72 New South Wales Law Reform Commission, *Report 82, Partial Defences to Murder: The Defence of Diminished Responsibility* (Sydney: NSWLRC, 1997).

73 This expression is defined in s. 23(8) of the New South Wales *Crimes Act, supra* note 71, as "a pre-existing mental or physiological condition, other than a condition of a transitory kind".

74 [1960] 2 Q.B. 396 at 403 [*Byrne*], *per* Lord Parker C.J., who defined the term as constituting a "state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal. It appears … to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment."

75 Save that, while the revised provision refers to "capacity", the Court of Appeal in *Byrne*, *ibid.*, spoke of the accused's "perception" and "ability" so as to cast the inquiry in terms of his or her lack of knowledge.

76 See further Stanley Yeo, "Reformulating Diminished Responsibility: Learning from the New South Wales Experience" (1999) 20 Sing. L. Rev. 159.

not recognise conative defects, a defence of diminished responsibility was needed to enable persons to avoid a murder conviction whose mental disorder substantially impaired their capacity to control their conduct. A third reason was to enable a person whose mental disorder fell short of the insanity defence to avoid the mandatory sentence prescribed for murder.

At the close of Part II of this article, the submission was made that it would be open to the courts to interpret terms like "mental disease or defect" in a sufficiently broad manner so as to meet the public policy considerations of control and treatment of people who have committed harmful behaviour whilst in a mentally disordered condition.[77] Were this to happen, there would be no real advantage to be gained by introducing another concept such as "abnormality of mind". Then in Part VII, it was contended that the insanity defence should recognise conative defects. Again, were this to be implemented, there would be less of a reason for introducing a defence of diminished responsibility. This leaves the matter of mandatory sentencing of murderers which is as much a legal issue as a political one and is beyond the scope of this article to engage in.[78] Suffice it to say that in those jurisdictions such as England, Queensland and Singapore which continue to insist on retaining a mandatory penalty for murder, the case for having a partial defence to murder of diminished responsibility is much stronger than those jurisdictions such as New South Wales which allow for discretionary sentencing of murderers. In these latter jurisdictions, it is submitted that diminished responsibility should be assigned the role of a mitigating factor in sentencing, as instanced in South Africa.[79] Such an arrangement would permit the courts to impose appropriate penalties on persons whose mental impairment was not of the high degree required for the insanity defence, but was nevertheless regarded by the courts as sufficiently substantial to warrant reducing the offence to a lesser form of culpable homicide.

IX. The Defence of Insanity in the Statute of the International Criminal Court

It is noteworthy that most member states of the Commonwealth have ratified the Statute of the International Criminal Court (ICC).[80] As a result of this Statute, a permanent international criminal court was created for the first time in history, composed of judges who are independent of their home states to try perpetrators of crimes against humanity, genocide, war crimes and aggression. The ICC Statute contains provisions spelling out some of the general principles of criminal responsibility one of which is Article 31 which provides for certain defences. Among them is the

---

77 The judicial interpretation of "mental disease or defect" contemplated here could extend to those forms of mental disorders recognised as "abnormalities of mind" for the purposes of the plea of diminished responsibility by the Scottish High Court of Justiciary in *Galbraith v. Her Majesty's Advocate* 2001 S.C.C.R. 551. These include sexual or other abuse of the accused which has resulted in some scientifically recognised mental disorder.

78 See Simester and Sullivan, *supra* note 68 at 335-337.

79 *Criminal Procedure Act*, *supra* note 12, s. 78(7).

80 *Supra* note 5.

defence of insanity which reads as follows:

> [A] person shall not be criminally responsible if, at the time of that person's conduct the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.[81]

This formulation may be usefully compared with the Commonwealth formulations considered in this study. The ICC provision lends support to the correctness of several propositions that have been made concerning the elements that should go into making the best possible formulation of the defence of insanity. First, the ICC provision describes the mental disorder in terms of "a mental disease or defect". In doing so, the provision recognises the difference between a disease and a defect[82] and, at the same time, avoids unnecessary complications by not using the adjective "natural" to describe "mental defects" as some Commonwealth formulations have done. Secondly, the ICC provision uses the word "appreciates" to describe the cognitive defects referred to, thereby signifying that disruption of a deeper level of reasoning will support the defence. This renders it unnecessary for the provision to refer to the "quality" of the accused's conduct. Hence, the defence would be available to a person who knew the nature of his or her conduct but, due to a mental disease or defect, could not understand the harmful effect or consequences of that conduct. Thirdly, the ICC provision supports recognition of conative defects and, in so doing, joins the many Commonwealth jurisdictions which have taken this stance. Fourthly, by using the word "destroys" the ICC provision is empathic that a total (as opposed to a substantial) incapacity is required for the defence to succeed. Fifthly, the absence in the ICC provision of a supplementary rule on partial delusions confirms the superfluous nature of such a rule. Finally, the absence of a defence of diminished responsibility in the ICC Statute lends support for the view that the concept of diminished responsibility should be treated as a sentencing factor[83] rather than given an exculpatory role.[84]

However, there are three matters appearing in the ICC provision which, it is contended, require revision. The first concerns the restriction of the defence to persons who did not appreciate the legal wrongness of their conduct. The argument has been made in Part VI of this article that accused persons who, on account of a mental disease or defect, could not reason like normal people do about the moral rightness or wrongness of their conduct, do not deserve to be convicted and punished but are rather in need of clinical treatment and support. The second matter requiring revision is that the ICC provision should not have connected the accused's conative defect

---

[81] Article 31(1)(a). For a detailed discussion of this provision, see Peter Krug, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Interpretation" (2000) 94 A.J.I.L 317; Geert-Jan Knoops, *Defenses in Contemporary International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2nd edition, 2008) at 109–112.

[82] See *supra* Part III and more specifically the comment in *supra* note 23.

[83] This is possible under the framework of the general sentencing provisions of Article 78 of the ICC Statute.

[84] The non-recognition of a defence of diminished responsibility by the ICC Statute is all the more glaring given that it was recognised by the International Criminal Tribunal for the former Yugoslavia in the *Čelebići Camp* Case: see *Prosecutor v Delalić*, Judgment, No. IT-96-21-T (16 November 1998) available online: International Criminal Tribunal for the former Yugoslavia <http://www.un.org./icty>.

with the cognitive matter of conforming to the requirements of the law.[85] By imposing such a connection, the provision wrongly assumes that conative defects have no effect whatsoever on a person's cognitive faculties.[86] Fortunately, the wording of the provision is sufficiently vague to enable the ICC to interpret it in a way which does not require the accused to have appreciated that his or her uncontrollable conduct was contrary to law. The ICC could do so by regarding the relevant words as simply stating (rather superfluously) that the uncontrolled conduct of the accused was such as to have breached the law. A much better remedy would be for the Review Commission of the ICC Statute to strike out the words "to conform to the requirements of law" from the provision.[87] The third matter concerns the use of the word "capacity" in the ICC provision. It has been argued in Part IV of this article that this word has the effect of unjustly denying the defence to persons who may have had the capacity to appreciate the nature or wrongness of their conduct or to control it but who, on the occasion in question, lacked such appreciation or control as a result of a mental disease or defect. The solution would be to reformulate the ICC provision so as to avoid using the term "capacity".[88]

X. A Spotlight on Singapore Law

Since this article appears in the *Singapore Journal of Legal Studies*, a few observations may be made on the nature and state of Singaporean criminal law pertaining to the defences of insanity and diminished responsibility. Having been a British Crown Colony in the Far East until as recently as 1959, it is not at all surprising that much of Singaporean criminal law has been borrowed from the *Indian Penal Code* which the British colonial administration based in India introduced to many of its colonies.[89] As a result, section 84 of the Singapore *Penal Code*, the provision on insanity (or "unsoundness of mind" as it is described in the Code) is identical in wording to section 84 of the *Indian Penal Code*. Even after gaining its independence, Singapore has continued to look to English criminal law developments for guidance. A good example was the introduction of the English statutorily created defence of diminished responsibility[90] into the Singapore *Penal Code* in 1961 in the form of Exception 7 to section 300.[91] Interestingly, this move was not taken by India or by

---

85 The wording describing this connection is closely similar to that found in the American *Model Penal Code* provision on insanity which is reproduced in *supra* note 32.

86 This same criticism was made at the close of Part VII of this article against the South African provision.

87 Article 123 of the ICC Statute provides for the establishment of such a commission to consider any amendments to the Statute seven years after its entry into force. The commission is due to be convened in 2009.

88 A formulation which does so appears later, see *infra* Part XI.

89 See Chan Wing Cheong & Andrew Phang, "The Development of Criminal Law and Criminal Justice" in Kevin Tan, ed., *Essays in Singapore Legal History* (Singapore: Marshall Cavendish Academic and the Singapore Academy of Law, 2005).

90 *Homicide Act 1957* (U.K.), 1957, s. 2.

91 The exception is closely similar in wording to the English provision. It reads: "Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death".

Malaysia, our close neighbour which, like Singapore, has also adopted the *Indian Penal Code*.

Singaporean law follows the English position in not recognising conative defects for the insanity defence, but does so for the defence of diminished responsibility.[92] This is the direct result of section 84 of our Code being modeled on the M'Naghten formulation, and Exception 7 to section 300 of the Code following closely the wording of the English defence of diminished responsibility. To date, no convincing explanation has been given for recognising conative defects for one defence but not for the other. On what basis does the law decide that cognitive defects have a greater extenuating effect on criminal responsibility than conative ones? As noted previously, while cognitive defects may (but not necessarily so) have a bearing on the *mens rea* of the crime charged, conative defects certainly render the accused's conduct involuntary thereby negating the *actus reus* of the crime.[93]

The submission is therefore made that section 84 of our Code should be extended to recognise conative defects. This would enable the court to view the extent of the accused's mental disorder as a spectrum, ranging from total to substantial to some impairment of his or her conative faculties. In a murder case, the choice before the court would therefore be an acquittal on the ground of unsoundness of mind where the conative impairment was total, a conviction of culpable homicide not amounting to murder where the impairment was substantial, or a conviction of murder where the impairment fell short of substantial. As the law now stands in Singapore, however, an accused person charged with murder who was found to have suffered from a conative defect at the time of the killing will be convicted and punished either for murder or culpable homicide not amounting to murder. Viewing such a person as someone in need of treatment rather than punishment is not an option that is open to the court.

Another point worth raising is that Exception 7 is silent as to whether the defence requires the accused to have been "incapable of knowing" the nature or wrongness of his or her conduct, or that he or she "did not know" of such nature or wrongness. Based on the close relationship between this defence and unsoundness of mind under section 84, one would have thought that the Exception subscribes to the latter since this is the position under section 84.[94] However, our courts have followed the English Court of Appeal decision in *Byrne* which opts for actual lack of knowledge.[95] The stance taken in *Byrne* can be readily explained by the fact that the M'Naghten Rules likewise speak of a lack of actual knowledge. It would therefore appear that our courts failed to properly relate the Exception with section 84 and were too quick to apply English judicial pronouncements on diminished responsibility. This is not to say that it was impermissible for our courts to follow *Byrne*. However, should they have chosen to do so, they should have expressly noted the distinction between that common law pronouncement and section 84. Our courts could then have gone on to explain why they thought that this was the legislative intent, for example, that this interpretation was consistent with the purpose of introducing the Exception of

---

92 See *Byrne*, *supra* note 74 at 403 and adopted by several Singaporean cases such as *Tengku Jonaris Badlishah v. P.P.* [1999] 2 S.L.R. 260; and *Zailani bin Ahmad v. P.P.* [2005] S.L.R. 356.

93 See *supra* Part VII.

94 See the main text accompanying *supra* note 30.

95 See *Byrne*, *supra* note 74. For examples of Singaporean cases which had adopted this definition, see *Mansoor s/o Abdullah & Anor v. P.P.* [1998] 3 S.L.R. 719; *Tengku Jonaris Badlishah v. P.P.* [1999] 2 S.L.R. 260; *Took Leng How v. P.P.* [2006] 2 S.L.R. 70.

enabling people who killed while suffering from an abnormality of mind to escape the death penalty.

A further special feature of Singaporean law is its recognition of intoxication-induced insanity as a distinct defence under section 85(2)(b) of the *Penal Code*. Successfully pleading this defence has the same effect as the "unsoundness of mind" plea under s 84 of empowering the court to "order [the accused] to be kept in safe custody in such place and manner as the court thinks fit".[96] Section 85(2)(b) reads:

> Intoxication shall be a defence to any criminal charge if by reason thereof 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 the person charged was, by reason of intoxication, insane, temporarily or otherwise, at the time of such act or omission.

In a recent judgment, the Singapore Court of Appeal held that the choice of the term "insane" in the provision was deliberate so as to differentiate this form of mental disorder caused by intoxication from those described as "unsoundness of mind" under section 84.[97] A corollary of this difference is that the intoxication-induced mental disorder can be transient while that envisaged by unsoundness of mind must be permanent. Without engaging in the merits or otherwise of recognising this type of defence, one wonders whether anything was served by having the clause "insane, temporary or otherwise" in section 85(2)(b). Indeed, the clause produced unnecessary uncertainty which required judicial clarification. Arguably, a reference without more to mental incapacity caused by intoxication would have sufficed since it is common knowledge that the effects of intoxication can be temporary or permanent. In this regard, the following provision in the *Indian Penal Code* is attractive for avoiding the term "insane" and not referring to the temporal nature of intoxication:

> Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law …[98]

Singaporean judges have been very active in producing a sizable body of case law on both the defences of insanity and diminished responsibility. While they have frequently followed Indian cases on the defence of insanity and English ones on diminished responsibility, our judges have occasionally been prepared to depart from the views of their Indian and English counterparts. An example of this in relation to the defence of insanity is the view that, for the cognitive defect concerning wrongness, accused persons must prove both that they did not know that it was morally wrong and that it was contrary to law.[99] This is in spite of Indian case law permitting the defence to apply where the accused knew that the act was contrary to law but thought that it was morally right to do, and *vice versa*.[100] It is submitted that, besides going against the clear words of the provision, this view may be criticised for making the

---

96 S. 315 of the *Criminal Procedure Code* (Cap. 68) (Rev. Ed. 1985).

97 *Tan Chor Jin v. P.P.* [2008] SGCA 32 at para. 24.

98 S. 85. The closing words of the provision read "provided that the thing which intoxicated him was administered to him without his knowledge or against his will", and need not concern us here.

99 See *P.P. v. Rozman bin Jusoh* [1995] 3 S.L.R. 317.

100 *Ashiruddin Ahmed v. The King* A.I.R. 1949 Cal. 182.

defence unduly restrictive.[101] As contended previously, it would be far more just for the law to permit the defence to succeed where the cognitive defect resulted in the accused not knowing either that their conduct was legally wrong, or that it was morally wrong.[102]

As for the defence of diminished responsibility, our courts have departed from the English law on the relevance of voluntary (*i.e.*, self-induced) intoxication to the plea. They have held that such intoxication, not being "illegally caused", does not meet the definition of "injury"[103] provided for under section 44 of the Singaporean *Penal Code*. Accordingly, voluntary intoxication cannot support a plea of diminished responsibility since it is not one of the prescribed causes listed in Exception 7. Conversely, since involuntary intoxication has been illegally caused, it meets the definition of "injury" and can therefore support the plea.[104] As might be expected, this technical approach to voluntary intoxication has no place under English law where such intoxication is excluded simply because it does not fit any of the descriptions of prescribed causes listed in the provision.[105] Whatever else may be said of our judges' approach on this matter, they are to be commended for their diligent adherence to the wording of the Code.[106]

A concluding general observation is that Singapore, although a small nation both in terms of physical size and population on the world stage, has much to offer to the thinking and development of the criminal law. It is therefore lamentable that Singaporean criminal law appears to be hardly known or studied elsewhere.[107] On this score, whether or not one ultimately agrees with Singapore's handling of insanity and criminal responsibility, studying its statutory provisions and the healthy body of case law which has grown up around them is an excellent way of discovering the best possible solution to this universal issue.

XI. A Model Formulation of the Insanity Defence

This comparative study of selected Commonwealth formulations of the defence of insanity shows that the basic structure of the M'Naghten formulation remains generally in good shape. For a person to avoid criminal responsibility on the ground of insanity, the formulations of all the jurisdictions studied (including that of the ICC) have continued the tradition of the M'Naghten formulation of requiring not only proof of a mental disorder but also certain specified defects caused by such disorder. Where the M'Naghten formulation has been found wanting is in the detail which is

---

101 See further Yeo, Morgan and Chan, *supra* note 52, at para. 24.22.

102 See *supra* Part VI.

103 The term is defined as denoting "any harm whatever illegally caused to any person, in body, mind, reputation or property".

104 *Tengku Jonaris Badlishah v. P.P.* [1999] 2 S.L.R. 260; *Zailani bin Ahmad v. P.P.* [2005] 1 S.L.R. 356.

105 The closest descriptions would be a disease or injury, but the temporary states of intoxication contemplated here would not meet these descriptions.

106 For a critique of this judicial interpretation of the word "injury" appearing in the Singaporean provision on diminished responsibility, see Yeo, Morgan and Chan, *supra* note 52, at paras. 25.41–25.43.

107 This is apart from Malaysia where courts often refer to Singaporean criminal case authority. This observation was enforced when the author, on a visit in September 2007 to the renowned Max Planck Institute of Comparative and International Criminal Law in Freiburg, Germany, found that its extensive reference library had scant material on Singaporean law.

needed to ensure that certain types of mentally disordered people are diverted away from a regime of punishment to one of control and treatment. It has been contended in this article that the formulation could be improved by replacing "disease of the mind" with "mental disease or defect"; avoiding using the descriptor "capacity" in relation to the accused mental defects; replacing the expression "nature or quality" with "nature or consequences"; replacing the word "know" with "appreciate"; interpreting the word "wrong" to mean "either legally or morally wrong"; striking out the supplementary rule on partial delusions; and recognising conative defects. A provision of the defence which incorporates all these revisions is easy enough to formulate. It could read as follows:

> A person shall not be criminally responsible if, at the time of that person's conduct, he or she suffers from a mental disease or defect which destroys his or her
> (i) appreciation of the nature or consequences of his or her conduct; or
> (ii) appreciation that his or her conduct was either wrong or contrary to law; or
> (iii) control over his or her conduct.

A common feature of all of the proposed revisions to the M'Naghten formulation is that they expand the scope of the defence of insanity. This is entirely in keeping with the basic principle of criminal responsibility which regards individuals as responsible agents who should be punished for choosing to engage in criminally proscribed conduct, or for failing to exercise their ability to control such conduct. The expansions contained in the proposed formulation are aimed at clinically treating rather than punishing people whose choice or control over their conduct has been eliminated by mental disorder. It is also worthwhile emphasising that every one of the proposed revisions to the M'Naghten formulation is not novel but has been recognised (sometimes more, sometimes less) by many of the jurisdictions studied in this article.

To allay concerns that these expansions would open the floodgates, the proposed formulation continues to be quite restrictive in requiring a very high level of manifestation of the prescribed cognitive and conative defects, as evinced by the term "destroys". Thus, a substantial impairment will not suffice. Furthermore, the burden of proof lies with the accused to prove the elements of the defence.

In keeping with the process of globalisation, it would be ideal if member states of international organisations such as the Commonwealth of Nations were to agree on a common set of general principles of criminal responsibility. The first step could be the adoption by all member states of the formulation of the defence of insanity proposed in this article which arguably incorporates the best features of the principal formulations of the defence in the Commonwealth. With such adoption, the impetus could be laid for other general principles of criminal responsibility to be proposed and agreed upon. It is also noted that the proposed formulation is an improved version of the ICC provision on insanity. The case for adoption of the formulation would be greatly increased were it to be accepted by the Revision Commission on the ICC Statute when it convenes in 2009.[108]

---

[108] See *supra* note 87.