THE PRINCIPLES FOR SENTENCING AND CUSTODY FOR THE MENTALLY ILL-OFFENDER: A COMPARATIVE STUDY BETWEEN THE UNITED KINGDOM AND BRUNEI DARUSSALAM

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ABSTRACT

There is little understanding how the mentally ill offenders are sentenced and the placement of the mentally ill offender when found 'not guilty by reason of insanity'. There is a mixture of sentiments when it comes to a person who is found to be mentally ill. This highlights the lack of understanding of the principles of sentencing and the custody for the mentally ill offender. This paper seeks to address how mentally ill offenders are sentenced and discussed whether the present approach to sentencing suitably addresses the broad goals of the criminal justice system whilst taking into account of the situation of the mentally ill offenders. The objective of this study is to compare the selected jurisdictions with regards to the procedure for the mentally ill offender. Doctrinal research has been used in analysing legal and academic literatures, as well as case laws in the United Kingdom and Brunei Darussalam. In sentencing the mentally ill offender, the

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court lean towards rehabilitation so that the mentally ill offender can return to society behaved and safe. The United Kingdom Mental Health Act 1983 Chapter 20 can guide Brunei Darussalam in producing her own Mental Health statute.

Keywords: Principles of Sentencing, Mental Health Act, Criminal Procedure Code, Brunei, retribution, deterrence, rehabilitation

Introduction

Every person is presumed to be of sufficient soundness of mind to be criminally responsible for his actions until the contrary is proved. To raise a successful defence of insanity under the M'Naghten Rules, it has to be proved that: a) the accused was labouring under a defect of reasoning; b) the defect arose from a disease of the mind; and c) as a consequence of the defect of reasoning, the accused either: i) did not know the nature and quality of the act he or she was doing, or ii) did not know that what he or she was doing was wrong. The defence of insanity protects the mentally ill, who may not fully understand the nature of their crime, from being forced into a prison system where they will not receive proper treatment. Further, little is known on the procedure for the mentally ill offender. There is little understanding how the mentally ill offenders are sentenced and the placement of the mentally ill offender when found 'not guilty by reason of insanity'. Not only that, there is almost a misunderstanding in the general public as to how the mentally ill offender are sentenced in courts. There is a mixture of sentiments when it comes to a person who is found to be mentally ill. This highlights the lack of understanding of the principles of sentencing and the custody for the mentally ill offender. In the United Kingdom

(UK), the Mental Health Act 1983 Chapter 20 lists out a comprehensive procedure for the placement of the mentally ill. On the other hand, Brunei Darussalam's (Brunei) procedure for the mentally ill is listed in the Criminal Procedure Code 1951 Chapter 7. This paper seeks to address how mentally ill offenders are sentenced and discussed whether the present approach to sentencing suitably addresses the broad goals of the criminal justice system whilst taking into account of the situation of the mentally ill offenders. Further, this paper has looked into the UK and Brunei's approaches in imposing punishment to the mentally ill offender, and whether Brunei should follow the UK's approach in creating its own Mental Health Act for the purpose of the mentally ill offender's placement after trial. In order to examine the insanity legislations of these two jurisdictions, doctrinal research has been used. Insanity legislations and literatures have been examined to answer the above question. Here, the application of the legislations, the issues addressed, and the opinions from both the academia and the judiciary were explored. The materials accumulated from the previous research contribute to identifying and analysing the similarities and divergences among the approaches taken by the selected legal regimes. This paper has referred to Singaporean law cases as well to demonstrate further on the diverging opinions of the courts with regards to sentencing the mentally ill offender.

This paper is structured as follows: following the introduction, this paper briefly explained the principles of sentencing – rehabilitation, deterrence, retribution and incapacitation. For rehabilitation, the mentally ill offender requires a greater amount of care and different methods of treatment. In such cases, psychiatric institutions are preferred over imprisonment. Deterrence is categorised into general and specific. Retribution contains a proportionality requirement that relates to the nature of the crime committed

and its effects to society. Incapacitation is normally utilised for severe cases. Part 3 has discussed on the principle of sentencing in insanity cases. Whilst the courts prefer to utilise the principle of rehabilitation for insanity cases, often than not, the principles overlap to confer a suitable sentence for the mentally ill offender. Further, part 4 dealt with the issue on the placement for the mentally ill offenders in the UK and Brunei. Both jurisdictions impose their respective Acts in handling the procedure for the mentally ill offenders in the UK and Brunei after trial. This part looked into the UK Criminal Procedure (Insanity) Act 1964 Chapter 84, the UK Mental Health Act 1983 Chapter 20 and the Brunei Criminal Procedure Code 1951 Chapter 7. Part 5 looked into the summary of findings of this paper and ended with a conclusion in part 6.

The Principles of Sentencing

In jurisdictions where English law is applicable, the principles of sentencing are as follows: rehabilitation, deterrence, retribution and incapacitation. [5]

Rehabilitation

Under rehabilitation, the criminal justice system serves to treat offenders so that they can return to society as behaved and productive citizens. Rehabilitation increases an offender's self-respect, instilling good values and a proper attitude, and providing him with the means to live a productive life so that he could return to society as a law abiding-citizen.[6] A mentally ill offender requires a greater

[5] Ashworth, A. (1995). *The Criminal Justice and Public Order Act 1994*. Criminal Behaviour and Mental Health. 5. p. 141-143.

[6] Fond. J. Q. L. (1984). *Observation on the Insanity Defense and Involuntary Civil Commitment in Europe.* University of Puget Sound Law Review. p. 527 – 545.

amount of care and different methods of treatment than a mentally healthy offender.[7] Thus, the only rational measure is to commit mentally ill offenders to psychiatric institutions, rather than incarceration, so that the offenders can get the care they truly need.[8]

Prisons are not an ideal environment for psychiatrist treatment. Overcrowding in prisons tends to result in greater violence, excessive noise and lack of privacy that can have a negative effect on the mentally ill as they are vulnerable to emotional and psychiatric problems.[9] Thus, rehabilitation would mean choosing a sentence such as probation over imprisonment. In a case where imprisonment is unavoidable, a more lenient sentence ought to be imposed.[10] The principle of proportionality should be checked on the imposition of lengthy sentences for the purposes of compulsory treatment.[11]

Deterrence

There are two categories for deterrence:[12] i) general deterrence; and ii) specific deterrence. General deterrence punishes an actor in order to intimidate other potential offenders so that they will not commit the same or a similar crime as the punished actor, and specific deterrence punishes

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7 Ibid.

8 Ibid.

9 Chua. H. H. (2011). *Sentencing Mentally Disordered Offenders, Lessons from US and Singapore.* Singapore Academy of Law Journal. pp. 434-462.

10 Chua. H. H. (2011). *Sentencing Mentally Disordered Offenders, Lessons from US and Singapore.* Singapore Academy of Law Journal. pp. 434-462.

11 Fond. *Observation on the Insanity Defense and Involuntary Civil Commitment in Europe.* p. 527 – 545.

12 Ibid.

an actor so that the same actor will not commit another crime.[13] Chua stated:

> "There will be no value imposing a more severe sentence for the purposes of specific deterrence because mental illness may render offenders "undeterrable" in the sense of being unable to understand the significance of punishment as a result of their mental illness affecting their thought processes or because they will be unable to control their future behaviour by reason of their mental illness. Moreover, with general deterrence because those of the public at large who are mentally ill may not be able to comprehend the warning meant for them and, even if able to comprehend, may be themselves "undeterrable". However, it is possible to imagine exceptional scenarios where the offender has sufficient comprehension and control despite the presence of a mental disorder such that specific deterrence may be of some relevance. Similarly, general deterrence may also feature in that scenario where the ability to understand the significance of punishment and to control future behaviour applies generally to all those with the same mental disorder."[14]

Even if the ordinary person is a rational actor, neither type of deterrence can apply to mentally ill offenders.[15] This is because punishing mentally ill offenders cannot be

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13 Ibid.

14 Chua. *Sentencing Mentally Disordered Offenders, Lessons from US and Singapore*. p. 438.

15 Chua. *Sentencing Mentally Disordered Offenders, Lessons from US and Singapore*. p. 438.

justified under a theory of general deterrence as mentally healthy people are unable to identify with a mentally ill offender. Thus, they are not likely to learn anything from the punishment of a mentally ill offender.[16] Cesare di Beccaria's eighteenth-century approach to punishment suggested that "punishments… should be chosen in due proportion to the crime so as to make the most efficacious and lasting impression on the minds of men, and the least painful impressions on the body of the criminal."[17]

Likewise, mentally ill offenders cannot be deterred from the punishment of other mentally ill actors because mentally ill people lack the capacity to act rationally:

> "Mental illnesses potentially impair or skew rational calculation of risk and reward and generate motivations that may skirt the calculus of offending based on a narrower risk-reward model of decision making. Because mentally ill offenders do not fully understand their actions, they are incapable of learning from the punishment of other mentally ill offenders to perform a rational cost-benefit analysis."[18]

Further, punishment of mentally ill offenders cannot be justified under a theory of specific deterrence. This is because a mentally ill offender lacks the rationality to perform a cost-benefit analysis that incorporates his own incarceration. Therefore, punishing mentally ill actors

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16 Ibid.

17 *Of Crimes and Punishments*, translated by Jane Grigson (Marsillo, 1996) at 49.

18 Ibid.

cannot discourage future crimes committed by either mentally healthy or mentally ill actors.[19]

Retribution

The society believes that the offender should suffer in a manner proportionate to the crime he committed.[20] The retributive principle also contains a proportionality requirement that relates to the nature of the crime committed and its effects on society. This is to ensure that mentally ill offenders are not detained under criminal law exceeding the period that a mentally healthy offender would be detained for the equivalent offence. There are two types of retribution: i) culpability-based retribution punishes criminals because criminals knew their actions were wrong and therefore are blameworthy; and ii) harm-based retribution punishes criminals based on the harm they caused.[21]

An important element of culpability-based retribution is questioning whether the offender committed the crime subsequent to his making a choice to do so.[22] Thus, if the offender did not choose to commit the crime, then the society should not punish him.[23] The offender must be morally blameworthy in order to deserve punishment.[24] Fond stated that "a legally insane offender, however lacks moral culpability for his actions because, by definition, the insane offender's acts result from a mental disease, not a controllable conscious choice. Thus, the offender does not

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19 Fond. *Observation on the Insanity Defense and Involuntary Civil Commitment in Europe.* p. 527 – 545.

20 Ibid.

21 Fond. *Observation on the Insanity Defense and Involuntary Civil Commitment in Europe.* p. 527 – 545.

22 Ibid.

23 Ibid.

24 Ibid.

deserve to be punished under the culpability-based retributive theory of punishment unless he made a conscious choice to commit the crime."[25]

To the contrary for harm-based retribution, society believes that the offender should be punished in proportion to the harm he caused.[26] Therefore, where a mentally ill defendant causes the same amount of harm as a mentally healthy defendant, the defendants are punished equally regardless of their respective mental states.[27] Fond opined that "the criminal justice system is the improper place for harm-based retribution because it is objective of tort law, not criminal law, to make a victim whole again. Tort law focuses on compensating for wrongful actions themselves. Therefore, society should look to the tort system rather than the criminal justice system to provide for harm-based retribution."[28]

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[29] The sentencing judge must locate the offence on a scale of gravity, bearing in mind that the maximum sentence is to be reserved for egregious offences. It is only by having due regard to the circumstances of the offence and the offender as well as to the accepted principles of sentencing that this exercise can properly be performed.[30] The presence of a mental disorder ought to have a mitigating effect to the

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25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ferguson, G. (2016). *A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code*. p. 8. Retrieved from https://www.justice.gc.ca/eng/rp-pr/jr/rppss-eodpa/RSD_2016-eng.pdf.
30 Malley, T. O. (2001). *Principles of Sentencing: Some Recent Developments.* Judicial Studies Institute Journal. p. 55.

extent that the mental illness affects the criminal's moral agency.[31] Some mentally ill people have impaired understanding, whereas others may suffer affective disorders that reduced their ability to control their actions because mental illness is so varied.[32] It also occurs at different degrees.[33] This will significantly be a matter of judgment for the court to make based on the totality of the evidence.[34]

Yet, the Federal Court of Australia in McDonald v R[35] interestingly remarked:

> "… the most serious consequences of the conviction of a 'white-collar' offender … must be loss of his own self-respect and the suffering of disgrace and humiliation, as well as the complete loss of his previous standing in the community, his professional position, and the means of livelihood he has chosen and in which he has acquired expertise. The conviction is a personal calamity. So far as [jail] is concerned, to be sent there is also a disaster of the greatest magnitude. These are the considerations that must loom large if a professional person is confronted by a situation inducing thought about the personal cost of committed comparable offences, and a significant period in jail attended by such consequences; must constitute a weighty deterrent. Indeed, an equivalent [jail] term is plainly a severer punishment for a man like the appellant than it

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31 Chua. *Sentencing Mentally Disordered Offenders, Lessons From US and Singapore.* p. 437.
32 Ibid.
33 Ibid.
34 Ibid.
35 (1994) 48 F.C.R. 555, p. 564-565.

> would be for many violent criminals, who could take up much the same life upon leaving [jail] as they had led before."[36]

This has been regarded as an acceptable view.[37] In a case of insanity, to be found of unsound mind must be a punishment itself. A mentally ill offender will have to bear the label 'mentally ill' for the rest of his life, even after treatment. It not only is a personal calamity but a lifelong one.

Incapacitation

Incapacitation may have either an aggravating or mitigating effect on sentence depending on the circumstances.[38] If the offender's mental illness is treatable expediently, then it would be unjust to detain the offender longer than necessary to administer the cure because the need for incapacitation would have been removed. However, if the mental illness is incurable and the risk to society posed by the offender is great, hence, it is possible that a disproportionately long sentence may be required. Chua commented:

> "First, predictions of future dangerousness, upon which a lengthy sentence would have to be based, are of doubtful value. Second, mental illnesses are not easily classifiable into the categories of curable and incurable – the successful management of one's mental illness may depend on a whole host of factors including family support, availability of psychiatric medication, access to therapy, the patient's co-operation in taking medication and

[36] Ibid.
[37] (1994) 48 F.C.R. 555, p. 564-565.
[38] Ibid.

> even having regular employment. It would be too simplistic and also cruel to label an offender incurable in order to justify inordinately long incarceration without knowledge of how he will respond to treatment over time. Finally, there are also fairness issues when mentally ill offenders are held for longer periods than offenders who are not mentally ill, all other things being equal, solely for the purposes of incapacitation. Thus, although incapacitation would understandably be demanded by the public, especially where violent crimes have been committed against vulnerable individuals, the courts should resist the temptation to order a more severe sentence solely for the purpose of incapacitation. Alternatives outside the criminal justice system, such as civil commitment (such as placing a person in a psychiatric hospital or ward), should be utilized instead."[39]

Chua further commented that deterrence and incapacitation will seldom be the driving concern when sentencing a mentally ill offender and that the courts will look more towards retribution and rehabilitation.[40] Connolly stated that the focus will be on retribution where " the proportionality element of retribution providing the upper limit of the sentence for the sake of fairness."[41] The sentencing judge must try to find a balance between delivering retribution for the community, deterring other potential criminals from committing an offence,

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[39] Chua. *Sentencing Mentally Disordered Offenders, Lessons From US and Singapore.* p. 439.

[40] Ibid.

[41] Ibid.

rehabilitating the offender to prevent from re-offending and protecting the community from criminal behaviour.[42] A mental illness that affects the 'mind' of the accused person should therefore generally result in a mitigated sentence.

Sentencing in Insanity Cases

The principles of sentencing may at times conflict and the court will have to prioritise one or more of them over the others, especially when a mentally ill offender is involved. The presence of a mental disorder may be regarded as an aggravating or a mitigating factor depending on how the four principles are weighed and balanced.

For example, in the Singaporean case of Public Prosecutor v Goh Lee Yin,[43] the respondent was a young woman diagnosed with kleptomania. The respondent was convicted for shoplifting. She appealed, however, whilst her sentence was on appeal, she had committed further similar offences. Nonetheless, the High Court allowed the appeal and placed her on probation for 24 months. Yet, the respondent committed another series of shoplifting offences, during the probation period. The District Court sentenced her to one day's imprisonment and a fine of $8,000. The prosecution appealed. The High Court held that where an offender committed offences whilst suffering from a psychiatric disorder, kleptomania, which seems to prompt the offence, the principles of rehabilitation and deterrence must form the prime focus of the court's attention. With regards to rehabilitation, the court depended on the respondent's psychiatrist where he mentioned of his

[42] Connolly, J. (February 11, 2006). *Human Rights Aspects of Sentencing*. p. 3-4. Retrieved from https://www.courts.act.gov.au/__data/assets/pdf_file/0011/957692/humanrights.pdf.

[43] [2008] 1 SLR(R) 824 at 148.

treatment plan for the respondent could be "irreversibly derailed" should she be sent to prison. Placing the respondent in prison could have a negative effect on her progress. Further, rehabilitation could take precedence over incapacitation as the offences committed were of a low-key nature.[44] It is interesting to see in the case of Public Prosecutor v Kwong Kok Hing[45] where the court observed:

> "[w]hile the respondent's rehabilitation was a relevant consideration, there was no suggestion that he could not be similarly rehabilitated in prison. In fact,… the respondent's private psychiatrist… was also a psychiatrist engaged by the prison authorities."[46]

Chua commented that this approach is "inconsistent with the scientific consensus and manifests a rather simplistic approach to what is required for successful rehabilitation."[47] In Director of Public Prosecutions v Heffernan,[48] the court said that in insanity, the plea is irresistible compulsion or total absence of reason. This is an illness that requires therapeutic intervention. The court also said that:

> "[i]nsanity is available as a defence to all offences but rarely used outside murder. The circumscription of its elements makes it an unlikely resort for those accused of shoplifting or drug-pushing. Since the likely result of an

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44 Chua. *Sentencing Mentally Disordered Offenders, Lessons from US and Singapore*. p. 454.

45 [2008] 2 SLR(R) 684.

46 Public Prosecutor v Kwong Kok Hing [2008] 2 SLR(R) 684 p. 37.

47 Chua. *Sentencing Mentally Disordered Offenders, Lessons from US and Singapore*. p. 454.

48 [2017] IESC 5.

> insanity finding is incarceration is a psychiatric hospital, perhaps over decades, only the charge of murder makes calling it in aid attractive to one accused of crime."[49]

It can be seen that the courts prefer to impose the rehabilitation principle on the mentally ill offender. However, it seems that the courts have a hard time in deciding a better sentence for repetitive offender such as Goh Lee Yin. Even if a prison provides psychiatrists for the mentally ill offender, it is still not an ideal environment to 'cure' the mentally ill offender. However, if that is the only way to stop offenders such as Goh Lee Yin from committing further crimes, then the courts have no choice to impose temporary incarceration.

With regards to deterrence, the court approved that specific deterrence is efficient where the defendant had a conscious choice to commit crimes and accepted that the theory of "undeterrability" applied to kleptomaniacs, who could not control their impulse to commit theft.[50] The court in Public Prosecutor v Goh Lee Yin stated:

> [B]ecause the cause of kleptomania is known or thought to be known… and treatment modalities can be prescribed to limit, or even cure, the extent of kleptomania, the onus must therefore be on the sufferer to stick religiously to his or her treatment. **If the suffered knows that he or she is likely to reoffend and yet violates the treatment programme designed for him or her with impunity and total disregard, it would be right for the concept**

[49] Ibid, para 10.
[50] [2017] IESC 5.

> **of specific deterrence to bite and provide the discouragement necessary for the offender not to skip future treatments.** In this sense, the principle of specific deterrence… acts as a secondary as opposed to a primary source of deterrence or discouragement.[51]
> **[emphasis in bold italics added]**

In the Bruneian case of Md Zain bin Hassan @ Anggas v Public Prosecutor,[52] the defendant was charged with theft of a car. However, the defendant did not have any recollection of having done so. It was found by psychiatric evidence that the defendant was suffering from psychosis at the material time and that his judgment was impaired because of his illness. The doctor who gave medical evidence said that the defendant had been her patient prior to the incident and that his illness was transient, depending on whether he continued to take his medication.

Thus, specific deterrence can be applied as an alternative when kleptomaniac skips or disregards his or her treatment. As for general deterrence, the court held that this would usually be irrelevant in cases involving kleptomaniacs given the type of offences involved, the low incidence of kleptomania among apprehended shoplifters and the "undeterrability" of kleptomaniacs.[53] Overall, the element of general deterrence could and should be given considerably less weight if the offender was suffering from a mental disorder at the time of the commission of the offence.[54] Nevertheless, the element of general deterrence would be

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51 [2008] 1 SLR(R) 824, para 78-80.
52 MCCS No. 1822 of 2001.
53 Chua. *Sentencing Mentally Disordered Offenders, Lessons From US and Singapore.* p. 455.
54 Ibid.

upheld if the offender in question had skipped his or her treatment plan persistently.[55]

On retribution and incapacitation, these two principles are highly relevant to violent offences only. For example, in the case of Public Prosecutor v Barokah,[56] where a domestic maid suffering from a moderate depressive episode strangled her elderly employer after an argument and while she was unconscious pushed her out of the window of her ninth floor flat, the principle of retribution features only where the crime committed by the mentally ill offender was cruel, inhumane or particularly heinous. Therefore, the courts imposed the most severe sentence for the particular offence.[57]

On the other hand, incapacitation involves offences where the potential risk to victims is significant, therefore, the courts find it hard to apply this principle because of the limited sentencing option available.[58] In Public Prosecutor v Abdul Rashid bin Haji Ishak,[59] the defendant was convicted for causing grievous hurt to his wife and 5-month-old child. The court commented:

> "There can be no doubt that the defendant's actions were dangerous and terrifying and there was every reason for the wife to be fearful for her life and her child. A threat imposed by the flourish of a weapon cannot be underestimated or to be dismissed as merely idle threats often caused by a person who suffered from emotional stress and depression and

55 Ibid.
56 [2009] SGHC 46, para 70.
57 Ibid.
58 Chua. *Sentencing Mentally Disordered Offenders, Lessons From US and Singapore.* p. 456.
59 [2002] BLR 91.

> subsequently corrected by remorse of the same person who uttered the threats."[60]

The court accepted the opinion of medical doctor that in view of the seriousness of the offences and the high probability that his illness would recur or he would resume the abuse of drugs, it is necessary to arrange for his continuous supervision. The appellant was ordered to be confined to a lunatic asylum or prison to avoid further danger to his family. In Public Prosecutor v Aniza bte Essa[61] the court stated:

> "As [the testifying psychiatrist] himself has acknowledged in another case (quoting another expert psychiatrist), 'Nothing is certain in psychiatry'… in our view, to sentence a mentally unstable offender (whose condition is treatable) to life imprisonment, because *at the point of time* we do not know with certainty when it is safe to release him or her back to society, seems to be unjust to such an offender. It would mean punishing and offender out of proportion to his or her culpability."[62]
> **[emphasis in original]**

The court in Director of Public Prosecutions v Heffernan[63] stated that "an accused that kills another, operating under the insane delusion that he is in a battle with evil and non-human forces, for instance, cannot seek an acquittal outside the insanity defence. If that is the state of mind of the accused, society is to be protected by the special

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60 Ibid. p. 95.
61 [2009] 3 SLR 327.
62 Ibid. para 40.
63 [2017] IESC 5.

verdict applicable to insanity."[64] Yet, a long incapacitation would be deemed unjust if the mentally ill offender has already been treated.

Chua stated on the case of Public Prosecutor v Barokah[65] that incapacitation "remains highly relevant in cases involving serious offences where the potential risk to victims is substantial, notwithstanding the fact that the offender suffers from an impulse control psychiatric disorder, which causes the commission of the very offence. As for incapacitation, however, the courts have struggled with applying the principle of incapacitation because of the limited sentencing options available, particularly in cases of culpable homicide not amounting to murder punishment under s 304(a) of the Penal Code."[66] The court mentioned in Director of Public Prosecution v Heffernan:[67]

> "where the jury accept that the persuasive burden has been met on the part of the accused and the defence of insanity has been

64 Ibid.

65 [2009] SGHC 46, para 70.

66 Chua. *Sentencing Mentally Disordered Offenders, Lessons from US and Singapore.* p. 456. Chua stated:" Prior to the Penal Code (Amendment) Act 2007 (which came into effect on 1 February 2008), the legislatively prescribed sentence under s 304(a) was life imprisonment, or imprisonment of up to ten years. "Life imprisonment" in Singapore has, since 1997, been an initial period of 20 years and then up to the time the prisoner is released by a Life Imprisonment Review Board. This meant that when sentencing an offender under s 304(a), the court had to choose between a sentence of up to six years and eight months' imprisonment (with remission) and a minimum sentence of 20 years' imprisonment up to the extent of the offender's natural life. This gap led to starkly different outcomes for mentally disordered offenders who came before the courts."

67 [2017] IESC 5.

> successfully raised, the accused will be deemed not guilty of murder but will generally undergo compulsory psychiatric treatment in the designated mental hospital. Treatment for a mental illness is not necessarily verdict dependent; many prisoners sentenced to terms in an ordinary jail may, by executive decision, spend some time in a secure mental hospital."[68]

With that said, sentencing benchmarks and guidelines are utilised by the courts in their decision-making as to confer a well-considered sentence.[69] Judges are expected to balance the sentencing goals of retribution, deterrence, incapacitation and rehabilitation in applying the sentencing benchmarks to each individual, different and unique case. The courts are expected to fulfil a vital social-control role in sentencing an offender such that when mental illness points towards a future danger more severe sentencing may be required to protect society.[70] Nevertheless, the courts are also concerned with rehabilitating the offender, which may require imposing a less severe sentence.[71]

Finally, to end this section, VK Rajah JA in the case of Public Prosecutor v Chee Cheong Hin Constance[72] said:

> "The current position, where the courts are neither empowered nor endowed with any discretion whatsoever to customaries or tailor their sentences in a manner that would be consistent with either the possible recovery or

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68 Ibid, para 11.

69 Chua. *Sentencing Mentally Disordered Offenders, Lessons From US and Singapore.* p. 451.

70 Ibid.

71 Ibid.

72 (2006) 2 SLR(R) 707.

> decline of the medical condition of an offender who is unwell, is far from satisfactory. Judges often have to choose between a rock and a hard place when resolving their colliding instincts in determining the appropriate sentence. Should the offender's medical condition stabilize without any real risk of a relapse it would be quite unjust for him or her to continue to be incarcerated after rehabilitation through medical attention when he or she no longer poses any further risk to the public upon a return to the community… In order to properly and fairly sentence offenders whose medical condition might potentially be reverse through medical attention and/or with the passage of time, the courts should be conferred the discretion to impose a sentence band with appropriate minimum and maximum sentences tied to periodical medical assessments and reviews. This will minimize the rather unscientific and imprecise conjecture that is now inevitably prevalent when determining appropriate sentences for such offenders. The proposed approach, while fairer to offenders, will also concomitantly serve to address and assuage public interest concerns on adequate sentencing as well as protection from mentally ill offenders with a propensity for violence. It is my hope that Parliament will review the present position and, upon taking into account the view of all relevant stakeholders in the sentencing and rehabilitation framework, endow the courts with more comprehensive and pragmatic sentencing powers."[73]

[73] (2006) 2 SLR(R) 707. para 29.

The existence of a mental illness is always a relevant factor in the sentencing process, but its impact will vary according to the circumstances of the case. Judges cannot mechanically apply sentencing principles to any given fact scenario to achieve the 'right outcome'. Unfortunately, there is no sentencing machine that processes all the considerations that judges must take into consideration. The High Court in Veen v The Queen[74] commented the difficult nature of the task:

> "… sentencing is not purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment… the purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence, but sometimes they point in different directions."[75]

In the research by O'Loughlin, she stated that "[c]urrent sentencing guidance states the mental disorders, disabilities and impairments can affect culpability at sentencing or warrant mitigation of penalties where a sentence may be expected to have a disproportionate impact upon the individual… Case law emphasises the need to ensure that the sentence adequate reflect culpability and the need for punishment. Recently, however, the Court of Appeal has adopted a more flexible approach that allows

[74] *(No 2)* (1988) 164 CLR 465, 476.
[75] *(No 2)* (1988) 164 CLR 465, 476.

sentencing courts to give greater weight to the offender's therapeutic interests and the protection of the public."[76]

There are three areas where mental disorders may be especially relevant to proportionality and fairness:[77] i) there may be equality considerations arising from a mental disorder; ii) a mental disorder may mean that a punishment will have a harsher impact or weigh more heavily on a person with a mental disorder. A court is required to consider in terms of ensuring equality, fairness and proportionality; and iii) for sentencing purposes, culpability is a key consideration.

The courts have struggled with applying the principles of sentencing in insanity cases. The court must ensure that the sentence is proportionate and assist in the recovery of the mentally ill offender and not contribute to his detriment. Yet, the court has a duty to protect the society and to prevent future danger. Factors relevant to the determination of sentence depend on the chosen objective of sentencing, such as deterrence, rehabilitation, reparation, or public protection. Factors are relevant only insofar as they relate to limiting the harm of punishment or ensuring that the sentence meets its objective.[78]

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[76] O'Loughlin, A. (2022). *Mental Disorder, Disability and Sentencing: A review of policy, law and research*. Retrieved from https://www.sentencingacademy.org.uk/_files/ugd/7afd9a_ff2c3c58eadf47f181132c782a861203.pdf.

[77] O'Loughlin, A. et al (2022). *Mental Health and Sentencing: Literature Review.* Retrieved from https://www.scottishsentencingcouncil.org.uk/media/2211/20220331-mental-health-literature-review-final-as-published-20220512.pdf.

[78] Manikis, M. (2022). *The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions.* Osgood Hall Law Journal. 59(3), p. 602.

Placement for Mentally Ill Offenders in the United Kingdom and Brunei Darussalam

If the criminal defendant is found not guilty by reason of insanity (NGRI), the court will impose an order to send the mentally ill offender to a mental health institution for further evaluation to ascertain whether he is still mentally ill and dangerous.[79] He will be released from such an institution when it is determined that he is cured or at least, safe to be released to society.[80] Fond said that the approval of a court is also needed and that judicial review of continued confinement in a mental health institution is almost always available to such an individual.[81] In the UK, the placement of the mentally ill offender is governed by the Criminal Procedure (Insanity) Act 1964 Chapter 84 (1964 Act) and the Mental Health Act 1983 Chapter 20 (1983 Act). On the other hand, the placement of the mentally ill offender in Brunei is governed by the Brunei Criminal Procedure Code 1951, Chapter 7 (Brunei CPC).

United Kingdom

The procedure for the mentally ill offender who is found NGRI in the UK is governed by the 1964 Act[82] and the 1983

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79 Fond. *Observation on the Insanity Defense and Involuntary Civil Commitment in Europe.* p. 4.

80 Ibid.

81 Ibid.

82 An Act to amend the form of the special verdict required by section 2 of the Trial of Lunatics Act 1883 and the procedure for determining whether an accused person is under a disability such as to constitute a bar to his being tried; to provide for an appeal against such a special verdict or a finding that the accused is under such a disability; to confer on the court of trial and the Court of Criminal Appeal further powers of making orders for admission to hospital; to empower the prosecution to put forward evidence of insanity or diminished responsibility; and for purposes connected with the matters aforesaid.

Act. According to Section 5 of the 1964 Act, it provides for the powers to deal with persons NGRI or unfit to plead etc:

> **Powers to deal with persons not guilty by reason of insanity or unfit to plead etc.**
>
> (1) This section applies where –
>
> (a) a special verdict is returned that the accused is not guilty by reason of insanity; or
>
> (b) findings have been made that the accused is under a disability and that he did the act or made the omission charged against him.
>
> (2) The court shall make in respect of the accused –
>
> (a) a hospital order (with or without a restriction order);
>
> (b) a supervision order; or
>
> (c) an order for his absolute discharge.
>
> (3) Where –
>
> (a) the offence to which the special verdict or the findings relate is an offence the sentence for which is fixed by law, and
>
> (b) the court have power to make a hospital order,
>
> the court shall make a hospital order with a restriction order (whether or not they would have power to make a restriction order apart from this subsection).
>
> (3A) Where the court have power under subsection (2)(c) to make an order for the absolute discharge of the accused, they may do so where they think, having regard to the circumstances, including the nature of the offence charged and the character of the accused, that such an order would be suitable in all the circumstances of the case.
>
> (4) In this section –

> "hospital order" has the meaning given in section 37 of the Mental Health Act 1983;
> "restriction order" has the meaning given to it by section 41 of that Act;
> "supervision order" has the meaning given in Part 1 of Schedule 1A to this Act.

In the UK, the placement of the mentally ill offender after trial is guided by the 1983 Act. The 1983 Act contains a comprehensive view of the procedure for the mentally ill offender, specifically on his placement. This Act provides the procedure for the reception, care and treatment of mentally ill patients, the management of their property and other related matters. It includes the compulsory admission to hospital and guardianship, patients concerned in criminal proceedings or under sentence, consent to treatment, treatment of community patients not recalled to hospital, mental health review tribunals, removal and return of patients within the UK, management of property and affairs of patients and miscellaneous functions of local authorities and the secretary of state.[83] Part 3 of the 1983 Act specifies the procedure for patients concerned in criminal proceedings or under sentence. This can be seen from Section 35 until Section 55 of the 1983 Act. This includes the remands to hospital, hospital and guardianship orders, restrictions orders, hospital and limitation directions, detention during Her Majesty's pleasure and the transfer to hospital of prisoners. Thus, Section 37(1) of the 1983 Act states:

> **37 Powers of courts to order hospital admission or guardianship.**
>
> (1) Where a person is convicted before the Crown Court of an offence punishable with

[83] See UK Mental Health Act 1983 Chapter 20.

> imprisonment other than an offence the sentence for which is fixed by law, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorize his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be so specified.

A mentally ill convicted defendant can be sent to a prison or a mental health hospital.[84] If a person is sent to a mental health hospital, it is usually for an undetermined period.[85] A Crown Court can make a restriction order under section 41.[86] Section 41(1) of the 1983 Act states:

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[84] See Section 37 (1) of the UK Mental Health Act 1983 Chapter 20. The clause provides: Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorize his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be so specified.

[85] Fond. *Observation on the Insanity Defense and Involuntary Civil Commitment in Europe.* p. 527-545.

[86] Section 37/41 of the Mental Health Act. Retrieved from https://www.rethink.org/advice-and-information/rights-restrictions/mental-health-laws/section-37-41-of-the-mental-health act/#:~:text=The%20restriction%20order%20means%20that,restrict

> **41 Power of higher courts to restrict discharge from hospital.**
>
> (1) Where a hospital order is made in respect of an offender by the Crown Court, and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the offender shall be subject to the special restrictions set out in this section; and an order under this section shall be known as "a restriction order".

The court imposes a restriction order on such a person if it considers him dangerous.[87] It requires two doctors to assess the defendant and agree that the defendant has a mental illness and that he should be in the mental health hospital. One of these doctors should be from the hospital where the defendant will be placed. If a person is not subject to a restriction order, the hospital staff can release a mentally ill offender when they are determined that he is safe enough to be in the community.[88] If a person is subject to a restriction order, the Secretary of State must concur in the decision to

ion%20order)%20by%20clicking%20here. (accessed 6th September 2022).

87 See section 41-45 of the Mental Health Act 1983 Chapter 20.

88 Section 37/41 of the Mental Health Act. Retrieved from https://www.rethink.org/advice-and-information/rights-restrictions/mental-health-laws/section-37-41-of-the-mental-health act/#:~:text=The%20restriction%20order%20means%20that,restriction%20order)%20by%20clicking%20here. (accessed 6th September 2022).

release.[89] Thus, the release of a mentally ill offender from a psychiatric facility or from a prison in the UK is usually a medical-political decision.[90] The courts have virtually no control over the decision.[91] Fond commented:

> "[i]n reviewing British practice, some surprising observations can be made. First, by effectively suppressing assertion of the insanity defense and making mental illness relevant to placement of the offender, the British system disregards the theory and substance of its own law and adopts, instead, a pragmatic, utilitarian approach to the problems posed by the mentally ill offender. It is much less concerned with assessments of moral blameworthiness and doing justice in the individual case and must be more concerned with the appropriate disposition of the criminal offender. Second, it seems to emphasize as its primary social objective the safety and security of the community and minimizes the interests of the mentally ill offender in liberty and an early return to the community. As a consequence, the role played by courts and lawyers in the process is quite minimal when compared to our system."[92]

Further, in the UK, a person can be civilly committed if he is mentally ill, dangerous to others or in need of

89 Ibid.
90 Ibid.
91 Fond. *Observation on the Insanity Defense and Involuntary Civil Commitment in Europe*. p. 527-545.
92 Fond. *Observation on the Insanity Defense and Involuntary Civil Commitment in Europe*. p. 527 – 545.

treatment.[93] Commitment can be initiated either upon court order or the recommendation of two physicians.[94] A committee is entitled to automatic and periodic review by an administrative tribunal having a mixed composition.[95] A committee is not entitled to judicial review of his continued confinement and seldom has the assistance of his counsel in seeking his release. Release from a mental health facility is invariably determined by the medical staff.[96]

In O'Loughlin's study, it was found that despite efforts to reduce barriers to the uptake to alternatives to custody, the court usage of orders under the 1983 Act and mental health treatment requirements remains low.[97] Between 1984 and 2016, the use of hospital order with or without restrictions declined by 49%.[98] During the same period, transfers from prison to hospital increased by 710%. This suggests that powers to divert convicted offenders from imprisonment are being under-utilised.[99]

Brunei Darussalam

In Brunei, legislative guidance in respect of sentencing is limited to the inclusion of minimum or maximum sentences in the definition of criminal offences, or in establishing mandatory sentences for particular offences. In general, how to approach the sentencing of mentally ill offenders is a matter of judicial discretion and has to be gleaned from case law. There are two types of criminal appeals - first from the

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93 Ibid.
94 Ibid.
95 Ibid.
96 Ibid.
97 O'Loughlin. *Mental Disorder, Disability and Sentencing: A review of policy, law and research*. p. 2.
98 Ibid.
99 Ibid.

Subordinate Courts to the High Court, and second, from the High Court to the Court of Appeal. This system has produced consistent and comprehensive guidelines towards of sentencing mentally ill offenders. In Bruneian insanity cases, the court usually finds the mentally ill offender convicted and leaves the Prime Minister's Office to exercise the discretion on his placement.[100] The Brunei CPC provides the procedure for the placement of the mentally ill offender. Section 321 of the Brunei CPC provides as follows:

> **Order for detention.**
>
> 321. (1) When a special finding under section 320 of the Code is made by any Court of a Magistrate, it shall report the case for the order of a Judge and shall meanwhile order the person in respect of whom it has made the finding to be kept in custody in any prison or hospital or in such place and in such manner as the Court shall direct.
> (2) If the Judge is satisfied with such special finding, he shall order that such person be confined in a psychiatric facility or prison or other suitable place of safe custody pending the order of the Permanent Secretary to the Office of the Prime Minister* under subsection (5).
> (3) If, after such inquiry as he considers necessary, the Judge is not satisfied with such special findings, he may make further inquiry or direct that further inquiry be made or order a new trial on the same or on an amended charge with such direction to

[100] See cases Public Prosecutor v Shirley Q Arcala (Criminal Trial No. 2 of 1993); Public Prosecutor v Farida P. Amandoron (Criminal Trial No. 2 of 1996).

> the Court of a Magistrate as he shall think fit.
> (4) When a special finding under section 320 is made by the High Court it, shall report the case to the Permanent Secretary to the Office of the Prime Minister*[101] and order the person in respect of whom it has made such finding to be confined in a psychiatric facility or prison or suitable place of safe custody pending the order of the Permanent Secretary to the Office of the Prime Minister* under subsection (5).
> (5) Where any case has been reported to the Permanent Secretary to the Office of the Prime Minister* under subsection (2) or subsection (4) the Permanent Secretary to the Office of the Prime Minister* shall order the person in respect of whom a special finding has been made to be confined in a psychiatric facility or prison or other suitable place of safe custody during the pleasure of His Majesty the Sultan and Yang Di-Pertuan.

Prior to the amendments in the Brunei CPC in 2021, 'psychiatric facility' used to be termed as 'lunatic asylum'. The 'Permanent Secretary to the Office of the Prime Minister' used to be 'Minister'. This is because it was referring to the Minister of Law then. However, this was transferred from the Minister of Law to the Permanent Secretary, Office of the Prime Minister, with effect from 26th July 1983. Here, two medical officers visit the mentally ill

[101] 'Permanent Secretary to the Office of the Prime Minister' used to be 'Minister'. It was referring to the Minister of Law before the amendments in 2021.

offender in order to ascertain his state of mind, once at least in every 12 months, and they make a report to the Permanent Secretary to the Office of the Prime Minister.[102]

On the discharge of the person who is of unsound mind, Section 324 provides for the procedure to be followed. The section reads:

> **Procedure where person of unsound mind appears to be fit for discharge.**
>
> 324. (1) If it is made to appear to His Majesty the Sultan and Yang Di-Pertuan by a medical report under section 322 or otherwise that a person detained or confined under the provisions of section 247, 317 or 321, in this section referred to as "the patient", may have recovered his sanity and that his discharged may be warranted then, if His Majesty the Sultan and Yang Di-Pertuan is of the opinion that the discharge of the patient either unconditionally or under the provisions of section 325 and 325A is warranted, he shall proceed to order his discharge:
>
> Provided that if the patient is confined under the provisions of section 317, this section applies only if the Public Prosecutor shall have informed His Majesty the Sultan and Yang Di-Pertuan that he had declined to certify to the effect mentioned in section 323:
>
> Provided further that if the prisoner is confined under the provisions of section 247, His Majesty the Sultan and Yang Di-

[102] Section 322 of the Brunei Criminal Procedure Code 1951, Chapter 7.

> Pertuan may, *in lieu* of discharging the prisoner, order that he be transferred to a prison to serve the remainder of any sentence of imprisonment remaining unexpired and that it shall be a condition of any discharge under this subsection that the balance of any such sentence of imprisonment shall have been remitted or shall be remitted from a date not later than the date as from which the discharge is to take effect.
> (2) For the purpose of assisting him in forming an opinion under subsection (1), His Majesty the Sultan and Yang Di-Pertuan may in his discretion appoint a Commission consisting of a Judge or a magistrate and such number of suitable persons or other suitable persons, as he shall deem fit, to inquire formally into the question whether the discharge of the patient is warranted.
> (3) A commission appointed under subsection (2) shall sit in camera:
> Provided that the patient or his representative and the Attorney General or his representative shall have the right without leave to appear and be heard by the Commission.

Section 325A provides for the conditional discharge of person who has been of unsound mind:

Conditional discharge of person who has been of unsound mind.

325A. (1) Whenever the Permanent Secretary to the Office of the Prime Minister* orders the discharge of a person confined under the provisions of section 247, 317, 321 or under the provisions of this section, it shall be lawful for him to make such discharge conditional upon the compliance by the person with such conditions relating to the further medical observation, care control or supervision of that person as he may consider desirable in the interest of that person or in the public interest and the contravention of any such condition by such person shall constitute an offence punishable with a fine of $8,000.

(2) Upon conviction of that person of an offence under subsection (1), the Magistrate may, if he has any reason to believe that there has been a relapse in the mental condition of that person, *in lieu* of or in addition to any penalty under subsection (1), order that person to be confined in prison, hospital or in such place as the magistrate shall think fit.

(3) When any person is confined under the provisions of subsection (2), he shall be visited by two medical officers who shall make a report to the Permanent Secretary to the Office of the Prime Minister* on the state of mind of that person.

(4) Upon the receipt of report under subsection (3), the Permanent Secretary to the Office of the Prime Minister* may, if the

> medical officers so recommend, revoke the order by which that person was discharged whereupon that person shall be liable to be dealt with in like manner as if he had never been discharged or shall order that such person be discharged.

Section 324 of the Brunei Criminal Procedure Code states that for the discharge of an unsound patient (if he is already treated and safe to be released to the community), the court does not have the jurisdiction to decide whether to discharge the mentally ill offender or not. This is significant because once a decision is made under this clause, the mentally ill offender will be discharge with no supervisions. On the other hand, just like the United Kingdom, the unsound person may be discharged according to section 325A where the institution caring for the offender is of the opinion that the unsound person is fit in accordance to medical opinion. However, if there should be a relapse in the mental condition of a person, then the discharge order can be withdrawn. The courts have no control over the discharge of the offender. The court and the legal counsels have no role in determining the placement of the offender. Yet, it should be noted that the procedure for the mentally ill offender after trial in Brunei ends there. The UK which has a comprehensive procedure for the mentally ill offender in her 1983 Act. This includes those in the discretion on the welfare of the mentally ill offender, outside the courts. The 1983 Act has assisted in understanding how the mentally ill offender is to be treated after trial.

Summary of Findings

To summarise, the principles of sentencing consist of four elements – rehabilitation, deterrence, retribution and incapacitation. For rehabilitation, the criminal justice system

serves to treat offenders so that they can return to society. A mentally ill person requires a greater amount of care in treating him back to become behaved and productive citizen. On the other hand, deterrence can be divided into two: i) general deterrence and ii) specific deterrence – the first one is for the purpose of teaching the public not to commit such an offence whilst the latter to deter the same offender from recommitting the same offence. Specific deterrence is efficient where the defendant has conscious choice to commit crimes however could not control their impulse to commit theft. On the other hand, the element of general deterrence could and should be given considerably less weight if the offender was suffering from a mental disorder at the time of the commission of the offence. For retribution, this principle is for the purpose that the offender should be punished in a manner proportionate to the crime committed. Retribution can be divided into two: i) culpability-based retribution punishes criminals because criminals knew their actions were wrong and therefore blameworthy and ii) harm-based retribution punishes criminals based on the harm they caused. Under the culpability-based retribution, the offender must ensure that he did not choose to commit the crime because the offender must be morally blameworthy in order to deserve punishment. The offender does not deserve to be punished under the culpability-based theory of punishment unless he made conscious choice to commit the crime. On the other hand, the criminal justice system is the improper place for harm-based retribution because it is objective of tort law, not criminal law, to make a victim whole again. For incapacitation, it would be unjust to detain the offender longer than necessary, especially without knowledge of how he will respond to treatment overtime. The courts have resisted the temptation to order a more severe sentence solely for the purpose of incapacitation. It should be noted that the principles of sentencing may at times conflict and the court will have to prioritise one or more of them over the

others, especially when a mentally ill offender is involved. The presence of a mental disorder may be regarded as an aggravating or a mitigating factor depending on how the four principles are weighed and balanced. The existence of a mental disorder is always a relevant factor in the sentencing process, but its impact will vary considerably according to the circumstances of the individual case.

Further, this paper has also examined into the procedure for mentally ill offenders in the UK and Brunei after trial. In the UK, the procedure of the mentally ill offender after trial is governed by the Criminal Procedure (Insanity) Act 1964 Chapter 84 and the Mental Health Act 1983 Chapter 20. Similarly, in Brunei, the procedure for the mentally ill offender after trial is governed by the Brunei Criminal Procedure Code 1951 Chapter 7. Section 5 of the 1964 Act provides for the powers to deal with persons not guilty by reason of insanity or unfit to plead. The placement of the mentally ill offender after trial is guided by the 1983 Act which contains a comprehensive view of the procedure for the mentally ill offender including his treatment. This Act provides the procedure for the reception, care and treatment of mentally ill patients, the management of their property and other related matters. It includes the compulsory admission to hospital and guardianship, patients concerned in criminal proceedings or under sentence, consent to treatment, treatment of community patients not recalled to hospital, mental health review tribunals, removal and return of patients within the UK, management of property and affairs of patients and miscellaneous functions of local authorities and the secretary of state. However, similar to Brunei, a mentally ill offender can be sent to prison or a mental health hospital. Here, the discretion on the welfare of the defendant is upon the institution, not the courts, including their discharge.

The current sentencing guidance states the mental disorders, disabilities and impairments can affect culpability at sentencing or warrant mitigation of penalties where a sentence may be expected to have a disproportionate impact upon the mentally ill offender. There is a need to ensure that the sentence reflect culpability and the need for punishment. The courts have adopted a more flexible approach that allows sentencing courts to give greater weight to the offender's therapy and the protection of the public. The court usage of orders under the 1983 Act and mental health treatment requirements remains low. There is a lack of usage of the court orders in the 1983 Act. This suggests that powers to divert convicted offenders from imprisonment are being under-utilised. Three factors where mental disorders are relevant to proportionality and fairness:[103] i) there may be equality considerations arising from a mental disorder; ii) a mental disorder may mean that a punishment will have a harsher impact or weigh more heavily on a person with a mental disorder. A court is required to consider in terms of ensuring equality, fairness and proportionality; and iii) for sentencing purposes, culpability is a key consideration.

Conclusion

The Mental Health Act 1983 Chapter 20 will be a suitable guideline for Brunei's mentally ill offenders' placement and treatment. Although the Mental Health Act 1983 Chapter 20 does not provide any discretion on the part of the judiciary to direct the placement and treatment of the mentally ill offender and that the Act is under-utilised, the respective Act will be able to assist the general public in understanding the procedure for the mentally ill offender. The Act is structured

[103] O'Loughlin, A. et al (2022). *Mental Health and Sentencing: Literature Review.* Retrieved from https://www.scottishsentencingcouncil.org.uk/media/2211/20220331-mental-health-literature-review-final-as-published-20220512.pdf.

and informative as to the placement for mentally ill offenders. This Act provides the procedure for the reception, care and treatment of mentally ill disordered patients and the management of their property. With that said, the Mental Health Act 1983 Chapter 20 can help in guiding Brunei to produce her own Mental Health statute. In Brunei, the procedures for the mentally ill offenders are included in the Criminal Procedure Code 1951 Chapter 7 only, however, does not include on the management of the mentally ill offender. By having its very own mental health statute, this would clarify and manifests the importance of handling the mentally ill offenders in Brunei. This would also help the public to understand the procedure and the treatment of the mentally ill offenders receive in Brunei.

In conclusion, this paper has looked into the principles of sentencing and elaborated on rehabilitation, deterrence, retribution and incapacitation. Further, it has explored on the procedure for the placement of the mentally ill offender. The UK refers to the Criminal Procedure (Insanity) Act 1964, Chapter 84 and the Mental Health Act 1983 Chapter 20 whilst Brunei refers to the Criminal Procedure Code 1951 Chapter 7, for the procedure for the mentally ill offender after trial. Both jurisdictions have manifested the significance in helping, curing and treating the mentally ill rather than punishing them.

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