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Print ISSN: [3006-2497](#) Online ISSN: [3006-2500](#)Platform & Workflow by: [Open Journal Systems](#)<https://doi.org/10.5281/zenodo.17289836>**Insanity Defense in Criminal Law in Portugal****Ali Ajmal**

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faizarasool2005@gmail.com**Abstract**

This study analyzes the law defending insanity in Portugal. The doctrinal legal analysis research method was carried out to study the law of the insanity defense in Portugal. Article 20 of the Penal Code of Portugal 1982 deals with the law on the insanity defense in Portugal. An offender with a mental disorder cannot be declared guilty for his crime in Portugal. However, merely having a mental disorder cannot be considered as evidence of being legally insane; rather, there are certain legal parameters to determine the criminal responsibility of an offender specified by criminal law in Portugal. A mental health evaluation of an offender is mandatory to determine his legal insanity. The law in Portugal is recommended to be amended to make a standardized criterion of legal insanity. Moreover, the introduction and implementation of a standard format and procedure of mental health evaluation in Portugal is also recommended.

Keywords: Crime, Health, Insanity, Mental, Law

Introduction

An offender with a mental disorder cannot be punished for his criminal acts. Criminal law across the world does not punish an offender with a mental disorder. There are different legal arrangements in different jurisdictions to deal with offenders with mental disorders. In most jurisdictions, the defense of insanity is recognized as a complete defense against the criminal responsibility of an offender. In the jurisdictions where the defense of insanity is not recognized, the offenders with mental health issues are dealt with under the principle of fixing criminal responsibility (Neville, 2010). In a few jurisdictions, the offenders with mental health issues are considered guilty of their offences, but they are not sent to imprisonment; rather, they are admitted into a psychiatric facility (Ajmal et al., 2023a). Moreover, different jurisdictions adopted different standards of insanity defense, the most common of which is M'Naughten's Standard (Gostin, 1981).

The insanity defense is based on the abnormal mental health condition of an offender and consequent incapacities (Malatesti et al., 2020). The criminal law focuses on the mental health of an offender at the time of commission of the offense to determine his/her legal insanity (Pogrebin et al., 1986). The determination of legal insanity of an offender involves both law and mental health science, which made the determination of legal insanity a complex task (Carvalho et al., 2019) and somehow a controversial topic (Meynen, 2016). Moreover, the communication gaps between the law and mental health science made it further complicated (Eastman et al., 2012).

Different approaches deal with legal insanity differently. The legal approach focuses on the mental capacities of an offender and its consequences on the conduct of the offender, whereas the mental health science approach is more focused on the presence of a mental disorder. Moreover, there are certain limitations of mental health science to evaluate the mental incapacity of an offender retrospectively. These limitations of mental health science are one of the reasons, among others, the critics of the insanity defense propose against the procedure of the assessment of legal insanity of an offender (Steinert & Henking, 2022).

Literature Review

The doctrine of insanity defense is based on the basic principle of criminal law of fixing criminal responsibility to declare an offender guilty for his crime. A person who cannot be responsible for his criminal acts cannot be declared guilty, and an insane person cannot be responsible for his criminal acts (Neville, 2010). The jurisprudence on the defense of insanity evolved differently in different regions in the world due to the interplay of different factors, i.e., legal system, culture, and awareness about mental health. Although there are different criteria adopted in different jurisdictions to determine the legal insanity of offenders, there is a common principle that can be seen in all the jurisdictions: an offender with mental health issues, meeting criteria specified by relevant law, cannot be punished for his criminal acts (Ajmal et al., 2023b).

In most jurisdictions, offenders are considered mentally fit unless otherwise proved. An offender who takes the plea of insanity is supposed to prove that he met the criteria of legal insanity at the time when he committed the criminal act. Moreover, in most jurisdictions in the world, an offender can take the defense of insanity successfully in case of severe mental disturbance, while mild mental disturbances and conditions are dealt with under the doctrine of diminished responsibility (Johnston et al., 2023). The laws dealing with insanity defense and mental health across Europe vary, but there is one similarity in laws across Europe: the offenders with mental health issues are not sent to prison; rather, they are admitted to psychiatric facilities. Likewise, the law dealing with the insanity defense in Portugal shares many similarities and a few differences with the laws dealing with the insanity defense in other countries in Europe (Mitchell et al., 2008).

Method

The doctrinal legal analysis research method was employed to study the defense of insanity in criminal law in Portugal.

Analysis

Article 20 of the Penal Code of Portugal 1982 is the statutory provision that deals with the insanity defense in Portugal. An offender with compromised mental health cannot be

considered guilty of his criminal acts in Portugal. However, having a mental disorder cannot be considered evidence of being legally insane in Portugal; rather, there are certain parameters to determine the criminal responsibility and legal insanity of an offender specified in Portuguese criminal law (Antunes & Ceiro, 2023).

A Mentally Unstable Person Is Not Responsible for His Criminal Acts

An offender with a mental disorder cannot be declared responsible for his criminal acts in Portugal. The criminal law in Portugal gives immunity to the offenders with mental disorders from punishment. However, the mere presence of a mental disorder is not sufficient for such an immunity from punishment for an offender suffering from mental health issues (Carvalho et al., 2019). There are certain legal and mental health criteria based on which an offender with mental health issues can get immunity from punishment in Portugal. The criminal law in Portugal considers permanent mental health conditions as relevant in the determination of the legal insanity of an offender (Almeida et al., 2010). Moreover, the proven inability of an offender to be influenced by punishments can be considered an indication of his legal insanity in Portugal (Article 20 (3) of the Penal Code of Portugal, 1982).

Inability to Appreciate Unlawfulness of Acts or to Conform Conduct in Accordance with Law

Although the criminal law in Portugal does not consider a person with a mental disorder guilty of the crimes committed by him, there are certain legal and mental health criteria to determine the criminal responsibility of an offender in Portugal. An offender can only be exempted from punishment in Portugal if such an offender is unable to appreciate the unlawfulness of his actions and/or to conform his conduct in accordance with law at the time of the commission of an offense due to his abnormal mental health condition (Almeida et al., 2016). The criteria of determination of criminal responsibility in Portugal in the case of an offender with a mental disorder are like the criteria recognized by most of the jurisdictions across the world (Ajmal & Rasool, 2024a).

At the Time of the Commission of an Offense

Like other jurisdictions in the world, the criminal law in Portugal determines legal insanity of an offender with a mental disorder based on his mental disorder and consequent mental and behavioral incapacities at the time of commission of the offense (Almeida et al., 2010). The mental health of an offender at the time when an offense was committed is relevant to uphold the principle underlying the defense of insanity that an offender with a mental disorder cannot be declared guilty of an offense committed by him. Not just in Portugal but in all the jurisdictions in the world, to determine the criminal responsibility of an offender, the mental health of an offender at the time of the offense is relevant (Ajmal & Rasool, 2024b).

Significant Diminished Capacity to Appreciate Unlawfulness of Acts or to Conform Conduct in Accordance with Law

The criminal law in Portugal does not consider a person guilty for his criminal acts if his capacity to appreciate the unlawfulness of his actions or to conform his conduct in accordance with law is substantially diminished due to his abnormal mental health condition at the time of the commission of an offense (Article 20 (2) of the Penal Code of Portugal, 1982). The doctrine of diminished capacity is recognized in most of the jurisdictions in the world. However, diminished capacity of an offender does not absolve an offender of his criminal responsibility but

is considered at the stage of sentencing. The application of the principle of diminished capacity of an offender results in the awarding of a less severe punishment (Ajmal & Rasool, 2024c).

Mental Instability Caused by the Offender Himself with the Intention to Commit a Crime

Criminal law does not exclude a person from his criminal responsibility if such a person self-induced his mental incapacity with an intention to commit a crime (Ajmal et al., 2023d). Likewise, criminal responsibility in Portugal cannot be excluded in case an offender self-induced his abnormal mental health condition with an intention to commit a crime (Article 20 (4) of the Penal Code of Portugal, 1982). On this point, the criminal law in Portugal is like the laws in most of the jurisdictions. The jurisdictions across the world do not exclude an offender from his criminal responsibility due to his abnormal mental health state at the time of committing an offense if he took an intoxicant when he was sober (Ajmal et al., 2023c). The reason behind this is that when a person decided to take an intoxicant, he was supposed to know the effects of taking the intoxicant, and he took it willingly when he was sober. Such a person cannot take the plea of insanity in Portugal (Almeida et al., 2010).

Mental Health Evaluation of Offenders to Determine Legal Insanity in Portugal

To determine the defense of not guilty by reason of insanity in Portugal, a mental health evaluation of the offender is mandatory (Moreira et al., 2018). Mental health evaluations in Portugal are conducted by the mental health professionals ordered by the court. The mental health evaluation is conducted to ascertain the mental health condition of the offender taking the defense of not guilty by reason of insanity. Mental health professionals in Portugal submit their reports to the court with their recommendations, and it is the courts in Portugal that determine the legal insanity of the offender based on mental health evaluation reports. The determination of the dangerousness of the offender along with his mental incapacity at the time of commission of the crime is one of the fundamental features of mental health evaluation reports in Portugal. Moreover, the proposed treatment of the offender is also a part of the mental health assessment reports in Portugal (Moreira et al., 2024).

Compulsory Hospitalization of an Offender with a Mental Disorder in Portugal

An offender with mental health issues who is found not guilty by reason of insanity shall be admitted to a psychiatric facility instead of prison in Portugal (Almeida & Molodynski, 2016). The Portuguese Mental Health Act (Law No. 35/23), 2023, is the relevant statutory law that regulates the admission of a person with mental health issues into a psychiatric facility in Portugal. This act also lays out the conditions and procedure of the compulsory admission of people with mental disorders into a psychiatric facility. Under this act, a person with a mental disorder may be compulsorily hospitalized, based on the terms specified in law, if there is a threat posed due to their mental health conditions (The Portuguese Mental Health Act (Law No. 35/23), 2023).

The admission of a person with a mental disorder into a psychiatric facility and the treatment given to such a person must be strictly according to the relevant rules and regulations, and such a person must be given proper treatment for his mental disorder during his stay in a psychiatric facility (*Miranda Magro v. Portugal*, 2024). As far as the compulsory hospitalization of offenders with mental disorders in Portugal is concerned, an offender who is declared not guilty under Article 20 of the Penal Code of Portugal, 1982, and in the case of a danger posed to

the society and recidivism, the detention of such an offender in a psychiatric facility for security and treatment purposes is dealt with under Article 91 of the Penal Code of Portugal (1982).

After the new legislation in Portugal, hospitalization of a person can be considered an option in case outpatient treatment proves insufficient. The provision of compulsory hospitalization is there, but as an option, not as a rule, after the enactment of new legislation in Portugal (Moreira et al., 2024). Moreover, the court must decide about involuntary confinement of an offender with a mental disorder, but it must be based on the mental health evaluation of the offender and the recommendation of the qualified mental health professionals (Almeida & Molodynski, 2016).

Recommendations

The law on legal insanity in Portugal must be amended considering modern developments in jurisprudence, mental health, and behavioral sciences. By adopting an interdisciplinary approach, the matter of legal insanity can be better addressed. Interdisciplinary research must be encouraged, and there must be mandatory minimum training of mental health professionals in law and of legal professionals in mental health and behavioral sciences. In this regard, the courses of law must be made a mandatory part of the training of forensic mental health professionals, and courses on mental health must be taught to the legal professionals as a mandatory part of their professional training.

There is a shortage of trained forensic mental health professionals in Portugal. A study confirmed the shortage of mental health professionals in Portugal and highlighted a need to develop human resources (Mateus et al., 2012). It is recommended that the number of trained mental health professionals be increased in proportion to the requirement in Portugal. Moreover, the mental health professionals must be forensically trained to better meet the objectives of forensic mental health evaluations, and only forensically trained mental health professionals should be allowed to conduct mental health evaluations in Portugal.

The standard format and procedure of forensic mental health evaluation must be introduced in Portugal. A study found anomalies in forensic mental health evaluation reports in Portugal (Moreira et al., 2018). By introducing and implementing a standard format and procedure of forensic mental health evaluations in Portugal, the objectives of forensic mental health evaluation can better be met. Moreover, the introduction of uniform criteria of forensic mental health evaluation will bridge the communication gaps between mental health and legal professionals, which will consequently promote fairness of standard and procedure.

Conclusion

An offender with a mental disorder cannot be declared guilty for his crime in Portugal. Article 20 of the Penal Code of Portugal 1982 deals with the defense of insanity in Portugal. Having a mental disorder cannot be considered proof of being legally insane. There are certain legal criteria to determine the legal insanity of an offender in Portugal. A mental health evaluation of an offender is mandatory to determine his legal insanity. The criminal law in Portugal is recommended to be amended to make a standardized criterion of legal insanity. Moreover, there is a need to introduce a standard procedure of mental health evaluations of offenders for the determination of legal insanity, and interdisciplinary research of law, mental health, and behavioral sciences must be encouraged in Portugal.

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