THE DSM-5 AND THE ROLE OF PERSONALITY DISORDERS UNDER THE CRIMINAL LAW

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SUMMARY

The DSM-5 Diagnostic and Statistical Manual of Mental Disorders was published in 2013. This manual replaced and significantly revised the former DSM IV-TR, as it abolishes the Multi-Axial system that distinguished between personality and other disorders, which system had an impact on the disorders that were considered legally significant from those that were not. Owing to its recent publication, the DSM-5 Diagnostic and Statistical Manual of Mental Disorders, was not judicially considered in a criminal-law context. This article examines the role that personality disorders in the DSM-5 will play on the possible future of Criminal Law jurisprudential literature. Personality disorders are examined in the context of their classification, the definition of mental illness and pathological criminal incapacity. Possible solutions are suggested on how these mental disorders may be accommodated in the Criminal Law context.

1 INTRODUCTION

In the criminal justice system the most prevalent behaviour that is linked to a personality disorder is criminal and antisocial behaviour.[1] The latest revised Diagnostic and Statistical Manual of Mental Disorders (DSM-5) was published in 2013.[2] It provides the most recent diagnostic criteria containing an organizational structure of mental disorders.[3] The most significant

1 Newrith, Meux and Taylor *Personality Disorder & Serious Offending* (2006) 13.

2 American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders *DSM-5* (2013) (hereinafter "the *DSM-5*").

3 These disorders are *inter alia*: neurodevelopmental disorders, schizophrenia and other psychotic disorders, bipolar and related disorders, depressive disorders, anxiety disorders, obsessive-compulsive and related disorders, trauma- and stressor-related disorders, feeding and eating disorders, sexual dysfunctions, gender dysphoria; disruptive, impulse

difference arising from the DSM-5 is that it has abolished the Axis system, which *differentiated* between personality disorders and clinical conditions.[4] Criticism levied against the former multi-axial-evaluation system used in the DSM-IV-TR[5] was that its inaccuracies led to the destabilization of legal standards where courts relied on the distinction between Axis I disorders (mental illnesses) and Axis II disorders (personality disorders and mental retardation).[6]

The role of personality disorders under the law is therefore possibly considered an anathema amongst experts who are faced with the difficult task of determining whether a personality disorder may be classified as a mental illness for legal purposes or not.[7] There are views that personality disorders can be described as an "outgrowth" of pathological personality traits and are "endpoints from earlier mental disorders" and are also "not simply 'psychological' in nature, having their own specific pictures of genetic heritability and correlation with function of identified neurological substrates".[8]

Recent international jurisprudential literature has ventured to state that to exclude personality disorders categorically and generally from being categorized as mental illness is not justifiable as the reasons for doing so are arbitrary and not scientifically sound.[9] As Kinscherff states:[10]

> "Jurisprudentially, it is hazardous to have a per se rule that would exclude from an insanity defense impairments attributed to a personality disorder when an expert witness cannot reliably make that attribution as a matter of science or clinical experience. Attempting to do so puts the mental health

and conduct disorders, substance-related and addictive disorders, personality disorders, other mental disorders and medication-induced movement disorders at xiii–xxxiv. It is evident that there are a vast number of mental disorders identified in the *DSM-5*, however, the focus of this article is purely on personality disorders due to length constraints and also due to the fact that psychopathy would arguably fall under this category under antisocial-personality disorder (*DSM-5* 659), which position has been considered under the Criminal Law.

4 Personality disorders fell on Axis II of the former *DSM-IV-TR* whilst clinical conditions fell on Axis 1 of the multi-axial evaluation system. Axis 1 conditions could qualify as mental diseases; and Stork "A Competent Competency Standard: Should it Require a Mental Disease or Defect?" 2013 44 *Columbia Human Rights Review* 927 938.

5 American Psychiatric Association *Diagnostic and Statistical Manual 4ed Revised Text* (2000).

6 Stork 2013 44 *Columbia Human Rights Review* 939; and Sparr "Personality Disorders and Criminal Law: An International Perspective" 2009 37 *Journal of the American Academy of Psychiatry and the Law* 168 169.

7 The terms "mental illness" and "mental disease" are synonymous and will be used interchangeably throughout this article.

8 Kinscherff "Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act" 2010 38 *Journal of Law, Medicine & Ethics* 745 748. He cites Borderline Personality Disorder and Psychopathy as examples in this regard. Further practical complications are the fact that there must be co-occurring conditions in the form of dependence disorders, anxiety or mood disorders (751); and Sparr 37 2009 *Journal of the American Academy of Psychiatry and the Law* 168.

9 Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 749; Bonnie "Should a Personality Disorder Qualify as a Mental Disease in Insanity Adjudication? 2010 *Journal of Law, Medicine & Ethics* 760−761; Stork 2013 44 *Columbia Human Rights Review* 931; and Sparr 2009 37 *Journal of the American Academy of Psychiatry and the Law* 168.

10 Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 749.

> professional in a role as the gatekeeper of evidence in a context where it is not possible for that professional to do so in a scientifically reliable manner."

The focus of this article is to establish the role of personality disorders in the criminal-law context. In order to establish this, the article is divided into four parts. The first part will examine the DSM-5 classification and definition of mental disorders and personality disorders. The second part will examine psychopathy in a historical context as a form of antisocial-personality disorder and investigate how it has been dealt with under the criminal law, the third part will investigate personality disorders in the context of pathological criminal incapacity and will conclude with possible solutions on how personality disorders can be accommodated by the criminal justice system.

2 THE DSM-5 CLASSIFICATION AND DEFINITIONS OF MENTAL AND PERSONALITY DISORDERS

A personality disorder is defined as:

> "an enduring pattern of inner experience and behaviour that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment".[11]

According to the DSM-5 a mental disorder is defined as:[12]

> "a syndrome characterized by clinically significant disturbances in an individual's cognition, emotion regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behaviour (e.g. political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above".

One of the key points relating to the diagnostic criteria that can be highlighted in the context of personality disorders is that there must be an enduring pattern relating to thoughts or perception, which are inflexible and which "cause significant functional impairment or subjective distress."[13] An

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11 American Psychiatric Association *DSM-5* 645. The International Classification for Diseases – Classification of Mental and Behavioural Disorders, (hereinafter "ICD-10") by the World Health Organisation defines personality disorders as: "deeply ingrained and enduring behaviour patterns, manifesting themselves as inflexible responses to a broad range of personal and social situations" (156). The specific personality disorders are defined in the ICD-10 as: "A specific personality disorder is a severe disturbance in the characterological constitution and behavioural tendencies of the individual, usually involving several areas of the personality, and nearly always associated with considerable personal and social disruption" (157); Burchell *Principles of Criminal Law* (2013) 282−283; and Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* (2007) 791.

12 American Psychiatric Association *DSM-5* 20.

13 American Psychiatric Association *DSM-5* 647.

analysis of the definition and criteria of personality disorders suggests that a personality disorder is a behavioural pattern learnt and adjusted to over many years.[14] It describes a pattern of behaviour that is troublesome to someone other than the personality-disordered individual.[15]

The DSM-5 makes provision for 10 specific types of personality disorders as mental disorders. These disorders are narcissistic, avoidant, paranoid, schizoid, antisocial, schizotypal, borderline, histrionic, dependent, obsessive-compulsive and also mentions personality changes due to medical conditions or unspecified personality disorders.[16]

The problem behaviour in itself is, however, not conclusive for diagnosing a personality disorder as individuals with other mental disorders may also display problem behaviour.[17] It should be noted that the DSM-5[18] contains a cautionary provision stating that the clinical diagnosis of a DSM-5 disorder is primarily designed for clinical assessment, but that it can assist with legal decision-making when it has to be determined whether "the presence of a mental disorder is the predicate for a subsequent legal determination".[19] With the revision of the DSM-5, greater harmonization between the DSM-5 and the ICD-11 systems is envisaged than was the case with the diagnostics of the previous DSM-IV-TR and ICD-10, which did not always correlate.[20]

The DSM-5 makes provision for three groups of personality disorders.[21] Firstly, Cluster A-personality disorders which include odd, eccentric

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14 Skodol, Johnson, Cohen, Sneed and Crawford "Personality Disorder and Impaired Functioning from Adolescence to Adulthood" 2007 190 *British Journal of Psychiatry* 415 419 mention that many individuals who were diagnosed with personality disorders in adolescence, outgrow the personality disorder as they mature into early adulthood.

15 Newrith *et al Personality Disorder & Serious Offending* 14 point out that the difficulties that individuals with personality disorders experience in their personal relationships may, however, cause the individual and not just those around them to suffer.

16 645.

17 Newrith *et al Personality Disorder & Serious Offending* 13. The editors also point out that, for individuals who suffer from an Axis 1 disorder such as bipolar disorder or schizophrenia, behavioural disturbances are often associated with a relapse of this Axis 1 illness.

18 American Psychiatric Association *DSM-5*.

19 American Psychiatric Association *DSM-5* 25; and *McDonald v United States* 312 F.2d 847 (D.C Cir. 1962), where the court confirmed that what is considered a mental illness by psychiatrists for purposes of treatment may or may not be the same as mental illness or mental defect for the jury's purposes when having to determine criminal responsibility. According to Slovenko "The Role of Psychiatric Diagnosis in the Law" 2002 30 *Journal of Psychiatry and Law* 421 426, the court in this case would not have considered a personality defect as a mental illness. Mental illness for purposes of that trial was defined as an "abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behaviour controls". According to Slovenko, a personality defect does not meet these criteria; *Daubert v Merrel Dow Pharmaceuticals Inc* 61 USLW 4805, 113 S Ct. 2786 (1993), which case allows judges to include or exclude testimony by experts.

20 American Psychiatric Association *DSM-5* 11. The ICD-11 is expected to be completed in 2017. See World Health Organisation "Classifications" http://www.who.int/classifications/icd/revision/en/index (accessed 2014-02-19).

21 American Psychiatric Association *DSM-5* 646. The division of personality disorders into these three clusters has been criticized for the fact that they overlap and lack specificity. Newrith *et al Personality Disorder & Serious Offending* 11. Bloom and Schneider *Mental Disorder and the Law* (2006) 14–16.

personality disorders.[22] This group of disorders is characterized by "peculiar or eccentric behaviour" and "includes the paranoid, schizoid and schizotypal personality disorders".[23] These individuals display symptoms similar to those of individuals with schizophrenia, but they have not lost touch with reality as the case is with schizophrenia.[24] These individuals will often behave in an odd, aloof[25] and even inappropriate manner.[26] These disorders are often present in individuals with family members in the first degree that suffer from schizophrenia.[27]

Secondly, the dramatic and emotional personality disorders are grouped together in Cluster B.[28] This group includes the histrionic,[29] borderline,[30] narcissistic and antisocial personality disorders.[31] These disorders may have a genetic base.[32] This group of personality disorders is characterized by dramatic, impulsive and erratic[33] features as well as emotionally labile behaviour.[34] Individuals with these personality disorders tend to manipulate, are uncaring and hostile in social relationships and are prone to impulsive, even violent behaviour that exhibits little regard for the safety of themselves or others.[35] Individuals with these disorders often exaggerate their behaviour and may act in attention-seeking ways such as attempting to commit suicide for attention.[36] The one core feature of these disorders is their lack of concern for others.[37]

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22 American Psychiatric Association *DSM*-5 649–659.

23 Meyer "Personality Disorders" in Friedman (ed) *The Disorders* (2001) 311 and 313; and The American Psychiatric Association *DSM*-IV-TR 685.

24 Nolen-Hoeksema *Abnormal Psychology* (2011) 266.

25 Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* 791.

26 Nolen-Hoeksema *Abnormal Psychology* 266.

27 Nolen-Hoeksema *Abnormal Psychology* 271; and Sadock and Sadock *Synopsis of Psychiatry* 791.

28 American Psychiatric Association *DSM-5* 659−672.

29 Histrionic personality disorder often has a strong association with somatization disorder, Also known as Briquit's syndrome where physical symptoms are generated from a psychological condition. See Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* 791.

30 Patients with borderline personality disorders, often have a mood disorder as well and often have family members with depression or a family background of depression. Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* 791; Foti "Borderline Personality Disorder: Considerations for inclusion in the Massachusetts Parity List of 'Biological Based' Disorders" 2011 82 *Psychiatry Quarterly* 95 104 who suggests that borderline-personality disorder should be included as a "biologically based" disorder and puts forward scientific evidence that borderline-personality disorder is biologically based.

31 American Psychiatric Association *DSM-5* 659ff.

32 Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* 791.

33 *Ibid*.

34 Meyer in Friedman (ed) *The Disorders* 311.

35 Nolen-Hoeksema *Abnormal Psychology* 272; and see Bloom and Schneider *Mental Disorder and the Law* 200–201 for detail on the triggers of violence in individuals with borderline-personality disorder, narcissistic personality disorder and those with antisocial-personality disorder.

36 Nolen-Hoeksema *Abnormal Psychology* 266.

37 Nolen-Hoeksema *Abnormal Psychology* 272.

Cluster C constitutes the third cluster grouping the anxious-fearful personality disorders together.[38] This group is characterized by anxiety-avoidance[39] behaviours and chronic fearfulness and include disorders such as obsessive-compulsive, passive-aggressive, avoidant and dependent personality disorders.[40] These disorders may also have a genetic base.[41] These individuals have dysfunctional relationships with others as they are afraid of abandonment and criticism by others.[42] They have low self-confidence,[43] are nervous and generally unhappy.[44]

As far as personality disorders are concerned, jurisprudential literature is scarce and dogged by uncertainty.[45] To date only one of these disorders has been explored in significant depth in the South African criminal-law context and that is the antisocial personality under the cluster B classification of personality disorders. A person with antisocial-personality disorder is sometimes also referred to as a "psychopath".[46]

3 PSYCHOPATHY AND ANTISOCIAL PERSONALITY DISORDER

The phenomenon of psychopathy is placed at the extreme end of the spectrum of personality disorders. The construct of a "psychopath" in the 19th century meant someone who suffered from "moral" insanity, alluded to psychological damage or a failure in moral responsibility and referred more to psychosis then what is considered to be psychopathy in more recent times.[47] In the 20th century it has been regarded as synonymous with a personality disorder and is often described as antisocial-personality disorder, sociopathy or psychopathy as there is a considerable overlap between these

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38 American Psychiatric Association *DSM-5* 672–682.

39 Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* 791.

40 Meyer in Friedman (ed) *The Disorders* 311; and American Psychiatric Association *DSM-IV-RT* 685.

41 Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* 791.

42 Nolen-Hoeksema *Abnormal Psychology* 266.

43 *Ibid*.

44 Nolen-Hoeksema *Abnormal Psychology* 284.

45 The only recent Criminal Law textbook which alludes to personality disorders is Burchell *Principles of Criminal Law* 282–283 mentions only three types of personality disorders (anti-social, paranoid, schizoid) encountered under the former *DSM*-IV and which is briefly discussed under pathological criminal incapacity. The position is not taken further. One should also bear in mind that there are actually a number of personality disorders, as indicated earlier.

46 American Psychiatric Association *DSM-5* 659ff. Antisocial-personality disorder and psychopathy are often used interchangeably. The definition of psychopathic personality was recast in the *DSM*-III as the behavioural syndrome now known as antisocial-personality disorder. The *DSM*-1 listed psychopathic disorder as a mental illness but after concerns that those with psychopathy will escape their prison sentence and be sent to hospital instead it was decided that it shall no longer be deemed a mental illness. See Slovenko *Psychiatry and Criminal Culpability* (1995) 104–105.

47 Harris, Skilling and Rice "The Construct of Psychopathy" 2001 28 *Crime and Justice* 197 202−203.

disorders.[48] It would appear that there is no formal definition of psychopathy as controversy exists on whether to define it in terms of personality or as "abnormal behaviour" although many of the features would appear to relate to psychopathy as a personality disorder.[49] Harris *et al* mention that there are many medical conditions which may cause violent behaviour, but which do not incorporate psychopathy and suggest that there might be two distinct paths relating to criminality, that is, psychopathy which may not be pathological, and the other route could be distinctly linked to "developmental neuropathology".[50]

In fact, psychopathy is often used as a premise in many jurisdictions to impose longer sentences on offenders for the protection of society.[51] Psychopathy has been developed under South African law, and is therefore important for this discussion as far as its association with antisocial-personality disorder is concerned. What is important to note is that psychopathy has not been accepted as a ground for exemption of criminal liability, nor as a ground for a mitigation of sentence based on diminished accountability, and has also neither been accepted as a mental disease in law.[52] In the case of *S v Mnyanda*,[53] it was held that a psychopath does not lack criminal capacity. The Booysen Commission of Inquiry recommended that psychopathy should not be retained as a certifiable mental illness under mental-health legislation, and in fact recommended an indeterminate sentence of imprisonment and that certain such persons should be considered as dangerous offenders.[54] Section 268A of the Criminal and Procedural Act 51 of 1977 was created subsequent to this inquiry, which provides for the declaration of certain individuals, such as psychopaths, as dangerous criminals and prescribes indeterminate sentences of detention.[55]

High courts and regional courts may impose sentences in terms of section 286A of the Act and the court should be persuaded that the person

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48 American Psychiatric Association *DSM-5* 659; Ruffles "Diagnosing Evil in Australian Courts" 2004 11 *Psychiatry Psychology and Law* 113 115−117; Harris *et al* 2001 28 *Crime and Justice* 203 and 218; and Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 747.

49 Harris *et al* 2001 28 *Crime and Justice* 216, 225 and 227. It may be "viewed as a functional or psychological disorder with one or more unspecified physiological bases" (228).

50 Harris *et al* 2001 28 *Crime and Justice* 230.

51 Harris *et al* 2001 28 C*rime and Justice* 238, 299 and 300 fn 104. In Canada psychopaths are classified as dangerous offenders.

52 Burchell *Principles of Criminal Law* 288 and 288 n104; and Snyman *Criminal Law* (2008) 177.

53 1976 (2) SA 751 (A) 763E−G.

54 The Inquiry was instituted in order to provide findings and recommendations into "The continued inclusion of psychopathy as a certifiable mental illness and the handling of psychopathic and other violent offenders" in par 7.2.7. Psychopathy was included as a mental illness in the Mental Health Act of 1973. The Commission had to investigate the desirability of the continued inclusion of psychopathy as a certifiable mental illness in the Mental Health Act 1973 at the time. They were also required to investigate and recommend methods of controlling violent offenders and sex-offenders after their sentences have expired so as to ensure the safety of the public. See Cohen "Risk Assessment" in Tredoux, Foster, Allan, Cohen and Wassenaar (eds) *Psychology and Law* (2005) 254 265. See also Du Toit *et al Commentary on the Criminal Procedure Act* (2012) 1987 Service 49 s 286A 28-24C.

55 Hereinafter "the Act". An indefinite period of imprisonment is prescribed for such persons in s 286B. See *S v Bull* 2001 (2) SACR 674 (SCA) par 5.

"represents a danger to the physical or mental well-being of other persons and that the community should be protected against him".[56] According to Terblanche, the meaning of "dangerous" should be given its ordinary meaning as it is not defined in the Criminal Procedure Act. According to him it connotes a "risk of evil" and also provides that "the greater the risk and the greater the evil, the more likely the court will be to find the offender dangerous".[57] Furthermore he mentions that cognizance should be taken of the fact that "dangerousness" is neither a medical nor scientific term and that one therefore needs to consider under which circumstances such person would cause harm, as well as his "strength or persistence of his inclination to do" and also consider the likelihood that such person would face these circumstances in the future.[58]

From a comparative perspective, legislation in the United States of America, for example, pertaining to sexual predators, usually commands a determination of the dangerousness of such an offender, combined with a mental-health diagnosis such as an abnormality, illness or defect which *includes* a personality disorder.[59] There is a view that, regardless of whether psychopathy is a disorder or not, it is an "enduring aspect" which is not subject to change.[60]

In Australian courts, despite expert evidence and the fact that psychopathy or antisocial-personality disorder is recognized in the mental-health field, psychopaths are not regarded as mentally ill, as the courts are of the view that the accused is not deprived of control over his or her actions, nor deprived of the ability to understand the consequences of such actions.[61] It is therefore apparent that the functional impact of such disorder on the accused's ability to control or understand his actions is the critical aspect. The courts are loathe to recognize antisocial-personality disorder or psychopathy as a mental illness. The condition is also not regarded as a factor in mitigation of a sentence or diminished capacity. On the contrary, it is regarded as an aggravating circumstance, and will instead lead to a heavier sentence being imposed.[62]

In Canada, psychopathy has been regarded as a disease of the mind for the insanity defence and in England it has been recognized as a mental disorder falling within the scope of the Mental Health Act of 1983.[63] Under Canadian law, a person may raise a lack of criminal responsibility based on mental disorders, if such disorder is a disease of the mind and if such person could not distinguish between the nature and consequences of their

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56 Terblanche *Guide to Sentencing in South Africa* (2007) 241.

57 Terblanche *Guide to Sentencing in South Africa* 241; *S v Bull supra* par 17.

58 Terblanche *Guide to Sentencing in South Africa* 242; Harris *et al* 2001 28 *Crime and Justice* 238.

59 Harris *et al* 2001 28 *Crime and Justice* 239.

60 *Ibid*.

61 Ruffles 2004 11 *Psychiatry Psychology and Law* 116.

62 Ruffles 2004 11 *Psychiatry Psychology and Law* 116−117; and *R v Bowhay* [1998] NSWSC 782.

63 Harris *et al* 2001 28 *Crime and Justice* 236−237.

conduct.[64] A disease of the mind includes illnesses and disorders, but does not include conditions caused by external factors such as the use of drugs or alcohol or temporary conditions.[65] While expert witnesses in the field of mental-health care may be utilized in courts, the issue of what constitutes a disease of the mind remains a legal issue.[66]

In Canada, psychopaths are regarded as having criminal capacity to act, but it has been submitted by some Canadian authors that neuroscientific developments could have an impact on the sentencing of such persons in the future due to diminished criminal responsibility, attributable to "neurological abnormalities" which impact significantly on the person's behaviour.[67] It is argued that they are regarded as sane, because they appear to be aware of their actions and seem rational, and that psychopathy constitutes behaviour which exists autonomously from a mental disorder.[68] Their view is that if there are neurological defects that contribute significantly to the behaviour of the psychopath, and diminishes this person's responsibility, then such behaviour should be considered during the sentencing phase.[69] It should, however, be borne in mind that instead of regarding such behaviour as a mitigating factor, the courts in fact treat this as an aggravating factor.[70]

Of interest is that in the Canadian case of *R v Kjeldsen*, the courts did in fact recognize that psychopathy complies with the legal requirements for what constitutes a disease of the mind, but held that this factor is subject to the fact that the person must also have incapacity to appreciate the nature or consequences of their conduct.[71] This case is also important from a South African perspective. One should not lose sight of the fact that the test for pathological incapacity is a two-legged test and the classification of the mental illness is merely one component of this test.[72] It is submitted that the crux of this issue actually centres around the second leg of the test, namely, whether the accused has the ability to appreciate the nature or consequences of their actions. In other words, if a person has a disorder which could be classified as a mental illness it could be deemed irrelevant, if there is no functional impact or impairment relating to the second leg of the

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64 Freedman and Verdun-Jones "Blaming the Parts Instead of the Person: Understanding and Applying Neurobiological Factors Associated with Psychopathy" January 2010 *Canadian Journal of Criminology and Criminal Justice* 29 46.

65 *R v Cooper* (1980) 51 CCC (2d) 129 SCC par 144; and *R v Stone* (1999) 134 CCC (3d) 353 (SCC) par 195.

66 Freedman and Verdun-Jones January 2010 *Canadian Journal of Criminology and Criminal Justice* 46.

67 Freedman and Verdun-Jones January 2010 *Canadian Journal of Criminology and Criminal Justice* 47 and 48.

68 Freedman and Verdun-Jones January 2010 *Canadian Journal of Criminology and Criminal Justice* 47.

69 Freedman and Verdun-Jones January 2010 *Canadian Journal of Criminology and Criminal Justice* 48.

70 *Ibid*. S 718.1 of the Canadian Criminal Code mentions that the sentence should be proportionate to the measure of criminal responsibility of the offender as well as the seriousness of the offence.

71 (1981) 64 CCC (2d) 161 SCC. See also discussion in Freedman and Verdun-Jones January 2010 *Canadian Journal of Criminology and Criminal Justice* 46−47.

72 See par 4 1.

test for mental illness whereby such person can in fact appreciate the wrongfulness of their actions or act in accordance with such appreciation.

The scientific literature on psychopathy is undergoing change as far as the concept of psychopathy is concerned and it has been considered as being heritable "by genes that modulate some neuroanatomical structures and monoamine oxidase-type A (MAO) neurotransmitters".[73] It has also been submitted that psychopaths are unable to assess their actions based on "the moral standards of ordinary individuals" as they are not aware of these standards and that the former suffer from a dysfunction relating to their amygdala.[74] Kinscherff mentions that both psychopathy, as a form of Anti-Social Personality Disorder and Borderline Personality Disorder, have "anomalies in brain function" evident from neural-imaging studies and neuropsychological assessment.[75]

It now needs to be assessed what the impact of psychopathy is in the context of other personality disorders. To regard all persons with personality disorders as dangerous offenders subject to indeterminate sentencing would be legally unsound and hazardous to say the least.[76] Clearly a different approach is called for. The central issue is whether the criminal law can in fact accommodate the accused persons with personality disorders and if so, in what manner can this be accomplished? Two questions will now be explored.[77] Firstly, it will be assessed whether a personality disorder can be classified as a mental illness. Secondly, if not, it will be determined whether this fact can serve as a mitigating factor during sentencing.

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73 In other words, psychopathy may be inherited and the behaviour may be attributed to a certain extent by genetic factors. See Harris *et al* 2001 28 *Crime and Justice* 198.

74 The amygdala is part of the brain that regulates emotions. Freedman and Verdun-Jones January 2010 *Canadian Journal of Criminology and Criminal Justice* 36, 38 and 39. There is a body of research which also propounds that psychopaths have reduced dopamine and serotonin levels (42). The amygdala is a roughly almond-shaped mass of grey matter inside each cerebral hemisphere of the brain, involved with the experiencing of emotions. See Oxford English Dictionary http://www.oxforddictionaries.com/definition/english/amygdala?q=Amygdala (accessed 2014-08-12). See also Webster's New World Medical Dictionary's definition http://www.medterms.com/script/main/art.asp?articlekey=39203, where it is described as "A small oval structure in the temporal lobe of the brain that is closely connected to the hypothalamus, the hippocampus, and the cingulate gyrus. The amygdaloid nucleus is part of the olefactory and limbic systems and plays a role in the sense of smell, motivation, and emotional behavior."

75 Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 748.

76 Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 753.

77 An alternative to getting enmeshed in the debate over pathological criminal incapacity would be to perhaps consider personality disorders in the context of the defence of automatism under the conduct requirement. This is especially relevant with scientific developments as "psychologists now believe that consciousness is not binary, but consists of a single brain activity during which consciousness moves from the unconscious, to preconsciousness, to settled consciousness, therefore negating any sound legal basis for dividing behavior into voluntary and involuntary acts" (Mishler Esq "How Functional Magnetic Resonance Imaging (fMRI) Will Change the Legal Profession – A View from the United States of America" 2007 9 *Eur. J.L. Reform* 17). Should an accused successfully raise the defence of automatism any further discussion on the other requirements such as criminal capacity are rendered moot. As this aspect merits an entire discourse and lengthy article of its own, it will not be discussed here, as the focus of this article is specifically on personality disorders in the context of pathological criminal incapacity.

4 PERSONALITY DISORDERS IN THE CONTEXT OF THE CRIMINAL LAW

In terms of South African criminal law, the requirements for criminal liability are that there must be conduct (an act or omission), compliance with the definitional elements of the crime, unlawfulness and culpability.[78] Forming part of the requirement of culpability is (1) the concept of criminal capacity and (2) intention or negligence.[79] Criminal capacity refers to a person's mental ability to appreciate the wrongfulness of his/her conduct (cognitive function) and the ability to act in accordance with such appreciation (conative function).[80] The prosecution must prove all of these elements beyond a reasonable doubt, but where an accused person alleges a mental illness, the accused must prove on a balance of probabilities that he is suffering from a legally recognized mental illness or defect (pathological incapacity) which excludes his capacity to act.[81] Should a person successfully raise a defence of mental illness, a verdict of not guilty, by reason of mental illness may ensue and such person may be detained in a psychiatric hospital as a State Patient until such time as a judge in chambers orders his/her release.[82] The courts also have a discretion in this regard to release such person conditionally or unconditionally.[83] Section 78 (7) of the Criminal Procedure Act 51 of 1977 provides for diminished capacity where a person is criminally responsible, but that due to mental illness or mental defects the diminished responsibility may be taken into account during the sentencing.[84] In order to determine where personality disorders fall within the continuum of the criminal law, pathological criminal incapacity needs to be examined, which includes the concept of mental illness.

4 1 Pathological criminal incapacity

Prior to the Criminal Procedure Act 51 of 1977, the defence of insanity was mainly founded upon the M'Naghten rules.[85] The M'Naghten rules were adopted in South Africa and developed to include an irresistible impulse test, as the rules did not incorporate a situation where an accused was able to

78 Snyman *Criminal Law* 30–32; and Burchell *Principles of Criminal Law* 47–59.

79 Snyman *Criminal Law* 159.

80 Snyman *Criminal Law* 160; and Burchell *Principles of Criminal Law* 53.

81 Burchell *Principles of Criminal Law* 53–54. S 78(1A) of the Criminal Procedure Act 51 of 1977 presumes that everybody is presumed not to suffer from a mental illness of defect. There are views that the onus on the accused to raise mental illness may in fact be unconstitutional. Snyman *Criminal Law* 175; and Burchell *Principles of Criminal Law* 292–293. A mental defect refers to an abnormally low intellect which dispossesses a person of his/her cognitive and conative functions (279).

82 S 42 of the Mental Health Care Act 17 of 2002.

83 S 78(6)(a) and (b)1(i) and (ii) of the Criminal Procedure Act 51 of 1977 (as amended by the Criminal Matters Amendment Act 68 of 1998).

84 Burchell argues that this plea is not really necessary as judges may deviate from imposing minimum sentences imposed by legislation in the case of both pathological and non-pathological conditions if "substantial and compelling reasons" are present to do so. Burchell *Principles of Criminal Law* 301.

85 S 77−79. See also the *M'Naghten's* Case [1843] 10 Clark and Finnelly 200, 8 ER 718; and Snyman *Criminal Law* 170.

understand the nature of his act, but who proceeded with the act in any event "under the compulsion of his mental illness" [86] A key issue in terms of these rules was whether the accused had a "disease of the mind" not attributable to external factors, such as drugs or alcohol.[87]

The Rumpff Commission Inquiry in 1967 recommended that the law should be amended and that the issue of insanity or mental disorders should be considered under the test for criminal capacity.[88] The M'Naghten rules were replaced by the provisions in the Criminal Procedure Act which currently regulates the test for criminal capacity.[89] It states in section 78(1) that:

> "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 wrongfulness of his or her act or omission; or
>
> (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act."

From an analysis of these provisions, it is evident that there is both a pathological and psychological component present in the test. The pathological component deals with the mental illness or mental defect, while the psychological component deals with the general test for criminal capacity, with its cognitive and conative functions.[90]

It is clear that even if a person suffers from a mental illness or defect, such illness in itself will be insufficient to prove the absence of criminal responsibility, as an additional investigation into the cognitive or conative leg identified above, in the test for criminal capacity, must also be undertaken.[91] Of importance, is that the test is a two-pronged test which hinges not only on diagnostics, but also the impact that such illness has on the accused's criminal capacity.

Furthermore the Act only refers to mental illness and mental defects and not personality disorders. A diagnosis of a mental illness[92] will render an accused not criminally liable.[93] If the requirements are met, such a person

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86 Burchell *Principles of Criminal Law* 272; *Koortz* 1953 (1) SA 371 (A) 375; *Makete* 1971 (4) SA 214 (T) 215; and Van Oosten "The Insanity Defence: Its Place and Role in the Criminal Law" 1990 1 *SACJ* 1.

87 Le Roux and Stevens "Pathological Criminal Incapacity and the Conceptual Interface Between Law and Medicine" 2012 25(1) *SACJ* 44 57−58.

88 The Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters RP 69/1967; and Burchell *Principles of Criminal Law* 53.

89 51 of 1977.

90 S 78(1)(a) and (b) sets out the two prongs for criminal capacity. Also see Slovenko 2002 30 *Journal of Psychiatry and Law* 424, where he points out that the inability to appreciate the consequences of one's action does not establish mental illness, but such inability must be a consequence of the mental illness the relevant individual is suffering from.

91 Snyman *Criminal Law* 172.

92 The diagnosis *per se* will not excuse a person from criminal liability. In addition to that, it has to be proved that the illness had an effect on, *inter alia*, the person's cognitive abilities. O'Donohue and Levensky *Handbook of Forensic Psychology* (2004) 167.

93 Bloom and Schneider *Mental Disorder and the Law* 123 state that it is uncommon in Canada for personality disorders to be the basis of a finding of not criminally responsible due to mental illness. Kaliski *Psycholegal Assessment in South Africa* (2006) 244 opines

will be absolved from criminal liability.[94] The accused will be found not guilty by reason of mental illness[95] as such person will lack criminal capacity as a result of the mental illness and can be detained in a psychiatric institution in terms of the Mental Health Care Act.[96] Alternatively, where a mental illness or mental defect is of such a nature that the person is found to have been criminally responsible at the time of commission of the offence, but his/her capacity to distinguish between right and wrong or to act accordingly was diminished, such person may be found criminally liable, but this factor could be considered in the sentencing phase instead.[97]

4 2 The legal definition of "mental illness"

The legislature did not define the term "mental illness" in the Criminal Procedure Act, leaving it to the courts to develop a legal definition of the term.[98] The problem which arises, is that the concepts of mental illness or mental defects (pathological incapacity) are legal concepts which are not precise scientific concepts, as there may be an overlap with the psychiatric concepts[99] A mental defect should be distinguished from a mental illness as the former refers to an extremely low intellect, whereas the latter is envisaged as a "disease of the mind".[100] Case law is indicative of the fact that a mental illness should involve a pathological disturbance, which is the result of a recognizable endogenous disease and not due to external *stimuli* such as drugs or provocation.[101] It is this lack of precise definition, which

that a diagnosis of a personality disorder alone will not result in an accused being found "incompetent", meaning, not criminally responsible. Also see O'Donohue and Levensky *Handbook of Forensic Psychology* 161, where it is observed that there is an unwillingness to use personality disorders (antisocial-personality disorder in particular) as a basis for the insanity defence.

94 Peay "Personality Disorder and the Law: Some Awkward Questions" 2011 18 *Philosophy, Psychiatry & Psychology* 231 232 states that persons with personality disorders are "largely judged by the law to have capacity" and do not qualify for the "special protection afforded to those found to be insane".

95 S 78(6) of the Criminal Procedure Act 51 of 1977.

96 S 42 of the Mental Health Care Act 17 of 2002. Also see s 32 of the Act that provides for the treatment of involuntary mental health-care users. The Criminal Procedure Act 51 of 1977 provides in s 78(6) that an accused, if found to have committed an offence of a violent nature, can be detained in a psychiatric hospital until a judge in chambers orders his/her release. Where a non-violent crime has been committed, the court may order that the accused be treated as an involuntary mental health-care user in terms of the Mental Health Care Act. S 78(6) also makes provision for the release of the accused on conditions or for his unconditional release.

97 Hoctor "Recent Cases: General Principles and Specific Crimes" 2009 22 *SACJ* 248; and *S v Marx* (2009) 1 All SA 499 (E).

98 Van Oosten "Non-pathological Criminal Incapacity Versus Pathological Incapacity" 1993 6 *SACJ* 127 132. Le Roux and Stevens 2012 25(1) *SACJ* 44 49. See their discussion of the meaning of mental illness in terms of the South African Mental Health Care Act 17 of 2002 which defines a mental illness in terms of diagnostics made by a mental health-care practitioner, but which is not binding on the criminal law (50).

99 Burchell *Principles of Criminal Law* 279–280.

100 Burchell *Principles of Criminal Law* 278–279; and Snyman *Criminal Law* 171.

101 *Stellmacher* 1983 (2) SA 181 (SWA) 187H; Burchell *Principles of Criminal Law* 276; and Van Oosten 1990 *SACJ* 6 who mentions that the term "mental illness" has not been legislatively defined and while it is a matter of expert evidence, it is qualified as the court

creates difficulties in the sense of whether to classify a personality disorder as a pathological condition or not. While it has been shown that there are a number of mental disorders which require expert evidence, the determination of whether such mental disorders comply with the insanity defence remains "a legal prerogative".[102]

Furthermore should an individual meet the DSM-5 criteria it is not necessarily indicative of the accused's measure of control over his behaviour.[103] The key issue would be whether the identified psychiatric illnesses also comply with the *legal* definition of pathological criminal incapacity.

4 3 Problems with expert testimony

What constitutes a mental illness or defect is immersed in controversy and is usually determined with the assistance of expert evidence.[104] Personalities are mostly examined by applying two complementary methods, namely, psychometric tests[105] and clinical interviewing of the relevant individual.[106] The findings of the psychometric tests should not be considered in isolation, but should be considered together with the impression that the examiner gained of the individual during the clinical interview.[107] One of the motivations for considering these two findings together, is to factor in the possibility of malingering by the examinee, as the purpose of a particular question in a test can sometimes be anticipated by the examinee.[108]

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needs to make the final decision on the issue (6). See also Le Roux and Stevens 2012 25(1) *SACJ* 44 48 49.

102 Le Roux and Stevens 2012 25(1) *SACJ* 64.

103 Burchell *Principles of Criminal Law* 275 and fn26; and see the former American Psychiatric Association *DSM*-IV-TR xxxiii.

104 The USA decision of *Daubert v Merrell Dow Pharmaceuticals Inc* 1993 509 U.S. 579 is a leading case which delineates the parameters for expert testimony. See "*Daubert v. Merrell Dow Pharmaceuticals, Inc. Requiem for Frye*: The Supreme Court Lays to Rest the Common Law Standard for Admitting Scientific Evidence in the Federal Courts" 1994 29 *New England LR* 93−128; Van Oosten 1993 *SACJ* 131. In a more recent article, Le Roux and Stevens examine the "conceptual interface between the law and medicine" relating to the defence of pathological criminal incapacity, that is, "mental illness" and "mental defects". See Le Roux and Stevens 2012 25(1) *SACJ* 44 in this regard. They suggest a cross dimensional approach which places medicine and law on an equal footing (64–65); and *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) 774 the "cross-dimensional" nature of law and medicine is also illustrated by Satchwell J who mentions that the evidence of experts is permissible as long as it is not elevated above the court's capabilities and that the function of the court should, therefore, not be usurped.

105 There are many personality tests that are used to identify personality types. The most acclaimed tests are the Minnesota Multiphasic Personality Inventory and the Millon Clinical Multiaxial Inventory. See Kaliski *Psycholegal Assessment in South Africa* 238.

106 Kaliski *Psycholegal Assessment in South Africa* 238. Taking a thorough history of the individual is particularly important in determining if the feelings and thoughts of the individual at the given time have been present since adolescence (which would confirm that it is a personality disorder as the thoughts or feelings manifest in various aspects of the individual's life) or if the thoughts and feelings are caused by a mental illness "with a specified onset" after "a period of normal functioning". See Newrith *et al Personality Disorder & Serious Offending* 11.

107 Kaliski *Psycholegal Assessment in South Africa* 238.

108 Kaliski *Psycholegal Assessment in South Africa* 239.

The diagnosing of personality disorders are not without challenges, as the boundaries are not clear-cut between mental illnesses and personality disorders, which compounds the problem of accurate diagnostics.[109] The symptoms of personality disorders may also overlap with other disorders, which are in fact mental illnesses, which in turn complicate an exact diagnosis.

The following challenges have been identified: Firstly, the diagnostic criteria for a particular personality disorder, as set out in the DSM, more often than not overlap with the diagnostic criteria of another disorder, making exact diagnosis difficult.[110] Secondly, diagnosing is particularly problematic where the examinee is suffering from a psychiatric disorder as the examinee might incorrectly appear to have a personality disorder when, in actual fact, it is rather symptoms of their psychiatric disorder that are displayed.[111] Thirdly, the clinician often requires objective information about the patient in order to make a diagnosis, such as information on how the individual treats others and how stable his/her behaviour has been since childhood.[112] The information is difficult to obtain and the clinician is often left to rely on what the patient discloses during the interview referred to above. Fourthly, personality disorders are seen as constant characteristics of an individual.[113] Studies have, however, shown that the number of symptoms and the severity thereof vary over time, especially if the patient also suffers from another acute disorder such as major depression.[114] Lastly, diagnostic criteria in the two diagnostic manuals used across the world, namely the former DSM-IV compiled by Psychiatrists in the United States of America and the International Classification for Diseases – Classification of Mental and Behavioural Disorders[115] by the World Health Organisation did not always correlate. The effect hereof would be that the diagnosis of a person may differ, depending on the diagnostic manual that was used.[116] Research

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109 See Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 748 and further for his criticism of the categorical diagnostic approach followed in the *DSM*-IV-TR, while he submits that mental disorders are better understood as a dimensional, rather than a categorical construct. Also see Ulrich and Marneros "Dimensions of Personality Disorders in Offenders" 2004 14 *Criminal Behaviour and Mental Health* 202–213 for the factors considered in a dimensional approach to personality disorders. See also Johnson and Elbogen "Personality Disorders at the Interface of Psychiatry and the Law: Legal Use and Clinical Classification" 2013 15 *Dialogues on Clinical Neuroscience* 203 209−210. Also http://www.ncbi.nlm.nih.gov/pmc/articles (accessed 31-03-2014)

110 Kaliski *Psycholegal Assessment in South Africa* 244.

111 Kaliski *Psycholegal Assessment in South Africa* 243–244.

112 Newrith *et al Personality Disorder & Serious Offending* 11.

113 Nolen-Hoeksema *Abnormal Psychology* 289.

114 Where depression presents with a personality disorder, the symptoms of the personality disorder are often more prominent when the depression is more severe and less prominent when the depression is less severe. Nolen-Hoeksema *Abnormal Psychology* 289.

115 (1992). Hereinafter "the ICD-10". This is the official classification system used in Europe. Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* 284.

116 See, eg, the criteria relating to Paranoid Personality disorder contained in the American Psychiatric Association DSM-5 649 and compare it with Paranoid Personality Disorder as set out in the ICD-10 ch V. As these are two separate classification systems, used for different purposes and in different countries they do not always correlate. The DSM manuals were formulated by the American Psychiatric Association specifically for the diagnosis of mental disorders, whereas the ICD is a World Health Organisation

has shown that personality disorders are being diagnosed unreliably in general clinical practice and have little clinician-to-clinician reliability.[117] The aim of the revised DSM-5 was to harmonize this system with the ICD system with the use of a shared organizational framework.[118]

While psychiatrists, in fact, are ambivalent on this issue and have a tendency not to regard personality disorders as mental illnesses,[119] the British Government has, for example, expressed an intention to include personality disorders and psychopathy, as well as mental illnesses under the ambits of their definition of mental illness.[120] Furthermore, both diagnostic manuals, namely the DSM-5[121] and the ICD-10,[122] include personality disorders in their classification of mental disorders.[123] Presently, controversy exists regarding whether "disorder" and "illness" are scientific terms, socio-political terms, a combination of the two or ostensible terms.[124] The key issue is seemingly whether a personality disorder responds to treatment, which would accord with a mental illness and not merely to a disciplined environment.[125] Even the World Health Organisation is hesitant to define

classification of diseases which also incorporates mental disorders. See an article by the American Psychological Association "ICD v DSM" 2009 40 *Monitor on Psychology* 63 where further differences between these two diagnostic manuals are explained. Also http://www.apa.org/monitor/2009/10/icd-dsm.aspx (accessed 2014-08-21).

117 Sparr 2009 37 *Journal of the American Academy of Psychiatry and the Law* 169.

118 American Psychiatric Association *DSM-5* 11.

119 *Ibid*. See further Slovenko "Commentary: Personality disorders and Criminal Law" 2009 37 *Journal of the American Academy of Psychiatry and the Law* 182, where it is confirmed that contemporary British psychiatrists do not regard personality disorders as mental (psychiatric) illnesses.

120 Kendell "The Distinction between Personality Disorder and Mental Illness" 2002 *British Journal of Psychiatry* 110.

121 This is the official psychiatric coding system used in the United States of America. Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* 284.

122 This is the official classification system used in Europe. Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* 284.

123 See Kendell 2002 *British Journal of Psychiatry* 113. Psychopathy, eg, was no longer classified as a mental illness when the *DSM*-III was published. It was, however, included in the *DSM*-III as Antisocial-personality disorder and Slovenko points out that it is paradoxical to state that antisocial-personality disorder is not a mental illness, but till then still include it in the Diagnostic manual (*DSM*-III at the time). See Slovenko 2009 37 *Journal of the American Academy of Psychiatry and the Law* 184. The courts in South Africa have also not viewed antisocial-personality disorder as a mental illness, mainly because such a condition was not certifiable in terms of the Mental Health Legislation at the time. See *R v Kennedy* 1951 (4) SA 431 (A); *R v Van Zell* 1953 (3) SA 303 (A); *R v Roberts* 1957 (4) SA 265 (A); and *S v Mnyanda supra*. In 1996 all references to psychopathy were removed from South African legislation. The Criminal Procedure Act 51 of 1977 was amended to make provision for the incarceration of "dangerous criminals". Kaliski *Psycholegal Assessment in South Africa* 247. It is important to note that those with psychopathy will be assessed under the provisions for dangerous criminals in the Criminal Procedure Act 51 of 1977 and not the Mental Health Care Act 17 of 2002.

124 Kendell 2002 *British Journal of Psychiatry* 111–113. It is mentioned in the previous *DSM*-IV-TR xxi that "the concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations".

125 Kendell 2002 *British Journal of Psychiatry* 114. Foti 2011 82 *Psychiatry Quarterly* 101, points out that Borderline Personality Disorder is treatable with various types of psychotherapy and submits that the treatment of Borderline Personality Disorder results in the improvement of other co-existing disorders such as major depression. Persons with personality disorders are, however, far more likely to refuse psychiatric treatment than

these terms and simply states that a "disorder is not an exact term, but it is used here to imply the existence of a clinically recognizable set of symptoms or behaviour, associated in most cases with distress and with interference with personal functions".[126] It is clear that there has been no consensus on the medical definition of either personality disorders or mental illness.[127] With the publication of the recent DSM-5, which has abolished the Multi-Axial system, which distinguished between personality disorders and other mental disorders, personality disorders are included among the listing of all other mental disorders which may or may not lead to more attention being paid to personality disorders.[128]

5 CONCLUSION

While clinicians use the DSM criteria in order to diagnose mental illness, and although there has been a movement towards a dimensional as opposed to a categorical approach, one should still bear in mind that such diagnosis does not necessarily comply with legal requirements for what is considered a mental illness.[129] Some of the solutions for addressing the issues presented by personality disorders could be to consider the accused's criminogenic needs, the legally functional impact of such behaviour, the introduction of mental-health courts to specifically deal with mentally disordered individuals or substantive legislative reform. These four proposals will be discussed in turn.

5 1 *Criminogenic needs*: Instead of the courts focusing on "categorical judgments" and whether an accused fits a particular label or not, such as being "evil", a psychopath or as having antisocial-personality disorder it is suggested that the court should focus on the person's "criminogenic needs".[130] In so doing, a formula could be employed, which focuses on

patients with some Axis I disorders such as depressive disorder and anxiety disorder (Sadock and Sadock *Kaplan & Sadock's Synopsis of Psychiatry Behavioral Sciences/Clinical Psychiatry* 791). See further Davison "Presenting Characteristics of Personality Disorder" in Newrith, Meux and Taylor (eds) *Personality Disorder & Serious Offending* (2006) 9 who points out that individuals with personality disorders are among the "heaviest users of mental health services", but they often do not complete treatment.

126 See World Health Organisation *ICD-10* 11; and Kendell 2002 *British Journal of Psychiatry* 111.

127 Kendell 2002 *British Journal of Psychiatry* 111; Sparr 2009 37 *Journal of the American Academy of Psychiatry and the Law* 168 points out (168 and 169) that clinicians often find it difficult to arrive at a definition of mental illness or defect because of the expectations for the definition to meet the medical criteria and "comply with the legal concepts of responsibility and culpability".

128 American Psychiatric Association *DSM-5* Section III 645ff. Johnson and Elbogen 2013 15 *Dialogues on Clinical Neuroscience* 205.

129 Johnson and Elbogen 2013 15 *Dialogues on Clinical Neuroscience* 204.

130 Criminogenic needs refer to certain risk factors relating to attributes of a perpetrator which can be changed. "Personality", "associates" and "antisocial" are examples of relevant criminogenic needs discussed in Flores, Russell, Latessa and Travis "Evidence of Professionalism or Quackery: Measuring Practitioner Awareness of Risk/need Factors and Effective Treatment Strategies" 2005 69 *Fed Prob* 910. It is often discussed in the context of psychopathy, but due to the links with antisocial-personality disorder could also perhaps be extended for use for the rest of the categories of relevant personality disorders. Ruffles 2004 11 *Psychiatry Psychology and Law* 116 120. Harris *et al* 2001 28 *Crime and Justice* 234. Eg, Hare has formulated a checklist to determine whether a person is a psychopath or

the propensity of the accused to be a future risk of recidivism, based on the seriousness and number of the criminogenic needs. The courts would then be in a better position to impose an appropriate sentence, relevant to the accused and to society.[131] It has been suggested that a criminogenic-needs-based approach might be a better solution, or else a person with a different personality disorder, such as obsessive-compulsive disorder for example, may also face an extended sentence if all personality disorders are categorized and treated in the same manner as psychopathy, which is an untenable proposition.

5 2 *Legally relevant functional impact*: Personality disorders are often present in persons with other mental disorders and neurocognitive science indicates that the behaviours associated with psychiatric disorders and personality disorders have been affected by experiences which have had neurobiological consequences.[132] Ultimately, what will form key importance is the "legally relevant functional impact" and not the "diagnostic origin" of such a personality disorder.[133] In other words, it is preferable for experts to present a "functional assessment" of the nature of the disorder and the impact on whether a person can distinguish between right and wrong or can act accordingly, in terms of the test for pathological criminal incapacity. The courts can then make a finding on whether such impact is sufficient for a finding of a lack of criminal capacity or for mitigation purposes.[134]

5 3 *Mental health courts*:[135] These courts primarily aim to divert the mentally ill offender away from the criminal justice system and to respond to the illness that may have been the underlying reason for the criminal behaviour.[136] The underlying theory applied in all of these courts, is therapeutic jurisprudence.[137] Specialized courts, such as mental health courts, came into existence as it became evident that criminal courts were ill equipped to deal with the complex issues that mentally ill offenders present to the criminal justice system.[138] A mental health court is a problem-solving court where creative solutions are given for cases where social, human and legal problems interact.[139] The judge, prosecutor, legal representative of the accused and other court personnel that form part of the multidisciplinary team that operates

not to predict risk. Hare "Psychopathy: Assessment and Forensic Implications" 2009 54 *Canadian Journal of Psychiatry* 791−802.

131 Ruffles 2004 11 *Psychiatry Psychology and Law* 119.

132 Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 747, 748 and 750. Anomalies in brain function (such as serotonin dysregulation) have been identified in persons who have personality disorders; and Stork 2013 44 *Columbia Human Rights Review* 952.

133 Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 750.

134 Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 754.

135 Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 746.

136 Rich "The Path of Mentally Ill Offenders" 2009 36 *Fordham Urban LJ* 89 99. Some Mental Health Court models, however, do not accept defendants if their only diagnosis is that of a personality disorder.

137 Schneider, Bloom and Heerema *Mental Health Courts* (2007) 39.

138 Frailing "How Mental Health Courts Function: Outcomes and Observations" 2010 33 *International Journal of Law and Psychiatry* 207.

139 Fisher "Building Trust and Managing Risk: A Look at a Felony Mental Health Court" 2005 11 *Psychology, Public Policy and Law* 587 589.

within the court, are all specially trained and have knowledge of the public mental health care system.[140] If an accused is eligible to be diverted to the mental health court, such person will undergo a court-monitored treatment programme aimed at treating the illness (for example, ensuring that the accused takes his/her medication) and at reducing recidivism. Most mental health courts, however, allow only persons accused of minor offences into the court programme.[141]

5 4 *Substantive legislative reform:* It is suggested that substantive legislative reform could be utilized to narrow down the definition of mental incapacity by a delineation of the scope of the type of disorders that may be included. A possible reduction of the type of mental disorders from the ambit of the definition of mental illness could be considered.[142] Arguably, only serious disorders could be considered for inclusion.[143] Kinscherff is of the view that personality disorders could be considered in the context of their associated impairments, as their exclusion cannot be scientifically justified.[144] With the abolition of the axis system in the recent DSM-5 it becomes even more crucial for the law to reach clarity on personality disorders.[145] In the United States of America, recent

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[140] Watson, Lanraham, Luchins and Lurigio "Mental Health Courts and the Complex Issue of Mentally Ill Offenders" 2001 52 *Psychiatric Services* 477; and Rich 2009 36 *Fordham Urban LJ* 99.

[141] See the discussion of the inner-workings of the Brooklyn Mental Health Court as discussed by Baker "Special Treatment: A One-of-a-kind Court May Offer the Best Hope for Steering Non-violent Mentally Ill Defendants into Care Instead of Jail" 1998 4 *ABA Journal* 20−22, where specific cases of mentally ill accused persons who were diverted to this court, are discussed.

[142] See Krug "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation" 2000 94 *American Journal of International Law* 317 324. See Krug 2000 94 *American Journal of International Law* 324 for possible criticism that can be levied against such measures. He states that: "Such close linkage between a legal test and specific diagnostic criteria has been criticized because it fails to acknowledge the on-going redefinition of mental illness or disorders; the lack of precision in the diagnostic process; and the unique nature of each individual's mental state." The states of Georgia, Maine and Oregon have, by way of legislation, excluded personality disorders from the definition of mental illness or mental defect. Slovenko 2002 30 *Journal of Psychiatry and Law* 427. Also see Bonnie 2010 *Journal of Law Medicine and Ethics* 762. He proposes that even in states where personality disorders have been statutorily excluded from the definition of mental illness, a person with a personality disorder can still be found not criminally responsible due to mental illness if evidence shows that the person for instance had a psychotic episode at the time of the commission of the offence which affected his/her ability to appreciate the nature or consequences of his/her actions. Bonnie states that courts in such an instance would possibly ignore the statutory exclusion and find the person not criminally responsible due to mental illness based on the fact that the psychotic episode itself constituted the "mental disease" for purposes of the insanity defence (761). See also possible criticism by Le Roux and Stevens 2012 25(1) *SACJ* 54−55 of broad versus narrow definitions of mental illness and for possible guidelines that could be considered in the contexts of mental illness.

[143] Sparr 2009 37 *Journal of the American Academy of Psychiatry and the Law* 175; Johnson and Elbogen 2013 15; *Dialogues on Clinical Neuroscience* 209; and Bonnie 2010 *Journal of Law Medicine and Ethics* 762.

[144] Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 746.

[145] With the former axis system, Axis I disorders (such as schizophrenia and bipolar disorder) and not Axis II personality disorders could qualify as mental diseases. See discussion in Stork 2013 44 *Columbia Human Rights Review* 929−938. She argues that Axis II personality disorders should not have been categorically excluded (931).

> cases are indicative of a movement towards including personality disorders as mental diseases.[146]

Until there is clarity on the definition of the term "mental illness" and more specifically in the context of personality disorders, the law may still continue to be plagued by uncertainty. To irrefutably and generally exclude all personality disorders as mental illnesses, without a sound legal and scientific basis, may be considered arbitrary and legally perilous, resulting in unjust consequences for defendants.[147] In saying this, one should not lose sight of the fact that the recognition of certain serious personality disorders is only part of the battle won, as a classification as a "mental illness" only complies with one part of the legal definition of pathological criminal incapacity. The impact of such illness on the cognitive or conative leg must also be complied with in order to meet the requirements for the legal definition of pathological criminal incapacity. The key critical focus should remain centred on functional impairment, or the effects on the cognitive or conative elements of the test for criminal incapacity, as opposed to getting solely immersed and entangled in problems of diagnostics of mental illnesses.[148]

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146 See Stork 2013 44 *Columbia Human Rights Review* 927 for a discussion of these cases that contend that personality disorders can count as mental diseases in *United States v DeShazer* 554 F 3d 1281 (10th Cir 2009); and *United States v Salley* 2004 WL 170322 943−945 and for cases that contend that personality disorders cannot constitute mental diseases such as the considerably less recent cases of *United States v Rosenheimer* 807F 2d 107112 (7th Cir. 1986); and *United States v Teague* 956 F 2d 1427 (7th Cir 1992) discussed 941–943.

147 Bonnie 2010 *Journal of Law Medicine and Ethics* 760. Stork 2013 *Columbia Human Rights Review* 945 and 962; *Daubert v Merrel Dow Pharmaceuticals Inc* 61 USLW 4805, 113 S Ct. 2786 (1993); and Le Roux and Stevens 2012 25(1) *SACJ* 65 suggest a cross-dimensional concept in the defining of a mental illness in their article, which while it does not focus on personality disorders, does deal with the complexities inherent between law and medicine.

148 Stork 2013 44 *Columbia Human Rights Review* 931 and 960. See also *United States v Mitchell* 706 F supp 2d 1148 (D Utah 2010), which is also critically discussed by the author on 961–964; Kinscherff 2010 38 *Journal of Law, Medicine & Ethics* 752; and Le Roux and Stevens 2012 25(1) *SACJ* 46 47.