The Insanity Defence in French Law: Are Prisons the 'New Asylums'?

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Insanity in French law: are prisons the 'new asylums'?[1]

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In 2006, 35 to 42% of inmates in French prisons were *de facie* extremely or seriously mentally ill.[2] Ten years later, the Human Rights Watch report on French prisons confirmed 'a double punishment', as more mentally ill offenders are sentenced to prison, for longer and with inadequate care.[3] Covid seems to have just made the situation more visible.[4] The problem is, of course, multi-faceted, but one identified factor is the over-criminalisation of offenders suffering from a disorder under Article 122-1 of the Criminal Code (CP), which defines the French 'insanity'[5] defence.[6] Yet, when the defence was recodified in 1992, the Article was presented as just 'officialis[ing] for the most part a daily judicial practice which considered mental disorders as a mitigating cause of liability.'[7] Has the defence then failed to safeguard offenders suffering from a 'psychological or neuropsychological disorder'?

Using a historical perspective, as well as contemporary medico-legal writings, this chapter will demonstrate that the re-codification of the defence in Article 122-1 CP has exposed and accentuated perennial fault lines in French criminal law's articulation of the defence. Determining the boundaries between responsibility, irresponsibility and attenuated responsibility has never been as straightforward, as often claimed. The fraught and tense

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[1] Jean Louis Senon, 'Soins ambulatoires sous contrainte : une mise en place indispensable pour préserver une psychiatrie publique moderne' (2005) 81 L'information psychiatrique 627.

[2] Haute Autorité de Santé, *Audition publique. Expertise psychiatrique pénale. Rapport de la commission d'audition*, 2007) pp18-20 (hereafter HAS, *Rapport*); Jean-Pierre Michel, *Rapport n° 216 sur la proposition de loi relative à l'atténuation de responsabilité pénale applicable aux personnes atteintes d'un trouble mental ayant altéré leur discernement au moment des faits,* 2011, 15-16 (hereafter, Michel, *Rapport* n° 216). This chapter concentrates on mainland France and leaves aside its overseas regions and territories which still suffer from the traumatic effects of slavery and colonisation. For example, Aimé Charles-Nicolas, 'Folie et psychiatrie dans la Martinique d'antan. Des questions pour le temps présent' (2015) 173 Annales Médico-psychologiques 313; Nicolas Guerda and Anna Wheatley, 'Historical and socio-political perspectives on mental health in the Caribbean region' (2013) 47 Interamerican Journal of Psychology 167.

[3] Human Rights Watch, *Double Punishment. Inadequate Conditions for Prisoners with Psychosocial Disabilities in France*, 2016 <https://www.hrw.org/report/2016/04/05/double-punishment/inadequate-conditions-prisoners-psychosocial-disabilities> accessed 5 April 2021; A Garib and others, 'General Medical Care in French Psychiatric Units For Inmates: A National Survey' (2018) 45(2) Encephale 139

[4] Thomas Fovet and Pierre Thomas, 'Troubles psychiatriques à l'entrée de prison: un enjeu de santé publique' *The Conversation* (4 March 2021) <https://theconversation.com/troubles-psychiatriques-a-lentree-en-prison-un-enjeu-de-sante-publique-153600> accessed 5 April 2021; Thomas Fovet and others, 'Mental health care in French correctional facilities during the Covid-19 pandemic' (2020) 46(3S) Encéphale S60

[5] Thereafter, I will not use the terms insane or insanity as the French law defence is broader than its English and other common law counterparts. It encompasses insanity, automatism, intoxication, and diminished responsibility. Loss of control (provocation), abolished in 1992, was outside the scope of the French defence for mental disorder, an excuse leading to mitigating sentences.

[6] Inspection générale des services judiciaires and Inspection générale des affaires sociales, *L'organisation des soins aux détenus. Rapport d'évaluation*, 2001) (2001) 85 <https://igas.gouv.fr> accessed 5 April 2021 (hereafter IGAS, *Rapport*); HAS, *Rapport* (n 2); Gilbert Barbier and others, *Sénat. Rapport n° 434 d'information par le groupe de travail sur la prise en charge des personnes atteintes de troubles mentaux ayant commis des infractions*, 2010, 28-30 (hereafter, Sénat, *Rapport* n° 434); Caroline Lafaye, Camille Lancelevée and Caroline Protais, *L'irresponsabilité pénale au prisme des représentations sociales de la folie et de la responsabilité des personnes souffrant de troubles men- taux. [Rapport de recherche] Mission de recherche Droit et Justice*, 2016, ch. 1 < https://halshs.archives-ouvertes.fr/halshs-01480984> accessed 5 April 2021 (hereafter, Lafaye, *Rapport*)

[7] Sénat, séance 9 mai 1989, JO p555 in Michel, *Rapport n° 216* 9n (n 2) 13.

debates surrounding the case of Halimi, which the Cour de cassation, the French Supreme Court, decided in April 2021, confirm the need for clarification and reform. This evolution of the French law defence in turn sheds light on English criminal law's own approach to the insanity defence and its satellites: automatism, diminished responsibility and intoxication.

Legal scholars in France fear that the principle of irresponsibility under Article 122-1 al.1 CP is being eroded or abandoned in favour of an attenuated responsibility increasingly used to sentence more severely mentally ill than non-mentally ill offenders, because of their perceived dangerousness.[8] Yet, over the last twenty to thirty years, the literature outside the pure legal field[9] has depicted a more nuanced picture of how the defence has been structured and used over time. Historical and sociological studies have demonstrated how the work of the alienists, i.e. the 19th century psychiatrists, who could also be experts to the courts, led the courts and legal scholars to accept that mentally ill offenders could be liable under the 1810 criminal code applicable until 1992.[10] Studies also contextualised the defence by looking at the period before 1810, i.e. during the French Revolution (1789-1799), and earlier during the Ancien Regime (1600-1789).[11] Moreover, medical experts and regulators have reflected on the modern challenges faced by psychiatry both generally, in light of the penal laws' obsession with dangerousness, and specifically, in relation to Article 122-1 CP.[12] They

[8] Laurence Leturmy, 'La pénalisation des personnes atteintes de troubles mentaux' AJ Pénal 2018, 491; Denis Salas, 'La responsabilisation des fous criminels à l'ère néolibérale' (2012) 88 L'information psychiatrique 423; Christine Lazergues, 'Le choix de la fuite en avant au nom de la dangerosité : les lois 1, 2, 3, 4, 5, etc. sur la prévention et la répression de la récidive' RSC 2012, 274; Pierre-Jérôme Delage, 'La dangerosité comme éclipse de l'imputabilité et de la dignité' RSC 2007, 797; Jean Danet and Claire Saas, 'Le fou et sa 'dangerosité', un risque spécifique pour la justice pénale' RSC 2007, 779; Elizabeth Bonis, *Répertoire de droit pénal et de procédure pénale*. V° Troubles psychiques - Malades mentaux (Dalloz 2018) (hereafter, Bonis, *Répertoire*)

[9] For structural reasons, French legal academy tends to be narrow in its outlook to other disciplines, see John Bell, *French legal cultures* (Butterworths London 2001) 46-48.

[10] Notably, Laurence Guignard, 'Le corps criminel au XIXe siècle : du trouble des facultés de l'âme à la dégénérescence' (2012) 118 Cahiers d'histoire. Revue d'histoire critique 61 (hereafter, Guignard, 'Corps criminel'); Laurence Guignard, 'Les lectures de l'intériorité devant la justice pénale au XIXe siècle' (2008) 141 Romantisme 23; Marc Renneville, 'Les deux figures de la déraison criminelle' AJ Pénal 2004, 309; Marc Renneville, 'Psychiatrie et prison: une histoire parallèle' (2004) 162 Annales Médico-Psychologiques 653; Yves Hémery, 'Irresponsabilité pénale, évolutions du concept' (2009) 85 L'information psychiatrique 727 (hereafter Hémery, 'Irresponsabilité'); D. Bouley and others, 'Les fondements historiques de la responsabilité pénale' (2002) 160 Annales Médico-psychologiques 396.

[11] Caroline Mangin-Lazarus, 'L'affaire Firmin (1794-1799) et l'absence de législation sur le crime en "démence" pendant la Révolution française' (2012) 46 Histoire des sciences médicales 145; Laurence Guignard, 'La genèse de l'article 64 du code pénal' (2016) Criminocorpus [En ligne] <https://journals.openedition.org/criminocorpus/3215?lang=it> accessed 5 April 2021 (hereafter, Guignard, '*Génèse'*); Christine Peny, 'Le droit et les institutions de l'insanité d'esprit en France sous l'Ancien Régime' (2008) 2 Biomedical Law & Ethics 249 (hereafter, Peny, 'Le droit'); Michel Caire, 'Psychiatrie et ordre public, de l'Ancien Régime à la Restauration. L'exemple parisien' (2014) 172 Annales Médico-psychologiques 41.

[12] Michel Bénézech, 'La législation actuelle face à l'évaluation des comportements criminels violents : l'urgence d'une réforme' (2018) 176 Annales Médico-psychologiques 404; Michel Bénézech, 'Dangerosité psychiatrique et responsabilité pénale atténuée : à propos de la condamnation à la réclusion à perpétuité d'un schizophrène auteur d'un homicide sexuel sadique' (2020) 178 Annales Médico-psychologiques, revue psychiatrique 949 ; Jean-Pierre Bouchard, 'Irresponsabilité et responsabilité pénales : faut-il réformer l'article 122-1 du Code pénal français ?' (2018) 176 Annales Médico-psychologiques 421 (hereafter, Bouchard, 'Irresponsabilité'); Daniel Zagury, 'Vers une clinique de l'abolition du discernement' (2006) 164 Annales Médico-psychologiques 847 (hereafter, Zagury, 'Clinique); Daniel Zagury and Jean-Pierre Bouchard, 'Le psychiatre expert judiciaire et les auteurs d'homicides' (2020) 178 Annales Médico-psychologiques 938 (hereafter, Zagury and Bouchard, 'Le psychiatre expert'); Jean-Louis Senon (n 1).

notably pointed out how the legal concepts have never been easy to grasp from a medical perspective.[13]

Legal scholars do not completely ignore these works.[14] They do not, however, articulate well how the scope of the defence and its outcome continue to be shaped by the two interrelated matters the other disciplines have highlighted: firstly, the challenges the criminal law has faced over time when confronted with medical knowledge on mental disorders; and secondly, the technical and conceptual choices made, and not made, to determine who should or should not be answerable to society.

This chapter aims to fill this gap by showing that the 1992 codification exposed perennial fault lines in the structure of the defence, as the Halimi case illustrates. The chapter will start by briefly outlining the defence, its criminal justice context and the Halimi case; it will then retrace the evolution of the defence to uncover these fault lines for each of the defence's defining features: the definition of the disorder to trigger the defence; the understanding of the impact the disorder should have for the defence to be accepted; and the modulation of the outcome of the defence in light of prior fault. The final section will bring together the various findings, with a brief comparison with English law, to show how this renewed perspective on the defence could allow for outlining pathways to improvement.

1. The defence in context: its structure, the criminal justice system and the Halimi case.

The defence is a long-standing feature of French criminal law.[15] Inherited from Roman law and consolidated by case law (without the doctrine of precedent), it was never stated in any written text of the Ancien Regime (1600-1789), although it was generally accepted that 'the mad (*fous*) d[id] not sin neither before God, nor before men'.[16] The Revolution (1789-1799) brought sweeping legal reforms, with notably a Bill of Rights, still in force today, a new judiciary, one criminal code (1791) and two criminal procedure codes (1791, 1795).[17] The context in which the defence operated had thus been transformed, acquiring many of its modern features. Paradoxically, the defence remained 'an implicit [principle] that d[id] not require further precision'.[18] As Bexon, former President of the Paris Assises Court, put it in 1799, the rules were 'so present in the heart of the French citizens that it was not needed to write them down'.[19]

This absence of a legal framework led to occasional challenges; yet, the defence gained statutory footing only in 1810, when a new criminal code was enacted.[20] In line with French legal style, Article 64 CP was laconic: 'There is neither *crime* nor *délit* when the defendant

[13] Bouchard, 'Irresponsabilité' (n 12); Sénat, *Rapport* n° 434 (n 6) 28-30.

[14] Leturmy (n 8); Bonis, *Répertoire* (n 8)

[15] For a presentation of French criminal law history, see Elliott, *French Criminal Law* (n 10) ch 1

[16] François Serpillon, *Code criminel, ou commentaire sur l'ordonnance de 1670, Tome 1* (les frères Perisse 1784) 398 (hereafter, Serpillon, *Code criminel*); Daniel Jousse, *Nouveau commentaire sur l'ordonnance criminelle du mois d'août 1670*, t. 1 (Debure Père 1763) v fn (e) (hereafter, Jousse, *Nouveau commentaire*). All sources prior to 1930 have been accessed in their digital format at gallica.bnf.fr, the website of the Bibliothèque nationale de France (the French 'British library').

[17] Pierre Lascoumes, Pierrette Poncela and Pierre Lenoël, *Au nom de l'ordre: une histoire politique du code pénal* (Hachette 1989) Part 1-2 ; Bell, *French legal cultures* (n 9) 53-58.

[18] Guignard, '*Génèse'* para 4.

[19] Scipion-Jérôme Bexon, *Parallèle du code pénal d'Angleterre avec les lois pénales françaises, et considérations sur les moyens de rendre celles-ci plus utiles* (Fauvelle et Sagnier 1799) 155

[20] Guignard '*Génèse'* (n 11)

was in a state of *démence* at the time of the act', leaving the courts to fill in the gaps and to slowly return to the practice of sentence individualisation abolished by the Revolution. By 1885, the Supreme Court had accepted that madness could also be a mitigating circumstance at the sentencing stage.[21] The Ministry of Justice confirmed the practice in a 1905 Instruction.[22] Committal to a mental health institution was not systematic, and the 1838 statute confirmed it was outside the courts' jurisdiction.[23]

Replacing Article 64 CP in 1992,[24] Article 122-1 CP encapsulates the defence's two-tiered structure, while replacing the old-fashioned 'démence' with the more modern and neutral expression of a psychological or neuropsychological disorder ('*trouble psychique ou neuropsychique'*).[25] When the disorder 'abolished [the offender's] discernment or his ability to control his actions', he 'is not criminally liable'. (Article 122-1 al.1 CP). When the disorder only 'altered his discernment or ability to exercise control', he 'remains criminally liable' (Article 122-1 al. 2 CP).

The criminal procedure code adds details as to who raises the defence, who decides on liability, and how the relevant authority should do so. For offences other than *crimes* (those below ten years imprisonment), the prosecutor can close the case without taking further action (Article 40-1 al.3 CPP) if s/he concludes that Article 122-1 al.1 CP applies. This represents less than 2% of all decisions to close cases. [26] If in doubt, the prosecutor can transfer the case to a trial court. The *tribunal de police* (one professional judge) will have jurisdiction for the *contraventions* (misdemeanours with no imprisonment, maximum fine €1500), and *the tribunal correctionnel* (with three professional judges, but increasingly with one judge) for the *délits*, i.e offences of less than ten years imprisonment, for example, theft, involuntary manslaughter, sexual assault.

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[21] Bull. crim. T90, n170, année 1885, 1887, 285.

[22] Guignard, '*Génèse'* (n 11)

[23] Caire (n 11)

[24] The code came in force on 1st March 1994, Mireille Delmas-Marty, 'Nouveau code pénal, avant-propos' RSC 1993, 433 (hereafter, Delmas-Marty, 'Nouveau code pénal).

[25] Prof J Spencer's 2005 translation, https://www.legislationline.org/download/id/3316/file/France_Criminal%20Code%20updated%20on%2012-10-2005.pdf; Prof J Bell referred to a 'psychiatric or neuropsychiatric disorder, John Bell, 'Criminal Law', in John Bell, Sophie Boyron, and Simon Whittaker (eds), *Principles of French Law* (OUP 2008) 226. Prof Spencer's version is more reflective of the neutrality the French Parliament intended to achieve (see section 2). All primary sources of French Law are available in French at the official website of Legifrance.gouv.fr. My translation of the text is as follow:

'A person is not criminally liable who, when the act was committed, was suffering from a psychological or neuropsychological disorder which abolished his discernment or his ability to control his actions.

A person who, at the time he acted, was suffering from a psychological or neuropsychological disorder which reduced his discernment or impeded his ability to control his actions, remains punishable. However, the court shall take this circumstance into account when it decides the penalty and determines its regime. If the sentence is of imprisonment, it is reduced by one third or, in the case of a *crime* with an imprisonment penalty or life imprisonment penalty, the sentence is brought down to thirty years imprisonment. In case of liability for a *delit*, the court can nevertheless, decide not to diminish the sentence after having extensively stated its reasons. When, after medical advice, the court considers that the nature of the disorder justifies it the chosen sentence may allow for the convicted person to undertake treatment adapted to his health status.'

[26] Références statistiques Justice 2019, ch 7, 11 at http://www.justice.gouv.fr/statistiques-10054/references-statistiques-justice-12837/

Until 2008, there were no special findings for irresponsibility (Article 122-1 al.1 CP) and no court could order committal to a hospital. Breaking with this long tradition, stemming from the 1789 Revolution, the 2008 reform introduced both the disposal order and the equivalent of the English law verdict of "not guilty by reason of insanity" when the disorder completely abolished the defendant's capacities. Courts must now make a decision 'of criminal irresponsibility for reason of mental disorder' after having confirmed that the defendant committed the actus reus of the offence.[27] The statistics do not record these courts' decisions when the offence is not a *crime*.

When the offence committed is a *crime* (a statutory minimum of ten years imprisonment, e.g. for murder and rape), the prosecutor cannot close a case and has to transfer it to the investigatory judge (Article 79 CPP). The latter can make a discharge order on the grounds of Article 122-1 al.1 CP, which since 2008, has to be made after hearing the victims who are parties to the trial and the defendant's lawyers or the defendant him/herself should s/he be fit to plead. Since 2008, the decision to discharge on the grounds of Article 122-1 al. 1 CP can be appealed before the investigatory court, then before the regional appeal court. A final appeal on the law can be presented to the Supreme Court. Conversely, the investigatory judge may decide to transfer the case to the trial court, the *Cour d'assises*. The latter, composed of three professional judges and seven jurors deciding together on liability,[28] has, since 2000, to answer a specific question on Article 122-1 CP. As for the other courts, the 2008 reform introduced the special verdict of non-guilty for reason of mental disorder and the power to commit to a mental health hospital. Only the decisions of irresponsibility are recorded.

All the courts' first instance decisions can be automatically appealed to the regional appeal courts on law and facts, including those of the Assises courts since 2000 (which includes acquittals since 2002). Appeals, on the law only, to the Supreme Court, are also automatic.

Whichever trial court is considered, when the disorder only 'altered [the defendant's] discernment or ability to exercise control' (Article 122-1 al. 2 CP), the court will declare the defendant liable, with no specific 'verdict'. No statistics record the proportion of these decisions. The courts have to take the disorder into account at the sentencing stage. The original text of Article 122-1 al.2 CP did not specify that courts should mitigate the sentence. The different actors of the criminal justice system noticed that the practice quickly evolved towards an aggravation of the sentences, to account for the perceived dangerousness of the mentally ill offenders.[29] The 2014 reform attempted to curb this unexpected development. Mitigation became an obligation for Assises Courts, yet, the *tribunaux correctionnels* can still refuse mitigation. The impact of the reform is unknown,[30] but may prove ill-fated. The obligation to mitigate concerns less than 1% of the cases going to trial, since the *tribunaux*

[27] Article 706-119 to 706-140 Criminal Procedure Code, following Loi n° 2008-174, 25 February 2008

[28] The composition of the Court has profoundly changed since its creation in 1791, see Catherine Elliott, *French Criminal Law* (Devon: Willan Publishing, 2001) ch 2.

[29] Sénat, *Rapport* n° 434 (n 6) 23-27 ; Catherine Ménabé, 'L'irresponsabilité pénale pour cause de trouble mental' AJ Pénal 2018, 488.

[30] Jean-Jacques Urvoas, Ministre de la Justice, *Rapport sur la mise en œuvre de la loi du 15 août 2014 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales*, 2016 < http://www.justice.gouv.fr/publication/rap_loi_15082014.pdf> accessed 5 April 2021.

correctionnels decide 99.74% of the prosecuted cases.[31] More importantly, the reform stopped short of tackling the origin of the problem. The issue of mitigation arose because of the steady decrease in the use of Article 122-1 al.1 CP, a pattern identifiable by the statistics on discharge orders. Where they would have been declared irresponsible, offenders are now sent to trial and convicted. Socio-legal research demonstrated that this pattern predates the Article, going back to at least the 1950s, but has accelerated since 1992.[32] So 'how did we come to the idea that a criminal is mentally ill but responsible enough to go to prison?'[33]

The recent Halimi case has crystalised the tensions surrounding the determination of the boundary between irresponsibility and liability when a defendant is mentally ill. In April 2017 Kobili Traoré entered a friend's apartment; fearing for their lives, the friend and his family locked themselves in one bedroom. Traoré chose to then access from the balcony their neighbour's apartment. He killed Sarah Halimi by throwing her over the balcony, after having beaten her up, while shouting 'Allah Akbar', 'I killed a daemon'. Sarah was Jewish, Kobili Muslim.

The investigatory judge called for a first expert report. The expert concluded that a severe psychotic episode, which was not acute intoxication, existed at the time of the offence. Traoré completely lost control and discernment. The episode, however, did not originate in a disorder such as schizophrenia, but from the regular and excessive consumption of cannabis (up to fifteen joints a day) over the last eleven years.[34] Therefore, instead of recommending irresponsibility, he favoured liability under Article 122-1 al.2 CP.

The two additional groups of experts settled on the same medical diagnosis. However, they supported irresponsibility because the defendant had started to develop schizophrenia and was not aware of the dangers his cannabis consumption created to his mental health.[35]

The investigatory judge made a discharge order on the grounds of Article 122-1 al.1 CP. Benefiting from the 2008 reform, the victim's family appealed. For them, the prior fault of voluntarily consuming cannabis over eleven years barred the use of Article 122-1 al.1 CP; the Assises court should have heard the case, as the defendant's hate speech demonstrated enough consciousness to consider attenuated liability under Article 122-1 al.2 CP. The investigatory court rejected the appeal; as did the Paris Court of Appeal in 2019 and the Supreme Court on 14 April 2021 because Article 122-1 al.1 CP did not distinguish according to the origin of the disorder.[36] The case raises a variety of questions that feed into the wider debates surrounding the defence. Let us start with the first one: how to define the disorder that may trigger the defence.

2. Defining the disorder: a legal definition grounded in medical knowledge

[31] Ministre de la Justice, *Les Chiffres-clés de la Justice 2019*, <http://www.justice.gouv.fr/art_pix/Chiffres%20Cles%202020.pdf> accessed 5 April 2021

[32] Lafaye, *Rapport* (n 6) ch 1.

[33] 'Marc Renneville, *Crime et folie. Deux siècles d'enquêtes médicales et judiciaires*, Paris, Fayard, 2003, 10.

[34] CA Paris, pôle 7, ch. instr. 6, 19 déc. 2019, n° 2019/05058 *Halimi*, Dalloz Actualité 3 Feb 2020 pp11-13 < https://www.dalloz-actualite.fr/flash/affaire-sarah-halimi-declaration-d-irresponsabilite-penale-pour-cause-de-trouble-mental#.YGstSS1Q1TY> accessed 5 April 2021.

[35] Ibid.

[36] Crim. 14 April 2001 Arrêt n. 404 (20-80.135) para 29 at https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/404_14_46872.html

How the disorder has been understood has evolved over time. It first shredded its religious roots to become a medical condition called 'disease of the brain'. This concept - developed before the 1789 Revolution - was integrated into the original understanding of '*démence'* in Article 64 of the 1810 CP, before disappearing a century later. By the time Article 122-1 CP replaced Article 64 CP, the disorder was already considered to be a 'psychological or neuropsychological disorder'.

2.1. From a religious concept to a 'disease of the brain': the Ancien Droit or Old Law (1600-1789)

By the mid-17th century, the mentally ill, those with learning disabilities, epileptics, and their families ceased to be considered to be punished by God.[37] Madness became a medical condition, with no possibility that the mentally ill should be liable for witchcraft,[38] a 'crime de lese-majesté divine' as serious as the offences against the King's person.[39]

Jousse and Muyart de Vouglans, the two main judges and criminal law scholars of the 18th century, considered madness a 'disease of the brain', both citing Paolo Zacchias, the Pope's doctor[40] who identified madness as a medical condition.[41] The insane lacked 'will (*volonté*) and knowledge of the wrong committed', like 'a child who does not have yet the use of reason'.[42] Based on medical knowledge of the time, legal scholars distinguished three forms of madness: the furious (*furieux*), who are extravagant, violent, and cannot control their impulses; the idiot ('*dément'*), whose reason is weak, with physical signs of lack of reason, childish behaviours or akin to an animal; and the melancholic, who present no symptom of excessive agitations and often have suicidal tendencies.[43] Epilepsy was incorporated into madness.

Despite sleepwalkers being 'deprived of the use of reason', they were not considered suffering from madness.[44] They were nevertheless not liable unless prior fault (liability but with mitigated sentence).[45] Madness also excluded intoxication, with Muyart de Vouglans

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[37] Peny, 'Le droit' (n 11) 253.

[38] Jean-Marie Carbasse, *Histoire du droit pénal et de la justice criminelle* (Droit fondamental, PUF 2000) 200-201 (Carbasse, *Histoire*); Alfred Soman, 'Les procès de sorcellerie au Parlement de Paris (1565-1640)' (1977) 32 Annales Histoire, Sciences Sociales 790; Alfred Soman, 'The Parlement of Paris and the Great Witch Hunt (1565-1640)' (1978) 9 The Sixteenth Century Journal 31.

[39] Peny, 'Le droit' (n 11) 253-255 ; Alfred Soman, 'La décriminalisation de la sorcellerie en France' (1985) 4 Histoire, Économie et Société 179 196-198. Thereafter, the target shifted to infanticide, Alfred Soman, 'La justice criminelle vitrine de la Monarchie française' (1995) 153 Bibliothèque de l'École des chartes 291, 302-303.

[40] Hémery, 'Irresponsabilité' (n 10) 729 ; Julie Doyon, 'Les enjeux médico-judiciaires de la folie parricide au XVIIIe siècle' (2011) 15 Crime, Histoire & Sociétés 5, 15-17 (hereafter, Doyon, 'Les enjeux').

[41] Pierre-François Muyart de Vouglans, *Institutes au droit criminel, ou principes généraux sur ces matières, suivant le droit civil, canonique, et la Jurisprudence du Royaume; avec un traité particulier des crimes*, Paris, Le Breton, 1757, 76 ; Jousse, *Nouveau commentaire* (n 16) .

[42] Jousse, *Nouveau commentaire* (n 16) xci, 440-441; Daniel Jousse, *Traité de la justice criminelle de France, t. 2* (Debure Pere 1771) 619-624 (hereafter, Jousse, *Traité*). Similarly, Pierre-François Muyart de Vouglans, *Les loix criminelles de France dans leur ordre naturel* (1780) 11 (hereafter, Muyart de Vouglans, *Les loix*); Serpillon, *Code criminel* (n 22) 439..

[43] With references, Doyon, 'Les enjeux' (n 41) 21-22.

[44] Muyart de Vouglans, *Les loix* (n 43) 29 ; Jousse, *Traité* (n 43) ; Serpillon, *Code criminel* (n 16) 398.

[45] Jousse, *Traité* (n 43) 628-629; Muyart de Vouglans, *Les loix* (n 43) 29 ; Serpillon, *Code criminel* (n 16) 399 ; Nicolas Laurent-Bonne, 'Les origines de l'irresponsabilité du somnambule' RSC 2013, 547.

recognising non-liability for involuntary intoxication,[46] but not Jousse for whom intoxication, voluntary or not, was a crime.[47] Finally, madness was distinguished from '*l'amour violent'*, literally violent love, which could only be a mitigating circumstance but not for rape or violent kidnapping (full liability).[48] Despite the use of the language of madness ('*une espèce de fureur'*), violent love could at best be a mitigating factor to the sentence.[49]

This conception persisted not only during the Revolution,[50] when psychiatry was still in its infancy,[51] but also well into the 19th century.

2.2. The persistence of the biological origin in the **'démence'** *of the 19th century*

Article 64 CP, enacted in 1810, did not define '*démence'*, but the legal scholarship confirmed an understanding anchored in the *Ancien Droit*. They restricted *démence* to 'the diseases of the brain', epilepsy[52] and 'idiocy'.[53] 'Intoxication […] did not have madness's essential character, the biological disorder of intellectual faculties'.[54] Intoxication and sleep-walking could exclude liability, but outside the scope of Article 64 CP, as before.[55]

In medical circles, the term *démence* had quickly acquired its specific meaning of 'dementia'. Lawyers nevertheless considered the term to be generic, to describe the situation of those deprived of reason (*de-mens*). *Démence* meant madness, mental alienation by reference to the alienists' new vocabulary.[56] It was a legal term informed by medical knowledge but not solely defined by it.

This definition of madness, with its mixture of medical knowledge and Ancien Droit, should be viewed in light of the contemporary medical context. The first generation of alienists tried to move away from the purely biological understanding of mental illness, with the concepts of mania (Pinel) and homicidal monomania (Esquirol) based on passions.[57] Lawyers baulked

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[46] Muyart de Vouglans, *Les loix* (n 43) p79.
[47] Daniel Jousse, *Traité de la justice criminelle de France, t. 3* (Desure Pere 1771) 671.
[48] Jousse, *Traité* (n 43) 629; Muyart de Vouglans, *Les loix* (n 43) 14.
[49] Muyart de Vouglans, *Les loix* (n 43) 15.
[50] Louis-Nicolas Lemercier, *Opinion de Lemercier, député de la Charente-Inférieure, sur la résolution du 16 messidor an 5, relative aux accusés en démence : séance du 3 prairial, an 6* (De l'imprimerie nationale) <https://archive.org/details/opinion00unse_20> accessed 1 April 2021.
[51] Jean Garrabé, 'Nosography and classification of mental diseases in the history of psychiatry' (2019) 84 L'Évolution Psychiatrique e31 (hereafter, Garrabé, 'Nosography'); Jean-François Pelletier and Larry Davidson, 'À l'origine même de la psychiatrie comme nouvelle spécialité médicale : le partenariat Pinel-Pussin' (2015) 40 Santé mentale au Québec 19.
[52] Crim 8 brumaire an XIIII ; Crim 17 January 1822, Edouard Dalloz, Charles (père et fils) Vergé and Gaston Griolet, *Les codes annotés. Code d'instruction criminelle annoté et expliqué d'après la jurisprudence et la doctrine.* (Bureau de la jurisprudence générale 1898) under Article 339 CIC, para 176
[53] Adolphe Chauveau and Faustin Hélie, *Théorie du code pénal*, vol 1 (Société typographique belge 1837) 216 (the passages are repeated in the 1852, 1872 and 1887 versions) (hereafter, Chauveau and Hélie, *Théorie*); René Garraud, *Précis de droit criminel contenant l'explication élémentaire de la partie générale du code pénal, du code d'instruction criminelle, et des lois qui ont modifié ces deux codes* (11 edn, Sirey 1912) 217-218 (hereafter, Garraud, *Précis*).
[54] Chauveau and Hélie, *Théorie* (n 54) 216.
[55] Id. 213; Garraud, *Précis* (n 54) 218 ; Joseph-Louis-Elzéar Ortolan, *Éléments de droit pénal: pénalité, juridictions, procédure: suivant la science rationale, la législation positive et la jurisprudence*, vol 1 (3rd edn, Librairie de Plon 1863) 138-139 (hereafter, Ortolan, *Éléments*).
[56] Chauveau and Hélie, *Théorie* (n 54) 205-207 ; Ortolan, *Éléments* (n 56) 128-129 ; Garraud, *Précis* (n 54) 216.
[57] Guignard, 'Corps criminel' (n 10).

at the idea, afraid that every passion would become madness, that criminals would simulate madness and escape liability when they should be punished.[58]

When the next generation of alienists discredited monomania in the 1850s, tensions eased.[59] Judges were receptive to the alienists' conception of madness as a spectrum where responsibility would remain but would be attenuated by the disorder.[60] It helped that at the same time the alienists defended a biological vision of madness based on the ideas of degeneration (Morel, Lombroso, Ferri, Garoffallo).[61]

When exactly this biological origin of madness disappeared is difficult to pinpoint. In 1887, Hélie, by then Honorary President of the Cour de cassation, continued to define madness as disease of the brain,[62] but in 1872, Lallement already included under Article 64 CP sleep-walking and intoxication when the disorders abolished discernment.[63] In the 1905 *circulaire*, the Minister of Justice Chaumié asked the psychiatric experts to search for 'physical, psychic or mental anomalies' as a basis for the judicial practice of mitigated sentences by reason of *démence*.[64]. The law however did not completely switch to a deterministic vision of criminal liability where mental disorders would be based on inherited physical characteristics. It remained centred on the concepts of reason and free will.[65]

By mid-20th century, the '*démence'* of Article 64 CP had become a neutral term not defined by its biological origins. Post-1945, the case law on 'démence' included the following disorders: amnesia,[66] epilepsy,[67] schizophrenia,[68] sleep-walking and intoxication.[69] Legal scholarship ceased to make any reference to the brain. It would not be surprising if the experience of the Nazi Occupation, and its extermination programme of the mentally ill, especially if Jewish, finally led to abandoning any biological reference.[70] In that regard, the movement of *L'école de la défense sociale nouvelle*, launched in 1954 by the judge Marc

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[58] Chauveau and Hélie, *Théorie* (n 54) 210-211; Guignard, 'Corps criminel' (n 10); Caroline Protais, 'Psychiatric care or social defense?: The origins of a controversy over the responsibility of the mentally ill in French forensic psychiatry' (2014) 37 International Journal of Law and Psychiatry 17, 21-22 (hereafter, Protais, 'Psychiatric care') ; Marc Renneville, 'L'anthropologie du criminel en France' (1994) 27 Criminologie 185, 187 (hereafter, Renneville, 'L'anthropologie'); Lisa Bogani, 'Le vol sous l'œil des médecins légistes. Étude du concept de kleptomanie au cours du XIXe siècle' (2016) Criminocorpus [En ligne] <https://journals.openedition.org/criminocorpus/3253> accessed 5 April 2021 (hereafter, Bogani, 'Le vol')

[59] Protais, 'Psychiatric care' (n 59) 22.

[60] Thomas Lepoutre and Tom Dening, ''De la non-existence de la monomanie', by Jean-Pierre Falret (1854)' (2012) 23 History of Psychiatry 356; Benjamin Lévy, 'Entre tribunaux et asiles – des « aliénés persécuteurs » aux « revendicateur »' (2016) Criminocorpus [En ligne] <https://journals.openedition.org/criminocorpus/3266> accessed 5 April 2021; Rafael Huertas and Winston, 'Madness and degeneration, I: From 'fallen angel' to mentally ill' (1992) 3 History of Psychiatry 391.

[61] Guignard, 'Corps criminel' (n 10) para 16-20.

[62] Chauveau and Hélie, *Théorie,* 1887, 576.

[63] Louis Lallement, *De la condition des aliénés en droit romain et en droit français* (Paris, 1872) 234 (hereafter, Lallement, *De la condition*) ; contra, Garraud, *Précis* (n 54).

[64] Guignard, 'Corps criminel' (n 10) para 19-20 ; Protais, 'Psychiatric care' (n 59) 18.

[65] Guignard, 'Corps criminel' (n 10) para 15-20; Jean-Louis Halpérin, 'Ambivalences des doctrines pénales modernes' RSC 2010, 9.

[66] CA Alger, 18 Dec. 1948 D. 1949, 382 note Vouin.

[67] Crim. 14 Dec. 1982 Gaz. Pal. 1983 1. pan 178.

[68] CA Paris 21 May 1996 Droit pénql 1996 comm. 240 obs. Véron; Crim. 18 Feb. 1998 Bull. Crim. n. 66

[69] Yves Mayaud, *Droit pénal général* (Presses universitaires de France 2004) 397-407.

[70] Yoram Mouchenik and Véronique Fau-Vincenti, 'The fate of Jews hospitalized in mental hospitals in France during World War II' (2020) 31 History of Psychiatry 178; Freudian ideas may also have played a role in accepting that un/consciousness is not the biological functioning of the brain, Renneville, 'L'anthropologie' (n 59).

Ancel, insisted on the need to shred any preconceived ideas on crime and defendants.[71] Viewed as obsolete, the term 'démence' was abandoned in 1992.[72]

2.3. A more modern and neutral terminology: the current Article 122-1 CP

Article 122-1 CP refers to a 'psychological or neuro-psychological disorder'. Chosen for its neutrality, the expression encompasses any medical condition an expert would consider affecting the defendant's intellectual and volitional capacities. There is no legal requirement for the disorder to be recognised in a particular medical classification, whether the WHO International Classification of Diseases (ICD) or its French equivalents.[73] The disorder is thus a legal concept.

This conception was tested in the Halimi case. In her non-binding *avis* to the Cour de cassation to reject the appeal, the *Avocate générale* explained that the notion of psychological or neuropsychological disorder should not be interpreted, as the victim's family argued, as 'restricted to a psychiatric pathology, [such as schizophrenia,] but should include any cause leading to the abolition of discernment'[74] such as the 'psychic reaction' to cannabis consumption. 'To conclude otherwise contradicts the letter and spirit of the text, its historical origins and its judicial application'.[75] The Cour de cassation confirmed this conception of the 'psychological and neuro-psychological disorder'.[76] The disorder is a legal concept, neither based on the biological roots of the mental illness, as it was until the early 20th century, nor dependent on a particular pathology, as the Halimi case illustrated. What matters is for the experts to attest to the disorder and its impact on the defendant's capacities.; But how has French law attempted to define this impact?

3. Defining the impact of the disorder: some perennial fault lines

The impact of the disorder focuses on capacities of discernment and control, terms that have never been defined in depth. The debates have instead concentrated on how the disorder has affected these capacities: is there abolition or alteration of capacities? The question is closely tied to the defence's outcome: abolition justifies irresponsibility; alteration, attenuated responsibility. How to define abolition/alteration continues to raise a number of challenges.

3.1. The continuous focus on capacities of discernment and control

For the first time in the history of the defence, Article 122-1 CP identified discernment and control as capacities the defence requires. In doing so, it recognised a long tradition going as far back as the Ancien Regime.[77] It also fits within the wider theory of criminal law underpinning the 1791 criminal code and integrated in the 1810 criminal code. Only an individual who can reason, control, and exercise moral autonomy can be criminally liable.

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[71] Roger Merle et André Vitu, *Traité de droit criminel*, t.1 (7e edn, Cujas) 134-136.
[72] Delmas-Marty, 'Nouveau code pénal' (n 24).
[73] Garrabé, 'Nosography' (n 52) e41-43.
[74] Avis, Crim. 14 April 2021 (n 36)
[75] Id. 24
[76] Crim (n 36)
[77] Supra section 2.1.

The terms of discernment and control have never been defined, even in Article 122-1 CP. The courts have remained silent, probably because of three combined factors: a legal tradition of laconic and formulistic drafting of judicial decisions,[78] the absence of directions given to juries;[79] and the decision on the defence being a question of fact outside the control of the Supreme Court.

Neither 19th century authors,[80] nor 20th/21st century scholars,[81] are specific beyond generic references to free will, reason or discernment, control, intellectual and cognitive faculties.[82] The absence of definitions and analysis does not preoccupy the legal scholarship, but for psychiatric experts, the notions are problematic. Medical practice does not aim to measure the capacity to discern.[83] Experts are even less at ease with the concept of 'control', which they hardly use.[84] Discernment and control are not medical concepts. The terms abolition and alteration add to these difficulties. The fault line appeared in the 19th century.

3.2. Emerging fault line in the 19th century: alteration, abolition or causality?

In 1810, the impact of the disorder under Article 64 CP was understood as an all or nothing matter. Either the person lost capacity and was not liable; or s/he did not and was liable, with no mitigating circumstances.[85] Medical knowledge challenged the *status quo* in two ways.

The first generation of alienists, notably Esquirol, identified monomania, specifically 'homicidal monomania', as a delusion fixated on a unique 'object', an irresistible impulse to kill.[86] For them, a person should be legally irresponsible when the overpowering delusion they suffered from explained the criminal act, even if they otherwise appeared sane.[87] Madness did not have to lead to a complete and absolute loss of the defendant's capacities to discern and control.

The second challenge was brought about by the second generation of alienists, around the 1850s. They viewed madness as a spectrum. The 'half-mad', those defendants who were not severely affected by their mental illness, remained criminally liable and should benefit from mitigating circumstances at the sentencing stage.[88] It was a different perspective from that of Esquirol. How did the lawyers receive this medical knowledge?

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[78] Bell (n 9) 96. The 2019 reform barely dented this style, See, in French, https://www.courdecassation.fr/institution_1/reforme_cour_7109/reformes_mouvement_8181/reforme_mode_redaction_arrets_9223/

[79] Edouard Boitard and Faustin Hélie, *Leçons de droit criminel, contenant l'explication complète des Codes pénal et d'instruction criminelle (11e éd., revue, complétée et mise en harmonie avec toutes les lois modificatives des deux codes)* (11 edn, A. Cotillon et Cte, Librairies du Conseil d'Etat 1876) 735

[80] Chauveau and Hélie, *Théorie* (n 54); Garraud, *Précis* (n 54) ; Ortolan (n 56); Laurence Guignard, 'Michel Foucault et la pratique des discours de vérité: droit et psychiatrie au XIXe siècle' in Damien Boquet, Blaise Dufal and Pauline Labey (eds), *Une histoire au présent : les historiens et Michel Foucault* (CNRS éditions 2013) 183, 190-191 (hereafter, Guignard, 'Foucault').

[81] Merle et Vitu (n 72); Mayaud (n 70); Bonis, *Répertoire* (n 8).

[82] Protais, 'Psychiatric care' (n 59) 18

[83] Sénat, *Rapport* n° 434 (n 6) 75.

[84] Id.

[85] Chauveau and Hélie, *Théorie* (n 54) 214.

[86] Guignard, 'Corps criminel' (n 10).

[87] Laurence Guignard, 'Crime et Psychiatrie. Antoine Léger, le lycanthrope: une étape dans la généalogie des perversions sexuelles (1824–1903)' (2017) 82 L'Évolution Psychiatrique 579, 584-585; Renneville, 'L'anthropologie' (n 50) 187; Guignard, 'Corps criminel' (n 10); D. Bouley and others, 'Les fondements historiques de la responsabilité pénale' (2002) 160 Annales Médico-psychologiques 396, 402-403.

[88] Guignard, 'Corps criminel' (n 10)

The possibility for the disorder to justify attenuated responsibility, rather than irresponsibility, was well received, but needed a statutory basis. Bound by the principle of strict interpretation of the criminal law, the courts could not expand the scope of Article 64 CP to include attenuated liability. Its wording clearly indicated that the disorder excluded liability. With the 1832 statute giving judges the power to individualise the sentence between a minimum and maximum, courts acquired the legal authority to recognise the disorder at the sentencing stage. The Supreme Court recognised the practice in 1885,[89] and the Ministry of Justice in its 1905 Instruction. Both the case law and the Instruction had no binding legal authority, but the system remained until its codification in Article 122-1 CP. The 19th century thus saw a return to the Ancien Regime practice of sentence individualisation to accommodate the alienists' ideas about madness.[90]

Legal scholarship was also receptive to the concept of attenuated responsibility for the 'half-mad'. In response, the theories of imputability (for irresponsibility) and culpability (for attenuated responsibility) were developed, the concepts still in use today.[91] Imputability is the capacity to be accountable because of 'the author's existing free will and lucid intelligence'.[92] It captures the 'requisite of rationality'[93] underlying Article 64 CP. Culpability affects the mens rea in different degrees. The criminal law integrated the medical understanding that madness was a spectrum.

One would therefore infer that the boundaries between irresponsibility and attenuated responsibility were settled along clear lines. Abolition of the defendant's capacities to discern and control led to irresponsibility. Attenuated liability meant that their capacities partially remained. As the 19th century debates surrounding homicidal monomania illustrate, medical knowledge and legal scholarship however presented a far more complex picture, where abolition and irresponsibility did not solely equate to complete loss of capacity.

The second generation of alienists discredited monomania, preferring the expression of 'partial alienation', but they did not entirely discard the factual situation Esquirol attempted to describe and the legal outcome of irresponsibility if further conditions were met.[94] For them, irresponsibility should ensue when the delusion had a broader impact on the individual's capacities than the first alienists described. Upon scrutiny, the individual would not appear of sound mind: their mental illness would have affected more widely their capacities to discern and control, making them alien to their surroundings.

Initially rejecting monomania, by the late 1830s juries declared defendants irresponsible despite their mental illness not having completely abolished their capacities to discern and

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89 Infra n 21

90 On the broader aspects of sentence individualisation, Carbasse, *Histoire* (n 29) 408-412; Guignard, 'Corps criminel' (n 10); Guignard, 'Foucault' (n 81) 192-196.

91 Merle et Vitu (n 72).

92 Ortolan, *Éléments* (n 56) 98-130 ; Merle et Vitu (n 72) 773; Protais, 'Psychiatric care' (n 59) 18

93 Citing Foucault, Laurence Guignard, 'L'irresponsabilité pénale dans la première moitié du XIXe siècle, entre classicisme et défense sociale' (2005) Champ pénal/Penal field [En ligne], XXXIVe Congrès français de criminologie, Responsabilité/Irresponsabilité Pénale, para 10 <https://journals.openedition.org/champpenal/368> accessed 5 April 2021.

94 Jean-Pierre Falret, *Des maladies mentales et des asiles d'aliénés : leçons cliniques et considérations générales*, Librairies de l'Académie de médecine 1864, 443-448

control.[95] However, for the same reasons they did not define discernment and control, the courts did not define abolition and alteration. Legal scholarship provided more details, but not necessarily more clarity.[96] Chauveau & Hélie stated that '*démence*, in the legal meaning of the word, is not a complete abolition of intelligence' as otherwise too few mentally ill defendants would benefit from the defence.[97] Citing medical knowledge on monomania and partial alienation, they recommended irresponsibility,[98] enjoining judges to 'examine the relationships between this idea [on which the *démence* rests] and the apparent causes of the offence.' [99] Similarly, Ortolan considered that when the defendant suffered from 'this dominant and exclusive idea that led to the crime itself, the person submitted to an irresistible passion or impulse.' Having lost his will, but not his reason, he was not liable.[100] The legal test is thus in terms of causality and the effects on the defendant's capacities. Garraud was more ambiguous, stating that *démence* justifies irresponsibility 'where there was a *sufficient alteration* of his mental faculties to *destroy* his culpability' (my emphasis).[101] Lallement did not take a position, citing three contradictory verdicts of Assises Courts.[102]

Probably the most enlightening summary of the legal scholarship is by legal scholar Acollas in 1887, two years after the Supreme Court's decision. For him, two conceptions of *démence* were competing. Some considered that when 'convinced that the agent was in one of these states at the time of the offence, the courts could base the acquittal on the *general cause of démence'*. Others defended a '*more restrictive and more subtle*' view, that the courts could acquit only when the agent 'did not possess, in fact, the *full exercise* of his will' (my emphasis).[103] 'Anyway, they [all] agree […]that the same causes [of *démence*] can lead, at least, to an attenuation of culpability.'[104]

As Acollas pointed out, the difference in understanding the impact of madness on the defendant is subtle but, I argue, crucial when establishing the boundaries between no liability and attenuated liability. When the focus is on the illness being the dominant cause of the offence, as in the words of Ortolan, a decision to acquit can be taken even when the illness had not destroyed the defendant's faculties. With the second conception, establishing the causality between the disorder and the offence will not suffice: only when the illness destroyed the defendant's intelligence and will can liability be excluded.

By the time Article 64 CP was to be abolished in 1992, the Supreme Court referred to the disorder having *totally* abolished capacity or control.[105] The legal scholarship adopted similar wording,[106] although Decocq added that the disorder must 'be related to the offence', i.e. must explain the offence.[107] When this shift happened is difficult to identify in the absence of

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[95] Guignard, 'Corps criminel' (n 10) para 14
[96] Emile Acollas, *Les délits et les peines* (Libraire Ch. Delagrave 1887) 74-75; Chauveau and Hélie, *Théorie* (n 54) 528-531; Guignard, 'Foucault' (n 81) 192.
[97] Chauveau and Hélie, *Théorie* (n 54) 497-498
[98] Id. p502
[99] Id. p531.
[100] Ortolan, *Éléments* (n 56) 131.
[101] Garraud (n 54) 217
[102] Lallement, *De la condition* (n 64) 240-241.
[103] Acollas (n 97) 75.
[104] Ibid.
[105] Crim 14 Dec. 1982 Gaz Pal. 1983.
[106] Bonis, *Répertoire* (n 8) 117; André Decocq, *Droit pénal général* (Armand Colin, 1971) 338-339; Marc Puech, *Droit pénal général* (Litec 1988) 398-400.
[107] Decocq, *Droit pénal* (n 107) 339.

studies having focused on the exact legal test used to define abolition and alteration. It also does not account for the profound changes in psychiatric practice and how this fed into the boundaries between abolition and alteration without the legal test changing!

Protais has demonstrated that the increased use of attenuated liability did not start with Article 122-1 CP. From the 1960s onwards, medical experts began to recommend attenuated responsibility for conditions that were predominantly viewed, until the 1950s, as obvious cases of abolition and irresponsibility. The shift was gradual: first, the behavioural problems, low and medium debility (1950s/1960s), then the 'borderline' or 'psychopathic personality with psychotic decompensation' (1970s); finally the decompensated psychoses which include dissociated states with hallucination and paranoia (1990s).[108] In other words, the legal test remained centred on abolition/alteration, but the medical use of the test changed so much that cases of irresponsibility shrank, while conversely cases of attenuated responsibility increased. Many reasons explain these changes, not the least viewing criminal liability as a form of treatment;[109] but medical experts do not work alone. Judges have to be receptive to their conclusions. The treatment of kleptomania in the 19th century illustrates the point. For most of the 19th century, judges rejected kleptomania as a mental disorder excluding liability. However, by the late 19th century, the courts accepted kleptomania could result in the acquittal of defendants from theft under Article 64 CP. Why? The defendants were often women among the middle classes, if not upper classes, educated and who had the means to pay for the goods; thus they were seen as having no motives to steal. Greed explained theft by the working class; mental disorder, and gender, excused the middle-class thieves! [110]

Therefore, the boundaries between abolition and attenuation have fluctuated because of evolving medical knowledge and because social factors interplayed with the perception of who was 'mad' and who was not, or not mad enough to be irresponsible. This flexibility was in a way facilitated by the terms of Article 64 CP itself. The diagnosis of *démence* at the time of the offence established a factual presumption that the defendant would not be liable unless the expert demonstrated that the defendant's capacities were only altered.[111] With Article 122-1 CP, establishing a diagnosis is no longer sufficient. How the disorder affected the defendant at the time of the offence needs to be carefully articulated in light of Article 122-1 CP's express reference to abolition and alteration. This subtle change made the experts' task more demanding, leaving less space for imprecision in the medico-legal interpretation.[112] It is thus not surprising that the shift towards more recommendations for attenuation, which started in the 1950s, finally became visible under Article 122-1 CP. In turn, the previous difficulties in defining the impact of the disorder resurfaced: is the dichotomy abolition/alteration the correct legal test?

3.3. Renewed questions under Article 122-1CP: abolition/alteration or causality?

[108] Protais, 'Psychiatric care' (n 59) 22-23.

[109] Ibid.

[110] Lallement, *De la condition* (n 64) 241 ; Patricia O'Brien, 'The Kleptomania Diagnosis: Bourgeois Women and Theft in Late Nineteenth-Century France' (1983) 17 Journal of Social History 65 pp67-68, 71-73; Bogani, 'Le vol' (n 59) para 32.

[111] In that sense, Zagury and Bouchard, 'Le psychiatre expert' (n 12) 944; Catherine Protais, 'Le psychiatre et le juge' AJ Pénal 2018, 494.

[112] HAS, *Rapport* (n 2) p30 ; Lafaye, *Rapport* (n 6) 77; Zagury and Bouchard, 'Le psychiatre expert' (n 12).

Following concerns that Article 122-1 al. 2 CP was overused, a parliamentary commission led in 2010 to an inquiry.[113] The resulting consensus was that experts generally agreed on a diagnosis on the disorder(s), but they tended to disagree on the medico-legal interpretation of that diagnosis because the concepts of abolition, alteration, discernment and control remained outside the scope of a diagnosis. [114] The Commission asked whether a list of pathologies should be added to Article 122-1 al.1 CP, since some medical conditions, such as delusional psychoses, tend to fit within the concept of abolition/destruction of reason and will. This option was rejected on the basis that a list would further reduce the use of Article 122-1 al.1 CP. Indeed, other pathologies, especially those at the borderlines, are difficult to interpret, in the sense of altering or abolishing capacities according to the facts of the case.[115]

The report also considered whether the distinction between abolition and diminution should be abandoned. Some experts consider that even the 'core' disorders associated with abolition, such as schizophrenia and paranoia, do not deprive a person of their cognitive and volitional capacities unless in a middle of a crisis.[116] As in the 19th century, questions endure as to whether a person can be irresponsible when appearing sane, except for the object of her delusion. The dichotomy abolition/alteration was ultimately retained on the basis that the vast majority of experts wished to keep it. They appreciated the opportunity to establish 'a direct and exclusive link between the disorder at the time of the offence and the offence committed'. [117]

Yet, establishing a link does not completely equate to establishing abolition, as the 2018 proposal by Dr Bouchard, medical expert since 1979, shows. For him, irresponsibility under Article 122-1 al.1 CP would be when the disorder was the 'exclusive cause of the facts for which s/he is guilty'. Article 122-1 al.2 CP should apply when the disorder is 'the non-exclusive cause'. He also recommended a reflection to form a 'consensus clinically and semantically on what the disorders are' and the legal test, which could be taught to both medical experts, judges and lawyers.'[118] His justification for the change rests on the absence of definitions of the key words (abolition, alteration, discernment and will) and the fact that the legal concept of abolition does not match the clinician's reality: a person can be suffering from a mental disorder and still retain their reason and intention to commit crime, [119] an observation the alienists made long ago through the concepts of monomania and partial alienation.[120] Interestingly, his causality test recommendation echoes 19th century legal scholar Ortolan's test of a 'dominant and exclusive' idea leading to the crime and Acollas' explanation of the debates before the courts.

There is certainly a difference between a test based on causality and one based on abolition/alteration. A disorder can be the dominant or exclusive cause of the offence, while

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[113] Sénat, *Rapport n° 434* (n 6)

[114] Ibid ; HAS, *Rapport* (n 2) 30-31; Benjamin Godechot, 'Psychiatrie et droit pénal: discernement ou contrôle des actes, un dilemme médico-légal? Analyse de la littérature professionnelle et de la position d'un échantillon d'experts psychiatres.' Thèse Médecine humaine et pathologie 2014 <https://dumas.ccsd.cnrs.fr/dumas-01082093> accessed 5 April 2021.

[115] HAS, *Rapport* (n 2) 30; Lafaye, *Rapport* (n 6) 72-73.

[116] Lafaye, *Rapport* (n 6) 71-72.

[117] Sénat, *Rapport n° 434* (n 6) 76.

[118] Bouchard, 'Irresponsabilité' (n 12) 423; similarly, Zagury, 'Clinique (n 12)'; Godechot, 'Psychiatrie' (n 101).

[119] Bouchard, 'Irresponsabilité' (n 12) 422 ; HAS, *Rapport* (n 2) 31; Zagury, 'Clinique' (n 12) ; M. Bénézech, 'Folie où es-tu?: Libre dissertation critique sur la responsabilisation des psychotiques. ' (2010) 168 (1) Annales Médico-psychologiques 48.

[120] Bénézech (n 120) 52

not completely destroying the defendant's capacities. The test would bring within the orbit of 'abolition' a broader range of disorders than are likely to be currently dealt with under 'alteration'. In addition, it shifts the focus away from discernment and control towards understanding how the disorder is the dominant or exclusive explanation for the offence. Thus it brings the work of experts closer to their actual expertise, i.e. that of establishing a medical diagnosis at the time of the offence. Discernment, control, abolition and alteration, could still be taken into account, but they would not be the focal point anymore. It would also bring more transparency to the decisional process; it could even be used to explain a decision to the victim.

In the Halimi case, for example, the victim's family argued that the judges could not simultaneously recognise the antisemitic nature of the defendant's speech and conclude that his capacity to discern was abolished. Citing the experts' reports, the Court of Appeal and the Avocate Generale took care to explain that the contradiction was only apparent, that the antisemitic words were part of the delusion.[121] The Supreme Court reached the same conclusion.[122] Nevertheless, when the legal test focuses on the defendant's capacities, it can be difficult to convince the victim's family that the defendant, in using the victim's religion to fuel his delusion, has lost his reasoning faculties. Viewing the test in causal terms on the other hand helps to shift the focus slightly away from discernment and volition. It requires an understanding of how a delusion works and how the psychotic episode dominated the defendant despite his apparent ability to reason. The causality test does not however provide an answer to the thorny issue of prior fault, when for example the episode results from a voluntary consumption of cannabis.

4. The outcome of the defence: the modulation of prior fault?

Once the disorder is identified and is considered to have affected the defendant's capacities, the decision can still be influenced by the defendant's prior fault, a controversial question even today.

4.1 – The state of the law until the Halimi case

The question of prior fault is longstanding. The Ancien Droit considered that prior fault for madness and sleepwalking meant conviction, with a mitigated sentence. For intoxication, scholars disagreed as to whether it was full liability in any case or just for voluntary intoxication.[123] Little is known of the revolutionary period. One wide-ranging study of historical records of the juries between 1791-1801 however mentioned that madness was often pleaded as a mitigating circumstance for sentencing purposes, after a conviction. Why is not clear, but madness seemed to have been accepted along with voluntary intoxication, learning difficulties, and destitution,[124] confirming Ortolan's observations in 1863.[125] Therefore, it may well be that the jury did not want to exclude liability, because there was prior fault and/or an altered state of mind (as with intoxication). France may have continued

[121] CA Paris Halimi (n 34) 23-24.
[122] Crim (n 36)
[123] *Supra* section 2.1.
[124] Robert Allen, *Les tribunaux criminels sous la Révolution et l'Empire : 1792-1811* (Presses universitaires de Rennes 2005) ch. 2, 3.
[125] Ortolan, *Éléments* (n 56) 466-467.

the Ancien Regime practice, despite the revolutionaries' wide-ranging ban on individualisation of sentences by judges.

Article 64 CP makes no mention of the question. At first, the Supreme Court seemed divided,[126] but over time it settled on the fact that voluntary intoxication, when it altered the defendant's capacities, cannot justify mitigating circumstances, whichever type of offence is considered (intentional or non-intentional).[127] The question of prior fault when there is complete loss of discernment or control does not seem to have been resolved, as the Avocate Générale demonstrated in her *avis* to the Halimi case.[128]

The 19th century legal scholarship on prior fault focused on intoxication and sleepwalking rather than on *démence*/mental alienation. They all agreed intoxication cannot be an excuse in the situation dubbed in English 'Dutch courage' as the author premeditated his crime while drinking. They also all agreed that involuntary intoxication leading to complete loss of consciousness or control should exclude liability; if it only altered the defendant's capacities, mitigating circumstances should be recognised.[129]

For voluntary intoxication, the authors are divided. Ortolan rejected liability as long as the person completely lost his faculties, even if drunkenness is habitual and not an accident, because the person stopped being just intoxicated and entered a state of mental alienation; when the person has not lost capacity, then the judge could consider intoxication as a mitigating or aggravating circumstance.[130] Garraud differentiated according to the type of offence (intentional/non-intentional) if intoxication led to total incapacity. Voluntary intoxication without abolition of capacities may be considered at the sentencing stage. Nevertheless, if the 'habitual use of alcohol, opium, hashish, morphine' leads to a state of mental alienation recognised by medical experts, then the person is in a state of *démence* and is not liable.[131] Lallement has a similar outlook, noting that for Esquirol 'intoxication is far less the cause than the first symptom of madness'.[132]

For Chauveau and Hélie, intoxication which altered the defendant's capacities justifies mitigating circumstances, whether it is habitual or accidental. When voluntary intoxication leads to complete loss of capacity, in theory, the offender should not be liable, but in practice, only involuntary intoxication may be admissible.[133]

Modern authors' developments testify of a persisting fault line. They observe that Parliament has criminalised certain behaviours when the defendant is voluntarily intoxicated (mostly driving). They acknowledge the scholarly controversy. Furthermore, observing that the question is one of fact, outside the control of the Supreme Court, they explain that the case law, pre and post 1992, is unfavourable to recognising voluntary intoxication as a mitigating

[126] Against mitigating circumstances (voluntary intoxication): Crim 7 prairial an 9; Crim 15 thermidor an 12; for, when intoxication is not total, Crim 8 frimaire an 7; Crim 11 florial an 10, in Devilleneuve L-M and Carrette A-A, *Recueil général des lois et des arrêts, avec notes et commentaires (1791-1830).* vol 1 (1843).
[127] Crim 1 June 1843 S. 1843, 1, 844 ; Crim 3 Dec. 1963 Bull. Crim. 343; Bouloc, *Droit pénal général*, Dalloz 2017 (25e ed) para 464.
[128] Avis, Crim (n 36)
[129] Garraud, *Précis* (n 54) 226-227 ; Lallement, 'De la condition' (n 64) 242 ; Chauveau and Hélie, *Théorie* (n 54) 214-215 ; Ortolan, *Éléments* (n 56) 132-133.
[130] Ortolan, *Éléments* (n 56) 225.
[131] Garraud, *Précis* (n 54) 224, 226-227.
[132] Lallement, *De la condition* (n 64) 247.
[133] Chauveau and Hélie, *Théorie* (n 54) 213-216.

factor at sentencing, let alone as a cause to exclude liability.[134] Prof Mayaud quotes a long extract of a *tribunal correctionnel*'s decision (so a trial court) to explain why voluntary intoxication cannot be accepted as part of the defence: 'when the person knows well the intoxicating qualities of the multiple drinks he consumed, which is strongly indicative of his intention to gradually reach a state of no-return in the state of drunkenness and a degree of excitement particularly dangerous for a habitual drinker'.[135] This rationale was put to the test in the Halimi case.

4.2. The Halimi case

Nobody disputed that the defendant voluntarily consumed cannabis for eleven years, up to fifteen joints a day. One expert, and the victim's family, considered however that this consumption, because it was voluntary, meant that the defendant understood the risks associated with cannabis. The defendant was at fault in terms echoing the extract above. The Paris Court of Appeal reached a very different assessment. It repeated twice that the defendant did not know, when he was consuming cannabis, that its use could cause an acute psychotic disorder.[136] His three convictions for possessing cannabis did not demonstrate either that the defendant understood the dangers of using cannabis. The Paris Appeal Court, therefore, rejected prior fault; so did the Supreme Court: Article 122-1 al.1 CP does 'not distinguish according to the origin of the disorder which led to the abolition of [the defendant's] discernment'.[137] The Avocate Générale reached a similar conclusion,[138] suggesting that at best, the investigatory court could have considered a charge for involuntary manslaughter, since the consumption demonstrated indifference to its dangers.[139]

Prior fault thus raises issues of causality, showing the relevance of the debates about the legal test to define the impact of the disorder. It also illustrates that defining the disorder's impact is not just a legal choice but a political and social choice. Who does society wish to punish? Would prior fault for example apply if the defendant had refused treatment? It is a controversial question among psychiatrists.[140] In early 2020, three senators proposed an amendment to Article 122-1 CP which would criminalise any form of prior fault, the refusal of treatment included.[141] Yet refusal of treatment is often symptomatic of the disorder,[142] and raises the question as to the degree of autonomy our society wants to give to a patient in choosing his treatment. Kobili's excessive consumption of cannabis could be a sign that he was already so ill that he could not seek medical help and thus was not at fault. The question would certainly deserve a parliamentary debate, informed if possible by clinical experience and the patients' own views.

5. A conclusion with a comparative law outlook

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[134] Bouloc (n 128); Bonis, *Répertoire* (n 8) para 71-72; Véronique Tellier-Cayrol, 'La turpitude du fou' Recueil Dalloz 2020, 349.
[135] Mayaud (n 70) 402.
[136] CA Paris Halimi (n 66).
[137] Crim (n 36) para 29
[138] Avis, Crim (n 36) 68-70
[139] Id. 75-77
[140] Lafaye, Rapport (n 6) 82.
[141] J-L Masson, Ch Herzog and Cl Kauffmann, Sénat, *Proposition de loi n. 252*, 16 Jan 2020.
[142] Tellier-Cayrol, 'Turpitude' (n 135).

This chapter has presented the evolution of the French law defence of mental disorder over four centuries. French law has always accepted that the defence could have two outcomes: if total lack of capacity, liability is excluded. If capacity is only altered, liability is attenuated; the disorder justifies conviction with the court applying mitigating circumstances. Even the Revolution, which banned individualisation of sentencing by judges, seemed to have continued with the practice of a mitigated sentence via the concept of excuse. Contrary to the claim often made, it has always punished offenders suffering from a medical condition, as long as the conditions of the defence have been met.

Over the centuries, the definition of the disorder has changed. Anchored in the Ancien Droit, the *démence* of Article 64 CP (1810 criminal code) was initially a disease of the brain, an expression not dissimilar to the 1843 "disease of the mind" in the M'Naghten rules in English Law. In their own ways and in their own time, both laws stopped being defined by biology and evolved to encompass different conditions that do not reside in the brain.[143]
By the first half of the 20th century, *démence* was understood generically, including intoxication and sleepwalking which before were recognised but outside Article 64 CP. The 1992 codification solidified this understanding by using the neutral expression of 'psychological or neuro-psychological disorder'. English law however developed the separate defence of automatism, and thus the insanity defence never extended as far as the French defence. In that sense, the modern French expression of 'psychological or neuropsychological disorder' is closer to the 'recognised medical condition' of diminished responsibility[144] and the Law Commission's suggested concept of 'a medically recognised condition' in its proposals relating to insanity, automatism and intoxication.[145] As the Halimi case illustrated, the French law concept is a legal concept, where the disorder does not have to be a specific pathology such as schizophrenia and can include a wider range of medical conditions.

Once identified, the disorder has to have an impact, which has always been defined in French law along the lines of abolition/alteration of capacities, both cognitive and volitional. There is no exclusion of control like in the English insanity defence, and thus no separation between insanity and automatism. With perhaps the exclusion of the revolutionary period, French law always had two outcomes: exclusion of liability based on abolition and attenuated responsibility based on alteration. By contrast, English law does not formally recognise attenuated responsibility, except indirectly with diminished responsibility which only applies to murder charges. The Law Commission's reform proposal continues that tradition. English law, though, does not ignore mitigating circumstances based on a mental disorder. The current sentencing guidelines indicate that 'when the offender appears to be mentally disordered, the court must obtain and consider a medical report'.[146] The ultimate outcome may therefore be similar in both countries.

The legal test to decide between irresponsibility and responsibility focuses in both laws on abolition -total incapacity- to justify excluding criminal liability, in contrast for example to

[143] Kemp [1957] 1 QB 399, at 407.
[144] Homicide Act 1957 c.11, s.2
[145] Law Commission, *Criminal Liability: Insanity and Automatism. A Discussion Paper* 2013
[146] Para 6, https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/

the Dutch legal test for insanity which focuses on causality.[147] Yet, following recurring difficulties for medical experts to interpret the terms abolition/alteration and discernment/control, which remained undefined in French law, I suggested amending Article 122-1 CP to switch to a causality test. The test for Article 122-1 al.1 CP would become slightly wider, bringing within its orbit cases where defendants have not completely lost capacity but where the disorder, nevertheless, is the dominant or exclusive cause of the offence.
Articulating such a test would bring additional clarity with regard to prior fault as Parliament would have to decide whether a disorder, which is the dominant or exclusive cause of the offence, should be excluded if brought about by the defendant's prior fault.

The question of prior fault has never ceased to be controversial in French law. The 19th century authors did not agree, and modern scholars remain divided as to the effect of voluntary consumption of alcohol or cannabis. English law has long refused to conclude that the regular consumption of alcohol constitutes prior fault when the defendant has developed a mental illness and a defence or partial defence applies.[148] French courts have not had the opportunity to answer this question until the Halimi case. The Supreme Court rejected prior fault: judges cannot distinguish where Parliament never intended to make such a distinction when it enacted Article 122-1 CP. If prior fault is to be recognised in French law, it will have to be through a Parliamentary reform.

More generally, the Halimi case illustrated how the application of the defence cannot be dissociated from the fact that Article 122-1 CP and embodies a choice French society made based on how it sees its relationship with those who commit a crime while suffering from a medical condition affecting their capacities. Psychiatric experts have their own conceptions of liability and treatment, but their participation in criminal proceedings is in practice limited. For offences of less than ten years imprisonment, which represent 99.74% of tried cases, the multiplication of summary proceedings akin to guilty pleas has led to defendants rarely if ever seeing an expert before entering a prison after conviction.[149] Article 122-1 CP has its defects, but perhaps it is a sign of a wider problem: what is the purpose of a criminal sanction when often those offenders suffering from a mental disorder are the most vulnerable? It is time for France to confront the startling question as to why its prisons can be seen as the new asylums. Article 122-1 CP is only part of the solution.

[147] Johannes Keiler and David Roef (eds), Comparative Concepts of Criminal Law (3rd edn, Intersentia) 243. The Dutch criminal code is built on the 1810 French criminal code.
[148] Law Commission (n 146) 74.
[149] Lafaye, *Rapport* (n 6) 210.