SOUNDNESS OF THE DEFENCE 'UNSOUNDNESS OF MIND' AS A GENERAL EXCEPTION – AN ASSESSMENT OF ITS APPLICATION IN INDIA

DR. KVK SANTHY
Asst Professor,
NALSAR University of Law,
Hyderabad, Telangana

Abstract: *For a substantial amount of time, the general idea has been to absolve a man who is not guilty for the commission of the crime. And in this light, since the dawn of modern rationality, societies have believed that the insane should be considered 'not guilty' for the crimes they commit. This paper in detail discusses and analyses the problems and perspectives in implementing the law relating to Insanity/unsoundness of mind. Since the law is adopted from England a considerable research goes into comparative study as well.*

Keywords: *rationality, perspectives, insane, absolve*

INTRODUCTION

A man is not punished for a crime committed by him unless he had the requisite intention to commit it. This idea stems from the Latin maxim '*actus non facit reum nisi mens sit rea*' which means that the act does not makes one guilty unless one has a guilty mind. Lord Diplock[1] had made a somewhat similar assertion in a case called Swet vs. Parsley[2] and said, 'An act does not make a person guilty of a crime unless his mind be so guilty'. Mainly within this framework, insanity has charted out a fairly clear course in the history of culpability all across the world. Stephen[3] had stated that "*No act is a crime if the person who does it, is at the same time when it is done prevented either by defective mental power or by any disease affecting his mind (a) from knowing the nature and quality of the act, or (b) from knowing that the act is wrong*".[4] Stephen remarked that if a person cut off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, the case could be construed as one where the offender had no means of knowing the effects of his act.[5] Sir William Blackstone, wrote that "*idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities*" [6]

Although, there is no evidence supporting individual instances of the use of insanity as a defence in the medieval period, we can infer that the defence was in usage through the writing of many commentators which depict a legal system which subscribed to the view that defendants lacking an ability to discern between good and evil were paralleled with infants and animals.[7] Insanity as it stands today varies across the world with the way in which it is accepted and utilized. Nuances vary even for nations which follow the same general set of rules.

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[1]Dr KVK Santhy, Asst Professor, NALSAR University of Law. Author would like to ackonolwedge for the research assistance provided by Ms Arti Mohan in writing this article.
One of the longest serving Lord of Appeals, he made gigantic contributions to legal ideas like Audi alterum partum, ultra vires, etc.
[2] 1970 AC 132.
[3] Sir James Fitzjames Stephen was an English lawyer, judge and writer who also played a tremendous role in the drafting of the Indian Evidence Act.
[4] Stephen, History of Criminal Law Vol. II, Art. U.P. 5.
[5] Ibid, pp. 166
[6] William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK IV - OF PUBLIC WRONGS (1769), pp. 24.
[7] Donald H.J. Hermann, THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES 23 (1983)

'The insane cannot be treated the way in which those who are responsible for their crimes are treated' seems to be the idea which is broadly accepted. However, even this view holds within it a surfeit of interpretations of 'insanity'. It equates not with one objective definition, but rather, with an idea which has always been prone to multiple ways of construal. And this idea is one which brackets subtle equivalents of terms, a little playing with words, which has a substantial impact on the perception of justice in a given epoch. Or rather, it could be said that the varied perceptions of justice result in innovation with terminology and thus give us not just 'insanity' and 'guilty' to explore but also 'unsoundness of mind', 'diseased mind', defect of the mind', 'not guilty by reason of insanity', 'guilty but mentally ill' and so on.

The law today, at least on the face of it, gives a perception of being quite objective, and extremely rational, making the best use of the dichotomies created by itself, i.e. of Sane and Insane. Though doubts about its misuse are often raised yet it is simultaneously believed that there is just a paltry scope for the violation of justice. A law which gives the perception of rationality, but when seen in light of the fact that the law regarding unsoundness of mind as a defence is based on a statute which was passed in 1860 and the particular provision has remained stagnant in the face of the gigantic leaps taken by psychiatry and mental health sciences, it becomes impossible not to question the relevance of the defence in the present scenario. The present research paper report seeks to do precisely that, question and analyze the scope of reform in this realm. By comparing the current test applicable in India with the applicable tests or recommendations across the world, and by putting into perspective the mental health sciences perception of various mental disorders as well as the relevance of technological growth, this report tries to cull out the loopholes in the law which till now has rejected all suggestions of reform.[8]

II- LEGAL PRINCIPLES APPLICABLE IN INDIA AND POSITION UNDER INDIAN PENAL CODE, 1860

Section 84 of the Indian Penal Code lays down the legal test for absolving criminal liability in cases of 'unsoundness of mind'. The law as applicable in India does not define 'unsoundness of mind'.[9] Though purposely not termed as insanity, judges in a 2008 case, *Hari Singh Gond v. State of Madhya Pradesh*[10], remarked that the courts have mainly treated this expression as equivalent to insanity. But then again, the term `insanity' itself lacks a precise definition. The subtle differences which arise because of the interplay in words have been discussed later in the project.

The current position of the defence was summed recently in *Siddhapal Kamala Yadav vs State of Maharashtra*[11] which paralleled the words of Section 84 with the way in which the defence is understood by the judiciary presently. The two judge bench stated that Section 84 exonerates any person from liability who at the time of committing the act was either incapable of knowing

(a) the nature of the act, or

(b) that what he did was either wrong or contrary to law.

However, the protection does not extend to a person who knew what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong.

Further, going onto the evidentiary aspect, the Bench stated that the onus of proving unsoundness of mind is on the accused but if any previous history of insanity is stumbled upon during the course of the investigation it is a duty of any honest investigator to subject the accused to a medical examination and place that evidence before the Court.

The Bench said the onus, has to be discharged by producing evidence dealing with the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, and also by evidence of his mental condition and other relevant factors.

[8] The 42nd Law Commission Report expressly stated that there is no need for reform in this section.
[9]The penal codes of Malaysia, Northern Nigeria and Singapore also use the expression unsoundness of mind
[10] 16 SCC 109 = AIR 2009 SC 31
[11] Crl. A. No.1602 of 2008]

For it to be termed as 'unsoundness of mind', just a peculiarity in behaviour or some strange habits are not enough. The Bench also added that the mere fact that an accused is "*conceited, odd irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts, in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section.*"

Also, under Section 84 every person who is mentally diseased, is not, *ipso facto* exempted from criminal responsibility. Going strictly by the interpretation of the law, courts have continuously re-iterated that mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath cannot be included within the ambit of this section to absolve liability. And in this context, the Bench emphasized that the distinction between legal insanity and medical insanity needs to be taken cognizance of. At the same time, the courts have tried as far as possible to come close to scientifically founded definitions of unsoundness of mind.

Sudhir CH. Biswas v State[12] was one of the cases which held that mere eccentricity is not enough to constitute unsoundness of mind. Also, the mere absence of a strong and adequate motive to commit a crime like murder is not by itself a proof of insanity.[13] In *Dahyabhai v. State of Gujarat*[14], the Supreme Court held that the brutality or the heinouness of the crime does not necessarily prove the unsoundness of mind. Also, the mere existence of 'unsoundness of mind' at the time of the commission of the crime is not enough since the law takes into account only the causal effects of the condition which render the cognitive abilities of the accused in relation of the commission of the crime.[15]

Talking about the exact interpretation of the section, Mayne's view is worthy of mention. He talks about the two different states of mind which the words incapable of 'knowing the nature at act' may refer to, described through the words nature and quality. An individual can be considered to be unaware of the *nature* of his act when he is unable to comprehend the 'properties and operation of the external agencies which he brings into play'. Mayne gave an example of an idiot shooting at a person with a belief that the gun was a harmless firework. On the other hand ignorance of the *quality* of his act implies that person is incapable of comprehending the result of his act. An example could be a person unable to appreciate the difference between shooting a man and shooting a stone.[16]

As is evident from the above paragraph, the legal position is such that the cognitive element of the mind is the main focus of the Indian judiciary. There is absolutely no mention of a volitional or emotional element. The Courts have, in a few cases, highlighted the fact that the law contained in Section 84 is based on "*the outdated Naughton rules of 19th Century England*" which relied on separation between the cognitive and volitional element of the mind.[17], rather than treating the mind as a unified whole. However, there is still no scope for the volitional element under Indian law. In *Brij Kishore v State of UP*[18], it was explicitly held that behaviour stemming out of uncontrollable impulses with no loss of ability in the knowledge of the doer is not an exemption from criminal responsibility in India. Also, in *Amrit Bhushan v. Union of India*[19], the court held that

[12] 1987 CRLJ 863
[13] Nakula Chandra Aich v. State of Orissa, 1982 Cri LJ 2158 (2162) Ori (DB), 1983 Cri LJ 1385
[14] AIR 1964 SC 1563
[15] In S.K. Nair v. State of Punjab the Supreme Court held that the plea that accused was suffering from paranoid fact establishing that he understood implications of his acts at the time he committed the offence is not maintainable.

[17] Sherall Walli Mohammed v. State of Maharashtra 1972 Cri.LJ 1523
[18] 1989 CriLJ 616
[19] 1977 AIR 608

not being statutorily accepted, courts cannot absolve responsibility merely on the basis of rules otherwise given under Common Law.

Coming to the proof of the 'unsoundness of mind', heavy reliance has always been laid by courts on the behaviour of the accused immediately before, through, and after the commission of the crime. In the case of *Dahyabhai*[20], the court observed that "*Whether the accused was in such a state of mind as to be entitled to the benefit of S. 84 of the Penal Code can only be established from the circumstances which preceded, attended and followed the crime*." the same has also been held in a lot of earlier cases where sometime the nature and the character of the crime and the conduct during and after the trial were also taken into consideration besides the conduct during and after the crime.[21] As seen from innumerable cases, most of the judgments have been able to take into account only the symptoms displayed by the accused before and after the commission of the crime. Keeping in mind the fact that there are hardly any fool proof methods of ascertaining with absolute clarity the mental state of the offender, the behaviour of the accused happens to be the only evidence available. However, this method is fraught with arbitrariness and at the same time, cerebral logic which is distanced from concrete knowledge of the functioning of the human brain. And even where medical disorders are said to be definitely present, these pseudo-medical definitions of mental health disorders again rely solely on the signs and symptoms displayed and on the observed and reported behaviour. There is hardly ever any scientific evidence to justify the state of mind claimed.

No objective tests have been formally laid down, and in practicality aren't available and in some cases, or even in existence, and this has lead to an approach which deals with the *judges being satisfied* that the accused at the time of the commission of the act did not know the nature and quality of the act or that the act was wrong or contrary to law, and not to the fact that the *accused actually did not know* the nature and quality of the act or that the act was wrong or contrary to law.

In most cases in the past, the examination of the offender was made by a medical officer and in very few cases by a psychiatrist.[22] However after the amendment in the Criminal Procedure Code[23], examination by a psychiatrist (and not just a medical officer) has become mandatory.

However, even with the psychiatrist's opinion becoming mandatory, the divide between the cognitive and the volitional remains a reality in the law. And to this extent, the current test as applicable appears distanced from scientific knowledge of the human mind which lacks the ability to differentiate between the two prongs. Also, being based only on symptoms, the test lacks objective validity in all cases. The lack of scope for concrete evidence, and the narrowness of the section, as well as the scope of malingering, makes us question the very essence of the section. Before analyzing the scope of reform in the law, the applicability of the law in relation to various disorders has been discussed and following that , other tests have been explored.

III THE LAW AND SCIENCE

Mental health science is a discipline which is continuously evolving, continuously changing. Diseases, disorders, their causes, their symptoms have hardly ever been held as constant in this realm. Neurosis, which was always considered as one of the most important forms of mental disorders, almost vanished after the 1980. Even homosexuality was considered to be a pathological disease once [24] Narcissism was declared a "personality disorder"[25] almost seven decades after it was

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[20] Ibid, 14

[21] Chhotelal Gangadin Gadariya

[22] Example, In Emperor v. Gedka Goala AIR 1937 Pat 363 Asisstant Surgeon he could not ascertain the state of the mind of the accused, Etwa Oraon v. The State, AIR1961 Pat 355, The accused was examined by an Assistant Surgeon and a Civil Surgeon..

[23] The Code of Criminal Procedure (Amendment) Act , 2008 which amended Section 328 of the Principal Act

[24] This idea was done away with by the American Psychological Association in 1973

first described by Freud. However in the context of criminality this discussion happens to be relevant since the evolution in the science also brings forth changing perceptions in various concepts which laws like those under Section 84 make use of. Some 'mental disorders' have been linked with the law in this section with the main idea being to analyze the scope of the law in relation to the law and subsequently cull out spaces for reform if required.

Personality Disorders

Crime and personality disorders can be closely linked to each other. A number of researchers have been able to diagnose such disorders in prison populations.[26] A few of these have been discussed below to bring out the implications the disorder has and the way in which it fits into the realm of insanity as a defence.

Taking up the idea of narcissism, it is understood that narcissists are not subject to 'irresistible impulses' or even to disassociation but are rather, fully in control of their behaviour. Narcissists have rage attacks and grandiose fantasies. Most narcissists are also mildly obsessive-compulsive. Yet, the disorder would hardly play a role in the defence of 'unsoundness of mind' since there is no elimination of cognitive ability. The symptoms or conditions defining narcissism may be many but it can be clearly said that since they are at all times in perfect awareness of their acts, both the nature and the quality and also of the consequences of these acts, they cannot find a place in the whole unsoundness of mind discussion for exemption from liability. For that matter, since narcissists also do not experience irresistible impulses even though their grandiose fantasies may not be in their control, they would not even come under the irresistible impulse defence if ever applied.

However, some scholars have noted that that many narcissists have no criminal intent even when they commit criminal acts, equating it with a lack of *mens rea*.[27] However, to give specific inclusion to a defence for narcissists who are otherwise in perfect control would go against the rationality society vests in the defence, or at least likes to. Also, the DSM V will also in the best of speculations eliminate narcissism from personality disorders. [28]

Schizophrenia

Schizophrenia has been explained by psychiatrists under four basic heads - simple, hebephrenia, catatonia, paraphrenia-paranoid. Studies related to schizophrenia and violent crime have brought forth contradicting results with some claiming that the disorder results in an increased disposition of the individual towards violence and crime[29] while others claim that it plays no role in determining the violence levels. Taylor, in such a study came up with a few propositions. According to him, schizophrenia does increase the proclivity towards crime; however, the proportion of individuals affected is small. The violent streaks are more common in patients who have recurrent attacks and not in those who are continuously ill. He also mentioned that at the time of the actual commission, the offender acts without insight.[30] These propositions are relevant

[25] Again, by the American Psychological Association

[26] John Gunn, in EPILEPTICS IN PRISON. put forward his diagnosis of abnormal personality in 20% of prisoners in prisons in South East England. Bluglass, in his MD thesis on 'A psychiatric study of Scottish prisoners' found psychopathic personality disorder in 40% of newly convicted prisoners in the St. andrews prison.;

[27] It is believed that the narcissist may victimise, plunder, intimidate and abuse others - but not in the cold, calculating manner of the psychopath. The narcissist hurts people offhandedly, carelessly, and absentmindedly. The narcissist is more like a force of nature or a beast of prey - dangerous but not purposeful or evil.

[28] This view was opined in a New York Times article available at: http://well.blogs.nytimes.com/2010/11/29/narcissism-no-longer-a-psychiatric-disorder/

[29] , Kris Naudts and Sheilagh Hodgins, NEUROBIOLOGICAL CORRELATES OF VIOLENT BEHAVIOR AMONG PERSONS WITH SCHIZOPHRENIA, Schizophrenia Bulletin, (2006) 32 (3): pp.562-572. , Abstract

30 Taylor, P., SCHIZOPHRENIA AND VIOLENCE. IN ABNORMAL OFFENDERS, DELINQUENCY, AND THE CRIMINAL JUSTICE SYSTEM (eds J. Gunn & D. P. Farrington), 1982 pp. 269-284. New York: Wiley

in this discussion not to assuage the extent to which the disorder causes the crime but to fix the culpability of the individual who commits a crime.

Modi[31] has spoken about schizophrenia in substantial detail and he discusses how suspiciousness leads on to delusions of persecution. Schizophrenia entails auditory hallucinations, delusions which result in the individual getting very irritable and disagreeable. Delusions can both of the persecutory or grandiose type but besides the delusions the person retains both his memory as well as his orientation. The delusions do affect a schizophrenic's behaviour and this is where criminal acts come into the picture. Since a person acting under a delusion does not comprehend the true nature of the crime, he is not held liable for the commission of a crime. A famous case decided by the Supreme Court in this regard has been *Shrikant Anandrao Bhosle v. State of Maharashtra*[32]

Indian courts have dealt with quite a few cases of paranoid schizophrenia. Though delusions are often understood as the sole crime causer for schizophrenics, Vivkkunen found that only one-third offended directly as a result of their delusions and hallucinations. The remaining two-thirds offended because of problems arising from stress produced within the family.[33] This research points to the fact that not all crimes committed because of schizophrenia are in a state of inability to know and comprehend the nature, quality and the wrongness of the act but are nevertheless because of the disease itself. Whether culpability can be assigned in such cases remains a question which should be answered in the affirmative, for the opposite would give rise to more vagueness as well as encourage determinism. Therefore, in this regard the law does not require any reform.

Multiple Personality Disorder (MPD, now known as DID - Dissociative identity disorder)[34]

It is characterized by the presence of two or more distinct personalities[35], both housed within the same individual, each possessing a complete personality. The personalities manifest themselves at separate times with the transition between the two usually being attributable to some traumatic incident.

Indian courts have had no instance of dealing with a crime committed by one personality of the DID without any concurrence with the other/others. Even if it is proved that the person has committed a crime the question of the applicability of Section 84 to a crime committed by one alter, with the other alter having no knowledge or memory of the act is questionable. Apart from the relevance in crime, DID on its own remained an uncommon diagnosis in India almost till 1989.[36] After that too, very few cases have been reported.

On a cursory glance it can be believed that it would be difficult to ascertain DID, however research[37] has showed that when it came to testing DID, the validity as well as reliability was the same as that for schizophrenia. Though of course there is no blood test for the diagnosis of any mental disorder unlike for other pathological diseases, DID can be diagnosed as easily as any of the other mental illnesses. Also, it has been repeatedly suggested that the explicit allowance of DID in the insanity defence would open up scope for a lot of malingering. But then, malingering must *always* be suspected in the context of forensics.

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[31] Modi's MEDICAL JURISPRUDENCE AND TOXICOLOGY, 22nd Edn

[32] (2002) 7SCC 748

[33] Virkkunen, M, , ON ARSON COMMITTED BY SCHIZOPHRENICS, 1974.

[34] MPD was first considered as an official psychiatric diagnosis by the American Psychiatric Association in 1987 when it was included for the first time in the Diagnostic and Statistical Manual for Mental Disorders (DSM). MPD is now called the Dissociative Identity Disorder in DSM IV.

[35] Most systems have one to twenty alters, some have hundreds. For example, a typical young woman with MPD might have six personalities including a 4-year-old girl, a 90-year-old man, a secretive intellectual, a promiscuous young lady, a studious introvert, and an impulsive, teenage girl.

[36] Adityanjee, Raju,G.S.P. & Khandelwal, S.K. (1989) CURRENT STATUS OF MULTIPLE PERSONALITY DISORDER IN INDIA. American Journal of Psychiatry,146, 1607-1610

[37]Using the Structured Clinical Interview for the DSM-IV Dissociative Disorders (SCID-D)

But the problem which does need to be taken into cognizance is that even if DID is diagnosed, it is difficult to assess which alter committed the crime and how that should be relevant for imposing culpability. Some courts have used 'The Alter Approach' which treats the state of mind of a DID defendant like that of a person who is a totally integrate whole. Ohio v. Grimsley[38] was a famous case which made use of this test but in sharp contradiction to this field of thought, science claims that the host does not even know that a crime was committed by the alter unless the two of them were co-conscious.[39] There have been instances where psychiatrists have been able to evaluate the presence and ability of the other alter to intervene in the act. [40] But these are extremely rare instances and such professional knowledge and technology can hardly be considered to be available in India. Keeping these factors in mind, though it is accepted that the current law lacks any provision for defendants suffering from DID, the only suggestion put forward is that courts have no other option than to consider the alter as a unified whole and therefore the law is helpless in this regard and cannot be amended.

Somnambulism

Somnambulism is an unconscious state known as sleep walking. Modi has described it as "*In this condition the mental faculties are partially active and are so concentrated on one particular train of ideas that a somnambulist is capable of performing most remarkable and incredible pieces of work, which would have baffled his intelligence during his waking hours. A somnambulist may thus solve a very difficult problem or may commit theft or murder. A person who is the victim of a somnambulistic habit has generally no recollection of the events occurring during the fit after he awakes. In some cases he remembers the events of one fit in subsequent fits and follows them with exact precision, though he forgets them in the normal state.*"[41]

If it can be proved that the accused committed the offense during a fit, somnambulism is a very good defence under the current law since a person committing such an act does so without the conscious knowledge of the nature or the quality of the act. R.C. Ray gave furtherance to thus claim by asserting that "*While in this condition the higher (intellectual) centres activate partially to one train of impressions, the result being elaborate physical and intellectual feats, performed in perfectly rational manner, the brain being inactive to other impressions. Homicides and suicides may thus be effected..... Somnambulists remember their dreams, but not their motor acts; whereas, after recovery from insanity, events may be partly recalled. No responsibility attaches to their acts*."

It has been claimed that the somnambulist should be held responsible for acts committed during the fit since complete lack of control and consciousness can rarely accomplish a crime. What is done in the fit is often only the accomplishment of a project formed while awake. However, this claim holds no water since that would be akin to punishing a man merely for intention without having resorted to preparation or attempt.

Bearing these medical observations in mind, somnambulism if proved will constitute that unsoundness of mind, attracting the application of Section 84, I. P. C and doesn't require any modification to this extent.

Automatism

Automatism is a term used to describe unconscious as well as involuntary behaviour. It means an unconscious, involuntary act, where the mind does not go with what is being done. Automatism can be a symptom of

a) epileptic seizures
b) somnambulism

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[38] 444 N.E.2d 1071, 1076 (Ohio App. 1982).

[39] Elyn R. Saks, MULTIPLE PERSONALITY DISORDER AND CRIMINAL RESPONSIBILITY, pp. 25 U.C. DAVIS L. REv. 383, 386-88 (1992). Maryland Journal of Contemporary Legal Issues

[40] Dr. Olsen in his psychiatric evaluation in State v.Greene (59551 A.2d 207 (N.J. Super. Ct. Law Div. 1988)) assessed the other alters' presence and ability to intervene in the crime.

[41] Modi's MEDICAL JURISPRUDENCE AND TOXICOLOGY, Twelfth Edition, page 399

c) psychological dissociation
d) low blood sugar
e) head injuries[42]

Discussing epileptic[43] seizures under the same head, studies like those of Fenwick[44] make it clear that seizures are related to violent and aggressive acts. While linking epilepsy and crime, Gunn[45] concluded that it is very rare that the offence occurs directly because of a fit, however, the two may be coincidental.[46] Besides automatism, epilepsy also entails confusion, stupor, depression or excitement. Since the act is committed in a state of unconsciousness, the person would have lacked the knowledge of the crime and can thus make use of Section 84. When it comes to psychiatric evidence it is again a difficult task, although EEG findings in this case are of special importance.

Bipolar Disorder

As described by Pierre Janet, "*the psychosis called manic-depressive insanity is today much over-emphasised and applied wrongly or capriciously*"[47] Sidney Smith says that in the disorder "*Homicidal crimes are by no means infrequent. ...The crime may be committed in a confusional state, but frequently with complete consciousness, and then it may take the form of irresistible impulse.*"[48] This clearly shows that the form the offence takes is not automatism but an impulse though there is complete consciousness, This is also the opinion of. Drs. Gonzales Vance and Helpern say: "*The maniacal stage may be severe, characterised by struggling and raving, or it may be mild in which the patient merely has a rapid and uncontrolled flow of ideas, due to excessive mental activity. The reasoning power is not lost, but ungoverned. The patient is seized with wild impulses, even homicidal in type, and he may act upon them. In the depressive stage the subject is depressed or even stupor us. He is attacked by delusions and may commit suicide under their influence*"[49]. If the delusions can be proved, Section 84 clearly applies, but under the 'uncontrolled flow of ideas' and 'struggling' and 'raving' when there is knowledge about the nature, quality, or wrongfulness of the act, it would not apply. Thus, a strict interpretation of the law excludes a number of sufferers of the disorder from using the defence where the act would not have been committed 'but for' the disorder.

IV. VARIATIONS IN THE LAW - ANALYZING PRAGMATIC ALTERNATIVES

THROUGH HISTORY

Before proceeding to other tests, it is important to make note of the tests to which Section 84 can trace back its origin. The section has some similarity with the right-wrong test which came-

[42] Susan Young, Michael Kopelman, Gisli Gudjonsson, FORENSIC NEUROPSYCHOLOGY IN PRACTICE: A GUIDE TO ASSESSMENT AND LEGAL PROCESSES

[43] Epilepsy is a group of heterogeneous neural disorders which cause seizures or ictus. In the state of epileptic automatism, the individual can retain muscle tone and posture but perform complex or simple movements without being aware of what is happening.

[44] Fenwick P (1986). AGGRESSION AND EPILEPSY. In MR Trimble and TG Bolwig, eds. Aspects of Epilepsy and Psychiatry, pp. 31-60. John Wiley and Sons, Chichester.

[45] Gunn J. (1998) Legal IMPLICATIONS OF BEHAVIOURAL CHANGES IN EPILEPSY. IN ADVANCES IN NEUROLOGY VOL 55 (Ed. Smith D, Treiman D, Trimble M): 461-471.

[46] In a Chennai study by Somasundaram, of crimes committed by persons with epilepsy, out of 115 criminals mentally ill, 15 were found to be suffering from epilepsy i.e. 13%. However, this does not have a direct causal relation with the

[47] Dr. Pierre Janet. Flaminarion, Paris,. 1923. "Principles of Psychotherapy" or "La Medecine Psychologique"

[48] Sidney Smith , FORENSIC' MEDICINE, 1945, ..

[49] Gonzales, Vance, Helpern and Umberger, Legal Medicine: Pathology and Toxicology 917 (2d ed. 1954). at pp. 428

up after stricter tests like the 'wild beast'[50] test. The defence as perceived today, is however, the most similar to the Mc'Naughton rules which were laid down in 1843 in England.[51] The House of Lords laid down a test which consisted of three prongs:

1) an unsound mind
2) not knowing what they were doing
3) an inability to appreciate the wrongfulness of the act

This test deals with the cognitive faculties of the brain and not with the volitional, a direct reflection of 19th century psychology which advocated the independence of different brain functions in relation to each other. Comparable to the criticism voiced against Section 84, this approach has been held to be antithetical to modern psychiatry which understands that the mind cannot be split into watertight, unrelated, autonomous functioning parts. [52] It therefore becomes pertinent to discuss a few other tests which have been used or merely suggested.

The Product Test and the Durham Standard

As early as 1871, the New Hampshire Supreme Court offered a set of rules at variance with the M'Naughton rules. According to these a defendant would be held 'not guilty' if any crime committed by him was the 'product of a mental disease'.

In 1954, Durham v. United States[53], the United States Court of Appeals for the District of Columbia adopted the Product test. The court put forward the definition of a person being legally insane if he "*would not have committed the criminal act but for the existence of a mental disease or defect*."

This decision was considered revolutionary since the law for the first time went from mere notions of right and wrong to actual concrete scientific, pathological disease. It gave space for the psychiatrist /clinical psychologist to report his own finding without having to contain it to cramped legal terminology. However, the question of what constituted the 'mental disease' remained unanswered. Being a constantly evolving term, this but naturally resulted in vagueness and perceptions that a number of persons will be wrongly acquitted. The *Durham* rule was deterministic in nature, it being a direct reflection of the then prevalent criticisms from the field of psychiatry.[54]

However, both these tests are far too deterministic. By including all forms of mental disease or disorder as defences, there is a high probability of gross misuse of the law by those who are afflicted with a mental disease even if they commit a crime intentionally and knowingly. This may happen since they claim that the crime was committed solely because of the disease and there is no objective way to validate this. Also, again, such a defence could also bring within its ambit personality disorders which otherwise contribute to the commission of a number of crimes. This could, therefore, absolve liability for a majority of offenders who would claim to be afflicted with narcissism or psychopathy. Also, such a defence would to lead to extremely heavy reliance on the role of clinical experts and as discussed later in this report, such reliance would lead to extreme subjectivity. This idea of the defence is, therefore, by no means strong enough to be implemented even though it is far more inclusive than the current provision and inclusivity is a ground on which the law is challenged, the arguments voiced above weigh down this inclusivity and therefore not relevant.

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[50] One of the first tests to check insanity. It was laid down in 1724. If the defendant was found to be a madman, 'a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment' he would be acquitted..

[51] A man called Mc'Naughton murdered Mr. Drummond, the Private Secretary of Sir Robert Peel, the British Prime Minister. He had actually intended to murder Sir Robert Peel labouring insane delusion but failed in his attempt and murdered his secretary by mistake. His acquittal created a furore in the mind of the public. This matter fraught the minds sitting in the House of Lords.

[52] G. Sadasivan Nair, "Defence of Insanity: Need For Reform", (1998) pp. 129-64

[53] 214 F.2d 862

[54] Ibid, 876

The McDonald Test

This was a modification of the Durham test, laid down in 1962 by a District Court in Washington.[55] It narrowed the definition of mental disease or defect to only those conditions which substantially impaired mental or emotional processes, and more importantly, impacted one's behavioural controls.

On the face of it, this test gets rid of the majority of the problems highlighted for the previous two tests. However, the interpretation would again be inclusive of personality disorders since they do substantially affect behavioural controls and mental and emotional processes. Such a test would therefore be far too inclusive and subsequently, a huge blow to the criminal justice system.

The Washington revision of the Product Test

This was a 1967 ruling by Judge Bazelon[56] by which mental health experts were barred from rendering any 'ultimate opinions' about any causal connection between mental illness and criminal behaviour. Expert testimony was to be limited to a description of the illness, the adaptation of the person to it and whether or not the accused was suffering from the illness at the time of the offense.

In India expert testimony is generally taken as indicative. However the weightage which such testimony should be given has been analyzed later in this report.

American Law Institute (ALI) Test[57]

This test recommended that insanity can be defined as the presence of a mental disease or defect (specifically excluding personality disorders and diminished capacity conditions) and where either: (1) a substantial capacity to appreciate the wrongfulness of the act exists; or (2) an inability to conform or control one's behaviour to the requirements of the law exists (known as the volitional prong).[58] This test comes across as the most inclusive, including both the cognitive and the volitional and for all practical purposes excluding personality disorders and diminished capacity. It also allowed evidence of mental abnormality to be introduced not only on the insanity issue, but also on the issue of whether the accused had the *mens rea* associated with the alleged crime.[59]

The scope of the application of a provision which would also include the control factor has been examined in the next chapter.

Substantial Capacity Test

This criterion was, in effect, a combination of the Mc'Naughton Rule and Volitional Tests. A compromise, at least to some extent, seemed acceptable to the courts. However it entails within its ambit huge amount of subjectivity which if given place in the law would lead to

Besides these tests which have been applicable at different points of time, the position in various countries as of now has been discussed in the following section.

ACROSS THE GLOBE

The human mind as well as the deviances in its functioning would generally be the same across the world, but there is hardly any consensus if taken as an objective science. Since the system is one which is primarily symptom based, other diagnostic systems being unavailable or absent, there is a huge amount of discrepancy in assumptions and diagnosis and consequences across the world. In the context of criminal law, this becomes relevant since the implications of the lack of objectivity reflect directly on the way in which liability is absolved and on the way in which it is not. Also, there are huge differences in the way different societies perceive justice and subsequently in the way in which they try to mould their laws to try and come close to that justice. Discussed below are the laws in a few countries.

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[55] In the case of Mc'Donald v. United States, 312 F.2d 847

[56] Washington v. United States, 129 U.S.App.D.C. 29, 390 F.2d 444 (1967)

[57] Also called the /Brawner Standard

[58] It was laid down in the Model Penal Code

[59] Section 4.02 of the MPC

United Kingdom

The United Kingdom, being the progenitor of the Mc'Naughton rule, retains the concept of "not guilty by reason of insanity" verdict to eliminate responsibility through the rule. However the practical usage of the defence is minimal since very few defendants invoke the defence and out them too, very few are actually successful.[60,61] Also, mental illness is considered to be a criminal defence only if such illness results in specified psychological impairment.

France

France considers the mere presence of mental illness to be a sufficient basis for excusing a defendant, without regard to any incapacitating consequences of mental illness. This is far broader than the scope of Section 84.

Sweden

Sweden is one of the countries where the insanity defence has been abolished for all criminal defendants.

Switzerland

Section 10 of the Penal Code states that "*any person suffering from a mental disease, idiocy or serious impairment of his mental faculties, who at the time of committing the act is incapable of appreciating the unlawful nature of his act or acting in accordance with the appreciation may not be punished*".

China

The law is somewhat similar to Indian law except that it includes the uncontrollable behaviour element. The law states that "*If a mental patient causes harmful consequences at a time when he is unable to recognize or control his own conduct, upon verification and confirmation through legal procedure, he shall not bear criminal responsibility. . . . If a mental patient who has not completely lost the ability of recognizing or controlling his own conduct commits a crime, he shall bear criminal responsibility; however, he may be given a lighter or mitigated punishment.*"[62] Those defendants who are thus acquitted may be compelled by the government to receive treatment or otherwise kept under the protection of his family members.

Ghana

The defence in Ghana is recognized only when it relates to the nature and quality of the act and not when it relates to the wrongness of the act. Also, the provision gives partial delusions a role. When a person is accused of crime, the special verdict provided for by the Criminal Code in the case of insanity shall only be applicable ... if he did the act in respect of which he is accused under the influence of an insane delusion of such a nature as to render him, in the opinion of the jury or of the Court, an unfit subject for punishment of any kind in respect of such act.[63]

South Africa

The provision on insanity recognizes the defect pertaining to wrongness but not that concerning the nature and quality of the act.[64] The control factor is also recognized and therefore

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[60] This has been attributed to the belief in the minds of the defendants that the insanity plea has more to do with disposition than responsibility and related to this another belief that it would be better for them to stay a part of the criminal justice system rather than being transferred to mental healthcare services.

[61] Observations on the Insanity Defense and Involuntary Civil Commitment in Europe; La Fond, John Q., U. Puget Sound L. Rev. 527 (1983-1984)

[62] Article 18 of the Criminal Law of the PRC (People's Republic of China)

[63] Section 27(b), Criminal Code of Ghana

[64] Section 78(1) of the South African Criminal Procedure Act

an incapability to act in accordance with an appreciation of the wrongness of his or her act or omission absolves the defendant of criminal responsibility.[65]

Queensland, Australia

The Criminal Code states that a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to control the person's actions.[66]

Statute of the International Criminal Court (ICC)

According to its provisions a person is not criminally responsible if, at the time of that person's conduct the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.

V. TINKERING WITH THE LAW - ANALYZING THE SCOPE FOR REFORM

A - UNCONTROLLABLE BEHAVIOUR AND IRRESISTIBLE IMPULSE

The law as applicable in India holds a person possessing the ability to distinguish right from wrong guilty even if he has absolutely no power to control his behaviour or to stop himself from committing the act he does commit. In an attempt to explore the possible remedies to this aspect of the law, we examine the idea of including the volitional element of unsoundness of mind. As seen in the chapter on the variations in tests of unsoundness of mind, a number of jurisdictions include the volitional element or have done so at some point of time.

Some otherwise 'mentally healthy' persons who have perfect cognitive ability and knowledge of their circumstances are unable to make their actions conform to the law. In other words, "*A person may be perfectly competent to draw a correct distinction between right and wrong, and yet labour under a form of insanity which ought unquestionably to protect him from legal or moral responsibility. I allude to cases of insanity where the patient is driven, by an irresistible impulse, to destroy, after struggling, for some time, against the morbid desire, being, at the same time, perfectly conscious that he is impelled to do what is wrong both in the sight of God and man*."[67] The law limits the insanity defence to the cognitive elements of legal insanity, being based on the 'knowledge' of the defendant. Volitional elements of control and irresistibility are not included in Section 84 of the IPC as compared to Section 67 of the Draft Penal Code which had a much broader scope.[68] According to Section 84 of the IPC, it is only when there is a concurrent lack of knowledge of the act or of its nature or quality that the unsoundness of mind can be acknowledged as a defence. Therefore, uncontrollable impulses have no place in the Indian system. In fact, Justice Hansaria had observed that if such a defence is to become a part of our legal system 'it would be subversive to life and property'.[69]

There do happen to be a number of flaws in the current system of analyzing only the cognitive elements of the mind. A number of professionals have contended that isolating the cognitive is a process which is extremely alienated from the actual functioning of the mind. As Sidney Smith says, the whole problem in this case is that law repeatedly deals with insanity as if it were a disease of the intellect whereas it is usually a disease of the affective or emotional sphere of the mind. The criminal impulses spring from this derangement, and no examination of the intellectual functions will throw any light on the problem in such affective diseases.[70] This is precisely what Section 84 seeks to do, understand the intellectual functions and thus come to conclusions about the 'unsoundness of mind' and subsequently the culpability of the accused. The

[65] Ibid
[66] Section 27 of the Code
[67] Winslow, THE PLEA OF INSANITY IN CRIMINAL CASES 74 (1843).
[68] Mayne, CRIMINAL LAW, (3rd Ed.) p.405.
[69] State Of Assam v Inush Ali 1982 CriLJ 1044
[70] Sidney Smith , FORENSIC' MEDICINE, 1945, .pp. 407:

law in this case provides absolutely no space to the idea a unified functioning of the mind which cannot be understood solely from cognitive abilities of the mind.

To deal with this problem, alternate, more inclusive tests seem to be the only option. Before analyzing the scope of these tests in the Indian context, the alternatives which do give cognizance to a volitional prong have been discussed below.

As far back as 1874, Lord Justice Clerk Moncrief had stated that "*A man may be entirely insane, and yet may know well enough that an act which he does is forbidden by law. Probably a large proportion of those who occupy our asylums are in that position. It is not a question of knowledge, but of soundness of mind*."[71] James Fitzjames Stephen[72], had put forward the idea that irresistible impulse should be a defence expressing the opinion that a person who acts under such an impulse does not know the nature of his act and should not be liable.[73]

The Royal Commission on Capital Punishment in England, 1953, was one of the first significant voices against the defective nature of the 'right-wrong' M'Naghten rules. It recommended that the test should be such that the Jury is satisfied that at the time of the offence the accused, as a result of the disease of the mind or mental deficiency,

a) did not know the nature and quality of the act, or
b) did not know that it was wrong, or
c) was incapable of preventing himself from committing it[74]

By recommending a volitional element, the law tried to examine culpability in terms which could break through the boundaries of closeted 'intellectual' perspectives.

In the American context, Parsons v. Alabama[75], 1963, established additional criteria besides the erstwhile right-wrong for the insanity defence in 1886. The court decided that a person could utilize the insanity defence if he or she could prove that "*by reason of duress of mental disease he had so far lost the power to choose between right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed*."

Tests such as the ones mentioned above can be traced out to be the origin of the 'Irresistible Impulse Test' in American courts. The 'policeman at the elbow test.' was a version applicable in England, according to which if a person would have committed the crime even if a policeman was standing next to him, the act could be characterized as an irresistible impulse because no sane person would commit a criminal act in the presence of a law enforcement agent.

As mentioned in the previous chapter, the American Law Institute also created a test of its own for the Model Penal Code. This model stated that a defendant is not responsible for a criminal offense if "*at the time of such conduct as a result of a mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law*." By generally bracketing behaviour which a person is not in control of and has no ability to refrain from as 'irresistible impulses', the simple premise of most of these formulations has been to absolve a person of liability under the control of such impulses.

Irresistible Behaviour - An Insight

Such behaviour, or rather impulse can be understood by analyzing both legal as well as medical definitions.[76] Black explains irresistible impulse as "*Used chiefly in criminal law, this term means an impulse to commit an unlawful or criminal act which cannot be resisted or overcome by the patient because insanity or mental disease has destroyed the freedom of his will and his power of self-control and of choice as to his actions.*"[77]

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[71] H.M. Adv. v. Miller, 3 Coup. 16, 18 (1874

[72] One of the most learned writers on the Criminal Law of England during the nineteenth century

[73] In his treatise, History of the Criminal Law of England

[74] Report of the Royal Commission on Capital Punishment, para.317 (Cmd. 8932, 1953)

[75] 81 AL 577, So 854 1886 AL

[76] Stedmans Medical Dictionary defines 'impulse' as a sudden pushing or driving force, sudden, often unreasoning, determination to perform some act, and "irresistible impulse" is a compulsion to act in a way that one knows as wrong.

[77] Black's Law Dictionary, Revised Fourth Edition

In a broader sense, impulses like those in kleptomania, pyromania, dipsomania, or even suicidal and homicidal impulses can well be argued to be irresistible and beyond the control of an individual. By accepting these impulses as defences, either liability for a great number of offenses would diminish substantially or there would have to be drastic variations between medical and legal terminologies, again giving rise to a plethora of problems. The expression "irresistible impulse" according to the Medical Dictionary, generally means as impulse to commit unlawful or criminal act. The main question which arises here is should the defence be applicable in cases where the offender, although aware of the wrongful, or even criminal nature of his act, is unable to desist, from doing it because of his mental conditions?[78]

On a vary cursory glance we can see that the concept of an 'irresistible' or 'uncontrollable' impulse is an unsafe area to tread on since there is no objective way of distinguishing between impulses fuelled by mental disease and impulses not fuelled by such disease, or even impulses which are incontrollable, and impulses which are merely uncontrolled. Even the judiciary has held that such cases are not considered by the law and it would be extremely undesirable to change the law to exempt them from responsibility[79].

Understanding irresistible impulse and uncontrollable behaviour in a broader sense, research has been able to attribute irresistible behaviour to a number of causes, an example even including glandular malfunctioning.[80] Spirer[81]'s classification of the categories to which such behaviour is attributable is worth a mention since it makes the behaviour easier to comprehend. Habit, psychoneurosis and emotion were the categories he explored. One of the best examples of irresistible behaviour is encountered in psychoneurosis. Within this approach, these impulses have been understood as "*appearing without cause, the patient is restless until they are carried out, and their accomplishment is accompanied by a feeling of relief*."[82] These impulses are considered to be resistible, but only to a certain point. The potency of these impulses has been highlighted. Freud, for example, describes the case of a young man. ". .. *for whom an obsessional neurosis made life almost unendurable, so that he could not go into the streets, because he was tormented by the fear that he would kill everyone he met*."[83] Burt further adds that these irresistible impulses are very common and at times assume a criminal nature. Compulsion neurosis is the fancy term which brings under its umbrella kleptomania, nymphomania, pyromania, dipsomania, dromomania, homicidal mania, to name a few 'manias'. "*The offender acts as if under some spell of magic, and feels himself forced irresistibly to perpetrate some useless theft, to wander off on some motiveless tour, to set light to some gloriously inflammable pile, or even to stab his nearest relation or strangle his dearest friend.. ...* [84]" The conduct of a person acting in such a state is often highly irrational and motiveless. However, even once the neurosis 'ends', the symptom may persist merely because it becomes a learned or acquired trait.[85] And irresistible impulses can be conceived through habit too. Psychologists have often taken into cognizance the potency of entrenched behaviour patterns. Behaviour responses to stimuli sometimes result in habituated responses. Criminal and non-criminal habituation arise in the same way with there being hardly any deep seated pathological effects but at the same time criminologists do understand that a habitual offender becomes, in Dewey's words, ".*a creature of habit, not of reason nor yet of instinct*," but is nevertheless unable resist his criminal impulses any more than a cigarette smoker is able to stop

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[78] Law Commission 42nd Report on the Indian Penal Code, p.93-94
[79] In Re: Pappathi Ammal vs Unknown, AIR 1959 Mad 239
[80] Over-activity of the thyroid gland frequently leads to irritability, excitability, and a tendency to respond quickly to stimuli.
[81] 33 J. Crim. L. & Criminology 457 (1942-1943) PSYCHOLOGY OF IRRESISTIBLE IMPULSE; Spirer, Jess
[82] White, W. A., OUTLINES OF PSYCHIATRY, Washington, Nervous and Mental Disease Publishing Co. (1929)
[83] Freud, S., INTERPRETATION OF DREAMS, p. 92. 8
[84] Burt, C., THE YOUNG DELINQUENT, New York, Appleton (1931), pp. 560, 561.
[8585] Hollingworth, H. L., THE PSYCHOLOGY OF FUNCTIONAL NEUROSES, New York, Appleton (1920), p. 76.

smoking and to that extent, experiences irresistible impulses. The quantification of the irresistibility is however, impossible.

A question which arises is can we justify the exclusion of control merely for reasons which say that the rule is of difficult application? The 'right-wrong', 'nature-quality' test warrants precisely the same criticism. The problem of difficulty of application is not something which afflicts the volitional element of the mind, it is a problem which afflicts the whole realm of insanity.[86]

Elaborating on the fact of the vagueness in the ascertainment of the irresistibility of an impulse, most commoners unthinkingly agree with this statement. So do psychiatrists and they admit that it is difficult to ascertain, difficult to determine. But at the same time they add that it is about just as difficult as ascertaining the rationality, or rather the existence or the absence of the individual's capacity to distinguish right from wrong.[87] What is often taken as a logically rationalized definition of the 'nature' 'quality', 'know', 'right- wrong', is scientifically speaking as abstract in most cases as the idea of control. It is true that even when psychiatrists are certain that a defendant suffers from a psychotic condition which impairs his rationality there is hardly any possibility of ascertaining that the psychotic symptoms were directly responsible for the criminal conduct.[88] And also, the assessment of impulse control is undertaken using precisely the same principles of forensic assessment that are used when assessing cognitive impairment.[89] The fact that forensic assessment is not used in India as of now even for determining the cognitive element brings us to a point where we see that when determining the rationales of a human mind is substantiated by very little rationality, do we want another test which determines the volitional, impulsive prong through methods which will again reek of the absence of objectivity?

And if not, the moral question is that, is it fair for us to justify to ourselves that it is alright to punish individuals who had absolute no intent or desire to commit a crime and had no ability to stop themselves from doing so merely because *we* do not have a control assessment mechanism in place? Should this law, then, also be extended to the whole defence of unsoundness of mind? We do not have any foolproof, or for that matter *any* objective method for ascertaining whether the accused had knowledge of the nature or the quality of the act or of its wrongfulness.

We have to reconcile to the fact that the test is flawed, being based on cerebral ideas more than on any concrete scientific evidence. There has been no way of determining what exactly went on in the accused's mind while committing the crime, and whatever the extent of the expert testimony may be, it is fraught with a number of lacunae and cannot in the technical sense be upheld as absolute evidence. However, till today we have never swung away from the entire idea of unsoundness of mind as a defence, merely because as a society we rest strong belief in the view that we punish not just for deterrence but also for retribution and punishing someone for what was never in their control, is downrightly unacceptable. However, keeping in mind the uncertainty which arises in relation to the whole defence, the next section goes on to analyze the views expressed by abolitionists.

B -ABOLISHING THE DEFENCE

It is necessary to understand that it is extremely ironic that it is while trying to explore ways to make the defence more inclusive we come across the subjectivity in the law and thus go on to analyze the views of abolition of the law and replacement with objective laws.. It is mainly keeping the subjectivity in mind that abolitionist ideas can be understood.

Abolitionists subscribe to the idea that it is practically impossible to differentiate between those who are responsible and those who are not. For practical purposes, it is not possible to know

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[86] Parsons v. State, 2 So. 854, 864-65 (Ala. 1887)

[87] MODEL PENAL CODE § 4.01, app. A (Official Draft and Revised Comments) (1962) (Statement of Dr. Guttmacher). This comment, provided by Dr. Guttmacher, was based on his surveys of psychiatrists. *See* Deborah W. Denno, *Criminal Law in a Post- Freudian World*, 2005 U. ILL. L. REV. 601, 626-27 (2005).

[88] SLOBOGIN, MINDING JUSTICE, ,pp. 51.

[89] Kirk Heilbrun, PRINCIPLES OF FORENSIC MENTAL HEALTH ASSESSMENT (2001), 321

who knew the act was wrong and who did not. The maximum we can determine is the capability of the defendant to possess the knowledge and that too, not without fool proof methods. Leaving more than a substantial chunk of the defence to an analysis of symptoms, a psychiatrist's sub conscious biases and personal opinions, and the logical, cerebral skills of the judiciary which may stand staunchly divorced from actuality, the purpose of the defence as such is greatly undermined. These beliefs can be well substantiated since psychiatrists have time and again repeated that a clear determination of the defendant's guilt or innocence is extremely difficult to determine.[90]

Coming to Section 84, the arguments of the abolitionists hold water, with there being no scientific way of knowing whether the accused had or lacked knowledge about the nature, quality and wrong of the crime, there is very little objectivity to complement the section. However, getting rid of the defence as it stands today can serve no purpose for it would complicate things further by just changing the words.

Most jurisdictions which have gone for abolition allow the evidence of the mental state of the defendant to negate the state of mind or *mens rea* which is essential for the crime. *Mens rea*, translated to mean guilty mind, refers to the intention to commit a wrongful act. For someone to be guilty of an offense there needs to be a perfect collaboration of the act which is wilful and an intention to commit it. When a person is said to be insane, it is believed that he lacks the requisite amount of *mens rea* or intention to commit the crime and is thus, not guilty. Therefore abolitionists seek to do away with the insanity defence altogether and rely solely on the mental element.

One problem which arises in this context is that, the whole idea of *mens rea* does not always hold much relevance in laws which try to replace unsoundness of mind. Labouring under a paranoid delusion, if a man plans to kill his boss, he does so after harbouring in his mind an intention to do so subsequent to which he also plans and prepares. Construing it in the narrowest sense, the mental element was present when he planned to commit the crime and prepared for it and actually committed it. The fact that it was harboured under a delusion is buried in the interpretation of the mental element. A person in a such a state may plan the crime with extreme precision, commit it in perfect accordance with the plan, and yet not be 'morally guilty' by virtue of his mental state But convicting him on the bases of his specific intention and his act without taking into account his mental state and the general intention would be placing culpability on a person whose mental state sets him at a gross disadvantage as compared to other citizens and thus ensuring a very strict form of liability. And if general intention is taken into account, problems to this extent would be a lot simpler, but the question is general intent is again not easy to ascertain merely from the circumstances and facts.

Jurisdictions which have abolished the defence, like Montana[91] for example, have to place increasing reliance on psychiatric testimony which would vest extreme power in the expert witness to make the case swing either way depending on his assessment. What happened in Montana court rooms was not absolute abolition in the court rooms but a shift to the thoroughly variable procedure involving *mens rea*, incompetency, psychiatric testimony and sentencing.[92] But perhaps, in a realm which is fraught with variability, the only way of dealing with it is to limit well demarcated technicality.

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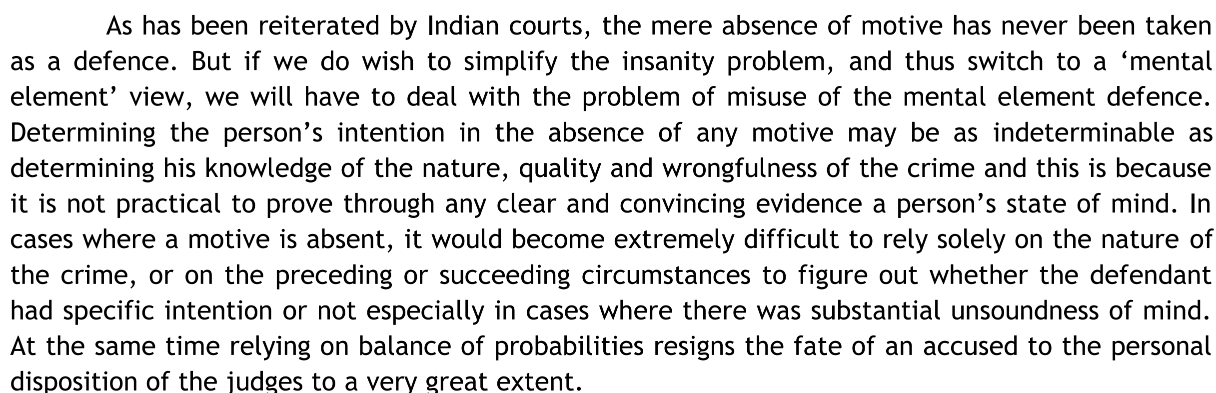
[90] Acceptance of mental disorder as diminishing or eliminating criminal responsibility demands the ability to get inside someone else's skin so completely as to determine whether he acted wilfully or knowingly, and also to experience the strength of the temptations to which he is exposed. That, is beyond the capacity of even the most highly qualified psychiatrist. , BARBARA WOOTTON, CRIME AND PENAL POLICY; REFLECTIONS ON FIFTY YEARS' EXPERIENCE (1978).

[91] Abolished through statute in 1979

[92] Since Montana claims to have abolished the insanity defense, its retention of a verdict of "not guilty by reason of mental disease or defect" appears counter-intuitive. 273 The statute granting defendants this verdict originally
contained a companion section setting out the burden of proof required for the repealed insanity defense. The 1979 bill deleted the language on the burden of proof, but retained the verdict. Idaho has only two verdicts of guilty and not guilty.



As has been reiterated by Indian courts, the mere absence of motive has never been taken as a defence. But if we do wish to simplify the insanity problem, and thus switch to a 'mental element' view, we will have to deal with the problem of misuse of the mental element defence. Determining the person's intention in the absence of any motive may be as indeterminable as determining his knowledge of the nature, quality and wrongfulness of the crime and this is because it is not practical to prove through any clear and convincing evidence a person's state of mind. In cases where a motive is absent, it would become extremely difficult to rely solely on the nature of the crime, or on the preceding or succeeding circumstances to figure out whether the defendant had specific intention or not especially in cases where there was substantial unsoundness of mind. At the same time relying on balance of probabilities resigns the fate of an accused to the personal disposition of the judges to a very great extent.

Unsoundness of mind, does at least offer *some* evidence which can explain the capability of the person to have the requisite knowledge or awareness, the mental element defence relies solely on circumstances. This is why it becomes pertinent to realize that insanity cannot be equated with the mere lack of intention and propositions which seek to simplify the realm of culpability and the mental element have to rely on other means and not on a simplistic abolition.

Therefore, to sum up the views of the commission in this realm, it can be clearly seen that arguments of the abolitionists may hold water in the Indian context, the idea expressed by them does not, i.e. abolition of such a defence would solve no problems since replacement by rephrasing the defence would lead to similar amount of subjectivity and complete exclusion of the defence would lead to the imposition of liability which goes against the belief of modern society and its rationality.

C- Diminished Responsibility

A defence of diminished responsibility, or the like of it, has been used in certain jurisdictions where the defendant's behaviour results in the crime being committed but, however, his rationality is non-culpably compromised. Instead of relying solely on the black and white dichotomies of sane and insane, this defence tries to bring into picture the various degrees which exist in between. The diminished capacity doctrine allows a criminal defendant to put forth evidence of a mental disease, defect, or abnormality during trial.[93] Also if evidence is allowed for diminished responsibility, there are two cases possible. It could include allowing evidence to negate the state of mind which is required for the offence or for cases where the evidence would challenge the element of the specific intent for the given defence.

The doctrine of diminished capacity was first recognized in Scottish courts and was later adopted by the United Kingdom in the 1957 Homicide Act[94] which gives scope for the plea of diminished capacity in cases where the defendant charged with murder is suffering from abnormality of mind which 'substantially impaired his mental responsibility' while committing the act. Regina v. Bryne[95] was a famous English case in which a 'sexual psychopath' killed to gratify his desires and was provided with the defence[96].

Diminished capacity has been used in two ways; one is the 'partial responsibility' variant, more dominant in England and the '*mens rea*' variant which is used in a number of American jurisdictions.

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[93] Stephen J. Morse, Diminished Capacity: A Moral and Legal Conundrum, 2 INT'L J.L. & PSYCHIATRY 271 (1979); Stephen J. Morse, Undiminished Confusion in Diminished Capacity, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984)

[94] Section 2(1)

[95] 1960 2 QB 396

[96] It was held that the degree of abnormality was so great that he could be held guilty for murder but only for manslaughter.

A few American cases have since long stuck to the idea that if a requisite amount of mental element is absent because of insanity or intoxication, the person should be absolved of guilt.[97] The *Mens Rea* Variant does precisely this by allowing the defendant to deny the case against him by showing that he is not guilty of the crime he is charged with though he may be guilty of a lesser crime. This variant can be traced back to a case called People v. Wells. This variant is justified by the same logic that a person who commits a crime without a given intent is not liable in the same way as one who commits it with the intent and therefore, the two should not be punished in the same way.

The partial responsibility variant allows the defendant to use evidence to put forth a form of lesser legal insanity. This variant basically deals with the mitigation of punishment. Through the testimony if it is shown that his mental abnormality rendered him less capable of forming the given intent he will be held liable for the same offence, he will not get the same amount of punishment. This defence has nothing what so ever to do with the mental element.

Criminal defendants, just like people, have a wide range of control and cognitive ability and not two especially demarcated categories of total control and of no control. And acknowledging the spectrum of both, control as well as cognitive ability, is the closest we can come to giving each his 'just desserts'. Keeping this in mind the Commssion suggests the need for reform in this regard.

D - Expert Opinion And Technology

The way in which culpability is assigned can easily be debated upon, as is evident from the sections discussed earlier. The reliance placed on the testimony of expert witnesses has been substantial, since it is considered objective. Though, according to the CrPC Amendment Act, 2008, psychiatrists in particular are mentioned, most of the earlier judgements in the Indian context have mentioned the reliance on the opinion put forward by Surgeons and Assistant Surgeons. It being evident that medical practitioners lack the specific knowledge required by psychiatrists, they lack the discipline specific knowledge possessed by experts but are however placed as much reliance on. It is necessary that psychiatrists and not other medical professionals assess the defendant.

However, there has been a lot of discussion in the West about the role of expert witnesses in general, even psychiatrists, in courtrooms.[98]In a survey conducted by Hans among general populace, it was found that "*91.2% think that psychiatrists should testify about a defendant's mental condition in insanity trials*." About half however, believe that '*if psychiatrists were paid enough, they will say anything about a defendant's sanity*" These responses showed that while the public thought that psychiatrists should be used somehow in an insanity trial, they only had, "*modest faith in the abilities of psychiatrists to determine legal insanity*"[99] The same applies to psychiatric testimony in general, it is doubted and at the same time far too heavily relied upon.

A grave problem which arises is that there is hardly ever complete agreement between multiple or competing psychiatrists and this leads to the thought that psychiatric testimony is not objective in nature and depends highly on which psychiatrist gives his opinion.[100] Psychiatry as a

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[97] Jones v. Commonwealth, 75 Pa. 403, 408 (1874); Hopt v. People, 104 U.S. 631 (1881); Anderson v. State, 43 Conn. 514 (1876); Rogers v. Commonwealth, 96 Ky. 24, 27 S.W 813 (1894); People v. Moran, 249 N.Y. 179, 163 N.E. 553 (1928).

[98] After the famous acquittal of Andrea Yates, there were huge questions raised about the testimony of psychologists and psychiatrists. A small mistake made during the testimony led to the discussion of whether expert witnesses such as psychologists and psychiatrists should even be allowed in insanity defense trials.

[99] 24 Criminology 393 (1986) Analysis of Public Attitudes toward the Insanity Defense, An; Hans, Valerie P.

[100] . It is reported that, "agreement on whether or not a defendant has psychosis rarely approaches a level as high as 90% even when the clinicians come from the same background" (Torry, and Billick).

science tends to evaluate individual behaviour in a way in which each individual can get special consideration for his unique characteristics, there is of course inherent some vagueness which is essential for the discipline, but for the legal dichotomy is what is essential. For the legal world, the standard of evaluation should be in an uncomplicated form. And therefore, the legal system will continue to reiterate that the science of psychiatry needs to advances to precise and universally accepted techniques of diagnosis for better incorporation in legal systems.[101]

The opinion or the speculation of the psychiatrist is not an official diagnosis and should not be taken as one in most cases. As Doherty said, "*For the most part, what scientific expert witnesses in such cases do is to interpret actions, not analyze objective facts*" Blau said that the psychologist/psychiatrist is placed in a difficult and vulnerable position and therefore often pressed to make moral rather than scientific judgements. A statement from the APA indicated that psychiatrists are reluctant to draw conclusions about whether the defendant is sane or insane. According to the statement, psychiatrists do not want "*to infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will*."

Also, at the time of the examination the defendant's emotional or neuropsychological condition may be in remission. On the other hand, the patient may be in worse condition during the psychological examination than at the time of the commission of the crime. Also, malingering[102] is a very serious concern in the case of psychological tests.[103] Though the detection of malingering is in itself a field of science, detecting it is not extremely easy.

For an examiner to give an opinion, extensive interviews with the defendant are essential to the assessment, but, contrary to popular belief, the examiner cannot stop there. Other data about the defendant at or near the time of the crime must be obtained. Witnesses, victims, relatives, treating professionals, arresting officers, employers, friends, and lovers are sources of such data, as are past and present medical records. In short, any source of data that might contribute information that does or does not corroborate the defendant's story is essential. Going by the cases mentioned earlier, it is quite evident that courts do take into account all the other data and have continuously done so more because of the absence of psychiatric opinion other than anything else.

The development of sophisticated examination techniques over the past decade have provided the database and instrumentation to enable psychologists to render opinions as to defects in cognition, awareness and judgements based on clearly defined and generally accepted neuropsychological deficits. Individuals suffering focal conditions such as temporal and frontal lobe lesions, and more diffuse tissue disturbance or compulsive pathology are known to have periods in which judgement, planning, or awareness disappear. However such methods are still in the embryo stage in India and mandating such rationality over the present discretion would not be a viable opinion keeping in mind the availability of psychiatrists with expert knowledge as well equipment required.

Neuroimaging testing is expensive, and if the defendant is an undertrial it would be even more expensive. The funding for such equipment would require exorbitant amounts. And if individual defendants are able to afford such testing, it would be at a gross disadvantage to those who are not. Besides this neuroimaging techniques are not standardized and can be easily manipulated. Also, such evidence could be used as predicting evidence and thus could be used to

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[101] Moore, THE ENCYCLOPEDIA OF PHILOSOPHY Responsibility, Moral and Legal 183-88 and 1113 (1967).

[102] The DSM IV describes it as "the intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution or obtaining drugs" as malingering.

[103]119 – Psychological Examination of Defendants, THE PSYCHOLOGIST AS EXPERT WITNESS

increase punishment merely by the fact that he may be prone to violent tendencies. Such tests can be easily manipulated by anyone who knows the technology [104] Stacey Tovino argued especially for the MRI, saying that it offers only "an illusory accuracy and objectivity."[105]

Thus, it is evident that law is not ready as yet to embrace psychiatry with full vigor. When financial constraints and limits to the number of skilled experts available come in, the advancement in technology stands annulled and can therefore play no role in an attempt to reform the exception of 'unsoundness of mind'. Therefore, again a point is reached where the imperfection of the law is witnessed but at the same time no other alternative which would be more practical is available.

CONCLUSION

Morse said that "*mental disorders may give people crazy reasons for doing what they do, but virtually never negates the defendant's intention, knowledge,, conscious awareness of the risk, and other required mental states*." That is there can hardly ever be a perfect fulfilment of the requirements of Section 84. However, combined with the symptomatic behaviour and the expert opinion, the Section has continued to function.

But this defence in India is by no means perfect. It is not perfect since it does not absolve everyone who committed a crime *only* because of a pathological mental condition, it is not perfect because it does not imbibe in itself some of the core ideas of psychiatry as a science, it is not perfect because it places heavy reliance on non-objective means, it is not perfect because it is not foolproof and is easily prone to malingering. But for one, the defence is practical. Practical in the sense that it is the best option we have between the two ends of the spectrum, one being absolute determinism and thus, failure of the criminal justice system and the other being strict liability and thus a violation of the reformatory theories society claims to abide by.

The main argument advanced for the need of analyzing reform in this section was that since the section deals mainly with the functioning of the mind which can best be understood by science, the law needs to be reformed to bring the 1860 ideas in consonance with the leaps taken by the science of psychiatry in the intervening period. Psychiatry may have advanced in the one and half century following the legislation, but the only question which arises is whether it has succeeded to a level which will provide us with objectivity, the absolutism we'd like to seek.[i] When the answer to this question is in the negative and when the inherent purposes of the two disciplines are different, a complete meshing between the two is hardly pragmatic, and perhaps, not even possible. One seeks to primarily diagnose to treat the other seeks to assess. The former doesn't look for the absolute but makes the best of what it has, the latter, will raise doubts about the certainty. In this situation, the reliance placed by the Courts on the relevant facts (the expert opinion rendered), facts of issue is the closest it can come to rationality.

In the words of Donald E Watson, "*Contradictions inevitably emerge where the laws of man are confused with the laws of nature: The former can be broken; the latter cannot*." However the best we can do is come to the closest possible bonding between the two and for that the suggestion of this Commission is to allow

Acknowledging that it is risky to give too much space to determinism in law, the Commission gave considerable thought to the idea that if determinism to the extent of knowledge is allowed it should be to the extent of control too, since the both can be determined with almost similar 'illusory' accuracy. Though 'those who lack absolute control over their acts should not be held liable' is a belief which should be subscribed to, at the same time it becomes difficult to assess the level of irresistibility and the 'cause' of the irresistibility. Therefore, acknowledging that a number certain crimes may be attributable to 'irresistible behaviour', and that the law is fraught

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[104] [30]Donald R. Reeves et al, *Limitations of Brain Imaging in Forensic Psychiatry*, 31 J. AM. ACAD. PSYCHIATRY & L. 89, 90 (2003) .

[105] Stacey A. Tovino, *Functional Neuroimaging Information: A Case for Neuro Exceptionalism?,* 34 FLA. ST. U. L. REV. 415, 479 (2006), quoting Martha J. Farah, *Emerging Ethical Issues in Neuroscience,* 5 NATURE REV. NEUROSCIENCE 1123, 1127 (2002).

with lacunae in this regard, it also becomes pertinent to acknowledge that any reform in this regard would be fraught with significant lacunae again. There would be no way of assessing whether the irresistibility was caused because of pathology or habit and there would be only very subjective ways of knowing whether there was some irresistibility in the first place. However, the fact that there was significant emotional disturbance which impaired the mental ability of the accused is a fact which cannot be ignored.

Proposing reform in the law in this context is not a very difficult thing, especially keeping in mind the plethora of tests in other countries available as examples. However inclusive the definition may be, it becomes very difficult to make legal definitions completely un-contentious. The exact wording of the defence in the commission's opinion would not have an inordinate amount of significance. However, this commission is of the view that introducing such reform would lead us nowhere since the subjectivity which is innate to the defence cannot be dealt with, given the technology and knowledge possessed today. Therefore, reform to this extent would be merely a desperate attempt to reform the law solely because it has not been amended and is at variance with the law in other countries. The commission feels that the law at present is the closest it can come to practicality and for that, to an extent, the law is appreciable.

Without changing the definition and without allowing ambiguity to creep in, the commission does reiterate that the defence as applicable today is the closest we can remain to practicality and therefore reform though needed, is not available. However, at the same time, this Commission takes into cognizance the fact that holding a person subject to extreme mental/emotional disturbance equally liable as a person acting out of free will needs a thought. Including a general mitigation clause, either added to Section 84 or elsewhere, would result in a lot of arbitrariness being vested in the courts and would also be an impetus for innumerable trump cases and false evidenced being put forth before the courts. However, since the offence of homicide is the only offence which has been doctrinally divided, the Commission proposes an amendment there, it proposes the inclusion of the following amendment to Section 300 of the IPC by the inclusion of Exception 6.

" ***Culpable homicide is not murder if the offender, at the time of doing the act or making the omission which causes death, by reason of unsoundness of mind, is substantially impaired from controlling his conduct to conform to the requirements of law, but is, however not incapable of knowing the nature or quality or the wrongness of the act.*** "

Section 30 of the Prisoner's Act, 1900 (Act III of 1900) If need be, this would apply to an accused who would be held liable for culpable homicide not amounting to murder under Exception 6 of Section 300. Section 335 of the Criminal Procedure Code: would not apply.

Elaborating on the fact of the vagueness in the ascertainment of the 'substantial impairment', the Commission reiterates what has been stated earlier in the report, Psychiatrists admit that it is difficult to ascertain, difficult to determine but at the same time they add that it is about just as difficult as ascertaining the rationality, or rather the existence or the absence of the individual's capacity to distinguish right from wrong.[106] And also, the assessment of impulse control is undertaken using precisely the same principles of forensic assessment that are used when assessing cognitive impairment.[107] Also, the determining of the 'unsoundness of mind' would be done in precisely the same way as it is done now.

Though maximum usage of the offence has been made for cases of homicide, the Commission however at the same time accepts that including diminished responsibility only for the offence of murder and excluding it for all other would be unfair on an accused who happened to

[106] MODEL PENAL CODE § 4.01, app. A (Official Draft and Revised Comments) (1962) (Statement of Dr. Guttmacher). This comment, provided by Dr. Guttmacher, was based on his surveys of psychiatrists. *See* Deborah W. Denno, *Criminal Law in a Post- Freudian World*, 2005 U. ILL. L. REV. 601, 626-27 (2005).

[107] Kirk Heilbrun, PRINCIPLES OF FORENSIC MENTAL HEALTH ASSESSMENT (2001), 321

burn someone's property instead of killing him. However, keeping in mind the fact that there is no pragmatic alternative for diminishing responsibility and culpability in all cases, the Commission opines that its proposal is the best alternative possible.