

ROCK, PAPER AND THE SCISSORS: A CRITICAL ANALYSIS OF LAW RELATING TO INSANITY ACROSS VARIOUS JURISDICTIONS ACROSS THE GLOBE

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ABSTRACT

Criminal law defines both legal and illegal practices. Like the two-sides of a coin, it expresses, on one hand, legal strategies of punishment; on the other hand, those of non-punishment because of justification or excuses such as insanity. Mens Rea is an essential element in every crime. But in the case of insane person, he may not understand the nature of the act. An insane person is not punished because he does not have any guilty mind to commit the crime. This paper analyzes the Law of Insanity in India and other criminal law jurisdictions. The researchers briefly introduce the evolution of Insanity Plea in Common Law Jurisdiction. The researcher covers both English law and Indian law on insanity in detail. The researcher also mention the provision of Insanity defense in Rome Statute of International Criminal Court and Principle laid down by the European Court of Human Right. Finally an attempt was made to figure out if there is any scope for improvement in the law or not.

[A.] INSANITY IN LAW

Criminal law defines both legal and illegal practices. Like the two-sides of a coin, it expresses, on one hand, legal strategies of punishment; on the other hand, those of non-punishment because of justification or excuses such as insanity.² Mens Rea is an essential element in every crime.³ There may be no crime of any nature without an evil mind.⁴ There must be a mind at fault to constitute a criminal act.⁵ The concurrence of act and guilty mind constitutes a

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² F.Boland., "Insanity, the Irish Constitution and the European Convention on Human Rights". 47 "NRT'N IRELAND LEGAL QUARTERLY 260,261 (1996).

³ Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1004-07 (1932).

⁴ Gostin, L. "Human Rights, Judicial Review and the Mentally Disordered Offender". CRIM. LR 779.779 (1982).

⁵ ELLIOTT, CATHERINE; CRIMINAL LAW 241-248 (3rd., ed. Harlow, Essex: Pearson Education Ltd. 2000).

crime⁶. This theory has its basis in the latin maxim ‘*actus non facit reum nisi mens sit rea*’ which means that the act does not makes one guilty unless he has a guilty intention. Lord Diplock in the case of *Swet v. Parsley*⁷ said, ‘*An act does not make a person guilty of a crime unless his mind is so guilty*’.⁸

Insanity or unsoundness of mind is not defined in any act. It means a disorder of the mind, which impairs the cognitive faculty; that is, the reasoning capacity of man to such an extent as to render him incapable of understanding consequences of his actions.⁹ It means that the person is incapable of knowing the nature of the act or of realising that the act is wrong or contrary to law.¹⁰

[B.] THE HISTORY OF INSANITY PLEA

Before the thirteenth century, mental disease had no legal significance in the criminal law.¹¹ During the 1200s, the historian *Henrici Bracton* first coined the phrase that would later become the “wild beast test”.¹² The first recorded English case with an acquittal by reason of insanity was notably decided in 1505.¹³ In the eighteenth century, *Rex v. Arnold*¹⁴ became one of the first recorded cases in England where the aptly named "right versus wrong" or wild beast test was called-upon.¹⁵ The test demanded exculpation where the defendant 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 . . . [It must be determined whether the defendant] knew what he was doing, and was [he] able to distinguish whether he was doing good or

⁶ O.P SRIVASTAVA, PRINCIPLES OF CRIMINAL LAW 228 (4th ed., 2005).

⁷ 1970 AC 132.

⁸ David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 23 (1987).

⁹ Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defence for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 434-37 (1988).

¹⁰ D.D. BASU, INDIAN PENAL CODE 257 (9th ed., 2006).

¹¹ DONALD H. J. HERMANN, THE INSANITY DEFENCE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES 22 (1983).

¹² *Id.* at 23-24.

¹³ NIGEL WALKER, CRIME AND INSANITY IN ENGLAND: VOLUME ONE: THE HISTORICAL PERSPECTIVE 25-26 (1968).

¹⁴ 16 How. St. Tr. 695 (1724).

¹⁵ Holly Maguigan, *Battered Women and Self-Defence: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 397 (1991).

evil, and understand what he did.¹⁶ Arnold serves as precedent for the holding that an assertion of madness as a defense would not result in a not guilty verdict without the prerequisite finding of total insanity.¹⁷

Despite these early cases and some commentary on the subject, noted scholarly attention was not given to the doctrine of insanity until the 1700s.¹⁸ In 1736, the scholar Lord Hale stated that "[m]an is naturally endowed with these two great faculties, understanding and liberty of will. . . . The consent of the will is that, which renders human actions either commendable or culpable. . . . [W]here there is a total defect of the understanding, there is no free act of the will."¹⁹

In the 1843 landmark case of Daniel M'Naghten,²⁰ the jury found the defendant NGRI. The jury determined that at the time of the crime the defendant suffered from the "morbid delusion"²¹ that many people, including the Prime Minister of England, were persecuting him. Daniel M'Naghten, under the mistaken impression that the Prime Minister was indeed riding in his own carriage, shot and killed the Prime Minister's secretary, Edward Drummond, who actually was using the carriage at the time.²²

Although the rule has undergone substantial change over the last century-and-a-half in the United States, English courts continue to follow it.²³ Even intense criticism of the rule has not stopped a number of states from following

¹⁶ Id. at 765.

¹⁷ Hermann, supra note 10, at 29.

¹⁸ Cynthia G. Hawkins-León, "Literature As Law": The History Of The Insanity Plea And A Fictional application Within The Law & Literature Canon, 72 TEMP. L. REV. 381,381 (1999).

¹⁹ MATTHEW HALE, KNT., THE HISTORY OF THE PLEAS OF THE CROWN 13 (1847).

²⁰ 10 Cl. & Fin. 200 (H.L. 1843). It should be noted that, throughout history, the defendant's name has been variously spelled (namely, "M'Naughten") and the case variously cited (namely, "10 Cl. & Fin. 210"). The author has chosen what she believes is the correct spelling of the defendant's name and the correct citation. Justice Frankfurter was also of this opinion: "[t]o what extent is a lunatic's spelling even of his own name to be deemed as authority?" Of Law and Life & Other Things That Matter: Papers and Addresses of Felix Frankfurter 1956-1963 3 (Philip B. Kurland ed., 1964).

²¹M'Naghten, 10 Cl. & Fin. at 201.

²² See United States v. Freeman, 357 F.2d 606, 616-17 (2d Cir. 1966) (reviewing facts of M'Naghten case).

²³ Dalby, J.T. "The Case of Daniel McNaughton: Let's get the story straight." AMERICAN JOURNAL OF FORENSIC PSYCHIATRY, 27, 17-32 (2006).

some form of the old M'Naghten Rule.²⁴ The main defect of the M'Naghten test is that it was based on the now obsolete belief in the pre-eminent role of reason in controlling social behavior.²⁵ Contemporary psychiatry and psychology emphasize that man's social behavior is determined more by how he has learned to behave than by what he knows or understands.²⁶ Despite such criticism, the M'Naghten Rule continues to have legal force in America and England.²⁷

[C.] CONSTITUTE ELEMENT OF INSANITY DEFENSE

There are three conditions to be satisfied in any case where a defence of insanity is raised:

[1.] *The accused was suffering from the disease of the mind* – Disease of the mind is a legal term and not a medical term.²⁸ The law is concerned with the question whether the accused is to hold legally responsible for his acts.²⁹ This depends on his mental state and its cause complying with legally defined criteria. Lord Denning defined it as 'any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind.'³⁰ At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal. The leading decision on what constitutes a disease of the mind was given in the case of *Sullivan*,³¹ in which a distinction was drawn between insane and non-insane person automatism. Lord Diplock defined disease of the mind as mind in the Mc'Naghten rules is used in the ordinary sense of the medical faculties of reason, memory and understanding.³² If the effect of the disease is to impair these faculties so severely as to have either of the

²⁴ HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENCE REFORM 37(1993).

²⁵ Ellis, J. W. "The Consequences of the Insanity Defence: Proposals to reform post-acquittal commitment laws". 35 CATHOLIC UNIVERSITY LAW REVIEW 961,961 (1986).

²⁶ CARL ELLIOTT, THE RULES OF INSANITY: MORAL RESPONSIBILITY AND THE MENTALLY ILL OFFENDER 11 (1996).

²⁷ Gerald Robin, *The Evolution of the Insanity Defence*, 13 J. CONTEMP. CRIM. JUST. 224, 226 (1997).

²⁸ IAN MELEAN AND PETER MOORISH, HARRIS' CRIMINAL LAW 90 (1st ed., University Law Publishing Co., 2000).

²⁹ R. P. KATHURIA, LAW OF CRIMES AND CRIMINOLOGY 583 (1st ed., Vinod Publication 2005).

³⁰ K.D. GAUR, CRIMINAL LAW: CASES & MATERIALS 130 (1st ed., Butterworth, 1999).

³¹ (1984) A.C. 156 at 172.

³² Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defences: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 828 (1970).

consequences referred to in the latter part of the rules, it matters not whether the etiology of the impairment is organic, as in epilepsy or functional or whether the impairment is itself permanent or is transient and intermittent,³³ provided that it subsisted at the time of commission of the act.³⁴

[2.] *This disease gave rise to a defect of reason:* Where the defence of insanity is to succeed, the disease of the mind must give rise to a defect of reason.³⁵ The reasoning power of a person must be impaired.³⁶ The defendant must show that he was suffering from such defect of reason that he did not know the nature and quality of the act he had committed, or if he did know, that he did not know that what he was doing was wrong.³⁷ If the accused is relying on the second limb, he must show proof that he did not know that it was legally wrong; and as a result, he either did not know that what he was doing was wrong: If the accused's defect of reason is to be effective in establishing the defence of insanity, the insanity must affect his legal responsibility for his conduct as such he is not able to realise that what he was doing is wrong. Wrong here means something that is contrary to law.³⁸

[3.] Where the person knows the nature or quality of the act and knows he was doing wrong, then the fact that he was acting under a strong impulse will not entitle him to defence under the rules.³⁹ The insanity defense is an affirmative defense, in that the defendant, who usually carries the subsequent burden of persuasion at trial must raise it.⁴⁰

³³ Y. V. CHANDRACHUD. RATANLAL AND DHIRAJLAL'S, THE INDIAN PENAL CODE 91(30th ed., Wadhwa and Co. Publishers, 1997).

³⁴ J Goldstein & J Katz, "Abolish the 'Insanity Defence' – Why Not?" 72 YALE LJ 853,853(1963).

³⁵ LEO KATZ, MICHAEL S. MOORE AND STEPHEN J. MORSE, FOUNDATIONS OF CRIMINAL LAW 314(Oxford University Press. 1999).

³⁶ John L. Hill, Note, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 GEO. L.J. 2045, 2071 (1988).

³⁷ Anthony Platt & Bernard L. Diamond, *The Origins of the "Right And Wrong" Test of Criminal Responsibility and its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227 (1966).

³⁸ *R vs. Windle* (1952) 2 QB 826

³⁹ Rene J. LeBlanc-Allman, *GUILTY BUT MENTALLY ILL: A POOR PROGNOSIS*, 49 S.C. L. REV. 1095, 1099 (1998).

⁴⁰ 21 Am. Jur. 2d Criminal Law § 47 (2006).

[D.] THE MOTHER OF INSANITY LAW: M'NAGHTEN PRINCIPLE

Under the M'Naghten formulation of the insanity test, black rage will satisfy the right-wrong prong of M'Naghten if the actor acts in an altered state of consciousness, for example, believing himself to be a leader in a racial war.⁴¹ There were five significant questions which were raised in front of the House of Lords and the replies by the jury for these questions were named as M'Naghten Principle. The five principles were mentioned below⁴²;

- Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of the jury.⁴³
- To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was labouring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing or if he did know it that he did not know that what he was doing was wrong.⁴⁴
- He should not be aware that act was at the same time contrary to the law of the land and he is punishable.⁴⁵
- Where a person under an insane delusion as to existing facts commits an offence in consequence thereof, the judges indicated that the answer must depend on the nature of the delusion; but making the assumption that he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.⁴⁶

There are two significant issues related to the Insanity Rule, which are necessary to be elaborated for the clear interpretation of these rules.

⁴¹ United States v. Alexander, 471 F.2d 923, 957 (D.C. Cir.).

⁴² Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 CALIF. L. REV. 105,106 (1924).

⁴³ Slobogin C., *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*. 53 GEORGE WASH. L. REV. 494, 527(1985).

⁴⁴ A. Brudner, "Insane Automatism: a Proposal for Reform", 45 MCGILL L. J. 65, 73(2000).

⁴⁵ MacKay, *Book Review on Reznick, Legal Studies* 59 STAN. L. REV. 237, 270(2000).

⁴⁶J. C. Mohr, "The Trinational Debate over Insanity and the Law in the 19th Century: Harris's Contribution", 16 LAW & SOC. INQUIRY 636,637 (1991).

1) *The use of the word "know":*⁴⁷

(a) the word "know" can either take on its cognitive meaning namely, is the defendant able to perceive correctly certain objective features of their conduct, i.e. I am shooting a gun; or

(b) the word "know" can have a more affective meaning namely, whether the defendant is able to fully appreciate the significance of cognitive observations i.e. understand what he objectively knows; and

2) *The use of the word "wrong":*⁴⁸

(a) In narrow terms, the word wrong could mean a particular crime; or

(b) In the broader sense, wrong could take into account the defendant's individual beliefs about the desirability of his or her conduct.⁴⁹ These two issues still animate discussion of the M'Naghten Rule, which continues to play a role in the insanity defense in England and America.⁵⁰

From its inception the *M'Naghten* rule was criticized as being too rigid and confining because it did not cover cases in which offenders may cognitively know right from wrong, but were unable to stop themselves from committing the crime charged.⁵¹ Based on this argument, jurisdictions began to develop other definitions for the insanity defense such as the irresistible impulse defense.⁵² In addition, as psychiatry became more accepted and prominent in the United States,

⁴⁷ J. Y. Kim, "Rule and Exception in Criminal Law", 82 TUL. L. REV. 247,289(2007).

⁴⁸ *Id.*

⁴⁹ Hermann, *supra* note 10, at 36-37.

⁵⁰ Bernadette McSherry, "Mental Impairment and Criminal Responsibility: Recent Australian Legislative Reforms" 23 CRIM. L.J. 135, 141 (1999).

⁵¹ Carol A. Rolf J.D, *From M'naghten To Yates – Transformation Of The Insanity Defence In The United States – Is It Still Viable?*, 2 RIVIER COLLEGE ONLINE ACADEMIC JOURNAL 1,4 (2006).

⁵² *Id.*

several critics argued that the insanity defense should focus on mental illness and not a cognitive test of knowing right from wrong.⁵³

EXPLANATION AND APPLICATION OF THE INSANITY TESTS

Insanity defense has been in existence since the twelfth century.⁵⁴ However it has been recognized as an argument for pardon or a way to mitigate a sentence but not as legal defense claiming exemption from criminal liability.⁵⁵ There are certain tests for the insanity defense some of them are obsolete in the present time and few of them has laid down the new principle for insanity defense in various criminal laws jurisdiction of the world.⁵⁶

[A.] WILD BEAST TEST

It was the first test to check insanity that was laid down in the case of *R v. Arnold*⁵⁷ in 1724. Justice Tracy, a 13th century judge in King Edward's court, first formulated the foundation of an insanity defense when he instructed the jury that it must acquit by reason of insanity if it found the defendant to be a madman which he described as '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'.⁵⁸

[B.] GOOD AND EVIL TEST

This test was laid down in the case of *R v. Madfield*⁵⁹. The test laid down in this case is 'the ability to distinguish between good and evil'⁶⁰. In this case, the

⁵³ *Id.*

⁵⁴ Judd F. Sneirson, *Black Rage and The Criminal Law: A Principled Approach To A Polarized Debate*, 143 U. PA.L. REV. 2251,2264 (1995).

⁵⁵ Hugh McGinley & Richard A. Pasewark, *National Survey of the Frequency and Success of the Insanity Plea and Alternate Pleas*, 17 J. PSYCHIATRY & L. 205, 208 (1989).

⁵⁶ George L. Blau & Richard A. Pasewark, *Statutory Changes and the Insanity Defence: Seeking the Perfect Insane Person*, 18 LAW & PSYCHOL. REV. 69, 106 (1994).

⁵⁷ (1724) 16 St.Tr.695.

⁵⁸ Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases* 86 VA. L. REV. 1199, 1208 (2000).

⁵⁹ (1760) 19 St.Tr.885.

accused was charged for treason for attempting to kill the King. The defence pleaded that he was not able to distinguish between good and evil and 'wild beast test' was unreasonable. He was acquitted.⁶¹

[C.] INSANE DELUSION TEST

The *Insane Delusion test* was the second test concerning the defence of insanity. It was laid down by the House of Lords in *Hadfield Case*⁶². In this case Hadfield was charged for high treason in attempting the assassination of King George III. The counsel for the accused Mr. Erskine was successful in proving that the accused was suffering under the insane delusion, a mental disease and thus obtained the verdict of not guilty.⁶³ The counsel pleaded that insanity was to be determined by the fact of fixed insane delusions with which the accused was suffering and which were the direct cause of his crime.⁶⁴

[D.] TEST OF CAPACITY TO DISTINGUISH BETWEEN RIGHT AND WRONG

In *Bowler's case*⁶⁵ the House of Lords formulated the test of capacity to distinguish between right and wrong.⁶⁶ In this case Le Blanc J. charged the jury that it was for them to determine whether the accused when he committed the offence was incapable of distinguishing right from wrong or under the influence of any illusion in respect of the prosecutor which rendered his mind at the moment insensible of the nature of the act he was about to commit.⁶⁷ Ever since the decision in *Bowler's case* the courts have laid more stress on the capacity of the accused to distinguish right from wrong, though they had not yet definitely

⁶⁰ Gerry Ferguson, "The Insanity Defence in Canada, Malaysia and Singapore: A Tale of Two Codes" 17 J. MAL. & COMP. L. 1, 12(1990).

⁶¹ Ira K. Packer, *Homicide and the Insanity Defence: A Comparison of Sane and Insane Murderers*, 5 BEHAV. SCI. & L. 25, 25 (1987).

⁶² (1800) 27 St.Tr.128.

⁶³ Richard J. Bonnie et al., *Decision-making in Criminal Defence: An Empirical Study of Insanity Pleas and the Impact of Doubtful Client Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48, 54 (1996).

⁶⁴ *Id.*

⁶⁵ (1812) 1 Collinson Lunacy 673.

⁶⁶ Hava B. Villaverde, Comment, *Racism in the Insanity Defence*, 50 U. MIAMI L. REV. 209, 212 (1995).

⁶⁷ MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW 35 (1997).

formulated this test in very clear terms until the Mc Naughten case decided in 1843.⁶⁸

[E.] M'NAUGHTEN TEST

The law relating to the defence of insanity is to be found in the rules set out in Mc'Naghten⁶⁹ that delineate the circumstances in which an accused will be held not to have been legally responsible for his conduct.⁷⁰

[F.] IRRESISTIBLE IMPULSE TEST

The irresistible impulse test usually appears as a third prong of the traditional M'Naghten test. This volitional prong broadens M'Naghten by including as insane actors those who act out of irresistible, uncontrollable impulses.⁷¹ According to typical jury instructions, an irresistible impulse must "completely deprive the person of the power of choice or volition."⁷² Consequently, "[I]f the accused would not have committed the act had there been a . . . policeman present, he cannot be said to have acted under an irresistible impulse."⁷³ This prong, adopted in many M'Naghten jurisdictions, draws much criticism on the ground that psychiatrists -and philosophers - have difficulty discerning between resistible and irresistible criminal urges.⁷⁴

[G.] THE MODEL PENAL CODE TEST

The Model Penal Code of the American Law Institute embraces a third insanity test that incorporates both the cognitive element of the M'Naghten test and the volitional element of the irresistible impulse test.⁷⁵ It reads: A person is not responsible for criminal conduct if at the time of such conduct as a result of a

⁶⁸L INDSAY FARMER, CRIMINAL LAW, TRADITION AND LEGAL ORDER 132-34, 150-52 (1997).

⁶⁹ (1843) 10 CI & F 200.

⁷⁰ Johnson v. State, 76 So. 2d 841, 844.

⁷¹ *Id.*

⁷² United States v. Kunak, 17 C.M.R. 346, 359 (C.M.A. 1954).

⁷³ *Id.*

⁷⁴ Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*: I, 37 COLUM. L. REV. 701, 754 (1937).

⁷⁵ Michael R. Hawkins & Richard A. Pasewark, *Characteristics of Persons Utilizing the Insanity Plea*, 53 PSYCHOLOGICAL REPORTS 191, 193 tbl.2 (1983).

mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.⁷⁶ The first prong, the appreciation of criminality is a substantial revision of the M'Naghten test, collapsing its redundant prongs, substituting the more lenient "appreciate" for the stricter "know," and allowing jurisdictions the option to resolve the moral-legal question by inserting either "criminality" or "wrongfulness." The second prong, the conforming of conduct restates the irresistible impulse test but avoids the ambiguous word "impulse." The Model Penal Code also modifies both of its prongs with "lacks substantial capacity" and thus departs from both earlier tests in requiring less than total incapacitation.⁷⁷ As a result, the Model Penal Code test is broader and some would say more realistic than the earlier tests.⁷⁸

[H.] THE PRODUCT TEST

The product test is more forgiving than the M'Naghten, the irresistible impulse and the Model Penal Code tests both with respect to the mental disease or defect requirement and with respect to the cognitive and volitional prongs. Instead of requiring a "disease of the mind" that only some psychoses and extreme mental defects can satisfy or a lack of substantial capacity to understand or control the product test includes "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."⁷⁹ As a result of this lenient definition, more defendants could successfully assert a black rage defense under this part of the product test than under other insanity formulations.⁸⁰ If these defendants could additionally show that black rage was a but for cause of their criminal conduct, they would also satisfy the second part of the test and qualify as legally insane.⁸¹

⁷⁶ Model Penal Code § 4.01(1) (1962).

⁷⁷ Model Penal Code § 4.01 .

⁷⁸ About half of the states and all but one of the federal courts of appeals had adopted the popular Model Penal Code test by 1980.

⁷⁹ McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962).

⁸⁰ *United States v. Alexander*, 471 F.2d 923, 958-59 (D.C. Cir.).

⁸¹ Richard A. Pasewark et al., *Differentiating Successful and Unsuccessful Insanity Plea Defendants in Colorado*, 15 J. PSYCHIATRY & L. 55, 58-59 (1987).

[I.] THE FEDERAL TEST

The United States Congress comes with a final insanity test, aptly called the "federal test."⁸² Under this test, an actor is legally insane if, at the time of the criminal conduct, he suffered from a "severe mental disease or defect" and as a result was unable to appreciate;

- The nature and quality of the conduct or
- The wrongfulness of the conduct.⁸³

A partial throwback to M'Naghten, the federal test replaces the Model Penal Code's more lenient "lack of substantial capacity" with the less forgiving "severe mental disease or defect" and removes completely the Model Penal Code's volitional prong.⁸⁴ As a result, incapacitation must be cognitive and total, as in M'Naghten, in order to exculpate the accused.⁸⁵

LAW OF INSANITY IN INDIA

The Indian law relating to insanity has been codified in the IPC, section 84⁸⁶ contained also the general exceptions.⁸⁷ Section 84 of the Indian penal Code, 1860 mentions the legal test of responsibility in case of alleged unsoundness of mind. It is by this test as distinguished from a medical test that the criminality or the *mens rea* of the *actus reus* is to be determined.⁸⁸ This section in substance is the same as the M'Naghten Rules which are still the authoritative statement of law as to criminal responsibility in spite of the passage of time.⁸⁹

⁸²Jeffrey L. Weyant, Comment, *Reforming Insanity Defence Procedures in New York: Balancing Societal Protection Against Individual Liberty*, 45 Alb. L. Rev. 679, 679 (1981).

⁸³ See 18 U.S.C. s 17(a) (1988); see also *United States v. Salava*, 978 F.2d 320, 322 (7th Cir. 1992).

⁸⁴ *United States v. Fishman*, 743 F. Supp. 713, 720 (N.D. Cal. 1990).

⁸⁵ *United States v. Reed*, 997 F.2d 332, 334 (7th Cir. 1993).

⁸⁶ Indian Penal Code, § 84: '*Acts of a person of unsound mind*— Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law'.

⁸⁷ *State of M.P. v. Digvijay Singh*, AIR 1981 SC 1970.

⁸⁸ R.C SRIVASTAVA, LAW RELATING TO CRIME AND PUNISHMENT 234 (1st ed., Manav Law House, Allahabad 2006).

⁸⁹ *Peeru Singh v. State of M.P.*, AIR 1987 Cr L J 1781 MP.

[A.] SECTION 84 OF IPC AND M'NAGHTEN PRINCIPLE

IPC section 84 deals with the law of insanity on the subject. This provision is made from the M'Naghten rules of England. In the draft penal code, Lord Macaulay suggested two section (66 and 67), one stating that 'nothing is an offence which is done by a person in a state of idiocy' and the other stating that 'nothing is an offence which a person does in consequence of being mad or delirious at the time of doing it' to deal with insanity.⁹⁰ The Law Commissioners in replacing these two provisions by IPC, section 84 have adopted a brief and succinct form of the Mc'Naghten rules. It has been drafted in the light of the replies to the second and third questions, which is generally known as M'Naghten rules.⁹¹ But IPC, section 84 uses a more comprehensible term 'unsoundness of mind' instead of insanity.⁹² Huda says the use of the word 'unsoundness of mind' instead of insanity has the advantage of doing away with the necessity of defining insanity and of artificially bringing within its scope different conditions and affliction of mind which ordinarily do not come within its meaning but which nonetheless stand on the same footing in regard to the exemptions from criminal liability.⁹³

[B.] UNSOUNDNESS OF MIND

The Code does not define unsoundness of mind.⁹⁴ But to exempt a man from criminal liability unsoundness of mind must reach that degree such that it materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility.⁹⁵ A distinction must be drawn between insanity affecting the cognitive faculties of a man and that affecting the will or emotions. It is only the first that is within the purview of the section.⁹⁶

⁹⁰ K.N. PILLAI, CHANDRASEKHARAN, GENERAL PRINCIPLES OF CRIMINAL LAW, 267 (1st ed., Eastern Book Company 2005).

⁹¹ K.D. GAUR, COMMENTARY ON INDIAN PENAL CODE 271 (1st ed., Universal Law Publishing Co. 2006).

⁹² *Amruta v. State of Maharashtra*, 1996 Cr LJ 3450 (Bom).

⁹³ *Id.*

⁹⁴ *Kader Hasyer Shah*, (1896) 23 Cal 604,607.

⁹⁵ *Geetika Goala*, (1973) 16 Pat 333.

⁹⁶ *Id.*

In *Bikari v. State of U.P.*,⁹⁷ it was held that where evidence of deliberate or premeditated actions are found, destruction of cognitive faculties cannot be inferred. Such unsoundness however cannot be inferred from mere lack of motive or the nature of the defendant's preceding or subsequent actions. Such was the dictum of the Supreme Court in *Sheralli Walli Mohammed v. State of Maharashtra*⁹⁸.

In *Lakshmi v. State*,⁹⁹ the meaning as to unsoundness of mind was cleared up. It was held that what section 84 lays down is that the accused claiming protection under it should not know an act to be right or wrong but that the accused should be "incapable" of knowing whether the act done by him is right or wrong. The former is a potentiality; the latter is the result of it. If the person possesses the former, he cannot be protected in law, whatever might be the result of his potentiality.

[D.] THE LAW COMMISSION REPORT SUMMARY

After much deliberation it was decided that the provisions in the criminal justice system dealing with the insanity defense need no alteration and the same were left untouched.¹⁰⁰ However, This decision of the Law Commission has come under fire since the M'Naghten Rule (which is based the Indian insanity defense) has come under increasing attack in most common law countries.¹⁰¹ In fact to remedy it's in adequacies, a vast number of legislations and new theories have been formulated. In India however no such innovations have been introduced and we continue to live with this much criticized system.¹⁰²

The Indian Law on insanity is based on the rules laid down in the M'Naghten case.¹⁰³ However, the M'Naghten rules have become obsolete and are not proper and suitable in the modern era.¹⁰⁴

⁹⁷ AIR 1961 SC 1.

⁹⁸ AIR 1972 SC 2443.

⁹⁹ AIR 1963 ALL 534.

¹⁰⁰ Shivraj Singh v. State of M.P., 1975 Cr LJ 1458.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Bhan Singh v. State of M.P., 1990 Cr LJ 1861 (MP).

LAW OF INSANITY IN OTHER CRIMINAL CODES: AN OVERVIEW

The Criminal Codes of many countries provide for a broader scope for the defence of insanity.

[A.] INSANITY LAW IN USA

The United States' courts expanded upon the M'Naghten Rule by exempting from criminal liability those who acted under "irresistible impulse."¹⁰⁵ This test focused on exempting spur-of-the-moment reactions from criminal responsibility.¹⁰⁶ Thus, courts, following this rule, would not excuse crimes committed after prolonged contemplation.¹⁰⁷

*Parsons v. State*¹⁰⁸, a much-noted early case, exemplified this proposition. In *Parsons*, a wife and daughter were accused of killing their husband/father by fatally shooting him. The two defendants were tried jointly and both pled insanity. At the trial level, the jury found the defendants guilty of murder with malice aforethought.¹⁰⁹

Another development with limited application in the law of the insanity plea in the United States was the so called "product" test.¹¹⁰ According to this test, the defendant would not be criminally responsible if his unlawful act was the product or result of a mental disease or defect.¹¹¹

The American Legal Institute's (ALI) Model Penal Code (MPC) test, found in MPC section 4.01, provides that a person is not responsible for criminal

¹⁰⁴ Elkai Shankari v. State of A.P., 1990 Cr LJ 97 (AP).

¹⁰⁵ MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENCE 84 (1994).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 2 So. 854 (Ala. 1887).

¹⁰⁹ Henry J. Steadman et al., *Factors Associated With a Successful Insanity Plea*, 140 AM. J. PSYCHIATRY 401, 401(1983).

¹¹⁰ *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954) (explaining the product test), overruled by *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

¹¹¹ *Id.*

conduct if, at the time of such conduct as a result of mental disease or defect she or he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.¹¹² Thus, the ALI test focuses on the defendant's understanding of his conduct and on the defendant's ability to control his actions. Notably, the test absolves from criminal responsibility a person who knows what he is doing, but is driven to crime by delusions, fears, or compulsions.¹¹³ The test is a combination of portions of the M'Naghten Rule and the irresistible impulse test. The ALI test contains a cognitive prong from the M'Naghten Rule and a volitional component of the irresistible-impulse test.¹¹⁴

[B.] AUSTRALIAN CAPITAL TERRITORY

Pursuant to the Crimes Act 1900, section 428(1):¹¹⁵

An accused is entitled to be acquitted of an indictable offence on the grounds of mental illness if it is established on the balance of probabilities that, at the time of the alleged offence, the accused was, as a result of mental dysfunction¹¹⁶-

- Incapable of knowing what he or she was doing; or
- Incapable of understanding that what he or she was doing was wrong.

[C.] NEW SOUTH WALES

In New South Wales, §38 of the *Mental Health (Criminal Procedure) Act 1990* states:¹¹⁷

¹¹² Model Penal Code § 4.01 (1962). §4.01 states that:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

¹¹³ Richard A. Pasewark et al., *The Insanity Plea in New York State*, 51 N.Y. ST. B.J. 186,187 (1979).

¹¹⁴ H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENCE 77 (1954).

¹¹⁵ Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 61-62 (1961).

¹¹⁶ J. V. Barry, *Insanity in the Criminal Law in Australia* 21 CAN. BAR REV. 429 437 (1943).

¹¹⁷ G. P. Fletcher, "Two Kinds of Legal Rules: a Comparative Study of Burden-of-Persuasion Practices in Criminal Cases" 77 Yale L.J. 880, 899-901(1968).

If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty by reason of mental illness.¹¹⁸

It is noted that this test invokes the common law; New South Wales is the only Australian jurisdiction to do so in those terms.¹¹⁹

[D.] SINGAPORE

Having been a British Crown Colony in the Far East until as recently as 1959, it is not at all surprising that much of Singaporean criminal law has been borrowed from the Indian Penal Code which the British colonial administration based in India introduced to many of its colonies.¹²⁰ As a result, section 84 of the Singapore Penal Code, the provision on insanity (or "unsoundness of mind" as it is described in the Code) is identical in wording to section 84 of the Indian Penal Code. Even after gaining its independence, Singapore has continued to look to English criminal law developments for guidance. A good example was the introduction of the English statutorily created defence of diminished responsibility¹²¹ into the Singapore Penal Code in 1961 in the form of Exception 7 to section 300.¹²² Interestingly, this move was not taken by India or by Malaysia, our close neighbour which, like Singapore, has also adopted the Indian Penal

¹¹⁸ W. M. BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE 548 (6th ed., 1875).

¹¹⁹ O. Dixon, "A Legacy of Hadfield, M'Naghten and Maclean" 31 A.L.J. 255,256 (1957).

¹²⁰ Chan Wing Cheong & Andrew Phang, "The Development of Criminal Law and Criminal Justice" in Kevin Tan, ed., Essays in Singapore Legal History (Singapore: Marshall Cavendish Academic and the Singapore Academy of Law, 2005).

¹²¹ See §2, Homicide Act 1957 (U.K.), 1957.

¹²² The exception is closely similar in wording to the English provision. It reads: "Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death".

Code.¹²³

[E.] TASMANIAN CRIMINAL CODE

Section 16 says that an accused may not be punished if he may not understand the nature of the act or that it was against law. They may also not be punished if they committed the act under an 'irresistible impulse'.

[F.] PENAL CODE OF FRANCE

Article 64 provides that 'there is no crime or offence when the accused was in state of madness at the time of the act or in the event of his having been compelled by a force which he was not able to resist'.

[G.] SWISS PENAL CODE

Section 10 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'. The American Law Institute suggested that 'a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks the substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law'.

INSANITY DEFENSE UNDER INTERNATIONAL LAW

[A.] THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A somewhat different aspect of the tension between crime control and democratic freedoms arises in the context of the mentally ill offender.¹²⁴

¹²³ White, "The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991" 4 CRIM.L.R. 4 , 9(1992).

¹²⁴ N. WALKER, CRIME AND INSANITY IN ENGLAND 15-73 (1968).

Here, there is always a serious danger that the emphasis on protecting the public from a person perceived as dangerous will result in that person being short changed regarding his rights, particularly the right to liberty.¹²⁵ The leading European Court decision on the detention/hospitalization of the mentally ill is *Winter Werp v. Netherlands*.¹²⁶ The principles set out in this seminal judgment must cause serious concern that Ireland is in serious breach of the Convention as regards both the insanity defense and the issue of fitness to plead in criminal trials.¹²⁷ The *Winter werp* principles include the following requirements:¹²⁸

- There must be a proper test of insanity, which is flexible and closely linked with current psychiatric concepts;
- There must be a proper consideration, at the time of detention, of whether there is a need for such detention/hospitalisation;
- There must be provision for periodic review of such detention/hospitalization;
- The test operated by the review body must be whether the conditions which warranted the original detention continue to exist;
- The procedures operated by the review body must be fair to the detainee;
- The review body must be sufficiently independent to have the power to order the release of the person if the previous condition is no longer satisfied; and
- Reviews must be dealt with speedily.¹²⁹

Without setting out a litany of possible shortcomings in this area of the criminal law, suffice it to say that many, if not all, of the *Winterwerp* requirements are ignored by seriously outdated Irish legal provisions concerning fitness to plead and insanity.¹³⁰

[B.] THE DEFENCE OF INSANITY IN THE STATUTE OF THE

¹²⁵ H. WEIHOFEN, *INSANITY AS A DEFENCE IN CRIMINAL LAW* 17-21 (1933).

¹²⁶ (1979) 2 E.H.R.R. 387.

¹²⁷ *Id.*

¹²⁸ J. N. Eule, *The Presumption of Sanity: Bursting the Bubble* 25 U.C.L.A.L.R. 637,669 (1978).

¹²⁹ *Luberti v. Italy* (1984) 6 E.H.R.R. 440.

¹³⁰ Sutherland and Gearty, *"Insanity and the European Court of Human Rights"* (1992) CRIM.L.R. 418, 419.

INTERNATIONAL CRIMINAL COURT

It is noteworthy that most member states of the Commonwealth have ratified the Statute of the International Criminal Court (ICC).¹³¹ As a result of this Statute, a permanent International Criminal Court was created for the first time in history, composed of judges who are independent of their home states to try perpetrators of crimes against humanity, genocide, war crimes and aggression. The ICC Statute contains provisions spelling out some of the general principles of criminal responsibility one of which is Article 31 which provides for certain defences. Among them is the defence of insanity which reads as follows:

[A] Person shall not be 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.¹³²

This formulation may be usefully compared with the Commonwealth formulations considered in this study. The ICC provision lends support to the correctness of several propositions that have been made concerning the elements that should go into making the best possible formulation of the defence of insanity. First, the ICC provision describes the mental disorder in terms of "a mental disease or defect". In doing so, the provision recognises the difference between a disease and a defect¹³³ and, at the same time, avoids unnecessary complications by not using the adjective "natural" to describe "mental defects" as some Commonwealth formulations have done. Secondly, the ICC provision uses the word "appreciates" to describe the cognitive defects referred to, thereby signifying that disruption of a deeper level of reasoning will support the defence.

¹³¹ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), reprinted in 37 I.L.M. 999 (1998), available at <http://www.un.org/icc>.

¹³² Article 31(1)(a). For a detailed discussion of this provision, see Peter Krug, "The Emerging Mental Incapacity Defence in International Criminal Law: Some Initial Questions of Interpretation" (2000) 94 A.J.I.L 317; GEERT-JAN KNOOPS, DEFENCES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 109-112 (2nd ed., Martinus Nijhoff Publishers 2008).

¹³³ *Id.*

This renders it unnecessary for the provision to refer to the "quality" of the accused's conduct.

Hence, the defence would be available to a person who knew the nature of his or her conduct but, due to a mental disease or defect, could not understand the harmful effect or consequences of that conduct. Thirdly, the ICC provision supports recognition of conative defects and, in so doing, joins the many Commonwealth jurisdictions which have taken this stance. Fourthly, by using the word "destroys" the ICC provision is empathic that a total (as opposed to a substantial) incapacity is required for the defence to succeed. Fifthly, the absence in the ICC provision of a supplementary rule on partial delusions confirms the superfluous nature of such a rule.

Finally, the absence of a defence of diminished responsibility in the ICC Statute lends support for the view that the concept of diminished responsibility should be treated as a sentencing factor¹³⁴ rather than given an exculpatory role.¹³⁵

However, there are three matters appearing in the ICC provision which, it is contended, require revision. The first concerns the restriction of the defence to persons who did not appreciate the legal wrongness of their conduct. The second matter requiring revision is that the ICC provision should not have connected the accused's conative defect with the cognitive matter of conforming to the requirements of the law.¹³⁶ By imposing such a connection, the provision wrongly assumes that conative defects have no effect whatsoever on a person's cognitive faculties.

Fortunately, the wording of the provision is sufficiently vague to enable the

¹³⁴ This is possible under the framework of the general sentencing provisions of Article 78 of the ICC Statute.

¹³⁵ The non-recognition of a defence of diminished responsibility by the ICC Statute is all the more glaring given that it was recognised by the International Criminal Tribunal for the former Yugoslavia in the Celebici Camp Case: see *Prosecutor v Delalic*, Judgment, No. IT-96-21-T (16 November 1998) *available at* <http://www.un.org/icty>.

¹³⁶ The wording describing this connection is closely similar to that found in the American Model Penal Code provision on insanity

ICC to interpret it in a way which does not require the accused to have appreciated that his or her uncontrollable conduct was contrary to law. The ICC could do so by regarding the relevant words as simply stating (rather superfluously) that the uncontrolled conduct of the accused was such as to have breached the law. A much better remedy would be for the Review Commission of the ICC Statute to strike out the words "to conform to the requirements of law" from the provision.¹³⁷

The third matter concerns the use of the word "capacity" in the ICC provision. That this word has the effect of unjustly denying the defence to persons who may have had the capacity to appreciate the nature or wrongness of their conduct or to control it but who, on the occasion in question, lacked such appreciation or control as a result of a mental disease or defect. The solution would be to reformulate the ICC provision so as to avoid using the term "capacity".

CONCLUSION

The Indian Law on insanity is based on the rules laid down in the M'Naghten case. However, the M'Naghten rules have become obsolete and are not proper and suitable in the modern era. The M'Naghten rule is based on the entirely obsolete and misleading conception of nature of insanity, since insanity does not only affect the cognitive faculties but affects the whole personality of the person including both the will and the emotions. The present definition only looks at the cognitive and moral aspects of the defendant's actions but ignores the irresistible impulse that may be forcing him to commit that act. An insane person may often know the nature and quality of his act and that law forbids it but yet commit it as a result of the mental disease.

¹³⁷ Article 123 of the ICC Statute provides for the establishment of such a commission to consider any amendments to the Statute seven years after its entry into force. The commission is due to be convened in 2009.

The Law Commission of India in its 42nd report after considering the desirability of introducing the test of diminished responsibility under IPC, section 84 gave its opinion in the negative due to the complicated medico-legal issue it would introduce in trial. It is submitted that the Law Commission's view needs modification since it is not in conformity with the latest scientific and technological advances made in this direction. There are three compartments of the mind controlling cognition, emotion and will. IPC, section 84 only exempts one whose cognitive faculties are affected.

The provision is regarded as too narrow, and makes no provision for a case where one's emotion and the will are so affected as to render the control of the cognitive faculties ineffectual. The Courts must also adopt a broader view of the Insanity and introduce the concept of diminished responsibility.

The Indian Government may also look at the provisions of the other countries relating to insanity. Swiss Penal Code, section 10 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'. This provision is much broader and is better suited for the defence of insanity.