
A PERPETUAL DILEMMA OF INSANITY AS A DEFENSE

Kostub Singla, O P Jindal Global University

ABSTRACT

There is a constant debate on whether the insanity defense should be used or should be banished. Some believe that the mentally ill are treated discriminatorily, and some believe that they are violent and a threat to society; therefore, they should not be coddled. However, mental illness among criminal offenders affects every stage of the criminal justice system from issues during the investigation to the implementation of competencies. If not everyone, then at least people with a severe mental disorder should be treated differently by the criminal law. The main question that arises after seeing various case studies is, how judges interpret insanity as a defense because in some cases they ignore the mental condition of an accused for the protection of society at large, and in other cases, they set them free. There is no certainty on how judges deal with such cases. I believe that one of the major reasons behind this is very well described by Ian Parker in his article *Madness and Justice*. According to him, there are different models of how insanity is interpreted and according to that judges give different verdicts. There are other measures to tackle this issue like GBMI (guilty but mentally ill) which I will discuss in detail later on, but despite these measures, the problem with the mentally ill still prevails.

The main aim is to protect the rights of vulnerable individuals who fail to defend themselves in court and to preserve natural justice in the legal system while balancing the needs to see justice served and the protection of the public. This paper aims to analyze the importance of insanity as a defense in the criminal justice system and how insanity is interpreted differently throughout history by various associations like the Diagnostic and Statistical Manual of Mental Illness (DSM) or International Classification of Diseases.

NUANCES OF INSANITY

Insanity is a legally used term and not scientifically. Insanity is a genus of psychiatric disorder and it is scientifically proved that all psychiatric disorders are central nervous system diseases characterized by disturbances in emotion, cognition, motivation, and socialization.¹ So now the question that arises is, How insanity can be defined legally, and in what cases one can be allowed to use insanity as a defense? Though there is no particular definition of mental disorder, however, the DSM- IV definition of mental disorder is used in both the medical and legal fields. Under DSM IV certain criteria are formed each with a slight change in the definition of mental disorder. According to criterion A, it refers to clinically significant behavioral or psychological syndrome. Criterion B states that mental disorder is associated with any kind of disability, distress, or any kind of suffering like death, loss of freedom, or pain. Criterion D refers to any kind of biological, behavioral, or psychological dysfunction. With each criterion there are some lacunas in the definition of mental disorder like in criterion A 'clinically significant' is not defined, in criterion D term 'dysfunction' is understood either in a statistical way or in terms of the consequence of the syndrome.²

Based on these definitions there exist four basic insanity defenses i.e. M'Naghten rule, irresistible impulse, substantial capacity, and Durham rule. Out of these four, the M'Naghten rule got the most validation. The main focus of this defense is on the defendant's awareness rather than the ability to control his actions.³ The test contains two elements; it has to be proved that the defendant is suffering from a mental defect at the time of the commission of an unlawful act, secondly, because of that criminal act the defendant was unable to understand the nature and quality of that unlawful act.⁴

DSM criteria is not the only criteria that have been debated. Ian Parker a well-known psychologist in his article '*Madness and Justice*' talked about different models of madness. He focused on four mainstream models: the psychiatric medical model, psychoanalytic conceptions of "psychosis," systemic interventions into family systems, and cognitive–

¹L. LARRY JAMESON & ANTHONY FAUCI, HARRISON'S PRINCIPLES OF INTERNAL MEDICINE (19th ed. 2015).

² Dan J. Stein & Katharine A. Phillips, *What is a Mental/Psychiatric Disorder? From DSM IV to DSM V*, N.C.B.I. (Jan 20, 2010), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3101504/#:~:text=In%20DSM%20DIV%2C%20each%20of,are as%20of%20functioning\)%20or%20with](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3101504/#:~:text=In%20DSM%20DIV%2C%20each%20of,are as%20of%20functioning)%20or%20with)

³ University of Minnesota Libraries Publishing, *Criminal Defenses*, O.E.R. SERVICES. <https://courses.lumenlearning.com/suny-criminallaw/chapter/6-1-the-insanity-defense/>

⁴ *Id.*

behavioral therapy approaches.⁵ Some people believe that having different approaches is good because it gives them multiple perspectives however, these four approaches are not different perspectives on the same thing. Additionally, having multiple understandings is good for rival approaches such as advocates will use a different approach in every case according to the facts. This will give them a loophole to use madness as a defense in every case.

Another well-recognized method of dealing with cases of the insanity defense is Guilty but Mentally Ill (GBMI). Due to public outrage in 1975 because of acquittals on basis of insanity Michigan came up with this new way of interpreting Insanity defense.⁶ Under GBMI, irrespective of a person's mental condition he will still be criminally liable for his acts. The objective behind this is to protect society and give proper treatment to an offender who is mentally ill. However, one has to keep in mind that GBMI is a supplement to the insanity defense and not a substitute. According to GBMI standards, the defendant is guilty if he was not insane at the time of the commission of a crime but he is suffering from a mental disease or an intellectual disability. Different jurisdictions have different treatment for GBMI, like in some states the offender is sent to the Department of Mental Health for medical treatment, in other states the offender is kept in separate prison cells for treatment and after that, he will be shifted to general prison cells with rest of the prison population.⁷ However, in some states, they are not even treated unless it becomes problematic for the authorities to keep them with other prisoners.

HISTORY OF INSANITY DEFENSE IN INDIAN LAW

Insanity, as a defense, is a part of various legal systems for centuries, but minimal emphasis has been given to this issue. From the very basic understanding of the law, it can be said that punishing a person who is not liable for the offense constitutes a breach of basic human and fundamental rights provided in the Indian Constitution. In India, Section 84 of the Indian Penal Code (IPC)⁸ deals with “the act of a person of unsound mind” and defense of insanity. In India, very limited research has been done on this topic, however, in a landmark study of the forensic psychiatry of Indian studies conducted in 2011, in which 5024 prisoners were assessed, out of which 79.6% individuals could be diagnosed as having either mental illness or substance use.

⁵ Ian Parker, *Madness and Justice*, 34 JOURNAL OF THEORETICAL AND PHILOSOPHICAL PSYCHOLOGY 28, (2014).

⁶ L.E. Weinberger & E. Markowitz, *In Encyclopaedia of Mental Health* (2d. ed. 2016).

⁷ *Supra* note 6.

⁸ The Indian Penal Code, (1860), No. 45 of 1860, (India), S 84.

After eliminating substance use, 27.6% of prisoners still had a diagnosable mental illness⁹.

There were various tests used to determine the mental health of a person, such as the Wild Beast test¹⁰, The insane delusion test¹¹ and test of capacity to distinguish between right and wrong,¹² and These tests laid the landmark M’Naghten rule¹³. Section 84 of IPC is also based on the McNaghten rule. With an in-depth reading of Section 84, we can say that it embodies a fundamental principle of criminal jurisprudence that is "Actus nonfacit reum nisi mens sit rea" which means that an act does not constitute guilt unless done with a guilty intention and secondly "Furiosi nulla voluntas est," which means a person with mental illness has no free will¹⁴. Based on these two maxims, it is clear that an insane person cannot be held guilty of a crime.

Further, mental illness is categorized as medical insanity and legal insanity. Unsoundness of mind is not defined in the Penal code, and every person with mental illness is not exempted from criminal responsibility. Courts are concerned with legal insanity instead of medical insanity¹⁵. Medical insanity can be defined as any kind of mental illness; however, legal insanity refers to the mental state of a person at the time of the commission of a crime. In short, the totality of the circumstances should be seen in the light of the evidence and not just the fact that he is insane to prove that he was unaware of his acts and had no control over his actions.

RECOGNITION OF INSANITY DEFENSE IN INTERNATIONAL LAW

Just like various domestic jurisdictions like India, mental insanity is a controversial topic in International Criminal Law. The idea that a person who has committed a crime is acquitted or receives a mitigated sentence on psychological grounds is somehow difficult for society and even for some legislatures to tolerate. At the domestic level, this issue has been regulated somehow by sending convicts to mental hospitals instead of prisons.¹⁶ However, the position

⁹ Math SB, Murthy P, Parthasarathy R, Naveen Kumar C & Madhusudhan S., *Mental Health, and Substance Use Problems in Prisons. The Bangalore Prison Mental Health Study: Local Lessons for National Action*, NATIONAL INSTITUTE OF MENTAL HEALTH AND NEURO SCIENCES, BANGALORE (2011).

¹⁰ R. v. Arnold. 1724, 16 St.Tr.695. Also, see Lord Ferrer's case 1760, 19 St.Tr.885.

¹¹ Hadfield Case. 1800, 27 St.Tr.128.

¹² Bowler's case. 1812, 1 Collinson Lunacy 673.

¹³ Asokan TV. Daniel McNaughton (1813-1865), INDIAN J PSYCHIATRY (2007).

¹⁴ Bapu @ Gajraj Singh vs State of Rajasthan. Appeal (crl.) 1313 of 2006 (India).

¹⁵ Hari Singh Gond v. State of Madhya Pradesh. 2008, 16 SCC 109 (India).

¹⁶ For example, In Germany s63 StGB and in England section 37 Mental Health Act 1983.

is different when it comes to the International Criminal Court (ICC) and International Criminal Tribunal for the Former Yugoslavia (ICTY). From the outset, International Criminal Law has focused on ending the impunity of those who are responsible for "the most serious crimes of concern to the international community as a whole."¹⁷ Now, if an International Tribunal declares someone not guilty only on the basis of mental illness, it would be considered against the purpose of the international legal system. Although, rehabilitation is one of the objectives of international criminal prosecutions,¹⁸ It is normally treated as a "subsidiary rationale" in comparison to the retributive and deterrent goals.¹⁹

(i) Evolution of Insanity as Defense

In the International Criminal Court, this defense was first raised at Nuremberg. In the case of Rudolf Hess, he was number two to Hitler in the early years of the Third Reich. He was the most senior officer in the Nazi Party, and he used to make decisions on Hitler's behalf. He ordered the German aggression against Austria, Denmark, Norway, Czechoslovakia and Poland, Belgium, and the Netherlands.²⁰ He was charged with conspiracy and crime against peace and sentenced to life imprisonment in 1946.²¹ Before the trial, he left Germany in a very weird moment and showed up in England; he claimed to be there to secretly negotiate a peace treaty between the German Government, Hitler, and the British Government. Instead of believing him, the British Government put him in jail and after that, he was tried at Nuremberg with other defendants.²² There, he argued that he had such a mental incapacity that it would not be fair for him to stand a trial. In fact, during the entire trial, he had such bizarre behavior. In court, he could not form sentences; he would go into his own little quiet world and would not be communicative. The tribunal knew that this was a case of someone who was suffering from something, but they said that there was no suggestion that he was so utterly insane at the time when charges against him were committed, that he should be absolved of responsibility. Through 60 years of legal development, the International Criminal Court says that the defense of insanity is only available if "the person suffers from a mental disease or defect that destroys

¹⁷ Preamble ICC statute para 4.

¹⁸ D' Ascoli, S., *Sentencing in International Criminal Law: The approach of the two UN ad hoc Tribunals and future perspectives for the International Criminal Court*, EUROPEAN UNIVERSITY INSTITUTE 37 (Jun. 2008).

¹⁹ Henham, R., *Some Issues for Sentencing in the International Criminal Court*, 52 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 81, 89 (2003).

²⁰ Rudolf Hess judgment, IMT (Nuremberg), 1 October 1946.

²¹ *Id.*

²² S. Natalia, *Mental insanity at the ICC: Proposal for a new resolution*, 19 (2014).

the person's capacity to appreciate the unlawfulness or the nature of his or her conduct or the capacity to control his or her conduct to conform to the requirements of law."²³ It means that at the time the act was committed, the person has to have this insanity. If the person was sane at the time, the act was committed but later becomes insane, maybe because of guilt or because of years that go by when they are on the run. That later insanity does not prevent the person from being held responsible because, the question is, were you insane at the time you committed the act.²⁴ India has a similar concept of legal insanity, which we briefly discussed above.

(ii) Different interpretation of Insanity in International Law

There are two main factors. First is, it can go to the person's inability to understand the nature of what he is doing that, what's he is doing is actually a crime or it can go to the inability of the person to control what he is doing so that his insanity makes him do things which he does not want to. There is also a third type that is if a person later is so insane that they do not understand the nature of the proceedings against them. This does not absolve them from guilt, but it does say that a criminal prosecution would be unfair at that point because you cannot prosecute someone who does not understand the nature of what is going on. They have to have the due process to be able to participate in their own defense. Another latest case is of Madame Ieng Thirith; she was the third most powerful lady during the reign of Pol Pot and Khmer Rouge. She was tried in Cambodian Tribunal for Genocide, War crimes, and a crime against humanity. Her defense said she needed to be examined because she had Dementia and the psychiatrists determine that she probably had senility caused by Alzheimer's and that she was not able to understand what was going on. Based on this, the tribunal ordered her release unconditionally. The point here is she succeeded in the very thing Rudolf Hess tried to accomplish in his trial. The difference is that in her case, it was not an insanity defense; it's the defense that you really cannot understand the proceedings, and it is not fair.

(iii) Different models of Insanity Defense

Various legal scholars found the wording of Article 31 of the ICC Statute²⁵ and 145 ICC RPE²⁶

²³ Rome Statute of International Criminal Court, Article 31(1)(a).

²⁴ *Supra* note 22.

²⁵ *Supra* note 23.

²⁶ International Criminal Court, Rules of Procedure and Evidence, Article 145.

are unclear and inadequate as it does not specify which approach the international criminal court should follow. The first possibility is adherence to the English model. English law divides its criminal liability theory into '*actus reus*, *mens rea*, and absence of a valid defense.'²⁷ Under valid defenses, there are two available defenses for perpetrators who are mentally sick i.e., mental illness (complete defense) and diminished responsibility (partial defense). Both of these concepts are defined in *M'Naghten* rules and section 2 of the Homicide act 1957.²⁸ The second option would be adherence to the German model to the ICC. German theory of mental insanity can be defined in one line "conduct can only be punished if it satisfies the elements of the crime, is unlawful and is blameworthy." Hence, mental insanity is an excuse affecting blameworthiness and culpability and it can eliminate criminal responsibility if the elements of S20 StGB are met.²⁹ With an in-depth analysis, it is clear that the ICC statute is closer to the German model than the English one. Till now, there have been no cases of mental insanity in ICC; however, by the precedents set by the ICTY, it is quite clear that international justice is not in favor of acquittal or mitigation of sentence because of mental illness. Moreover, there are only two possibilities either a person is acquitted or he is sent to prison, there is no other alternative such as sending a defendant to a medical institution. In International criminal law, there is a conscious disregard of the rehabilitative function of criminal law and the offender's culpability.³⁰

CRITIQUE OF INSANITY AS A DEFENSE

There are many objections to the defense of insanity, and most of them have been made on false assumptions and wrong logic. Some of those objections are- defense of insanity produces wrong verdicts, it is a rich person's defense, it is used too infrequently and it requires a study of the defendant's former state of mind.

Defense of insanity produces wrong verdicts- Unlike other criminal law concepts, defense of insanity is not solely based on factual questions instead, it is based on the moral and social justice of the mental state of the accused at the time of the commission of an offense. For example, if A shot B and killed him, then the question of intention will be a factual question. Defense of insanity tests asks indeterminate questions such as how much knowledge he lacked

²⁷ Allen, M., *Textbook on Criminal Law*, OXFORD UNIVERSITY PRESS, 19 (2007).

²⁸ *Supra* note 22, at 40.

²⁹ *Supra* note 22, at 41-42.

³⁰ *Supra* note 22, at 47-48.

to determine what is right and wrong³¹.

Insanity is a rich person's defense- wealthy defendants can hire the best attorneys and experts in any case, whether civil or criminal, and abolishing insanity as a defense cannot eliminate the inequalities of the criminal justice system. Moreover, it is not easy to prove the defense of insanity; only a few defendants raise the defense of insanity and rarely succeed with it³².

Defense of insanity is raised too infrequently to be worth the trouble- defense of insanity is raised very rarely, and it is very time consuming and requires much effort, but that cannot be a basis of abolishing it. When a defense is legally necessary, it should be maintained even though if only a few defendants qualify for it. Punishing those who are legally insane is unjust, and society should bear the expense of preventing such injustice³³.

Past mental states cannot be determined- people argue that it is impossible to reconstruct the mental state of the defendant at the time of the crime³⁴. If this argument is correct, then what about the concept of *mens rea*, which has to be proved in every crime. Both *mens rea* and legal insanity refer to the past mental state that has to be inferred from the defendant's actions.

ROLE OF PSYCHIATRISTS AND MEDICAL SCIENCE

Psychiatrists and medical experts play an important role in cases of insanity because a standard evaluation test of all the patients who plead insanity as a defense is absolutely necessary. Often experts are called to assess the fitness of an accused to stand a trial in cases where mental illness impedes an individual's cognitive, emotional, and behavioral faculties, causing a severe impact on the ability to defend the trial³⁵. It is the psychiatrist's responsibility to advise the court, clarify psychological issues, offer honest and unbiased advice based on reliable evidence and clear reasoning.

Extensive research has been done in medical science to find the reasons for such behavior in persons with serious mental illnesses or psychopaths. On the biological side, aggressive and violent behavior can come from Limbic System inside amygdale. Some portions of the limbic

³¹ M. Stephen, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 LAW REVIEW, 777-838 (1985).

³² Hawkins & Pasewark, *Characteristics of Persons Utilizing the Insanity Plea*, 53 PSYCHO- LOGICAL REP. 191, 194 (1983).

³³ *Supra* note 31.

³⁴ W. Winslade & J. Ross, *The Insanity Plea* 8-12 (1983).

³⁵ Knoll JL IV & Resnick PJ., *Insanity defense evaluations: Toward a model for evidence-based practice. Brief Treat Crisis Interv*, 92-110 (2008).

structures are inhibitory, while others appear to be in close proximity to both inhibitory and excitatory structures. Both the hippocampus and amygdale contain various areas that may inhibit or promote aggression. Stimulations of amygdale in humans can lead to fear, rage, or even direct attack; another biological aspect can be the release of hormones in the body. Either extra hormones or lack of hormones or even just the improper secretion can drastically affect a person's behavior³⁶. On the psychological side, this kind of behavior can be a result of some childhood trauma or an accident.

CONCLUSION

In the last 50 years, medical science has had tremendous progress and achieved many breakthroughs in understanding the brain and in explaining to why we do and what we do. Brain imaging research is starting to identify regions that function differently in persons with severe mental illness. There are various researches that suggest a link between psychopathic tendencies and reduced reactions to the emotion of causing harm to others³⁷. Efforts should be made to treat them and reform them while keeping them in some kind of social control as it is dangerous to set them free in society.

Nonetheless, many defendants who were suffering from severe mental illnesses have been sentenced to death despite being several pieces of evidence of them being unaware of their actions. It is because usually, the crime committed by people with mental illness is so unusual for a juror that they fear for their own safety. Thus rather than the fact that the defendant is insane, being his defense, it acts as an aggravating factor and results in jury to vote for capital punishment for such a defendant rather than any other form of punishment. I am of the opinion that once an individual like a psychopath has been proved medically insane and incompetent to stand trial in court, they should be treated alike irrespective of the degree of their inhumane actions and there is no point in abolishing the defense of insanity unless we genuinely believe that every perpetrator of a criminal act deserves to be punished, no matter how crazy he is. If this is not the case, then we must retain insanity as a defense.

Another major reason behind the increasing insanity verdicts is the inadequacy of the M'Naghten rule. This rule is the most recognized way of applying insanity defense however, there are some issues with the same. The M'Naghten rule fails to link the capacity for criminal

³⁶ Grise, Jennifer. 2019. "RICHARD RAMIREZ". *Nyu.Edu*. <https://www.nyu.edu/classes/keefe/ww1/grise.html>.

³⁷ Glaser, Daniel (Ed.). *Handbook of Criminology*. Chicago: Rand McNally College Publishing Co., (1974).

responsibility with irrationality.³⁸ This rule only deals with cognition and ignores other impairments of practical thinking. For example, if a paranoid schizophrenic believes that a person is evil and on the instructions of his inner voices he kills that person, thinking he is saving the world. We may perceive the defendant to be irrational which is not a responsible agent for M’Naghten rule, and treat him like any other criminal.

At present, there are only four states in the world that deny the use of insanity as a defense³⁹. It is so widely considered that it is even there in the ICC statute. Regardless of various criticism, it is still used in international law. This defense has such a strong moral, historical, and practical background and it is excepted so widely in the world that it is now treated as a matter of fundamental fairness in a just society. It is entirely on the jurisdictions as to which approach they want to opt for.

³⁸ Helen Howard, *Reform of the Insanity Defence: Theoretical Issues*, 67 J. CRIM. L. 51 (2003).

³⁹ M. Stephen & B. Richard, *Abolition if Insanity defense violates due process*, THE JOURNAL OF AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, 488-495 (2013).