

SHAPE SHIFTING AND ERRONEOUS: THE MANY INCONSISTENCIES IN THE INSANITY DEFENCE IN INDIA

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Largely based on the ruling in R v. M'Naghten, §84 of the Indian Penal Code, 1860, and its jurisprudence, the defence of insanity continues to operate within anachronistic theories of the mind and its understanding in the law. This paper explores how the inconsistent interpretation and application of the test under §84, as a result of reliance on long discarded notions, has injected arbitrariness and vagueness into the jurisprudence. The lack of a uniform standard in turn impacts the burden on the defence even if such burden is to be discharged on a 'preponderance of probabilities'. With courts inferring incapacity of the accused based on a host of factors, each of which may or may not be relevant, it becomes unclear how the defence must establish its plea. Ultimately, the paper concludes that resolving the issues outlined might well require rewording and updating the insanity defence in India.

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I. INTRODUCTION

Criminal law has for long presumed that every person who is sane and possesses sufficient reasoning capacity should be held responsible for their actions and crimes committed.¹ The idea that those considered ‘insane’ cannot or rather should not be held liable for their actions has existed for centuries under common law, with rationales changing over time. Various terms like ‘infant,’ ‘idiot,’ ‘wild beast’ have been used to characterise the mental capacity of persons with mental illness to excuse them from criminal responsibility.² The ruling in *R v. M’Naghten* continues to shape the insanity defence, either as a point of departure or as the basis for the defence in legal systems.³ While the insanity defence has undergone change and modifications in various jurisdictions⁴, §84 of the Indian Penal Code, 1860, (‘IPC’)⁵ continues to be substantially similar to the M’Naghten Rules.⁶

The Indian insanity defence largely borrows from the holding in *R v. M’Naghten*, which noted that “It must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as to not know the nature and quality of the act or that it was wrong” – the M’Naghten Rules.⁷ This holding requires an inquiry into whether, at the time of the commission of the offence, the accused knew or understood the act.

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- ¹ *R. v. M’Naghten*, (1843) 8 ER 718 (‘M’Naghten’); *State of M.P. v. Ahmadulla*, AIR 1961 SC 998.
- ² In the 12th century, the ‘good and evil’ test excused persons with mental illness, much like infants, on the assumption that not being able to differentiate between good and evil, they are, therefore, incapable of committing sins. The 16th century saw the introduction of the ‘idiot’ test, which was replaced by the ‘wild beast’ test in the 18th century, under which defendants were not to be convicted if they understood the crime no better than ‘an infant, a brute, or a wild beast’. For a discussion on this history, see Sheila Hafter Gray, *The Insanity Defense— Historical Development and Contemporary Relevance*, Vol. 10(3), AM. CRIM. L. REV., 559 (1972); Nigel Walker, *The Insanity Defense before 1800*, Vol. 477(1), THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, 25-30 (1985); Beatrice R. Maidman, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, Vol. 96, B. U. L. REV., 1831 (2016).
- ³ M’Naghten, *supra* note 1.
- ⁴ Ingo Keilitz, *Researching and Reforming the Insanity Defense*, Vol. 39(2-3), RUTGERS L. REV., 289 (1987).
- ⁵ See also The Penal Code, 1860, §84 (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).
- ⁶ §84 does not use the word ‘quality’ in relation to the act. The phrase ‘contrary to law’ has been added, hence the act can either be ‘wrong’ or ‘contrary to law’. It uses a broader phrase i.e. ‘unsound mind’ instead of the term ‘disease of the mind’. For such interpretation of the provision, see *Queen-Empress v. Kader Nasyer Shah*, ILR (1896) 23 Cal 604; *State v. Kartik Chandra Dey*, 1949 SCC OnLine Gau 17.
- ⁷ M’Naghten, *supra* note 1; Prior to this, the James Hadfield trial in 1800 found him not guilty, since under the influence of insanity at the time the act was committed. This replaced the ‘wild beast’ test which required a person to have total deprivation of understanding, a state of mind akin to a wild beast. It also led to the passage of the Criminal Lunatics Act, 1800, which formalised detention and made an insanity acquittee subject to automatic confinement for an indefinite period of time. For a history of this development, see Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield*, Vol. 19(3), LAW & SOCIETY REVIEW, 440 (1985);

As per the M’Naghten Rules, this has two possible directions of enquiry. The first possibility is that the defendant lacked the capacity to *per se* understand the nature and quality of their act, i.e. cognitive capacity. The second possibility is that, while the defendant might understand the nature of the act, they did not have the capacity to understand that the action was wrong, i.e. moral capacity.⁸ Akin to the M’Naghten Rules, to successfully claim the insanity defence under §84, a person must be ‘mentally unsound’ at the time of committing the act (first limb), and this unsoundness of mind should render the person incapable of knowing the nature of the act or that the act was wrong or contrary to law (second limb).

With advancements in the field of mental health, the evolution of M’Naghten Rules in common law jurisdictions has seen significant variation from the manner in which it was originally envisioned.⁹ Some jurisdictions adopted standards based on the M’Naghten Rules comprising both its components – cognitive and moral capacities;¹⁰ others based their test on one of the two components with variants. Certain jurisdictions have also included volitional incapacity,¹¹ while others have reformulated the M’Naghten Rules by redefining the degree of capacity required by the test.¹²

Sitting at the intersection of mental health and criminal law, §84 jurisprudence has been plagued by confusion that has often resulted in uncertainty about the requirements to establish the insanity defence. As early as the 1960s, K. M. Sharma highlighted issues with the stringent nature of §84 and its inability to keep up with advances in medical-psychiatric knowledge.¹³ Undertaking a detailed

Walker, *supra* note 2; Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, Vol.12(2), CALIFORNIA LAW REVIEW, 105 (1924).

⁸ See also R. v. Windle, (1952) 2 QB 826 (discussing the meaning of the word wrong held that, “there is no doubt that in the M’Naghten rules ‘wrong’ means contrary to law and not ‘wrong’ according to the opinion of one man or of a number of people on the question whether a particular Act might or might not be justified. In the present case, it could not be challenged that the appellant knew that what he was doing was contrary to law, and that he realised what punishment the law provided for murder”).

⁹ AMITA DHANDA, LEGAL ORDER AND MENTAL DISORDER, 114 (Sage Publications, 2000); Gray, *supra* note 2, at 567.

¹⁰ Keilitz, *supra* note 4.

¹¹ See also State v. White, 270 P 2d 727 (1954) (New Mexico Supreme Court) (used by some States such as Virginia and Colorado, in combination with the M’Naghten Rules. If a person cannot ‘control their conduct because of a mental defect or disease’, such a person is excused even if they know that the conduct is wrong); Albert J. Hauer, *Insanity - Irresistible Impulse*, Vol. 28, MARQ. L. REV., 47 (1944).

¹² See also The Model Penal Code, 1962, §4.01 (a person is not responsible if they lack, as a result of mental disease or defect, substantial capacity to appreciate the wrongfulness of the act or conform their conduct to the law. By replacing ‘complete lack of capacity’ with ‘substantial capacity’ and ‘knowledge’ of wrongfulness with ‘appreciation’ of wrongfulness, the test departs drastically from the M’Naghten Rules in so far as the test’s inquiry into the degree of capacity is concerned); See also United States v. Currens, 290 F 2d 751 (3d Cir. 1967) (which required the defendant to show that the accused, as a result of mental disease or defect, lacked substantial capacity to conform their conduct to the requirements of the law allegedly violated).

¹³ K.M. Sharma, *Defence of Insanity in Indian Criminal Law*, Vol. 7(4), JOURNAL OF INDIAN LAW INSTITUTE, 325 (1965).

review of the jurisprudence spanning over a century, Sharma has highlighted the subjectivity in the jurisprudence and recommended that an interdisciplinary commission be set up to change the law on insanity to reflect the advancements in medicine.¹⁴ Building on Sharma's work, Professor Amita Dhanda correctly remarked that encapsulating the jurisprudence within any one interpretational construct is difficult as it is dictated by subjectivity and swayed by the conflict between medical and legal interpretations of insanity.¹⁵ Professor Dhanda and Sharma's judicial review highlights the issues with the substantive formulation of §84 and the need for change.

This paper demonstrates the 'application problem' with the judicial discourse on §84, which might very well be unsolvable due to the legislative language, structure, and conceptual framework of the insanity defence as it currently exists in Indian criminal law. Many of the problems highlighted by Sharma and Dhanda have continued to persist, and this paper builds upon their work to highlight, at a granular level, the different standards courts have applied, which have resulted in inconsistencies that go beyond the subjectivity inherent in the intersection of law and mental health. The ambiguity in what the test requires also has implications for the evidentiary burden that is to be discharged by the accused. The paper highlights the problems that have emerged in the judicial interpretation and application of the insanity defence, and seeks to establish the argument that the jurisprudence in India is characterised by inconsistency, vagueness and arbitrariness.

The jurisprudence has continued to rely on outdated approaches to mental illnesses and disorders which are incompatible with contemporaneous advancements in psychiatry, psychology and allied disciplines. Confusion and lack of nuance have particularly affected the understanding of 'capacity', 'unsoundness of mind', 'legal insanity,' and 'totality of circumstances,' resulting in significant uncertainty about the evidentiary burden in law. Phrases like 'insanity' or 'unsoundness of mind' have arisen from centuries of usage, which has largely been based on intuition, prejudice, and an understanding of the mind and brain as it were when the defence was first introduced into criminal law.¹⁶ Dealing with the historical and conceptual underpinnings of these ideas merits independent engagement, a task which this paper does not undertake.

Over the course of the paper, we highlight that the judicial discourse surrounding the subject suffers from the lack of a coherent conceptual foundation, and which, in turn, has resulted in a framework that struggles to be a judicially maintainable 'standard'. As will be evident through Part III, the understanding of

¹⁴ *Id.*, 383.

¹⁵ Dhanda, *supra* note 9, at 111.

¹⁶ Michael Perlin L., *The Insanity Defense: Nine Myths That Will Not Go Away*, ARTICLES AND CHAPTERS, 3 (2017); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, Vol. 40(3), CASE W. RSRV. L. REV., 599 (1989).

‘unsoundness of mind’ and ‘at the time of the commission of the offence’, is subject to a wide range of interpretations often at odds with each other. The concerns that arise out of the determination of the first limb undeniably impact the judicial determination around the second limb of §84. Part IV discusses the second limb of the defence, which the courts refer to as ‘legal insanity’. This is the threshold that must be crossed for a successful defence. The section highlights the ambiguity around legal insanity in judicial pronouncements, particularly as courts seem to ‘infer’ legal insanity based on subjective metrics of behaviour and ‘totality of circumstances’. This has led to the determination of legal insanity on assumptions rather than a meaningful inquiry into whether the person lacked cognitive or moral capacity at the time of the incident.

The effect of the judicial uncertainty and confusion on the burden and standard of proof to be discharged by the defence is analysed in Part V. Unlike the prosecution, which must prove its case beyond reasonable doubt, the accused has to meet a lower standard of proof. Even though the burden on the accused is no higher than that which rests upon a party to civil proceedings, i.e. a preponderance of probabilities,¹⁷ the divergent evidentiary standards introduced make it unclear as to how the standard is understood and applied. In conclusion, the paper argues that the current framework for the determination of insanity pleas is not judicially maintainable.

II. OVERVIEW OF THE INSANITY DEFENCE IN INDIAN CRIMINAL LAW

The insanity defence in India through §84 comprises both medical insanity, as it was understood, and legal insanity. While laying out the terms of the insanity defence, this provision argues that the judicial discourse has struggled with developing a coherent or consistent approach to legal insanity. The insanity defence in India enquires into the incapacity of an individual to understand the nature or consequence of the act. Acquitting the accused from all responsibility, the defence states, “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”.

It is evident from the text of §84 that two limbs need to be satisfied – *first*, unsoundness of mind at the time of the commission of the offence, what the courts have referred to as ‘medical insanity’, and *second*, that by reason of unsoundness of mind, the person is incapable of knowing the nature of the act or that it is either wrong or contrary to law, referred to as ‘legal insanity’. The second limb requires the defendant to satisfy any one of the three possibilities – that by reason of unsoundness of mind, such person is incapable of (a) knowing the nature of the

¹⁷ Dahyabhai Chhaganbhai Thakker v. State of Gujarat, AIR 1964 SC 1563 (‘Dahyabhai Chhaganbhai’).

act – cognitive incapacity, or (b) even if the person knows the nature of the act, he or she does not know that the act is wrong – moral incapacity, or (c) even if the person knows the nature of the act, he or she does not know that the act is contrary to law. The second limb outlines the legal threshold that needs to be proved for an accused to claim the defence successfully.

The courts have not paid heed to the fact that the term ‘insanity’ itself ceased to have any scientific relevance nearly a century ago.¹⁸ While the origins of the term are a subject matter of wide intellectual debate, the term ‘insanity’ found mention in both medical and legal writing well into the 19th century.¹⁹ The shift towards eliminating the usage intensified in the early 20th century; while it is impossible to pinpoint the exact date, renaming the ‘American Journal of Insanity’ in 1922 to the ‘American Journal of Psychiatry’ is one such indicator.²⁰ As it is currently understood, ‘insanity’ is a legal term and not a medical term.²¹ For the purposes of this paper, we will employ the terminology used by the courts.

Unsoundness of mind or medical insanity is only a threshold requirement for §84. A successful defence must further show that medical insanity resulted in legal insanity, i.e. lack of cognitive capacity – not understanding the nature of the act or that it is contrary to law – or moral incapacity – not knowing that the act was wrong.²² Though courts have drawn this seemingly clear distinction, they have struggled to apply the same meaningfully. Once ‘unsoundness of mind’ has been established, courts have often assumed incapacity or looked at surrounding facts and circumstances to infer legal insanity.²³ A direct inquiry into the second limb is a rarity in the Indian insanity defence jurisprudence.²⁴ The burden of proof to be discharged by the defence is the same as which rests upon a party in civil proceedings, i.e. on a preponderance of probabilities – a threshold lower than

¹⁸ J.A. Tighe, “What’s in a name?”: A Brief Foray Into the History of Insanity in England and the United States, Vol. 33(2), JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, 252 (2005); Kenneth J. Weiss et al., *Insanity: A Legal and Cinematic Diagnosis*, Vol. 207(9), THE JOURNAL OF NERVOUS AND MENTAL DISEASES, 749 (2019); Winfred Overholser, *Psychiatry and the Law*, Vol. 38, MENTAL HYGIENE, 243 (1954).

¹⁹ Andrew Scull, *Madness in Civilization*, Vol. 385, THE LANCET, 1066 (2015); Tighe, *supra* note 18.

²⁰ *Id.*

²¹ See also BRYAN A. GARNER, BLACK’S LAW DICTIONARY (11th ed., 2019) (any mental disorder severe enough that it prevents a person from having legal capacity and excuses the person from criminal or civil responsibility); No separate definition for legal insanity is provided in the American Psychological Association, Dictionary of Psychology, see American Psychological Association, *Insanity*, APA DICTIONARY OF PSYCHOLOGY, available at <https://dictionary.apa.org/insanity> (Last visited on January 22, 2021) (defines insanity, in law, as a condition of the mind that renders a person incapable of being responsible for his or her criminal acts. Defendants who are found to be not guilty by reason of insanity therefore lack criminal responsibility for their conduct); See also Redfern v. Sparks- Withington Co., 403 Mich. 63 (1958) (Supreme Court of Michigan) (insanity is a legal term, and medical definitions are not determinative. It is a legal term, with legal standards or definitions that requires medical facts to establish insanity).

²² Dhanda, *supra* note 9, at 111.

²³ For further discussion, see *infra* Part IV.B on “Totality of Circumstances Framework”.

²⁴ Kumari Chandra v. State of Rajasthan, 2018 SCC OnLine Raj 1899; Devidas Loka Rathod v. State of Maharashtra, (2018) 7 SCC 718 (‘Devidas’).

that has to be discharged by the prosecution in a criminal case. In line with §105 of the Indian Evidence Act, 1872,²⁵ ('IEA') the court is to presume the absence of the circumstances outlined above.

In *Shrikant Anandrao Bhosale v. State of Maharashtra* ('Shrikant'), the Supreme Court observed that the unsoundness of mind as a result of which one is incapable of knowing consequences can ordinarily be inferred from the circumstances.²⁶ The circumstances relied upon were the presence of mental illness (paranoid schizophrenia) both prior to and post the commission of the act and motive. Limiting its inquiry to the first limb, the Supreme Court heavily relied both on the presence of a mental illness and the nature of the illness to assume that the appellant was delusional at the time of the act, and 'thus' incapable of knowing its nature.

Devidas Loka Rathod v. State of Maharashtra ('Devidas') is another case where though the Supreme Court undertook a comprehensive inquiry into the mental illness (psychosis) of the accused, it did not conduct a separate inquiry to determine whether the presence of mental illness resulted in a loss of capacity at the time of offence.²⁷ Courts have generally looked at various surrounding factors like history of mental illness and treatment, the conduct of the accused prior to and post the commission of the offence, in their determination of insanity pleas as a whole, cumulatively referred to as 'totality of circumstances'.²⁸

However, there is no uniformity or clarity on the assessment of these varying facts and circumstances. Where Shrikant relied on facts that proved the presence of a mental illness to assume incapacity, in *Jai Lal v. Delhi Admn.* ('Jai Lal'),²⁹ the Supreme Court relied on surrounding circumstances to assume cognitive capacity and observed that "even at the moment of his greatest excitement, he could distinguish between right and wrong".³⁰ The court, in making this observation, relied on the fact that the accused attended his office and discharged his duties in a 'normal' manner. This was also factored in *Surendra Mishra v. State of Jharkhand* ('Surendra Mishra'), observing that if the appellant was of unsound mind, it may not have been possible for him to run a medical shop.³¹ By looking at 'normal' and 'abnormal' behaviour or conduct, the determination by courts continues to be shrouded in uncertainty and bias.

²⁵ When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the IPC or within any special exception or proviso contained in any other part of the said statute, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

²⁶ *Shrikant Anandrao Bhosale v. State of Maharashtra*, (2002) 7 SCC 748, ¶14 ('Shrikant').

²⁷ *Devidas*, *supra* note 24.

²⁸ *Shrikant*, *supra* note 26, at ¶20.

²⁹ *Jai Lal v. Delhi Admn.*, AIR 1969 SC 15.

³⁰ *Id.*, 10.

³¹ *Surendra Mishra v. State of Jharkhand*, (2011) 11 SCC 495 ('Surendra Mishra').

These cases highlight the indiscriminate manner in which courts look at ‘totality of circumstances’ by cherry-picking facts and circumstances to infer capacity or lack thereof under the second limb. The inquiry into surrounding facts and circumstances may indicate whether a person is having an episode. It is, however, not determinative of an individual’s capacity to know the nature or consequence of the act at the time of committing it. While this part has highlighted concerns about the tests for the two limbs of §84 collapsing into each other, the subsequent parts will focus on each of the two limbs separately to highlight concerns that emerge therein.

III. VAGUENESS IN THE UNDERSTANDING OF UNSOUNDNESS OF MIND AT THE TIME OF COMMISSION OF THE OFFENCE

Macaulay’s Draft Penal Code exempted two categories of acts from criminal liability – acts done by a person in *first* a state of idiocy or *second* as a consequence of being mad or delirious at the time of committing the offence.³² This was replaced by §84. Unlike the M’Naghten Rules, which refer to disease of the mind, §84 uses the term ‘unsoundness of mind’, which is not defined under the IPC. Over the years, the language surrounding this term has developed to include various conditions and afflictions of the mind. This development has neither been consistent nor has it kept up with the developments in psychology and psychiatry.³³ Whilst one could argue that there might be merit in leaving the term undefined as it allows the court to interpret it on a case-to-case basis,³⁴ the lack of a definition or guidelines to determine the meaning of unsoundness of mind leaves jurisprudence open to vagueness, inconsistency and judicial subjectivity. Courts are left to their own devices to determine unsoundness of mind giving rise to a process that is coloured by poor understanding, stereotyping and stigma around certain mental illnesses and disorders. It is this vagueness in the interpretation of what construes ‘unsoundness of mind’, that becomes our focal concern in this part.

Courts have employed terms like ‘lunatic’, ‘loss of mental equilibrium’,³⁵ ‘serious mental trouble bordering on insanity’,³⁶ ‘madman’, ‘idiot’, and ‘insane’³⁷ synonymously with ‘unsoundness of mind’, without any attempt to

³² Law Commission of India, *Penal Code*, Report No. 42, ¶4.26 (June 1971) available at <https://lawcommissionofindia.nic.in/1-50/Report42.pdf> (Last visited on January 22, 2021).

³³ Sharma, *supra* note 13, at 381; Dhanda, *supra* note 9, at 110; T.V. Asokan, *The Insanity Defense: Related Issues*, Vol. 58(2), INDIAN JOURNAL OF PSYCHIATRY, 191 (2016).

³⁴ Stanley Yeo, *The Insanity Defence in the Criminal Laws of the Commonwealth of Nations*, SING. J. L. S., 241 (2008).

³⁵ Pratap Baburao Shevale v. State of Maharashtra, 2016 SCC OnLine Bom 873.

³⁶ Pundalik Laxman Chavan v. State of Maharashtra, 1994 SCC OnLine Bom 49.

³⁷ Sumitra Shriram Pimpalkar v. State of Maharashtra, 1999 SCC OnLine Bom 753; Gopal Bhowmik v. State of Tripura, 2001 SCC OnLine Gau 61; T.N. Lakshmaiah v. State of Karnataka, (2002) 1 SCC 219.

provide definitions or explanations thereto.³⁸ The use of antiquated terminology tends to instruct the courts' understanding limiting it to mental illnesses which have observable manifestations of 'madness'. The Supreme Court in *Bapu v. State of Rajasthan* ('Bapu'),³⁹ has summed up the observations made by courts in older cases to highlight situations that would not qualify for §84 as, "being conceited, odd, irascible, weak intellect due to physical and mental ailments affecting emotions and will, liable to recurring fits of insanity at short intervals, or subject to getting epileptic fits or that his behaviour was queer".⁴⁰ This does little to help matters as these terms have no legal or medical basis. For instance, there is no basis for recurring fits of insanity not qualifying for the protection under §84.

A person is of unsound mind if they fall in the category of an idiot, one made *non-compos* by illness, a lunatic or madman, and a drunkard.⁴¹ While this statement appears to make distinct categories of what may constitute unsoundness, in effect, it does not help clear the confusion. *Bapu* observes that a 'lunatic' is one who is afflicted by mental disorder only at certain periods and falls under acquired insanity while idiocy is natural insanity.⁴² What these distinctions mean or how they align with the law meaningfully are questions that have gone unanswered by the courts, even as they continue to rely upon these ideas. The terms and concepts used by the courts are colloquial and hold no scientific relevance and continued reliance on such terms plays into the courts' misunderstanding of unsoundness of mind under §84.

In addition, and as the following Part III.A indicates, the vagueness in understanding and determining 'unsoundness of mind' is magnified by both an unreasoned restriction of the term to mental illness and also an expansion of the term to include certain neurological disorders. As explained in Part III.B, the courts' excessive reliance on behaviour through the lens of normality and abnormality also opens up the determination to individual subjectivity. Finally, as Part III.C discusses, courts have tried establishing a temporal link between the incident and presence of 'unsoundness of mind', but why such temporality becomes important or what time period sufficiently establishes the link are aspects that have found no clear articulation, adding more confusion regarding the determination of 'unsoundness of mind' at the time of the offence.

A. RESTRICTION TO MENTAL ILLNESSES

A reading of §84 does not indicate that only unsoundness of mind arising from a mental illness would qualify for the general exception. However,

³⁸ Sharma, *supra* note 13, at 325.

³⁹ *Bapu v. State of Rajasthan*, (2007) 8 SCC 66, ¶12 ('Bapu').

⁴⁰ *Id.*, ¶13.

⁴¹ *Sumitra Shriram Pimpalkar v. State of Maharashtra*, 1999 SCC OnLine Bom 753, ¶13.

⁴² See also *Bapu*, *supra* note 39 (explains the term 'idiot' as someone who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like. This explanation is taken from the idiot test used in the 16th century).

a dominant trend has been for courts to continue to place heavy reliance on the evidence of mental illness.⁴³ In a case representative of the dominant trend, where the accused was diagnosed with schizophrenia, the Supreme Court stated that it was not possible to take a different view, but to assume incapacity due to the nature of mental illness.⁴⁴ This form of bias in assuming incapacity highlights two issues—*first*, the tendency to restrict unsoundness to mental illness, and *second*, the automatic assumption of incapacity based on the nature of mental illness. The automatic assumption of incapacity due to the presence of mental illness indicates a lack of knowledge of mental illnesses and their effect on an individual. The presence of a mental illness does not necessarily debilitate or take away from the ability of an individual to function as a ‘normal’ human being. It is this lack of knowledge that has courts making observations of persons being ‘completely cured’ based on their ability to resume their duties or even the fact that the accused could hold down a job which would not have been possible if they were of unsound mind.⁴⁵

Courts have not yet articulated a principled rationale for restricting ‘unsoundness of mind’ to mental illnesses. Consequently, there is a lack of clarity on the exclusionary criteria for certain mental health concerns, even if they arise out of physiological or organic illnesses. For instance, in *Bapu*, the Supreme Court casts doubt on epileptic seizures as qualifying for the defence, but in subsequent cases, the court appears to look favourably at epileptic attacks for the purposes of the defence.⁴⁶ Considering the term unsoundness of mind is undefined and given its relationship with understanding capacity under §84, restricting it to only mental illness⁴⁷ excludes a whole range of conditions, including certain neurological and endocrine disorders,⁴⁸ which impact the cognitive and volitional abilities of a person. For instance, studies have shown that certain endocrine disorders such as severe hypothyroidism and hyperthyroidism, may have psychiatric symptoms

⁴³ Parthasarathy Ramamurthy et al., *How does India Decide Insanity Pleas? A Review of High Court Judgments in the Past Decade*, Vol. 41(2), INDIAN JOURNAL OF PSYCHOLOGICAL MEDICINE, 150 (2019).

⁴⁴ *State of Punjab v. Mohinder Singh*, (1983) 2 SCC 274.

⁴⁵ *Jai Lal v. Delhi Admn.*, AIR 1969 SC 15, ¶10; Surendra Mishra, *supra* note 31, at ¶17.

⁴⁶ There exists jurisprudence where the defence has been accepted despite the absence of a mental illness. In *State of Rajasthan v. Shera Ram*, (2012) 1 SCC 602, the court accepted the defence arising from a neurological condition – epilepsy. Even in *Bhura Kharia v. State of A.P.*, 2007 SCC OnLine AP 38, the High Court held that it was difficult to conclude that the accused, diagnosed with complex partial seizure disorder, was conscious of the criminality of his acts and was acquitted under §84 of the IPC.

⁴⁷ *Bapu*, *supra* note 39 (discusses the four kinds of persons who may be said to be non-compos mentis – not of sound mind – i.e. an idiot; one made non-compos by illness, a lunatic or a mad man and one who is drunk. The court does not define or outline the ambit of illnesses covered under ‘non-compos’ by illness).

⁴⁸ Carl D. Weinberg, *Epilepsy and the Alternatives for a Criminal Defense*, Vol. 27(3), CASE W. RES. L. REV., 771 (1977); Guy Beaumont, *Automatism and Hypoglycaemia*, Vol. (14)2, J FORENSIC LEG. MED., 103 (2007); R.D. Mackay & Markus Reuber, *Epilepsy and the Defence of Insanity—Time for Change?*, Vol. 10, CRIMINAL LAW REVIEW, 782 (2007).

associated with them, causing behavioural and cognitive changes.⁴⁹ Even within the realm of mental illness, a dimensional approach to mental health rather than the present categorical approach would align better with current advances in psychiatry and would also prevent the concerns arising from ideas of ‘normal’ and ‘abnormal.’

A categorical approach concerns itself with the ‘label’ of mental illness, while a dimensional approach allows inquiry into symptoms that may be related to the cognition or behaviour of the person. A more fruitful approach to the defence might be to inquire into any concern which may have an impact on the cognitive or volitional abilities of the accused and then testing the claim against the legal threshold set out in §84.⁵⁰

B. UNSOUNDNESS OF MIND DETERMINED BY BEHAVIOUR

The state of the mind of the accused at the crucial time can only be established from the circumstances which preceded, attended, and followed the crime.⁵¹ While it may be relevant in determining the mental condition of the accused, reliance solely on behaviour is problematic as there is no precise criteria to legally analyse behaviour under §84. The inquiry then typically turns to look at ‘normal’ and ‘abnormal’ behaviour,⁵² throwing it open to judicial subjectivity. The focus is on superficial issues and dictated by popular notions of ‘craziness.’ Where the accused had a mental illness, the court observed that the accused acted like a ‘crazy’ person and no one was confident of his ‘normalcy.’⁵² In a case under §302 of the IPC, the Gauhati High Court stated that it was clear that a person killing their own mother or father falls under the purview of abnormal behaviour.⁵³ Though the court ultimately rejected the plea of insanity, it nonetheless categorised the behaviour as ‘abnormal’ because the accused had killed his mother.⁵⁴

‘Erratic’ behaviour such as lecturing imaginary audiences for several hours together every day,⁵⁵ stripping stark naked in public and smearing himself with faecal matter,⁵⁶ are some instances where the courts have rejected behaviour to attract §84. While the courts acknowledged the existence of erratic behaviour in both the above cases, they relied on surrounding circumstances such as pre-meditated design, weapon used, to hold that the accused knew the nature of their

⁴⁹ Spencer H. Conner & Solomon S. Solomon, *Psychiatric Manifestations of Endocrine Disorders*, Vol. 2, J. HUM ENDOCRINOL, 7 (2017); Jeesuk Yu, *Endocrine disorders and the neurologic manifestations*, Vol. 19(4), ANNALS OF PAEDIATRIC ENDOCRINOLOGY & METABOLISM, 184 (2014).

⁵⁰ PROJECT 39-A, *Deathworthy: A Mental Health Perspective of the Death Penalty*, National Law University Delhi, 2021.

⁵¹ Dahyabhai Chhaganbhai, *supra* note 17, at ¶12.

⁵² Raju Babu Patel v. State of Maharashtra, 2015 SCC OnLine Bom 6372.

⁵³ Pancham Rowtia v. State of Assam, [2005] (Suppl.) GLT 534 (unreported decision).

⁵⁴ *Id.*, ¶12.

⁵⁵ R. v. Kazi Bazlur, 1928 SCC OnLine Cal 168.

⁵⁶ R. v. Lachhman, 1924 SCC OnLine All 158.

actions. By looking at ‘normal’ and ‘abnormal’ behaviour or conduct, such an approach subjects the determination to prejudices that are influenced by anecdotal evidence, value systems and culturally transmitted beliefs.⁵⁷ While behaviour is relied on to determine whether an accused has a mental illness, it is not a conclusive determinant of the accused’s culpability or incapacity required to be shown under §84.

C. *TIMELINE TO DETERMINE UNSOUNDNESS OF MIND*

The test under §84 requires unsoundness of mind to be present at the time of the commission of the offence. Courts have considered the conduct of the accused, evidence of his or her mental condition and other relevant factors – while not clarifying what these relevant factors might be – before, during and after the act, to be pertinent to determine the state of mind of the accused.⁵⁸ It is not clear, however, how these factors must interact to determine unsoundness of mind.

While the courts have created a time period within which the behaviour and conduct of the accused become important, the period itself is vague and could be anywhere between ‘not too remote in time’⁵⁹ to ‘proximate to the occurrence’.⁶⁰ However, both these terms are flexible and have been interpreted as such on a case to case basis.⁶¹ Another factor that also renders the temporal connection between the illness and the incident is the continuation of treatment. Whilst the courts have highlighted the importance of continuation of treatment, the jurisprudence provides no guidance on whether this is sufficient to get the exception under §84, or only fulfils the threshold requirement.⁶² It, therefore, becomes unclear whether continuation of treatment would satisfy the proximate occurrence element, i.e. whether the person was of unsound mind at the time of commission, or whether the defendant must show that the person was under an active episode immediately prior to the incident. Unsoundness of mind must be present at the time of commission of the offence. The term ‘unsoundness of mind’ is itself devoid of any meaning in medical or psychiatric literature, and jurisprudence

⁵⁷ DHANDA, *supra* note 9, at 121.

⁵⁸ Bapu, *supra* note 39, at ¶11.

⁵⁹ Hari Singh Gond v. State of M.P., (2008) 16 SCC 109.

⁶⁰ Surendra Mishra, *supra* note 31.

⁶¹ In Ratan Lal v. State of M.P., (1970) 3 SCC 533, the court factored evidence (witness testimony) on the presence of mental illness two to three years prior to the crime. However, in Surendra Mishra, *supra* note 31, the court rejected evidence of mental illness, prescriptions produced two years prior to the crime, as not being proximate to the occurrence. In fact, the Supreme Court in Jai Lal v. Delhi Admn., AIR 1969 SC 15, rejected evidence of mental illness eight months before the crime. This confusion is also seen in Mariappan v. State of T.N., (2013) 12 SCC 270, where the accused was suffering from paranoid schizophrenia and the court rejected evidence of mental illness (accused was admitted and treated three months prior to the crime). On the other hand, in Shrikant, *supra* note 26, the court factored in evidence of mental illness six months prior to the crime (the accused was admitted as an in-patient).

⁶² State of Rajasthan v. Shera Ram, (2012) 1 SCC 602; Devidas, *supra* note 24.

developed by the courts has consistently failed to put forth a coherent understanding of the term as well as reinforced harmful stereotypes.⁶³

The inherent complexities of the human mind, nature and behaviour depend on and may alter according to differing factors and circumstances, making it near impossible to spot a determinate moment at which the accused became of unsound mind. The jurisprudence has developed a flexible, albeit vague, scale of ‘not too remote in time’ to ‘proximate to the occurrence’ which is used to factor circumstances relevant for the determination of unsoundness of mind. As discussed earlier, the test under §84 requires the satisfaction of both limbs – the presence of ‘unsoundness of mind’, i.e. medical insanity at the time of the offence, and consequently the inability to know the nature of act or consequences, i.e. legal insanity, which is determined by courts looking at the ‘totality of circumstances’.

IV. DETERMINATION OF THE SECOND LIMB

It has been routinely observed that the courts are concerned with legal insanity, and not with medical insanity, inasmuch as it is legal insanity that will lead to the determination of whether the accused can be held criminally responsible. As pointed out by Sharma, the standards of gauging medical and legal insanity are not identical, and in the judicial determination, the legal view prevails over the medical view.⁶⁴ Further, Dhanda indicates, through her analysis, that the lay notion of insanity was not only more encompassing than the legal notion but also closer to the medical understanding of it.⁶⁵ Dhanda’s analysis highlights that the lay evidence of insanity covers various abnormal behavioural manifestations that are generally dismissed in jurisprudence as ‘eccentricities’.⁶⁶ Additionally, the lay notion does not confine itself to treatment at hospitals but also includes traditional methods such as exorcisms and faith healers to testify to the insanity of the accused.⁶⁷ This distinction is considered self-explanatory in that the term ‘legal insanity’ is understood to be synonymous with the second limb.

While there is agreement on what needs to be determined, i.e. legal insanity, courts have struggled with making this determination. The determination of legal insanity is complicated by the lack of clarity on the degree of incapacity required to be shown under the second limb and the subjective nature of the framework relied upon to determine it. The jurisprudence is unclear on the extent and the degree of incapacity required under the law, i.e. whether it is complete incapacity, material incapacity, or substantial incapacity.⁶⁸

⁶³ For discussion on the incoherent understanding of the court, see *supra* Part III on “Vagueness in the Understanding of Unsoundness of Mind at the Time of Commission of the Offence”.

⁶⁴ Sharma, *supra* note 13, at 350.

⁶⁵ Dhanda, *supra* note 9, at 126.

⁶⁶ *Id.*, 114 – 115.

⁶⁷ *Id.*, 125.

⁶⁸ The test under §84 requires that the accused by virtue of unsoundness of mind is incapable of knowing the nature of the act or its consequences. The ‘degree of incapacity’ that must be shown

One of the earliest attempts to explain legal insanity was made by the Allahabad High Court in *Lakshmi v. State*,⁶⁹ ('Lakshmi') while discussing *Ashiruddin Ahmad v. R.*, ('Ashiruddin') where the accused had dreamt that he was commanded by someone in paradise to sacrifice his five-year old son.⁷⁰ The court, while acquitting the accused, found that he was "clearly of unsound mind and that acting under the delusion of his dream, he made this sacrifice believing it to be right".⁷¹ Disagreeing with this observation, the Allahabad High Court elaborated on the requirements of legal sanity by drawing a distinction between knowing right from wrong and the capacity to know right from wrong. The capacity to know, according to the court, is a potentiality, which if the accused possesses, will always lead to a conviction.⁷² The court made a leap to categorise those who would be said to 'not have the potentiality' – persons with an inherent or organic incapacity.⁷³ Therefore, the test under §84 would only be fulfilled when there is complete extinguishment of the capacity to know right from wrong. A bare reading of §84 indicates that the unsoundness of mind must result in a person being 'incapable of knowing' the nature or consequences of their act. However, capacity or incapacity to know have found little cohesion in jurisprudence.

As early as 1896 in *Queen-Empress v. Kader Nasyer Shah* ('Kader Nasyer'), the court had held that unsoundness of mind which 'materially impairs' the cognitive faculties of the mind can form a ground of exemption from criminal responsibility.⁷⁴ On the other hand, in *Lakshmi*, the court talked about the complete extinguishment of the guiding light helping man to know right from wrong.⁷⁵ This is a significant shift as material impairment, to know the nature or consequence, allows some subjectivity to enter the interpretive realm in the context of §84. *Bapu* interprets the person's 'incapacity to know' to even exclude a person whose faculties may be "sufficiently dim to apprehend their actions".⁷⁶ This is

has been understood and explained differently within Indian jurisprudence. While some courts require complete incapacity i.e. the person must absolutely lack the ability to know the nature of his act or consequences, others have sought a lower standard of 'material incapacity or substantial capacity'. As it is near impossible to accurately determine whether the accused's capacity to know was completely extinguished, the latter category of cases are more attuned to a medical understanding of mental illness and its effect on the person's capacities to know the nature and consequences of one's actions.

⁶⁹ *Lakshmi v. State*, 1958 SCC OnLine All 208 ('Lakshmi').

⁷⁰ *Ashiruddin Ahmad v. R.*, 1948 SCC OnLine Cal 168.

⁷¹ *Id.*, ¶10.

⁷² *Lakshmi*, *supra* note 69, at ¶28.

⁷³ *Id.*; *See also* *Bapu*, *supra* note 39 (*Bapu* differs from the case of *Lakshmi* by excluding idiots who have a 'non-sane memory right from birth' and limits it to persons made non-compos by illness).

⁷⁴ *Channabasappa v. State of Mysore*, 1957 SCC OnLine Kar 26; *Pappathi Ammal, In re*, 1958 SCC OnLine Mad 258; *See also* *Sankaran v. State*, 1993 SCC OnLine Ker 252 (the word 'mind' used in the phrase 'unsoundness of mind' is generally understood in the sense of mental faculties of reason, memory and understanding).

⁷⁵ *Lakshmi*, *supra* note 69, at ¶28.

⁷⁶ *See also* *Bapu*, *supra* note 39 (such persons must always be presumed to intend the consequences of his action).

much closer to Lakshmi's imagination of a person whose guiding light has been completely extinguished.

Yet another standard of incapacity is introduced by the Kerala High Court, in *Venugopalan v. State of Kerala* ('Venugopalan'), which states that "the unsoundness of mind should be of such a nature which will cloud or affect the perception of facts by the accused person".⁷⁷ In other words, under Venugopalan, only a clouding of faculties would do, whereas Kader Nayer requires faculties to be materially impaired, and another standard is the complete extinguishment of capacity.⁷⁸ Certain judgments have also explained cognitive incapacity beyond the requirements under §84. For instance, in *Keshaorao Bhiosanji Navale v. State of Maharashtra*,⁷⁹ ('Keshaorao Navale') and *Shama Tudu v. State*,⁸⁰ ('Shama Tudu'), the Bombay High Court and the Odisha High Court, respectively, interpreted capacity to mean the deprivation of ability to pass a rational judgment on the moral character of the act. The Bombay High Court alludes to 'automation' and the absence of 'consciousness of effect, or responsibility'.⁸¹

If these degrees of incapacity were to be compared with other existing tests under the insanity defence such as 'the clouding of faculties' or 'material impairment', it takes the test closer to the one under the American Model Penal Code which focuses on substantial incapacity. The test is a major reformulation of the M'Naghten rules, and under this test, a person is not responsible if they lack "substantial capacity to appreciate the wrongfulness of the act or conform their conduct to the law".⁸² By introducing the term 'substantial capacity' and by replacing 'knowledge' of wrongfulness with 'appreciation' of wrongfulness, the test scales down the M'Naghten Rules to a framework closer to a scientific understanding of mental illness. In contrast, the requirement under §84 of 'incapable of knowing' is absolute, making the defence inflexible and stringent.

As opposed to this, Lakshmi and Babu are closer to a purer interpretation of the standard of 'incapable of knowing' under §84. These interpretations of capacity are not the exclusive domain of mental illness, but may include many other conditions, for instance neurological or those arising out of a physiological concern. This circles back to the point made earlier that a cogent, coherent rationale for restricting 'unsoundness of mind' to mental illnesses has not been provided under Indian jurisprudence. In laying out the defence, §84 is concerned with cognition in its understanding of capacity – to know – rather than volition – will or ability to control behaviour.

⁷⁷ *Venugopalan v. State of Kerala*, Criminal Appeal 307 of 2003 (unreported decision).

⁷⁸ *Ashis Dey v. State*, 2003 SCC OnLine Cal 424 (states that §84 protects an 'unnatural mind' resulting in destruction of cognitive capacity).

⁷⁹ *Keshaorao Bhiosanji Navale v. State of Maharashtra*, 1978 SCC OnLine Bom 23 ('Keshaorao').

⁸⁰ *Shama Tudu v. State*, 1986 SCC OnLine Ori 241.

⁸¹ *Keshaorao*, *supra* note 79, at ¶10.

⁸² The Model Penal Code, 1962, §4.01.

However, as Part IV.A demonstrates, courts have, in fact, expanded the ambit of the defence and the second limb to include the inability of the accused to control their behaviour. While this inclusion is more in line with how mental illnesses affect an individual, it is not what §84 envisages. Courts have also not provided any rationale for departing from the requirement of the defence to include volitional capacity. Further, the framework of ‘totality of circumstances’ evolved by the courts adds to the obscurity surrounding the determination of the second limb. As will be discussed in Part IV.B, the phrase ‘totality of circumstances’ is devoid of any clear legal meaning and has resulted in a legal framework that is not judicially sustainable because of the subjectivity that has come to characterise it.

A. INADVERTENT INCLUSION OF VOLITIONAL INCAPACITY

In determining legal insanity, courts have also inadvertently referred to volitional incapacity.⁸³ The volitionally impaired offender knows the difference between right and wrong but suffers from mental disease, which compromises the capacity for self-control.⁸⁴ The volitional incapacity prong has been added to the substantive test of insanity in some jurisdictions – for instance the State of Queensland in Australia, and South Africa – that recognises that volition or self-control as an aspect of certain mental illnesses which may not impair the capacity to know right from wrong, and such persons must also not be held criminally liable.⁸⁵ Critics of the volitional incapacity prong argue that not only does it broaden the defence too much, it is also tough to implement the test as it has no scientific foundation.⁸⁶ The proponents argue for the test on two fronts. *First*, that there is empirical research and development in psychiatry which shows that mental disease can impair an individual’s capacity to control their actions in conformity with the law, and *second*, that it would be morally wrong to punish an individual who is not blameworthy for acts committed due to their mental compulsion.⁸⁷ In response to the issue of over- expansiveness of the test, it has been argued that a purported increase in the number of persons seeking the defence is an insufficient reason to reject it.⁸⁸

§84 does not recognise volitional incapacity arising from a disease of the mind. Courts have held that insanity ‘affecting the will and the emotions’

⁸³ Hazara Singh v. State, 1957 SCC OnLine Punj 99; Shama Tudu v. State, 1986 SCC OnLine Ori 241; Aravindakshan Pillai v. State of Kerala, 1988 SCC OnLine Ker 587; Madhavan v. State, 1992 SCC OnLine Ker 55.

⁸⁴ Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, Vol. 40, HASTINGS L.J., 1 (1988).

⁸⁵ Yeo, *supra* note 34, at 254.

⁸⁶ Abraham S. Goldstein, *THE INSANITY DEFENSE*, 67 (Yale University Press, 1967); Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, Vol. 51, S. CAL. L. REV., 527 (1978).

⁸⁷ Laura Reider, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, Vol. 46, UCLA L. REV., 289 (1998); Yeo, *supra* note 34, at 241.

⁸⁸ *Ibid.*

are not covered under §84.⁸⁹ Courts recognising the issue of free will and blameworthiness observed that in the case of insane persons, no culpability is fastened on them, as they have no free will – *furiosi nulla voluntas est*.⁹⁰ In *Hazara Singh v. State*, the Punjab and Haryana High Court observed that in order to earn immunity from criminal liability, the disease, disorder, or disturbance of the mind must be of a degree, which should obliterate perceptual or volitional capacity.⁹¹ The Odisha High Court in *Shama Tudu* held that §84 exempts persons who cannot control their conduct and are deprived of passing a rational judgment on their actions.⁹² Volitional capacity or loss of self-control has also been factored in by the Kerala High Court and the Supreme Court, highlighting the confusion that exists in understanding legal insanity.⁹³ The courts have inadvertently introduced aspects of volition. However, there is no discussion on why it is relevant for understanding the second limb. In other words, courts have not commented on the nature of the relationship between volition and the incapacity to know the nature or consequences of one's actions. The courts' rationale to use volition to comment on cognitive capacity is not only unclear but also squarely falls outside the ambit of §84.

B. TOTALITY OF CIRCUMSTANCES FRAMEWORK

Courts have typically looked at three broad heads to determine insanity – expert testimony, non-expert testimony, and other facts showing mental condition.⁹⁴ The court in *Shrikant* observed that the issue of whether or not a particular case falls under §84 must be examined from the 'totality of circumstances'. The court relied on *Dahyabhai Chhaganbhai Thakker v. State of Gujarat* ('Dahyabhai'), stating that the accused must establish circumstances which preceded, attended and followed the crime to be a case under §84.⁹⁵ In *Shrikant* the court observed that whether an accused, on account of unsoundness of mind, is incapable of knowing the consequences of their act can ordinarily be 'inferred' from the circumstances.⁹⁶ In the instant case, the mental illness being paranoid

⁸⁹ "It has been thought that the object of criminal law is to make people control their sane as well as their insane impulses", see *Kalicharan v. R.*, 1946 SCC OnLine MP 99; *Queen-Empress v. Lakshman Dagdu*, 10 ILR Bom 512; See also The 42nd Law Commission of India Report, *supra* note 32 (registered opposition against the inclusion of the 'irresistible impulse' test, it noted that there was little support as some did not consider it to be 'strictly insanity' and its inclusion would make the trial more difficult for the judges).

⁹⁰ *Shivraj Singh v. State of M.P.*, 1974 SCC OnLine MP 56; *Ambi v. State of Kerala*, 1960 SCC OnLine Ker 247.

⁹¹ *Hazara Singh v. State*, 1957 SCC OnLine Punj 99.

⁹² See also *Shama Tudu v. State*, 1986 SCC OnLine Ori 241 (exempts a person who is "prevented from controlling his own conduct and deprived of the power of passing a rational judgment on the moral character of the act he did").

⁹³ See also *Madhavan v. State*, 1992 SCC OnLine Ker 55 ("that the disorder should be of such magnitude and degree as to destroy the volitional capacity of individuals"); *Hussain v. State of Kerala*, 2005 SCC OnLine Ker 375.

⁹⁴ *Sharma*, *supra* note 13, at 324.

⁹⁵ *Dahyabhai Chhaganbhai*, *supra* note 17, at ¶9.

⁹⁶ *Shrikant*, *supra* note 26, at ¶14.

schizophrenia was a significant determinant in ‘inferring’ the circumstances to hold that the accused was entitled to the exception under §84. What these circumstances constitute has not been consistently outlined by the courts.

While the courts are unanimous in the relevance of inquiring into surrounding circumstances to determine legal insanity, there is inconsistency and arbitrariness in determining the relevance and weightage of these variable factors to determine legal insanity. Except for Shrikant, in cases from 1970 to 2018 which resulted in an acquittal, the Supreme Court looked at lack of or weak motive, history of mental illness, treatment post-arrest and behaviour on the day of the incident.⁹⁷ Interestingly, two⁹⁸ out of the four cases also factored in the failure of the prosecution to do its duty. However, it is unclear if, in these cases, the defence succeeded in proving its case under §84 or whether the failure of the prosecution resulted in an acquittal.⁹⁹ The same is further discussed in Part V. While the discussion on the second limb is sparse, we will look at some of the often relied upon factors and their treatment under the jurisprudence.

1. Continued Mental Illness

Continued mental illness, pre and post the incident, has been relied on as a factor to infer that the person may have been of unsound mind at the time of the commission of the offence. The Bombay High Court in *State of Maharashtra v. Sindhi*,¹⁰⁰ observed that the extent to which such medical insanity affects a person’s cognitive faculties would naturally depend upon the nature of that insanity. This is interesting in as much as it attempts to find a link between the nature of insanity and its effect on cognitive incapacity instead of assuming it. In contrast, the court in Shrikant used continued medical sickness to observe that the accused may have been under a partial delusion.¹⁰¹ The court did not discuss if the ‘medical insanity’ resulted in an inability to know the nature of the act or its consequences. Instead, it looked at the ‘characteristics and dangers’ flowing from the ailment, i.e. paranoid schizophrenia, and inferred legal insanity. In its determination of the second limb, the court relied heavily on the presence of mental illness and weak motive. It held that a reasonable inference could be drawn that the accused was under a delusion at the appropriate time.¹⁰²

One could argue that this ‘reasonable inference’ was drawn due to the nature of the illness. Where the accused produced prescriptions, the Supreme

⁹⁷ These variables have also been factored in cases of conviction. However, not all of them may have been considered. In some cases, the inquiry stops at no record of mental illness. In some cases, there is no treatment post arrest.

⁹⁸ Devidas, *supra* note 24; Ratan Lal v. State of M.P., (1970) 3 SCC 533.

⁹⁹ The accused was not subjected to medical examination while in custody in both the cases; the prosecution also withheld facts about the accused’s mental health in one of the cases.

¹⁰⁰ State of Maharashtra v. Sindhi, 1987 SCC OnLine Bom 223.

¹⁰¹ Shrikant, *supra* note 26, at ¶12.

¹⁰² *Id.*, ¶19.

Court observed that the prescriptions did not spell out the mental illness, and therefore, the accused was not excused from criminal responsibility.¹⁰³ In this case, the accused had been diagnosed in the past, noting the presence of paranoid features and was given medication for the same. However, the court here relied on the accused's behaviour post the incident – threatening the driver, throwing the weapon, and running away from the crime scene – to hold that the accused knew the act was wrong and illegal.¹⁰⁴ Interestingly, the court also factored in the fact that he was running a medical shop and had he been of unsound mind, it may not have been possible for him to do so.¹⁰⁵ Where the former case hinges its determination on the mental illness, the latter case has relied on behaviour post the incident and ability to run a shop to reject the defence, even while evidence of mental illness existed in the form of prescriptions. However, none of these cases conduct a separate inquiry to determine cognitive capacity, or lack thereof, or the degree that has been proved to result in an acquittal and conviction, respectively.

While there is limited jurisprudence, courts have attempted to understand the nature of mental illness and whether it could result in incapacity under the second limb. Both *Devidas* and *Kumari Chandra v. State of Rajasthan* ('Kumari Chandra') considered the nature of illness and its treatment and also looked at medical literature to hold that the accused's case fell under the exception.¹⁰⁶ It is interesting that whereas Shrikant looked at the dangers flowing from the ailment, these judgments adopted a more progressive approach of looking at the nature of illness and its symptoms and not inferring dangerousness. The reliance on 'medical insanity' to determine 'legal insanity' not only heightens the burden on the defence but also requires specialised knowledge and expert opinion to assist the court in arriving at its determination.

2. Expert Evidence

A related issue that must be highlighted in proving legal insanity is expert evidence. The Supreme Court has observed that the onus would be on the accused to prove by expert evidence that he is suffering from such a mental disorder or mental condition that he could not be expected to be aware of the consequences of his act.¹⁰⁷ However, the Supreme Court in *Devidas* took a more realistic approach and observed that it could not be expected for the appellant, who came from a poor socio-economic background, to diligently maintain their medical records or lead expert evidence.¹⁰⁸ It is thus of paramount importance to subject the accused to a mental health evaluation in these cases to determine whether the person was of unsound mind at the time of the incident.

¹⁰³ Surendra Mishra, *supra* note 31, at ¶11.

¹⁰⁴ *Id.*, ¶17.

¹⁰⁵ *Id.*

¹⁰⁶ *Kumari Chandra v. State of Rajasthan*, 2018 SCC OnLine Raj 1899; *See also* *Kuttappan v. State of Kerala*, 1985 SCC OnLine Ker 256.

¹⁰⁷ *State of Rajasthan v. Shera Ram*, (2012) 1 SCC 602, ¶19.

¹⁰⁸ *Devidas*, *supra* note 24, at ¶18.

For instance, in *Bibhuti Mahato v. State of W.B.*, the court hearing the witness testimony had subjected the accused to a medical evaluation revealing that the accused had schizophrenia.¹⁰⁹ Given that, and as it occurred in the case of *Devidas*, there may be accused persons from poor socio-economic backgrounds who do not have access to proper healthcare and treatment, it would be difficult for them to not only produce documentary evidence of their illness but also ensure an expert to depose on their behalf. It is therefore imperative for courts to exercise judgment and ensure that the accused are sent for mental health evaluations. This is evident from the huge reliance on witness testimony to ascertain legal insanity in the absence of expert testimony or evidence.¹¹⁰ As the succeeding paragraphs will highlight, courts rely on witness testimony to ascertain the conduct at the time of the offence and also subsequent conduct of the accused.

3. Motive

While the motive is not a standalone factor, the courts' treatment of the same is determined in some cases by the nature of the mental illness while in some by the nature of the crime, resulting in dissimilar treatment. The general trend is that the absence of motive without proof of legal insanity does not entitle a person to the exception under §84, regardless of the nature of the crime.¹¹¹ The mere fact that no motive has been proved or that no attempt to run away was made would not indicate that the accused was insane or did not have the necessary *mens rea*.¹¹² The absence of motive, however, gains relevance in cases where the accused is able to meet the threshold requirement, i.e. unsoundness of mind. In *Shrikant*, the court's determination was veered by the presence and nature of mental illness, and weak motive, to hold that the accused was under a delusion at the relevant time.¹¹³

Again, in *Pundalik Laxman Chavan v. State of Maharashtra*,¹¹⁴ the court, considering the accused's conduct and history of mental illness, commented on the lack of motive for the murder and observed that the accused was under an "illusion or delusion" while committing the crime. On the other hand, the nature of the crime also moves the court in favour of an insanity verdict. For instance, in *Kamala Bhuniya v. State of W.B.*,¹¹⁵ the court noted that in cases involving murder of a close relation, absence of motive would lead to a conclusion in favour of insanity under §84. Interestingly, in *Durga Domar v. State of M.P.*,¹¹⁶ the court noting

¹⁰⁹ *Bibhuti Mahato v. State of W.B.*, 2000 SCC OnLine Cal 271.

¹¹⁰ *DHANDA*, *supra* note 9, at 123.

¹¹¹ *Bapu*, *supra* note 39; *Sheralli Wali Mohammed v. State of Maharashtra*, (1973) 4 SCC 79; *Hari Singh Gond v. State of M.P.*, (2008) 16 SCC 109; *Mariappan v. State of T.N.*, (2013) 12 SCC 270.

¹¹² *Sheralli Wali Mohammed v. State of Maharashtra*, (1973) 4 SCC 79.

¹¹³ *Shrikant*, *supra* note 26, at ¶19.

¹¹⁴ *Pundalik Laxman Chavan v. State of Maharashtra*, 1994 SCC OnLine Bom 49.

¹¹⁵ *Kamala Bhuniya v. State of W.B.* 2006 SCC OnLine Cal 6; *Shanti Devi v. State*, 1967 SCC OnLine Del 56.

¹¹⁶ *Durga Domar v. State of M.P.*, (2002) 10 SCC 193, ¶1.

the ferocity of the crime and absence of motive, observed that the mental condition of the accused had not been considered at any stage. The court directed that the accused be kept under observation to ascertain whether the accused was under the ‘spell of any mental illness’ at the time of committing the murders. The courts have thus introduced subjectivity to the totality framework by linking motive to either the nature of the mental illness or the crime to determine §84.

4. Conduct of the Accused

Behaviour of the accused has been used by courts to determine un-soundness of mind and also plays a role in the court’s construction of the totality of circumstances framework to determine the second limb. Bapu distinguished between cases where insanity is proved and those in which it must be proved as the person ‘appears sane’.¹¹⁷ In the former case, Bapu states that certain considerations become material such as whether the circumstances showed deliberation or preparation, a desire to conceal, guilty conscience, amongst other factors.¹¹⁸ Courts do rely on subsequent conduct to see if the accused is conscious of his guilt and whether he knew the consequences of his act. Concealment of weapon,¹¹⁹ attempting to run away,¹²⁰ and displaying consciousness of guilt are factors that have generally been used to ascertain whether the person knew the consequences of the act.¹²¹ Subsequent conduct has been used to conclude that the accused retained cognitive capacity and, therefore, the presence of mental illness did not amount to legal insanity as understood under §84.

However, the bigger challenge for courts arises where a person retains sufficient soundness of mind to appreciate the nature of the act, but not that it is wrong or contrary to law.¹²² For instance, a person, under a delusional belief, poisons their own child so the child can go to heaven and be reborn as an angel. Here, the person knows that ingesting poison would result in death but is unable to appreciate that it is contrary to law to wilfully kill the child.

There exists confusion on both what needs to be determined as well the framework required to determine it. Courts have not only inconsistently understood the degree of incapacity that must be shown but have also inadvertently introduced volitional incapacity under the second limb. The framework of ‘totality of circumstances’ has further introduced unguided judicial subjectivity into this area of law. The case laws discussed in this section shed no light on how the ‘totality of circumstances’ framework is a conclusive determinant of the incapacity required to be shown under the second limb. The lack of clarity under both the

¹¹⁷ Bapu, *supra* note 39, at ¶7.

¹¹⁸ *Id.*

¹¹⁹ *Unniri Kannan v. State*, 1959 SCC OnLine Ker 121; *Jai Lal v. Delhi Admn.*, AIR 1969 SC 15; *Pundalik Laxman Chavan v. State of Maharashtra*, 1994 SCC OnLine Bom 49.

¹²⁰ *Surendra Mishra*, *supra* note 31; *Unniri Kannan v. State*, 1959 SCC OnLine Ker 121.

¹²¹ *Id.*

¹²² *Dhanda*, *supra* note 9, at 111.

limbs, in turn, affects the burden of proof that is required to be discharged by the defence, which is dealt with in the following part.

V. EVIDENTIARY REQUIREMENTS

§105 of the IEA places the onus of proving any exception in a penal statute on the accused, and the court shall presume the non-existence of circumstances that are needed to establish the exception.¹²³ Under §3 of the IEA, a fact is said to be ‘proved’ if the Court either believes or considers its existence so probable that a prudent person would act on the existence of such a fact.¹²⁴ In the context of general exceptions to crimes, the burden of proof on the defence has been discussed in *R. v. Parbhoo* (‘Parbhoo’),¹²⁵ which was subsequently clarified in a nine-judge bench decision of *Rishi Kesh Singh v. State*.¹²⁶ The case in *Parbhoo* related to self-defence under §96 of the IPC where the court held that when an exception is pleaded, the evidence led in support of such plea would be judged on a preponderance of probability. The court discussed the meaning of the word ‘proof’ holding that the degree of proof required by §3 on the existence of a fact amounts only to a great preponderance of probabilities in favour of the existence of a fact. In the context of the insanity defence, this position has found judicial recognition in *Dahyabhai*.¹²⁷

Thus, a reading of §105 with §3 of the IEA makes it evident that the standard of proof required is on a preponderance of probabilities, where the accused has to prove the exception. The foregoing discussion has shown that the jurisprudence is inconsistent and arbitrary in its interpretation and understanding of §84. While there has been relatively more clarity on questions concerning the burden of proof and standard of proof in the context of §84, the lack of consistent and appropriate judicial standards in understanding the requirements of the defence itself has had the effect of introducing uncertainty into the burden of proof and standard of proof considerations. This part also argues that the judicial confusion in the substantive aspects of §84 presents a very real risk of heightening the standard of proof in a manner not envisaged under §105 read with §3 of the IEA.

As discussed above, the interplay between §84 of the IPC, and §3 and §105 of the IEA makes it evident that ‘preponderance of probabilities’ is the standard of proof required to successfully establish an insanity defence. The Blacks’

¹²³ When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the IPC, or within any special exception or proviso contained in any other part of IPC, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

¹²⁴ “A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.”

¹²⁵ *R. v. Parbhoo*, 1941 SCC OnLine All 62.

¹²⁶ *Rishi Kesh Singh v. State*, 1968 SCC OnLine All 204.

¹²⁷ *Dahyabhai Chhaganbhai*, *supra* note 17, at ¶7.

Law Dictionary defines preponderance of evidence as evidence that is sufficient to incline an impartial mind to one side of the issue than the other. While explaining ‘preponderance of probabilities’ in *Miller v. Minister of Pensions* (‘Miller’), Lord Denning stated that the evidence discharged must be such that it makes a claim ‘more probable than not’.¹²⁸ The Supreme Court in *N.G. Dastane v. S. Dastane*,¹²⁹ relying on *Miller*, noted that the existence of fact may be founded on a balance of probabilities if on weighing the various probabilities, a prudent person finds that the preponderance is in favour of the existence of the particular fact. In effect, as far as §84 is concerned, the accused has to establish that they were more likely to be ‘insane’ than not.

The judicial view over many decades has been that even the failure by the accused to establish any of the general exceptions could nonetheless demonstrate that the prosecution has not met the ‘proof beyond reasonable doubt’ standard. In the specific context of cases under §84, the ruling in *Dahyabhai* held that despite a failure to successfully establish a §84 defence, the accused could, through the course of that attempt, end up injecting reasonable doubt into the prosecution’s case.¹³⁰ Therefore, while being unable to take benefit of the §84 defence, the accused could nonetheless be found not guilty by ensuring that the prosecution fails to meet its burden of providing ‘proof beyond reasonable doubt’. Evidently, the reasonable doubt that the accused might bring to bear in such circumstances would relate to the lack of necessary *mens rea* to establish the offence.

However, courts have distinguished between reasonable doubt about the existence of the ‘insanity’ defence on the one hand, and reasonable doubt that impacts the assessment of whether the prosecution has established all ingredients of the offence ‘beyond reasonable doubt’.¹³¹ Merely casting reasonable doubt on the existence of the insanity defence would not secure an acquittal under §84 since the required standard of proof, i.e. preponderance of probabilities, would not have been met. However, if the evidence goes so far as to cast reasonable doubt on the ingredients of the offence itself, more specifically on whether the necessary *mens rea* exists, the court may acquit the accused on account of the failure of the prosecution to discharge its burden beyond all reasonable doubt. The courts have, therefore, made a distinction between establishing the ‘insanity’ defence and establishing the necessary *mens rea*.

Despite the distinction drawn between the two, some courts have also understood the latter category as an acquittal under §84. For instance, where courts have observed that failure of the prosecution to do its duty casts serious infirmity on the prosecution’s case, it is unclear whether the acquittal is on account

¹²⁸ *Miller v. Minister of Pensions*, (1947) 2 ALL ER 372.

¹²⁹ *N.G. Dastane v. S. Dastane*, (1975) 2 SCC 326.

¹³⁰ *Dahyabhai Chhaganbhai*, *supra* note 17, at ¶7.

¹³¹ *Id.*; *T.N. Lakshmaiah v. State of Karnataka*, (2002) 1 SCC 219, ¶9; *Santosh Maruti Mane v. State of Maharashtra*, (2019) 19 SCC 797, ¶6.

of failure by the prosecution or the defence successfully proving that the accused was insane at the time of committing the offence.¹³² It is important to differentiate between a general acquittal and an acquittal under §84, but by conflating two different standards, courts have only added to the confusion surrounding the requirements to be met to mount a successful §84 defence.

In assessing the myriad trajectories of the §84 defence, it is evident that not only is there a disparity in the approaches adopted to determine the existence of the defence, but even within each of those approaches, there is further uncertainty about the constitutive elements. This obscurity is visible *first*, in the fluctuating burdens of proof to be discharged by the defence, i.e. regarding what exactly the defence would need to show, and *second*, in the unclear evidentiary requirements. In respect of the burden of proof to be discharged being variable, while some courts have limited their entire §84 determination to the first limb of unsoundness of mind, others have conducted a separate inquiry under the second limb by relying on the ‘totality of circumstances’ framework. Consequently, it is unclear whether the defence must show that the accused (a) was of unsound mind at the time of the offence, i.e. first limb only, or (b) was legally insane, i.e. both limbs, to make a successful defence under §84. Naturally, the burden of proof to be discharged by the defence would be different in situations (a) and (b). The ambiguity surrounding the scope of unsoundness of mind and the inconsistency in the determination of legal insanity further renders unclear the evidentiary requirements to be met under the situations (a) and (b) separately.

A. DISSIMILARITY IN BURDEN OF PROOF

To further illustrate the dissimilarity within each of the aforesaid categories, we will now deal with them separately. In the first approach, courts have determined insanity pleas by assuming incapacity based on the nature of the mental illness. Thus, where the accused is suffering from ‘severe mental illness’, the court has assumed incapacity instead of undertaking a separate inquiry into it.¹³³ Courts have also observed that it might be better for the accused to specify the type of disorder while setting up an insanity plea to allow for easier appreciation of the evidence on record.¹³⁴ Consequently, the evidentiary requirements are largely determined by the courts’ understanding and knowledge of mental illnesses and throws the door wide open to subjectivity and prejudice.

Where there has been an inquiry into the second limb, courts have factored different circumstances and determined legal insanity on a case to case

¹³² Dhanda, *supra* note 9, at 121; Bapu, *supra* note 39; Ratan Lal v. State of M.P., (1970) 3 SCC 533; Shama Tudu v. State, 1986 SCC OnLine Ori 241; Tukappa Tamanna Lingardi v. State of Maharashtra, 1990 SCC OnLine Bom 443.

¹³³ Devidas, *supra* note 24; *See also* Bibhuti Mahato v. State of W.B., 2000 SCC OnLine Cal 271 (the accused were diagnosed with psychosis and schizophrenia respectively, in these cases).

¹³⁴ Ramdulare v. State, 1958 SCC OnLine MP 107.

basis. As has already been discussed, the understanding of legal insanity is not uniform, and courts have relied on variable factors to infer legal insanity. This creates issues of inconsistency as there is no consensus on what factors would be deemed relevant in a particular case, thus resulting in a confusion regarding what needs to be proved by the defence, even if on a preponderance of probabilities. We also note the inconsistency in the treatment of witness statements – while some courts rely on oral testimony,¹³⁵ others have observed that mere oral statements cannot give rise to an inference that the accused was of unsound mind.¹³⁶ Further, as noted above, courts need to be careful in interpreting witness statements to prevent falling into the trap of bias, customs, and culture.¹³⁷ Thus, even where the inquiry extends to the second limb, the defence is faced with the predicament of discharging uncertain and sometimes dissimilar burdens of proof.

B. TEST TO BE SATISFIED ON A PREPONDERANCE OF PROBABILITIES

Having addressed the issues with the evidentiary requirements to be met by the defence, it is important to briefly comment on the test which needs to be satisfied on a ‘preponderance of probabilities’. In *Dahyabhai*, the Supreme Court held that the defence must show circumstances so probable that a prudent man would act on the supposition it existed.¹³⁸ The accused has to satisfy the ‘prudent man’ standard. This was also upheld in *Bapu* with a slight modification that the ‘reasonable man’ standard be applied to see if the act was right or wrong. *Bapu* while discussing two types of insanity also refers to the ‘policeman at elbow’ test which is whether the prisoner would have committed the act if there had been a policeman at his elbow.¹³⁹ Interestingly, the test was proposed by Lord Bramwell while discussing the ‘irresistible impulse’ defence observing that an accused must be convicted if he or she would not have yielded to the criminal impulse if a policeman was at his elbow at the time of the commission of the offence.¹⁴⁰

¹³⁵ *Ratan Lal v. State of M.P.*, (1970) 3 SCC 533; *Bibhuti Mahato v. State of W.B.*, 2000 SCC OnLine Cal 271; *Veluswamy v. State*, 1984 SCC OnLine Mad 191; *DHANDA*, *supra* note 9, at 125-126.

¹³⁶ *Kirtanram Mansai Uranv v. State of M.P.*, 2011 SCC OnLine Chh 269; *Samsuz Saman Ahmed v. State of Assam*, 2014 SCCOnLine Gau 403 ; *Budhis Rai v. State of Sikkim*, 2014 SCC OnLine Sikk 212; *Dhanda*, *supra* note 9, at 125-126.

¹³⁷ *See also Jai Lal v. Delhi Admn.*, AIR 1969 SC 15 (the court’s reliance on the accused’s ability to attend office and discharge duties in a normal manner is reflective of the biases that exist against persons with mental illnesses regarding their ability to carry out day to day activities); *Surendra Mishra*, *supra* note 31.

¹³⁸ *Dahyabhai Chhaganbhai*, *supra* note 17, at ¶5.

¹³⁹ *See also Bapu*, *supra* note 39, at ¶7 (This test is only for cases where previous insanity has been proved or admitted- and is not reliable in cases of ‘inferential insanity’. The case has also drawn a distinction between cases, in which insanity is more or less proved and the question is only as to the degree of irresponsibility, and cases in which insanity is sought to be proved in respect of a person who for all intents and purposes appears sane).

¹⁴⁰ *Baron Bramwell Committee, Report of the Capital Punishment Commission*, Vol. XXI (1866); *People v. Hubert*, 119 Cal 216 (1897); *Roderick J. O’Hanlon, Not Guilty Because of Insanity*, Vol. 3(1), IRISH JURIST, 61 (1968).

The Supreme Court recently, in *Mohd. Anwar v. State (NCT of Delhi)*,¹⁴¹ made similar observations on what must be established by the accused. The court held that in order to successfully claim defence under §84, the accused must show that he or she suffered from a serious enough mental disease or infirmity, and that but for this disease or infirmity, the crime would not have been committed. This ‘but for’ test is distinct from the test laid under §84 and is in fact in line with the Durham Rule, which requires the act to be a product of mental illness.¹⁴² The ‘but for’ test commonly used in tort law says that an action is the cause for the harm that has occurred if, but for the action, the harm would not have occurred.¹⁴³ In the context of §84, this would mean, much like the Durham rule, that the act occurred, therefore, is a product of the illness and was caused by the illness. On the other hand, the presence of unsoundness of mind is only a threshold requirement under §84. A successful defence requires both the presence of unsoundness of mind and, consequently, the incapacity to know the nature or consequences of one’s actions due to such unsoundness of mind.

As is evident, courts have assigned different meanings to what it means to successfully raise a §84 defence. There are stark differences in the required mental state, the relevant time period of that mental state and the manner in which that mental state is to be established. Differences in each of those aspects then bring to bear a different burden on the person seeking to invoke the §84 defence. Finally, courts are also unclear on the test that needs to be satisfied on a preponderance of probabilities. As a result, not only is there inconsistency and vagueness in the law that has developed on §84, there is also the more immediate effect on accused persons not knowing the exact ingredients that need to be established and the manner in which those ingredients are to be established.

VI. CONCLUSION

The statutory law on the insanity defence under §84 has remained unchanged for over 150 years, but our judicial discourse also continues to be instructed by outmoded ideas and notions. Grounded in the vagueness of ‘unsoundness of mind’, Indian jurisprudence has not yet articulated a cogent approach, much less debate, about what ‘unsoundness’ means. Courts have struggled with applying legal standards that depend on concepts arising from relevant, though not exclusive, fields such as psychiatry and psychology. For instance, cognition and cognitive abilities are known to be impacted by mental health concerns for however brief a period, but the manner in which those abilities translate into questions

¹⁴¹ *Mohd. Anwar v. State (NCT of Delhi)*, (2020) 7 SCC 391.

¹⁴² *See also* *Durham v. United States*, 214 F 2d 862 (1954) (The Durham Rule excuses an accused from criminal responsibility if the unlawful act is the product of a mental disease or defect. It looks at neither the defendant’s capacity to understand the nature of the act (cognition) nor their ability to control their actions (volition), and only requires the act to be a product of mental illness).

¹⁴³ David Owen, *The Five Elements of Negligence*, Vol. 35(4), *HOFSTRA LAW REVIEW*, 1671 (2007).

of capacity, which is a legal determination, is a critical discussion missing from Indian jurisprudence on the insanity defence.

Even when courts do employ modern tools, such as the Diagnostic and Statistical Manual of Mental Disorders, as was done in *Kumari Chandra v. State of Rajasthan*,¹⁴⁴ to discuss mental health concerns, the legal standards applied are outdated ones. Given this continued deficit, the law then invariably fails to make any meaningful advancements in jurisprudence, apart from ad-hoc additions of more illnesses into the umbrella category of ‘unsoundness of mind’. A prime example of such chaos is the inclusion of aspects of volitional capacity when discussing §84. Relying on volition, courts infer cognitive incapacity without any discussion on how they are related or what impact such reliance has on the test itself. Courts seem to privilege ‘established’ legal principles explicitly but implicitly subvert them, giving rise to more and newer confusions.

While Indian jurisprudence continues to grapple with the difficulties that flow from conceptual errors and confusion, it remains far from recognising the disability rights discourse on the insanity defence. The international human rights framework under the Convention on the Rights of Persons with Disabilities (‘CRPD’) has moved to challenge fundamental assumptions about persons with mental disorders lacking legal and mental capacity and questions the validity of the insanity defence as a whole.¹⁴⁵ The premise of the insanity defence to exclude certain persons as they are unable to form the mental state required for criminal responsibility is rejected by the disability rights discourse. It insists that persons with mental disability, who would traditionally be largely out of the scope of criminal law, are equal participants in society, are possessors and actors of rights and their actions – even those which may be considered wrong, and must be accorded legitimacy under law.¹⁴⁶

Through the course of this paper, we have highlighted the issues with the interpretation and administration of the test under §84. While some courts assume incapacity after an inquiry into the first limb, others conduct a separate

¹⁴⁴ See also *Kumari Chandra v. State of Rajasthan*, 2018 SCC OnLine Raj 1899 (The court in this case relied extensively on medical literature, such as Diagnostic and Statistical Manual of Mental Disorders - V, to understand premenstrual dysphoric disorder and the symptoms associated with it to determine whether the accused by reason of this disorder would fall under §84.)

¹⁴⁵ Micheal Perlin, *God Said to Abraham/Kill Me a Son: Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, Vol. 54, AM. CRIM. L. REV., 477 (2017); Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Law*, Vol. 86(6), VIRGINIA LAW REVIEW, 1199 (2000); Peter Barlett, *The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law*, Vol. 75(5), THE MODERN LAW REVIEW, 752 (2012); J. Cragie, *Against a Singular Understanding of Legal Capacity: Criminal Responsibility and the Convention on the Rights of Persons with Disabilities*, Vol. 40, INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY, 6 (2015).

¹⁴⁶ The discourse arising out of the CRPD on the abolition of the defence merits a separate discussion, which is beyond the scope of this paper.

inquiry into the second limb and then determine capacity, or lack thereof. There also exist substantive inconsistencies, which in turn impact the administration of the test under §84. Courts are unclear both on the definition and the scope of unsoundness of mind under the first limb of §84. This is compounded by the indeterminate timeframe relied upon to determine such unsoundness of mind, which ranges anywhere between ‘not too remote in time’ to ‘proximate to the occurrence’.

There also exists confusion on the meaning and determination of ‘legal insanity’. The jurisprudence is inconsistent in terms of the degree of incapacity required to be shown as also the process of determining or inferring, or assuming incapacity using the totality of circumstances framework. The jurisprudence on the insanity defence has imported concepts and standards that lack any clear meaning or a principled approach resulting in a framework that is regressive and incapable of being maintained as a judicial standard. It might be worthwhile to revisit the substantive wording of §84 to make it well-founded and practicable.