THE IDEA OF INSANITY: WHEN EQUALITY LEADS TO INEQUALITY

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The concept of ability breeds discrimination. On the basis of empirical evidence and other intangible aspects of human existence, the authors submit, that the theory of centrality governs the understanding of canons of criminal jurisprudence asymmetrically more than the theory of marginality. It is in this light that the insanity defence needs substantial, if not total, reconstruction. The article characterises mental disability with reference to the concept of responsibility in criminal law underlining the essential variance in the perception and construction of the defence. The authors, on one hand, highlight the quandary of the present-day approach by underlining the invasion of the most basic rights such as that of equality, non-discrimination and the right to access justice and self-determination, while on the other hand, dwell on the glaring inconsistencies in the law and procedure in this area. Finally, the authors reason that the critical disability viewpoint requires us to avoid adopting any exclusionary action, more so on the basis of rationality that the majority commands. The focus must not be to place people beyond criminal adjudication but to improve rehabilitation services and expand the understanding of subjective defences of mens rea. This is what the disability discourse stands for.

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I. INTRODUCTION

Disability is traditionally construed as a natural phenomenon with exceedingly limited human agency.[1] It is observed as an individual's biological abnormality with an emphasis on scientific and value-neutral medical tags.[2] There has been a deviation from this approach more recently where accentuation has been to analyse disability and its consequences in terms of its political and socio-economic identity, or rather, an overlap or intersection of identities.[3]

The phrase 'mental disability' evokes an archetypal description of a mental impairment which effectively limits the interaction and participation of the subject in society.[4] The foremost abstraction in the minds of the individual on the perception of disability is usually of sympathy where the subjects are regarded as passive agents of oppression and marginalisation.[5] The world then becomes concerned about the disability, or rather, such inability of the subjects more than the subjects themselves.[6] Magnanimity and empathy usually form the basis of such a response. A common expectation accruing out of this concern is to concentrate on the things that disability does not hinder and, in turn, capitulate on other affairs. It is then that disability of the subject stops counting and instead, her abilities start.[7]

One of the most disregarded and inconspicuous areas of disability studies is that of mental disability, primarily because it treads into the domain of intellect or the functioning of the brain.[8] Further, defining the contours of this branch is a difficult task as the affected breeds have unforeseeable variations and unpredictable medical and biological probabilities.[9] In the interest of preventing under-inclusion of any kind, mental disability may be best defined as an impairment or disturbance in the functioning of the mind or brain resulting from any

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1 Kevin Timpe, *Agency and Disability* in THE ROUTLEDGE HANDBOOK PHILOSOPHY OF AGENCY, 159-168 (1st edn., 2022).

2 Matilda Carter, *Minority Minds: Mental Disability and the Presumption of Value Neutrality*, Vol. 40, J. APPL. PHILOS., 358-375 (2022).

3 INTERNATIONAL DISABILITY ALLIANCE, *Intersectionalities*, 1999, available at https://www.internationaldisabilityalliance.org/intersectionalities (Last visited on May 1, 2023).

4 Centers for Disease Control and Prevention, *Common Barriers to Participation Experienced by People with Disabilities*, September 16, 2020, available at https://www.cdc.gov/ncbddd/disabilityandhealth/disability-barriers.html (Last visited on April 30, 2023).

5 C. Raghava Reddy, *Impairment to Disability and Beyond: Critical Explorations in Disability Studies*, Vol. 60(2), SOCIOLOGICAL BULLETIN, 287-306 (2011).

6 Michael Connolly, TOWNSHEND-SMITH ON DISCRIMINATION LAW: TEXT, CASES AND MATERIALS, 465 (2nd edn., 2004).

7 WORLD HEALTH ORGANIZATION, *World Report on Disability*, (December 14, 2011) (Professor Stephen W. Hawking in Foreword).

8 Sandip Subedi & Pramod Shyangwa, *Disability in Mental Illness: A Neglected Issue*, JOURNAL OF PSYCHIATRISTS ASSOCIATION OF NEPAL, 1-4 (2018).

9 P.K. Chaudhury et al., *Disability Associated with Mental Disorders*, Vol. 48(2), INDIAN J. PSYCHIATRY, 95-101 (2006).

disability or disorder. It impairs the ability to make a proper judgement in the giving of consent or knowing the nature or consequence of one's act.[10]

In law, there are two limbs for imposing criminal liability against an offence, namely: *actus reus* and *mens rea*.[11] While the former is focused on the action or conduct, the latter forms the bedrock of what is known as the mental element or the intention behind the action of the person.[12] Every person is presumed to know the natural consequences of her actions.[13] However, as per §84 of the Indian Penal Code, 1860,[14] an unsound person is considered incapable of this basic norm of human behaviour.[15] Unsoundness of mind here means a state of mind in which an accused is incapable of knowing the nature of his act or knowing that what he is doing is wrong or contrary to the law.[16] An unsound person is presumed in law to lack *mens rea*.[17] This forms the substratum for the defence of insanity.[18]

Insanity, as a defence in preventing the imposition of criminal liability, was adopted in India at the time of the codification of the Indian Penal Code in the year 1860.[19] This idea was first developed in Britain through the *M'Naughten* case,[20] which formed the edifice of insanity jurisprudence in most of the common law countries, where some rules were propounded to determine whether the defendant can exercise the benefit of this defence. This test involved five questions for the consideration of the court and comprised two parts– *first*, whether the person knew the quality and nature of the act done by her, and *second*, whether she knew that the act was right or wrong.[21] However, most nations have experimented with their laws and much development has been observed since the case.[22] In India as well, this case was the basis of the formulation of §84 of the Indian Penal Code ('IPC'),[23] and its subsequent continuation even after independence.

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[10] Robert L. Spitzer & Jean Endicott, *Medical and Mental Disorder: Proposed Definition and Criteria*, Vol.176(7), Annales Médico-Psychologiques, 656-665 (2018).

[11] Walter Wheeler Cook, *Act, Intention and Motive in the Criminal Law*, Vol. 26(8), Yale L. J., 645-663 (1917).

[12] Francis Bowes Sayre, *Mens Rea*, Vol. 45(6), Harvard Law Review, 974-1026 (1932).

[13] Ratanlal & Dhirajlal, The Indian Penal Code, 113 (K. Kannan & Anjana Prakash, 36th edn., 2019).

[14] The Indian Penal Code, 1860, §84.

[15] State of Rajasthan v. Shera Ram, (2012) 1 SCC 602 : AIR 2012 SC 1, ¶19 (per Swantanter Kumar, J.).

[16] Ratanlal & Dhirajlal, *supra* note 13, 116-117.

[17] *Id*., 112.

[18] *Id*.

[19] K.M. Sharma, *Defence of Insanity in Indian Criminal Law*, Vol. 7(4), Journal of Indian Law Institute, 325-383 (1965).

[20] R. v. McNaughten, (1843) 8 ER 718 : (1843) 8 Eng Rep 718.

[21] James K. Kahler v. Kansas, 206 L Ed 2d 312.

[22] *Id*.

[23] The Indian Penal Code, 1860, §84.

However, this defence has been subjected to a lot of disapproval. Copious authors have proposed alternative tests and requisite amendments.[24] Here the authors suggest a two-fold approach. *First*, to defenestrate the exclusionary approach which places people with disability beyond the bounds of criminal adjudication. *Second,* to adopt an alternative approach of an inclusive social order where the accused may bring to the table her full range of mental-capacity evidence seeking clemency under subjectivised *mens rea* rather than complete subjugation and negation of legal capacity.

In Part II, the authors trace the focal point of criminal law and argue for reliance on the theory of 'centrality' of disability vis-a-vis that of 'marginality'. The assertion is supported by theoretical texts of criminal law where it is discerned that the various statutes governing and informing the law have been drafted keeping the welfare, interest and justice for persons with disabilities at the centre of the consideration.[25] At every stage of the criminal trial from filing the FIR, investigation and questioning, to trial, sentencing and bail, disability has been of prime cogitation.

In numerous trials, the defence stands its case by the proposition that the accused is not guilty for he did not know what he did was wrong.[26] This is more so in the cases where acquittal on the grounds of insanity is pleaded.[27] If a reference is made to numerous trials in which the ground of insanity is pleaded, it would be prudent to conclude that the requirement of *mens rea* is always in question.[28] This implies a close association between insanity and criminal responsibility. Towards the end of this part, the authors deal with this alleged connection between these expressions.

In Part III, the authors proceed to characterise the defence of insanity and deliberate on whether or not insanity should be viewed as a defence for completely negating liability or as a justification for an act. It is argued that the defence has lived its time and the obligation now is to widen the ambit of the law to include the persons who do not conform to the two prongs test of *M'Naughten case*,[29] so as to effectively take into account the evolved understanding of mental health and discard the stereotypical and outdated understanding of mental disability.

In Part IV, the authors attempt to engage themselves with the drawbacks of the present regime and the lacunas such as violation of the equal protection clause and deprivation of the legal right and recognition of personhood and

[24] T.V. Asokan, *The Insanity Defense: Related Issues*, Vol. 58, Indian J. Psychiatry, 191 (2016).

[25] *See infra* note 31.

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

[27] Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, 1964 SCC OnLine SC 20 : AIR 1964 SC 1563.

[28] *See* Shrikant Anandrao Bhosale v. State of Maharashtra, (2002) 7 SCC 748; Bapu v. State of Rajasthan, (2007) 8 SCC 66; Lalitha@Latha v. State of Kerala, (2007) 8 SCC 66.

[29] R. v. McNaughten, (1843) 8 ER 718 : (1843) 8 Eng Rep 718.

entitlement to enjoy legal capacity on an equal basis with others in all aspects of life as against substitute decision-making and legal incapacitation. Finally, in Part V, the authors provide concluding remarks and propose a two-fold solution to the imperfect *status quo* alternative by suggesting that instead of abolition, an alternative doctrine and practice must be adopted. Further, it is suggested that an inclusively designed framework must be adopted to read mental health as a continuum rather than seeking binary rigid answers.

II. DISABILITY AS THE CENTRUM OF CRIMINAL LAW

The peculiar construction of legitimacy and capacity in criminal law and the constituents of normal legal subjects have been on account of the interaction and mutual reaction of disability with theoretical criminal law.[30] As a result of this interaction, there has been a genesis of two competing theories– the theory of marginality and that of centrality.[31] Practical experience within the operation of criminal law, in general, provides impetus to the preference of the theory of marginality of disability *vis-a-vis* that of the centrality of disability.[32]

The former contemplates that the traditional approaches to the idea of ability and that of liability arising from the same have been construed keeping at the centre an image of a 'normal' legal subject.[33] Arguments of stalwart scholars in the area of legal theory then create artificial distinctions in the construction of disability where one group is viewed as able, normal and mutually constitutive and the other as 'disabled', which is exceptional and abnormal.[34] Conclusively, it encompasses a view to providing differential treatment to some, in turn, legitimising grouping and marginalisation.

It is argued that preference should be given to the centrality of disability, which provides that criminal law, as it stands today, has been fashioned by discarding the shifting of disability at the periphery and instead engaging with it by keeping abilities at the centre. This is on account of three reasons, namely, the critical appreciation of theoretical texts informing criminal law, empirical evidence, and the understanding of capacity and rationality.

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30 Linda Steele & Stuart Thomas, *Disability at the Periphery: Legal Theory, Disability and Criminal Law*, Vol.23(3), Griffith Law Review, 357-369 (2015).

31 *Id*.

32 Jamelia Morgan, *Why Disability Studies in Criminal Law and Procedure?*, Vol. 71(1), Journal of Legal Education, 124-140 (2021).

33 Tina Minkowitz, *Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond*, Vol. 23(3), Griffith Law Review, (2014).

34 Paul Harpur & Heather Douglas, *Disability and Domestic Violence: Protecting Survivors' Human Rights*, Vol. 23(3), Griffith Law Review, 405-433 (2015).

A. THE CRITICAL APPRECIATION OF THEORETICAL TEXTS INFORMING CRIMINAL LAW

1. Language of Law

The theory of substantive equality is incorporated into the texts governing the operation of criminal law, particularly when the principal criminal procedure code of the country, Code of Criminal Procedure, 1973, provides for ousting its jurisdiction and precedence of special form and procedure in certain criminal cases.[35]

For example, the distinctive right to demand the presence of a judicial magistrate when recording a statement and the privilege of recording the statement of the witness from the place of residence or convenience, instead of a police station, contemplate in favour of the subject.[36] These provisions are not measures of protection or generosity, but are rather an endeavour in ensuring the discharge of lawful obligation of every facet of the system.

Further, with regard to the language of the recording of evidence, the law provides that evidence given in any language may be documented, and the true translation of the same shall form the part of the record.[37] Furthermore, when read with the rules pertaining to the admissibility of witness, the law provides that a person who is unable to speak, if is able to provide his evidence, shall be deemed to have given oral evidence.[38] A dead or dumb person is, therefore, still a competent witness.[39]

This is further evident from the jurisprudence of the doctrine of *locus standi*, which has been diluted to effectively declare that for inquiries and trials, a writ petition could be instituted by a third party acting as a 'next friend' on behalf of the aggrieved party if the victim is a person with a disability.[40]

2. Punishments in Law

The purpose of punishment is to inflict pain.[41] The severity of crime and the aim of general deterrence are important justifications for the imposition of sentences.[42] In this light, punishment is the harshest quantum of pain that the State

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35 The Code of Criminal Procedure, 1973, §5.
36 *Id.*, §164.
37 *Id.*, §277.
38 The Indian Evidence Act, 1872, §119.
39 State of Rajasthan v. Darshan Singh, (2012) 5 SCC 789.
40 Karamjeet Singh v. Union of India, (1992) 4 SCC 666 : AIR 1993 SC 284.
41 Nils Christie, LIMITS TO PAIN: THE ROLE OF PUNISHMENT IN PENAL POLICY (Restorative Justice Classics, 1982).
42 Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, Vol. 58(1), STANFORD LAW REVIEW, 37-66 (2005).

can legally inflict on its citizens.[43] However, the individual circumstances of the accused are given primacy by the courts in certain sentences. In some violations, offences may be serious, and therefore normally, the court would (have to) award imprisonment.[44]

Disability is ordinarily accepted as a mitigating factor in sentencing.[45] This is done to make an overall assessment of the circumstances of the convict, her personal and social characteristics and situations surrounding the crime along with the disability of the individual.[46] This assessment aims to ensure the correctness of the offender's term of imprisonment and allows for changes if and when required.[47]

The most common recourse available is to reduce the degree of culpability of the disabled convict or to convert her sentence to a specific period of community service, taking into account individual circumstances.[48] The principle of equality, in such cases, is essentially balanced with that of justice.

If the primary goal of the criminal justice system– to ensure justice– is realised,[49] it is evident that disabled offenders are on a different pedestal *vis-a-vis* other offenders. The law imposes an obligation on the States to prevent cruel, degrading or inhumane treatment and punishment being imposed upon persons with disabilities.[50] However, evidence buttresses the fact that the prison sentence is more onerous for people with disabilities.[51] For example, sentences for people with disabilities may be detrimental to their physical and mental health as it restricts their access to the community.[52] Further, poor physical condition, limited activities, and restricted access to medical care may compound this situation. In addition to this, maintaining the prison conditions in accordance with the needs of the non-disabled also aggravates the risk of life disproportionately in the case of the person with disabilities.[53]

It is apparent that disability has formed the primary core of the law from an understanding of the basic legal constraints of criminal law and the

[43] J. Ellis McTaggart, *Hegel's Theory of Punishment*, Vol. 6(4), International Journal of Ethics, 479-502 (1896).

[44] J. Dullum, *Sentencing Offenders with Disabilities*, Vol. 17(S1), Scandinavian Journal of Disability Research, 60-73 (2017).

[45] X v. State of Maharashtra, (2019) 7 SCC 1.

[46] State of Maharashtra v. Sukhdev Singh, (1992) 3 SCC 700.

[47] *Id*.

[48] Dullum, *supra* note 44.

[49] Henry M. Hart Jr., *The Aims of the Criminal Law*, Vol. 23(3), Law and Contemporary Problems, 401-441 (1958).

[50] United Nations Convention on the Rights of Persons with Disabilities, December 13, 2006, 2515 UNTS 3, Art. 15, §2.

[51] Atkins v. Virginia, 2002 SCC OnLine US SC 62 : 153 L Ed 2d 335 : 536 US 304 (2002).

[52] Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, Vol. 58(1), Stanford Law Review, 37-66 (2005).

[53] Atkins v. Virginia, 2002 SCC OnLine US SC 62 : 153 L Ed 2d 335 : 536 US 304 (2002).

interpretation provided by the courts. However, there are exceptional situations where the legal liability may be completely absolved.[54] For example, in the case of mentally disabled individuals, it is assumed that they do not possess the requisite intent to commit a crime.[55]

It has also been observed that courts, though not expressly, consider physical or other disabilities as compelling factors in granting bail to the accused. For example, in a Special Leave Petition, the Supreme Court of India reversed the judgement and order of the Rajasthan High Court while granting bail to the accused having eighty-five percent disability,[56] for not being in a 'fit state of mind' and suffering from 'moderate mental retardation'.[57]

Therefore, from the understanding of the bare statutory regulations of the criminal law and the interpretation offered by the courts, it is clear that ability has formed the central core of the law. Thus, the theory of centrality governs the understanding of canons of criminal jurisprudence asymmetrically more than the theory of marginality.

B. CONCEPT OF RESPONSIBILITY IN CRIMINAL LAW

Blame is a social construct.[58] Criminal law rarely imposes supererogatory obligations on an individual, nor does it unfairly infringe upon a person's freedom of choice.[59] In principle, it establishes a set of values which lays down standards of fair expectations from an individual such as *thou shall not kill, steal or cheat*.[60] In law, theoretically, a person is a practical reasoner. When, on account of her desires such a person is infested with irrationality, a breach of an expectation occurs. It is then that the person deserves a punishment.[61]

Both law and morality strongly conform to the theory of 'Just Deserts', which dictates that a person not at fault must not be held responsible.[62] Therefore, they set similar minimum standards for ascertaining liability, and as long as a subject complies with such standards, she abides by the moral obligations

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54 A.T.H. Smith, *Doli Incapax under Threat*, Vol. 53(3), CAMBRIDGE LAW JOURNAL, 426-428 (1994).

55 R. v. McNaughten, (1843) 8 ER 718 : (1843) 8 Eng Rep 718.

56 Prem Singh v. State of Rajasthan, 2023 SCC OnLine SC 128.

57 *Gujarat HC Grants Bail to 'Totally Disabled' Man Accused of Raping 8-Year-Old Girl*, THE INDIAN EXPRESS, August 4, 2022, available at https://indianexpress.com/article/cities/ahmedabad/gujarat-hc-grants-bail-to-totally-disabled-man-accused-of-raping-8068118/ (Last visited on August 4, 2022).

58 Janice Nadler, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, Vol.75(2), LAW AND CONTEMPORARY PROBLEMS, 1-31 (2012).

59 The Human Rights Act, 1998, Art. 7 (United Kingdoms).

60 *Exodus* 20:15 (King James).

61 Paul H. Robinson, *Imputed Criminal Liability*, Vol.93(4), YALE L. J., 609-676 (1984).

62 Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, Vol. 49(3), LAW AND CONTEMPORARY PROBLEMS, 47-80 (1986).

making it unfair and unreasonable to subject her to a penalty.[63] That is, if the subject is not able to discern the morality of her acts and guided by a good reason, breaches the moral or legal expectation of others, it may be concluded that the subject was not capable of making rational choices.[64]

This may be seen in two different dimensions. *First*, the subject may have not been able to comprehend the applicability of relevant moral or legal codes, or *second*, although she may have comprehended the dictates of the code, she may have failed to understand the facts. Though distinguishable, both these dimensions ultimately boil down to the subject's inability to understand what she was doing. This is where the defence of insanity is born and bred.

This, rather than mere moral justification, also involves an element of emotional bias and prejudice.[65] The lawmakers in this case are effected by an implicit and unconscious bias towards persons with disabilities, perceiving them to be members of traditionally disadvantaged groups.[66] This bias is also evident from other defences of similar nature where, for example in India, a child below seven years of age is completely saved from any criminal liability.[67] A lawmaker not only in the interest of fairness provides this exemption, but also there lies a sense of emotional bias pertaining to the blamelessness of a child.[68]

The authors here assert that imputing someone as morally or legally responsible or irresponsible reflects that human beings are susceptible to a rainbow of emotional biases. In the event a subject breach their moral or legal expectations, they are bound to respond by positive or negative connotations, such as reward or admonition.

Unlike natural sciences, legal personhood involves attributing reasons for actions to intentional human conduct.[69] The 'why' becomes the product of human intentions accruing from her beliefs and desires. Suppose, for example, Afham commits murder by striking a pointed tip soldering iron in the heart of his

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63 Fred Feldman & Brad Skow, *Desert*, Stanford Encyclopedia of Philosophy, Winter 2020 Edition, available at https://plato.stanford.edu/archives/win2020/entries/desert/ (Last visited on May 12, 2023).

64 Carl Elliott, The Rules of Insanity: Moral Responsibility and the Mentally Ill Offender (1996).

65 Chioma C. Ajoku, The Insanity Defense, Public Anger, and the Potential Impact on Attributions of Responsibility and Punishment (2015) (PhD Dissertation, Graduate Centre, City University of New York).

66 For a discussion on the Implicit Association Test ('IAT') and the law of implicit bias, *see* Jolls Christine, & Cass R. Sunstein, *The Law of Implicit Bias*, Vol. 94(4), California Law Review, 969-996 (2006).

67 The Indian Penal Code, 1860, §82.

68 Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, Vol. 96(2), Columbia Law Review, 269-374 (1996).

69 Visa A.J. Kurki, A Theory of Legal Personhood (2019).

friend. This may be explained by either folk psychology[70] by referring to a reason-based explanation or a mechanistic method.[71] The latter comes to service more than the former. It provides that the actions of Afham are solely attributed to the functioning of his mind and this ultimately waters down to the bio-chemical working of his brain and nervous system.[72] His choices and perceptions are therefore beyond his control.

The underlying philosophy of the insanity defence is that the individual who is incapable of making a 'rational choice' pertaining to her interaction with the world should not be held responsible.[73] When analysing an individual's relation with his acts and consequences, the defence of insanity involves a meta-judgement, like in this case, excusing Afham for his acts on the grounds of his mental state. Meta-judgment usually involves legal hypocrisy. Legal hypocrisy ensues when any institution, contrary to its avowed values, acts in such a way so as not only to deceive, but also functions in a way contrary to its institutional role.[74]

The legal actors, in this case, exhibit hypocrisy when, by a very statutory mandate, they adjudge someone to be incapable of making a rational choice and confer a stigmatising and prejudicial status, consequentially divorcing an individual from her free will and choice. In other words, a peculiar meta-judgement is dictated pre-actual judgment declaring a person not as a 'moral equal' for the liability of his own acts.[75]

The view of responsibility presented by the authors is not a bright-line concept. There may be numerous possibilities of normative competence or inflexibility. Thus, responsibility must be assigned without disregard to the infinite spectra of cases. Epistemologically, humans have never been able to calculate and determine a yardstick *sans* inaccuracy.[76] Neither does the law demand this. The law requires that rough mitigating circumstances may be made out of them so as to address the moral relevance appropriately.

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[70] In common parlance, 'folk psychology' is a framework of concepts representing the human capacity to explain and predict the behaviour and mental state of other people in the demands of everyday life. *See* Paul M. Churchland, *Folk Psychology and the Explanation of Human Behaviour*, Vol. 3, PHILOSOPHICAL PERSPECTIVES, 225-241 (1989).

[71] G.W. Crile, *A Mechanistic View of Psychology*, Vol. 38(974), AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, 283-295 (1913).

[72] *Id*.

[73] Beatrice R. Maidman, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, Vol. 96, BOSTON UNIVERSITY LAW REVIEW, 1831-2016 (1863).

[74] Ekow N. Yankah, *Legal Hypocrisy*, Vol. 32(1), RATIO JURIS, 2-20 (2019).

[75] Stephen J. Morse, *Immaturity and Irresponsibility*, Vol. 88(1), JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 15-67 (1977).

[76] *Id*.

C. THE EMPIRICAL EVIDENCE

There is a disproportionate representation of individuals afflicted with cognitive impairment and mental illness within the criminal justice milieu.[77] This concomitant with elevated susceptibility to victimisation, underscores the cogent proposition that they ought to be integrally regarded as constituents intrinsic to the purview of the 'core business' of criminal law.

In India, out of its 121 crore population, 2.68 crores, i.e., 2.21 percent accounts for what we colloquially call the disabled population.[78] Further, as per the Prison Statistics India Report, 2021, of the various inmates lodged in the numerous prisons in the country, 1.7 percent (i.e., 9,180 out of 5,54,034) account for mentally ill inmates.[79] Within this group, 41.3 percent (3,787) are convicts, 58.4 percent (5,365) are undertrials and 0.3 percent (23) are detenues.[80] This indicates that people with disabilities, particularly those with cognitive impairment and mental illness, are overrepresented as offenders in the criminal justice system and face high rates of victimisation. As a result, they could be considered part of the 'core business' of criminal law.

Therefore, the authors submit that based on empirical evidence highlighted by the limited statistical data on record, read with the concept of responsibility in criminal jurisprudence and the theoretical texts underlining the criminal law, indicate that the theory of centrality governs the understanding of canons of criminal jurisprudence asymmetrically more than the theory of marginality.

III. DISABILITY– DEFENCE OR JUSTIFICATION?

After reflecting on the relationship between disability and criminal jurisprudence, it is imperative to understand how disability affects liability in criminal law.

In criminal jurisprudence, a defence is a specific condition that negates elements of a particular crime.[81] Justification is a defence in which the person who committed an unlawful violation asserts that she is not criminally

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[77] N. Bonfine, A.B. Wilson & M.R. Munetz, *Meeting the Needs of Justice-Involved People with Serious Mental Illness within Community Behavioral Health Systems*, Vol. 1(4), Psychiatr. Serv., 355-363 (2020).

[78] Office of the Registrar General & Census Commissioner, India, 2011 Census Data, *Population Enumeration Data, Disabled Population by type of Disability, Age & Sex*.

[79] National Crime Records Bureau, Prison Statistics India, 2021, 169.

[80] *Id*.

[81] N. Monaghan, *Defences I: Incapacity and Negating the Elements of the Offence* in Criminal Law Directions (Oxford University Press, 2020).

accountable for her actions because those actions did not meet some specific legal requirements. In a strict sense, justification is a subset of defence.[82]

The authors submit that it would be prudent to consider having just a defence-based approach, contrary to the justification-like approach accorded to insane individuals at present.

Some authors such as Nourse, without criticism or consideration, advance a status-based approach to justify the defence.[83] They maintain that 'insane persons' are not proper subjects for the relations created by criminal adjudication.[84] However, a relational approach to theorising the adjudication of criminal cases is appealing to a critical disability perspective, since work on legal capacity from this perspective is based, in part, on a relational understanding of disability.[85] The core idea of a relational approach is that normative political and legal philosophy is, and should be grounded on people's relational features, in particular their ability to commune with others and be communed with by them.[86]

To illustrate, consider, Sanika, exhausted after a long day's routine returns back from her office at some midnight hour. While returning back she crosses a lane opposite a city civil hospital where suddenly she realises that from a looming darkness, a man is briskly walking towards her. Entrapped in fear, she refrains from looking back at him and keeps moving in the forward direction until she gathers the courage and effort to look back. Needless to say, there is an apprehension of danger to her life. But she is pushed backwards by a superficial enquiry which makes her realise that the man had lost his only child a few hours prior to the incident.

Normally, such behaviour could have caused alarm and even contempt in the eyes of Sanika. However, upon the mere knowledge of the grief of the person whose behaviour is under scrutiny, the conditions transverse. This essentially explains the role of emotions in what is called the 'excuse' in criminal jurisprudence.[87]

When we are 'in the grip of' or 'in the thrall of' an emotion, it has a role in driving our actions. When we make an excuse, we are contending that our

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82 Christopher Bennett, *Excuses, Justifications and the Normativity of Expressive Behaviour*, Vol. 32(3), Oxford Journal of Legal Studies, 563-581 (2012).

83 Tina Minkowitz, *Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond*, Vol. 23(3), Griffith Law Review (2014).

84 Arval A. Morris, *Criminal Insanity,* Vol. 43(3), Washington Law Review, 583-622 (1968).

85 *Id*., 27.

86 Metz Thaddeus, A Relational Theory of Justice (Oxford University Press, 2021).

87 R.A. Duff, *Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion*, Vol. 58(2), Inquiry: An Interdisciplinary Journal of Philosophy (2015).

actions were 'unreasonable in the grip of a reasonable emotion'.[88] This becomes a mitigating or even an exonerating factor.

In criminal law, there are two ways in which such mitigating circumstances are recognised. One approach is to understand the excuse as a defence, while the other is to treat it as a justification.[89] To consider these excuses as defences is to deny that they are justifications, and to consider them as justifications is to deny that they are defences. As Austin is frequently used to explain this distinction, in justification we acknowledge the responsibility but we deny that the act was wrong; in the other, we admit that it was wrong but we refuse to acknowledge complete or partial responsibility.[90]

However, the basic question remains: if the conduct is wrong, how can it be justified? This may be reconciled by considering justification as a 'normative consideration', that, at least partially, supports an action, thereby decreasing, or possibly cancelling, the wrongness of the agent's action.[91] On the other hand, defence is a psychological consideration that lessens, or possibly negates, the agent's responsibility for acting incorrectly.[92] 'Normative considerations' are typically those that are relevant to an agent, such as someone in the respondent's position while deciding whether or not to act in a given way. However, many such reasons may be relevant and, as a result, modify the nature of the act without fully justifying it. We should not be misled to assume that accepting a justification means believing that an act is entirely justified as long as we recognise that justifications might be partial.

Without collapsing defences into justifications, we can find logical space for defences that respond to reason, requiring reasonableness on the part of the agent. Admittedly, when we make a justification for what we did, we also claim to be justified. However, it does not mean we believe our actions were justified. On the contrary, we admit that our actions were unjustified. Instead, we claim to have been justified in another way. In the case of emotional excuses, we claim that our emotions were justified. Similarly, in the event of insanity defence, we claim to be indemnified because we are incapable.[93]

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88 John Gardner, *The Logic of Excuses and the Rationality of Emotions*, Vol. 43, Journal of Value Inquiry, 315, 317 (2009).

89 Guyora Binder, *Justification and Excuse* in Criminal Law (Oxford Academic, 2016).

90 Proceedings of the Aristotelian Society, *The Presidential Address*, October 29, 1956, available at https://doi.org/10.1093/aristotelian/57.1.1 (Last visited on 15th May, 2023).

91 Christopher Bennett, *Excuses, Justifications and the Normativity of Expressive Behaviour*, Vol. 32(3), Oxford Journal of Legal Studies, 563-581 (2012).

92 Suresh Bada Math, Channaveerachari Naveen Kumar & Sydney Moirangthem, *Insanity Defense: Past, Present, and Future*, Vol. 37(4), Indian J. Psychology Medicine, 381-387 (2015).

93 For discussion on how not having a mental state inconsistent with the requisite *mens rea* does not mean that someone was incapable of forming it, *see* Morse, Stephen J. & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, Vol. 97(4), Journal of Criminal Law and Criminology, 1071-1149 (2007).

This is not to be confused with the notion that defences are just partial or insufficient excuses. A wrong is only partially justified if there are reasons, albeit insufficient ones, for its commission. However, according to the viewpoint adopted, a mistake can be entirely justified even though there was no motivation to commit it. What falls under the defence division are not the reasons for our behaviour, but the reasons for our being in the situation that drove us to take that action, such as the reasons for our being as helpless or distraught as we were.[94]

In the given situation, the man was not justified in following Sanika. However, we believe that his motivation to seek Sanika's help must influence the extent to which we should criticise him. This is not because his emotions give us grounds to excuse him, but because his emotions, while not fully justified, fall within the domain of justification. His concern for his dead kid is an important factor in his actions which form a part of his good human life. What might have ventured improperly was that his feelings grew and caused him to disregard certain critical personal boundaries of other individuals. This effectively means that the failure in the reasoning of his emotions leads to a failure in the reasoning of his actions.

IV. THE KATZENJAMMER

It is evident from the bare reading of the theoretical text underlying the defence of insanity that it does not treat the mental state as a continuum. It disregards the conception of mental capacity or the fact that there is a considerable variation in every subject with regard to individual's cognition, behaviour and emotional or psychological regulations.[95]

The focus of this section is a thorough investigation of the complex issues surrounding the defence of insanity in criminal law. A careful examination exposes a glaring flaw in the conventional defence of this claim, one that fails to take into account the complex and continuum-like character of the human mental state. By extension, this dominant paradigm ignores the core idea of mental capacity as well as the wide range of individual differences in cognition, behaviour, and emotional or psychological control. The analysis highlights the substantial differences between this conventional legal framework and the more fundamental equality and non-discrimination ideals entrenched in the Indian Constitution, 1950, and international human rights treaties. It emphasises the fundamental idea that the principle of equality does not exclude fair discrimination based on predetermined criteria, underscoring the transcendent notion that the principle of equality does not preclude reasonable differentiation based on well-defined criteria.

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[94] James Edwards, *Theories of Criminal Law* in The Stanford Encyclopaedia of Philosophy (Edward N. Zalta, 2021).

[95] Ashok Malla, Ridha Joober & Amparo Garcia, *"Mental Illness is Like any Other Medical Illness": A Critical Examination of the Statement and its Impact on Patient Care and Society*, Vol. 40(3), J. Psychiatry Neurosci., 147-150 (2015).

It needs no re-iteration that persons with disabilities are equal to others before and under the law.[96] But the defence of insanity disregards this understanding of the law and belittles the concept of equal recognition before the law, and guarantee of equality and non-discrimination, which effectively leads to a violation of right to access justice of the subject, and may lead to an indefinite incarceration.

A. EQUAL RECOGNITION BEFORE THE LAW

One Constitution after another delineates equality *sans* distinction. The Indian Constitution, for example, when prohibiting discrimination[97] based on religion, race, caste and the like; or when abolishing titles,[98] or untouchability,[99] suggests that there are no objects of domination of one human by another in the modern day. Liberal constitutions around the world subscribes to the idea of John Stuart Mill when he states "over himself, over his own body and mind the individual is sovereign".[100] Autonomy is quintessentially linked with legal capacity.[101] In the words of Quinn, it is significant as a 'sword to enable one to make one's own choices' and 'a shield fending off others' purporting to make decisions for herself.[102]

The term 'legal capacity' has many definitions. There is no universally accepted definition. Canonical examples such as the competence to contract, marry, vote, among others, usually help us in defining the term.[103] Though it has no clear-cut definition as such, yet in diverse matters, it serves as an instrument in deriving what Menaka Guruswamy calls the 'bouquet of rights' including legal representation, the right to consent, and resist State actions.[104]

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96 *United Nations Convention on the Rights of Persons with Disabilities*, December 13, 2006, 2515 UNTS 3, Art. 27.

97 The Constitution of India, Art. 15.

98 *Id*., Art. 18.

99 *Id*., Art. 17.

100 John Stuart Mill, On Liberty (1859).

101 Lucy Series, *Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms*, Vol. 40, Int. J. Law Psychiatry, 80-91 (2015).

102 Gerard Quinn, *Rethinking Personhood: New Directions in Legal Capacity Law & Policy*, April 29, 2011, available at https://www.universityofgalway.ie/media/centrefordisabilitylawandpolicy/files/archive/Submission-on-Legal-Capacity-to-the-Oireachtas-Committee-on-Justice,-Defence-&-Equality-(August,-2011).pdf (Last visited on May 16, 2023).

103 Nev Jones & Mona Shattell, *Beyond Easy Answers: Facing the Entanglements of Violence and Psychosis*, Vol. 35, Issues in Mental Health Nursing, 809-811 (2014).

104 *Same-Sex Marriage Supreme Court LIVE Hearing |SC Live | India Today LIVE*, India Today, April 18, 2023, available at https://www.youtube.com/watch?v=_xZHLv0MrVM (Last visited on May 16, 2023).

Article 6 of the Universal Declaration of Human Rights,[105] read along with Article 16 of the International Covenant on Civil and Political Rights,[106] forms the core of the right to legal recognition in modern-day international jurisprudence. These articles were incorporated in the Charter to address the issues of colonial regimes that routinely denied the colonised subjects their legal right to personhood.[107] This bears relevance to the colonial mindset where people with mental disabilities were liked as 'beastly' and were treated akin to a wild animal.[108]

This standard on equal recognition has also been adapted in Convention on Rights of Persons with Disability ('CRPD'). Article 12 of the CRPD,[109] deals with legal capacity in two ways: *firstly*, the legal capacity to hold rights and *secondly*, the legal capacity to assert, create, modify or extinguish legal relationships arising out of such rights. The paradigm of legal capacity outlined in Article 12[110] can be best summarised as requiring both formal and substantive equality. It mandates governments to abandon the current approach in favour of supporting the exercise of legal capacity while respecting the person's autonomy, will, and preferences.[111]

Further, Article 19,[112] also in the same vein, protects the right to live and be included in the community on an equal basis with others, and it prohibits any compulsory living arrangements, such as institutions. This reflects the same paradigm of respecting autonomy while still providing support and accommodation.[113]

Legal personality in, an unadorned way, is the ability to discharge legal obligations and rights.[114] Article 12 of the CRPD,[115] is associated with both,

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[105] *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810 (December 10, 1948) Art. 6.

[106] *Internal Covenant on Civil and Political Rights*, March 23, 1976, 999 UNTS 171, Art. 16.

[107] United Nations Office of the High Commissioner for Human Rights, *Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles-Article 6*, November 15, 2018 available at https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-6 (Last visited on May 16, 2023).

[108] Kahler v. Kansas, 206 L Ed 2d 312 : 589 US (2020).

[109] *United Nations Convention on the Rights of Persons with Disabilities*, December 13, 2006, 2515 UNTS 3, Art. 12.

[110] *Id*.

[111] United Nations, *Article 12– Equal Recognition Before the Law*, available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html (Last visited on May 16, 2023).

[112] *Id*., Art. 19.

[113] United Nations, *Article 19– Living Independently and Being Included in the Community*, available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-19-living-independently-and-being-included-in-the-community.html (Last visited on May 16, 2023).

[114] Bryant Smith, *Legal Personality*, Vol. 37(3), THE YALE LAW JOURNAL, 283-299 (1928).

[115] *United Nations Convention on the Rights of Persons with Disabilities*, December 13, 2006, 2515 UNTS 3, Art. 12.

the legal personality, and the capacity to act.[116] It is intimately connected to the idea of personhood.

It is not uncommon for society to deny the most basic right to an individual to be recognised as a legal person while recognising non-human persons as legal personalities. For instance, chattel slaves were not recognised as legal individuals under American civil law.[117] In the meantime, several jurisdictions now acknowledge some animals as having legal status,[118] and 'Mother Earth' is given legal status by Bolivian law.[119] In this context, what has to be perceived is that the mere conferral of legal personality does not specify what rights or duties are held; it is the rights flowing from it that bear relevance. However, even defiance of such a basic right would constitute what William Blackstone called in the eighteenth-century 'civil death'.[120]

If Article 12(1) of the CRPD,[121] is read conjunctively with other provisions elucidated earlier, it tends to impose a negative obligation on States to recognise all persons as capable of bearing rights and discharging duties within both criminal and civil justice systems.[122] Therefore, any law or practice which impairs a person from being recognised under the law would be a violation of the CRPD.

Through a declaration of judicial nature by the court or any authorised administrative body, legal capacity may be formally restricted.[123] For instance, through an administrative or court declaration of 'incapacity', or informally, through legal defences for actions that would typically be viewed as unlawful invasions of someone's privacy or damage to their property, for example.

Further, as the CRPD committee highlights, even after formal declarations abolishing the defence of incapacity, some form of substitute decision-making remains.[124] Furthermore, *de facto* constraints on legal capacities may occur when society operates in a way that routinely denies disabled individuals their basic legal rights to self-determination, even if there is no source of law that restricts the legal capacity of disabled persons. For example, '*de facto* guardianship'

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116 Smith, *supra* note 114, 102.

117 Dred Scott v. John F.A. Sandford, 15 L Ed 691: 60 US 393 (1856).

118 A. Peters, *Toward International Animal Rights* in Studies in Global Animal Law, 109-120 (2020). not accessed.

119 The Law of the Rights of Mother Earth, 2010 (Bolivia).

120 Sir Blackstone, Commentaries on the Laws of England in Four Books (1753).

121 *United Nations Convention on the Rights of Persons with Disabilities*, December 13, 2006, 2515 UNTS 3, Art. 12(1).

122 Smith, *supra* note 114, 102.

123 *See* The Prohibition of Child Marriage Act, 2006, §13(1); The Representation of People's Act, 1951 §8; The Indian Contract Act, 1872, §10.

124 I. Bantekas, M.A. Stein & D. anastasiou, The UN Convention on the Rights of Persons with Disabilities: A Commentary (Oxford University Press, 2018).

through societal norms like families excluding disabled relatives from making decisions about marriage, purchasing or renting a home, or inheriting.[125]

B. GUARANTEE OF EQUALITY AND NON-DISCRIMINATION

Inter-alia, this summarises to violate the guarantee of equality and non-discrimination. At least, the Indian version of the principle of equality does not prevent the State from making differentiation between persons.[126] In fact, the State always has the power and is under constant obligation to treat dissimilarly situated people, differently.[127] Thus, the State has the power to make reasonable classifications.[128] But, for differentiation to be held lawful, *first*, it should deal with members of a well-defined class, and *second*, it should not be obnoxious.[129]

The class that §84 of the IPC [130] makes by the virtue of division between insane and other persons is not well defined. Primarily, the law on the insanity defence, as evolved by the courts, has remained unamended for the last 150 years, and the judicial mind too continues to be guided by the same old-fashioned notions and ideas. Indian jurisprudence has not yet established a convincing approach regarding what 'unsoundness' implies, because it is based on the nebulous concept of 'unsoundness of mind'.[131] Applying legal standards based on concepts majorly pertinent to fields like psychiatry and psychology have proven challenging for courts. As in Kumari Chandra v. State of Rajasthan,[132] even when courts use modern-day resources such as the Diagnostic and Statistical Manual of Mental Disorders, the standards utilised remain antiquated and *vice versa*.

Additionally, there are substantive inconsistencies, which have an effect on how the test under §84[133] is administered. The first limb of the definition of §84[134] of 'unsoundness of mind' and its application are both disputed by the courts.[135] This is aggravated by the ambiguous timescale used to assess mental instability, which might range from 'not too remote in time' to 'proximate to the occurrence'.[136]

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125 *Id*.
126 State of W.B. v. Anwar Ali Sarkar, (1952) 1 SCC 1 : AIR 1952 SC 75.
127 Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : AIR 1981 SC 487.
128 State of W. B. v. Anwar Ali Sarkar, (1952) 1 SCC 1 : AIR 1952 SC 75.
129 Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489 : AIR 1979 SC 1628.
130 The Indian Penal Code, 1860, §84.
131 Vishnu Wardhan Singh & Khushi Doshi, *Insanity as a Defence in IPC: A Critical Analysis*, Vol. 3(1), Indian Journal of Legal Review, 801-806 (2023).
132 Kumari Chandra v. State of Rajasthan, 2018 SCC OnLine Raj 1899 : (2018) 3 RLW 2382 (Raj).
133 The Indian Penal Code, 1860, §84.
134 *Id*., §84.
135 Soumitra Pathare, *Widely Cited, but Still Undefined*, The Hindu, April 23, 2017, available at https://www.thehindu.com/sci-tech/health/widely-cited-but-still-undefined/article18191442.ece (Last visited on November 23, 2023).
136 Prakash Nayi @ Sen v. State of Goa, 2023 LiveLaw (SC) 71.

The definition and criteria for legal insanity are likewise unclear.[137] In terms of the level of incapacity that must be demonstrated as well as the method for determining, inferring, or assuming incapacity within the framework of the totality of the circumstances, (that is, in the established behaviour and norm concerning the standard of the trial or, in general, the procedure concerned in whole) the law is inconsistent.[138] The jurisprudence surrounding the insanity defence has imported concepts and norms that lack any discernible meaning or a systematic approach, creating a framework that is backward and cannot be upheld as a legal requirement. It could be beneficial to review how §84 of the IPC[139] is written in order to make it sounder and more applicable.

Further, the division is also obnoxious in nature as it creates categories of individuals who are deemed 'undeterrable' like people who have infectious or contagious diseases and are 'enemy combatants'. The discrimination in this case remains obvious and adversely affects people with psychological disabilities. The law, both national and international, prohibits this kind of discrimination based on psychological abilities.

Thus, the division created by this legal framework is equally obnoxious in nature, generating categories of individuals labelled as 'undeterrable', a characterisation that adversely affects those with psychological disabilities. As highlighted, this contravenes both national and international laws that prohibit discrimination based on psychological abilities. The enduring consequence of this discrimination permeates various aspects of legal practice, ultimately undermining the fundamental right to access justice. Therefore, there is an urgent need for legal reform and the alignment of legal capacity and responsibility with the principles of equality, non-discrimination, and justice.

C. RIGHT TO ACCESS JUSTICE

The undeviating effect of this discrimination bears its impact on the most basic right to access justice. It gives legal effect to mental incapacity and stigmatises the individual in question as well as all people with psychosocial and intellectual disabilities. Further, the denial of criminal responsibility based on insanity or mental incapacity discriminates against people with disabilities and undermines the right to a free and fair trial. In a complex legal context, the defence of insanity often hinges on the assertion that an individual's mental incapacity denies them criminal responsibility, which inherently leads to a denial of their essential existence within the legal framework.[140] This profound discrimination profoundly

[137] Gerben Meynen, *The Insanity Defense* in Law and Mind: A Survey of Law and the Cognitive Sciences, 317-341 (2021).
[138] *Id*., 115.
[139] The Indian Penal Code, 1860, §84.
[140] Wallace A. MacBain, *The Insanity Defense: Conceptual Confusion and the Erosion of Fairness*, Vol. 67(1), Marquette Law Review, 1-32 (1983).

impacts the foundational right to access justice. It not only legitimises the societal stigmatisation of individuals with psychosocial and intellectual disabilities but also extends to all individuals facing similar challenges. By permitting the denial of criminal responsibility based on insanity or mental incapacity, this legal framework systematically discriminates against individuals with disabilities and fundamentally undermines the universal right to a free and fair trial.

The presence of the accused at his trial governs and informs the institution of a fair trial in the international jurisprudence governing the most basic human rights.[141]Article 14(2) of the United Nations Draft Covenant;[142] Article 6(2) of the European Convention;[143] Article 6(2) of the Inter-American Draft Convention,[144] all expressly guarantee an accused person the right to be tried in his presence. Rightly so, in a case involving civil procedures, the European Commission decided that, depending on the type of case, a party's presence may very well be a requirement for a 'fair' hearing, either in the sense of a 'fair trial' or based on the equality of the parties.[145]

In criminal cases where the accused's life or liberty are in danger, there is at least a good argument for this. At the minimum, the essential existence of a human being cannot be denied in a criminal trial only on the ground that she does not comply with the standards of cognition set by society.

D. INDEFINITE INCARCERATION

Further, it needs no reiteration that in a multitudinous number of cases,[146] it has been demonstrated that acquittals on the grounds of insanity lead to declarations effectively reading unfitness to plead. Although this saves the accused from incarceration in regular prisons, it leads her transfer to such specific prisons designed for mentally challenged individuals, such as mental health institutions. These institutions, leave it to the discretion and judgment of medical professionals which in turn subjects them to perpetual and indefinite incarceration.[147]

When people are exonerated on the basis of insanity, they are frequently sent to specialist facilities or mental health institutes rather than ordinary

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[141] William V. Griffin, *Criminal Trials, Presence of Accused*, Vol. 17(2), The Yale Law Journal, 110-112 (1907).

[142] *United Nations Convention on the Rights of Persons with Disabilities*, December 13, 2006, 2515 UNTS 3, Art. 14(2).

[143] *European Convention on Human Rights*, November 4, 1955, 213 UNTS 221, Art. 6(2).

[144] *Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities*, 1999, Art. 6(2).

[145] DG v. Secretary of State for Work and Pensions, (ESA) 2010 UKUT 409 (AAC).

[146] Shrikant Anandrao Bhosale v. State of Maharashtra, (2002) 7 SCC 748; Bapu v. State of Rajasthan, (2007) 8 SCC 66.

[147] Linda R. Steele, *Troubling Law's Indefinite Detention: Disability, the Carceral, Body and Institutional Injustice*, Vol. 30(1), Social & Legal Studies, 80-103 (2021).

prisons in many countries.[148] While the goal of these facilities is to offer people with mental health concerns the appropriate therapy and care, it is important to give careful thought to the presumption that people with mental disabilities acquitted on the basis of insanity, will inevitably spend their lives in such specialised facilities.

The idea of planned sentencing for these people, based on the crimes they committed, still poses a serious worry, even though the length of their stay in such facilities may be at the discretion of medical specialists. The length of their stay is decided by medical professionals' judgment and discretion. There is enough evidence to suggest that stigmatisation and discrimination in such institutions are widespread and sometimes severe.[149] Concerns over the provision of subpar physical healthcare to those suffering from mental illness are also becoming more prevalent.[150] Beyond this, reports have indicated that certain facets of psychiatric practice are inconsiderate, demeaning, or even incapacitating. This results in the permanent or indefinite imprisonment of people with mental disabilities.[151] Therefore, despite its good intentions, there is a dissonance between the goal of these institutions and the outcome.

This worry is caused by the fact that, in practice, those who have been exonerated on the basis of insanity, frequently encounter a lack of clarity regarding the conditions of their release. There may not be a set or specified period of time that they must stay in these facilities. Instead, their release is dependent on how their mental stability or development is regarded, which is often a nebulous and personal standard.

Furthermore, this system may unintentionally lead to situations in which people who need to have their rights and freedoms restored are institutionalised for lengthy periods of time or even eternally. Although the purpose of these specialised facilities is to offer the proper care, the absence of clear release standards and the possibility of indefinite detention may be viewed as a violation of their human rights and a problem that requires careful consideration and potential correction.[152]

Therefore, while the placement of people who have been found not guilty due to insanity in specialised facilities is meant to ensure their wellbeing, the lack of transparency and clarity regarding the conditions for their release raise

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[148] Okasha A., *Mental Patients in Prisons: Punishment versus Treatment?,* Vol. 3(1), World Psychiatry (2004).

[149] G. Thornicroft, D. Rose & N. Mehta, *Discrimination Against People with Mental Illness: What Can Psychiatrists Do?*, Vol. 16(1), Adv. Psychiatr. Treat (2010).

[150] Ontario Human Rights Commission, *Minds that Matter: Report on the Consultation on Human Rights, Mental Health and Addictions, Toronto, Ontario*, (2012).

[151] *Compulsory Commitment: The Rights of the Incarcerated Mentally Ill*, Vol. 1969(4), Duke Law Journal, 677-732 (1969).

[152] Okasha, *supra* note 148.

worries about possible indefinite detention, necessitating a fair and rights-based approach. This problem demonstrates the need for a thorough and equitable legal system that respects both the rights of people with mental disabilities and the security of society.

V. CONCLUSION

The authors, by analysing the theory of law along with the empirical evidence, go on to establish a unique nexus between capacity and rationality. This is then used to substantiate the understanding of the insanity defence and the quandary that it presents in the status quo. The authors argue on the counts of equality and justice to point out inconsistencies in the modern-day approach and the need to expand the understanding of sanity. This is done with due regard to growth in the area of human psychology, so that a subjectivised *mens rea* can enable an individual to bring to the table a range of mental capacity evidence.

A critical disability viewpoint requires us to resist excluding people with disabilities from the social order and instead create an inclusive social order. This is a comprehensive and multi-level obligation stemming from the principles of law and philosophy. Equality in its true sense cannot be achieved by changes in the language of law in an attempt to conceal an exclusionary purpose, intention and effect.

The inclusive social order which we aim to achieve does not single out people for scrutiny based on what others deem irrational. Nor can we regard rationality and the ability of comprehension as mascots of our social or legal norms and relations, contrary to some of the assumptions that underpin the insanity defence. The law may use reasoned methods, but it is not required to elevate reason or rationality as a supreme human function. The disability movement is familiar with the critique of such human functions.

At present, those who are in the realm of insanity are theoretically put beyond the sphere of criminal adjudication, but it is high time that we realise that the subject's perception and beliefs open the door to accepting varied reality which can, on no account, be denied. The present-day subjectivised defence of insanity focuses too narrowly on the respondent's mental condition when objective circumstances could be better understood to bring out a more straightforward claim of justification.

The use of assistance and accommodations aimed at promoting respect for individual autonomy, will, and preferences gives equitable chances for individuals with disabilities to participate in legal relationships from which they would otherwise be excluded. Theorising a disability-inclusive approach to criminal law and process, both narrowly as support and accommodation in criminal

proceedings and more widely in the substantive concept of criminal culpability, may benefit from devoting attention to the relational component of the law.

Though it may be plausible, the authors do not propose to completely eliminate the insanity defence. They suggest reading defence claims not viewing the mental state as a continuum, but as a varied spectrum of possibilities.

There is no question that the approach outlined here will result in fewer acquittals of persons with mental illness as compared to current insanity tests. If there is concern about the dispositional repercussions of convicting a mentally ill person, the right response is by improving rehabilitative programmes for all individuals who require treatment, not a special defence that has no required relevance to the rehabilitative requirements of its beneficiaries. People with mental illnesses are no less capable of controlling their behaviour than many others.

Preference should be given to judges to consider a broader concept of *mens rea*, which would result in mainstreaming within existing doctrine. Any innovation should be broadly defined and accompanied by democratising procedural innovations aimed at achieving 'equality', rather than drawing attention to differences through doctrine.

The most effective way to achieve equality involves ensuring that the legal system as a whole accommodates the requirements and circumstances of individuals with disabilities. Using the inclusively designed components and concepts, civil and criminal responsibilities, should be reformed, if necessary, to be equally sensitive to the needs and circumstances of individuals with disabilities. The assumption of the insanity defence that certain people cannot form the mental state required for criminal responsibility is rejected by the disability rights discourse.