

An Enigma Called Insanity: Exploring the Defence of Insanity in Criminal Law with Special Reference to Multiple Personality Disorder

*Souvik Roy¹
Samantha Ray Das²*

Abstract

The human brain is one of the most complex creations of nature and so is the defence of insanity, arising out of the same human mind. This paper elaborately discusses the different landmark rules that have affected the interpretation of this defence from time to time. Next, it also highlights the different forms of insanity mainly dealing with automatism and psychopathy while debating whether these could be fairly categorized under the defence of insanity. Furthermore, explicit discussion on the phenomenon of multiple personality disorder (MPD) coupled with a unique attempt to link MPD with the defence of insanity in criminal law has been ventured upon. The paper, therefore further enumerates the different approaches adopted in order to interpret MPD in the light of insanity defence, namely the Unified Approach, the Host Personality Approach and the Clinical Approach. Lastly, the researchers also proposed of introducing and applying the Brain Electrical Oscillation Signature Profiling Test vis-a-vis BEOS test, to determine the certainty of the existence of the disorder in the suspect, to a great extent. The test could help in ascertaining the criminal culpability to a greater degree. This research piece attempts to justify the above proposition by taking a hypothetical scenario and explaining the technique involved. The authors of this paper hereby declare that the same is original and unpublished before on any platform.

Key Words - *Insanity, McNaughten Rules, Multiple Personality Disorder, BEOS, Automation, Psychopathy, Alters, Intention*

1. Introduction

The human brain is one of the most complex and complicated creations of nature. It has innumerable ways of functioning and many other ways of controlling the body's conduct. Despite the huge leap taken by medical science, towards development and innovation in the same arena as well as that of technology, one can often find studies which indicate that scientists and medical scholars, through emerging technology, have tapped and understood only minimal share of the vast power of the brain. There still remains an ocean of mysteries that need to be solved if one wishes to

¹ Assistant Professor, School of Law, KIIT Deemed to be University, Bhubaneswar, Odisha

² Student, B.A. LL.B. (Hons.), School of Law, KIIT Deemed to be University, Bhubaneswar, Odisha

understand the functioning of the brain wholly; such is the enigma called the human mind.

When one enters the arena of criminal law, the significance of human mind and its consciousness becomes a matter of paramount importance. The two well-established elements of criminal law are *actus rea*, which denotes the action and *mens rea*, that denotes the guilty intention. While *actus rea* can be significantly backed by physical evidence in most cases, proving the requisite *mens rea* is what continues to be a dilemma often witnessed in the courtroom. In criminal law, both *actus rea* and *mens rea* must coexist in order to hold an accused responsible in the eyes of law. Mere evidence of the fact suggesting that the accused committed the crime is not sufficient enough to convict him. It must be evidenced beyond reasonable doubt that the accused possessed an intention to do what he did. Until and unless, the guilt is not proven, any accused is presumed to be innocent. Such is the importance of intention in any criminal case. When this scenario is accompanied by a case where the accused claims to be of unsound mind and that he did so under the influence of such unsoundness of mind, then it becomes even trickier for the Court to decide the matter. Such form of defence is known to be the plea of insanity. The defence of insanity is found in many legal systems. However, the way each system interprets insanity, differs from nation to nation. In India, for instance, Section 84 of the Indian Penal Code lays down the provision for such a defence. It says that “no person shall be guilty of any offense, if he, by reason of unsoundness of mind, is unable to know the nature of his act and that such act is either wrong or contrary to law, at the time of committing the offence”. Here, ‘nature of the act’ refers to the physical aspect of the concerned conduct. This section acquits any person who, while committing the offence, failed to appreciate what he was doing physically, or even if he did so, to know that what he was doing is either a moral wrong or a legal wrong. The Indian Penal Code derives the foundation for this section, from the well-known M’Naughten Rules, which arose out of the famous M’Naughten case which has been later discussed in detail. While India and some countries follow the M’Naughten standards, yet there are others who base their insanity laws on different rules laid down in the legal history.

To understand the working and application of the defence of insanity, one must look into the four different landmark standards established over time, to interpret the issue of insanity with respect to criminal responsibility. Proper acquaintance of these standards would enable one to identify the common universal ingredients that strengthen the claim of insanity and also the loopholes in each one of them. Further, a closer look at the supposed forms of insanity and their respective interpretations in the courtroom would be of immense help in acquiring a clearer understanding of the issue and moreover, to suggest and formulate possible reforms or

improvements that would enable delivery of maximum quantum of justice to the individual parties concerned as well as the society as a whole.

2. Landmark Rules

2.1. The McNaghten Rules

In 1843, Daniel McNaghten was constantly under a hallucination that Sir Robert Peel, the Prime Minister of that time, was after his life and would soon persecute him. Frustrated with this imagination, McNaghten made up his mind to kill the Prime Minister in order to end his ordeal. He did make an attempt but mistakenly shot Mr. Drummond, the Private Secretary, who resembled the Prime Minister in outward appearance. Following this, McNaghten was tried at the Central Criminal Court at Old Bailey and was found to be not guilty by reason of being insane. The “House of Lords” propounded a group of questions for the Crown’s Judges to answer. Their answers framed what came to be famously known as the McNaghten Rules. The answer in its essential parts read³,

“The jurors ought to be told in all cases that every man is presumed to be sane, to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be proved that (A) at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, (B) as not to know (1) the nature and quality of the act he was doing, or, if he did know it, (2) that he did not know that he was doing what was wrong. (3) that if the defendant labours under a partial delusion only, and not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.”

The McNaghten case was the foundation stone of the plea of insanity which had laid down a set of precisely defined rules that are to be applied in any case involving the defence.

In *R. v. Kemp*⁴, the defendant lashed out at his wife with a hammer. He argued that his act was a result of loss of consciousness due to arteriosclerosis. Arteriosclerosis is a condition which leads to thickening and hardening of the arteries, as a result of which the arteries lose their elasticity leading to congestion of blood in the brain. Among the symptoms of arteriosclerosis are confusion, difficulty in understanding, speech and vision.

³ Glanville Williams, *Textbook of Criminal Law* (Universal Law Publishing Co. Pvt. Ltd., Delhi, India, 2009)

⁴ (1957) 1 QB 399

The prosecution used the McNaghten Rule to strengthen their argument by asserting that arteriosclerosis was not a “disease of the mind”, rather it was a bodily impairment. Hence, the plea of insanity would not work in the present case. The court held that arteriosclerosis could amount to a ‘disease of the mind’ due to its effect on a person’s reasoning or decision-making faculty. Devlin J. observed that the term ‘mind’ in law does not specifically refer to brain. It refers to “the mental faculties of reason, memory and understanding”.

The Court also observed that for enjoying the usefulness of the plea of “unsoundness of mind”, no line of differentiation should be constructed between ailments of the brain, and those of the body hampering the functioning of the brain. Thus, allowing the plea of insanity and widening the interpretation of the McNaghten Rule, the jury gave a judgement of guilty but insane.

These Rules, though followed widely, are alleged to be broad and narrow simultaneously. They are too broad because it is suggested by them that each failure of a human to judge the “nature and quality of the act” or that it was immoral will be enough to negate liability.⁵ If the defendant has made a cognitive or critical error, then it is entitled to be excused only and only if his evaluation and cognition is radically isolated from his background values and beliefs.⁶ On the other hand, the Rules are too narrow in the sense that it does not protect people who are aware of “the nature and quality” of their act but whose general capacities are sufficiently lacking that they do not possess status-responsibility at all.⁷ The Rules do not appreciate the importance of time for responsibility. There maybe defendants who undergo a persona change such that the desires and beliefs that they carry are not indicative of their settled character.⁸ Such people may have all of the capabilities of a sound accused at the time at which the action is performed, but they lack liability for their actions on the grounds that during that time *they were not really themselves*.⁹

2.2. The Irresistible Impulse Test

The “Irresistible Impulse” principle announced its entry into the legal system of the United States of America in 1844. Abner Rodger murdered a prison guard, after stabbing him inside the prison where Rodger was held. The sole plea put up was that he suffered from an “unsound state of mind” during the stabbing. Following this, Rodger was held not to be

⁵ Victor Tadros, *Criminal responsibility*, (Oxford University Press Inc., New York, 2005)

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.

guilty of the offence by reason of insanity, by applying the Irresistible Impulse Test. In this case, the Chief Justice stated;¹⁰

“If then it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgement, and whether the prisoner...acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.”

In *Parsons v. State*¹¹, the court ruled that despite the fact that the accused was capable of distinguishing correct from incorrect, he was subjugate to "the duress of such mental disease [that] he had ... lost the power to choose between right and wrong" and also that "his free agency was at the time destroyed," and hence, "the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely." In the year of 1897, the US Supreme Court applied the "Irresistible Impulse test" and hence, disapproved of the McNaghten Rules absolutely.¹² Another popular case in which this standard was utilized is the case of Lorena Bobbitt, who had mutilated her spouse's penis after he came back home, intoxicated and ravaged her¹³, in 1994 where she was held to be not liable of homicide when her counsel put up the plea of the Irresistible Impulse principle.

In English law, the standard was introduced in *R. v. Byrne*¹⁴, where Chief Justice Parker gave a broader meaning of "abnormality of mind" to consider those people who lack "the ability to exercise will-power to control acts in accordance with their rational judgment".

The essence of the Irresistible Impulse Rule lies in the idea that the accused, although knew his act to be criminal in nature, was overcome with such a sudden, uncontrollable and irresistible impulse that he lost his power to regulate his own acts. However, this test somewhere loosens the grip over those offenders who unfairly walk away with the advantage of being given the benefit of doubt just because they were allegedly not able to control their actions, despite it being proved that they were very well aware

¹⁰ *Commonwealth v. Rodgers*, 7 Metcalf 500 (Mass. 1844)

¹¹ 222 A.2d 326 (1966)

¹² A. H. Garrison, "The history of the M'Naghten insanity defence and the use of post-traumatic stress disorder as a basis of insanity" . *American Journal of Forensic Psychology*, 39-88 (1998).

¹³ R. Bell, Crimes below the belt: penile removal and castration.(2010).

¹⁴ (1960) 2 QB 396 (CCA, England)

of the wrongful nature of their act. Also, the lack of scientific evidence to prove the degree of impairment of will power caused while commission of the offense facilitates the misuse of this test in the court of law. The defendant often gets the benefit of doubt in such cases as it is extremely difficult for the prosecution to prove the degree of impairment caused in the mind of the accused and thus, judge whether it was controllable or not. Thus, there is a great chance of witnessing gross miscarriage of justice in such cases.

2.3. The Durham Rule

In the well-known case of *Durham v. United States*¹⁵, the concerned person was charged with a break-in. He was adjudged to be dealing with “psychosis with a psychopathic personality” by two psychiatrists. He also had a prolonged history of prior imprisonment as well as hospitalization. Ultimately, a new standard of testing the insanity defence came up which came to be popularly known as “the Durham Rule”.

The “Durham Rule” was considered a very momentous progress of the insanity plea in history as it substituted chaste discourse with more impartial scientific determinations as a consequence of advancements in the subject area of psychological research¹⁶. The Durham Rule preaches that the accused is not “criminally responsible if his unlawful act is the product of a mental disease or defect.” This rule demanded the jury to determine as to whether the accused was troubled by disease or not, and whether or not there was actually a causative kinship between the illness and the act committed. The object of “the Durham rule” was to withdraw from focusing on mere indications to accepting the actual diagnosis of intellectual disorderliness. It was a method to make a concrete proof stand against the determination of a mental state based on mere symptoms without scientific and psychiatric finding.¹⁷

The Durham Rule regrettably was deemed unacceptable without gaining complete assistance in 1972 with the *US v. Brawner*¹⁸ case in the D.C. Circuit of Appeals¹⁹. The trials were to judge whether or not the defendant had a psychological illness, imperfection, or disorder and whether

¹⁵ United States Court of Appeals, District of Columbia Circuit (1954) 214 F 2d 862, 45 ALR 2d 1430.

¹⁶ “A Crime Of Insanity, 2012”.

¹⁷ R. Simon, “The defence of insanity”. *Journal of Psychiatry and Law*, 29-40 (1983)

¹⁸ 471 F.2d 969 (D.C. Cir. 1972)

¹⁹ A. H. Garrison, “The history of the M’Naghten insanity defence and the use of post-traumatic stress disorder as a basis of insanity”. *American Journal of Forensic Psychology*, 39-88 (1998).

that had any causative relationship to the offense done.²⁰ The Court stated that the primary reason they were departing from this test of insanity was that it put greater undue reliance upon the testimony of medical experts.

2.4. Model Penal Code

The then prevalent tests for insanity were vulnerable to certain criticisms, following which, the American Law Institute (ALI) established a brand-new principle for its Model Penal Code in 1962. According to this test, “a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law”²¹. Also what is to be noted is that the Model Penal Code Test is designed in such a way so as to incorporate the emphasized principles from all the previous tests. It aimed to bind them altogether and present an inclusive and extensive test. There was cognition of the conflict between wrong and right from McNaughten, absence of controlling ability as in the “Irresistible Impulse Test”, and finding of psychological imperfection as in Durham.²²

The Model Penal Code presents a different conceptualization of the insanity defence. According to this test, a man is not liable for criminal action if, while commission of the same, he suffered from a mental ailment or flaw which resulted in the him lacking the substantial ability to acknowledge the unjustness and immorality of his or her actions or to comply his or her actions as per the necessities under the law. He must be substantially incapable to control his own conduct, even if he were conscious of his actions.²³

3. Forms of Insanity

The defence of insanity is known to be a complicated defence with respect to its application in the legal history. The trouble arises from the fact that, irrespective the distinguishable characteristics of every plea, the defences also have shared nodes of deviation. One of these is embedded in the flaws of cognizance. On one hand, the point that pops up is whether the imperfection in knowing is so grave, that the action concerned may be considered as incognizant, in which scenario it is therefore unwilled. At the other end of the tunnel, the imperfection in awareness usually stems in a

²⁰ H.Fingarette, “What is criminal insanity, in ethics, public policy, and criminal justice”.
Gunn and Hain, Publishers Inc. (1982).

²¹ *Inderbitzin, R. (1969). Criminal Law—The ALI Model Penal Code Test.*

²² “CriminalLaw.” (2012) *Enotes.com*. Retrieved from <http://www.enotes.com/criminal-law-reference/insanity-defence> (last visited on 31st March 2018)

²³ *R. v. Codere (1916) 12 Cr.App.R.21*

disorganized mind. In the later case, the defendant might suitably take a defence of insanity.

With respect to imperfection of awareness, conduct leading to present claims of insanity and nonvoluntary actions may be rationally grouped into three categories:

- (1) "Conduct that falls exclusively within the kingdom of insanity, namely conduct caused by a malady of the mind which may result in defects of consciousness but does not lead to unconsciousness, for example, a condition that causes the accused not to understand the guiltiness or nature of his action, although he may be fully conscious."
- (2) "Conduct that falls solely within the arena of unwilled conduct, namely conduct caused by a defect of consciousness independent of mental incapacity, as, for example, actions performed immediately following an affliction that has handicapped the actor from regulating his behaviour.²⁴ This category is known as sane automatism or non-insane automatism."
- (3) "Conduct that falls within the shared area of both insanity and involuntary behaviour, which is known as insane automatism. At one extreme of this category are cases in which the action was clearly committed unconsciously, but it is doubtful whether the malfunction is the consequence of mental illness. Especially advanced cases of arteriosclerosis would fall into this category.²⁵ At the other extreme are cases in which the behaviour stems apparently from a sickness of the mind, yet it is doubtful whether during the same time the actor was unconscious. Especially intense forms of dissociation states might fall into this category.²⁶"

Greater trouble occurs when one attempts to construct the line of distinction between "non-insane and insane automatism". For this purpose, the lawful structure has evolved a couple of deciding standards - the social and the medical. The varied interpretations of these two criteria may become clearer by scrutinizing the Charlson²⁷ and Kemp²⁸ cases. There are many fact-based sameness between both the cases: in Charlson, a father was charged with "striking and pushing his child through the window" during an episodic attack caused by a "cerebral tumour" which tended to "trigger episodic violent" and "ungovernable sudden urges". In Kemp, the defendant

²⁴ Hill v. Baxter [1958] 1 All E.R. 193, 197

²⁵ R. v. Kemp (1956) 40 Cr.App.R. 121

²⁶ Parmerkar v. The Queen (1973) 33 D.L.R. (3d) 683

²⁷ R. v. Charlson [1955] 1 All E.R. 859

²⁸ R. v. Kemp (1956) 40 Cr.App.R. 121

harmed his better half through an affliction stemmed from “arteriosclerosis” i.e a condition leading to thickening and hardening of the arterial walls.

Both of the defendants, without a doubt, behaved under the force of “organic diseases” which led to some important alterations in their minds, and both of them were found to be unaware of the acts done by them. However, in Charlson, the court ruled that as it had not been established that the accused was troubled by any psychological illness, therefore he cannot be said to not have acted unconsciously, thus acquitting him. In simpler terms, the court held automatism, that is derived from “cerebral tumour”, is to be considered as “non-insane automatism”. However, in Kemp, the court held that the defendant's conduct was due to a “disease of the mind”, summing up that due to absence of awareness the defendant could not comprehend the essence of his action, and thus, the Court proclaimed him to be of unsound mind.

The antonymous derivations are seemingly caused by a difference in ways of approaching the same issue. In Charlson, the court stressed more upon the root of the involuntary demeanor. Only “diseases of the mind” which are sourced from mental disorders that satisfy the criteria defined in the McNaghten rules. A brain tumour, which originates physically, cannot, therefore, be regarded as a mental disease and the accused cannot be proclaimed to be unsound mind. In Kemp, the court uttered the opinion that the law must not be worried about the source of the disease, rather plainly with the psychological state that gave rise to the action.²⁹ The finding of the Kemp view is that in shaping the meaning of a sickness of the brain, the spotlight must be on the impact of the ailment of the mental faculties of “reason, memory and understanding”.³⁰

In conclusion, at present the present law surrounding the pleas of insanity and automatism are still seriously inadequate for what they were designed to do, which means the public will continue to be failed by the system until substantial reforms are brought in to bring it in line with current medical expertise and definitions, as well as reforming the sentencing guidelines in order to effectively reflect the changes to the defences.

4. Psychopath and Insanity

One of the most intriguing topics at the intersection of law and mental health is whether or not should psychopaths be able to utilize the insanity plea. However, the common typical factors needed for a successful insanity defence include the incapacity to acknowledge the nature of one’s conduct or to recognize the wrongfulness or immorality of an act, or else the

²⁹ Id, p.127

³⁰ Id, p.128

incapacity “to conform [one’s] conduct to the requirements of the law”.³¹ Because psychopaths are not delusional, and because they are often highly sensible and purposeful³², they are generally stopped from claiming the insanity defence.³³ Yet the more we learn about psychopathy, the harder it becomes to say whether psychopaths truly carry the *mens rea*, or “the criminal mind necessary for criminal liability”.³⁴

At the core of “psychopathy” lies the idea that the patient lacks capacity for empathy and remorse.³⁵ However, this cannot ignore the fact that psychopaths are often highly intelligent and charismatic—what McAleer calls “charming but callous”. A good deal of this research focuses on neurons that produce what is called “mirroring”.³⁶ Mirroring appears to be the reason behind the observed phenomenon where we often yawn when the person next to us yawns - the biological source of empathy.³⁷ Brain scans reveal far less mirroring activity in psychopaths as compared to sound people, indicating that psychopaths are devoid of the biological execution required to feel sympathy and produce regret.³⁸ However, authors of certain study hypothesize that psychopaths may have something akin to an empathy “switch”---the ability to turn empathy on and off at will.³⁹

A defendant generally cannot use psychopathy as the basis for an insanity defence.⁴⁰ Experts such as Stern acknowledge that the psychopath may lack the ability to “grasp and control his behavior in light of distinctly moral considerations”.⁴¹ Despite this, he considers the illegal and immoral behaviours of a psychopath to be a product of his failure to control his will. According to him, psychopaths are intelligent enough to not only understand and comprehend the moral rules, but also to understand the rules so well so as to manipulate them to suit their own purposes. However, a contradicting school of thought argue that the moral choices are “primarily guided by spontaneous, effortless emotional responses that operate automatically and unconsciously”.⁴² They prefer emphasizing upon the mirroring function in this respect. Empathy allows the normal individual to experience the pain of a victim which helps produce an aversion to behaviors that would cause

³¹ Legal Information Institute, 2010; paras. 7-10

³² McAleer, 2010; Lilienfeld & Arkowitz, 2007

³³ Stern, 2012; Glenn, Raine, & Laufer, 2011

³⁴ Stern, 2012, p. 3

³⁵ McAleer, 2010; Lilienfeld & Arkowitz, 2007

³⁶ Whiteman, 2013, para. 5

³⁷ Whiteman, 2013

³⁸ Id.

³⁹ Id. para. 16

⁴⁰ Stern, 2012; Glenn, Raine, & Laufer, 2011

⁴¹ Stern, 2012, quoting Litton, 2008

⁴² Glenn, Raines, & Laufer, 2011, citing Haidt, 2001

harm.⁴³ If this idea is held to be valid, then the psychopath's limitations give them an image more like people who cannot acknowledge the wrongful nature of their acts in the first place.

The more we learn about psychopaths and the biological origins of their non-conformity for laws, the less we may be able to back the idea that psychopaths are merely debauched people who disregard the regulations, as Sterns states. However, it is highly probable that psychopaths who commit crimes with full wilful enmity towards the victim, might take undue advantage of the insanity defence, if it is allowed to them. While we should have an open mind towards new understandings of legal and moral conduct of humans, along with the brain functions that enable it, we should be careful before taking a step towards extending protections to new groups of criminally insane people.

5. Multiple Personality Disorder and Its Relevance In Law

Multiple Personality Disorder, also scientifically known as Dissociative Identity Disorder, intricate psychological condition. Such a condition is usually effected by many factors which may include any severe trauma experienced by the person during his childhood days. The trauma could be caused due to any abuse of physical, emotional or sexual nature which is inflicted upon the individual repetitively. "Dissociative Identity Disorder" is said to be an immoderate form of dissociation which is unlike the innumerable moments of mild dissociation that we face in our day-to-day life such as daydreaming or getting lost while doing some work. It involves a lack of connexion of a person with his thought processes, emotions, feelings and self-awareness. It is accepted that MPD is a "coping mechanism" developed by the brain in which the person dissociates himself from the identity that suffers the traumatic experience. However, the reality of such disorder is still disputed as it becomes a matter of immense difficulty for the mental health professionals to judge and accurately identify the multiple emotional personalities, if any.

"Dissociative Identity Disorder" is defined by the occurrence of more than one different personality states that continuously regulate the person's conduct. The alters possess their own sex, age, or race. Every alter has his or her own unique body language. Sometimes the alters are even animals. The process of transforming into and revealing the alter while allowing it to take over the control over one's behaviour is named "switching". Switching might happen in any time frame. There exists a lost persona within the person, who is associated with the individual's true name. The host personality maybe unconscious of the existence of other personalities but not in all cases. After the early detachment of personalities (splitting), an alter

⁴³ Glenn, Raines, & Laufer, 2011

finds personality creation simpler; fresh identities are tallied whenever “stressors” are experienced on the far side the capability to deal with it. Every multiple executes “a definite set of psychological, physiological, or maintenance tasks” for the physical structure.⁴⁴ The multiples born and the jobs they are allotted are specific to every multiple system.⁴⁵ For instance, a sexually ill-treated kid might discover it to be essential to produce more than one personas to deal with the “psychological effects” of ill-treatment.⁴⁶ “One alter might be needed to house the horrifying memories, another to protect bodily integrity, a third to discharge rage, a fourth to contain sexual urges, a fifth to impose self-punishment, a sixth to insulate pain, and so forth”.⁴⁷

Diagnosing MPD is a Herculean task for the psychiatrists and other mental health experts. It might takes years in order to accurately prove the existence of such condition in the individual. This is usual, due to the fact that the database of indications that compel an individual suffering from a “dissociative disorder”, to search for aid is very akin to those of the other psychiatric study. In fact, numerous persons who possess “dissociative disorders” also have “coexisting diagnoses of borderline or other personality disorders, depression, and anxiety”.

The DSM-5⁴⁸ provides the following basis to detect “dissociative identity disorder”:

“Two or more distinct identities or personality states are present, each with its own relatively enduring pattern of perceiving, relating to, and thinking about the environment and self. Amnesia must occur, defined as gaps in the recall of everyday events, important personal information, and/or traumatic events.”

Coming to criminal law, one of the most wrenching questions that arises with respect to MPD is that when a multiple commits the offense, should the host personality be responsible for that crime? Since the past few decades, the defendants have been claiming pleas of MPD in scenarios including a mixture of crimes. MPD defences are out-of-the-way because defendants aver that another amply developed personality houses itself in a single human torso and that personality did the impugned act. Thus, even if the actus reus belongs to the host individual, the question that intrigues the Court is who is the owner of the mens rea involved in the crime - is it the

⁴⁴ Jacqueline R. Kanovitz, et al., "Witnesses with Multiple Personality Disorder," 23 Pepp. L. Rev. 387 (1996) citing Wilbur, Cornelia B., *The Effect of Child Abuse on the Psyche in Childhood Antecedents of Multiple Personality Disorder* 21 (1985).

⁴⁵ Frank W. Putnam, *Diagnosis and Treatment of Multiple Personality Disorder* (1989)

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ *The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, 2013

host personality or the alleged personality? If it turns out to be so that the host personality committed the criminal act with full consciousness about him committing the act, then there is nothing left to doubt the existence of mens rea along with the actus reus. However, if there is a reasonable possibility of a multiple committing the act through the host personality, then it takes the form of a challenging job for the Court to ascertain criminal responsibility because one cannot surely associate the mens rea to either the alleged personality or the host personality.

It was not until 1982, in *Ohio v. Grimsley*, that the first and most common state approach, the Alter Approach, was adopted.⁴⁹ Six years down the line, in *New Jersey v. Badger*, the New Jersey Superior Court introduced the Unified Approach, which is utilized in a minority of states.⁵⁰ The Tenth Circuit Court of Appeals introduced a third approach - the Host Approach - in 1993 in *United States v. Denny Shaffer*, which has since become federal precedent.⁵¹ In addition to these three culpability approaches that have been devised by courts, there also is a fourth approach - the Clinical Approach - that is often used in the clinical assemblage for curative purposes, but has not been adopted by any courts in criminal cases.

In *Ohio v. Grimsley*⁵², the accused took the plea that she was in the "state of cognizance" of a second identity named "Jennifer" when she was driving under the force of intoxicant. She was also previously detected with MPD. She contended that the act was not done by her conscious self but by Jennifer, who took over her consciousness. The Court rejected the plea by stating that even if the action was performed by another conscious personality of mind, still it was a voluntary action. Irrespective of the alter, if the action was a product of one's own volition and consciousness, then criminal responsibility cannot be waived. This case gave rise to the Alter Approach. Later in *Kirby v. Georgia*⁵³, William Kirby, the accused, was found guilty but mentally unsound. He was found to have with MPD and had a couple of personalities during commission of the crimes: Kirby, who committed the crimes, and Bill, who was inactive during the crimes. The Georgia Court of Appeals affirmed the conviction. The court observed that, "in the case at bar, it is undisputed that appellant was conscious and acting under his own volition. Moreover, appellant was able to recognize right from wrong and was not suffering from delusional compulsions."

⁴⁹ S. M. Owens, (1997, January-February). "Criminal responsibility and multiple personality defendants". *Mental and Physical Disability Law Reporter*, 21(1), pp. 133-143; 444 N.E.2d 1071 (Ohio Ct. App. 1982), 7 MPDLR 248.

⁵⁰ *Id.*; 551 A.2d 207 (N.J. Super. Ct. Law Div. 1988), 13 MPDLR 197.

⁵¹ *Id.*; 2 F.3d 999 (10th Cir. 1993), 18 MPDLR 23.

⁵² *Id.*; 3 Ohio App 3d 265

⁵³ *Id.*; 410 S.E.2d 333, 333 (Ga. Ct. App. 1991), 16 MPDLR 145.

The Unified Approach⁵⁴ is founded on the notion that a single body carries one person irrespective of the spectrum of personas present in the individual. The belief follows that if only one person did some illegal work, then only such one individual is liable. This view is comparatively easier to enforce legally as it is akin to the conventional concept of criminal liability which eases the onus upon the Court there is only one culpability determination to make. Although comparatively easier for a court to implement, the Unified Approach is not fair to alters in appreciating the peculiar character of the ailment. With this approach, one person equals one legal entity regardless of the number of personalities present. Advocates of the Unified Approach do not refuse the presence of MPD outright, but they do not give any leeway for differing positions of mind. In *Nebraska v. Halcomb*⁵⁵, Anthony Halcomb sexually assaulted two girls, each of five years of age. He was found to be a mentally disordered sex offender. He argued that the confessional statements that he provided to police are inadmissible because he had been detected to have MPD. Ultimately, the court ruled that it was unnecessary to adjudge whether the accused had MPD or not. The court reasoned that irrespective of the presence of the alleged personality named Oman, the person who committed the criminal act was actually Anthony Halcomb. Even if it is assumed that the so-called personality Oman had taken over during the commission of the crime and also while the confessional period, the fact that it was a voluntary confession cannot be ignored. Unlike confessions made out of police coercion, the law admits the confessions produced in whole or in part by shades of the personality of the accused.

The Host Personality Approach⁵⁶ is a host-oriented approach which is mostly centred around the state of mind of the host personality. The pertinent question to be focused upon is whether the identified host personality was conscious of the crime and indulged in the criminal act or not. If the host is found to be unaware during the commission of the crime or even if he was aware, he was unable to intervene into the act, then the law would favour the host personality due to lack of mens rea. Such an approach stems from the belief that no innocent host must be imprisoned for the crimes committed by his alters, of whom he was unaware and unable to intervene. In the famous case of *United States v. Denny-Shaffer*⁵⁷, a labor and delivery nurse named Bridget Denny-Shaffer kidnapped an infant from the hospital she was employed in. While committing the crime, she reportedly wore a lab jacket and represented herself as a medical student doing pediatric rounds. She was detained for kidnapping and evoked the

⁵⁴ Id. at 136

⁵⁵ Id.; 510 N.W.2d 344, 346 (Neb. Ct. App. 1993), 18 MPDLR 243.

⁵⁶ Id. at 137

⁵⁷ Id.; 2 F.3d 999, 1002 (10th Cir. 1993), 18 MPDLR 23.

insanity weapon. It was agreed upon by both sides that Denny-Shaffer was suffering from MPD and that a replacing persona named Rina had “taken over control” during the kidnapping. The mental health experts who testified in the Court agreed that her host personality did not participate in the abduction, but they could not agree on whether the alter personality was legally insane. The Trial Court found her guilty by rejecting her plea of insanity on the ground of lack of evidence concerning her alternate personality. Denny Shaffer contended for putting more emphasis on the host personality as opposed to the alter personality. She argued that when the evidence produced in the Court sufficiently demonstrates that the accused is indeed suffering from MPD and the host personality is identified who was not aware of the planning or carrying out of the criminal activity and was unable to prevent or control it, then the Court should emphasize upon such lack of guilty mind. The appellate Court upheld this contention and applied the Host Personality Approach to decide the case.

The Clinical Approach⁵⁸ is an approach which does not find much use in the court of law, though it is commonly used as a therapeutic tool for patients suffering from dissociative disorders. It holds the host personality responsible for all the actions of its own self as well as those of its alters, irrespective of their awareness about it. This is done with a view to integrate all the alters into a single whole personality by holding the host personality liable for the activities of all its alters regardless of whether he is aware of them or not. Clinicians prefer envisioning the multiples as one entity because only by doing such, they believe, the different versions of a personality can be blend together in order to give rise to a single wholesome personality.

These approaches helped the legal scholars to find different ways of viewing the peculiar problem of determining culpability of a person suffering from MPD, though in most cases, the Court has granted leeway to the host personality if it had been proved that the host personality was not aware of his alters and their actions. This is based on the fundamental reasoning of criminal law which preaches that no individual should be held blameworthy of an offence without possessing the requisite mens rea for committing that offence.

Although such approaches have proved to be of little help to the legal field in handling cases of dissociative disorders yet it continues to serve as a serious problem with respect to its application in the courtroom. The most disturbing problem lies in proving the existence of Multiple Personality Disorder in the accused. Disorders relating to the brain are as such quite deceptive when it comes to their medical diagnosis and when the case is such that a single individual houses multiple contrasting versions of

⁵⁸ Id. at 137

his personality, its diagnosis becomes even more baffling and trickier. MPD diagnosis is not something that can be successfully done overnight. It takes time to study the behaviour of the alleged patient, to wait for the different alters to take control. There may be one such alter or a hundred, who may or may not have a fixed time of appearing, who may or may not be of the same gender as the host personality. And on top of that, it becomes extremely difficult for the accused to prove that he was indeed 'someone else' while committing the crime because in instances where the plea of unsoundness of mind is provoked, it must be established that the concerned person possessed an unsound mind at the time of committing the crime following which he was "unable to know the nature of his act and even if he did, he did not know what he was doing was either wrong or contrary to law". Thus, it becomes really important to be able to diagnose MPD as claimed by the defendant, during the material time. Medical history of the disorder definitely helps the defence to build up their case but it is not conclusive, like in general defence of insanity, the law relies more deeply on legal insanity than medical insanity. Presence of history of medical insanity would surely serve as an aiding tool to the defence but unless and until, legal insanity is proved, the plea of insanity cannot be claimed successfully. Thus, in cases of MPD, it is important to adjudge as to whether the accused was his usual self during the commission of the crime or 'somebody else' had taken control over him.

6. Conclusion

Insanity is a peculiar defence in criminal law. It is so because of its nature which deals with the state of the impugned mind. Deciding the exact state of mind of the concerned person at a particular given point of time is a Herculean task in itself. This is because of the fact that it is only the accused person who experienced such state of mind during the material time. Therefore, only he knows best as to the presence or non-presence of such state of mind. However, in the case of an insane person, even the person himself, if truly insane, would be unaware of his own state of mind at the particular time in question. This makes it even more complicated. It is, however, interesting to note that the defence carries upon itself the onus of proving that he was insane during the commission of the crime. Once proved, it becomes an absolute defence for the accused, leading to complete acquittal. Medical insanity is usually easier to establish, as the claim of insanity is supported by medical proof which can seldom be disputed. However, law gives more importance to legal insanity. Hence, if a sort of medical insanity is of such nature that it does not impair the general capability of the person to reason out between the right and the wrong, then legal insanity cannot be established. As a result, despite being medically insane, he cannot take the absolute defence of insanity.

The evolution of the different standards, as discussed initially in the paper, gave varied interpretations of the plea of insanity. However, this is not to say that such rules or tests are perfect, without any loophole. In fact, one can witness a pattern where, the shortcomings in one standard lead to the birth of another. Also, it is cardinal to state that the different legal systems across the globe have their own preferences when it comes to complying with the above mentioned standards. This brings us to the requirement of a comparative analysis of them. The McNaghten Rules were the landmark set of rules that paved way for a specific interpretation of the defence of insanity. According to these rules, there must be a presumption of sanity, unless the contrary is proved. Also, it has to be particularly proven that, while commission of the act, the accused was troubled from “a defect of reason from disease of the mind”. Further, the above phrase has been interpreted in various ways in different case laws. While the McNaghten Rules stress upon the lack of reasoning capacity of an individual, the Irresistible Impulse Test relies upon the arousal of a sudden impulse to act, which is not resistible on the part of the individual. According to this standard, in spite of the fact that the accused was able to demarcate a line between that which is right and that which is wrong, if he was unable to exercise his choice between the two, then he qualifies for a plea of insanity. This test puts primary focus upon the will power of the individual over his physical acts. However, this test allows those individuals who unfairly walk away with the advantage of being given the benefit of doubt just because they were allegedly not able to control their actions. Also, the lack of scientific evidence to prove the degree of impairment of will power adds to the loopholes of this test. The Durham Rule, on the other hand, relies extensively upon scientific evidence. Thus, as per Durham Rule, if a person is scientifically or medically diagnosed to be having a mental disease and by reason of such disease, he was found to be of unsound mind. Thus, the testimony of medical experts and psychiatrists was given the utmost importance in this standard. However, the difference in the various opinions of the experts created a problem. The Model Penal Code is a comprehensive and inclusive standard. It is so because of the fact that it carries within itself the elements of all the previously existing standards. According to this standard, an individual is not to be held liable for criminal action during commission of such act, he is devoid of significant power either to acknowledge the guiltiness of his action or to comply his acts with the essentials of the law, as a byproduct of mental ailment or flaw which has been medically diagnosed by the medical experts. Each and every standard, therefore, has its own set of advantages and shortcomings. However, it cannot be disputed that they gave a direction to the legal interpretation of the defence of insanity.

Further, the paper has a special reference to a particular disorder of the mind called Multiple Personality Disorder. It has already been discussed

in detail as to it means and how it translates into human psychology as an effect. However, there still lies a gray area when one looks at the way MPD is approached in law in relevance to the law regarding insanity. The paper discusses four types of approaches. The Alter Approach adopts a strict policy wherein irrespective of whether the accused was in his original consciousness or in one of his alters, during the commission of the act, the fact that he acted out with his full consciousness and volition, will not help him in escaping liability. Hence, the Alter Approach does not give any leverage to the condition which forms the crux of MPD. The next approach is the Unified Approach which simplifies the determination of culpability for the court. It simply follows the logic that one body embodies just one person, irrespective of the varying states of mind. Hence, when such person does something illegal, the court shall not take into consideration any of his supposed alters and will hold the person responsible for the act. This makes the process easier for the court, however, it becomes unfair on the part of the actual patients suffering from MPD, in cases where one of the multiples or alters has actually committed the crime without the person's original consciousness. The Host Personality Approach, as the name suggests, is centred around the host personality only. Here, the question arises as to whether the host was aware of the 'taking over' of the alter or even if he was aware, he was not able to intervene into the action of his alter. The awareness or unawareness of the host as to the act done by his alter leads to a verdict of conviction or acquittal accordingly. This is a reasonable approach as it is based on the fair principle that no innocent host should be punished for the illegal act done by one of his alters or multiples. However, what proves extremely difficult in adopting this approach is the burden of proving that the host personality was unmindful of the act committed by his alter. The last approach discussed is the Clinical Approach which is more of a therapeutic approach rather than a legal approach, hence being rarely used in the court of law. It holds responsible the host for acts committed by himself as well as by any of his alters. The medical experts consider it a therapeutic tool as the person carrying all the alters is compelled to be responsible for each and every act committed by him, irrespective of the fact that whether it was committed by himself or by any of his multiples.

Thus, MPD is a peculiar form of disorder which needs to be adjudged with care and proper attention. Even in cases of MPD, if mens rea is established on the part of the original consciousness of the accused, then it become easier for the court to impose liability. Similarly, lack of mens rea would enable the accused to successfully claim the defence of insanity. However, establishing mens rea and the correct facts are extremely difficult tasks, especially when the case involves peculiar instances such as MPD. With the advancement of technology over time, scientists have evolved various scientific techniques which attempt to estimate the actual condition of mind of the accused as far as practicable, during commission of the crime.

One such test which is used to establish the knowledge or awareness of the alleged sequence of facts or incidents is the NARCO Analysis Test. In this test, the individual is made to be in a “semi-conscious state”, thus neutralizing his imagination. It is based on the principle that in such a condition the person is less likely to falsify and his answers would only be confined to facts of which he is conscious. Another example is that of the Polygraph Test or the lie-detector test. However, the veracity of these tests are often questioned as it is vulnerable to manipulation. One such another emerging technique is trying to make its way into the legal system. It is called the Brain Electrical Oscillation Signature profiling test, hereinafter referred to as the BEOS Test. “It is a technique developed by Dr. C.R. Mukundan in the year 2003 after lot of research. This technique is currently been used in a Forensic set-up to identify the presence of Experiential Knowledge in the perpetrator of the crime. Knowing and Remembering are two Neurocognitive processes, of which Knowing refers to the cognitive process of recognition with or without familiarity, whereas Remembrance is the recall of episodic and autobiographical details from a person’s life.”⁵⁹ When a person does an act in a situation, he is said to experience the doing of such act. The brain registers an ‘experiential knowledge’, which is quite different from ‘remembering’. Extensive study research in neuroscience has shown that the activation design of the brain is clearly different during “remembering” and “knowing”. Remembrance is often concerned with past personal episodes which constitute the experiences of the person while on the other hand, knowing signifies recovery from the knowledge depository of the brain used for recognition of the entities of world and their conceptualizations. For example, if A and B are both asked do they know Mr.X, then B who has met X will trigger an ‘experiential knowledge’ as opposed to A who had only read about X in a newspaper. This happens because while ‘remembering’, the brain retrieves or relives the autobiographical experience, which is not the case in simply ‘knowing’ the facts. This is what forms the basis of the Brain Electrical Oscillation Signature Profiling Test, also referred to as the BEOS Test. Statements, called Probes, are put forth to the individual, instead of questions, that reconstruct the series of events leading to the crime and post it. The individual is not required to say anything. The required number of electrodes are fitted on his head at multiple places, which help recording the response of the brain to each probe. If the individual triggers an EK or Experiential Knowledge response on a probe, it means that his brain is reliving the event mentioned in the probe by way of remembrance, which further supports the claim that the individual was indeed present in that particular place at that

⁵⁹ D.A.Puranik, S.K. Joseph, , B.B.Daundkar, M.V.Garad, Brain Signature profiling in India. It’s status as an aid in investigation and as corroborative evidence – as seen from judgments. Proceedings of XX All India Forensic Science Conference, 815 – 822, November 15 – 17, Jaipur.(2009)

particular time. The aim of incorporating the technique of BEOS while discussing insanity is for laying out a proposition for its usage to determine the condition of mind of the accused during the concerned time frame. The BEOS Test is yet to be applied to cases of insanity. However, one can witness the usage and admission of this test in a few cases. When a 24 year-old defendant was tried for the homicide of her fiancé, her “brain was the chief witness for the prosecution”. She agreed to undergo the “highly controversial Brain Electrical Oscillations Signature test” (BEOS). Her condemnation witnesses for the first time, an Indian court accepting the BEOS results as evidence of a guilty conscience.⁶⁰

Insanity is a terminology that encompasses a wide array of complex behaviors of human beings within itself. Due to the peculiarity of the human mind, the issue of insanity becomes an even more complex subject to study. It continues to bewilder the judges and legal experts with its newly emerging forms that make it difficult for the concerned institutions to adjudge and classify them under a broad heading and accordingly, interpret the concerned law. However, the silver lining in this whole scenario is the progress made in this regard, by the legal field over the years. With the advancement of science and technology, it has become comparatively easier to conclude the existence of medical insanity, as well as, to deduce from there, the presence of legal insanity in a case. New research studies and scientific findings are showing up that give us a deeper insight into the working of the human mind. And the best part about such findings is that it is often backed by reliable scientific evidences which are undisputed to a great extent. Also, over time, the legal field has witnessed a variety of cases, defendants, factual circumstances, backgrounds, etc. that give the judges enough exposure to identify the various ways in which the defence of insanity can be applied. This sharpens their skill of interpreting a law beyond the letters of the text. New propositions and hypotheses are emerging which need to be focused upon in order to formulate and discover new channels of application of this defence.

In the defence of insanity, what is important is the “state of mind” of the accused during the commission of the crime. It becomes very important to conclude the nearest to the accurate phase of mind of the defendant while he was committing the offense. Although a Herculean task, it is an issue of immense importance which is required to be determined almost accurately for ensuring that justice has been done. The cause of the unsoundness of mind is also to be taken into account; whether some trauma was the reason behind such unsoundness of mind or was it due to a mental illness, or was it induced as a result of any voluntary act done on behalf of the accused. The

⁶⁰ State of Maharashtra v. Aditi Baldev Sharma Sessions Case No. 508/07, June 12, 2008, p. 66.

answer to such questions affect the degree of criminal responsibility that is to be held by the accused. The Court must also look into the question whether the mental impairment was sudden and strong enough for the accused to be able to resist and control himself. Although there exists no scientific and undisputed means to measure the degree of impairment caused, but the testimonies of the licensed mental health experts can be reliable. However, sole reliance on the statements of the medical experts is unfair and unreasonable as it could lead to the Court imparting a biased verdict, unfairly inclined more towards the medical perspective only, while the legal systems view the defence in terms of legal insanity.

There have also been propositions suggesting an absolute abolition of the insanity plea. This could be harmful for the objective of justice as abolition of the defence could mean that all the doers of criminal acts are liable to be punished even if they were not conscious of their own act during the material time. The insanity defence is a much needed defence. Hence the fundamentally just defence must be retained in the legal field with certain fair and sensible modifications, rectifying the practical loopholes found with it.