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'Cut him some slack!' Diminished Responsibility - An International Perspective

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'*Crime is No Crime when the Mind is unsettled*' – The Times[1]

The study of Diminished Responsibility begins with the philosophical question of what makes a person criminally responsible. Simply put, men's rea forms (along with voluntariness) the basis of DR the same way it does for every other offense. This defense is also unique in that it is only a partial defense that does not absolve one of his/her liability, unlike an insanity plea which is a requirement for laws of insanity propounded in McNaughten's case, and lacks the statutory foundation for DR, it is to be commended in that it recognizes the defense even when it does not arise from mental defects. Of the many reasons for incorporating the defense, the most important one is, perhaps, an offender deserves for the world to know, he didn't mean to do what he did. After its birth in Scotland, the defense has made its way not just into national law systems, but also into the world of the International Criminal Justice system in one form or another. Thus, the potential for India to get on par with other nations is brighter than ever.

Keywords: *diminished responsibility, insanity place, partial defence, complete defence, criminal law.*

[1] Daniel McNaughton, 'On Late Acquittal taken' in DJ West and A. Walk (eds), *His Trial and The Aftermath, London* (Gaskell Books 1977)

INTRODUCTION

Paul H. Robinson, one of America's leading professors of Criminal law states that there are 44 defenses for hindering a successful criminal prosecution.[2] In a more general sense, Hart says there are 5 commonly used excuses for crimes, mistake, accident, provocation, duress, and insanity.[3] The diminished responsibility defense (referred to as DR henceforth), is considered a subset of the insanity plea and has garnered significance around the globe despite its relatively recent origin. This article purports to study the legal implications of this defense, its standing in various prominent criminal justice systems and the areas for development.

Criminal Responsibility & When Diminished: In a general sense, the sentences "you're responsible" and "you're liable" mean the same. Said likeness doesn't exist in criminal law.[4] Responsibility forms the basis of liability.[5] The American Model Penal Code defines criminal responsibility as occurring when a crime is committed with intention, recklessness or negligence.[6] After all, it is harm that sets the law in motion.[7]

Simply put, a person is criminally responsible when he knows what he is doing, that it is wrong and (most importantly) *wills* to do it.[8] It is this difference that sets the stage for *diminished responsibility*. A person can know what he is doing, without being willing to do so.[9] One can safely conclude that *mens rea* and DR have the same requisites.[10] Thus, DR is a partial defence that claims that the defendant was incapable of forming the requisite *intent* for the crime in

[2] Andrew Botterell, 'Revisiting the Defence of Diminished Responsibility' (2023) 60(2) Osgoode Hall Law Journal <https://digitalcommons.osgoode.yorku.ca/ohlj/vol60/iss2/3/> accessed 21 August 2023
[3] Hart HLA, *Punishment and Responsibility* (Clarendon Press 1968)
[4] Orvill C. Snyder, 'Criminal Responsibility', (1962) 11(2) Duke Law Journal <https://scholarship.law.duke.edu/dlj/vol11/iss2/2> accessed 23 August 2023
[5] *Ibid*
[6] 'Criminal Responsibility: Evaluation and Overview' (*Maryville Online*, 9 June 2021) <https://online.maryville.edu/blog/criminal-responsibility?> accessed 27 August 27 2023
[7] Hugh E Willis, 'Jural Relations, by Albert Kocourek' (1929) 4(6) Indiana Law Journal <https://www.repository.law.indiana.edu/ilj/vol4/iss6/5> accessed 26 August 2023
[8] *Monte Durham v United States* [1954] 214 F.2d 862
[9] Snyder (n 4)
[10] *Ibid*

question, to such an extent that despite there being no option of acquittal, as in an insanity plea, he may be convicted for a lesser offence. Yet another difference between the two pleas is that the DR defense applies only to murders in the majority of the criminal justice system.[11]

In the US for example, when the diminished responsibility plea of a convict is accepted, he is sentenced to punishment for the offence of manslaughter and not murder provided:

- The act under question was committed as a result of extreme emotional or mental disturbance.
- Such underlying disturbance has a reasonable explanation which may be understood by putting oneself in the shoes of the offender in the situation, relying on circumstances he believed to be true.

Manslaughter can be simply defined as the unlawful killing of a human without malice.[12] Simply put, if the DR defence had a statutory foundation in India, it would replace a conviction for murder with one for culpable homicide.

As Subset of the Insanity Plea and the Indian Scenario: A simple explanation was given by John Austin when he described that such defences merely 'get a person out of the fire into a frying pan, a pan that is still on fire.'[13] While an insane person lacks the volitional capacity to even understand that his acts are legally wrong, a person whose responsibility is diminished is unable to control his acts despite understanding their flawed nature.[14]

In India, however, the scope for DR as distinct from the insanity plea is even murkier. Insanity is intertwined with DR. The Law Commission of India in their 42nd report in 1971[15] suggested that it is unnecessary to insert a statutory provision relating to diminished responsibility in the

[11] Reshma Suresh, 'Diminished Responsibility and Addiction: Analysing the Legal and Scientific Complexities' (2022) Winter Issue ILI Law Review <https://ili.ac.in/pdf/6.Reshma_F_.pdf> accessed 27 August 2023
[12] US Criminal Code, s 112
[13] J. L Austin, 'A Plea for Excuses: The Presidential Address' (1956) 57 Proceedings of the Aristotelian Society <http://www.jstor.org/stable/4544570> accessed 19 August 2023
[14] *Prosecutor v Delalić* it-96-21-T
[15] Suresh Bada Math et al., 'Insanity Defense: Past, Present, and Future' (2015) 37(4) Indian Journal of Psychological Medicine <https://journals.sagepub.com/doi/10.4103/0253-7176.168559> accessed 26 August 2023

statute books as it runs parallel with the defence the Indian law already provides under Section 84 of the Indian Penal Code – 'Act of a person of unsound mind'. The precursor to unsoundness in the Indian legal background is said to be McNaughten's case.[16]

The provision must be understood in two segments to understand how it helps escape full liability:

a. A medical requirement for mental illness and
b. A logical requirement of loss of reasoning.

Thus, a person claiming this defence must have acted without being able to comprehend the nature of their act, its legality and repercussions during the commission of such an act. Two of the core principles in criminal jurisprudence support the idea of cutting some slack for the mentally insane or diminished:

- Actus non facit reum nisi mens sit rea - an act does not constitute guilt unless done with a guilty intention;
- Furiosi nulla voluntas est - a person with mental illness attracts no culpability since they lack both an intent of guilt and rational thinking.[17]

It is crucial to highlight that the requisites for insanity are stricter in law than in medicine. The difference between medical and legal insanity is that in the latter, the person must have a mental illness coupled with a condition of loss of reasoning because not every person with mental illness or any abnormality of mind or irresistible impulsion, can be exempted from criminal responsibility. This difference was emphasised in *Surendra Mishra v State of Jharkhand*[18] where the SC made it clear that though the accused suffered from a certain mental disorder or instability before and after the incident, it cannot be blanketed that the accused was unaware of the nature & consequence of the act (at the time of commission) and thus rejected the plea on the insanity defence.

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[16] *Ibid*
[17] Math (n 15)
[18] *Surendra Mishra v State of Jharkhand* (2011) 11 SCC 495

However, like many other provisions, this section as a defence has also been abused by many perpetrators to escape from long sentences in jail thus warranting many instances where the courts have rejected pleas on grounds of insanity though they were backed by a proven medical history or condition. In such cases, the courts have justified that such delusions or hallucinations were not potent/material enough to disable a person from understanding the very nature and consequence of their act. This hostile approach of the judiciary was evident in *Gopalan Nair v State of Kerala* where the court held that there is no connection between mental delusion and human conduct.

It is peculiar to note that despite the lack of proper recognition of DR as a separate, distinct branch of insanity, its validity has been upheld in cases of mob violence where an individual is said to not be himself. The cases of two deceased prominent women leaders are analysed here. During one of the multiple riots across the nation following the then Prime Minister, Mrs. Indira Gandhi's arrest, in *Kishori v State of Delhi,*[19] it was stated that there was diminished individual responsibility unless it could be shown that there were special circumstances indicating that a particular person had acted with any pre-determined motive. During one of the multiple riots across the nation following the then Prime Minister Mrs. Indira Gandhi's arrest, in *Kishori v State of Delhi,* it was stated that there was diminished individual responsibility unless it could be shown that there were special circumstances indicating that a particular person had acted with any pre-determined motive.

This case was also quoted during the *Salem bus burning case* of Tamil Nadu where the arrest of Ms. J. Jayalalitha triggered riots and a college bus was torched, resulting in the death of 3 students and severely injuring 16 others. Justice Ranjan Gogoi, the now Chief Justice of India, who was then on a three-member bench of the Apex court said that the incident happened in a flash during a 'mob frenzy' and was not premeditated and thus, the 3 convicts walked free from charges of murder.

[19] *Common Cause, A Registered v Union of India & Ors* Crim App No 197/1996

WHY RECOGNISED?

It is but logical for any individual who analyses the defence of diminished responsibility to wonder if such a defence has to exist in the first place. Why shouldn't every offender be punished for the offence of plain old murder and later at the sentencing stage be given varied punishments in accordance with the given case? In other words, why categorise at the liability stage instead of customising at the sentencing stage?[20]

The answer to this question could be twofold.

1. The short, technical answer is that in every case, murder shall be punished with mandatory life imprisonment which cannot be mitigated/reduced during the sentencing stage.[21] However, understanding the reasons for such practice is more important.
2. The very purpose of the death penalty is to instil a deterrent effect in the minds of existing and potential offenders. Even when the question of the abolishment of the death penalty arose, the argument in favour of its continuance was that capital punishment had to exist at least in textbooks as the complete removal of it might empower the already at-large criminals

This philosophical approach can be understood by drawing reference to Sir James Stephen's idea about the retributive theory of approach. He says the sentence of the law against an offender is to public sentiments what 'a seal is to hot wax'.[22] To get a clearer picture of this, reference may be made to the following statement: 'A criminal conviction - at least for stigmatic offences - is regarded as a penalty in its own right…for it has the effect of labelling the defendant as a criminal.'[23] Thus, such labelling must be fair.

For example, an individual who has been punished under section 304A of the IPC, for causing the death of an individual, without any *mens rea* whatsoever, cannot be convicted of murder

[20] Botterel (n 2)
[21] US Criminal Code, s 112
[22] Ahmad Siddique, '*Criminology, Penology and* Victimology (7th edn, Eastern Book Company 2016)
[23] 'Criminalization and the Role of Theory' in AP Simester & ATH Smith (eds), *Harm and Culpability* (Oxford University Press 1996)

merely because his punishment was reduced at the sentencing stage. It follows from this ideology that a conviction capable of sending a very strong message about a person should not be left to the discretion of a judge.[24] Adding on to this idea, imposing criminal responsibility along with associated stigma when there has been no realistic choice on the offender's part is a violation of the principles of justice.[25] Voluntariness is as important a leg of *actus rea* as is *mens rea*.[26]

WHERE FIRST RECOGNISED?

The question as to the need for recognising diminished responsibility as a separate doctrine in criminal defence arose in Scotland too. Scotland's jurisprudence is the significant reason that this defence is said to have originated here and later borrowed by other criminal justice systems. Earlier, the judiciary had a level of flexibility and informality that meant no separate doctrine would be necessary for providing mitigation of a sentence based on diminished responsibility.[27] The worse the mental condition of an accused, the lesser would be his sentencing.[28]

However, Scotland had begun convictions for culpable homicide in the early 19th century. In the opinion of Lindsay Farmer, culpable homicide was an insertion in law that permitted prosecution for offenses previously not charged. With the increasing significance of the offence of culpable homicide, it became crucial to establish the degree of guilt in each case, in turn, is necessary for determining whether an individual deserved to be punished for murder or the former. The degree of blame in each case had to be determined from the facts of the case itself.[29] As put by Gordon, there had to exist a legal basis for the defence that would help justify why it was being employed in a particular case.[30] The term 'diminished responsibility' is itself said to

[24] Botterel (n 2)
[25] *R v Ruzic* (2001) 1 SCR 687
[26] Botterel (n 2)
[27] Gerald H Gordon, *The Criminal Law of Scotland* (Edinburgh: W Green & Son Limited, 1978)
[28] *Ibid*
[29] Lindsay Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge University Press 1996)
[30] Nigel Walker, *Crime and Insanity in England I-The Historical Perspective* (Edinburgh University Press 1968)

have emerged around the year 1844.[31] The Scots Common law origin was a result of 2 cases both presided over by Lord Deas.

The case of *Alexander Dingwall*[32] - In the given case, Mr. Dingwall, a hopeless alcoholic had stabbed his wife to death with a carving knife, due to a quarrel that arose when she hid his supply of money and liquor. Lord Deas informed the jury that he would return a verdict of culpable homicide and not murder citing various reasons; the attack was sudden, not premeditated, death had been caused by a single stab wound, he had occasionally shown compassion to his wife. More notably, he didn't just have a peculiar mental constitution but also a weakened state of mind, potentially due to the Sunstroke he suffered from while in India.[33] Lord Deas summed up the very essence of the defence when he stated that the frame of the convict's mind in the instant case had to be taken as an extenuating circumstance, despite it being insufficient to facilitate his complete acquittal. This judgment is significant because it laid down the foundation for the statutory origin of the diminished responsibility defense.

In the case of *McLean*[34], he was considered an imbecile and had once been certified as a lunatic. Thus, when he was accused of robbery, despite resulting in a successful conviction, Lord Deas added a recommendation for leniency stating that it was relevant for a judge to do so irrespective of whether the jury recommended the same. In a vital precedent-setting statement, he mentioned that it was legally and morally correct to not just consider the weakened mental intellect or mental infirmity of an offender in the awarding of the punishment but also in deciding what category of offence the crimes of that particular individual would fall under.[35] This case is also noteworthy for the reason that the offence in question was a robbery and not murder. The reason was that back then, robbery was a capital charge, an offence that was permitted by the legislature to be punished by death, though it wasn't common practice at that time.[36]

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[31] *Ibid*
[32] *Dingwall* [1867] 5 Irv 466
[33] *Ibid*
[34] McLean [1876] 3 Couper 334
[35] *Ibid*
[36] *Dingwall* [1867] 5 Irv 466

Both these cases sprouted up when the distinction between a defence that would influence the conviction and mitigating factors that would impact the sentence, its period was 'porous'.[37] Further cases in Scotland helped set in stone that the peculiarity in mental state was a question of fact.[38]

Through later cases, it has been clarified that there need not be a condition bordering on insanity for there to be recognition of diminished responsibility.[39] The same attitude has been adopted in 51B (1) of the Criminal Procedure (Scotland) Act 1995 which provides a legal backing to this doctrine. As pointed out by the Law Commission Report in India[40], and incorporated in subsection 1 of the aforesaid provision, unlike some European countries where the doctrine is applied to all types of offences, Scots law has a much narrower scope and is restricted to offences of murder and other capital offences.

CASES FROM VARIOUS CRIMINAL JUSTICE SYSTEMS

England and Wales: In England and Wales, the doctrine is given statutory form throughout Section 2 of The Homicide Act, 1957, influenced by the Scottish jurist system, despite the initial skepticism on the part of the Royal Commission on Capital Punishment.[41] The purpose behind the introduction of this defense was to facilitate lesser punishment for cases that involved insanity that fell short of or was different from the type of insanity mentioned in the McNaughton rules. In the English jurisprudence where the plea of insanity was the only means to escape a death sentence, the Infanticide Acts of 1922 and 1938 arose as a relief for the victims of postpartum syndrome. Later, the defense of diminished responsibility arose.

It is interesting to note that the very formulation of the McNaughton rules was an aftermath of a widespread public outcry as is evident from an excerpt from the issue of Times published after the acquittal of Daniel McNaughton. It read, 'For we're now at the will of the merciless mad'. Said outcry also prevented the judges from freely acknowledging the diminished responsibility

[37] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (1st edn, OUP 2012)
[38] *Dingwall* [1867] 5 Irv 466
[39] *Margaret Galbraith v Her majesty's advocate* [2005] JAC 31
[40] Law Commission, *Capital Punishment* (Law Com No 35, 1967)
[41] *Ibid*

plea in many major cases like that of David Copeland.[42] However, as remarked by Mr. John Gunn, one of the examining psychiatrists in Copeland's case himself, the position has changed enough to provide closure to the victims and proper treatment to the 'diminished' at the same time.[43]

Initially, the defense was only meant to supplement the already eminent plea of insanity.[44] This has not continued to be the case, however. The landmark judgment in *R v Ahluwalia*[45] which shined a new ray of light in the dark landscape of domestic violence also expanded the scope of the diminished responsibility principle.[46]

In this case, Mrs. Kiranjit Ahluwalia was a victim of brutal domestic violence and several forms of torturous abuse from her husband for the entirety of her married life stretching over a decade. Her extent of suffering is evident from the fact that she had tried suicide twice. Moreover, even after finding out that her husband was having an extra-marital affair, she wrote him a letter expressing her willingness to sacrifice what remaining joy she had in her life if he would consent to live with her. Thus, when she finally snapped and burnt her husband using petroleum, despite refusing to accept any expansion in the scope of 'provocation' to include situations that did not involve sudden provocation,[47] the court recognized her diminished responsibility resulting from 'slow burn'. She had, like many other women 'learned helplessness'. As was evident from the letter, she was also a victim of 'battered woman syndrome'.

Thus, the defense of diminished responsibility was stretched to include acts not stemming from insanity in its practical sense. This being said, the scope of diminished responsibility still applies only to murder and not even to cases of attempt to murder.[48]

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[42] *R v Copeland* [2020] UKSC 8
[43] John Gunn, 'No Excuses' (2002) 95(2) Journal of the Royal Society of Medicine <https://doi.org/10.1177/014107680209500202>accessed 19 August 2023
[44] *Ibid*
[45] *R v Ahluwalia* (1992) 4 All ER 889
[46] *Ibid*
[47] *R v Duffy* [1949] 1 All ER 932
[48] *R v Campbell* [1997] Crim LR 495

The United States: A study of DR would be incomplete without directing the spotlight to the Trial of Dan White, famously known as the case where the 'Twinkie Defence' was employed.[49] The brief facts of the case are that Mr. White shot Mayor George Moscone and Supervisor Harvey Milk, which allegedly happened because they wouldn't let him rescind his resignation. Moreover, Mr. White was a conservative and is said to have fallen at odds with the openly homosexual Supervisor Milk over certain matters.

Already in a state of depression, White is said to have snapped over not getting his job back. The jury agreed with the defence which argued that White possessed diminished responsibility which stemmed from alleged episodes of depression and had acted in the heat of the moment. There are two controversies interwoven in this trial that require special attention.

Firstly, how could a man who exercised enough premeditation to load a gun once to kill one person and later reload it to shoot another person be guilty of 2 voluntary manslaughters alone? The homophobic nature of the jury was and remains to be major speculation. Secondly, in all fairness, this trial has no right to be addressed as the Twinkie defense given that the unhealthy diet of Mr. Daniel White was a very meager part of the case. The defense merely claimed that White's already existing symptoms were exacerbated by the high consumption of junk food which served as a sign of his depression inter alia. As has been stated by many credible sources, it becomes necessary to reiterate that the *'Twinkie Defence' is a myth.*

However, the fact remains that this press-produced defense has been and continues to be used in every case where the defense is that the offender had consumed/used a substance that influenced him to act a certain way. However, it's also worth noting that despite the inability of 'bright yellow snack cakes' to serve as the sole cause of criminal tendencies and the false origin of the Twinkie Defence, it must not be fully discarded. Some substances like cough syrups[50] and

[49] *People v White* 124 Cal App 548

[50] Barry K. Logan et al., 'Dextromethorphan abuse leading to assault, suicide, or homicide' (2012) 57(5) Journal of forensic sciences <https://doi.org/10.1111/j.1556-4029.2012.02133.x> accessed 26 August 2023

carbonated drinks[51] may hurt a person's mental strength, especially when they're already affected by some mental illness.

In the US, DR finds statutory support under s 5K2.0 of the United States Sentencing Commission Guidelines Manual (USSG), which permits the plea of diminished capacity.[52] However, the fact remains that different states within the US have varying levels of acceptance of the DR defense.

THE STANCE IN THE INTERNATIONAL CRIMINAL COURT

Given the extreme difficulties in the practical application of the diminished responsibility defense in State laws, international law has naturally faced more complexities. However, as witnessed through several cases, international criminal law has not halted in its growth concerning the DR defense.

In the trial of *Wilhem Gerbsch*, where he was accused of mistreating prisoners during his tenure as a guard, the Special Court in Amsterdam mitigated the death penalty to 15-year imprisonment, taking into consideration his defective and underdeveloped mental faculties. Much of the jurisprudence related to DR in international criminal law is attributed to the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY), as is evident from the statement of the Secretary-General wherein he had stated that while evaluating personal defenses capable of relieving a person from criminal liability, the Tribunal has to draw reference from general principles of law recognized as such in various countries.

It is perhaps this principle that was used in the *Celebići* case where the ICTY took into consideration the Homicide Act, of 1957 (in effect in England and Wales). There being no option of punishing an individual for culpable homicide or manslaughter in international tribunals, the DR defense is used as a mitigating factor as it cannot be a complete or even partial defense. Yet another significant case before the International Criminal Court is the Trial of Ongwen. It was the first case where Article 31(1)(a) of the Rome statute, dealing with Mental capacity was

[51] Sara J Solnick & David Hemenway, 'The 'Twinkie Defense': The Relationship Between Carbonated Non-diet Soft Drinks and Violence Perpetration among Boston High School Students' (2012) 18(4) Injury Prevention <https://doi.org/10.1136/injuryprev-2011-040117> accessed 20 August 2023

[52] United States Sentencing Commission Guidelines Manual, s 5K2.13

interpreted while Dominic, a victimizer had any remedy in the law by him having been a victim himself.[53] Thus, the scope for the development of DR in the international scenario is not so gloomy after all.

PATH AHEAD

About the DR defense as a part of the insanity plea in India, for fair justice to be delivered, establishing a mental disorder is not just the job of a medical professional but also that of the Court and Psychiatrists. The latter plays a major role in conducting crucial holistic tests to examine beyond the vernacular of mental soundness and put forth the best of observations to distinguish between the insanity within the ambit of mental disease and legal insanity. To properly establish legal insanity while avoiding foul play there must be a series of behavioral observations, evaluations, and diagnoses made as prescribed by the NIMHANS, The National Institute of Mental Health And Neuro-Sciences. Very soon, the need for having psychiatrists throughout the investigation, examination, and trial will become inevitable, therefore paving the way to the setting up of more Forensic Psychiatry Testing and Training Centres. This will, or perhaps should, formalize these intriguing areas as a separate study and include them as a part of the legal codes for the sake of all the stakeholders of judicial administration.

Currently, the DR defense is being interpreted only through precedents. Added to the fact that it provides a better defense than the plea of insanity, fixed terms of sentences as punishments are better than an indefinite period under the psychiatric institutions for treatment, and there is a pressing need for statutory recognition. Said lacunae creates a strong dependence on medical certifications for the mental health of the person who has undergone an irresistible impulse, despite the knowledge that his acts were contrary to law. Unfortunately, India is miles behind in facilitating such infrastructure due to its strong social stigmas, and stereotypes making structured application of psychiatric concepts a herculean task.

[53] Mark A. Drumbl, 'Victims who Victimise' (2016) 4(2) London Review of International Law <https://scholarlycommons.law.wlu.edu/wlufac/597/> accessed 20 August 2023

Even in countries where diminished responsibility has been explicitly recognized as a defense, the availability of judicial resources to distinguish cases involving said defense to ensure that no one is punished more than they deserve to be, is an unanswered question.[54] Thus, the same applies to the Indian Courts as to how efficiently they can convert a more grievous offense to a lesser one by valuing the circumstances of a particular case,[55] given the fact that we are practically yet to begin.

[54] Botterell (n 2)
[55] *Ibid*