

JURISPRUDENCE BEHIND PENALIZING PSYCHOPATHY WHILE EXEMPTING INSANITY IN CRIMINAL LAW

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It is a widely known fact that insanity is a general defence under the criminal law but on the same hand, psychopathy is exempted under it. Some may argue that psychopathy is also a form of insanity roughly, as the functioning of their minds is different from that of a normal civilized person living in a society and hence they should also be exempted from the criminal liability. The other side may argue that there is no close proximity between the two groups, namely insane and psychopaths as psychopaths live a completely normal life just like other citizens and they have no difficulty in carrying out the day to day functions. The objective of this paper is to bring out the arguments by both the groups and to check its credibility. At the same time, it also aims to analyse the legal provisions, their language and the jurisprudence behind their enactment and to check as to which class of people actually it offers the exemption to. There would be a comparative analysis between the statuses of the two in society and their legal protection.

INTRODUCTION

Terms like psychopath, sociopath are not rigidly defined, though both appear frequently in the literature.¹ In common parlance, criminal insanity is defined as “a state of mental illness where a person is unable to determine between right and wrong and as a result will commit unlawful acts.”² On the other hand, a psychopath is defined as “A person suffering from chronic mental disorder with abnormal or violent social behaviour.”³ The common symptoms of psychopathy include shallow affect, lack of empathy, guilt and remorse, irresponsibility, and impulsivity⁴. Usually, the common law exempts the persons from punishments who have an inability to perceive the world around them and make judgments about that world as to what is right or what is wrong.⁵ With that notion, in India and other common law countries, insanity is exempted from punishments even if insanity leads to the person committing heinous crimes⁶ because they are incapable to decide the rightness or

¹ Samuel Jan Brakel & Alexander Brooks, Law and Psychiatry in the Criminal Justice System 91 (2001).

² Definition as provided under Black’s Law Dictionary

³ Definition as provided under Oxford Dictionary

⁴ Hare, 2003 Manual for the Hare Psychopathy Checklist

⁵ Sproat JH. The Care of Idiots and Imbeciles. J Mental Sci. 1902;48:738, 739. Wermuth William C. Contracts. In: Gilmore Eugene Allen, Wermuth William Charles., editors. I Modern American Law. 1. 1921. pp. 112–113

⁶ Section 84 Indian Penal Code, 1860

wrongness of an act. On the other hand, psychopaths are not. The common understanding is that a psychopath understands the acts committed by himself just fine. However, the only thing that makes him commit those is his belief that it is not wrong to murder other human beings or to eat their flesh. They do not have feeling of guilt or remorse⁷ because according to them, murdering in itself is not a wrong act. They have their own set rules that they follow. Now, the law of the land has to be followed by every citizen of that land. And according to the law, insanity cannot be taken as a plea by the psychopaths.⁸ However, a question that arises here is, can those be penalized who believe that their acts are not wrong because of an innate characteristic in them? Insanity is exempted on the similar ground that they commit wrongs because they are incompetent to decide whether it is wrong or right. On the same line of argument, even psychopathy can be granted exemption from punishments because according to their own set rules, murder and cannibalism are no wrong. So, an important jurisprudential question that arises here is whether psychopaths are morally and legally responsible for their criminal behaviour? And, a second jurisprudential question would be whether the criminal law's response to psychopathy in sending them to prison like other convicted offenders and often treating them with severe penalties than non-psychopathic offenders just and practically sound? There is a two-sided aspect to it. A side from the psychopath and the other from the point of law, both of which sound equally justifiable. The law believes that psychopaths are firmly in touch with reality and they understand the nature of their conduct, the legal rules and the consequences for violating those rules. However, the other side says that psychopaths might not understand the point of legal rules because they are not concerned with anything that that is not self-interested for them. Now, how can it be just to punish a person who does not know that what he is being punished for, is a wrong act. The other argument could be that if insanity actually nullifies responsibility for any criminal conduct, then, there would be many similar cases by just nullifying the necessary ingredient of mens rea in most crimes.⁹

Now, delving into another aspect, what is the purpose behind punishing a criminal? What is the intention of the legislature behind enacting laws which has provisions for various punishments depending on the gravity of the crime committed by the perpetrator? The answer to this question lies on the theories of punishments. The most common theory is the deterrent theory¹⁰. The theory basically says that punishment is provided to deter an offender and the society from committing similar offences. If the same logic is applied to a psychopath's case, the purpose of punishment would fail. This is because psychopathy is considered non-treatable and psychopaths have no guilt no matter what punishment they are provided with. Hence they have a tendency to commit similar crimes in intervals. So, there are various aspects some of which justify penalizing psychopathy and not insanity and

⁷ BRAKEL & BROOKS, supra note 1, at 92

⁸ Heidi L. Maibom, *The Mad, the Bad, and the Psychopath*, 1 *NEUROETHICS* 167, 167 (2008)

⁹ Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 *YALE L.J.* 853, 862–63 (1963)

¹⁰ Jeremy Bentham is the founder of this theory.

some which put insanity and psychopathy on same footing. It is just the jurisprudential basis that makes all the difference.

This paper would deal with the various aspects that lead to decriminalizing psychopathy and the works of various philosophers who have dealt on their legal and moral responsibility.

STATUS OF PSYCHOPATHY AND INSANITY UNDER THE LEGAL FRAMEWORK

The defense of insanity is primarily used in criminal prosecutions. This statement finds its basis on the assumption that at the time the crime was committed, the defendant was suffering from severe mental illness and therefore, was incapable of understanding the nature of the crime, and the difference between right and wrong behaviour. Logically, this makes them not legally accountable for the crime. Section 84 of Indian Penal Code (IPC) deals with the "act of a person of unsound mind" and discusses insanity defense¹¹. Earlier, there were basically three tests used to decide on the insanity of a person under the law such as the Wild Beast test¹², The Insane Delusion test,¹³ and "test of capacity to distinguish between right and wrong."¹⁴ These three tests laid the foundation for the landmark Mc Naughten rule. The Mc Naughten rule became a legendary precedent for the law concerning the defense of insanity. Even, in India, Section 84 of IPC, that deals with the defense of insanity is solely based on the Mc Naughten rules. Since the time it was drafted, no changes have been made till date. The rule exempts insane persons from any crime they commit due to the fact that providing any punishment to them would not fulfil any purpose because insane persons do not have the capacity to understand either the nature of their actions or the reason of providing any punishments to them. The deterrent theory of punishment, which is the most famous theory would in itself fail if punishments are provided to insane persons. On the other hand, though there are similarities in the behaviour of an insane person and a psychopath, yet there is a doubt in the legal community as to whether the insanity defense covers psychopathy at all. The American Law Institute's Model Penal Code test of insanity states that "the terms mental disease or defect do not include an abnormality that is manifested only by repeated criminal or otherwise antisocial conduct." Clearly, a claim of insanity under the Model Penal Code which is the most widely used insanity test would not be allowed for antisocial personality disorder, or, psychopathy as per the criteria laid down by the DSM-IV¹⁵. Thus, while they are perceived as insane by most people, they cannot use the insanity plea as a defense in a court of law.

¹¹ Gaur KD. Textbook on the Indian Penal Code. New Delhi: Universal Law Publishing; 2009

¹² R. v. Arnold. 1724, 16 St.Tr.695. Also see Lord Ferrer's case 1760, 19 St.Tr.885

¹³ Hadfield Case. 1800, 27 St.Tr.128

¹⁴ Bowler's case. 1812, 1 Collinson Lunacy 673

¹⁵ American Psychiatric Associations most recent Diagnostic and Statistical Manual—Fourth Edition ("DSMIV")

CRIMINAL RESPONSIBILITY OF PSYCHOPATHS

When the nature of a psychopath is described, it is often in the manner that they have the capacity to reason for things in a practical sense, however they lack the capacity to control themselves according to such moral considerations.¹⁶ There arises two philosophical views¹⁷ between which there might be disagreement then: firstly, there are theorists who put forward the general capacity for practical reasoning or rational self-governance as sufficient for a person to be held morally responsible for his conduct; and secondly, there are theorists who view such general capacity as necessary but not sufficient for inflicting moral responsibility as for such responsibility to be inflicted, the capacity to grasp and respond to different moral reasons would also be necessary. If the first view is taken into consideration, psychopaths can be held responsible for their wrongful actions whereas on the second view, they might not be held responsible.

MORAL RESPONSIBILITY OF PSYCHOPATHS

It has always remained a controversial question¹⁸ that should psychopaths be blamed for their harmful actions? This question concerns itself with the capacities of psychopaths, and in particular, whether they are capable of moral knowledge. Some philosophers have argued that psychopaths' lack in empathy cause them to have difficulties with the understanding of the moral concepts, and that these difficulties, in turn, suggest that they lack moral responsibility for their actions.

This argument is again controversial for a number of reasons. Firstly, though psychopaths have deficits in empathy, it is controversial whether these deficits lead to their difficulty in understanding of moral concepts. It may be that empathy is not involved in the normal understanding of moral concepts; or alternatively, even if the understanding of moral concepts involves empathy, there may be alternative methods to the understanding of such concepts¹⁹. Further, it is also controversial whether the moral concepts in question are required for inflicting moral responsibility. Psychopaths may not understand the kind of harm that they inflict on people, but they are entirely capable of understanding that some kind of actions are forbidden by law. This in itself might be sufficient to make them liable for some moral responsibility for their actions²⁰. However, all the arguments to blame a psychopath have been defended by philosophers. Some have argued that psychopaths do

¹⁶ Haji I. The inauthentic evaluative schemes of psychopaths and culpability. In: Malatesti L., McMillan J., editors. *Responsibility and psychopathy: Interfacing law, psychiatry and philosophy*. Oxford: Oxford University Press; 2010. pp. 261–281

¹⁷ Ibid.

¹⁸ Harris G.T., Rice M.E., Quinsey V.L. Psychopathy as a taxon: Evidence that psychopaths are a discrete class. *Journal of Clinical Psychology*. 1994; 62:387–397

¹⁹ Vargas M., Nichols S. Psychopaths and moral knowledge. *Philosophy, Psychiatry, & Psychology*. 2007; 14:157–162

²⁰ Blair R.J.R. What emotional responding is to blame it might not be to responsibility. *Philosophy, Psychiatry, & Psychology*. 2007; 14:149–151

not understand moral demands and therefore should be exempted from moral responsibility²¹. According to these philosophers, since psychopaths cannot comprehend the moral demands, they cannot be blamed for violating these demands. On the other hand, it is argued that even if psychopaths do not understand moral norms as moral, such understanding is not necessary for moral responsibility. Rather, understanding that an action is against the rules may be sufficient for such responsibility²². Moral responsibility can be inflicted in the attitudes of the psychopaths that is expressed by their wrongful actions²³. This is because, by their action of harming others, it can be inferred that that they show a complete disregard for others and their interests. And this fact in itself might be sufficient to justify putting the blame on them. Psychopaths do not tend to understand the autonomy of other beings which also is one of the reason for their attitude towards such beings and causing impairment to such autonomy. As a result, they fail to understand the emotional state of other persons. For instance, a psychopathic rapist with regard to his victims once expressed: “they are frightened, right? But, you see, I don't really understand it. I've been scared myself, and it wasn't unpleasant”²⁴.

ANALYSIS OF THEIR STATUS UNDER LAW

Some of the psychopaths' failure to understand the distress of victims is not because of their failure to understand the emotions of their victims; rather, it is due to their failure to recognize that others have lives²⁵. One psychopath candidly confesses that he felt no worse about the people he harmed than about squashing a bug²⁶. From the psychopath's perspective, there is little difference between a bug and a human being; none of them is considered autonomous. It is suggestive that psychopaths do not understand the “persons” in their essence. Due to this, the moral content of psychopaths' actions is smaller than the moral content of similar acts of non-psychopathic offenders.²⁷ Because the latter understand their actions and wrongs and the autonomous nature of the persons they inflict their harm upon, and then carry their wrongful actions forward. With this approach at hand the psychopaths deserve a lower degree of blame and punishments for their actions.

²¹ Levy N. Psychopathy, responsibility and the moral/conventional distinction. In: Malatesti L., McMillan J., editors. *Responsibility and psychopathy: Interfacing law, psychiatry and philosophy*. Oxford: Oxford University Press; 2010. pp. 213–226

²² Levy N. The responsibility of the psychopath revisited. *Philosophy, Psychiatry & Psychology*. 2007; 14:129–138

²³ Arpaly N. *Unprincipled virtue: An inquiry into moral agency*. Oxford: Oxford University Press; 2002 AND Scanlon T.M. *Moral dimensions: Permissibility, meaning, blame*. Cambridge, MA: Harvard University Press; 2008

²⁴ Hare R.D. *Without conscience: The disturbing world of the psychopaths among us*. New York: Guilford Press; 1999, pg. 44

²⁵ Hare R.D. *Without conscience: The disturbing world of the psychopaths among us*. New York: Guilford Press; 1999, pg. 41

²⁶ *Ibid.*, pg. 33

²⁷ The claim made here is that because psychopaths lack the concept of personhood, they cannot intend a harm to a person, and that this fact reduces the moral content of their intentional actions that harm persons.

On the same footing of reason, it is also suggested that the differences observed between “psychopaths” and “normal individuals” are so extreme that the general expectation is that the psychopaths will be considered criminally not responsible. This is because psychopaths lack the basic level of empathy to be defined as “normal”.²⁸

PSYCHOPATHY AND THE INSANITY PLEA

There are several factors that are needed for a successful insanity defence. They differ from state to state.²⁹ However, the common typical factors include the inability to recognize the nature of one’s actions or to recognize the criminality or immorality of an act, or else the inability to act “to conform [one’s] conduct to the requirements of the law”³⁰. For the reason that psychopaths are not delusional, but highly intelligent and purposeful³¹ they are generally prevented from using the insanity defense³². Yet, it is difficult to decide whether psychopaths possess the *mens rea*, or “the criminal mind necessary for criminal liability”³³. The defense of insanity is a “full defense to a crime...the equivalent of pleading ‘not guilty’”³⁴.

- **Arguments For and Against the Use of the Insanity Plea by Psychopaths**

From the earlier discussion, it is evident that a psychopath cannot use the insanity plea³⁵. Experts like Stern see this as completely appropriate. Stern is of the belief that though a psychopath lacks the ability to “grasp and control his behaviour in light of distinctly moral

²⁸ Cancio Meliá, M. (2013). Psicopatía y Derecho Penal: Algunas consideraciones introductorias. In J. G. Fernández Teruelo, M. M. González Tascón, & S. V. Villa Sieiro (Coord.), *Estudios Penales en Homenaje al Profesor Rodrigo Fabio Suárez Montes*, (pp. 111-126). Oviedo: Constitutio Criminalis Carolina

²⁹ Legal Information Institute. (2010, August 19). Insanity defense. Cornell Law School. Retrieved from http://www.law.cornell.edu/wex/insanity_defense

³⁰ Ibid., paras 7-10

³¹ McAleer, K. (2010). Sociopathy vs. psychopathy. *Psych Central*. Available from: <http://blogs.psychcentral.com/forensic-focus/2010/07/sociopathy-vs-psychopathy/>

³² Stern, C. A. (2012, July 26). The heart of mens rea and the insanity of psychopaths. Regent University School of Law Working Paper Series. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118130 AND Glenn, A. L., Raine, A., & Laufer, W.S. (2011). Is it wrong to criminalize and punish psychopaths? *Emotion Review*, 3, 302-304.

³³ Stern, C. A. (2012, July 26). The heart of mens rea and the insanity of psychopaths. Regent University School of Law Working Paper Series. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118130, pg.3

³⁴ Legal Information Institute. (2010, August 19). Insanity defense. Cornell Law School. Retrieved from http://www.law.cornell.edu/wex/insanity_defense, para 2

³⁵ Stern, C. A. (2012, July 26). The heart of mens rea and the insanity of psychopaths. Regent University School of Law Working Paper Series. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118130 AND Glenn, A. L., Raine, A., & Laufer, W.S. (2011). Is it wrong to criminalize and punish psychopaths? *Emotion Review*, 3, 302-304.

considerations”³⁶, yet, he accrues the psychopath’s immoral or illegal behaviours as a failure of their will. He acknowledges the high intelligence of the psychopaths and the normal way to carry themselves just like other individuals in a society. He also emphasizes their lack of delusions. He says that psychopaths are indeed able to understand the moral rules very well and only then they manipulate them so as to suit their own purposes. It can be directly quoted from a work of *Stern* that “the mental illness of the psychopath removes the *motivation* to consult a moral sense. It does not remove the *knowledge* of moral facts any more than it removes the knowledge of physical facts”³⁷.

According to Stern, the quintessential element for making people legally liable for acting in accordance with the law is reason. It is immaterial whether they feel the importance of law or not as the other people do.

A contrary view is provided by the work of Glenn, Raines and Laufer (2011)³⁸ wherein they have argued that the legal system place heavy reliance on qualities such as reason and cognition in determining who should be held criminally responsible. The qualities reason and cognition have been exaggerated by the system of law. Although the ability to reason about moral rules has been shown as sufficient by Stern to allow an individual to follow them, constant research in these fields shows that emotion and morality cannot be separated from each other and that emotion is central to moral behaviour. According to some thinkers, the moral choices of any person are “primarily guided by spontaneous, effortless emotional responses that operate automatically and unconsciously”³⁹. It is empathy that helps a normal person to experience the pain of a victim and this refrains them from any behaviour that would cause any harm to such other persons.⁴⁰

Now, if these views are considered correct, i.e empathy and emotion are fundamental to moral behaviour, then the psychopaths seem to not even recognize the immoral nature of their wrongful actions in the very first place. If the rules of insanity are considered once again, it can be inferred that they revolve on a person’s ability to have the knowledge⁴¹ or appreciate⁴² that the nature of his act is wrong. The important words here are “know” and “appreciate”. While sometimes psychopaths may know formally what the law and moral rules are, they might at the same time fail to understand as to why certain things are illegal

³⁶ Stern, C. A. (2012, July 26). The heart of mens rea and the insanity of psychopaths. Regent University School of Law Working Paper Series. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118130 QUOTING Litton(2008)

³⁷ Stern, C. A. (2012, July 26). The heart of mens rea and the insanity of psychopaths. Regent University School of Law Working Paper Series. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118130 , pp. 10-11

³⁸ Glenn, A. L., Raine, A., & Laufer, W.S. (2011). Is it wrong to criminalize and punish psychopaths? *Emotion Review*, 3, 302-304.

³⁹ Glenn, Raines, & Laufer, 2011, citing Haidt, 2001

⁴⁰ Glenn, Raines, & Laufer, 2011

⁴¹ M’Naughten Rules(stretches back to English law)

⁴² Model Penal Code(Legal Information Institute, 2010, paras. 7 and 10)

or immoral. It is a human psychology that we use our reasoning capacity to guide our actions and behaviour and thereby act morally.

Moreover, the Model Penal Code, moreover, allows the insanity plea to be invoked when an individual lacks the capacity “to conform his conduct to the requirements of the law”⁴³. Another finding says that “impulsivity” is a key factor of psychopathy⁴⁴. Although there is not much proof to show how impulsive behaviour is brought about in psychopaths.

It would be interesting to note that if the above statement is proved, then insanity defense might be easier for psychopaths to plea, at least in states that follow the Model Penal Code rule because after all, impulsive behaviour can be related with a lack of understanding of the moral order. Laws which do not provide psychopathy with the insanity plea, repudiate the notion that people should be pardoned for having urges that are out of control. However, the important thing here is not whether someone chooses to act on those urges, but whether the person is beyond the help of treatment.⁴⁵ And, it is agreed that psychopathy is untreatable which makes psychopathy fall under this head.

CONCLUSION

A lot of things are yet to be researched on the functioning of mind of the psychopaths. The more information we get about psychopaths and the biological sources of their disregard for laws and moral norms, and the more we learn about the biological sources of conformity to laws and norms by healthy and normal individuals, the more we may understand the reasons behind the actions of the psychopaths and the less we would claim that psychopaths are simply immoral people who do not follow the rules⁴⁶. But it would not be right to reach any conclusion as of now. The study cited above (Stern, 2012) is suggestive of the fact that psychopaths may be able to show empathy towards others if they have the will to do so. However, if this was true, the main reasoning of critics like Glenn, Raines and Laufer (2011) would be defeated. Since, this study is an open ended one till now, we should be open to new studies and findings regarding the legal and moral behaviour of normal human beings and the relative differences in the psychopaths. Till then, we should be slow in extending protections to the psychopaths based on the existent findings. Otherwise, the basic definitions of the terms “innocent” and “guilty” would be hampered and need to be changed.

⁴³ Legal Information Institute, 2010, paras.10

⁴⁴ Bodhold, R. H., Richards, H. R., Gacono, C. B. (2000), pg. 61. Assessing psychopathy in adults. In C. B. Gacono, (Ed.), *The clinical and forensic assessment of psychopathy: A practitioner's guide* (55-86).

⁴⁵ McIlwain D. Living strangely in time: Emotions, masks and morals in psychopathically-inclined people. *European Journal of Analytic Philosophy*. 2010;6:75–94

⁴⁶ Stern, C. A. (2012, July 26). The heart of mens rea and the insanity of psychopaths. Regent University School of Law Working Paper Series. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118130