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An Insight into the Concept of Excusable Defenses: Comparative Account of Indian Law and Common Law

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ABSTRACT

One of the cardinal principles of criminal law is *actus non facitreus, nisi mens sit rea* i.e. the act itself does not make a man guilty, unless his intentions are so. In certain circumstances, the acts of person are exempted from criminal liability due to presence of some excuse. These circumstances are called as excusable defences. This article discusses the reasons and the circumstances in which, exemptions are allowed for availing of excusable defences. It explains different excusable defences in light of Indian Criminal Justice System and Common Law System. It compares the working of such defences for given two systems in light of relevant case law. Ultimately, the paper posits the points of comparison between the Indian law and Common law for applicability of excusable defences.

Key Words: Excusable Defences, Criminal Justice System, Common Law, Mens Rea, Criminal liability, Punishment.

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INTRODUCTION

Person is presumed to know the nature and consequences of his or her act and is, therefore, held responsible for its consequences.However, there are certain circumstances in which such presumption is displaced. In these circumstances, the criminal guilt of the person is excluded owing to some defence.The general notion underlying the criminal defences is captured by the claim, "Yes, I have committed harm but there are decisive reasons why I should not be blamed or punished for my action."[1]

A person who does acts which exactly fit the definition of an offence is not necessarily liable to be convicted of that offence. There are circumstances in which an act which would otherwise be a crime is justified or excused. Such circumstances are legally called as criminal law defences, which are the set of identifiable conditions or circumstances which may prevent a conviction for an offence. There are five categories of criminal defences *:failure of proof defences, offence modification defences, non exculpatory public policy defences, justification and lastly excuses*.[2] The excuse defences serve exclusively a *liability function* of the criminal law. They define the instances in which an actor is held blameless for a violation of the rules of conduct.

SCHEME OF EXCUSABLE DEFENCES

The old common law made a distinction between justifiable defences and excusable defences, in the law of homicide.[3]In the former category of defences, the circumstances under which the offence was committed furnish legal justification for its commission and hence the law would not take note of it. On the other hand, in the latter category of defences, the necessary *mens rea* for the offence would be lacking either by reason of a bona fide mistake as to the existence of a fact (*Section 76* and *Section 79* of *Indian Penal Code, 1860*), or by reason of the act being done accidently (*Section 80*), or by reason of infancy (*Section 82* and *Section*

[1]PAUL H ROBINSON, *CRIMINAL LAW DEFENCES : A SYSTEMATIC ANALYSIS,* 82 (Colum. L. Rev. 199, 203, 1982)
[2]*Ibid,* at 232 - 243.
[3] Both justification and excuse resulted in acquittal on a charge of homicide but, if the homicide was only excusable, under the common law, the killer's goods were forfeited.

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83), or by reason of insanity (*Section 84*) or lastly by reason of intoxication (*Section 85* and *Section 86*) and therefore, the person is not responsible for what he has done.

Mistake of fact

The defence of mistake is a denial that the accused had the appropriate *mens rea*. The nature of this defence, therefore, depends on the *mens rea* required for the particular offence which the accused is alleged to have committed. Mistake can be with respect to two subject matters : mistake of fact and mistake of law.

The justification for exemption on the ground of mistake of fact is based on the principle that a man who is mistaken about the existence of a fact cannot form the necessary intention to constitute the crime and therefore, not responsible in law for his deeds. On the other hand, mistake of law is no defence since every man is presumed to have knowledge of law and hence responsible for its breach. Thus, the mistake of law is no excuse to a charge of crime, howsoever genuine it might have been. The rule is recognized as basic principle of law on the ground of judicial expediency and public policy.

Sections 76[4] and *Section 79*[5] of the code incorporate the common law principle of *ignorantiafacit doth excusat, ignorantia juris non excusat,* which means, ignorance of fact excuses, ignorance of law does not excuse. The position which emerges from the literal interpretation of above provisions, is that the mistake of fact must be passing the test of "good faith". It does not specifically require that the mistake of fact must be based on reasonable grounds.

In *State of Maharashtra v. Mayer Hans George*[6]accused was carrying gold slabs and was caught by the customs officials on the airport. He pleaded ignorance of notification of Reserve Bank of India, imposing

[4]*Act done by a person bound, or by mistake of fact believing himself bound, by law* - Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

[5]*Act done by a person justified, or by mistake of fact believing himself justified, by law*- Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

[6]State of Maharashtra v. Mayer Hans George,AIR 1965 SC 722

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restrictions on the transit of gold to a place outside the territory of India. Supreme Court refused to accept the plea of ignorance of the notification and the accused was convicted.

Mistake of fact is generally a defence under common law. But if this defence is to be successful, the law requires certain conditions to be fulfilled.[7]

- Mistake must be of such a character that, had the supposed circumstances been real, they would have prevented the alleged liability from attaching to the person in doing what he did. In *R v. Tolsen*[8]*a*ccused was acquitted of charges of bigamy under section 57 of the Offences against the Person Act, 1881, as she believed in good faith and on reasonable grounds after having made inquiries that her husband had died (drowned in a vessel) prior to her second marriage. So the act of remarriage was held as a mistake of fact and not a mistake of law.[9]
  On the other hand, in *Queen v. Princess*[10]accused was held liable under Section 55 of the *Offences Against Person Act, 1861* for the abduction of a girl under sixteen years though he believed in good faith and on reasonable grounds that she was over sixteen years. The House of Lords held that the act in question was *mala in se*, i.e., wrong in itself for which person is liable irrespective of his knowledge.
- Mistake must be a reasonable one, which is fundamentally a matter of evidence. Since the defence of mistake raises an essentially subjective point as to what the prisoner really believed, the objective question of reasonableness is strictly irrelevant.
- Mistake, howsoever reasonable, must not relate to matters of law, but to matters of fact. It is expressed in the common law maxim, *ignorantia juris neminemexcusat*. Although, mistake of law leaves the offender punishable for the crime, it may afford good grounds for inflicting on him a milder punishment. In *Sherras v. De Rutzen*[11]accused was charged for supplying liquor to a constable on duty. The daughter of accused supplied liquor, in the presence of accused, to the constable, who had removed his armlet band, which was an indication that he was off duty. The

[7]KENNY, J W CECIL TURNER,*OUTLINES OF CRIMINAL LAW,* 58 – 62 (19th ed., Cambridge University Press)
[8]R v. Tolsen,(1889) 23 QBD 168 (CCR)
[9]*Supra* note 7, at 75.
[10]Queen v. Princess,(1875) LR 2 CCR 154 (HL)
[11]Sherras v. De Rutzen,(1975) 2 ALL ER 347 (HL) ;R v Fennell [1970] 3 ALL ER 215

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conviction was quashed in the appeal. It was observed that, there is a presumption that *mens rea* is an essential ingredient in

- every offence ; but that presumption is liable to be displaced either by the words of the statue or by the subject matter with which the statue deals, and both must be considered.

With respect to the conditions to avail of the benefit of this defence, the Indian system provides that the person must be either 'bound or justified by law', or he must, by reason of mistake of fact, 'believe himself to be bound or justified by law', in *good faith*. Thus, the emphasize is on *bonafide belief* of the person. For example, A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment exerted in *good faith*, of the power which the law gives to all persons of apprehending murderers in the fact, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defense.[12]

On the other hand, in common law system, such requirement of good faith was substituted by mistake on *reasonable grounds*.[13] Thus, a mistake of fact must be reasonable mistake to excuse the criminal liability.[14] In *Cundy v Le Cocq*[15], the accused was held to be not guilty for supplying liquor to an intoxicated person because he believed on reasonable grounds that the person is not intoxicated.

However, the element of 'Genuineness' was introduced in common law system by *section 76(4)* of the *Criminal Justice and Immigration Act 2008* which provides that a defendant can rely upon genuine, mistaken belief in the need to act in self defence, whether or not the mistake was reasonable one.[16]Thus, the element of good faith is concerned more with the belief of person which is very subjective and will be looked upon from his point of view, the element of reasonable grounds involve more of an objective test of whether an ordinary prudent man would have mistaken in similar situation.

[12] RATANLAL & DHIRAJLAL, *THE INDIAN PENAL CODE,* 656 (33rd ed., Lexis Nexis)
[13] The reason behind the obsolete beliefs (e.g. Superstition) not being treated as mistake which can be sufficient to excuse a crime.
[14]Hasan, [2005] 2 A.C. 467
[15]Cundy v Le Cocq,(1884) 13 QBD 207
[16]*Supra* note 7, at 93.

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On the whole, the position of mistake as a defence is not much different in the Indian law and common law except in terms of ingredients of good faith and reasonableness of the mistaken belief.

Intoxication

Alcohol is quite strongly associated with the crimes of violence. It weakens the inhibitions that normally keep us within the bounds of civilized behavior.The Indian Penal Code has crystallized the law relating to intoxication as a defence under *Section 85*[17] and *Section 86*[18]. Since criminal intention is the basis of criminal liability, an intoxicated person is in the same state of mind as an insane person. Such a state of mind has been termed as *dementia offectatia* (a form of lunacy in which the function of the mind is temporarily suspended.) but no one can be permitted to wearthe cloak of immunity by getting drunk, and thus, voluntary intoxication is never a defence to crime. *Section 86* of the Code, imputes the same knowledge (which is an essential of particular offence) to voluntarily intoxicated man, as he would have had, had he not been intoxicated , i.e. knowledge of a sober man. Thus, the code incorporates the maxim, *qui peccatebrius, luatsobrius*, i.e., let him who sins while drunk be punished when sober.

In *Basudev v. State of Pepsu*[19], the supreme court had discussed the law of intoxication at length. The accused, retired military personnel was charged with the murder of a child while in the state of voluntary intoxication. It was observed that, the accused was not so much under the influence of alcohol that his mind could be so obscure that he was incapable of forming any intention. The court reduced the offence of murder to culpable homicide not amounting to murder.

Initially, the common law did not afford an excuse for the commission of a criminal act as intoxication arises from the voluntary act of the accused. Until nineteenth century, intoxication was not recognized as a defence but later this rigid rule was relaxed. Intoxication as a result of medical treatment or fraud was given

[17] *Act of a person incapable of judgment by reason of intoxication caused against his will*- Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or a against his will.

[18] *Offence requiring a particular intent or knowledge committed by one who is intoxicated*- In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

[19] Basudev v. State of Pepsu,AIR 1956 SC 488

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full exemptive effect. A man who consciously takes risks of causing harm is acting with *mens rea* and thus, will

be criminally responsible if he does such harm.[20]However, the position of this defence in common law is not as simple as it appears to be. It has been subject to criticism on the basis of absence of any consistency. Following are the major rules with respect to the defenceof intoxication in common law:

- If an intoxicated person can establish that the effect of alcohol upon his mind was to make him unable to appreciate that he was taking any risk at all, that fact should negative a finding of *mens rea* on his part. When the measure of intoxication is not excusing the conviction, the point arises as to mitigation of punishment.
- Voluntary intoxication may be used as a defence in crimes of *specific intent*[21]but not in crimes of *basic intent.*The defendant is presumed to be reckless in voluntarily becoming intoxicated and this recklessness is sufficient *mens rea* for an offence of basic intent.[22]
- Defendant is entitled to be acquitted on the ground of voluntary intoxication by drink or dangerous drugs, where the defendant lacks *mens rea* and the crime is one of *specific intent,* provided there is no lesser included basic intent offence ; if there is so, he will be convicted of that offence instead.[23]
- The rule mentioned above with respect to the basic intent offences will not apply in cases where the self induced intoxication is caused by a non-dangerous drug as it will not amount to any recklessness on the part of person and will be treated as involuntary intoxicated.[24]

[20] In R v. Meade, (1909) I KB 895, the accused was convicted of murder of his wife. Though self-induced intoxication, the accused lacked the specific intent necessary to constitute the offence, thus, partially exempted from liability. He was convicted for manslaughter instead of murder. Director of Public Prosecutor v Beard [1920] AC 479 (HL) was decided on the same principle.

[21]*Lord Simon* in Majewski [1977] AC 443 and *Hughes L.J.* in Heard [2007] EXCA Crime 125 have defined the term.

[22] As per *Lord Elwyn Jones* in Director of Public Prosecution v Majewski [1977] AC 443, where it was observed that, lack of specific mens rea is no defence in self-induced intoxication.

[23] The Law Commission has acknowledged the difficulties that a lack of single, agreed test for crimes of specific intent can cause. (Law Commission Report No. 229, (1995). It recommended the abolition of such distinction.

[24]R v. Hardie [1985] 1 WLR 64

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- The rule does not help the defendant who, having decided to commit an offence, deliberately becomes intoxicated to give himself the courage (called as "Dutch Courage") to commit it. Even if the crime is one of specific intent, the defendant cannot use evidence of his intoxication to plead no *mens rea*.[25]
- If an intoxicated person accidently commits what would otherwise be an offence if committed deliberately, he will be liable for the wrong as a result of it, as "drunken intent is still an intent."[26]

- Intoxicated mistaken belief as to the identity of one's victim is no defence even if no offence would have been committed had the facts been as the defendant assumed them to be.[27]

Thus, thedefence of intoxication is available only when the intoxicant substance was administered to him against his will i.e. involuntary intoxication. This principle is incorporated very well under *Section 85* and *Section 86* of *Indian Penal Code, 1860*. Thus, voluntary intoxication is no excuse for the crime in Indian law.

On the other hand, in common law system, voluntary intoxication is not totally irrelevant for excusing the accused. It becomes relevant and also excuses the accused when the crime is of *specific intent* and not of *basic intent*. In crimes of basic intent, mere *recklessness* is sufficient to hold the person liable and defendant is presumed to be reckless in voluntarily becoming intoxicated and thus presumed to have *mens rea* for an offence.

Secondly, the distinction has been made between dangerous and non-dangerous drugs, according to which liability changes. Thus, in crimes of specific intent, defendant is entitled to be acquitted on the ground of voluntary intoxication only by drink or dangerous drugs. Moreover, intoxication by non-dangerous drugs is treated as involuntary intoxication for the purposes of crimes of basic intent as it does not amount to any recklessness on the part of person.

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[25]Attorney General for Northern Ireland v. Gallagher [1963] AC 349

[26] Hughes L J in Heard[2007] EXCA Crim 125,

[27]Fotheringham(1988) 88 Cr. App. R. 206

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Thirdly, involuntary intoxication is a defence to any crime, be it of specific intent or basic intent, *provided* that, the defendant did not form the *mens rea* for the offence. Such rule is absent in Indian law where once it is proved that the defendant was involuntarily intoxicated, the element of *mens rea* is negated.

On the whole, the common law has made compartments of crimes of basic intent and specific intent, and accordingly treats the act or omission of defendant irrespective of the fact that intoxication was voluntary or involuntary. Whereas, the Indian law is very precise and less complicated in terms of intoxication and emphasizes on 'involuntary' conduct of defendant. This may be one of the reasons as to why common law position has been subject to widespread criticism and subject of law commission recommendation (in its report *Intoxication and Criminal Liability*) heavily.[28]

Infancy

Moral delinquency is a prerequisite of criminal guilt and thus the realization of consequences could not be imputed to very young children. On these lines, infancy has been recognized as an excuse to the criminal liability for an offence. Infancy has been recognized as a complete answer to the criminal charge in India. *Section 82*[29] and *Section 83*[30]of the *Indian Penal Code, 1860* contains the Indian law on the subject. Thus, there is total immunity from criminal responsibility up to seven years of age and from seven to twelve years; the liability depends upon the capacity of understanding of the child. In other words, a child below seven years of age is deemed prima facie to be *doli incapax*. Children between seven and twelve years of age enjoy qualified immunity. However, the Law Commission of India has suggested that the age of total immunity of the child should be ten years and not seven years of age.[31]

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[28]INTOXICATION AND CRIMINAL LIABILITY, LAW COMMISSION, Law Com No. 314 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228983/7526.pdf

[29]*Act of a child under seven years of age.* - Nothing is an offence which is done by a child under seven years of age.

[30]*Act of a child above seven and under twelve of immature understanding.* - Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

[31] Law Commission of India, '*Forty-Second Report : the Indian Penal Code*', Government of India, 1971, pg 89http://www.lawcommissionofindia.nic.in/1-50/Report42.pdf

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In *Hiralal Mallick v. State of Bihar*[32], it was held by the court that child above seven years and below twelve years of age is qualified to avail the defence of *doli incapax*, if it is proved that he has not attained sufficient maturity of understanding to judge the nature of act. The accused, a twelve years old boy, was convicted of murder. He participated in a concerted action and used a sharp weapon to kill the victim and ran away after the crime. The defence was not allowed considering his level of understanding about the nature of act he was doing with other. Thus the presumption of *doli incapax* was held to be rebutted.

In common law the rule was that a child could not be guilty of crime unless he had reached the age of twelve. In due course of time, the law became more severe and the age for termination of immunity was fixed at seven years. Later, *Children and Young Persons Act, 1933* raised the age from seven years to eight years below which there could be no criminal liability. *Children and Young Persons Act, 1963* further rose the age at ten years for termination of immunity.

Thus, there is conclusive presumption that a child below ten years of age cannot be *doli capax*. Nothing that he does can make him liable to be punished by a criminal court.[33] In case of child between ten years and fourteen years, the presumption of *doli incapax* is no longer conclusive and may be rebutted by clearer proof of the mental condition.

When we compare the Indian and Common law it is observed that both the laws recognize that children's immaturity may impair their understanding of right and wrong so that it would be unjust to hold them criminally responsible in the same way as an adult. In India, a child below *seven years* of age is deemed prima facie to be *doli incapax* and children between *seven and twelve* years of age enjoy qualified

[32]Hiralal Mallick v. State of Bihar,AIR 1977 SC 2236

[33]Marsh v Loader (1863) 14 C.B. (n.s.) 535, where a child of six years of age, obtained damages from the person who arrested him for crime.

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immunity depending upon their mental capacity to understand the nature and consequences of their act or omission.[34]

On the other hand, in common law system, *tenyears*is the minimum age for conviction provided under *Children and Young Persons's Act, 1963*. Thus, there is conclusive presumption that a child below ten years of age can not be *doli capax*.Nothing that he does can make him liable to be punished by a criminal court.[35] In case of child between *ten years and fourteen years*, the presumption of *doli incapax* is no longer conclusive and may be rebutted by clearer proof of the mental condition.

It must be noted that, Indian law provides seven to twelve years as the benchmark for deciding the qualified immunity but does not specify the case where accused child is of seven years only. *Section 82* uses 'child under seven years' and *section 83* uses 'child above seven years', thus leaves the case where the child is seven years only. However, in common law system, term used is 'children of ten years and over' but under the age of fourteen. Thus, it includes ten years within the matrix of qualified immunity unlike not clearing whether seven years of age is included for immunity in case of Indian position.

However, in terms of availability of qualified immunity or defence of infancy, the two systems follow similar principles i.e. child must not have attained sufficient maturity of understanding to judge the nature and

consequences of his conduct, although the procedural implications in terms of handling of juvenile offenders may differ.

On the whole, there is presumption of incapacity to commit the crime, in respect of child below twelve years of age (Indian law) and Fourteen years of age (Common Law), unless rebutted by clear evidence that the child was *doli capax*.

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[34] As per *Section 82* and *Section 83* of Indian Penal Code, 1860

[35] Marsh v Loader (1863) 14 C.B. (n.s.) 535, where a child of six years of age, obtained damages from the person who arrested him for crime.

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Insanity

Insanity is one of the defences to a criminal charge on the theory that one who is insane has no mind and hence cannot have the necessary *mens rea* to commit the crime. It is also reflected in the maxims *Furiosisnullavoluntasest* i.e. a mad man has no will and *Furiosus furor sub puniter*i.e. a mad man is punished by his own madness. But at the same time, society has to be protected against such attacks of insane criminals and thus such larger interest must be balanced against the conferring of immunity from criminal charges on the ground of 'disturbed state of mind'.

Indian law of insanity is laid down under *section 84*[36] of Indian Penal Code, 1860 though the word 'insanity' is not used in the provision. It uses the expression 'unsoundness of mind' which has not been defined in the code anywhere. However, the etymological meaning of the two expressions is 'defect of reason arising from a disease of mind'. Insanity in law differs from the medical concept. In law, it means a disorder of the mind which impairs the cognitive faculty to such an extent as to render him incapable of understanding the nature and consequences of his actions. Every mentally diseased person is not *ipso facto* exempted.[37] In order to get the benefit of *Section 84* of the Code, it must be proved that, the nature of the act was not known to the accused, or the act was not known by the accused to be contrary to law, or the act was not known by him to be wrong. In *Ashiruddin Ahmed v. R*[38], the accused, in pursuance of dream in which he received divine command to sacrifice his son of five years of age, killed the son with knife. It was held that the accused made the sacrifice believing it to be right and was of unsound mind.

[36] *Act of a Person of Unsound Mind* : Nothing is an offence which is done by a person who, at the time of doing it, by reason of, unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.
[37] Hari Singh Gond v. State of Madhya Pradesh, (2008) 16 SCC 109 ; Surendra Mishra v State of Jharkhand, (2011) 11 SCC 495
[38] Ashiruddin Ahmed v. R,AIR 1949 Cal 182

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Further, it must be noted that the crucial point of time of such incapability due to unsoundness of mind is the time when accused committed the offence. Unsoundness of mind prior or subsequent to the commission of the offence is not sufficient to absolve the person from criminal responsibility.[39]

English law even in its harshest days recognized insanity as a possible defence but it never held that the mere existence of any insanity whatever would suffice to exempt the insane person from criminal responsibility. Only insanity of particular and appropriate kind was regarded as enough to produce exemption.[40]

Prior to 1991, it was very rare for the defendant to plead insanity as a defence because, although a successful plea will result in a verdict of 'not guilty' by reason of insanity, on reaching such verdict, the court had to order the accused to be detained indefinitely in a secure mental hospital. Further, the introduction of defence of diminished responsibility to the crime of murder in 1957 also had a dramatic effect in reducing the number of insanity pleas. However, important changes were brought in by way of *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991*, which gave the judges certain amount of discretion to deal with the defendant in ways other than indefinite detention in secure mental hospital where the verdict is not guilty, except when the offence involved carries a sentence 'fixed by law'. Further, the Act prohibits a finding of insanity unless supported by the written or oral testimony of at least two registered medical practitioners.[41]

The defence of insanity was more properly formulated by the House of Lords after the historic case of *M'Naghten*.[42] The House submitted to the judges certain questions in respect of persons afflicted with insane delusions, and answers to these questions became the basis of law of insanity. In essence, every person is presumed to be sane, and possess a sufficient degree of reason to be responsible for crimes, until the contrary is proved.

[39] PSA PILLAI, *CRIMINAL LAW*, 147 (10th ed., Lexis Nexis)
[40] *Supra* Note7, at 81.
[41] One of whom at least one is approved by the Home Secretary as having special experience in the field of mental disorder. (as per Section 1, *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991*)
[42] In this case M'Naghten murdered the private secretary of Sir Robert Peel, in mistake for that statesman. The acquittal of accused on the ground of insanity provoked widespread dissatisfaction and became the subject of debate in the House of Lords ;R v M'Naghten(1843) 10 Cl. And F. 200 (T.A.C.)

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Common law system recognizes sane and insane automatism, based on internal or external factors. Insane automatism[43] is caused by a disease of the mind or internal factor, as opposed to sane automatism, which is caused by external factor. For example, diabetes[44] would be an internal factor but insulin injection[45] would be an external factor. In *Sullivan*[46] the court held that an epileptic, who committed the offence of assault whilst recovering from an epileptic seizure, would be treated as an insane automaton, epilepsy being an internal factor. On the other hand, in *T*[47], it was held that, post-traumatic stress disorder as a consequence of being raped, was caused by the external factor (of rape) and thus defence of sane automatism was upheld.

In 1975, the *Butler Committee on Mentally Abnormal Offenders*[48] proposed radical reforms which were never enacted but the basis of its recommendations were incorporated by *Law Commission*[49] in Draft Criminal Code Bill in 1989. It has mainly recommended the abolition of M'Naghten rules, widening of the scope of 'disease of a mind', and, balance of probability being the standard of burden of proof for person alleging insanity (prosecution as well).

Both the Indian Law and Common law system recognize insanity as a defence but they also hold that the mere existence of any insanity whatever would not suffice to exempt the insane person from criminal responsibility. Thus, both accept that, irresistible impulse, mental agitation, annoyance and fury do not ipso facto exempt the accused from responsibility as they merely indicate the loss of control and not necessarily the unsoundness of mind. However, it may be a relevant factor for inflicting a lesser punishment.

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[43] Automatism means total destruction of voluntary control.

[44] Hennessy [1989] 2 All ER 9, In this case, Diabetic person acting unconsciously through failing to take insulin, which can lead to hyperglycaemia (caused by excess of blood-sugar), was held to be eligible for the defence of insane automatim or insanity.

[45] Quick [1973] 3 All ER 347, In this case, nurse was convicted of assaulting a patient. She raised a plea of sane automatism on the ground of hypoglycaemia. The court of appeal quashed the conviction on the ground that the defendant's condition was caused by an external factor, i.e. insulin injection. The condition is also transitory in the sense that it would not recur unless the external stimulus is reintroduced.

[46] Sullivan,[1984] AC 156 ;Burgess [1991] 2 QB 92, in this case the tendency to sleepwalk was held to be an internal factor.

[47] T, [1990] Crim. L.R. 256

[48] Report of the comitte on Mentally Abnormal Offenders (1975 ;Cmnd. 6244) (Butler Report)

[49] A CRIMINAL CODE FOR ENGLAND AND WALES, Vol I of Law Com 177http://www.lawcom.gov.uk/app/uploads/2015/06/Criminal_Code_177_1.pdf

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Indian Penal Code uses the expression 'person of unsound mind', whereas in Common law countries we find the mention of term 'insanity'. However, the meaning of the two expressions does not differ although the scope of the expression 'insanity' seems to be larger than 'unsound mind'.

Secondly, Indian law provides the test of 'knowing the nature of the act' in order to determine whether the person is legally insane or not. In this respect, common law position is also similar, which provides the capability to appreciate the physical nature and quality of an act. However, with respect to the alternative test of 'knowing the act to be wrong', the two systems differ. The Indian law uses the expression 'wrong or contrary to law', which introduces the element of morality or moral wrong in deciding the legal insanity of person. Whereas common law is completely divorced from the moral aspects of an act and it provides that wrong means legally wrong and not morally wrong.

Thirdly, in common law system, we find sane and insane automatism, based on internal or external factor. Thus, insane automatism is caused by a disease of the mind or internal factor like diabetes, as opposed to sane automatism, which is caused by external factor like insulin injection. Such classification of sane or insane automatism on the basis of internal or external factor is absent in Indian law which provides in very general terms about insanity.

On the whole, the Indian law and Common law system mainly differ in terms of importance of knowledge of moral wrongfulness of an act and recognition of diminished responsibility as a defence. In other respects like burden of proof, they have similar principles. However, it must be noted that, law relating to insanity in both the systems require modification in light of recent technological advances in psychology.

Accident

In an event that occurs without person's knowledge or beyond expectation and results in wrong to another person, the former cannot be held responsible in law. The event takes place out of ordinary courses of events, which no man of ordinary prudence could anticipate. Such events are called as accident or

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misfortune[50] for the purpose of defending against or excusing from the criminal liability. As the object of criminal law is to

punish only serious infractions of the rules of society, it follows that criminal law cannot punish a man for his mistake or misfortune.[51]

The defence of accident is incorporated under *Section 80* of the Indian Penal Code and exempts a person from liability if the act is done accidently, or by misfortune, without any criminal intention or knowledge and the accident occurs while doing a lawful act in lawful manner and by lawful means, wherein due care and caution is exercised. The idea of something fortuitous and unexpected is involved in the word 'accident'. It is essential that the event must be one to which human fault does not contribute, something which was so little expected that it came as a surprise. It is the effect of an act which is accidental and not the act which caused that effect.

A, turns out a trespasser, out of his house, using no more force than is necessary for that purpose. B resists but without striking A. they fall in struggle and B is killed. Death is accidental. In yet another example, A takes up a gun, not knowing whether it is loaded or not, points it in sport at B and pulls the trigger, B is shot dead. Such a death is not accidental. If A had reason to believe that the gun was not loaded, the death would have been accidental, although he had not used every possible precaution to ascertain whether gun was loaded or not.[52]

As far as defence of Accident under common law system is concerned one does not find express or separate defence. One of the most probable reasons is that, it partially covers the cases of accident under

[50] *Misfortune* is an accident with harmful consequences resulting in injury to another. Difference between accident and misfortune is that an accident involves obly an injury to another, but misfortune causes injury as much to the author as to another unconnected with the act.

[51] GAUR, K. D. *A TEXTBOOK ON INDIAN PENAL CODE*, 104 (7th ed, Universal Law Publishing Co.)

[52] SIR JAMES FITZJAMES STEPHEN, *A DIGEST OF CRIMINAL LAW* (9th ed, Sweet & Maxwell, London)

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the defence of mistake, as the two defences involve somehow similar factual matrix and implications. Another reason being that, the defence of accident is implied under the maxim *actus non facit ream, nisi mens site rea.* Thus, unless the act is accompanied with *mens rea*, the person cannot be held liable for the same. In cases of defence of accident, there is only *actus rea* of the person but the mens rea is totally absent and thus the person is not liable. Thus, the position of excusable defences in India and common law, largely differs in terms of scope of the defence, and is similar in terms of burden of proof.

CONCLUSION

The concept of excusable defences is very relevant in any criminal justice system, as it gives way to situations where a person would be helpless, despite being innocent, when it comes to defending his actions. It negates the evil intention of defendant and put him in a situation as if he has not committed the crime in true sense. The scheme of excusable defences in India is somewhat based on the common law principles, which is reflected under chapter IV of the Indian Penal Code. The excusable defences mainly cover mistake of fact, intoxication, infancy, insanity and accident.

The Indian position seems to be very precise and certain in respect of these defences covered under the Code. It has provided general rules for these defences without going into great details or sub rules, as is the case with common law. For example, in case of intoxication as a defence, the Indian position is very general and provides that only involuntary intoxication will be considered a valid defence. However, in common law system, we find types of intoxication and related consequences, types of drugs, types of crimes etc for determining the availability of the defence of intoxication.

Law commission of India has not suggested any radical reforms in these defences except some changes in the phraseology and rearrangement of the language of provisions. Whereas, law commission of England and Wales has been suggesting radical reforms in these defences, for example, abolition of distinction between crimes of basic intent and specific intent in case of defence of intoxication. The same can be attributed to the complexity involved in the rules governing such defences and the consequent

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inconvenience to the layman in understanding the law related to these defences and ultimately injustice taking place due to insufficient flexibility of these rules.

