STUDY MATERIAL FOR THE WEBINAR ON

THE STATUTORY FRAMEWORK OF THE MENTAL HEALTHCARE ACT, 2017 AND CONCERNS REGARDING IMPLEMENTATION

Contents

"But the illnesses that are called 'mental' are kept distinguished from those that all the 'body' in a fundamental way. In "Philosophy and Medicine", Vol. 5 at page-X the learned Editor refers to what distinguishes the two qualitatively:

...Undoubtedly, mental illness is so disvalued because it strikes at the very roots of our personhood. It visits us with uncontrollable fears, obsessions, compulsions, and anxieties....

...This is captured in part by the language we use in describing the mentally ill. One is a hysteric, is a neurotic, is an obsessive, is a schizophrenic, is a manic-depressive. On the other hand, one has heart disease, has cancer, has the flu, has malaria, has smallpox..."

-Hon'ble Supreme Court of India in **Ram Narain Gupta v. Rameshwari Gupta (1988) 4 SCC 247**

INTRODUCTION

- India has witnessed a major shift from the predominant seclusion in the Indian Lunacy Act, 1912, when there was no effectiveness in the treatment provided, to the Mental Health Act, 1987, when the focus was on the treatment and care of mentally ill patients along with some efforts to de-stigmatize and ensure human rights, to the recent Mental Healthcare Act, 2017, which primarily focuses on the human rights of people with mental illness.
- The Mental Healthcare Care Act 2017 was passed on 7 April 2017 and came into force from July 7, 2018. The law was described in its opening paragraph as *"An Act to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfill the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto. This Act superseded the previously existing Mental Health Act, 1987 that was passed on 22 May 1987."*
- This new Law marks a major shift in the way mental healthcare is delivered, as it aims to protect and promote the rights of people during the delivery of mental healthcare.
- 'Mental Healthcare' is explained in Section 2(o) as follows :-

(o) "Mental healthcare" includes analysis and diagnosis of a person's mental condition and treatment as well as care and rehabilitation of such person for his mental illness or suspected mental illness;

- Within this Act, a capacitous individual cannot be coerced into receiving treatment for mental illness; admissions can be 'independent' or 'supported' and 'supported admission' replaces involuntary admissions of the previous legislation.

- It upholds patient autonomy, dignity, rights and choices during mental healthcare and thus marks a bold step in India's mental health legislation.
- The law takes a rights-based approach to all aspects of mental healthcare. There are times when persons with mental illness are unable to express or communicate their preference for treatment to their treating psychiatrists. Therefore, the new Act makes provision for writing an advance directive which people can make when they are well. Through such advance directives, people can state their preferences for treatment, including how they would like to be treated for mental illness, the treatments they would not like to take, and finally, nominate a person who could take decisions on their behalf in such situations. This kind of provision has been made for the first time in healthcare legislation in India.
- The Act provides persons with mental illness protection from cruel, inhuman and degrading treatment, right to information about their illness and treatment, right to confidentiality of their medical condition and right to access their medical records, to list just a few rights. The government is explicitly made responsible for setting up programmes for the promotion of mental health, prevention of mental illness and suicide prevention programmes. Given the huge shortage of trained mental health professionals in the country, the Act requires the government to meet internationally accepted norms for the number of mental health professionals within 10 years of passing this law.
- ***It has also effectively decriminalized suicide attempts by 'reading down' the power of Section 309 of the Indian Penal Code.***

STATEMENT OF OBJECTS AND REASONS

The United Nations Convention on the Rights of Persons with Disabilities, which was ratified by the Government of India in October, 2007, made it obligatory on the Government to align the policies and laws of the country with the Convention. The need for amendments to the Mental Health Act, 1987 was felt by the fact that the related law, i.e., the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was also in the process of amendment. The Mental Health Act, 1987 could not protect the rights of persons with mental illness and promote their access to mental health care in the country.

2. In light of above, it is proposed to bring in a new legislation by repealing the Mental Health Act, 1987, and-

(a) Recognising that:

(i) Persons with mental illness constitute a vulnerable section of society and are subject to discrimination in our society;

(ii) Families bear financial hardship, emotional and social burden of providing treatment and care for their relatives with mental illness;

(iii) Persons with mental illness should be treated like other persons with health problems and the environment around them should be made conducive to facilitate recovery, rehabilitation and full participation in society;

(iv) The Mental Health Act, 1987 was insufficient to protect the rights of persons with mental illness and promote their access to mental health care in the country;

(b) And in order to:

(i) Protect and promote the rights of persons with mental illness during the delivery of health care in institutions and in the community;

(ii) Ensure health care, treatment and rehabilitation of persons with mental illness, is provided in the least restrictive environment possible, and in a manner that does not intrude on their rights and dignity. Community-based solutions, in the vicinity of the person's usual place of residence, are preferred to institutional solutions;

(iii) Provide treatment, care and rehabilitation to improve the capacity of the person to develop his or her full potential and to facilitate his or her integration into community life;

(iv) Fulfill the obligations under the Constitution and the obligations under various International Conventions ratified by India;

(v) Regulate the public and private mental health sectors within a rights framework to achieve the greatest public health good;

(vi) Improve accessibility to mental health care by mandating sufficient provision of quality public mental health services and non-discrimination in health insurance;

(vii) Establish a mental health system integrated into all levels of general health care; and

(viii) Promote principles of equity, efficiency and active participation of all stakeholders in decision making.

INTERNATIONAL CONVENTIONS ON MENTAL HEALTH

UN Principles for the Protection of Mental Illness and Health Care (The MI Principles 1994)

The MI principles were adopted by the United Nations General Assembly in 1991. The MI principles provide the non-binding standards which the mental health systems of the countries should meet to cure the mental disorder of the people. Basically, there are 25 principles provided by the document for the protection of the rights of the persons with mental illness. Some of the major principles are discussed below:

- **Fundamental freedoms and basic rights:** This provision contains not only a single provision in it but a lot of other provisions embedded in it. They are:
    - Every person shall enjoy the best available mental health care, which shall be part of the health and social care systems.
    - Every person with a mental illness shall be treated with humanity and dignity.
    - All persons with mental illness, have the right to protection from economic, sexual and other forms of exploitation.
    - There shall be no discrimination on the grounds of mental illness. "Discrimination" means any exclusion or preference that has the effect of nullifying or destroying equal enjoyment of rights.
    - Every person with mental illness shall have the right to exercise all civil, political, social, economic and cultural rights as recognized in Universal Declaration of Human Rights and other conventions.
    - If a person due to mental illness lacks legal capacity, a person shall be appointed, after a fair hearing by an independent and impartial tribunal. The person who is incapable of making rationale decision shall be entitled to be represented by a counsel. If the person whose capacity is at concern does not himself secure such representation, he shall be provided with services without payment to the extent he does not have sufficient means to pay for.
    - Where a court or other competent tribunal finds that a person with mental illness is unable to manage his or her own affairs, measures shall be taken so far as if necessary and appropriate to that person's condition, to ensure the protection of his or her interests.
- **Medical Examination:** No person shall be compelled to undergo any medical examination to determine whether he or she has a mental illness except in accordance with the procedures established by the law.
- **Consent to treatment:** A person should not be given treatment without his free consent. Consent is said to be free when it is not induced under any influence of another person. In case of an emergency or urgent medical practitioner is authorised by law to give treatment without the prior consent of a patient to eradicate the imminent danger on the health of a patient.

Where treatment is given to an individual without his prior consent every sort of effort should be made by an individual to inform the patient the nature of the treatment and possible alternatives also to involve the patient in the treatment plan.

- **Rights and conditions in mental health facilities:** Every person in a mental health facility shall have the right to full recognition before the law and have the full respect for

their privacy and have freedom of communication which includes freedom to communicate with another person i.e. should have the freedom to send and receive uncensored private communication.

- **Procedural Safeguards:** The patient shall have the right to choose and appoint a counsel to represent the patient in case of any source of violation or complaint procedure or appeal and the patient should be provided free legal aid to the extent that he is not able to pay.

UN Convention on the Rights of Persons with Disabilities (CRPD), 2006

- 'Disability' is not formally defined in the CRPD, allowing individual State Parties considerable latitude in how they define disability in their domestic law. People with disabilities are characterised as follows: *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*. The use of the word 'include' in the statement above allows for a non-exhaustive description of 'disability' that is not settled; neither are the meanings of terms such as 'long-term' and 'impairments'. It is accepted by the Committee on the Rights of Persons with Disabilities that people with a 'mental illness' (referred to as having a 'psychosocial disability') fall under the Convention.

The Basic provisions mentioned in the convention are as follows.

- *"Respect for the autonomy of an individual and inherent dignity including the freedom to make one's own choices, and independence of persons.*
- The admitted patients should not be discriminated in the society on the basis of their mental illness.
- There should be full and effective participation of the people suffering from the problem of mental health in society.
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.
- The opportunities provided to an individual to grow should not be restricted due to the reason of their mental illness and disability.
- The individuals shall have the proper access to the facilities and the rights provided them to exercise consciously and effectively.
- The individuals should not be discriminated on the basis of their gender i.e. on the basis that whether an individual is a male or female, age, colour etc.
- *Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities*."

POLICIES AND LAWS ON MENTAL HEALTH IN INDIA

Historical Background

- After the takeover of the administration of India by the British crown in 1858, a large number of laws were enacted in quick succession for controlling the care and treatment of mentally ill persons in British India. These laws were:
  - The Lunacy (Supreme Courts) Act, 1858
  - The Lunacy (District Courts) Act, 1858
  - The Indian Lunatic Asylum Act, 1858 (with amendments passed in 1886 and 1889)
  - The Military Lunatic Acts, 1877.
- These Acts gave guidelines for establishment of mental asylums and procedure to admit mental patients. The British scene existing in the middle of the 19th century served as the background of lunacy legislations in that period in India.
- During the first decade of the 20th century, public awareness about the pitiable conditions of mental hospitals accentuated as a part of the growing political awareness and nationalistic views spearheaded by the Indian intelligentsia. As a result, the Indian Lunacy Act, 1912 was enacted. The 1912 Act guided the destiny of Psychiatry in India. Lunatic asylums (named mental hospitals in 1922) were now regulated and supervised by a central authority. Procedure of admission and certification in this respect was clearly defined. The provision of voluntary admission was introduced. Still, the main stress was on preventing the society from dangerousness of mentally ills and taking care that no sane person is admitted in these asylums. Psychiatrists were appointed as full time officers in these hospitals. Provisions of judicial inquisitions for mentally ill persons were also given in the Act. After the Second World War, Universal Declaration of Human Rights was adopted by the UN General Assembly. Indian Psychiatric Society submitted a draft Mental Health Bill in 1950 to replace the outmoded ILA-1912. Mental Health Act (MHA-87) was finally enacted in 1987 after a long and protracted course.

Constitutional provisions

- Starting with Article 21 of the Constitution of India, the right to life has been expanded to include the right to health. It is essential that mentally ill persons receive good quality mental healthcare and living conditions in their homes and society.

Other important legislations

Indian contract laws

- According to Indian Contract Act, 1872, any person of sound mind can make a contract. Section 12 of the Act stipulates that a person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest. A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Marriage and divorce

- Under Hindu Marriage Act, 1955, conditions in respect of mental disorders, which must be fulfilled before the marriage is solemnized under the Act, are as follows.
    - Neither party is incapable of giving a valid consent as a consequence of unsoundness of mind.
    - Even if capable of giving consent, must not suffer from mental disorders of such a kind or to such an extent as to be unfit for marriage and the procreation of children.
    - Must not suffer from recurrent attacks of insanity.
- The expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia. The expression "psychopathic disorder" means a persistent disorder or disability of the mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment.
- Marriages in contravention to the provision in respect of mental disorders come under voidable category. Voidable marriages (Sec 12) are those which may be annulled by a decree of nullity on the given grounds but may continue to be legal till the time it is annulled by a competent court.
- According to the section 13 of the Act, divorce or judicial separation can be obtained if the person has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
- Further, According to Muslim Marriage Act, 1939, a woman married under Muslim Law is entitled to obtain a decree of divorce if her husband has been insane for a period of 2 years.
- Under Christian Law, marriage is voidable, if either party was a lunatic or idiot. Christians can obtain divorce under Indian Divorce Act. 1869 (as amended in 2001) on grounds of unsoundness of mind provided: (i) it must be incurable (ii) it must be present for at least 2 years immediately preceding the petition. Divorce is not admissible on ground of mental illness under the Parsi Marriage and Divorce Act, 1936. However, divorce can be obtained if the defendant at the time of marriage was of unsound mind, provided the plaintiff was ignorant of the fact and the defendant has been of unsound mind for a period of 2 years upwards and immediately preceding the application.

Liability under Indian Penal Code

- Indian Penal Code, 1860 states that *"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."* M'Naghten Rules define the criminal responsibility of mentally ill in our courts and it has been incorporated in the Section 84 of IPC. It has been held by the Supreme Court that the law presumes every person of age of discretion to be sane and defense on ground of insanity needs to be proved. There have been instances of lesser sentence on account of mental illness.

- Sec 89, IPC provides protection for any action done in good faith for the benefit of a person of unsound mind by or by consent of the guardian or other person having lawful charge of that person.

Mental Health Act, 1987 and related policies

- The Mental Health Act, enacted in 1987, had been the target of criticism since its introduction. The National Health Policy, 2002 incorporates provisions on mental health. However, no separate policy on mental health exists. In 1996, the District Mental Health Program (DMHP) was added and re-strategized in 2003 to include two important schemes of Modernization of State Mental Hospitals and Up-gradation of Psychiatric Wings of Medical Colleges/General Hospitals. India signed and ratified the Convention on Rights of Persons with Disabilities and its Optional Protocol in 2007. In 2009, the Manpower Development Scheme (Scheme-A & B) was made part of the Program.
- It is important to note that the DMHP envisages provision of basic mental health care services at the community level and has the following objectives:
- *a. To provide sustainable basic mental health services to the community and to integrate these services with other health services;*
- *b. Early detection and treatment of patients within the community itself;*
- *c. To reduce the stigma of mental illness through public awareness; and*
- *d. To treat and rehabilitate mental patients within the community.*
- A central mental health team has also been constituted to supervise and implement the programme. A Mental Health Monitoring System (MHIS) is being developed. Standardized training was proposed with the help of training manual.
- After the National Mental Health Survey during 2014–2016, the Government of India started making efforts to improve the mental health services by formulating policies like the National Mental Health Policy (NMHP), 2014 and consequently, the Mental Healthcare Act, 2017 was enacted and notified on May 29, 2018. The new Act focused on the rights of a mentally ill person and repealed the Mental Health Act, 1987. Despite having many positive features, the Mental Health Act, 1987 had been the target of criticism since its introduction and was not effectively implemented due to the lack of resources.

KEY FEATURES OF THE MENTAL HEALTHCARE ACT, 2017

Advance Directive

- A person with mental illness shall have the right to make an advance directive that states how he/she wants to be treated for the illness and who his/her nominated representative shall be. The advance directive should be certified by a medical practitioner or registered with the Mental Health Board.
- If a mental health professional/ relative/care-giver does not wish to follow the directive while treating the person, he can make an application to the Mental Health Board to review/alter/cancel the advance directive.

Mental Health Authority

- The Act empowers the government to set-up Central Mental Health Authority at national-level and State Mental Health Authority in every State. Every mental health institute and mental health practitioners including clinical psychologists, mental health nurses and psychiatric social workers will have to be registered with this Authority.
- These bodies will (a) register, supervise and maintain a register of all mental health establishments,(b) develop quality and service provision norms for such establishments, (c) maintain a register of mental health professionals, (d) train law enforcement officials and mental health professionals on the provisions of the Act, (e) receive complaints about deficiencies in provision of services, and (f) advise the government on matters relating to mental health.

Mental Health treatment

- The Act also specifies the process and procedure to be followed for admission, treatment and discharge of mentally-ill individuals.
- A medical practitioner or a mental health professional shall not be held liable for any unforeseen consequences on following a valid advance directive.

Prohibited Procedures

- Few procedures which seems barbarian and clearly against human rights are prohibited exclusively. These procedures make mental healthcare seem to be an entirely gruesome experience but these patients need to be aware that these procedures are forbidden and that they need not be scared and come forth with the treatment in a positive attitude.

I. Electro-convulsive therapy without the use of muscle relaxants and anesthesia,

II. Electro-convulsive therapy for minors,

III. Sterilization of men or women, when such sterilization is intended as a treatment for mental illness,

IV. Chained in any manner or form whatsoever.

Section 96 of the Act states: No psychosurgery shall be performed until:

I. The informed consent of the patient on whom surgery is being performed.

II. Approval from the concerned board to perform the surgery.

Presumption of severe stress in case of attempt to commit suicide

- A person who attempts suicide shall be presumed to be suffering from mental illness at that time and will not be punished under the Indian Penal Code. The government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide.
- Section 115 of the Mental Healthcare Act, 2017 reads as:
  Presumption of severe stress in case of attempt to commit suicide

(1)Notwithstanding anything contained in Section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said code.

(2) The Appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide.

- This shows how the formation of the Act has allowed the sensitive care that has to be taken to such victims of suicide who are mentally stressed and unaware about their well being, this Act has allowed now to take special care to such cases wherein the victim has attempted suicide due to stress or mental illness and has provided provisions through which they cater to the needs of mentally unhealthy or unfit personnel.

NATIONAL MENTAL HEALTH PROGRAMME

- Recognizing that Persons with mental illness constitute a vulnerable section of society and are subject to discrimination in our society; Families bear disproportionate financial, physical, mental, emotional and social burden of providing treatment and care for their relatives with mental illness; Persons with mental illness should be treated like other persons with health problems and the environment around them should be made conducive to facilitate recovery rehabilitation and full participation in society.
- The Government of India launched the National Mental Health Programme (NMHP) in 1982, keeping in view the heavy burden of mental illness in the community, and the absolute inadequacy of mental health care infrastructure in the country to deal with it. The district Mental Health Program was added to the Program in 1996. The Program was re-strategized in 2003 to include two schemes, viz. **Modernization of State Mental Hospitals and Up-gradation of Psychiatric Wings of Medical Colleges/General Hospitals**. The Manpower development scheme (Scheme-A & B) became part of the Program in 2009.

3 main components of NMHP-

1. Treatment of Mentally ill
2. Rehabilitation
3. Prevention and promotion of positive mental health.

Objectives -

- To ensure the availability and accessibility of minimum mental healthcare for all in the foreseeable future;
- To encourage the application of mental health knowledge in general healthcare and in social development;
- To promote community participation in the mental health service development; and
- To enhance human resource in mental health sub-specialties.

Strategies -

- Integration of mental health with primary health care through the NMHP
- Provision of tertiary care institutions for treatment of mental disorders
- Eradicating stigmatization of mentally ill patients and protecting their rights through regulatory institutions like the Central Mental Health Authority, and State Mental health Authority.

District Mental Health Program:

Envisages provision of basic mental health care services at the community level.

Objective: -

- To provide sustainable basic mental health services to the community and to integrate these services with other health services
- Early detection and treatment of patients within the community itself
- To reduce the stigma of mental illness through public awareness.
- To treat and rehabilitate mental patients within the community.

REFORMS IN POLICY AND LAW NEEDED FOR MENTAL HEALTHCARE ACT IN INDIA

- In this unprecedented time, the issues relating to mental health across world have been exposed. In India, even before the outbreak of the COVID-19 pandemic, there was already a mental health epidemic.
- As per the World Health Organisation (WHO), about 15% of the total disease conditions around the world are related to mental illness. WHO has also noted that India has one of the largest populations suffering from mental illnesses ranging from depression and anxiety, to severe conditions like schizophrenia.

Issues to be addressed

- India has highest number of suicides in the world. The high crime and drug addiction rate in India also has direct nexus with mental health. The pandemic has added unseen mental health issues which has unearthed drawbacks in the existing mental health infrastructure and laws/polices. This pandemic has emerged as an eye-opener to show that India's mental healthcare system needs strengthening and more support from the Central or State governments. There is a complete lack of integrated mental healthcare and failure on implantation of the DMHP across India.
- The consequences of the COVID-19 pandemic are visible on people's mental well-being, and this is just the beginning. Unless we make serious commitments to scale up investment in mental health right now, the health, social, and economic consequences will be far-reaching.
- The lost productivity resulting from depression and anxiety - two of the most common mental disorders - costs the global economy each year. In low and middle-income countries,

more than 75% of people with mental disorders receive no treatment at all for their disorder. In India, mental health is on the back foot due to lack of resources and allocation of budget. It is high time to prioritize on mental health by investing and integrating mental healthcare into the private and public sectors.

Measures required

- Experts note that effective implementation of the DMHP is the key to resolving many critical issues that mental healthcare delivery faces in India.
- The new Act requires the government to provide "less restrictive community-based establishments including half-way homes, group homes and the like for persons who no longer require treatment" in restrictive mental health establishments. However, in reality, such rehabilitation facilities are either missing or inadequate in India's landscape of mental healthcare services. The Central and State governments are yet to comply with the 2017 Supreme Court direction to set up or expand such half-way homes. As of 2020, the states have only provided a road-map towards implementation.
- Treatment of mental health disorders needs to be taken seriously and given equal or rather more importance than even physical health as there is 'no health without mental health'. The policymakers need to promote mental health and easy access to cost-effective treatment of common mental disorders at the primary healthcare level.
- The present mental health situation in India requires dynamic policy and resource allocation by the government. There is urgent need to use media and social media and other community services to increase awareness and reduce the stigma around mental health illness by implementing nationwide programs. Reports from all across the world show that the pandemic has also led to serious psychological consequences like anxiety, stress, depression, fear and insomnia etc. Recently, India Today reported a 20% increase in the mental health cases in India post imposition of the lockdown in March 2020.
- As seen above, some initial steps to improve on the mental healthcare system have been provided under the NMHP. Appropriate intervention, understanding about the issue, and easy accessibility of professionals are the way forward to improve the situation. This requires social, public and private teamwork to get the situation under control. There is an urgent need for providing psychological help with trained mental health professionals as first aid, to reduce distress and ensure easy access to mental-health facilities for citizens.
- Mental disorders also need to be covered under insurance, as a plea pending before the Supreme Court has prayed for.

IMPORTANT JUDICIAL PRONOUNCEMENTS

Sentencing an offender with mental illness

1. Accused 'x' v. State of Maharashtra (2019) 7 SCC 1

The Hon'ble Supreme Court dealt with the following question:

"How could culpability be assessed for sentencing those with mental illness?"

The Hon'ble Supreme Court observed:

- All human beings possess the capacities inherent in their nature even though, because of infancy, disability, or senility, they may not yet, not now, or no longer have the ability to exercise them. When such disability occurs, a person may not be in a position to understand the implications of his actions and the consequence it entails. In this situation, the execution of such a person would lower the majesty of law.
- There appear to be no set disorders/disabilities for evaluating the 'severe mental illness', however a 'test of severity' can be a guiding factor for recognizing those mental illness which qualify for an exemption. Therefore, the test envisaged herein predicates that, the offender needs to have a severe mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment. These disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders-with schizophrenia.

It was held that:

- Directions need to be followed in the future cases that, the post-conviction severe mental illness will be a mitigating factor and appellate Court, in appropriate cases, needs to consider while sentencing an Accused to death penalty. The assessment of such disability should be conducted by a multi-disciplinary team of qualified professionals (experienced medical practitioners, criminologists etc), including professional with expertise in Accused's particular mental illness. The burden is on the Accused to prove by a preponderance of clear evidence that, he is suffering with severe mental illness. The Accused has to demonstrate active, residual or prodromal symptoms that the severe mental disability was manifesting. The State may offer evidence to rebut such claim. Court in appropriate cases could setup a panel to submit an expert report. ***'Test of severity' envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that objectively the illness needs to be most serious that the Accused cannot understand or comprehend the nature and purpose behind the imposition of such punishment.***

The Hon'ble Rajashthan High Court in;

2. Ratanlal Chamar v. State of Rajasthan 2018 (3) RLW 1827 (Raj.)

- Accused suffering from mental disorder--Prosecuted for offence u/Sec. 302 Penal Code--Accused-appellant has been having active mental ailment at the time of incident and he was an old patent of Schizophrenia--Was not capable to make/arrange his defence.
- Held--Trial of accused appellant vitiated--Conviction for offence u/Sec. 302 Penal Code cannot be sustained--Order of trial Court set-aside--Matter remanded for fresh medical examination of the accused.
- "Special provision has been engrafted in Section 330 of the Cr.P.C., which provides that whenever a person is found under Section 328 or Section 329, to be incapable of entering defence due to unsoundness of mind or mental retardation, the court shall, whether the case is one in which bail may be taken or not, order release of such person on bail, provided that unsoundness of mind or mental retardation, which does not mandate in-patient treatment and a friend or relative undertakes to obtain regular outpatient psychiatric treatment from the nearest medical facility and to prevent from doing injury to himself or to any other person."
- "We have come across with several similar cases in the recent past where despite evidence emerging on record about acute mental ailment of the accused, neither the police has invoked relevant provision of law, nor even the courts have paid due regard to the mandate of law. The police in such kind of cases is expected to act with utmost sensitivity. Investigating Officer in the present case despite having been apprised of the acute mental disorder of the accused by number of witnesses, did not point this out in the summary of the charge sheet that was filed before the Court."

Rights of Patients under Mental Healthcare Act

The Hon'ble Supreme Court in its order in:

3. Pushpa M. Rawtani . v. In Reference Through, High Court Registrar, Principal Seat At Jabalpur, Madhya Pradesh . Special Leave Petition Criminal nos.3999-4000 of 2017

Date of Order: 04.07.2017

Held that:

- The rights of patients have been enumerated in Section 18-26 of the Mental Healthcare Act. Section 18(1) provides that every person shall have a right to access mental healthcare and treatment from mental health services run or funded by the appropriate Government. Section 18(2) provides that the right to access mental healthcare and treatment shall mean mental health services of affordable cost, of good quality, available in sufficient quantity, accessible geographically, without discrimination on the basis of gender, sex, sexual orientation,

religion, culture, caste, social or political beliefs, class, disability or any other basis and provided in a manner that is acceptable to persons with mental illness and their families and care-givers. Section 18(7) states that persons with mental illness living below the poverty line whether or not in possession of a below poverty line card, or who are destitute or homeless shall be entitled to mental health treatment and services free of any charge and at no financial cost at all mental health establishments run or funded by the appropriate Government and at other mental health establishments designated by it.

In enforcement of the enumerated rights, Section 27 and 28 are applicable.

27. (1) A person with mental illness shall be entitled to receive free legal services to exercise any of his rights given under this Act.

(2) It shall be the duty of magistrate, police officer, person in charge of such custodial institution as may be prescribed or medical officer or mental health professional in charge of a mental health establishment to inform the person with mental illness that he is entitled to free legal services under the Legal Services Authorities Act, 1987 or other relevant laws or under any order of the court if so ordered and provide the contact details of the availability of services.

28. (1) Any person with mental illness or his nominated representative, shall have the right to complain regarding deficiencies in provision of care, treatment and services in a mental health establishment to, " (a) the medical officer or mental health professional in charge of the establishment and if not satisfied with the response; (b) the concerned Board and if not satisfied with the response; (c) the State Authority.

(d) The provisions for making complaint in sub-section (1), is without prejudice to the rights of the person to seek any judicial remedy for violation of his rights in a mental health establishment or by any mental health professional either under this Act or any other law for the time being in force.

Concept of advance directives under the Mental Healthcare Act

The Hon’ble Supreme Court in

4. Common Cause (A Regd. Society) v. Union of India (UOI) and Ors. (2018) 5 SCC 1

Held that:

The Act recognises an advance directive. An advance directive has to be in writing. The person subscribing to it must be a major. While making an advance directive, the maker indicates

(i) The manner in which he or she wishes or does not wish to be cared for and treated for a mental illness; and

(ii) The person he or she appoints as a nominated representative.

An advance directive is to be invoked only when the person who made it ceases to have the capacity to make mental healthcare treatment decisions. It remains effective until the maker regains the capacity to do so.

465. The Central Mental Health Authority constituted under the Act is empowered to make Regulations governing the making of advance directives.

466. The Mental Health Review Board constituted under the Act has to maintain an online register of all advance directives and to make them available to a mental health professional when required.

467. Advance directives are capable of being revoked, amended or modified by the maker at any time. The Act specifies that an advance directive will not apply to emergency treatmentadministered to the maker. Otherwise, a duty has been cast upon every medical officer in charge of a mental health establishment and a psychiatrist in charge of treatment to propose or give treatment to a person with a mental illness, in accordance with a valid advance directive, subject to Section 11. Section 11 elucidates a procedure which is to be followed where a mental health professional, relative or care-giver does not desire to follow the advance directive. In such a case, an application has to be made to the Board to review, alter, cancel or modify the advance directive. In deciding whether to allow such an application the Board must consider whether

(i) The advance directive is truly voluntary and made without force, undue influence or coercion;

(ii) The advance directive should apply in circumstances which are materially different;

(iii) The maker had made a sufficiently well informed decision;

(iv) The maker possessed the capacity to make decisions relating to mental health care or treatment at the time when it was made; and

(v) The directive is contrary to law or to constitutional provisions.

A duty has been cast to provide access to the advance directive to a medical practitioner or mental health professional, as the case may be. In the case of a minor, an advance directive can be made by a legal guardian. The Act has specifically granted protection to medical practitioners and to mental health professionals against being held liable for unforeseen consequences upon following an advance directive.

468. Chapter IV of the Mental Healthcare Act 2017 contains detailed provisions for the appointment and revocation of nominated representatives. The provisions contained in Chapter IV stipulate qualifications for appointment of nominated representatives; an order of precedence in recognising a nominated representative when none has been appointed by the individual concerned; revocation of appointments and the duties of nominated representatives. Among those duties, a nominated representative is to consider the current and past wishes, the life history, values, culture, background and the caregiver of the person with a mental illness; give effective credence to the views of the person with mental illness to the extent of his or her understanding the nature of the decisions under consideration; to provide support in making

treatment decisions; have the right to seek information on diagnosis and treatment, among other things.

469. In the context of mental illness, Parliament has now expressly recognised the validity of advance directives and delineated the role of nominated representatives in being associated with healthcare and treatment decisions.

470. A comparative analysis of advance directives in various jurisdictions indicates some common components. They include the patient's views and wishes regarding: (i) Cardio-pulmonary Resuscitation (CPR)-treatment that attempts to start breathing and blood flow in people who have stopped breathing or whose heart has stopped beating; (ii) Breathing Tubes; (iii) Feeding/Hydration; (iv) Dialysis; (v) Pain Killers; (vi) Antibiotics; (vii) Directions for organ donation; and (viii) Appointment of Proxy/Health care agent/Surrogate, etc.

471. Legal recognition of advance directives is founded upon the belief that an individual's right to have a dignified life must be respected.

CONCLUSION

- The present healthcare system is inefficient and we suffer from lack of infrastructure and professionals in the field, resultant of this causes degraded quality of living and healthcare of the mentally ill. The decriminalization of attempt to suicide is one of the major highlights of the Act, along with the concept of Advance Directive and ban on all those treatment procedures that gave these mentally ill persons nightmares, also trying to fix the system of institutions by enlisting them and making sure they work at standards which are prescribed by the authorities in the act.
- There is an urgent need to depute specialized mental health professionals to work.
- The Mental Healthcare Act 2017 is supposed to change the fundamental approach on mental health issues including a sensible patient-centric health care, instead of a criminal-centric one, in India, the second most populous country and one of the fastest economies in the world. The guidelines need to be reviewed on aspects such as primary prevention, reintegration, and rehabilitation because without such strengthening, its implementation would be incomplete and the issue of former mental health patients will continue to exist.
- The pandemic and the rise in the number of suicides and the crime rate shows the need for an integrated mental healthcare policy covering mental health issues. There is an urgent need to develop infrastructure and prioritize mental health care resources, so that the mental health of most vulnerable groups is well-served.
