Volume III ISSUE I **ISSN NO: 2582-6034**

LEGALFOXES LAW TIMES

CRITICAL ANALYSIS OF THE MENTAL HEALTHCARE ACT, 2017

By Deepika Dhananjaya

INTRODUCTION

According to the World Health Organization (WHO), mental health and well-being are fundamental to quality of life, enabling people to experience a meaningful life. Mental health differs from general health where, in some cases, mentally ill persons are unable to make decisions on their own.[1]

Over 300 million individuals, or 4.4 percent of the world's population, are believed to suffer from depression. Several studies have shown that mental problems are associated with a wide range of acute and chronic ailments, including noncommunicable diseases, injury and violence, and poor mother and child health.[2]

Mental health issues are not uncommon nowadays. Persons with Mental Illness ("PMI") are frequently encountered in our daily lives. It is important to remember that the PMI are the most vulnerable members of our society. As a welfare state, our country has an important role in promoting social inclusion and ensuring equal access and participation. In 2007, India's government adopted the UN Convention on the Rights of Persons with Disabilities (UNCRPD)[3]. The Convention requires that the country's laws/rules adopt its guidelines. There was a pressing need for the current law to adapt to changing circumstances and to be consistent with the UNCRPD. As a result, the legislature consolidated national laws.[4]

---

[1]Patel V, Kleinman A. Poverty and common mental disorders in developing countries. *Bull World Health Organ.* 2003;81:609–15

[2]Murthy P, Bharath S, Narayanan G, Soundarya S. *Integrating mental health care and non-communicable disorders. Background Document to the Gulbenkian NIMHANS Symposium on Integrating Mental Health Care and Non-Communicable Disorders.* Bangalore: NIMHANS; 2015. Nov, [Google Scholar]

[3]Ministry of Social Justice and Empowerment, 2017. Government of India: Rights of Persons With Disabilities Act. The Gazette of India (Extraordinary) 28th December 2016, Part II, Section (I). /

[4]*The Mental Health Act, 1987and Persons with Disability Act, 1995 with the UNCRPD*

MENTAL HEALTH LEGISATIONS IN INDIA

Following the British crown's takeover of India's government in 1858, several of those laws were established in rapid succession to regulate the care and treatment of mentally ill people in British India.[5]The Indian Lunatic Asylum Act, 1858, The Lunacy (Supreme Courts) Act, 1858, The Lunacy (District Courts) Act, 1858 (with amendments passed in 1886 and 1889), The Military Lunatic Acts, 1877.The increasing political consciousness and nationalistic ideas pushed by the Indian intellectuals heightened public awareness of the pitiful circumstances of mental institutions throughout the first decade of the 20th century.[6]The Indian Lunacy Act of 1912 was enacted as a result of this.

As a result, a federal law dealing with mental illness was enacted. The legislation, on the other hand, dealt with the therapeutic and procedural aspects and was not right-centric for individuals with mental disorders. The United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) after World War II.This necessitated another legal amendment to defend the rights of mentally ill persons. As a result, the Mental Health Act of 1987 superseded the Indian Lunacy Act of 1912.

The Mental Health Act, 1987[7] was passed by the Republic of India to replace its colonial predecessor. The Mental Health Act of 1987 did not do much to protect the rights of mentally ill people. Thus, the act was repealed in 2018, and The Mental Healthcare Act of 2017 was enacted in its place.[8] The Mental Health Act of 1987 established legal guidelines for the treatment of people with mental illnesses who require inpatient care. The Act had a key flaw where it did not allow for an independent court or quasi-judicial review of the decision for compulsory admission. It lacked a provision to ensure the patient's rights were not infringed upon by compulsory treatment. The previous Act only applied to specialised mental institutions, which

[5]Banerjee G. The Law and Mental Health: An Indian Perspective, 2001. Available from: http://www.psyplexus.com/excl/lmhi.html. [Last accessed 13 August, 2021]

[6]*Ibid*.

[7] The Ministry of Health and Family Welfare, Government of India, 1987,The Mental Health Act. https://mohfw.gov.in/sites/default/files/207743528143272 4989_0_0. pdf.

[8] The Ministry of Law and Justice, 2017. The Mental Healthcare Act, 2017. The Gazette of India (Extraordinary), Part II Section I. 7th April 2017,https://legislative.gov.in/sites/default/files/A2017-10.pdf

meant that a vast number of persons receiving mental health care in normal hospitals were not covered by it.

To achieve conformity with the Convention, a review of the existing Mental Health Act was required. The new Act is solidly founded in the rights of people with mental diseases, as required by the Convention. It establishes a legal presumption of equality for people with mental diseases, unless the individual's decision-making competence for mental healthcare decisions is damaged. The act focuses on mental healthcare in general, rather than care of persons with mental illness.

The Mental Healthcare Act, 2017 is a significant move in India's mental health legislation in a new path. The Mental Healthcare Act, 2017 (Act or MHCA) preamble intends to offer mental healthcare and services for people with mental illnesses, as well as to promote and fulfil their rights while providing such treatment and services.

MENTAL HEALTHCARE ACT, 2017

According to the Act, Mental illness,[9] is defined as a significant mental, emotional, perceptual, orientation, or memory problem that severely affects judgement, behaviour, ability to recognise reality, or ability to handle the demands of daily life All 'substantive' mental illnesses, including substance abuse disorders, are covered by the law. However, intellectual disability is not included.It also does not include mental retardation. Mental illness will be determined according to national and international medical standards.[10]

According to the National Institute of Mental Health and Neurosciences (Nimhans), 13.7 % of Indians suffer from mental disorders, with 10.6 % requiring immediate treatment. A serious mental disorder affects roughly 1.9 percent of the population, which includes schizophrenia, bipolar mental disorders, and other conditions.[11]

Principles of the legislation

[9] Section 2(s), Mental Health Care Act, 2017
[10] *Ibid,* Section 3
[11] Vandana Kamath, *13.7% Indians are mentally ill, study says,* Times of India (August 13, 2021), https://timesofindia.indiatimes.com/city/bengaluru/13-7-Indians-are-mentally-ill-study-says/articleshow/54805096.cms.

This Act places a high priority on one's ability to make decisions about one's own mental health care. The ability to understand relevant facts, or comprehension of the consequences of actions, or ability to convey the decisions is articulated in the Act.[12] The act provides for an advance directive, which gives a mentally ill individual the ability to make an advance directive on how she or he wishes to be treated for the illness and who will be her or his selected representative. A medical professional must approve this directive.[13]

Section 14 of the Act says that each patient can appoint a representative to assist them in making decisions about their mental health care when they are unable to do so alone. The patient makes the nomination, and the nominee accepts it. While making decisions for the patient, the nominated representative is legally required to respect the patient's choice, will, and preferences. . In the absence of a nominated representative, other relatives, carers, and certain appointees from the State (following the Act's specific protocol) can act as a nominated representative. Only when the patient is incapacitated may a selected representative make choices for him or her.

Rights of a person with mental illness

1. **Right to access mental healthcare[14] -** In addition to constitutional rights, every Indian citizen now has the right to receive state-funded mental health treatment.
   Discrimination based on mental illness is prohibited in all areas of life (including for insurance purposes). This law also forbids discrimination in mental health services based on sexual orientation, gender, sex, class, religion, caste etc. If the government is unable to provide such services in the district where the PMI resides, the government should ensure that they have access to such services at any other location and shoulder the full expense of treatment. All people who are homeless, destitute, or living in poverty have the right to use all government-funded mental healthcare facilities and services for free. This provision is a good step toward guaranteeing the well-being of the poor who cannot afford or obtain even basic health care, let alone mental health treatment.
2. **Right to community living[15]–** It is the right of every person suffering from mental illness to be let in and be a part of the society.The law also considers community-based

[12]Section 4, The Mental HealthCare Act, 2017
[13]*Ibid,* Section 5
[14]*Ibid,* Section 18

mental health treatment to be a government duty for persons with mental illnesses. If a mentally ill person doesn't have a family to live with, the Government should provide legal aid.

3. **Right to protection from cruel, inhuman and degrading treatment**[16].- The law assumes that everyone with a mental condition is capable of receiving mental healthcare (unless proven otherwise) and protects them against harsh, inhumane, and degrading medical treatment, where the persons have the right to a hygienic and safe environment, to have facilities for education and leisure, to have adequate provision for food and space and the right to privacy as well.
4. **Right to equality and non-discrimination**[17]**-** The legislation mandates that mental and physical healthcare be provided on an equal footing. A woman's child under the age of three years should not be separated from her while she is getting care, treatment, or rehabilitation at a mental health facility, unless there is risk of harm to the child due to the mother's mental illness.
5. **Right to information** [18]**–** A person with mental illness has the right to all the provisions of this act, and to make an application for admission. It is the duty of the medical officer to ensure that the person has been provided with full information in case where person is not capable of understanding.
6. **Right to confidentiality** [19]**-**The Act gives the PMI a right to confidentiality, which means that the information of his or her mental illness and treatment will be kept private unless it is necessary to avoid damage for the public good and safety. The same information might, however, be given to the candidate and mental health specialists in order for them to properly treat the PMI.
7. **Right to access medical records**[20] **-** Every PMI has the right to view their fundamental medical documents, as prescribed. However, specific information could be withheld by the medical officer if there is a serious mental harm.

---

[15] *Ibid,* Section 19
[16] *Ibid,* Section 20
[17] *Ibid,* Section 21
[18] *Ibid,* Section 22
[19] *Ibid,* Section 23
[20] *Ibid,* Section 25

8. **Right to personal contacts and communication**[21] **-** A person admitted to a mental health facility has the right to reject or receive visitors, as well as refuse or receive and make at reasonable hours, according to the facility's rules.
9. **Right to legal aid**[22] **-** Under the Legal Services Authorities Act, 1987(39 of 1987), it is the obligation of the magistrate, police officer, person in charge of any specified detention institution, or medical professional to inform the person with mental illness that he is entitled to free legal services.

Mental health review board

A Mental health review Board should be constituted by notification of the State Authority[23]. A District Judge Equivalent, independent psychiatrists, other independent professionals, other independent clinicians and lay peopleconstitute these boards.[24] Despite the fact that an independent psychiatrist is required to be a member of the Board, the Board might theoretically be formed without one.

The Boards are also responsible for reviewing advance directives, reviewing nominated representatives, approving extensions of supported admission, and ECTs for minors and psychosurgeries, in addition to the required independent reviews and appeals by patients andnominated representatives[25]. Any appeals against the Mental Health Review Boards' judgments must be made to the High Court.[26]

Mental health establishments

The government must establish a National Mental Health Authority[27] and State Mental Health Authorities in each state[28]. This authority will require all mental health practitioners (clinical

[21] *Ibid,* Section 26
[22] *Ibid,* Section 27
[23] *Ibid.* Section 73
[24] *Ibid,* Section 74
[25] *Ibid*, Section 82
[26] *Ibid,* Section 83
[27] *Ibid*, Section 33
[28] *Ibid,* Section 45

psychologists, mental health nurses, and psychiatric social workers) and mental health institutes to register.[29]

These bodies must develop quality and service provision standards for such establishments; keep a register of mental health professionals; (d) train law enforcement officials and mental health professionals on the act's provisions; (e) review complaints about service inadequacies and provide mental health advice to the government.[30]

Admission to mental health establishments

This Act allows for either "independent" or "supported" admissions to mental health facilities.

Independent admission

Patients with capacity actively request independent admissions, giving them the flexibility and responsibilityto make their own decisions and treatment plans. The duration of independent admissions is unrestricted. Treatment shall be given only with the patient's consent.[31]

Independent admissions may not always necessitate the involvement of a psychiatrist (even for release) and are not obliged to be reported to Mental Health Review Boards. Parity between mental and physical healthcare is one of the Act's key concepts. Independent admissions necessitate passing a severity level. This Act, in addition to allowing patients to make an informed decision about whether or not to seek inpatient mental health treatment, restricts independent admissions to those who meet a severity threshold. Those seeking inpatient treatment below the threshold may find this to be a hurdle. This, according to others, is a violation of the concept of parity with physical healthcare.

Supported admission

The goal is to reduce involuntary admissions by utilising assistance. A selected representative is expected to provide support (patient-nominated or appointed by the State). Supported admissions can happen with or without the patient's consent. Even individuals with impaired decision-

[29] *Ibid,* Section 65
[30] *Ibid,* Section 43 and Section 55
[31] *Ibid,* Section 86

making capacity for mental healthcare must be supported and participated in decision-making as much as feasible, according to the legislation.

Two independent professional exams and recommendations (a psychiatrist and a medical practitioner/ mental health expert) are required for supported admissions. Within a week, the Mental Health Review Boards must be notified of all supported admissions.[32]

The maximum duration for an initial supported admission is thirty days. It can be extended upon renewal to a maximum of 180 days which must be approved by the Medical Review Board.[33]

Admission of a minor

A minoradmitted in this manner must be housed separately from adults in an environment that is appropriate for his age and developmental requirements and of at least the same quality as that offered to other children admitted to hospitals for other medical procedures.A minor may only be treated with his or her nominated representative's informed permission. In case of minor girls, a female attendant shall always stay with the minor girl for the duration of her admission.[34]

Prohibited procedures

Section 95 of the Act states that, certain treatments such as electro-convulsive therapy without anaesthesia;electro-convulsive therapy on a minor and sterilization and chaining of mentally ill must not be performed.

A person with mental illness must not be subjected to solitary confinement or any physical restraint unless there is immediate harm to another person. If a person is under restraint, A person who is restrained must be kept in a secure location where he cannot hurt himself or others, and under the constant observation of medical staff at the mental health facility. The medical health establishment should send a report to the Medical review board every month, regarding the instances of restraint.[35]

Responsibilities of other agencies

[32] *Ibid,* Section 89
[33] *Ibid,* Section 90
[34] *Ibid,* Section 87
[35] *Ibid,* Section 91

It is the duty every police officer-in-charge is required to report to the Magistrate if he has reasonable grounds to suspect a mentally ill individual is being mistreated or neglected. [36]The police officer must also take under protection any person wandering whom the officer believes must be suffering from mental illness and the medical officer will be responsible for assessment of the person based on which the person will be admitted into a mental establishment or to a government establishment for homeless persons.[37]

This legislation also provides a provision for prisoners with mental illness and persons in custodial institutions (orphanages, children homes and women protection homes), where the PMI must be admitted into a mental health establishment for assessment and treatment. [38]

Punishments

Violations of this Act's provisions will result in imprisonment for up to 6 months or a fine of Rs. 10,000, or both. Repeat offenders might face a sentence of up to two years in prison, a fine of Rs. 50,000–5 lakhs, or both.[39]

Decriminalising suicide

Suicide attempts are presumed to be caused by extreme stress under Section 115 of this Act, and it is recommended that trials under the Indian Penal Code be avoided for suicide attempts caused by stress. The government's responsibility to offer care, therapy, and rehabilitation for people who attempt suicide is signalling a shift in India's attitude on suicide.

CONCLUSION

The Mental Healthcare Act of 2017 is without a doubt a significant improvement over prior legislationthe rights of persons with mental disorders. It's because the Mental Healthcare Act of 2017 incorporates all of the progressive ideas that have already been put into law books by industrialised countries and the United Nations, bringing our laws up to date. There are also a number of additional laws that define the rights and limitations of people with mental disorders.

[36]*Ibid,* Section 101
[37]*Ibid,* Section 100
[38]*Ibid,* Section 103, 104
[39]*Ibid,* Section 108

The law evolves in response to societal demands, as may be observed in the subject of mental health.

With India's massive judicial backlog, the extra duty of the Mental Health Review Boards necessitates an express commitment of resources from the government. Legislative reform is an essential first step in this approach. The MHCA makes the government responsible for providing adequate mental health treatment, prohibits unmodified ECT, and positions allied healthcare professionals in important critical sectors of the mental health system. To support these new responsibilities, all of these requirements will necessitate an increase in employment and extra training for existing employees.

The MHCA, 2017, has a flaw in Section 89, which permits a person with mental illness to be hospitalised and treated without his permission if a chosen representative request it. The Act overlooks the fact that the family is the primary caregiver. Even clinicians are reliant on their patients' families.The Act also ignores the fact that the government has a mental health programme. The Act should have required all states to adopt a National Mental Health Program and made the State Mental Health Authority responsible for it.[40]

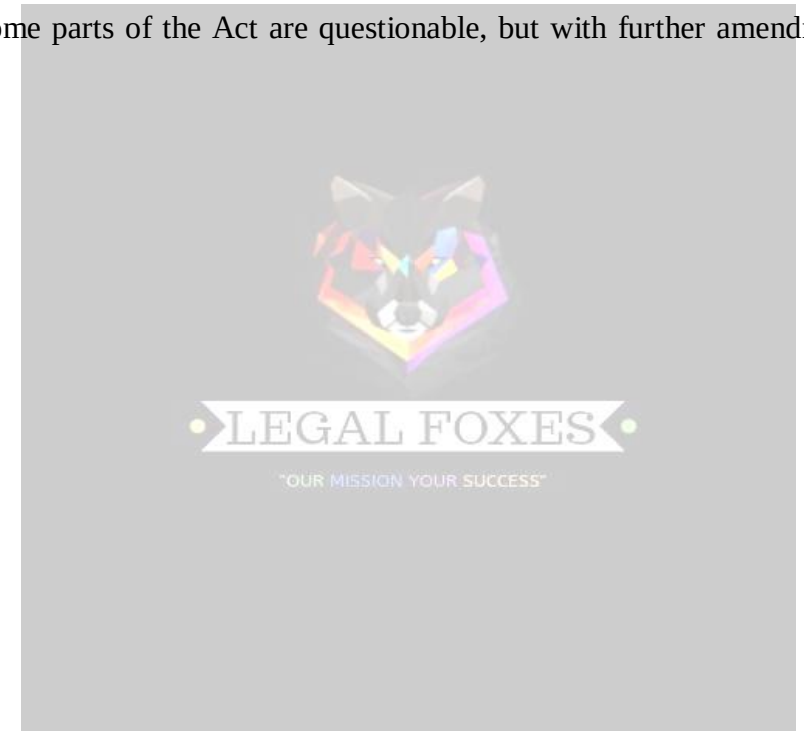
The act ensures that homeless people and those living below the poverty line (BPL) receive free, high-quality care, even if they do not have a BPL card.The financial load on government in our nation, where mental illness is deemed to be on par with depression, will be too high. The proposed health spending in India for the financial year 2017–2018 is 1.2 percent of gross domestic product. It is among the lowest in the world, and since 2013–2014, public health spending has been steadily decreasing.[41]According to a 2011 WHO study, most industrialised countries spend more than 4% of their budgets on mental health research, infrastructure,

[40]Sood, S. (2020, August 6). *Mental healthcare Act: A legislation for the people - food, drugs, healthcare, life sciences - India*. Welcome to Mondaq. https://www.mondaq.com/india/healthcare/972410/mental-healthcare-act-a-legislation-for-the-people.

[41]Center State Government Spends 1.3% of GDP on Health Care in 2015-2016. *Times of India.* 2016. Aug 2, . Available from: http://www.timesofindiaindiatimes.com/india/Centre-state-governments-spent-1-3-of-GDP-on-healthcare-in-2015-16/articleshow/53509406.cms

frameworks, and staff.[42] While the new legislation contains a number of provisions, it does not include any implementation instructions or rules.

The decriminalisation of suicide, which was just enacted, is a positive step. There is a strong risk that this bill will be abused. However, dowry-related burning/attempted homicide might be misconstrued as attempted suicide, and so will not receive the necessary attention.People with mental illnesses and their conditions are worsened in developing nations like India by socioeconomic and cultural issues such as a lack of access to healthcare, superstition, lack of knowledge, stigma, and prejudice. There are no provisions in the bill that address these issues. The law on mental health care does not include anything in the way of preventive and early intervention.Some parts of the Act are questionable, but with further amendments, the Act will be a blessing.



[42]World Health Organization. *Spending on Health: A Global Over View.* Geneva: World Health Organization; 2012. Available from: http://www.who.int/mediacentre/factsheets/fs319/en/ [Google Scholar]