

Stigmatization of Mental Health – An Overview of Mental Health Laws and Forensic Psychiatry in India

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Abstract

In our country the concept of Mental Health is often attached with stigma and prejudication. The lack of mental health literacy among people has led to the violation of human rights and discrimination. People suffering from mental disorder are categorically called mad or lunatics. Mental Health legislation is indispensable in protecting the rights and dignity of persons with Mental Disorders. Forensic psychiatry is a branch of psychiatry that applies both scientific and clinical expertise in legal proceedings. It plays an important role in assisting judiciary. Since, there is no separate specialization for Forensic psychiatry in India it is in a toddler stage. This paper presents the overall approach of the Indian legislation towards mental health and the present state of forensic psychiatry in India.

Keywords: *Lunatic, Forensic Psychiatry, Mental Health Legislation, Stigmatization*

I. Introduction

The general understanding of mental illness has improved over the years but studies show that prejudication, discrimination and humiliation runs deep in the country owing to illiteracy of the subject of mental illness and media stereotypes. Stigma and misinformation paralyses a person and acts as hindrances to treatment for a person suffering from mental illness.

Health encompasses the composite union of physical, spiritual, mental, and social dimensions according to the World Health Organization (WHO), which recognizes that “mental health and well-being are fundamental to quality of life, enabling people to experience life as meaningful, become creative and active

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citizens³.” World Health Organization report revealed that 7.5 percent of the Indian population is suffering from one form of mental illness or the other. The treatment gap which is the prevalence of mental illnesses and the proportion of patients that are being treated is over 70 percent. WHO has also predicted that by 2020, roughly around 20 percent of India will suffer from mental illnesses and to cater to this demographic India has less than 4000 mental health professionals.⁴

Thus, to achieve higher standard of protection for the rights of the people with mental illness India passed Mental Health Care Act, 2017 which came into force in 2018. This Act replaced the Mental Health Act of 1987. It widened the definition of mental illness by including substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behavior, capacity to recognize reality or meet ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrest or incomplete development of mind of a person, specially characterized by sub abnormality of intelligence.⁵ However, while witnessing evolution of various mental health laws in India, forensic psychiatry which applies psychiatric theories, concept, principles and practices to legal issues in legal context embracing civil, criminal, correctional, regulatory or legislative matters still seems to be in a toddlers stage. The Indian Psychiatry Society has a separate specialty section in forensic psychiatry but there is not much progress seen in this area.⁶ Hence, teaching and training is not adequate for the forensic psychiatry in our country making it difficult for the psychiatrist to assist the courts to handle the cases that involves mental components.

II. Mental Health Legislation in India

³Abhishek Misra and AbhiruchiGalhotra, Mental Healthcare Act 2017: Need to Wait and Watch, International Journal of Applied and Basic Medical Research,(31st July 2020,10:30 AM)<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5932926/>

⁴Nirja Birla, Mental Health in India, THE ECONOMIC TIMES (23rd July 2020, 11AM) https://www.google.com/amp/s/m.economictimes.com/magazines/panache/mental-health-in-India-7-5-country-affected-less-than-4000-experts-available/amp_articles/71500130.cms

⁵Mental Health Care Act2017 S 2.

⁶S. Nambi, Forensic Psychiatry in India : Past, Present, Future, Indian J Psychiatry (18th July, 2020, 10: 30 AM), <http://www.indianjpsychiatry.org>

In the olden days mentally ill people were disrespected and feared. They were considered to be possessed by evil spirit and either they were physically tortured or were driven out of the society. The first mental health law in India was mainly legislated by the Britishers that focused mostly on its own people. The first Act passed was the Lunatic Removal Act of 1851 that significantly aimed to ease the repatriation by the British offenders with mental illness⁷ which ceased in the year 1891.

Acts that were passed during the British India are:

1. The Lunacy (Supreme Courts) Act 1858
2. The Lunacy (District Courts) Act 1858
3. The Indian Lunatic Asylum Act 1858 (with amendments passed in 1886 and 1889)
4. The Military Lunatic Act 1877

Other Indian Acts on Mental Health

1. Mental Health Act, 1987
2. Mental Health care bill 2013
3. Juvenile Justice act (Care and Protection of Child) Act 2015
4. Mental Health Care Act 2017

Civil Laws for Persons with Mental Illness

1. Section 13⁸ and Section 14 of Hindu Marriage Act, 1985⁹
2. Section 118 of The Indian Evidence act, 1925¹⁰
3. Section 6¹¹, Section 11¹² and Section 12 of Law of Contract¹³,

⁷ Lunatic Removal Act 1851.

⁸Hindu Marriage Act 1985 S 13.

⁹ Hindu Marriage Act 1985 S 14.

¹⁰ The Evidence Act 1925 S 118.

¹¹ The Indian Contract Act 1872 S 6.

4. Testament capacity under Section 59 of Indian Succession Act 1925¹⁴

Criminal Laws for Offenders with Mental Illness

1. Criminal Responsibility under Section 84 of Indian Penal Code 1860¹⁵,
2. Attempt to commit suicide under Section 309 of Indian Penal Code 1860¹⁶,
3. Right to private defense against insane person Section 98 of Indian Penal Code 1860¹⁷.

In India the need to protect the rights of person with mental disorder was realized and many acts thereafter was legislated by the government that not only secured the rights of person with mental disorder but also suggested some pre-emptive measures in order to bridge the gap surrounding the pre-judicator of mental health and illnesses.

The Indian Lunacy Act of 1912 was regressive and traditional in its approach. It focused mostly on the safety of public rather than person with unsound mind. This Act saw a lot of human rights violation and deprivation that lead to a lot of controversies and criticism.

Under this Act Lunatic has been defined under section 3(5) as "lunatic" means an idiot or a person of unsound mind¹⁸. The Act mostly prescribes procedure regarding the detention and removal of Lunatics along with the treatment and care that are to be given to Lunatics. Section 15 specifically bestows power on the Magistrate that if it appears to the Magistrate on the report of the Police officer that lunatic is being cruelly treated or are not under proper care and control, he may be produced before him and summon such relative to have the

¹² The Indian Contract Act 1872 S 11.

¹³ The Indian Contract Act 1872 S 12.

¹⁴ The Indian Succession Act 1925 S 59.

¹⁵ Indian Penal Code 1860 S 84.

¹⁶ Indian Penal Code 1860 S 309.

¹⁷ Indian Penal Code 1860 S 98.

¹⁸ The Indian Lunacy Act 1912 S 3, cl.5.

charge of the lunatic¹⁹. Section 13 of the Act empowers the Police Officer to arrest the Lunatics roaming freely²⁰.

The Act brought about fundamental changes in the previous act and took over the management of the Asylum. However, it failed to safeguard the right of the Lunatics and focused on the inclusion of the Lunatics from the society who were considered a threat to the society. It prioritized the protection of the public at large and not the Lunatics. These Act heavily neglected basic human rights. Living condition of person of unsound mind during the 1920's was miserable. They were neglected and were treated more like a criminals and kept in confinement.

Shortly after Indian independence in 1947, new mental health act was drafted that took many years to be adopted which came to be known as Mental Health Act, 1987. The main highlight of this act was that it defined mental illness in a more progressive fashion that focused on care and treatment of the person with mental illness rather than depriving them of liberty. It laid emphasis on procedure for admission of person with mental illness in hospitals, guardianship and safeguarding basic human rights that was ignored by the previous acts.

However, it failed to recognize or address the issue rehabilitation leading to the amendment of the Act into Mental Health Care Bill 2013 which commenced in the Year 2017 as the Mental Health Care Act.

II.I The Current Legislation - The Mental Health Care Act, 2017

Section 2(s) of the Mental Health Act defines “mental illness” as a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of

¹⁹ The Indian Lunacy Act 1912 S 15.

²⁰ The Indian Lunacy Act 1912 S 13.

arrested or incomplete development of mind of a person, specially characterised by sub-normality of intelligence²¹.

The Mental Health Care Act has given many rights to the person of unsound mind and they are as follows:

1. **Advance Directives:** Section 5 of the Act discusses about the rights that allows a person to make his own decision regarding his treatment or how he wishes to not be treated²². This directive however must be in writing. But the Act does not provide for advance directive to minors. As per Section 5 of the said Act, all the services are to be ensured by both Central and State governments. The expenditures estimated will not meet the obligations under the bill.
2. **Right to Access to Mental Health Care Facilities:** Section 18 allows every person the right to access mental healthcare and treatment from mental health services run or funded by the appropriate Government²³.
3. **The right to community living:** Section 19 of the Act grants the right not to be segregated from the society. It accepts the right to access community living as a basic human right. It also allows a person to discontinue living in the Mental Health Care establishment just because he is homeless or is homeless. It also provides legal aid to person with poor financial background who is abandoned by his family.
4. **Basic Human Rights:** Section 20²⁴ states that every person with mental illness have the right to live with dignity and shall be protected against all inhuman treatment. It allows a person the right to privacy and instructs the consulting doctor to keep full confidentiality of his patient. It facilitates the person with mental illness the right to clean environment and community living. It has restricted any form of alienation or segregation of person with living with mental illness.

²¹The Mental Health Care Act 2017 S 2, cl. s.

²²The Mental Health Care Act 2017 S 5.

²³The Mental Healthcare Act 2017 S 18.

²⁴The Mental Health Care Act 2017 S 20.

5. Decriminalizing suicide and prohibiting electroconvulsive therapy²⁵: The Act decriminalizes suicide that was punishable under sec 309 of Indian Penal Code. The Act states, “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 Code²⁶”

According to the India law suicide was never considered as crime but an attempt to commit suicide was offense punishable under Section 309. Mensrea being one of the essential elements to commit a crime was often argued in number of cases whether an attempt to commit suicide does constitutes mensrea or not. In *Mulik v Emperor*²⁷, it was held that mental element is present in an attempt to commit suicide and is punishable under Section 309. Later many mental health professions and non government organizations protested to strike down the Section 309. The act of attempt to commit suicide was held unconstitutional in *Rathinam P v. Union of India*²⁸ case but there after the court in *Gian Kaur v. State of Punjab*²⁹ case restored the act as an offence because it was impossible to punish for the abetment to commit suicide without attempt being an offence. However, Section 309 is struck down from the Indian Penal Code.

III. Forensic Psychiatry and Criminal Law for Personswith Mental Disorder

Concept of Forensic Psychiatry is a new phenomenon which has developed over the years and as such carries no definite definition. However, if clinical psychiatry operates within therapeutic realm than forensic psychiatry comes within legal context. Forensic Psychiatry requires a conclusive understanding of

²⁵S. Nambi, Forensic Psychiatry in India : Past, Present, Future, Indian J Psychiatry (18th July, 2020, 10: 30 AM), <http://www.indianjpsychiatry.org>

²⁶Indian Penal Code 1860 S 309.

²⁷Mulik v. Emperor, AIR 1919 All 376.

²⁸Rathinam P v. Union of India, AIR 1994 (3) SCC 648.

²⁹Gian Kaur v. State of Punjab, AIR 1996 (2) SCC 648

relationship between law and mental health. Forensic psychiatry is a branch of psychiatry that applies scientific and clinical expertise in legal procedure.

In India, Forensic Psychiatry is comparatively new and developing. Criminal Law in India have however understood the relationship between criminal responsibility and state of mind during the occurrence of crime. Criminal law in India focusses on two elements of crime- MensReaandActus Reus. Without the composition of these two elements it is impossible or unjustified to punish the offender.

A well know dictum of law is that a man is presumed sane and responsible for his actions until he is proved otherwise. McNaughten Rule is a significant rule for criminal responsibility. According to these rules, to establish defense on the ground of insanity it must be clearly proved that at the time of committing the act he does not know the nature and the quality of the act he was doing.³⁰ Section 84 of Indian Penal Code, is based on McNaughten Rule, which states that nothing is an offence which is done by a person who at the time of doing it is by the reason of unsoundness of mind , incapable of knowing the nature of the act.³¹ This acts as one of the strong defense for a person with mental disability. However, it has been implicitly stated under Code of Criminal Procedure that Magistrate must be satisfied of the line of defense. In *Sankaran v. State*³², the Session Court did not notice any unsoundness of mind during the trial as well as at the time of questioning under section 313. Thus in view of the Session Judge the accused appeared to be normal but in view of strange answers given by him in connection with certain incriminating circumstances alleged against him the Session Judge referred the accused for examination by a Psychiatrist who issued a fitness certificate.

IV. Role and Need for Forensic Psychiatry

Forensic Psychiatry plays an important role in balancing justice system. Forensic Psychiatry concerns itself with competency of an offender to stand trial and other criminal responsibility. It also measures capacity, insanity defense and his ability to understand the nature of crime. Forensic psychiatry provide expert

³⁰K.D.GAUR, INDIAN PENAL CODE 153(4th ed. Universal Law Publishing Co.Pvt.Ltd, 2012).

³¹Indian Penal Code 1860 S 84.

³²*Sankaran v. State of Kerala*, 1994 Cr. L.J. 1173.

advice to court whenever required. They not only assist in criminal court but also in civil courts.

In India there is a dearth of forensic psychiatry. There is a lack of proper infrastructure and training in the department of forensic psychiatry. It has been stated that the number of forensic psychiatry ward or unit are much lesser than the person of unsound mind. The psychiatrist possesses little training or no formal training at all for such comprehensive subject. Although most prisons do have facilities surrounding forensic psychiatry, the condition of such health services is in mediocre state which are less advantageous to the patient. Many of the prisons have visiting psychiatry but not full time psychiatry which could indeed be helpful for the betterment of the mental state of a person.

Even though there is no separate Act or law governing Forensic Psychiatry there are however, certain provisions in criminal and civil laws that talks about the trial of a person of unsound mind and procedure therein. The Indian Evidence Act 1872, Section 45, allows forensic psychologists and psychiatrists to lend their expertise to solving in criminal investigations³³. This gives forensic psychologists an opportunity to make forensic psychological methods dynamic, unique and versatile befitting catering to the needs of cases with the help of feedback procured from the judicial system i.e. police, lawyers, prosecutors, judges and other forensic professionals they assist

Section 328³⁴, 329³⁵ and 330 of Code of Criminal Procedure, 1973 states about the trial of a person with unsound mind³⁶: It applies to the proceedings in the nature of an inquiry before a Magistrate. When the accused makes an application raising the question as to the unsoundness of mind the Magistrate is bound under this section to inquire before he proceeds with enquiry before him, whether the accused is or not incapacitated by the unsoundness of mind from his defence³⁷. In *Jai Shankar v. State of H.P.*³⁸ it has been stated that when the

³³ Indian Evidence Act 1872 S 45.

³⁴ Code of Criminal Procedure 1973 S 328.

³⁵ Code of Criminal Procedure 1973 S 329.

³⁶ Code of Criminal Procedure 1973 S 330.

³⁷ S.N. MISHRA, THE CODE OF CIVIL PROCEDURE 496 (19th ed. Central Law Publication).

³⁸ *Jai Shankar v. State of Himachal Pradesh*, AIR 1972, SC 2267.

magistrate without making any adequate or satisfactory enquiry enjoined by Section 328 at the threshold straight away proceeds with the committal proceedings, the committal proceedings as well as his order committing the accused to the Court of Session of trial is vitiated.

V. Forensic Psychiatry and Civil Law for Persons with Mental Disorder

Our country has provided equal opportunities for everyone including person with mental disorder to have access to justice. Code of Civil Procedure provides separate provision for the people suffering from mental disorder before or during the pendency of a suit. It states that the suit brought by a person with mental disorder is to be defended by a guardian ad litem. For the safety of the person with the mental disorder, if the appointment procedure of a guardian based on a medical certificate is not examined by the medical officer or without proper enquiry then such appointment shall not be considered.

1. **Testamentary Capacity**- Hindu Succession Act states that a person who cannot understand his or her at on account of intoxication or illness or from any other case cannot make a will. However, if any Will or testament is made during the lucid interval then such document would be valid. Similarly, a person who is a habitual drinker but has made a testament or a will when he was not intoxicated then such document would be considered valid.
2. **Right to hold property** – Earlier, under Hindu law there were restriction in regard to the right of a person with mental illness to hold property. Although during 1928 legislative measures were approached to remove disability of a person to hold property but at the same time it could not eliminate the disability of a person with mental illness. However, under the Indian Succession Act, 1956 the disqualification based on diseases, defect or deformity does not put a bar to hold property any longer.
3. **Right to Contract** - According to the Indian Contract Act, a person entering into a contract should not have any illness of mind at the time of the making of the contract. If a person with mental illness but with

occasional sound mind makes a contract during such period then such contract will be valid. Likewise, if a person who is generally of sound mind but suffers from mental illness occasionally cannot make a valid contract when he is unwell.

4. **Right to marriage** – In both Hindu Marriage Act and Special Marriage Act, at the time of the marriage both the party should be of sound mind. Nevertheless, if a marriage has already taken place and one of the spouses has the infirmity then such marriage would not be void but voidable at the instance of the other party.

VI. Conclusion and Suggestions

Forensic psychiatry aims to offer expert services in the justice system for welfare of the people but lack of training facilities, resources and research has made psychiatrists incapable to have proper understanding regarding the interference of law and psychiatry. Since, it is still a developing field in India a careful effort on the part of the various agencies and proper legislation is needed. It is necessary that more and more laws relating to new concept of forensic psychiatry and mental health illness should be made and properly implemented.

Taking into the consideration the current position of forensic psychiatry, there are certain suggestions for the future development of forensic psychiatry:

1. All mental health professionals, post graduates in psychiatry, lawyers, police officers should have basic knowledge about mental illness and its legislation.
2. Post graduate in psychiatry and others practicing psychiatry should be provided with proper training facilities for proper understanding about the interference of law with psychiatry.
3. More research on forensic psychiatry should be encouraged for development of psychiatry at various levels.
4. Although Indian Psychiatric Society has already put an effort to improve and strength the practice of forensic psychiatry, India should provide for a separate specialization on forensic psychiatry and forensic psychiatry centres for better clinical evaluation and reporting.
5. Our legislation should also put more effort to provide such provision that improve psychiatric care in prison. More focus should be given to the availability of resources and proper treatment of the mentally ill offenders by the professions psychiatrists.