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Privacy and Legal Rights of People with Mental Illness

MANAS SHRIVASTAVA[1] AND ADAYSA HOTA[2]

ABSTRACT

The importance of Privacy and Legal Rights of people with Mental Illness is manifest. This topic has long been overlooked, hampered in part by lack of proper research and limited existing literature, especially in relation to India. One in seven people in India (roughly 14% of the population) are affected by mental disorders of varying severity and almost 10% of the population require intensive institutionalized care. The World Health Organization estimates that India will brook an economic loss of 1.03 trillion 2010 US Dollars, between 2012-30, due to mental health conditions. Added to this, lack of awareness about their legal rights among patients is widespread. In India, this is one of the factors due to which there have been very few cases where an accused was able to successfully claim insanity defence, another factor for the same is that the criminal lability of a mentally ill person depends more on discretion of judges and less on medical reports, which allows the creation of a loophole that puts mentally ill people at disadvantage. Regarding privacy rights, patients in mental health institutions have next to none. This paper divides right to privacy into two parts, namely: 'confidentiality' and 'privacy of the institutionalized', while the first aspect is taken care of in the Indian legislatures, the second aspect is almost entirely overlooked. In this paper we aim to discuss and analyse, privacy and legal rights of the patients, recent legislative developments in the area and put forth certain criticism and solutions for the same.

I. INTRODUCTION

India, the land of spirituality and philosophy, a port of call for those in pursuit of mental serenity, is now ironically "world's most depressing country"[3]. One in seven people in India (roughly 14% of the population) are affected by mental disorders of varying severity [4] and almost 10% of the population require intensive institutionalized care. The World Health

[1] Author is a student at National Law University Odisha, India.
[2] Author is a student at National Law University Odisha, India.
[3] Herald View, *World's 'most depressing country' is facing a mental health epidemic,* National Herald (Jun 21, 2020, 12:00 PM), https://www.nationalheraldindia.com/opinion/worlds-most-depressing-country-is-facing-a-mental-health-epidemic.
[4] India State-Level Disease Burden Initiative Mental Disorders Collaborators, *The burden of mental disorders across the states of India: The Global Burden of Disease Study 1990–2017*, 7 TLP 148, 149 (2019).

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Organization estimates that India will brook an economic loss of 1.03 trillion 2010 US Dollars, between 2012-30, due to mental health conditions.[5] The president of our country, Shri Ram Nath Kovind has warned us about an imminent 'mental health epidemic'.[6] While Indian legislators still cogitate on the issue at hand, they have discounted their attention on the Privacy and Legal Rights of the people with mental illness.

This paper deals with privacy and legal rights of the mentally ill. Very little research has been done on this issue in India, thus the paper tries to bridge this gap and add to the limited literature available on this issue, by discussing and analysing, privacy and legal rights of the patients, recent legislative developments in the area and putting forth certain criticism and solutions for the same.

"The subject of criminal liability and mental illness is an unsolved problem of criminal jurisprudence"[7]. In India, criminal lability of a mentally ill person depends more on discretion of judges and less on medical reports, which allows the creation of a loophole that puts mentally ill people at disadvantage. Added to this, lack of awareness about their legal rights among patients is widespread. Regarding privacy rights, patients in mental health institutions have next to none. This paper divides right to privacy into two parts, namely: 'confidentiality' and 'privacy of the institutionalized', while the first aspect is taken care of in the Indian legislatures, the second aspect is almost entirely overlooked. The germaneness of such an evolving "right to privacy" to the mental patient is palpable, but the problem is that there aren't any statutory and judicial interpretations of this right with regards to the mentally ill.

II. PRIVACY RIGHTS

Mentally ill people constitute a group that faces gross human rights violations. While mental healthcare legislations across the world have ensured many of their human rights, one aspect they tend to overlook is privacy rights. In the Indian context, the recent Mental Healthcare Act, 2017 is the principal legislation concerning Mental Healthcare. Although the drafters of the Act have kept in mind the basic need of confidentiality of the patients, the words "privacy rights" find no mention in the entirety of the Act. Even though confidentiality and freedom from publication are important needs of a mentally ill person, there are two levels of privacy with regards to mentally ill, the basic level may be termed as "confidentiality" and the other

[5] Neerja Birla, *Mental health may hurt India to tune of $1.03 trillion; here's a dose for cos,* The Economic Times (Sep 10, 2019, 12:39 PM), https://economictimes.indiatimes.com/magazines/panache/mental-health-may-hurt-india-to-tune-of-1-03-trillion-heres-a-dose-for-cos/articleshow/71045027.cms?from=mdr.
[6] *Supra* note 1.
[7] K.M. Sharma, *Defence of Insanity in Indian Criminal Law,* 7 JILI 325, 325 (1965).

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may be termed as "privacy for the institutionalized".

One of the two facets, "confidentiality", is duly addressed by the Mental Healthcare Act, 2017 in various sections. Importance has been given to ensure the confidentiality of the mentally ill in various clauses like, section 23 that states, "All health professionals providing care or treatment to a person with mental illness shall have a duty to keep all such information confidential which has been obtained during care or treatment" [8] , section 24 that ensures freedom from publication by stating, " No photograph or any other information relating to a person with mental illness undergoing treatment at a mental health establishment shall be released to the media without the consent of the person with mental illness."[9] Further, the act states that a person admitted to a mental health establishment, has the right to refuse any visitors to maintain his privacy[10]. Lastly, section 99 makes sure that "any professionals conducting research must have to obtain free and informed consent from all persons with mental illness for participation in any research involving interviewing the person or psychological, physical, chemical or medicinal interventions"[11].

The other aspect of privacy here is "privacy for the institutionalised" which hasn't found any mention in the legislation. India's mental health establishments need to be given a clear set of guidelines which include proper sensitization on the subject of personal privacy rights of the patients. The infamous accident that occurred in 2001 in Erwadi brought to light the negligent conditions in which the mentally ill patients were kept in a faith based mental asylum. 26 patients lost their lives in a fire as they were kept tied up in the facility and couldn't escape the fire due to the shackles. This accident made the Supreme Court of India take *Suo Moto* recognition of the case and immediately shift 500 patients into government care. The Apex court shocked by these conditions and the gross violations of the fundamental rights under article 21 of the Constitution of India, called on the National Human Rights Commission (NHRC) to survey all the 37 Government Mental Health Establishments present at that time.[12] A review of mental hospitals undertaken in 2008 points out, "38% of the hospitals still retain the jail-like structure that they had at the time of inception, nine of the hospitals constructed before 1900 have a custodial type of architecture, compared to 4 built during pre- and one post-independence, 57% have high walls, patients are referred to as 'inmates' and persons in whose care the patients remain through most of the day are referred to as 'warders' and their

[8] The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 23.
[9] The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 24(1).
[10] The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 26.
[11] The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 99.
[12] In Re: Death Of 25 Chained Inmates in Asylum Fire in Tamil Nadu vs Union of India And Ors., A.I.R 2002 S.C. 979 (India).

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supervisors as 'overseers' and the different wards are referred to as 'enclosures'."[13] "Patients are expected to urinate and defecate into an open drain in public view, 89% had closed wards while 51% had exclusively closed wards, and 43% had cells for isolation of patients. Leaking roofs, overflowing toilets, eroded floors, broken doors, and windows are common sights; privacy for patients was present in less than half of the hospitals, seclusion rooms were present in 76% of hospitals and used in majority of these hospitals, and only 14% of the staff felt that their hospitals' inpatient facility was adequate."[14]

The 1972 American case of Wyatt v Stickney[15] is one of the most important cases regarding privacy of the patients in mental health institutions. The court found the hospital to be lacking in three key areas, namely, staffing ratios, individual treatment plans, and the provision of a humane physical and psychological environment. The right to privacy fell under the third area and the court set guidelines to ensure it. In the case of Indian mental health institutions, privacy is perceived as primarily a visual phenomenon. Thus, it is perceived that installation of screens and barriers between beds of the patients suffices the need. Even though it has been found that installation of barriers increases psychological comfort in overcrowded places, regarding privacy just as visual phenomenon is inaccurate. Privacy also enshrines olfactory, auditory and several other components.

Although at present times even the Wyatt standards stand ineffective but the drafters of the legislation can take inspiration from it and create an updated set of guidelines that guarantees mentally ill patients their right to privacy.

CRITICAL INSIGHTS AND SOLUTIONS

There is no doubt that privacy of the patients will act as a crucial environmental factor to facilitate the therapeutic goals of the institutions they live in. When questioned directly, 93% of mentally ill patients said privacy was very important.[16] Privacy will give them a chance to think things out, to calm down, to develop their individuality, and to improve their health if nothing more. Thus, this exhorts a revision of the present legislatures. Some of the points of consideration are, infrastructural development, which along with building of new institutes also includes renovation of existing establishment to amend the "jail like structure", building of new hygienic and fully functional private toilets and bathrooms for the patients, putting a stop to the use of communal washrooms, creating a private and safe space for each patient, ensuring

[13] Muktesh Daund et al., *Mental Hospitals in India: Reforms for the future,* 60 IJP 239, 239-40 (2018).
[14] Id.
[15] Wyatt vs Stickney, 325 F.Supp. 781, 781 (1971).
[16] Joseph O'Reilly & Bruce Sales, *Privacy for the Institutionalized Mentally Ill: Are Court-Ordered Standards Effective?* 11 LHB 41, 41 (1987).

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adequate privacy in their sleeping quarters. Along with this, there should be creation of awareness among the staff as well as creation of a course, on how to help the patients without intruding into their privacy or violating any of their rights, which should be mandatory for all of the staff to undertake.

Another major drawback is that the patients as well as their representatives sometimes may not be aware of these rights or sometimes not even be in a position to understand their rights. Thus, they can't voice their needs or discontent. And even if they do, there is lack of awareness about the grievance mechanism system and the patient's legal rights. In some cases, on apprehension of a complaint against them, the institution or hospital may impose restrictions or censor the patient's correspondence, hampering their privacy rights as well as legal rights. The court may also sometimes not give a favourable outcome of the redressal as the defence may try to 'shift the burden of proof', which has been discussed further in this paper. This setback can only be corrected by creating stricter laws against violation of privacy of the mentally ill patients. Along with revision of existing laws and creation of new ones on "right to privacy", creating awareness among people with mental illness about the legal rights they are empowered with can remove a huge roadblock on the path to wholistic development of laws regarding mental healthcare. Mentally ill people, whether institutionalised or not should be made to understand their legal rights and defences they are sanctioned with. They should be made aware of the laws designed in their best interest, for their protection and wellbeing.

III. LEGAL RIGHTS: INSANITY DEFENSE

According to criminal justice system, *Actus reus* and *Mens rea* are the 2 major conditions on which legal responsibility of act depends, that is, to held a person criminally liable it is required that the person has chosen to commit any criminal act with knowledge that this act was criminal. The people who suffer from mental illness, sometimes lose control over their mind and in those conditions, if they commit any kind of crime then that crime is not punishable as they don't have any intention or motive to cause hurt to anyone. Burden of proof completely lies on the defence; it does not mean that it sets the prosecutor free from all responsibilities, he has to prove the case is in his favour without any reasonable doubt, and then only the plea of unsoundness would be granted. If defence cannot prove it then the convicted person can be sent to mental hospital or prison depending upon his condition. Mentally ill persons constitute a large part of our society but then too only some people are able to claim this insanity defence, as to claim it, the person must have to satisfy certain conditions discussed below-

There were certain major tests in the earlier times to determine the mental condition of the

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patient, those are-

(A) The "Irresistible Impulse" Test

This test says that if the person does not know about his act and has no control over his action then that person would not be liable for any punishment. US court says that it does not matter whether the person knows that his act is wrong, if he has no control over his actions then he will not be liable.[17] There are two necessary conditions in this test: -

1. The existence of mental illness; and
2. That the mental illness caused the inability to control one's actions or conform one's conduct to the law.

(B) The Durham Rule

The Durham test was created in the 1954 case 'Durham v. United States'[18], the court made certain rules to help deal with cases related to insanity defence, it says that if the person is suffering from any mental illness at the time of commission of the act, and if the same is diagnosed by the doctor then that person cannot be convicted for his crime. This test gave discretionary power to judge to determine the mental condition of the patient and to determine relationship between his act and his mental condition. This test is not logical and too broad to be implement and that's why it was abolished after some time by the same court in 'United States v. Brawner'[19], the courts quashed it as people stated misusing it and took advantage of it for example, drug addicts started using this defence as their mind was not fit at the time of crime as they were under influence of drugs.

(C) Model Penal Code Test for Legal Insanity

This test is a modification of the Durham rule, it says a criminal defendant is not guilty of insanity under the MPC (Model Penal Code) test if he has some severe mental problem which makes his or her mind stop working (e.g. severe mental retardation or schizophrenia) and if at the time of the incident that person is suffering from a disease as such, then he can claim the insanity defence. The basic conditions require for this test are-

1. Appreciate the criminality of his or her conduct; or
2. Conform his or her conduct to the requirements of the law

[17] State v. Green, 6 Utah 177, 580 (1931).
[18] Durham v. United States, 401 U.S. 481, 483 (1971).
[19] United States v. Brawner, 471 F.2d 969, 969-70 (1972).

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(D) The "Mc'Naughten's Rule"

There were several criticisms of tests discussed above and each test has some flaws. One major question which was still not answered was-

Weather every person who has some mental illness can claim this defence? This question was answered in Mc'Naughten's Rule

This issue was raised in the Mc'Naughten's case where Mr. Daniel Mc'Naughten, killed Mr. Edmund Drummond, who was the private secretary of the Prime Minister of Britain, Mr. Robert Peel, while labouring under delusion of persecution. Prosecution lawyer argued that there was no sign of insanity in him and also that before the act, he transacted a business, which clearly shows that his mental condition was fine. Defence put forth the plea of insanity and due to weak mental illness laws, the accused was acquitted. The decision arose anger in public and protests were organized to pressurise government to interfere into the matter, as a result the House of Lords decided to probe into this. Accordingly, the above-mentioned question was asked from the 14-judge bench of the House of Lords. From the answers given by the bench some rules were framed towards determination of criminal responsibility of insane and were called the Mc'Naughten rules. According to these rules if any person commits any crime but while committing the act, he was not aware of the nature of the act, and what the consequences of act would be then the person should not be convicted for that crime. In other words, while committing the act if the person considers the act as right and doesn't know the nature of the act, he can claim the defence.[20]

INSANITY DEFENCE AROUND THE WORLD

There are contradictions in laws and punishment for mentally ill person in different countries, laws of some countries send the person to prison and some to mental hospital, it completely depends on the nature of the act. Almost all the countries around the world provide defense to the mentally ill except Sweden. USA grant insanity defense to its people based on whether the person knows about the nature of his act or not. So, in USA a mentally ill person who does not have knowledge about his act is not a fit subject for retribution, nor is his conduct deterrable by the threat of punishment. In UK "not guilty by reason of insanity" is applicable and it is decided on the basis of Mc'Naughten's rule, but there are very few cases where the person has successfully claimed this defence as it not only depends on medical insanity but also on legal insanity. India also follows the same system. Sweden is an exception in this case as it abolished the insanity defence in 1965. Thus, there is no "impunity" defence available to persons charged

[20] R v. Mc'Naughten, (1843) 8 E.R 718 (HofL).

with criminal offenses in Sweden[21]. Instead Sweden has same rules and laws for everyone irrespective of their sanity or insanity. But if the person is not mentally fit and this has been proved in court then after passing the judgement, the court has three choices:

(1) To confine them in a closed hospital for treatment as well as restriction on their movement;
(2) probation; or,

(3) pecuniary penalties.

The commitment to a psychiatric facility is permanent and the court will not decide when the offender will be released. Hungary also offers an insanity defence for the criminal defendants. A defendant is not held responsible for his conduct if he was mentally ill at the time of the crime and was "incapable of understanding the effect of his act or acting according to such awareness".

To no surprise most of the world except Sweden offers protection of insanity and finds mental illness important in assessing a person's proper propensity to commit a crime.

IV. INDIAN PERSPECTIVE: SECTION 84 OF IPC

Section 84 of IPC deals with insanity defence, it says that if any mentally ill person commits any crime and while committing that crime, the person doesn't know what he is doing, then he can claim this defence. Section 84 of the IPC is based on Mc'Naughten's rules of 1843.

Basic conditions under section 84

- Unsoundness of mind
- Unsoundness should exist at the time of act
- Nature of the act

(A) Unsoundness of mind

The section uses the term "unsoundness of minds" as it covers the various medical factors related to mental illness. As the term unsoundness of mind covers various aspect of mental illness, so the question arises that 'is the defence of mental illness for everyone who is insane?' and here the court in various cases held that no defence will be provided if the insanity is medical and not legal. It is not every type of insanity which is recognized medically that is

[21] Piers Gooding & Tova Bennet, *The abolition of insanity defence in Sweden and the United Nations conventions on the right of person with disability: Human rights Brinksmanship or evidence it won't work,* Hein online (July 2,2020,8:20A.M),https://heinonline.org/HOL/Page?handle=hein.journals/bufcr21&div=6&g_sent=1&casa_token=&collection=journals.

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given protection under this section.[22] Medical insanity is different from legal insanity.

1. Difference between medical insanity and legal insanity

Criminal law is mainly concerned with addressing liability not insanity per se. The definition of insanity is a matter of mental illness, and is not subject to law. Law is concerned with the effects (conduct) that arise from insanity.

Medically a person is considered insane if he has any illness or mental disorder. Medical insanity means the perception of the individual's actions against others affected by it and the understanding of the person in relation to himself through legal insanity[23]. If while committing the crime the person has some kind of emotions like hate, jealousy, agony etc then it should be considered that the person has some motive behind the crime. The patient is suitable for admission to the mental hospital under many conditions, but these aspects are not considered in law. If an accused suffering from paroxysms of fever killed his children because their weeping disturbed him, he will be convicted, although medically he may be called insane, but while committing the crime he felt anger, which is the reason for him to kill and thus he will be convicted. Absence of motive can be a factor to determine whether the person should be convicted or not. According to law insanity can be defined as the situation where the person loses control over the cognitive faculties of the mind, no legal insanity may occur unless the rational faculties of the mind are so affected as to make the perpetrator unable to know the essence of the act or to know that what he is doing is wrong or contrary to rule[24]. Therefore, for the purposes of criminal law, emphasis is placed on the degree of mental insanity. If the effect of delusions is such that they impair a person's cognition of his action, then he is not responsible. When Karma Urang[25] murdered his father under the delusion that Goddess Kali had ordered him to do so. With cut head in his pocket, he also continued to appeal. He was held to be in delusion and so acquitted, when a person who is under the delusion of oppression kills another person to save his own life, then he is exempted, but if he kills another person only to avenge something wrong, then he is punished. So according to IPC if the person lost control over his cognitive ability and does not have any motive then he can claim the insanity defence.

In **State of Maharashtra vs Sindhi Alias Raman[26],** court held that there can be several kinds of medical insanity and if the person is suffering from any of these, that would not act as

[22] Surendra Mishra v. The State of Jharkhand, (2011) 11 S.C.C. 495.
[23] YV CHANDRACHUD & V R MANOHAR, RATANLAL AND DHIRAJLAL'S THE INDIAN PENAL CODE 87-96 (28th ed. 2001).
[24] Sudhakaran v. State of Kerala, (2010) 10 S.C.C. 582.
[25] Karma Urang v. Emperor, (1927) AIR 238 (India).
[26] State of Maharashtra vs Sindhi Alias Raman, (1987) 89 BOMRL 423 (India).

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insanity defence given under section 84 of IPC. Court held that where a person suffers from any mental disorder but still understands the essence and content of the act for which he is being prosecuted or realizes that what he is doing is contrary to the law, that person would immediately forfeit the defence of insanity provided for in section 84 of the IPC in this case.

In **Surendra Mishra vs state of Jharkhand[27],** the apex court held that as there is no such term like "unsoundness of mind" given in IPC, so due to this language fault of law, court started confusing the term "unsoundness of mind" with "insanity" but this is not correct. While pronouncing judgement on this case court held that there is difference between these two terms, "insanity" is more related to mental illness while "unsoundness of mind" is related to legal insanity, and not every person who is mentally ill should be granted insanity defence but only the person who has legal insanity can claim it.

In **Jailal vs Delhi administration[28],** court knew that the person has some medical insanity report but then too, "court convicted the accused based on his subsequent conduct as he tried to hide weapon and bolting the door to prevent arrest and absconding thereafter. Court found these acts as display of consciousness of guilt, and convicted him".

(B) Unsoundness should exist at the time of act

Second condition required to get defence under section 84 of I.P.C says that the person committing crime should be mentally unfit at the time of offence, the person must be *non compas mentis* at the time of commission of offence. It is only the presence of insanity at the time of the act which matters and not before or after that[29], if the person was mentally unfit at the time of trial then it could lead to postponement of trial and not the acquittal of accused.[30] There is a difference between incapacity charged while performing the act and incapacity charged at the time of the trial.

In **Sarjerao Rambhau Machale Vs. The State of Maharashtra[31],** court held that the accused was not liable for murder as he was not sane and was unable to identify the nature of the act at the time of crime and thus acquitted. Court also held that it is necessary that insanity is present at the time of the act and not before or after the act otherwise the accused won't be able to get insanity defence provided under Section 84 of IPC.

[27] Surendra Mishra vs state of Jharkhand, (2011) 11 S.C.C 495.
[28] Jailal vs Delhi administration, (1969) 1 SCR 140 (India).
[29] Shrikant Anandrao Bhosale v. the State of Maharashtra, (2002) 7 S.C.C. 748.
[30] VV PILLAY, TEXTBOOK OF FORENSIC MEDICINE AND TOXICOLOGY 314 (14th ed. 2004).
[31] Sarjerao Rambhau Machale v. The State of Maharashtra, (2007) 3 S.C.C 509.

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(C) Nature of the act

The term nature of the act contained in Section-84 of the Penal Code applies to that state of mind where the accused did not understand the results of his actions. That would mean that in every possible sense of the word the perpetrator is insane, and such insanity would sweep away his ability to understand the legal consequences of his acts. The term "nature of the act" means the physical nature of the act or in general normal effect of the act, a man is said to be ignorant of nature of the act if he is ignorant of property and operation of external agency, for an example if any person shoots the another person just for fun and do not know the consequence of the act then he will not be liable for the act. In other terms if the evidence shows that the accused was conscious of the nature, of the act, he must be presumed to have been conscious of its criminality and will be liable, if a person behead another man because "it would be great fun to see him looking for it when he woke up" he is incapable of knowing the nature of the act and is therefore not liable[32]. In various cases court gave judgements and gave definition of "nature of the act" as –

INCAPACITY TO KNOW RIGHT AND WRONG

The next ground of exemption is the most important as it is tested in numerous cases, where mental disease has only partially extinguished the reason. The question was, if the person does not know what is right or wrong then will he be liable or not? And the answer was given by the Draft code of 1879, which puts the law in the most satisfactory manner. It says that if the person is unable to comprehend weather his act is right or wrong then he won't be held liable. The court answered: A person may be under the insane delusion that he is an executioner and beheads his son under that delusion that the king has ordered him to do so. He knows the essence of his act, but clearly, he cannot be held criminally liable insofar as he did not know that what he was doing was either incorrect or contrary to the law[33].

CRITICAL INSIGHT OF SECTION 84

Any law around the world which deals with insanity defence and criminal aspect of mental illness, more or less gives discretionary power to the court on whether insanity defence should be granted or not, in most of the cases discretion of court is correct but as it mostly depends on discretion and not on medical reports or any other technical support, sometimes it becomes weak and people can easily mould it according to them. In some cases, the person who is not

[32] X v. State of NCT of Delhi, (2018) 246 DLT, 204.
[33] Manas Shrivastava, *Insanity under IPC: An analysis of section 84*, Racolb Legal (June 21, 2020, 4:45), http://racolblegal.com/insanity-under-ipc-an-analysis-of-section-84/.

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mentally ill may try to escape from punishment by using insanity defence, also there are very few cases where court actually granted insanity defence[34] as it is very hard for a mentally ill person to bear legal expenses or for their lawyers to prove them as mentally unstable and get them insanity defence. The major loophole of section 84 also revolves around this only, as section 84 says to get insanity defence the person has to fulfil abovementioned 3 conditions. Those 3 conditions majorly revolve around discretion of court, as there is very little use of medical reports while dealing the case it becomes extremely difficult for the genuine mentally ill person to get insanity defence. This paper suggests that there should be balanced involvement of medical experts and their reports and discretion of judge whiling dealing with insanity defence cases so that the this law become unbiased and depend on technical aspect as well, also our government should work on raising level of medical experts of India and they should be trained to help in cases so that the right people can claim insanity defence.

V. MODERN DAY CHANGES IN THIS FIELD

1. 42nd law commission report

There were many doubts regarding section 84 of IPC and its validity, so to answer those doubts, in 42nd law commission report government of India answered some question. Major points in the report was-

Section 84 does not need to be modified or expanded as it has not much of a flaw. The alteration or extension would result in a variety of practical difficulties if the law were to be rendered liberal, as the decision would then rely entirely on the medical opinion. And given India's conditions, we have no such medical experts throughout India and it will create chaos. Another point in the report was to include "irresistible impulse" under Section 84. It found little support as some of the opinions considered that "irresistible impulse" cannot be strictly insanity. However, the main objection was that inclusion of "irresistible impulse" under Section 84 would make the trial more difficult for the judges than the present provision.

2. The Mental Healthcare Act, 2017

Need for a nationwide Mental Healthcare Act

The National Mental Health Survey of India, 2015-16, termed as "the most ambitious epidemiological survey to date"[35], has reported a nationwide care deficit of 85% for common

[34] Parthasarathy Ramamurthy & Vijay Chatoth, *How does India decides Insanity Plies? A review of High Court judgements in the past decades*, NCBI (June 30, 2020, 9:56 P.M), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6436411/.
[35] Richard M. Duffy & Brendan D. Kelly, *The right to mental healthcare: India moves forward,* 214 BJP 59, 60 (2019).

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mental disorders and outlined several other fundamental issues that existed. A report on the projected mental illness burden shows that it will rise more quickly in India, in recent years (over the next 10 years) than the other countries, accounting for almost one thirds of the global mental illness burden, a figure higher than all developed countries put together.[36] Added to this is the incompetence of our country regarding existing infrastructure, workforce and budget allocated towards mental healthcare. The Mental Health Atlas survey of the World Health Organisation shows that for a million people in India there are only three psychiatrists and far less psychologists, which is 18 times less than the commonwealth norm of 5.6:100,000 psychiatrists to people ratio.[37] The UN-Convention on the Rights of Persons with Disabilities (UN-CRPD) was published in 2006 and came into force in 2008. It was ratified by India in 2007. The legislation in our country then (in 2007), the Mental Health Act,1987, was not in accordance to UN-CRPD. Furthermore, this legislation was criticised for giving higher importance to legalities and not enough to healthcare and privacy of patients. All these factors and the added factor of social stigma towards the mentally ill, which is deep rooted in our country called for a reformed and updated legislation. Consequentially, The Mental Healthcare Act, 2017, was unanimously passed by the Rajya Sabha and was awarded the presidential nod on April 2017.

Highlights of the Act

According to its preamble, the act is designed "to provide mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons during delivery of mental healthcare and services".

The 2017 Act, unlike its predecessor, has given due importance to healthcare. Section 18(1) states that, "every person shall have a right to access mental healthcare and treatment from mental health services run or funded by the appropriate Government"[38]. The further clauses explain that this "shall mean mental health services of affordable cost, 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 caregivers"[39]. Also, "The appropriate Government shall make sufficient provision

[36] Anuradha Mascarenhas, *Mental illness India's ticking bomb, only 1 in 10 treated: Lancet study,* Indian Express (May 19, 2016 5:07:44 am), https://indianexpress.com/article/india/india-news-india/mental-illness-indias-ticking-bomb-only-1-in-10-treated-lancet-study-2807987/.
[37] *Supra*, note 33
[38] The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 18(1).
[39] The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 18(2).

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as may be necessary, for a range of services required by persons with mental illness"[40], which is further explained in the act. It covers a wide range of services and even funds for families taking care of a patient.

Various such provisions made by the Act include:

Definition: The Act has provided a new and inclusive definition for 'mental illness' and has also recognized the difference between 'mental illness' and 'mental retardation'. Section 2(s) of the Act states, " 'mental illness' means 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 arrested or incomplete development of mind of a person, specially characterised by sub normality of intelligence."[41]

Advanced Directive: According to the act, a mentally ill person is empowered to make an Advanced Directive on how he/she would want to as well as not want to be treated for the requisite illness and also given the power to choose his/her nominated representative. However, it is necessary that this is legal and also has to be reviewed and accepted by a medical practitioner.

Free Mental Healthcare for people living Below Poverty Line: 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."[42]

Reduction of Social Stigma: Chapter V of the Act, titled as "Rights of persons with Mental Illness", has guaranteed certain rights to the mentally ill and by this has tried to combat the effects of social stigma against them. The rights include, Right to Access Mental Healthcare, Right to community living, protection from cruel, inhuman and degrading treatment, Right to equality and non- discrimination, Right to information , Right to confidentiality, Restriction on release of information in respect of mental illness, Right to access medical records, Right to personal contacts and communication, Right to legal aid and Right to make complaints about

[40] The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 18(3).
[41]The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 2(s).
[42] The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 18(7).

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deficiencies in provision of services.

Laid out Duties on the Government: This Act makes Mental Health Awareness, reduction of social stigma, human resource development and training duties of the appropriate governments.

Central and State Mental Health Authority: Chapters VII and VIII deal with the setting up of Central and State Mental Health Authority respectively.

Decriminalization of Suicide and Prohibition of ECT : Considered to be one of its most progressive features, 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 Code."[43] As well as "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."[44] The act makes it obligatory that a person with mental illness cannot be subjected to electroconvulsive therapy (ECT) without the use of anaesthesia and muscle relaxants. Moreover, it cannot be performed on minors.

Legal Provisions: The Act lays down certain offences and respective penalties. Penalty for non-compliance with the provisions under this Act would be up to 6 months of imprisonment or/ and Rs. 10,000 fines. Repeat offenders may face up to 2 years of imprisonment or Rs. 50,000 up to 5 lakhs fine or both.

Critical Insight into the Act

As listed above, there are many positive aspects to the Act, but it is not without its drawbacks. The Act is not fool proof in the Indian Context. The Mental Healthcare Act, 2017 mandates that mental health services be made available in every district of the country by establishing institutions for the same. However, with the existing inadequate infrastructure and medical resources at district level, ensuring the functioning of this clause becomes a herculean task. If the state governments try to equip themselves with these resources, the financial burden borne by them will be tremendous. To solve this the central government should allocate a larger part of the budget.

The novel provision of Advanced Directive, which is said to be made for the empowerment of the mentally ill patients needs to be reviewed. This idea has been inspired by western

[43] The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 115 (1).
[44] The Mental Healthcare Act, No. 10 of 2017, INDIA CODE (1993) § 115 (2).

legislatures but unlike western countries, India lacks mental health awareness. Mentally ill patients with severe psychological impairment frequently lose the capacity to make rational choices and don't often have a representative to speak on behalf of them. In such a case, the best approach is to take the advice of the doctors since the patient or their nominated representatives have little or no information of mental health and diseases. Hence, from physician perspective, this new directive will definitely lengthen the time of admission of mentally ill persons.[45]

The Act recognizes many rights but has not given much thought into their implementation and funding. "In our country, where mental illness is considered equal to depression, the obvious financial burden on government will be too high."[46] In the financial year 2017-18, government allocated 1.2% of the GDP for health expenditure. This figure is one of the lowest in the world. Furthermore, India spends 0.06% of its healthcare fund on mental healthcare, which is significantly low from most developed nations which spend over 4% on mental healthcare and research.[47]

The mental healthcare act also does not focus on early intervention and prevention as well as privacy and legal rights of the mentally ill. Mentally ill people deal with gross human right violations, they are a vulnerable group. Hence, more reforms are obviously required.

In the words of Richard M. Duffy and Brendan D. Kelly, "The drafters of India's new legislation have demonstrated wisdom and vision in articulating a legally binding right to such care despite the inevitable challenges and complexities of such a bold move. If the urgent, practical challenges presented by the Act are addressed effectively through resourcing, policy change and legislative amendment, in partnership with key stakeholders such as the Indian Psychiatric Society, India will have done the world a profound service by stepping forward and making the right to mental healthcare a reality for so many people. The rest of the world should watch, listen and learn."[48]

VI. CONCLUSION

The recent Mental Healthcare Act elicits a sanguine response for some of its features but does very little for Privacy and Legal Rights. However, with the current insufficient infrastructure

[45] Raghuraj Gagneja, *Mental Healthcare Bill: Despite the Positive Reforms, a Lot More Needs to be Done for the Mentally Ill*, First Post (April 08, 2017 11:45:14 IST), http://www.firstpost.com/india/mental-healthcare-bill-despite-the-positive-reform-a-lot-more-needs-to-be-done-for-the-mentally-ill-3373156.html.
[46] Abhisek Mishra & Abhiruchi Galhotra, *Mental Healthcare Act 2017: Need to Wait and Watch*, 8 IJABMR 67, 69 (2018).
[47] *Supra*, note 33.
[48] *Id.*

and healthcare facilities, at the grass-root level, the implementation of the act becomes a huge challenge. Its biggest hurdles are lack of funding and improper implementation. While it overlooks personal privacy rights, it provides for certain legal rights but nothing on its execution.

Privacy rights of all forms should be guaranteed, rather than just from the narrow purview of confidentiality. Infrastructural development, increase in awareness about their rights among the patients and their representatives, mandatory course for the staff and a strict grievance redressal system are the ad hoc requirements. The exponential increase in the number of mentally ill people expected in the recent years calls for the government's immediate attention on increasing the funding of mental health establishments and setting up of strict guidelines along with review of the existing legislations to ensure Right to Privacy of the mentally ill and institutionalized. A need to revise the legal rights of the mentally ill as well as insanity defence has also arisen. There have been very few cases in India where an accused was able to successfully claim insanity defence. This paper encourages the judiciary to analyse the differences between legal and medical insanity and help in sharpening the nebulous line separating them. It puts forth a suggestion to include medical reports and opinions of medical experts while dealing with insanity defence to create a balance between discretionary power of the court and forensic psychology.

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