

Law & Psychiatry in India: An Overview

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Abstract

The application of legal knowledge to psychiatry and of psychiatric knowledge to the legal issues is the subspecialty of psychiatry known as forensic psychiatry. In India, forensic psychiatry is still in its infancy. The legal issues pertaining to the mental health care in India appeared only after British Rule, with very minimal changes occurring post independence. Currently, the training of psychiatry postgraduates to the idea of an interface between law and psychiatry is poor. It is neglected, ignored, misinterpreted and misunderstood. To meet the standards of the developed world and international covenants, there is a pressing need by psychiatric community in the region to understand the existing legislation and to initiate changes through various agencies and regulatory bodies. This paper attempts to elucidate the interface of law and psychiatry in India in a nutshell.

Keywords: Law; Psychiatry; India

Introduction

Forensic psychiatry is a subspecialty of psychiatry, which usually deals with the application of psychiatric knowledge to the legal issues and sometimes with the application of legal knowledge to psychiatry. The Mental Health enactments are promulgated with dual objects such as (i) to have a concern for the rights and protection of people with mental disorders (ii) to have a concern for the rights and protection of community to which the person with mental disorder belongs. In India, forensic psychiatry is still an emerging area which is still in its infancy. Yet there are numerous legislations that bring together law and mental health. The following article discusses these legislations under two broad headings of criminal and civil laws with respect to people with mental disorders.

I Criminal Law and People with Mental Disorder

The common law jurisdiction in India recognizes defence of insanity¹ against a charge of crime. This defence is different from other defences as far as the result is concerned. If the defence is successful, it is not acquittal and release of the accused but a special verdict which says that they are not guilty by reason of insanity and they need to be admitted and treated in a mental hospital.

A person who has to stand criminal trial in a criminal court shall know as to what is happening against him and shall

have full opportunity to contest the case. A special provision is envisaged in the Code of Criminal Procedure while dealing with a matter concerned with a person who is of unsound mind. In such case, it is for the prosecution to establish that the said person is sane² and capable of making defence.

Any unlawful act of a person with disorder of mind³ is not an offence has been based upon the famous dictum Rule of Mc'Naughten. The Courts in some of the cases looking at the facts and circumstances have held that the plea of insanity would be available and the act complained of would not constitute an offence [1]. The rule of Mc'Naughten is being criticised heavily in legal spheres of being applied blindly [2]. The courts however, have continued to use the standard of over hundred years old. This is because law and medicine do not look at the individual with same perspectives.

Automatism and criminal liability

By legal definition, the acts performed involuntarily in an unconscious manner are known as automatism. Automatism cannot be called insanity. There is a grey area between insanity and automatism. Somnambulism, epilepsy, hypoglycemia are some of the examples which would constitute the instances of automatism wherein there is a time span of automatic behavior. Thus automatism last for a brief period and the person shows a normal behavior after that period. This is unlike insanity which is persistent and pervasive. However automatism also acts as a good defence in a criminal case.

¹Insanity, ²Disorder of mind- Mental illness of such a severe nature that a person cannot distinguish fantasy from reality, cannot conduct his/her affairs due to psychosis or is subject to uncontrollable impulsive behavior.

³Sane- One who is of sound mind, not mad or mentally ill.

Alcoholism, drug addiction and criminal law

An act done by a person due to the result of intoxication, without knowing as to what he would be doing, is not an offence [1]. However, this exception would not be applicable in respect of a person who resorts to voluntary intoxication with an intention to do or commit an act.

Person with mental disorder as a witness

Any one may testify and be a competent person to testify as a witness, unless the Court considers that such a person is prevented from understanding the question put to him on account of old age, disease whether of body or mind or other cause of the same kind. In other words, a person cannot be considered incompetent to testify just because he has a mental disorder. On the contrary, it has to be established that on account of such a disorder he cannot understand the questions put to him [3].

Suicide and persons with mental disorder

Suicide as such, is not a crime under the scheme of penal code, but an attempt to commit suicide is definitely a crime. 'Mens-rea' (intention to harm) is one of the essential elements of this offence. The right to life does not include the right to die. When the mental element is absent, an attempt to commit suicide would not constitute an offence. *Mulik case* [24.a] throws a beacon of light regarding the presence of mental element to constitute an attempt to commit suicide as an offence. Mental health professionals desire that the offence of attempting suicide be removed from the statute book. After holding the statute, which categorised attempted suicide as an offence to be unconstitutional in *Rathinam case* [24.b], the Court in *Gian Kaur's case* [24.c] was forced to restore the act to the status of an offence, because it found that the punishment for abetment was not possible without the attempt itself being an offence. The abetment to commit suicide is an offence. However, the recent legislation has struck down the Indian Penal Code (IPC) section 309 [1] after a long protest by the mental health professionals [4].

Theft and persons with mental disorder

Taking away of a movable property out of possession of any person without consent would constitute an offence of theft [1]. Element of dishonest intention is a primary ingredient. If a person suffering from Kleptomania (an impulse to steal in which the dishonest intention is not apparent) does an act which would otherwise amount to theft, his act would not amount to a theft to punish him in true sense. The punishment should not be as prescribed in penal code but the one in need of treatment.

Premenstrual syndrome and criminal law

Premenstrual syndrome may be effective as an affirmative defence to a criminal charge if the defendant can show that (i) she was suffering from premenstrual syndrome at the time the crime was committed; and (ii) because of her condition, either that the criminal act was an involuntary act or that at the

time of the criminal act she did not possess the mental state required by law for the commission of a crime. Premenstrual syndrome has been successfully pleaded as a criminal defence in England but has not been tested in Indian courts [5].

Capital sentence and persons with mental disorder

Should a civilized society levy its most extreme punishment against someone who cannot fully understand it? Against someone who could not help his/her lawyer to defend him? Worldwide, the general opinion is that the persons who are insane and retarded shall not be executed. Though the same law is followed in India, of late, this norm had a dent to some extent while dealing with persons who were mentally retarded and similarly with those who could not take independent decisions owing to mental illness.

In *A.B. Gupta case* [24.d] the Apex Court with reference to English Law vis-a-vis executing a person suffering from mental disorder said that "we, in this Country, are governed entirely by our statute law on such matter. The Courts have no power to prohibit the carrying out of a sentence of death legally passed upon an accused person on the ground either that there is some rule in the common law of England against the execution of an insane person sentenced to death or some theological, religious or moral objection to it. Our statute law on the subject is based entirely on secular considerations which place the protection and welfare of the society in the fore front". Thus in this case welfare of the society was given more importance though the accused was proved insane.

Code of criminal procedure and persons with mental disorder

Procedural law is a tool to advanced form of justice. Article 21 of the Constitution as interpreted in *Maneka Gandhi case* [24.e] would mean that the procedure should be just, fair and proper. A special provision is envisaged in the Code of Criminal Procedure (Cr PC) while dealing with a matter concerned with a person who has mental disorder⁴. When a Magistrate holding an inquiry reasonably believes that the person against whom the inquiry is being held is of unsound mind and as a consequence thereof is incapable of making effective defence, then the said Magistrate shall inquire in to the fact of such unsound mind by causing such person to be examined by a civil surgeon of the District or such other medical officer as the State Government may direct. Further, the said surgeon or medical officer shall be examined and his statement would be recorded. After so recording the statement, if it is found that the person facing inquiry is incapable of making defence, then the Magistrate shall record his finding to postpone the inquiry [6].

A person who is found to be of unsound mind⁵ by the Magistrate/Court, as the case may be, releases the person on parole by obtaining sufficient surety. Where surety is not available, the Magistrate orders to detain him in safe custody [6]. If mental illness is accepted then custody can be given to another person. If no such person is available, then the

⁴Mental disorder- A mental disorder is a mental or behavioral pattern that causes distress or disability, and which is not developmentally or socially normative.

⁵Unsound mind- One who is not competent to go to trial.

court has to give the custody to some Non Governmental Organisation and not to the jail. However, no such person shall be detained at mental hospitals otherwise by complying with the rules made by the State government. The trial or inquiry of a person accused of an offence resumes in a normal manner, only on recovery of such person from disorder of mind³, and not otherwise [6]. When a person is detained in jail or mental hospitals and that person is said to be capable of making his defence, then a certification from the Inspector General of Prisons or two visitors of mental hospitals is an essential factor [6,7].

Juvenile justice and persons with mental disorder

A Juvenile or a child who is mentally ill and committing any act, should be lodged at a special home or a shelter home or in the institution as created under Juvenile Justice (Care and Protection of Children) Act. The said juvenile or child should not be kept there beyond the period specified by the competent authority or Medical Officer for an adequate treatment. This applies with equal force even in respect of a juvenile or a child who is not in conflict with law but suffers from disorder of mind. The juvenility considered for holding the trial is the date when the alleged offence was committed. It is not the age on the date of standing trial [8].

II Civil Law and Persons with Mental Disorder

Persons with mental disorders⁴ suffer certain disadvantages in their day-to-day life on account of their incapacity to take certain decisions independently. Even if they take such decisions, at the time when the said decisions were taken, whether they had understood the implications of the said action is an important question. The civil law broadly regulates the said aspects of power to hold and to alienate property as well as issues related to their marriage.

Right to hold property

The ancient Hindu law had certain restrictions regarding the right of a person who is having disorder of mind to hold the property. The legislative step taken during 1928 though had removed the disabilities of persons to hold the property; it did not remove the disability of a person with mental disorder. However after 1956, the disqualification based on diseases, defect or deformity is not a bar to have property [9].

Testamentary capacity

Testamentary capacity of a person follows the soundness of mind. A person who cannot understand his/her act on account of intoxication or illness or from any other cause cannot make a Will [9]. However, a Will or a testament made during the lucid interval (intervening periods of normalcy) would be a valid document. Similar is the situation with respect to a person who is a habitual drinker, but has made the testament when he/she is not under the influence of alcohol or inebriation. Letter of administration or probate cannot be granted to any person who has a disorder of mind³ [9]. However, he/she could be a

legatee under a Will.

Contract Law

Every person is competent to make contract, provided they have attained an age of majority and that he/she is of a sound mind⁶. A genuine consent is very much necessary to have a valid contract. The Indian Contract Act for the said purposes has specifically envisaged that a person entering into the contract should not have any disorder of the mind at the time of making the contract. This is to ensure that he is capable of understanding it and is capable of forming a rational judgement as to its effect upon his interest [10]. A person with a disorder of mind but with occasional sound mind can make a valid contract during those periods. Similarly, a person who is usually of sound mind but has a disorder of mind on occasions cannot make a valid contract when he is ill. A contract entered in to by a lawful guardian of a mentally ill person is valid. Also, the manager duly appointed under the Mental Health Act could enter in to a contract to bind award.

Partnership

The relationship of partnership arises from contract and not from status [11]. To become a member of a partnership firm, the soundness of mind⁷ is important. If a person of sound mental health, after becoming a partner suffers mental illness, then any other partner or other person who is found to be entitled may seek dissolution of partnership of such a person by filing an application before the District Court. On such application, after enquiry if it is noticed by the District Court that the person is mentally ill, then the District Court would appoint a manager. The manager so appointed by, as the district court may direct, shall join with other partners in disposing of the partnership property and shall do all such acts for carrying in to effect the dissolution of the partnership.

Transfer of Property

Only the persons having competency to contract could effect a transfer of property. As a contract made by a person with mental disorder is void, the transfer made by him would also be void. However, if the person transfers a property during the lucid interval, then such a transfer stands valid [12]. On behalf of a mentally ill under the Mental Health Act 1987, a manager appointed by the Court, with its prior approval could mortgage, charge or transfer by sale, gift, exchange or otherwise transfer any of the immovable property of the person who has mental illness. However before granting the permission, the court shall make such an inquiry to protect the interest of the person with mental disorder⁴.

Stocks, Shares and Securities

Acquisition, holding and transfer of shares, stocks and securities by a person who is mentally ill are equally an important aspect in the commercial market. If a person who holds such valuables becomes mentally ill or the manager appointed for such mentally ill dies or himself becomes mentally ill, then for the purpose of effective regulation of these stocks/shares, the District Court may direct the company or Government

⁶Sound mind- One having an understanding of one's actions and reasonable knowledge of one's family, possessions and surroundings.

⁷Soundness of mind- Being able to think and reason sensibly.

concerned to make such transfer or to transfer the same and receive and pay over the dividends [7].

Marriage and Mental illness

Most of the personal laws, barring Muslim law, disqualify a person with disorder of mind from getting married. There is almost a consonance in the legal field that at the time of marriage both bride and bridegroom should be of sound mind though there is a divergence about the degree of sanity required to make a person fit for marriage. The Hindu Marriage Act and Special Marriage Act both emphasize that neither party must be suffering from any disorder of mind. However, if a marriage has taken place in respect of a person who has the infirmity then the marriage ipso facto (by that very fact) would not be void but is voidable at the instance of the other party. So it is up to the spouse of the mentally ill whether he/she can continue the married life with such a person. However, the framers of law have stated that the mental disorder shall be of such a kind or to such an extent as to render the person to be unfit for marriage and procreate the children [13]. Over here, a grey area would be the situation where both the parties are suffering from mental disorder to render them as mentally ill and are capable to procreate children.

Divorce

A person having a severe disorder of mind or suffering continuously or intermittently from mental disorder of such a kind and to such an extent that he cannot be reasonably expected to live with his/her spouse would suffer a ground to have his marriage dissolved by a decree of divorce [13].

Adoption

The concept of adoption is a unique feature of Hindu personal law as far as India is concerned. The person giving in adoption must have age of discretion and must be of sound mind⁶. Similarly, to take in adoption the soundness of mind⁷ is an essential prerequisite [14].

Abortion

Prior to 1971, termination of pregnancy was considered an offence punishable under law and was also treated as a taboo [1]. Shantilal Shah Committee recommended among several aspects as to when the termination of pregnancy could be done. The committee recommended that pregnancy could be terminated, where the pregnancy would have resulted from rape with a mentally retarded, risk of serious mentally handicapped child being born or with serious risk to the life of the mother. To terminate pregnancy of a woman who has not attained the age of eighteen years or a woman more than eighteen years but mentally ill, the consent of guardian in writing is a mandatory requirement and without such consent, no termination could be done [15].

Code of Civil Procedure and persons with mental disorder

Separate provisions are made in Code of Civil Procedure (CPC) [16] to regulate the proceedings relating to persons with mental disorder and minors. With regard to the persons adjudged as mentally ill⁸ or incapable of understanding by reason of mental illness, before or during the pendency of a suit, the procedure as contemplated in rule 1 to 14 (except rule

2A) of order 32 shall be applied. Where a suit is to be brought by a person with a disorder of mind³, the suit must be defended by a guardian ad litem. Where a manager is appointed under the provisions of Mental Health Act to manage the property, no person other than the said Manager should act as a next friend of the person with mental disorder in respect of the property. The enquiry contemplated under the provisions of Order 32 is not similar to that of the enquiry under the Mental Health Act. Any appointment of guardian based on a medical certificate without examining the medical officer on oath and by conducting enquiry is not proper.

Women and Mental health

In case of women, examination of case law in matrimonial context has shown that institutionalisation is often undertaken as a mode of getting rid of an innocent wife. In some cases, the courts grant the decree relating to the mental conditions of a person merely on the basis of an affidavit of the husband alleging disorder of mind. In this context, a judicial sensitisation is needed before passing any order of reception or divorce. *Anamika Chawala case* [24.f] is an example to show how the legal machinery and men of medical profession were misused or abused to get rid of a wife by the husband. Relatives invariably do not want to keep mentally ill woman in the family. Even after recovery, they have to languish in mental hospitals. There is a need for half way homes where mentally ill women can work few hours under the supervision of professionals. The Court in *Sheila Barse case* [24.g] said that the High Courts are duty bound to monitor the conditions of mentally ill women and children in prison and pass appropriate orders from time to time.

Public Interest Litigation

The field of public interest litigation before the Apex Court of the country and High Courts of various States have in fact activated the Executive to take up the cause of persons who are mentally ill and disabled. However, without the timely intervention of the said courts, the conditions of the hospitals where the mentally ill were treated would not have improved [17]. The mentally ill cannot afford to approach the courts directly to seek relief. For such type of persons, the Non-Governmental Organisations should feel free to approach the courts to seek relief. The courts also should be liberal in dealing with such types of cases. Erwadi fire incident is one of the illustrious example in the field of judicial activism and public cause action in the field of mental health aspect in the country [18]. This incident brought to the light the slackness on the part of the concerned authorities to implement the mental health law enacted by the Parliament. Justice Bhagawathi, speaking for the Court said that lodging mentally ill persons at jails is not proper. The learned Judge stated that the State Government should make arrangements to have adequate number of institutions for looking after the mentally ill [19].

Judicial Inquisition

Holding judicial inquisition in to the mental condition of a person alleged to be mentally ill is one of the important aspects in the framework of the legislation relating to the mental health. An inquisition proceeding is a proceeding of special solemnity and importance. When an alleged mentally ill pers-

⁸Mentally ill- Mental illness of such a severe nature that a person cannot distinguish fantasy from reality, cannot conduct his/her affairs due to psychosis or is subject to uncontrollable impulsive behavior.

on is in possession of property, an application for holding an inquisition regarding the mental condition of such person could be made to the District Court within whose local limit or jurisdiction the alleged mentally ill person resides. Such an application could be made by (1) any of his relatives or (2) by a public curator appointed under Indian Succession Act or (3) by the Advocate General of the State in which the alleged mentally ill person resides or (4) by the Collector of the District.

Where during inquisition proceedings the Court observes that the person with mental disorder requires the assistance of others and the protection of the Court, then the appointment of Manager of the property of that person would be justified. The manager so appointed by the Court owes certain obligation and duty to protect the property and interest of the person regarding whom the order is passed [7].

The Court, on showing sufficient cause and for the reasons to be recorded, can remove a manager or replace a manager so appointed by it to administer the property and look after the person with mental disorder. In case of death of a person with mental disorder, the status of Manager to look after the property or person would cease and end automatically. However, this is not specifically spelled out in the Mental Health Act, but the said analogy could be gathered from the spirit of the Guardian and Ward ship Act [20]. It is submitted that, the framers of law could have taken a lead from the observation of Justice Hidayathullah in *Bhavarao case* [24.h] and could have made a specific provision in the Mental Health Act instead of leaving the things in ambiguity. The Scheme of the Act envisages that the District Court has to keep making the regulations from time to time to regulate the proceedings in respect of inquisition. It is submitted that though the law specifically empowers the District Courts to make regulations, no such regulations have been formulated until now.

III Mental Health and Legal Aid

The legal system of the country shall secure equal opportunities to one and all to have access to justice. If a person with mental disorder is not represented by a legal practitioner in a proceeding before a District Court or a Magistrate, the District Court or Magistrate shall assign a legal practitioner to represent him at the expense of the State [21].

To discharge a person on his request he has to apply to the Magistrate. The procedure prescribed under The Mental Health Act, on many occasions causes difficulties to the person with mental disorder as many such persons may not be in a position to make the requisite application, before the Magistrate, nor would they be aware of their rights, and the procedure to seek discharge. In this context, the Apex Court directed that two members of the Legal Aid Board of each State to make monthly visit to such Institutions. The said members shall assist the patients and their relatives in applying for discharge from the institutions if they have fully recovered, and do not require institutional assistance any longer or find out whether actually they require any such treatment as inpatients. The Court also ruled that the person with mental disorder and their guardians shall be explained their rights by a team of members of Legal Aid and a Judicial Officer, in the language known to them, at the time of admission to any institute. They

should also be informed as to, whom to approach in case their rights are being infringed [7].

The Supreme Court not only said that there shall be adequate number of institutions to look after the mentally ill persons but also stated that the jail superintendent shall send a periodical report to the district judge about the condition of a person who is mentally ill and detained as an inmate at jail. Also, in *Veena Sethi case* [24.i], it opined that the necessary expenditure incurred towards the journey should be met at the cost of the State as a part of the legal aid. In the scheme of the Mental Health Act, the legal aid is available only in respect of a proceeding before a District Court or Magistrate and not in respect of procedure for admission, experimental research, solitary confinement and freedom of communication. A suitable step is to be taken either by amending the law or by way of instructions and guidelines of the constitutional courts [22].

IV HUMAN RIGHTS AND MENTAL HEALTH

A person with mental disorder shall not be subjected to any physical or mental indignity or cruelty during the treatment or in the name of any treatment. Similarly, a person with mental disorder under the guise of treatment shall not be used for the purpose of any research, unless such a research is essentially needed to the benefit of that person or that person has given declaration voluntarily. While a person with mental disorder is under the care of any hospital or psychiatric nursing home, the letters, mails and communications, if they are not prejudicial to the treatment, vexatious, or defamatory, shall not be intercepted, detained, or destroyed. The said interception or destruction or detaining mail or communication is needed, the same could be done only as per the Rules framed and not otherwise. Any action taken disregarding the Rule would amount to not only violation of privacy, a part of Right to Life, but also the violation of human rights [7].

Many a time, one could notice that persons with mental disorder are neglected and allowed to wander on street or even chained like animal and confined in a room depriving of all basic needs. They would be treated in a barbaric manner. To avoid this type of treatment in respect of the person with mental disorder who cannot take care of themselves in civilized societies, certain protective provisions are made. A person with mental disorder whenever is treated cruelly or is not taken care of by any relative or person in charge of him, a duty is cast on every officer in charge of police station to report to the Magistrate. Similarly, a private person could also inform the fact to the Magistrate. The Magistrate on receipt of the report or information has to cause the person with mental disorder to produce before him and summon the relative or other person in charge of the said person to appear. On production, the Magistrate on due enquiry shall pass an order to safeguard the interest of such a person with mental disorder and also punish the person who had failed to take proper care of the person with mental disorder [23].

Any person who cannot take care of himself and found wandering at large or the person who is mentally ill found to be dangerous within the limits of a police station then the

officer in charge of that station can take or cause to take him in to his protection. The person who is so taken or caused to be taken in to protection shall be informed of the grounds and shall be produced before the Court of Magistrate within twenty-four hours excluding the time needed for the performance of journey. The Magistrate on due enquiry may either hand over the said person to the custody of relative or friend on taking suitable bond for proper care and protection or may even make an order of reception for admission at psychiatric hospital or nursing home.

V MENTAL HEALTH AND POLITICAL RIGHTS

A person with mental disorder, and also declared by a competent Court, cannot be an elector, legislator, or even hold the office such as an election agent, or can exercise the right to vote (Article 326 of the Constitution of India). In the absence of any declaration by a competent Court, the political rights cannot be denied on certain aspersions and allegations. It is submitted that in this field the case law has not developed much in India [5].

CONCLUSION

In India, Psychiatry has become an established medical speciality. There is development seen within the sub specialities of psychiatry in recent times. However, for forensic psychiatry to grow there needs to be a combined effort from various agencies and regulatory bodies. Many of the Indian laws are out dated as they were framed during British rule and need modifications and amendments according to the current needs. There is no point in having a law unless it can be implemented which is a major debacle in India. An interface of law and psychiatry through teaching, training and research can lead to positive developments in the future of forensic psychiatry. It would be of great interest to compare the prevalent interface of Indian law and psychiatry with that prevalent in United Kingdom (UK) or United States of America (USA) in the future.

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