CHAPTER-IV
CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK
ON MENTAL HEALTH

“Reconciliation cannot be used to pass comprehensive health care reform. It would not work because it was never designed for that kind of significant legislation; it was designed for deficit reduction.”

Kent Conard¹

“To deny people their human rights is to challenge their very humanity.”

Nelson Mandela²

4.1 INTRODUCTION

Mental illness is a medical problem then what has law got to deal with it?³ Any transaction, be it contract, a marriage, a transfer of property or a will, has physical or mental elements. The written document or oral declaration containing the recitals of the gift, will or contact comprises the physical element and the intention to perform the transaction with the requisite understanding constitutes the mental element. For the legal validity of the transaction, both the physical and mental elements of the transaction are examined.⁴ Mental capacity may be significantly impaired by mental disorder. Consequently, legislative propositions and adjudicative decisions on the validity of various transactions take the presence of mental illness into account. Whether or not mental illness has the effect of rendering a transaction invalid would depend upon the scale of capacity required to undertake it. There is an inverse relationship between the legal capacity and mental disorder. The higher the degree of legal capacity, the lesser the scale of mental disorder required. For example, soundness of mind is required to exercise testamentary capacity. Soundness of mind defined as a positive mental condition and not just absence of unsoundness of mind. Any life suffering or a disabling condition can render such capacity questionable. Old age and serious physical illness serve as too often raised and frequently accepted examples. A person to be held criminally non-culpable, a person would need to be

³Amita Dhanda, Legal Order and Mental Disorder 17 (1st edn., 2000).
⁴Ibid.
suffering from such an impairment of his cognitive faculties as to be unable to know either the nature of the act or that it is wrong or contrary to the law.\footnote{Id at 18.}

The maintenance of order is a recognized function of law. This function can be impeded by the dangerous and disruptive manifestations of mental illness. Setting up structures and procedures which control these manifestations is the second mode of legal interaction in this sphere. Confining persons of unsound mind in psychiatric institutions or other places of safe custody is the primary method of controlling the disruptive and dangerous manifestations of insanity. Measures like preventive detention are also resorted to under the policing statute or the civil commitment laws. Confinement of the vagrant mentally ill, insane acquittees and insane undertrials is aimed to fulfil this function of maintaining order. Even as a number of therapeutic dimensions are added to the civil commitment law, posing a danger to the self or others remains a principal ground for ordering compulsory institutionalisation.\footnote{Ibid.}

Mental disorder is seen to render the bearers of the condition liable to exploitation. Insofar as one function of the law is to provide protection to vulnerable members of society, constructing a protective regime for persons with mental disorder is another task that the law performs in relation to mental disorder.\footnote{Id. at 19.}

The Indian legislative regime attempts to provide this protection in three ways. One device used is to deny legality to legal transactions involving a person of unsound mind. Denial of legality means not acknowledging in law a transaction which has taken place in fact. Thus a contract with person of unsound mind is void. The second method is to freeze legal proceedings till the person of unsound mind regains sanity. The strategy is employed in the conduct of criminal proceedings because, in a state of unsound mind, an undertrial would be able neither to instruct counsel nor participate in the court proceedings. Postponement is therefore provided to promote a fair trial. The third device is to allow someone else to represent the interest of a person of unsound mind. This representation can occur either through temporary or permanent arrangements. In a temporarily arrangement, the surrogate represents the person of unsound mind for a particular activity or transaction, for example, the guardian who files or defends a litigation. In a permanent arrangement,
the surrogate acquires a more general authority to act for the incapacitated individual. During the subsistence of the surrogacy, persons of unsound mind cannot act for themselves even during a lucid interval. So it can be stated that the law interacts with mental disorder, to protect society from the dangerous manifestations of mental disorder, to protect persons with mental disorder from exploitation and to adjudge the extent to which mental disorder negates legal capacity.⁸

4.2 IMPORTANCE AND NEED OF MENTAL HEALTH LEGISLATION

Mental health legislation is essential for protecting the rights and dignity of persons with mental disorders, and for developing accessible and effective mental health services.⁹ They face stigma, discrimination and marginalization in all societies, and this increases the likelihood that their human rights will be violated. Mental disorders can sometimes affect people’s decision making capacities and they may not always seek or accept treatment for their problems. Rarely, people with mental disorders may pose a risk to themselves and others because of impaired decision-making abilities. The risk of violence or harm associated with mental disorders is relatively small. Common misconceptions on this matter should not be allowed to influence mental health legislation.¹⁰

Effective mental health legislation can provide a legal framework to integrate mental health services into the community and to overcome stigma, discrimination and exclusion of persons with mental illness. Legislation can also create enforceable standards for high quality medical care, improve access to care, and protect civil, political, social and economic rights of persons with mental illness, including a right of access to education, housing, employment and social security. Furthermore, mental health law can establish guidelines through which a country develops its mental health policy, or reinforce previously established mental health policies that seek to provide effective and accessible mental health care through the community. Mental health legislation plays an important role in implementing effective mental health services, particularly by utilizing political and popular will to reinforce national mental health policies. Enactment of mental health legislation can improve funding of mental health

⁸Id. at 19-20.
services, create accountability for those responsible for providing mental health services and overcome bureaucratic gridlock to ensure compliance with mental health policies and directives. World Health Organization and international guiding principles for mental health care mandate that all human rights, including the right to privacy, informed consent, confidentiality, freedom from cruel and unusual treatment and non-discrimination should be guaranteed through mental health legislation.\textsuperscript{11}

There is no national mental health legislation in 25\% of countries with nearly 31\% of the world’s population, although countries with a federal system of governance may have state mental health laws. Of the countries in which there is mental health legislation, half have national laws that were passed after 1990. Some 15\% have legislation that was enacted before 1960, i.e. before most of the currently used treatment modalities became available (World Health Organization, 2001).\textsuperscript{12}

4.3 HISTORY OF MENTAL HEALTH LEGISLATION

Mental illnesses and the diagnoses and treatment of the mental illnesses has been well documented in Ayurveda, the Charak and Shushrut Samhitas, Vagbhat and Ashtanga Sangraha and Ashtanga Hridaya. Ayurveda is a science of life and not just a system of medicine. There are vivid descriptions about the symptoms, etiology and herbal medication, oil baths, fumigation, shock treatment, so also kindness and humane attitudes to be shown to the patient. But the legal aspects pertaining to the mental illness have not been mentioned anywhere in the ancient Indian literature before the advent of the British.\textsuperscript{13}

The Institution of Mental Asylum, was a British concept, the first lunatic asylum was established at Calcutta in or about 1787.\textsuperscript{14} In India, as in other parts of the world, the traditional approach to the care of the mentally ill, during the last 200 years, was custodial rather than therapeutic. This system was built by the then rulers in the mould of the mental health care delivery system of contemporary Britain. To build a chain of mental hospitals and to introduce western healing practices in them were conceived and executed by the East India Company. In the early phase of their development, in late 18\textsuperscript{th} century, mental hospitals were meant exclusively for the

\textsuperscript{11} Supra note 9.
\textsuperscript{12} Supra note 10.
\textsuperscript{13} L.P Shah, “Forensic Psychiatry in India Current Status and Future Developments”, Indian J Psychiatry 1999 Jul-Sep; 41(3) 179-185.
\textsuperscript{14} Ibid.
soldiers, who fought for their British masters against the Indian princes, the civilian officers of the East India Company and the white settlers.\textsuperscript{15}

In the early 19\textsuperscript{th} century, experts and administrators believed that the tropical climate was one of the causes of mental disorders among the Europeans living in India. Accordingly European patients, who did not improve within six months after their admission in a mental hospital in India, were sent to England for treatment. The passage money and other expenses were paid by the East India Company as loan to be repaid by the recovered patient. The practice began in 1818. In course of time the cost-effectiveness of this exercise was called into question. In order to regulate the selection of such patients the need for enactment of a law became apparent. In 1851 the “Lunatics Removal Act” was passed. This Act has the dubious distinction of being the first mental health legislation in British India. In pursuance of this Act and the rules framed there under, the flow of patients gradually dwindled, till it came to an end in 1891.\textsuperscript{16}

The role of law in the development of modern psychiatry was extensive, particularly after the 18th century and reflected both a growing public awareness of problems raised by mental disorder and community’s need to express and enforce measures to manage the problems. Religion and utilitarian philosophies were influential in English public life during the 19\textsuperscript{th} century and coloured the contemporaneous calls for the reforms of asylums, prisons and the legal system. Thus the English Act of 1774 was replaced by the Country Asylum Act, 1808 which in turn was replaced by the English Lunacy Regulation Act, 1853 and the English Lunatic Act of 1853. These were further amended by the Lunacy Act of 1891. This was repealed by the Mental Health Act in 1959 in order to make fresh provisions for treatment and care of mentally disordered, provision for informal admission of mentally ill persons.\textsuperscript{17}

After the take-over of the administration of India by the British Crown in 1858, large number of laws were enacted in quick succession for controlling the care and treatment of mentally ill persons in British India.\textsuperscript{18}

\textsuperscript{16}Ibid.
\textsuperscript{17}Supra note 13.
\textsuperscript{18}Supra note 15.
Mental health legislation was first enacted in India in 1858 based on the two English Acts of 1853. Law relating to the custody of lunatics and management of their estates was introduced in India through three separate acts, The Lunacy (Supreme Court) Act, 1858, The Lunacy (District courts) Act, 1858 and Lunatic Asylum Act, 1858. This act was modified in 1883 and more elaborate instructions and guidelines for admission and treatment of lunatics were outlined.19

In essence these Acts gave guidelines for establishment of mental asylums and codified the procedures of admitting patients. The aim of establishing asylums was to segregate those who were considered dangerous to the society by reasons of mental illness. Asylums were the places where insanees were kept for safe custody and not for proper treatment. During the second half of 19th century, along with the proliferation of mental health legislation, number of mental hospitals also increased in different parts of India. Needless to say, they did not match the need of the community. Patients were incarcerated in these asylums for an indefinite period with very little chance of recovery and release. Consequently, by the end of the century overcrowding and its impact on the living condition of patients made these asylums a veritable inferno.20

During the first decade of the 20th century, public awareness about the pitiable conditions of mental hospitals accentuated as a part of the growing political awareness and nationalistic views spearheaded by the Indian intelligentsia. It resulted in the next phase of development of mental health legislation in India. Public resentment over the plight of mental patients was expressed through adverse criticism in the Indian press. It found its echo in the contemporary British press as well as in the British parliament. The government of India, thereupon, decided to tone up the administrations of the mental hospitals and the procedures of admission and discharge of inmates of those hospitals through a comprehensive Act.21

In 1911, the Hon’ble Mr. Jenkins moved to introduce a Bill22 in the council of the Governor General of India23 to consolidate and amend the law relating to lunacy. He observed “We propose to consolidate these enactments and to introduce certain

19Supra note 13.
20Supra note 15.
21Ibid.
23Supra note 15.
amendments and especially to bring the law in certain important particulars into line with the modern English Act, the Lunacy Act, 1890 as amended by the Lunacy Act, 1891.” The legislative department of the Council was complimented for its painstaking labour. He considered that it is more fit for careful examination with regard to all details in the Select Committee, than for general discussions in the Council. After a careful consideration of all details by a Select Committee the bill was passed as the Indian Lunacy Act, 1912.

The enactment of Indian Lunacy Act, 1912 had a far-reaching consequence and impact on the whole system of mental health services and administration in India. Under this new legislation the central supervision of all mental hospitals became a reality. This was a fundamental change in the management of mental hospitals. These hospitals were thus removed from the grip of the Inspector General of Prisons. The next most important change was the recognition of the role of specialists in the treatment of mental patients. Psychiatrists were appointed as full time officers in mental hospitals. These beneficial features apart, a dispassionate analysis of the Indian Lunacy Act, 1912 will lay bare the legacy of its predecessors enacted in the previous century. This Act also was obsessed with a persistent concern for the protection of the public from those who were considered dangerous to the society. Provisions of this Act have paid more attention to increase the legal safeguard against wrongful detention and proposed rigorous criteria for certification of the mentally ill. The law ensured an overriding power of the magistrate in the certification process. Thus an essentially clinical issue was overshadowed by a legalistic approach. The adverse effects of these procedures were not far to seek. The condition of mental hospitals rapidly deteriorated during the following three decades. In 1946 Col. M. Taylor, Superintendent of European Mental Hospital at Ranchi, as a member of the Health Survey and Development Committee, popularly known as “Bhore Committee” was asked to survey the mental hospitals. It was reported that the majority of mental hospitals in India were quite outdated and were designed for detention and custody without regard to curative treatment. It was highlighted that Indian Lunacy Act of

24 Supra note 22.
25 Supra note 15.
26 Ibid.
1912 had outlived its usefulness. A draft of the Mental Health Act was prepared in 1949 by Indian Psychiatric Society.\textsuperscript{27}

It was in 1949 that the first editor of the Indian Journal of Psychiatry (then known as the Indian Journal of Neurology and Psychiatry) Prof. N. De wrote editorials to highlight the need of amending the Indian Lunacy Act, 1912. In the same year the Indian Psychiatric Society in its second annual conference held at Allahabad, passed a resolution at the insistence of Prof. De to move the Government of India to repeal the Indian Lunacy Act, 1912 and to introduce a new mental health bill. As a follow up of this resolution the IPS appointed, in 1949, an ad-hoc Committee of three distinguished psychiatrists, namely, Dr. J. Roy of Nagpur, Dr. R.B. Davis and Dr. S.A. Hasib of Ranchi. They met at Ranchi and prepared a draft “Indian Mental Health Act”. In 1959-60 an attempt was made, under instruction from the Government of India, to suggest amendment to the 1912 Act. But the experts failed to reach a consensus. For about two decades the Government made no further efforts for enactment of a new law on mental health. During this period great strides were taken in the advancement of knowledge and understanding of the nature of mental disorders. Attitudes of the society towards mentally ill persons had changed remarkably. Stigma associated with mental disorders also was on the wane. There was growing demands and aspirations of the people to get better facilities and less rigid procedures for admission, treatment and discharge of mental patients. As far as possible mentally ill persons should be treated at par with any other sick person and the environment should be natural and familiar. This collective view was bolstered up by the principles of Alma Ata Declaration of 1978. The Government could hardly ignore this changed climate of opinion and responded to the concerted pressure of the people, professionals and policy makers by introducing the Mental Health Bill in parliament in 1981. It was referred to a Joint Committee of MP’s in 1982. Before the Committee could come to a decision the Lok Sabha was dissolved on 31\textsuperscript{st} December, 1984. In 1985 a new Joint Committee went into the Bill, elicited public opinion, suggested some amendments and adopted it on 24\textsuperscript{th} April, 1986. This amended Bill was passed by the Rajya Sabha on 26\textsuperscript{th} November, 1986 and by the Lok Sabha on 19\textsuperscript{th} March, 1987. The amendments made by the Lok Sabha were agreed to by the Rajya Sabha on 22\textsuperscript{nd} April, 1987. The President’s assent was received on 22\textsuperscript{nd} May, 1987.

\textsuperscript{27}\textit{Supra} note 13.
and it became the Mental Health Act, 1987.\textsuperscript{28} Mental Health Act, 1987 was drafted by Parliament in 1987 but it came into effect in all the States and Union Territories of India in April 1993. The Act replaced the Indian Lunacy Act of 1912, which had earlier replaced the Indian Lunatic Asylum Act of 1858.\textsuperscript{29}

Later on 29 December, 1990, State Mental Health Rules were framed that would come into force in a state on the date of commencement of the Mental Health Act, 1987, in that State. Under the State of Mental Health Rules, each state had to constitute a State Mental Health Authority that would act as a licensing body for the establishment of mental health care centres to ensure the minimum standards of care of the mentally ill.\textsuperscript{30}

New terms had been introduced in Mental Health Act, 1987 in place of the terms previously used in the Indian Lunacy Act. It used psychiatric hospital in place of nursing home asylum, mentally ill person in place of lunatic and mentally ill prisoner in place of criminal lunatic. The objectives of the Mental Health Act, 1987 were to establish Central and State authorities, establish psychiatric hospitals and nursing homes, provide a check on working of these hospitals, provide for the custody of mentally ill persons, protect the society from dangerous manifestations of mentally ill, regulate procedure of admission and discharge, safeguard the rights, protect citizens from being detained unnecessarily, provide for the maintenance charges of mentally ill persons, provide legal aid to poor mentally ill criminals at state expenses and change offensive terminologies of Indian Lunacy Act.\textsuperscript{31} So many changes had been introduced in the Mental Health Act, 1987. The positive changes in the Mental Health Act, 1987 were, more humane approach to problems of mentally ill persons, creation of Central and State Mental Health Authorities, procedure for admission and discharge, minor could be admitted with the consent of a guardian under the act, separate provision for admission of involuntary patients under category “Admissions Under Special Circumstances”, special centres for special population like drug addicts, under 16 years, mentally ill prisoners etc., establishment and maintenance of psychiatric hospitals and psychiatric nursing homes in private sector, discharge

\textsuperscript{28}Supra note 15.
\textsuperscript{29}Dr. Prateek Rastogi, “Mental Health Act, 1987 - An Analysis” JIAFM, 2005; 27 (3): 176-179.
\textsuperscript{30}B.S Chavan, Nitin Gupta, et. al. (eds.), Community Mental Health in India 35 (2012).
procedure have been made easy simplified, new different addition – protection of human rights of mentally ill persons, penalties, cost of maintenance and management of properties, prohibition on any research on subjects without proper consent.\textsuperscript{32}

Mental health legislations were initially drafted to safeguard the public from dangerous patients by isolating them from the public. A paradigm shift from custodial care to community care has occurred due to (i) Advances in medical technology in assessment and treatment of mental disorders; (ii) the human rights movement; (iii) World Health Organization’s (WHO) definition of ‘health’; and (iv) Promotive, preventive, curative, rehabilitative approaches and mitigation of disability. This shift has given a new perspective to the care of mental disorders and has led to the review of mental health legislations worldwide. Discrimination and stigma may impact access to adequate treatment and care as well as other areas of life, including employment, education, marriage and shelter. The inability to integrate into society as a consequence of these limitations can increase the isolation experienced by an individual, which can, in turn, aggravate mental disorder. The amendment of the Mental Health Act, 1987 considered very critical at this point of time because of two landmark developments. At the national level most exemplary amendments into the Protection of Human Rights Act of 1993 and the definition of ‘Human Rights’ and ‘International covenants’ have led to the broader concept of human rights which is enforceable in Indian judiciary. At the International level, the most wanted ratification of the Convention\textsuperscript{33} on Rights of Persons with Disability in October, 2007 has further strengthened the need for amendments in the Mental Health Act, 1987.\textsuperscript{34}

Though having many positive features, the Mental Health Act, 1987 had been the subject of criticism. It was alleged to be concerned mainly with the legal procedure of licensing, regulating admissions and guardianship matters of persons with mental

\textsuperscript{32}Ibid.
\textsuperscript{33}According to Article 2 of the Convention, persons with disability will enjoy legal capacity on an equal basis for all aspects of life. Article 3 calls the State to take appropriate measures to provide access to support by persons with disability to exercise the legal capacity. Article 4 calls for safeguards to prevent abuses of the system of support required by persons with disability. There is no explicit prohibition of forced interventions in the UNCRPD, but neither does the Convention permit compulsory mental health care. Quoted in C.L. Narayan and D. Shikha, “Indian Legal System and Mental Health”, \textit{Indian J Psychiatry} 2013 Jan; 55:177-81.
illness. Human right issues and mental health care delivery were not properly addressed in the Act. Because of a large number of very complicated procedures, defects and absurdities in the Act and also in the Rules made under the Act, it could never be implemented properly. Human right activists have questioned the constitutional validity of the Mental Health Act, 1987 because it involves curtailment of personal liberty without the provision of proper review by any judicial body. Mental Health Act, 1987 was under process of amendment to make it United Nations Convention for Rights of Persons with Disabilities (UNCRPD) compliant for a long time.35

Now, the Parliament has enacted the Mental Healthcare Act, 2017. The Mental Healthcare Act aims to provide for mental healthcare and services for the persons with mental illness and ensure these persons have the right to live a life with dignity by not being discriminated against or harassed.36 Before the provisions of the new the Mental Healthcare Act, 2017, are analysed, the safeguards if any existed to the persons with mental illness under the Constitution of India need to be studied briefly.

4.4 CONSTITUTIONAL LAW AND PERSONS WITH MENTAL ILLNESS

The Constitution of India ensures equality, freedom, justice and dignity of all individuals and implicitly mandates an inclusive society for all including persons with disabilities.37 As citizens of India, the mentally ill are entitled to all those human and fundamental rights which are guaranteed to each and every citizen by the Constitution of India, to the extent their disability do not prevent them from enjoying those rights or their enjoyment is expressly or impliedly barred by the constitution by any other Statutory law.38

The framers of the Constitution of India seemed to have been aware of the problems of the weaker sections of the society and the disabled persons. Ensuring

35 *Supra* note 33.
36 B. S. Web Team, “Mental Healthcare Bill Passed in Parliament: All You Need to Know”, *available at:*
38 Shiv Gautam, Sanjay Jain, Lalit Batra, Rajesh Sharma and Deepti Munshi, “Human Rights and Privileges of Mentally Ill Persons”, *available at:*
social and economic equality and justice also would require that some Constitutional provisions should be made for the physically and mentally disabled. We find that such provisions have indeed, been made which are found scattered in different parts of the Constitution. Although according to Entry 9 in the List II of Schedule 7 of the Constitution, the subject of “Relief to the disabled and unemployable” is the responsibility of the State Governments, in practice, the Central Government also has a major role to play in, this field. The Ministry of Welfare has been identified as the nodal Ministry by the Government for the welfare of the disabled. A brief survey of the constitutional and legislative provisions would enable us to have an idea of the concern shown by the Constitution makers and different governments towards the disabled ever since the establishment of Indian Republic. Some such provisions which have been and can be utilized for the upliftment of the disabled, are reproduced below.39

(a) The Preamble, promises that we, the people of India, having solemnly resolved to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and opportunity and fraternity assuring the dignity of the individual.40

(b) Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India.41

(c) Article 15 provides that nothing in Article 15 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens.42

(d) Article 16 further provides that nothing in this shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.43

41Id. art. 14.
42Id. art. 15(4).
43Id. art. 16.
(e) Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.\textsuperscript{44}

The fundamental right to life and liberty as interpreted by the Supreme Court of India in number of landmark cases includes the right to live with human dignity and right to health. The Supreme Court has also laid down the maintenance and improvement of public health as one of the obligations that flow from Article 21 of the constitution. This means that mentally ill have fundamental or human right to receive mental health care and to humane living conditions in the mental hospitals.\textsuperscript{45}

Though the fundamental rights\textsuperscript{46} listed above, in a way, do not have a specific mention of the persons with mental illness, yet they do pertain to the socially, economically and educationally backward class of people. But the Ministry of Social Welfare has already recommended that the disabled be treated equal to women and other weaker sections of the community. The fundamental rights give more emphasis on political equality and justice. It is the directive principles of State Policy, which become more relevant while bringing about social and economic equality and justice which should be the main concern of the State and the society when it comes to doing something for the welfare and rehabilitation of the disabled. Directive principles of the State Policy\textsuperscript{47} can be used as guidelines by the governments from time to time to undo injustice and step-motherly treatment meted out to this hapless and helpless section of Indian society for centuries.

Some of the directive principles of State Policy which pertain to and can be a guiding spirit for the amelioration of the conditions of the disabled are reproduced below\textsuperscript{48}:

(a) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life.\textsuperscript{49}

(b) The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only

\textsuperscript{44}Id. art. 21.
\textsuperscript{45}Id. Supra note 38.
\textsuperscript{46}The Constitution of India, 1950, Part III.
\textsuperscript{47}Id. Part IV.
\textsuperscript{48}Supra note 39.
\textsuperscript{49}Id. art. 37.
amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.\textsuperscript{50}

(c) The State, in particular, shall direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment and that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter a vocation unsuited to their age or strength.\textsuperscript{51}

(d) The State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.\textsuperscript{52}

(e) The State shall promote with special care the educational and economic interests of the weaker sections of the people and shall protect them from social injustice and all forms of exploitation.\textsuperscript{53}

4.4.1 The Mental Healthcare Act, 2017

- **Objectives of the Mental Healthcare Act, 2017**

  The objects and reasons of the Act, is to align and harmonise the existing laws of the country with the Convention on the Rights of Persons with Disabilities in 2007, which was adopted on the 13th December, 2006 at United Nations Headquarters in New York and came into force on the 3rd May, 2008 and signed and ratified the said Convention by India on the 1st day of October, 2007. An Act to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons

\textsuperscript{50}Id. art. 38(2).
\textsuperscript{51}Id. arts. 39(b), (c) and (e).
\textsuperscript{52}Id. art. 41.
\textsuperscript{53}Id. art. 46.
during delivery of mental healthcare and services and for matters connected therewith or incidental thereto.\textsuperscript{54}

- **Salient Features of the Mental Healthcare Act, 2017**

Salient features of the Act are:

a) One of the significant contributions of the Mental Healthcare Act, 2017 is the insertion of the definition of “mental illness”. “Mental Illness” means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize 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 subnormality of intelligence;\textsuperscript{55}

b) “Mental Health Establishment” under the Act means any health establishment, including Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy establishment, by whatever name called, either wholly or partly, meant for the care of persons with mental illness, established, owned, controlled or maintained by the appropriate Government, local authority, trust, whether private or public, corporation, co-operative society, organisation or any other entity or person, where persons with mental illness are admitted and reside at, or kept in, for care, treatment, convalescence and rehabilitation, either temporarily or otherwise; and includes any general hospital or general nursing home established or maintained by the appropriate Government, local authority, trust, whether private or public, corporation, co-operative society, organisation or any other entity or person; but does not include a family residential place where a person with mental illness resides with his relatives or friends;\textsuperscript{56}

c) Determination of Mental Illness shall be in accordance with such nationally or internationally accepted medical standards (including the latest edition of the International Classification of Disease of the World Health Organisation) as may

\textsuperscript{54}The Mental Healthcare Act 2017; The Act replaces the Mental Health Act (MHA) of 1987. It was published on 7th April 2017 in the Official Gazette of India. It provides for protection and restoration property rights of mentally ill persons. The Act is comprised of 126 Sections and 16 Chapters.

\textsuperscript{55}Id. s. 2(s).

\textsuperscript{56}Id. s. 2(p).
be notified by the Central Government. The determination shall not be on the basis of political, economic or social status or membership of a cultural, racial or religious group etc. and past treatment or hospitalisation shall not affect the present or future determination. The determination of a person’s mental illness shall alone not imply that the person is of unsound mind; 57

d) The Act provides that all persons with mental illness are presumed to be able to make treatment decisions. Patients and young people will be provided with information and support to make decisions about their treatment and where a person makes a decision regarding his mental healthcare or treatment which is perceived by others as inappropriate or wrong, shall not mean that the person does not have the capacity to make mental healthcare or treatment decision, so long as the person has the capacity to make mental healthcare or treatment decision. 58

e) Chapter III of the Act enables a person to make an advance directive to record their treatment preferences about the way the person wishes, to be treated for not to be treated for, in the event that they become unwell and ceases to have capacity to make treatment decisions and require treatment. Advance statements will give patients decide about their treatment. 59 Such an advance directive may be revoked, amended or cancelled by the person who made it at any time. 60 In case of minors, the legal guardian shall have right to make an advance directive in writing and all the provisions relating to advance directive, mutatis mutandis, shall apply to such minor till such time he attains majority. 61 The procedure of advance directive shall be reviewed by Central Mental Health Authority periodically. 62

f) Chapter IV provides that a minor shall have a right to appoint a nominated representative. 63

g) Chapter V provides the rights to the persons with mental illness. The Act gives every person the right to access mental healthcare and treatment from mental health services from the Government. 64 This right shall mean treatment which is affordable, of good quality, available in sufficient quantity, accessible

57 Id. s. 3
58 Id. s. 4.
59 Id. s. 5.
60 Id. s. 8(1)
61 Id. s. 11(4)
62 Id. s. 12.
63 Id. s. 14.
64 Id. s. 18 (1).
geographically, without discrimination on the basis of gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class, disability or any other basis and provided in a manner that is acceptable to persons with mental illness and their families and care-givers. Such services shall include provision of acute mental healthcare services such as outpatient and inpatient services; provision of half-way homes, sheltered accommodation, supported accommodation as may be prescribed; provision for mental health services to support family of person with mental illness or home based rehabilitation; hospital and community based rehabilitation establishments and services as may be prescribed; provision for child mental health services and old age mental health services. The appropriate Government shall integrate mental health services into general healthcare services at all levels of healthcare.

h) The persons with mental illness shall also have the right to community living and where it is not possible for a mentally ill person to live with his family or relatives, or where a mentally ill person has been abandoned by his family or relatives, the Government shall provide support including legal aid and to facilitate exercising his right to family home and living in the family home.

i) Another right which is guaranteed under the Act to the persons with mental illness is the right to protection from cruel, inhuman and degrading treatment. Every person with mental illness shall have a right to live with dignity and shall be protected from cruel, inhuman or degrading treatment in any mental health establishment and shall have the rights, namely, to live in safe and hygienic environment; to have adequate sanitary conditions; to have reasonable facilities for leisure, recreation, education and religious practices; to privacy; for proper clothing so as to protect such person from exposure of his body to maintain his dignity; to not be forced to undertake work in a mental health establishment and to receive appropriate remuneration for work when undertaken; to have adequate provision for preparing for living in the community; to have adequate provision for wholesome food, sanitation, space and access to articles of personal hygiene, in particular, women’s personal hygiene be adequately addressed by providing access to items that may be required during menstruation; to not be subject to

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65 Id. s. 18 (2).
66 Id. ss. 18 (4), 18(5).
67 Id. s. 19.
compulsory tonsuring (shaving of head hair); to wear own personal clothes if so wished and to not be forced to wear uniforms provided by the establishment and to be protected from all forms of physical, verbal, emotional and sexual abuse.  

j) Under the Act every person with mental illness shall be treated as equal to persons with physical illness. A child under the age of three years of a woman receiving care, treatment or rehabilitation at a mental health establishment shall ordinarily not be separated from her during her stay in such establishment. It is the duty of every insurer to make provision for medical insurance for treatment of mental illness on the same basis as is available for treatment of physical illness.

k) A person with mental illness and his nominated representative shall have the rights to information relating to the provision of this Act or any other law under which he has been admitted, the nature of the person’s mental illness and the proposed treatment plan.

l) A person with mental illness shall also have the right to confidentiality under the Act in respect of his mental health, mental healthcare, treatment and physical healthcare.

m) A person with mental illness shall be entitled to receive free legal aid.

n) A person with mental illness if not satisfied with the services in the mental health establishment shall have a right to complain to the medical officer, mental health professional in charge of the establishment, the concerned Board and to the State Authority.

o) Under the Act Government is under an obligation to implement programmes for the promotion of mental health and prevention of mental illness in the country and to take all measures to create awareness about mental health and illness and reducing stigma associated with mental illness.

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68 Id. s. 20.
69 Id. s. 21(1).
70 Id. s. 21(2).
71 Id. s. 21(4).
72 Id. s. 22.
73 Id. s. 23.
74 Id. s. 27.
75 Id. s. 28.
76 Id. ss. 29, 30.
The said Act calls for the establishment of the Central Mental Health Authority
and State Mental Health Authority for the registration, development of quality and
service norms and supervision of mental health establishments under the control
of Central Government and the State Government respectively.\textsuperscript{77} The Mental
Health Review Boards shall be constituted by the State Authority for a district or a
group of districts to register, review, alter, modify or cancel an advance directive;
to appoint a nominated representative; to visit and inspect prison or jails and to
conduct an inspection in the mental health establishment etc;\textsuperscript{78}

Chapter XII of the Act provides for the admission, treatment and discharge of the
persons with mental illness. All the admissions in the mental health establishment
shall be independent admissions (admission of person who has the capacity to
make treatment decisions) except when such conditions exist as make supported
admission unavoidable.\textsuperscript{79} Electro Convulsive Therapy (ECT) shall only be
performed with the use of anaesthesia on persons with mental illness and not be
performed on minors.\textsuperscript{80} Psychosurgery shall not be performed as a treatment for
mental illness unless the informed consent of the person on whom the surgery is
being performed and approval from the concerned Board to perform the surgery,
has been obtained.\textsuperscript{81}

Chapter XV of the Act deals with the offences and penalties. It provides that
whoever carries on a mental health establishment without registration shall be
liable to a penalty which shall not be less than five thousand rupees but which
may extend to fifty thousand rupees for first contravention or a penalty which
shall not be less than fifty thousand rupees but which may extend to two lakh
rupees for a second contravention or a penalty which shall not be less than two
lakh rupees but which may extend to five lakh rupees for every subsequent
contravention.\textsuperscript{82} Any person who contravenes any of the provisions of this Act, or
of any rule or regulation made thereunder shall for first contravention be
punishable with imprisonment for a term which may extend to six months, or with

\textsuperscript{77}Id. ss. 43, 55.
\textsuperscript{78}Id. ss. 73, 82.
\textsuperscript{79}Id. s. 85.
\textsuperscript{80}Id. s. 95.
\textsuperscript{81}Id. s. 96.
\textsuperscript{82}Id. s. 107.
a fine which may extend to ten thousand rupees or with both, and for any subsequent contravention with imprisonment for a term which may extend to two years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both.\textsuperscript{83} Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in-charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.\textsuperscript{84}

s) As per the Act people suffering from mental health attempting suicide shall be presumed, unless proved otherwise, to have severe stress, provided with treatment and rehabilitation and therefore the act will be exempted from the provisions of Section 309 of Indian Penal Code.\textsuperscript{85}

From the study of the salient features, it seems that the authors of the Mental Healthcare Act, 2017, have visualised that the new law would be a Magna Carta to liberate all the mentally ill all over the country. Their logic appears to be that with the word ‘care’ inserted in the title, the new law would ensure that every mentally ill person in India would enjoy the Government’s benevolence. However, ground realities are far from this.\textsuperscript{86} Notwithstanding, a major criticism of the implementation of the Mental Healthcare Act, 2017, the said Act has such a wide and textbook like definition of “mental illness”. According to Dr. J.T Antony,\textsuperscript{87} the over-inclusive definition would lead to a situation where even those with minor disorders would get stamped as mental.\textsuperscript{88} Under the said Statute, the Board can review, alter, modify or cancel the advance directive by making an application to the concerned Board.\textsuperscript{89} But the advance directive is not available in case of emergency treatment.\textsuperscript{90} It seems like the right given with one hand and taken away with the other. The Act does not provide for advance directive to minors, as per Section 5 of the said Act. All the

\textsuperscript{83}Id. s. 108.
\textsuperscript{84}Id. s. 109.
\textsuperscript{85}Id. s. 115.
\textsuperscript{87}Department of Psychiatry, Jubilee Mission Medical College and Research Institute, Thrissur, Kerala, India.
\textsuperscript{88}Ibid.
\textsuperscript{89}The Mental Healthcare Act, 2017, s. 11; \textit{Supra} note 61.
\textsuperscript{90}Id. s. 9.
services are to be ensured by both Central and State governments. The expenditures estimated will not meet the obligations under the Act. It also does not address guardianship of mentally ill persons.91 There was a provision of mental health tribunals under the Mental Healthcare Bill, 2013 which is also not incorporated under the Act.92

4.4.2 The Rights of Persons with Disabilities Act, 2016

On 22 December, 1995, the Persons with Disabilities (Equal opportunities and full participation) Act, 1995 was introduced for the benefit of disabled persons. The Act seek to place the disabled person on a par with other sections of the society in respect to jobs, education and vocational training. The main purpose of the Act was to define the responsibilities of the central and state governments with regard to the services for disabled individuals so as to make full contribution in accordance with their disability conditions. Blindness, hearing impairment, locomotor disability, mental illness, and mental retardation are the seven disability conditions were covered under the Act.93 Under the Act mental retardation and mental illness are categorized as conditions of disabilities. Thus, the persons with mental illness are entitled to benefits available to Persons with disability as provided under the Act.94 Recently, the government has passed the Rights of Persons with Disabilities Bill 2016 replacing the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.95 Under the Act, the types of disabilities have been increased from the existing seven to 21. The newly added types include mental illness, autism spectrum disorder, cerebral palsy, muscular dystrophy, chronic neurological conditions, specific learning disabilities, multiple sclerosis, speech and Language disability, thalassemia, hemophilia, sickle cell disease, multiple disabilities including deaf blindness, acid attack victims and Parkinsons disease. Disability has also been defined based on an evolving and dynamic concept and government will have the

93B.S Chavan, Nitin Gupta, et. al. (eds.), Community Mental Health in India 35 (2012).
94Choudhary Laxmi Narayan and Deep Shikha, Supra note 33.
power to add more types of disabilities. The Act has categorised Persons with Disabilities into three categories: person with disability, person with benchmark disability and person with disability having high support needs. The Act provides for raising reservation in government jobs for persons with benchmark disabilities from 3 to 4 per cent, and in higher education institutes from 3 to 5 per cent.

Special Courts will be designated in each district for providing speedy trial. The Act also makes the following acts punishable with imprisonment for a term, which shall not be less than six months but which may extend to five years and with fine:

- intentionally insults or intimidates with intent to humiliate a person with disability in any place within public view;
- assaults or uses force to any person with disability with intent to dishonour him or outrage the modesty of a woman with disability;
- having the actual charge or control over a person with disability voluntarily or knowingly denies food or fluids to him or her;
- being in a position to dominate the will of a child or woman with disability and uses that position to exploit her sexually;
- voluntarily injures, damages or interferes with the use of any limb or sense or any supporting device of a person with disability;
- performs, conducts or directs any medical procedure to be performed on a woman with disability which leads to or is likely to lead to termination of pregnancy without her express consent, except in cases where medical procedure for termination of pregnancy is done in severe cases of disability and with the opinion of a registered medical practitioner and also with the consent of the guardian of the woman with disability. Any person who contravenes any provision of the Act will be punished with a maximum fine of Rs 5 lakh.

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98 Supra note 96.
99 Supra note 97.
100 Supra note 96.
4.4.3 Criminal Law and the Persons with Mental Disorder

4.4.3.1 The Indian Penal Code, 1860

Section 84 of Indian Penal Code says that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.\(^{101}\)

The policy of the law is to control not only the sane, but, so far as is possible, also the insane. It is not, therefore, every person mentally diseased who, \textit{ipso facto}, is exempted from criminal responsibility. Such exemption is allowed only where the insane person “is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.” This Section lays down the legal test of responsibility in cases of alleged unsoundness of mind. It is by this test, as distinguished from medical test, that the criminality of an act is to be determined.\(^{102}\)

Section 84 of Indian Penal Code is the primary legislation dealing with the criminal responsibility of mentally ill persons in India. This law is based on Mc Naughten Rules enacted in England.\(^{103}\) This Section, in substance, is the same as the Mc Naughten Rules. These Rules in spite of long passage of time are still regarded as the authoritative statement of the law as to criminal responsibility.\(^{104}\) One Daniel M’ Naughten murdered Mr. Drummond, the private secretary of Sir Robert Peel, in mistake for that statesman. The acquittal of M’ Naughten on the ground of insanity provoked such widespread dissatisfaction that it became the subject of debate in the house of Lords. In consequence of the debate, the Lords submitted the judges certain abstract questions respecting persons afflicted with insane delusions.\(^{105}\) The learned Judges laid down inter alia that “every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their jury’s satisfaction, that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know

\(^{101}\) The Indian Penal Code, 1860, s. 84.

\(^{102}\) Ratanlal Dhirajlal, \textit{Law of Crimes} 280 (25\textsuperscript{th} edn., vol. 1, 2005).

\(^{103}\) Dr. Prateek Rastogi, “Section 84, IPC: An Analysis”, \textit{JIAFM}, 2006: 28 (4) ISSN: 0971-0973.

\(^{104}\) Dr. Sir Hari Singh Gaur, \textit{Penal Law of India} 620 (11\textsuperscript{th} edn., vol.1, 2004).

\(^{105}\) Ratanlal and Dhirajlal, \textit{The Indian Penal Code} 345 (31\textsuperscript{st} edn., 2006).
it, that he did not know he was doing what was wrong."\textsuperscript{106} Expounding the law pithly, Halsbury lays down: Where on a criminal charge, it appears that, at the time of the act or omission giving rise to the offence alleged, the defendant was labouring under a defect of reason owing to a disease of mind so as not to know the nature and quality of the act, or, if he knew this, so as not to know that what he was doing was wrong, he is not regarded as responsible for his act. The question whether, owing to a defect of reason due to disease of the mind, the defendant was not responsible for his act is a question of fact to be determined by the jury. Where the jury finds insanity is made out the verdict takes the special form of not guilty by reason of insanity.\textsuperscript{107}

A person can be held liable for any act he commits, only if he does it with his wish and free will. It is considered that motive is a must for a criminal act. A mere commission of act does not prove a person guilty. Law recognize the concept \textit{actus non facitireum, nisi mens sit rea and amens ne sine mente} i.e. the physical act alone does not make a person guilty, the mental component in the form of guilty mind is equally important.\textsuperscript{108} Section 84 deals with the deficiency of will due to weak intellect.\textsuperscript{109} Section 84 provides that a man who is, by reason of unsoundness of mind, prevented from controlling his own conduct and deprived of the power of passing a rational judgment on the moral character of the act he meant to do cannot be legally responsible for the act. A man who by reason of mental disease is prevented from controlling his own conduct, and a man who is deprived, by disease affecting the mind, of the power of passing a rational judgment on the moral character of the act he meant to do, is entitled to the benefit of this section.\textsuperscript{110}

A distinction is between legal insanity and medical insanity. A court is concerned with legal insanity and not with medical insanity.\textsuperscript{111} According to medical science insanity is another name for mental abnormality due to various causes and existing in various degree. Even an uncontrollable impulse driving a man to kill or wound comes within its scope. The legal conception of insanity differs considerably

\textsuperscript{106}Supra note 104.
\textsuperscript{107}Ratanlal and Dhirajlal, \textit{The Indian Penal Code} 346 (31\textsuperscript{st} edn., 2006).
\textsuperscript{108}Supra note 103.
\textsuperscript{109}Supra note 104 at 624.
\textsuperscript{110}Supra note 102.
\textsuperscript{111}Supra note 104 at 625.
from the medical conception. It is not every form of insanity or madness that is recognised by law as a sufficient excuse.\textsuperscript{112}

Burden of proving this unsoundness of mind lies entirely on the defence. It does not mean that prosecution is free from all responsibilities. Case is to be proved by prosecution beyond reasonable doubt and then only plea of unsoundness of mind is entertained. If case cannot be proved then accused is out rightly acquitted. If defence can prove that accused was of unsound mind at the time of committing the offence, then his responsibility diminishes. Depending upon the condition and nature of the offence, the accused can be sent to prison, psychiatric hospital, any other place of safe custody or he may be acquitted.\textsuperscript{113}

\textbf{4.4.3.2 The Code of Criminal Procedure, 1973}

Code of Criminal Procedure, 1973, Chapter XXV laid down the procedure for the trial of unsound person. The Code provides that:

- When a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the civil surgeon of the district or such other medical officer as the State Government may direct, and thereupon shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing.\textsuperscript{114}

- If the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied that such person is of unsound mind and consequently incapable of making his defence, he or it shall record a finding to that effect and shall postpone further proceedings in the case.\textsuperscript{115}

- Whenever a person if found to be of unsound of mind the Magistrate or Court, as the case may be, order release of such person on bail provided that security is given that he will not harm himself or any other person\textsuperscript{116} If the case is one in which, in the opinion of the Magistrate or Court, as the case

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{112}\textit{Ibid.}
\item \textsuperscript{113}\textit{Supra} note 103.
\item \textsuperscript{114}\textit{The Code of Criminal Procedure, 1973}, s. 328(1).
\item \textsuperscript{115}\textit{Id.} s. 329(1).
\item \textsuperscript{116}\textit{Id.} s. 330(1).
\end{itemize}
\end{footnotesize}
may be, bail cannot be granted or if an appropriate undertaking is not given, he or it shall order the accused to be kept in such a place where regular psychiatric treatment can be provided.\textsuperscript{117}

- Whenever an inquiry or a trial is postponed under section 328 or section 329, the Magistrate or Court, as the case may be, may at any time after the person concerned has ceased to be of unsound mind, resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.\textsuperscript{118}

- When the accused appears or is again brought before the Magistrate or Court, as the case may be, the Magistrate or Court shall proceed the inquiry or trial, if considers him capable of making his defence.\textsuperscript{119}

- When the accused is of sound mind at the time of inquiry or trial, and he was, at the time when the act was committed, is of unsound of mind, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act, which, if he had been of sound mind, would have been an offence, the Magistrate shall proceed with the case, and, if the accused ought to be tried by the Court of Session, commit him for trial before the Court of Session.\textsuperscript{120}

- Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, state shall specifically whether he committed the act or not.\textsuperscript{121}

- Whenever the finding states that the accused person committed the act alleged, the magistrate or Court, if such act would, but for the incapacity found, have constituted an offence, order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit or order such person to be delivered to any relative or friend of such person.\textsuperscript{122}

\textsuperscript{117}Id. s. 330(2).
\textsuperscript{118}Id. s. 331(1).
\textsuperscript{119}Id. s. 332(1).
\textsuperscript{120}Id. s. 333.
\textsuperscript{121}Id. s. 334.
\textsuperscript{122}Id. s. 335(1).
• If such person is detained under the provisions section 330, and the Inspector-General of Prisons, or, the visitors of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.\textsuperscript{123}
• If such person is detained under the provisions of Sub-Section (2) of section 330, or section 335 and such Inspector-General or visitors shall certify that, in his or their judgment, he may be released without danger of his doing injury to himself or to any other person, the State Government may thereupon order him to be released or to be detained in custody, or to be transferred to a lunatic asylum.\textsuperscript{124}
• Whenever any relative or friend of any person detained under the provisions of section 330 or section 335 desires that he shall be delivered to his care and custody, the State Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such State Government, order such person to be delivered to such relative or friend.\textsuperscript{125}

4.4.4 Civil Law and the Persons with Mental Disorder

4.4.4.1 The Indian Contract Act, 1872

Sections 6, 11 and 12 of the Indian Contract Act, 1872, deal with the responsibility of the insane with regards to contracts.

• Section 6(4) of the Act states that a proposal is revoked by death or insanity of the proposer, if the fact comes to the knowledge of the acceptor before acceptance.\textsuperscript{126}
• Section 11 of the Act states that every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject.\textsuperscript{127}

\textsuperscript{123}\textit{Id}. s. 337.
\textsuperscript{124}\textit{Id}. s. 338(1).
\textsuperscript{125}\textit{Id}. s. 339(1).
\textsuperscript{126}The Indian Contract Act, 1872, s. 6(4).
\textsuperscript{127}\textit{Id}. s. 11.
Section 12 of the Act states that a person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effects upon his interest. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

The general theory of the law in regard to contracts made by parties affecting their rights and interests is that there must be full and free consent in order to bind the parties. Consent is an act of reason combined with deliberation. It is upon the ground that there is a lack of rational and deliberate consent that transactions of persons of unsound mind are held to be void. If at the time of making a contract either party is of unsound mind and the fact is known to other party and it is shown that advantage is taken contract is invalid, it is voidable at the option of unsound mind person. On the other hand if other party is unaware of this fact and contract is a fair one then it is valid. Insanity which develops subsequent to the contract does not make it invalid unless steps are taken for its dissolution or the performance of service becomes impossible. Mental incapacity, arising out of any reason, deprives a person not only of a full understanding of a transaction, but also of the awareness that he does not understand it. This distinguishes it from lack of ability arising out of illiteracy and unfamiliarity with the language. To constitute a valid and binding contract, a party contracting must have the capacity to arrive at a reasoned judgment, as to the consequences of the transaction he is entering into. This does not mean that he must necessarily be suffering from lunacy to disable him from entering into a contract. To all appearances, a man may behave in a normal fashion, but he may really be incapable of understanding a bargain or transaction, and of forming a rational judgment as to its effect upon his interests.

Test of Unsoundness of Mind: The test of unsoundness of mind is whether a person is incapable of understanding the business concerned and its
implications. The understanding of the party to a contract required to uphold the validity of transaction would depend on the nature of the transaction. Therefore, there cannot be a fixed standard of sanity for all transactions. A person may by appearance be normal, but if he is incapable of forming a judgment as to what is in his own interest, the law would protect him. For a valid contract, the test of unsoundness of mind must be satisfied at the time the contract is made.\textsuperscript{136} Mere weakness of mind is not sufficient proof of unsoundness of mind. Although it is not necessary to prove utter mental darkness or congenial idiocy, the party alleging must establish that the person was incapable of understanding business and forming rational judgment as to its effect. Loss of memory does not usually reach such a stage during the lifetime of the individual so as to unfit him for the management of his own affairs.\textsuperscript{137} Such incapacity may result from insanity, from idiocy, from senile dementia, or any other mental defect, whatever its cause. To render a person incapable of contracting, his infirmity need not be so great as to dethrone his reason, nor amount to entire want of reason. But, it must be something more than mere weakness of intellect, whether he is an idiot or imbecile, or suffering from some form of lunacy, the state of his mind must be such as to render him incapable of comprehending the subject of the contract, and its nature and its probable consequences.\textsuperscript{138}

- **Contract in Lucid Interval:** The second paragraph of section 12 provides that person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. Thus, even a patient in a lunatic asylum may contract during lucid intervals [Illustration (a)].\textsuperscript{139}

- **Insanity:** A disposition by lunatic is completely void under the English law. But mere existence of dilution in the mind of a person is not enough to avoid a contract even though the dilution is connected with the subject matter of disposition or contract. The real question of determination is whether the dilution affected the disposition or contract. If a genuine consent were necessary to the formation of every agreement it would naturally follow that a mental patient could not make a valid contract. The first question in all such

\textsuperscript{136}Supra note 134.
\textsuperscript{137}Sanjiva Row, Commentary on the Indian Contract Act, 1872 and Tenders 236 (10\textsuperscript{th} edn., 2005).
\textsuperscript{138}Supra note 130.
\textsuperscript{139}H.S. Patahak (ed.), Mulla on Indian Contract Act 44 (11\textsuperscript{th} edn., 2004).
cases is whether the party at the time of contracting was suffering from such a
degree of mental disability that he was incapable of understanding the nature
of the contract. But, if it is proved that the party making the contract was
suffering from such a degree of mental disability that he was incapable of
understanding the nature of the contract, then under the English law the
contract is not void, but voidable at the mental patient’s provided that his
mental disability was known or ought to have been known by the other
contracting party.\textsuperscript{140}

\begin{itemize}
    \item \textbf{Drunkenness:} Under the English law, the test of incapacity by reason of
    drunkenness was the same as that for persons with mental disorder.\textsuperscript{141} When a
    person owing to drunkenness and debauchery was quite incapable of
    understanding the contract made by him and of forming a rational judgment as
to its effect upon his interest is held to be of unsound mind and such a contract
    under the Indian law in view of Section 11\textsuperscript{142} must be held to be void contract.
    Mere drunkenness would be no ground for resisting a suit to enforce a
    contract, but where the judgment of one was, to the knowledge of the other
    party, seriously affected by drink, equity will generally refuse specific
    performance at the suit of the other.\textsuperscript{143} But the onus is upon the person who
    alleges that due to extreme drunkenness, he was incapable of understanding
    the contract made by him.\textsuperscript{144} A similar approach would be taken of agreements
    made under the influence of other intoxicating substances.\textsuperscript{145}

    \item \textbf{Mental Idiocy:} An idiot or a natural fool is a person that has no understanding
    from his infancy. Contracts entered into by an idiot other than those for
    necessaries are void.\textsuperscript{146}

    \item \textbf{Old Age:} With increasing old age there must be a loss of vigour and even
    mental energy. So when any particular transaction is made, there is that
    infirmity of mind which disabled the man of old age from understanding what
    he is doing. Only then can a contract made by that individual deemed to be
    void at the option of the man. Extreme old age has often been contended to
\end{itemize}

\textsuperscript{140}\textit{Supra} note 130.
\textsuperscript{141}\textit{Supra} note 134 at 376.
\textsuperscript{142}The Indian Contact Act, 1872.
\textsuperscript{143}\textit{Supra} note 134 at 376 -377.
\textsuperscript{144}\textit{Supra} note 130.
\textsuperscript{145}\textit{Supra} note 134 at 377.
\textsuperscript{146}\textit{Supra} note 130.
negate sound mind. Courts have found loss of vigour and mental energy with age a natural process. It does not without more factors negate capacity. It has been held that a loss of memory and absent mindedness is not inconsistent with the acts of a sane man. Therefore, even an old man with declining strength of mind and body would be declared capable if he could exercise an independent and intelligent mind over what he is doing. Temporary forgetfulness would not indicate lack of mental capacity if the donor himself writes the gift deed and then gets it registered. Lack of capacity is inferred only if, due to age, the mind has become vacuous and delusory.\footnote{147}

\begin{itemize}
\item Burden of Proof: The presence or absence of the capacity at the time of making the contract is in all cases a question of fact.\footnote{148} There is a presumption in favour of insanity. The onus of proving insanity is on the person who alleges it.\footnote{149} Where a person is usually of sound mind the burden of proving that he was of unsound mind at the time of execution of a document lies on him who challenges the validity of the contract.\footnote{150} Where a person is usually of unsound mind, the burden of proving that at the time he was of sound mind lies on the person who affirms it.\footnote{151} It has already been indicated that when the person has been adjudged under the Lunacy Act to be of unsound mind or if when sufficient evidence is led that a person had been of unsound mind, then the onus shifts on to the person who alleges soundness of mind. The onus is really heavy and is not discharged by mere proof that at the time when the deed was executed the executants did not show any sign of insanity or incompatibility.\footnote{152}
\end{itemize}

\subsection*{4.4.4.2 Family Law and Persons with Mental Illness}

Marriage integrally links an individual with society through ties of blood and affinity. Unsoundness of mind can result in the nullification or dissolution of a marriage under various personal laws in India.\footnote{153} Under Hindu Marriage Act, 1955,\footnote{154}
conditions in respect of mental disorders, which must be fulfilled before the marriage is solemnized, are namely:

At the time of marriage neither party:-

(a) is incapable of giving a valid consent to it as a consequence of unsoundness of mind; or

(b) though capable of giving consent, has not been suffering from mental disorders of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to re-current attacks of insanity.

In view of Sections 5 and 12 of the Hindu Marriage Act, 1955, the marriage of a person, if he or she although capable of giving a valid consent to his or her marriage suffers from mental disorder of such a kind or such an extent as to be unfit for marriage and the procreation of children, is voidable. But to bring a case under Section 12 (1) (b) read with Section 5(ii), Hindu Marriage Act that is to say to have the marriage annulled under the provisions of the Hindu Marriage Act the petitioner is to prove that the respondent was suffering from the malady at the time of marriage.¹⁵⁵

According to the section 13 of the Act, divorce can be obtained on the ground that the person has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.¹⁵⁶

Explanation to Section 13 states that the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia.¹⁵⁷ The expression “psychopathic disorder” means a persistent disorder or disability of the mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment.¹⁵⁸

¹⁵⁶ The Hindu Marriage Act, 1955, s. 13(iii).
¹⁵⁷ Id. s. 3(iii)(a).
¹⁵⁸ Id. s. 3(iii)(b).
Divorce may be granted only when the disease is incurable. The expression “incurably” of unsound mind” was interpreted to mean a person who is not capable of managing himself or herself or him or her affairs as any ordinary reasonable person could do. It cannot be so widely interpreted as to as to cover feeble minded persons or persons of dull intellect who understand the nature and consequences of the act and are therefore able to control them and their affairs in the normal way. A spouse is incurably of unsound mind if he or she is of such mental incapacity as to make normal married life impossible and there is no prospect of any improvement in mental health, which would make this possible in future. The burden of proving the incurability of mental unsoundness, mental disorder or psychopathic disorder of the respondent, lies on the petitioner.

Under the Special Marriage Act, 1954, the grounds for marriage, divorce and judicial separation are practically the same as those in the Hindu Marriage Act, 1955. Section 4 of the Act lays down the conditions relating to solemnization of special marriages. It states that a marriage between any two persons may be solemnized under this Act, if at the time of the marriage neither party –

i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

ii) through capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

iii) has been subject to recurrent attacks of insanity or epilepsy.

According to the Section 27 of the Act, divorce can be obtained on the ground that the person has been incurably of unsound mind, has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of

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161 *Supra* note 159 at 225.
162 *Supra* note 33.
163 The Special Marriage Act, 1954, s. 4(b)(i).
164 *Id.* s. 4(b)(i).
165 *Id.* s. 4(b)(ii).
such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.\textsuperscript{166}

Explanation to Section 27 states that the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia.\textsuperscript{167} The expression “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the respondent, and whether or not it requires or is susceptible to medical treatment.\textsuperscript{168}

Under Muslim law, persons of unsound mind and minors can be validly contracted into marriage by their legal guardian. Such marriage is considered valid in the eyes of law.\textsuperscript{169} According to the Dissolution of Muslim Marriages Act, 1939, a woman married under Muslim Law is entitled to divorce on the ground if her husband has been insane for a period of two years.\textsuperscript{170}

Under the Christian Law, marriage is voidable, if either party was a lunatic or idiot. The Christians can obtain divorce under the Indian Divorce Act, 1869.\textsuperscript{171} Under the Act divorce can be obtained on the ground of unsoundness of mind if the respondent has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition.\textsuperscript{172}

Divorce is admissible on ground of unsoundness of mind under the Parsi Marriage and Divorce Act, 1936. Divorce can be obtained under the Parsi Marriage and Divorce Act, 1936:

- if the defendant at the time of marriage was of unsound mind and has been habitually so up to the date of the suit. Provided the plaintiff was ignorant of

\textsuperscript{166} Id. s. 27(1)(e).
\textsuperscript{167} Id. s. 27(1)(e)(i).
\textsuperscript{168} Id. s. 27(1)(e)(ii).
\textsuperscript{170} The Dissolution of Muslim Marriages Act, 1939, s. 2(vi).
\textsuperscript{171} Supra note 33.
\textsuperscript{172} The Divorce Act, 1869, s. 10(1)(iii).
the fact at the time of the marriage, and has filed the suit within three years from the date of the marriage; or\textsuperscript{173}

- the defendant has been incurable of the unsound mind for a period of two years or upwards immediately preceding the filing of the suit or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the plaintiff cannot reasonably be expected to live with the defendant.\textsuperscript{174}

\textbf{4.4.4.3 Testamentary Capacity and Mental illness}

Testamentary capacity is the legal status of being capable of executing a Will, a legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death.\textsuperscript{175} The Indian succession act states that every person of sound mind not being a minor may dispose of his property by Will.\textsuperscript{176} A married woman may dispose by Will of any property which she could alienate by her own act during her life.\textsuperscript{177} Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.\textsuperscript{178} A person who is ordinarily insane may make a Will during interval in which he is of sound mind.\textsuperscript{179} No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.\textsuperscript{180}

Testamentary capacity requires a person’s full sense and mental sanity to have confirmed and signed the Will after understanding what his assets comprised and what he is doing by making a Will. He understands in full mental capacity to whom he is naming the assets to and how are they related to him and what repercussions it may have later.\textsuperscript{181}

\textsuperscript{173}The Parsi Marriage and Divorce Act, 1936, s. 32(b).
\textsuperscript{174}Id. s. 32(bb).
\textsuperscript{175}Supra note 33.
\textsuperscript{176}The Indian Succession Act, 1925, s. 59.
\textsuperscript{177}Id. s. 59, Exp.1.
\textsuperscript{178}Id. s. 59, Exp.2.
\textsuperscript{179}Id. s. 59, Exp.3.
\textsuperscript{180}Id. s. 59, Exp.4.
\textsuperscript{181}Supra note 33.
4.4.4.4 The Code of Civil Procedure, 1973

The Code of Civil Procedure, 1973, Order XXXII laid down the procedure for the suits by or against the persons of unsound mind. The Code states that:

- Every suit by a person of unsound mind shall be instituted in his name by a person who in such shall be called the next friend of the person of unsound mind.\(^\text{182}\)

- Where a suit is instituted by or on behalf of a person of unsound mind without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.\(^\text{183}\)

- Where the defendant is a person of unsound mind the Court, on being satisfied of the fact of his unsoundness, shall appoint a proper person to be guardian for the suit for such person of unsound mind.\(^\text{184}\)

- No decree passed against a person of unsound mind shall be set aside merely on the ground that the next friend or guardian for the suit of the a person of unsound mind had an interest in the subject-matter of the suit adverse to that of the a person of unsound mind, but the fact that by reasons of such adverse interest of the next friend of guardian for the suit, prejudice has been caused to the interests of the a person of unsound mind, shall be a ground for setting aside the decree.\(^\text{185}\)

- Any person who is of sound mind and has attained majority may act as next friend of a person of unsound mind or as his guardian for the suit.\(^\text{186}\)

- Where a person of unsound mind has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the person of unsound mind minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor’s welfare that another person be permitted to act or be appointed, as the case may be.\(^\text{187}\)

\(^\text{182}\) The Code of Civil Procedure, 1908, o. 32, r. 1.
\(^\text{183}\) Id. o. 32, r. 2(1).
\(^\text{184}\) Id. o. 32, r. 3(1).
\(^\text{185}\) Id. o. 32, r. 3A(1).
\(^\text{186}\) Id. o. 32, r. 4(1).
\(^\text{187}\) Id. o. 32, r. 4(2).
• Every application to the Court on behalf of a person of unsound mind minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.\textsuperscript{188}

• A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a person of unsound mind either by way of compromise before decree or order, or under a decree or order in favour of the person of unsound mind.\textsuperscript{189}

• Next friend or guardian for the suit shall not without the leave of the Court enter into any agreement or compromise on behalf of a person of unsound mind with reference to the suit in which he acts as next friend or guardian.\textsuperscript{190}

• A next friend shall not retire without first procuring a fit person to be put in his place.\textsuperscript{191}

• Where the interest of the next friend of a person of unsound mind is adverse to that of the person of unsound mind, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly.\textsuperscript{192}

• On the retirement, removal or death of the next friend of a person of unsound mind, further proceedings shall be stayed until the appointment of a next friend in his place.\textsuperscript{193}

• Where the guardian for the suit desire to retire or does not do his duty, or where there sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him\textsuperscript{194} and where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.\textsuperscript{195}

• A person of unsound mind who is a plaintiff or a person of unsound mind who is not a party to a suit on whose behalf an application is pending, when the

\textsuperscript{188}Id. o. 32, r. 5(1).
\textsuperscript{189}Id. o. 32, r. 6(1).
\textsuperscript{190}Id. o. 32, r. 7(1).
\textsuperscript{191}Id. o. 32, r. 8(1).
\textsuperscript{192}Id. o. 32, r. 9(1).
\textsuperscript{193}Id. o. 32, r. 10(1).
\textsuperscript{194}Id. o. 32, r. 11(1).
\textsuperscript{195}Id. o. 32, r. 11(2).
person concerned has ceased to be of unsound mind, shall elect whether he will proceed with the suit or application.\textsuperscript{196}

- Where a co-plaintiff of unsound mind when he has ceased to be of unsound mind, desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff and the Court, if it finds that he is not a necessary party shall dismiss him from the suit.\textsuperscript{197}

- A person of unsound mind when he has ceased to be of unsound mind, if a sole plaintiff, apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper\textsuperscript{198} and the Court, upon being satisfied of such unreasonableness or impropriety, grant the application.\textsuperscript{199}

\textbf{4.4.5 The Indian Evidence Act and the Persons with Mental Illness}

Indian Evidence Act also laid down provisions for the protection of persons with mental illness. The Act provides that:

- When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.\textsuperscript{200} For example: The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the Act, or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.\textsuperscript{201}

- When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the

\textsuperscript{196}Id. o. 32, r. 12(1).
\textsuperscript{197}Id. o. 32, r. 13(1).
\textsuperscript{198}Id. o. 32, r. 14(1).
\textsuperscript{199}Id. o. 32, r. 14(2).
\textsuperscript{200}The Indian Evidence Act, 1872, s. 45.
\textsuperscript{201}Id. s. 45, III (b).
Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. For example: A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A.

- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Any person is competent to testify as a witness provided he understands the obligation of oath. He should be able to understand the nature of questions put to him. An insane person is not incompetent to give evidence unless he is not able to understand to give evidence and he is not able to understand the questions or is unable to give rational answers to them. The competency for this purpose is decided by presiding officer of the court. Lucid interval is an exception to this concept.

4.4.6 Other Legislations and Persons with Mental Illness

4.4.6.1 The National Trust Act, 1999

The National Trust for Welfare of Persons with (Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities) Act, 1999, is for single parent family or for aging parents or where the parents have died and the siblings are unable to look after the disabled individual. The National Trust plans to take over guardianship rights as well as to receive properties bequeathed by the family. This Act provides for the constitution of a body at the national level for the welfare of the disabled. It received the assent of the President of India on the 30th December 1999. This Act is also under revision to make it United Nations Convention for Rights of Persons with Disabilities, 2006 compliant and make it more comprehensive. Management of

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202 Id. s. 105.
203 Id. s. 105, III(a).
204 Id. s. 118.
205 Id. s. 118 (Exp.).
206 Dr. Prateek Rastogi, Supra note 131.
207 Ibid.
208 B.S Chavan, Nitin Gupta, et. al. (eds.), Community Mental Health in India 35 (2012).
properties of Persons with Mental Illness is supposed to be covered under the amended Act.\textsuperscript{209}

\textbf{4.4.6.2 The Legal Services Authorities Act, 1987}

In 1987, the Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9th of November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994. Section 12 of the Legal Services Authorities Act, 1987 prescribes the criteria for giving legal services to the eligible persons, and includes mentally ill persons, those coming under section 2 of the Juvenile Justice Act 1986 or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act 1987.\textsuperscript{210}

In brief, important legal provisions in respect of the persons with mental illness in the Indian legal system have been discussed. As most of the laws were either framed during the colonial period or their origin can be traced to the period, British influence is clearly visible.\textsuperscript{211} The existence of mental health legislation does not necessarily guarantee the protection of the human rights of people with mental disorders. In some countries, indeed, mental health legislation contains provisions that lead to the violation of human rights.\textsuperscript{212} Laws in respect of the persons with mental illness are presently on crossroad as most of them are under revision to bring them harmony with the UNCRPD-2006.\textsuperscript{213} Therefore, the Mental Health Act, 1987 and Persons with Disability Act, 1995 were under the process of revision.\textsuperscript{214} The parliament has recently passed the Mental Healthcare Bill, which repeals and replaces the Mental Health Act, 1987.\textsuperscript{215} Mental Health Act was drafted by parliament in 1987 but it came into effect in all the states and union territories of India in April 1993. The act replaced the Indian Lunacy Act of 1912, which had earlier replaced the Indian Lunatic Asylum Act of 1858.\textsuperscript{216} The Act mandates the Central and State governments to provide and ensure better treatment and access to health services in every district.

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\item \textsuperscript{209} Supra note 33.
\item \textsuperscript{209} Supra note 33.
\item \textsuperscript{211} Supra note 33.
\item \textsuperscript{212} Supra note 10.
\item \textsuperscript{213} Supra note 33.
\item \textsuperscript{214} Ibid.
\item \textsuperscript{215} Supra note 91.
\item \textsuperscript{216} Supra note 29.
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Earlier, mental health establishments included only the psychiatric nursing homes and hospitals. But now, under the Act, Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy establishments controlled by government are also included. It also states that any mental health establishment has to be registered with a Central or State mental health authority. It puts an obligation on the Centre and State level medical institutions to maintain a list of mentally ill patients undergoing treatment. The State authority shall also prepare a register of the professionally qualified personnel to provide healthcare services.\textsuperscript{217} The new Mental Healthcare Act, 2017 marks a major shift in the perspective towards persons with mental illness.\textsuperscript{218} It is an entirely rights based legislation and hence ushers a new era of hope for the persons with mental illness. In view of this critical departure from the past, it is believed that the families will benefit from knowing more on this Law.\textsuperscript{219}

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\item \textsuperscript{217} Supra note 91.
\item \textsuperscript{218} FACEMI, “Law and Mental Illness”, available at: https://facemindia.org.in/law-and-mental-illness/ (Visited on May 9, 2016).
\item \textsuperscript{219} Ibid.
\end{enumerate}
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