ANALYSIS OF THE DISCORD BETWEEN CRIMINAL JUSTICE AND MENTAL HEALTHCARE WITH REFERENCE TO DRUG USE

Apurva T. Bhilare[*]

Dr. Saleem M. Shaikh[**]

ABSTRACT

In societal narratives, drug use has long been perceived as a menace, framed as a moral and social threat leading to its categorization as a criminal wrong. The Narcotic Drugs and Psychotropic Substances Act, 1985, encapsulates this perception by primarily criminalizing drug use and related activities. However, evolving perspectives recognize the complexities inherent in drug use, urging a shift beyond mere moral judgments.

A significant development in this discourse is the acknowledgment of drug use as a mental illness under the Mental Healthcare Act, 2017. This acknowledgment plants the first seed of discord, highlighting a fundamental incongruence between criminal justice perspectives and the mental health paradigm. These two cornerstone legislations in India, approach and address drug use through fundamentally different lenses.

This paper delves into the heart of these conflicting perspectives which raise concerns about the effectiveness of interventions in supporting individuals with drug use disorders. The paper discusses various statutory discords, aims to humanize the discourse around drug use, and emphasizes the importance of balance in legislative frameworks.

Keywords: Drug Use, Substance Use Disorder, Criminalization, Mental Illness, The Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS Act), The Mental Healthcare Act 2017 (MHA)

[*] Ph.D. Research Scholar, M.C.E. Society's A.K.K. New Law Academy, Pune, Savitribai Phule Pune University; Assistant Professor, Department of Law, Vishwakarma University, Pune

[**] Associate Professor of Law, M.C.E. Society's A.K.K. New Law Academy, Pune

INTRODUCTION

The Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and the Mental Healthcare Act, 2017 (MHA) are pivotal legislative frameworks addressing substance use and mental health, respectively. The NDPS Act, is primarily punitive in nature, and criminalizes drug use. Conversely, the MHA adopts a rights-based approach, recognizing mental illness, including aspects related to drug use, as a healthcare concern deserving dignity and care.

Researcher in this critical and comparative analysis of these two enactments in context of drug use, has focussed on the contrasting definitions of mental illness, addiction, and consumption, the autonomy of persons with mental illness (including substance use disorder), the capacity of individuals to make treatment decisions, ethical issues surrounding compulsory treatment, and the acknowledgment of the other rights of individuals with mental illnesses or substance use disorders (SUDs). The research highlights the discord in approaches, and elucidates pathways for cohesive health-based and rights-based perspective within the existing legal framework.

BACKGROUND OF THE LEGISLATIVE FRAMEWORK

The roots of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) stretch back to the 1800s when the British exported opium from India.[1] The ensuing concerns over drug use led to Indian legislations like the Opium Act, 1878 and the Dangerous Drugs Act in 1930. In the 1960s, the global "War on Drugs"[2] catalysed by initiatives from figures such as President Richard Nixon and President Ronald Reagan. However, this campaign bore political and racial undertones, particularly against Oriental and Black communities. Internationally, this era saw the consolidation of drug control treaties, culminating in the 1961 Single Convention on Narcotic Drugs, 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

In India, Article 47 of the Constitution directs the state to take efforts for promoting public health and specifically endorses prohibition of drug use. However, the foundation of this

[1] Volume I, Neha Singhal, Arpita Mitra, Kaushiki Sanyal, From Addict to Convict – The working of the NDPS Act in Punjab 24 (Vidhi Centre for Legal Policy 2018)
[2] War on Drugs, https://www.history.com/topics/crime/the-war-on-drugs#section_4 (Last visited on Nov. 30, 2023)

prohibitive view does not lie in scientific data but on positive morality.[3] The NDPS Act thus emerged as a response to international treaties, global pressure, and constitutional mandates, shaping India's approach to the regulation and criminalization of narcotics and psychotropic substances.

Mental Healthcare legislations have witnessed development and transformation from 1912 to 1987 and then in 2017.[4] Highlights of this Act are defining mental illness, capacity to make decisions and give advanced directives for treatment, right to mental healthcare and so on.[5]

DEFINITIONS IN NDPS ACT AND MHA

In delving into the definitions surrounding mental health and substance use, a distinct shift is evident between the Mental Health Act of 1987 and its 2017 reformation. Initially, the MHA did not define mental illness but characterized a mentally ill person as someone in need of treatment due to a mental disorder excluding mental retardation.[6] The revised MHA in 2017 introduced a comprehensive definition of mental illness, encompassing conditions linked to alcohol and drug use. The 2017 Act defines mental illness as "substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person."[7] Thus, it can be understood that mental illness means a disorder relating to mood, behaviour etc. but also specifically includes disorder relating to use of alcohol and drugs. Further, the MHA outlines a procedure for determining mental illness based on nationally or internationally accepted medical standards, including the International Classification of Disease (ICD-11).[8]

The International Classification of Diseases, 11th Revision (ICD-11), is a globally recognized and comprehensive classification system for various health conditions, including mental and

[3] Part IV Article 47, Constituent Assembly Debates, https://www.constitutionofindia.net/constitution-assembly-debates/ (Last visited on Nov. 28, 2023)
[4] Toolika Payak, *Our journey to Mental Healthcare Act, 2017,* Readers' Blog by The Times of India (Nov 29, 2023, 10 pm), https://timesofindia.indiatimes.com/readersblog/eccentricdimensionist/our-journey-to-mental-healthcare-act-2017-24432/
[5] Richard M. Duffy, Brendan D. Kelly, *India's Mental Healthcare Act, 2017: Content, context, controversy,* 62 International Journal of Law and Psychiatry, Pages 169-178 (2019) https://doi.org/10.1016/j.ijlp.2018.08.002
[6] The Mental Healthcare Act, 2017, Section 2(l), No. 10, Acts of Parliament, 2017 (India)
[7] The Mental Healthcare Act, 2017, Section 2 (s), No. 10, Acts of Parliament, 2017 (India)
[8] The Mental Healthcare Act, 2017, Section 3, No. 10, Acts of Parliament, 2017 (India)

behavioural disorders. Published by the World Health Organization (WHO)[9], the ICD-11 provides intricate classifications of various disorders, providing researchers, practitioners, and policymakers with a shared lexicon. It is an effort to harmonize the understanding, prevention and treatment of disorders at global scale.

The ICD-11 in its Chapter Six, gives the diagnostic criteria for the 'Disorders due to Substance Use' and by virtue of Section 3 of MHA, these come under the purview of 'mental illness'. This chapter deals with disorders caused due to fourteen types of substance enumerates thirteen categories or stages of substance use disorder. ICD-11 mentions the substance use and substance induced disorders as 'Episode of Harmful Psychoactive Substance Use, Harmful Pattern of Psychoactive Substance Use, Substance Dependence, Substance Intoxication, Substance Withdrawal, Substance-Induced Delirium, Substance-Induced Psychotic Disorder, Substance-Induced Mood Disorder, Substance-Induced Anxiety Disorder, Substance-Induced Obsessive-Compulsive or Related Disorder, Substance-Induced Impulse Control Disorder, Other Specified Disorder Due to Substance Use, Disorder Due to Substance Use, Unspecified'.[10]

It is important to note that the MHA's definition of 'mental illness' given in Section 2(s) involves 'mental conditions associated with the abuse of alcohol and drugs.' An inconsistency surfaces with the use of the term 'abuse' as it is not reflected in ICD-11. The word 'abuse' generally implies continued use of substance despite of the knowledge of its social, psychological and physical harmful effects. But due to the ambiguity in the meaning and its non-medical usage, the use of the word 'abuse' is discouraged by WHO.[11] In the light of this discussion, it is clear that firstly, the MHA covers wide range of maladaptive pattern of substance use (from single episode of harmful use to severe substance induced disorder) under the ambit of mental illness. Secondly, as far as the definition section of section 2(s) of MHA is concerned, the word 'abuse' should be discouraged and word 'use' to be incorporated to align with the ICD-11 criteria.

[9] WHO's new International Classification of Diseases (ICD-11) comes into effect, https://www.who.int/news/item/11-02-2022-who-s-new-international-classification-of-diseases-(icd-11)-comes-into-effect (last visited on Nov. 25, 2023)
[10] Disorders due to substance use or addictive behaviours, ICD-11 for Mortality and Morbidity Statistics, *http://id.who.int/icd/entity/590211325* (last visited on Nov. 25, 2023)
[11] Lexicon of alcohol and drug term, https://iris.who.int/bitstream/handle/10665/39461/9241544686_eng.pdf?sequence=1 (Last visited on Nov. 26, 2023)

The Narcotic Drugs and Psychotropic Substances Act (NDPS Act) of 1985 on the other hand takes an opposing view to drug use than the MHA. NDPA Act approaches substance use with a punitive stance and blanket criminalization. The NDPS Act aims to make stringent provisions and punishes whoever consumes any narcotic drug or psychotropic substances.[12] Further, the act wishes to divert persons using drugs to treatment mechanism by making provision for probation[13] and immunity[14]. However, the catch here is that, the persons who are eligible to avail these benefits are the 'addicts' and the Act gives a specific definition of the word 'addict. It is defined as 'a person who has dependence on any narcotic drug or psychotropic substances.'[15] WHO has also discouraged the usage[16] of the words like 'addiction' and 'addict' as these cannot be used as diagnostic terms from a health perspective and rather are terms with social connotations. The tend to be stigmatizing labels which have the potential to influence medical care and medical practitioner perceptions.[17] Instead these terms are now replaced with neutral terminologies like 'substance use disorder' and 'person who use substance'

Careful consideration of the above discrimination makes it clear that the two legislations have distinct views towards the substance use. MHA considers substance use as mental illness. Whereas, the NDPS Act, punishes the substance use and loosely defines and loosely stipulate the persons eligible for treatment without taking into consideration, the nuances of drug use as mentioned in ICD-11. This sharp contrast unfolds as the NDPS Act adopts a punishment-based stance, criminalizing consumption without acknowledging the diverse stages of drug use, while the MHA embraces a rights-based approach, recognizing harmful use as a mental illness. The struggle between these approaches underscores the vital need for a refined understanding of mental health and substance use issues within the legal framework.

[12] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 27, No. 61, Acts of Parliament, 1985 (India)
[13] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 39, No. 61, Acts of Parliament, 1985 (India)
[14] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 64A, No. 61, Acts of Parliament, 1985 (India)
[15] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 2(i), No. 61, Acts of Parliament, 1985 (India)
[16] Supra note 13
[17] Ashford RD, Brown AM, McDaniel J, Curtis B. Biased labels: An experimental study of language and stigma among individuals in recovery and health professionals. Subst Use Misuse. 2019;54(8):1376-1384. doi: 10.1080/10826084.2019.1581221.

DECISION-MAKING CAPACITY OF PERSONS SUFFERING THROUGH SUBSTANCE USE DISORDER

In the context of bioethics, autonomy means that a patient has the ultimate decision-making responsibility for their own treatment, and treatment cannot be imposed on a patient.[18] It upholds an individual's right to self-determination, allowing them to actively participate in choices affecting their well-being. This empowerment fosters a sense of control, dignity, and personal agency. In mental health, particularly, autonomy ensures that treatments align with personal preferences, enhancing their efficacy.[19] Individual autonomy except in exceptional situations when the person is unable to make autonomous decisions, is considered paramount to promote a patient-centred approach for holistic and effective care.

In navigating the intricate terrain of mental healthcare decisions, the MHA promotes individual autonomy. Section 4 of the MHA places paramount importance on respecting the capacity of individuals grappling with mental illness to make decisions about their treatment. The provisions of the MHA entail that 'Every person, including a person with mental illness shall be deemed to have capacity to make decisions regarding his mental healthcare or treatment.'[20] This ability depends on a person's skill to grasp information, predict outcomes, and communicate decisions. The MHA reinforces this independence by explicitly stating that others' disapproval doesn't diminish an individual's capacity to decide on their mental health.[21] MHA goes ahead and empowers the person suffering through mental illness/ substance use disorder to give advanced directives wherein the person can make decisions regarding how they want to be treated, how they do not want to be treated or appoint a person on their behalf who would take these decisions for them.[22] The right to give 'Advanced Directives' is a unique feature of the Mental Healthcare Act, 2017.

Contrastingly, the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) introduces a conflict in its approach to individuals' capacity for treatment decisions. Sections 39 and 64A of

[18] Medical Ethics: Autonomy, https://www.themedicportal.com/application-guide/medical-school-interview/medical-ethics/medical-ethics-autonomy/ (last visited on Nov. 25, 2023)
[19] Varelius J. The value of autonomy in medical ethics. Med Health Care Philos. 2006;9(3):377-88. doi: 10.1007/s11019-006-9000-z. Epub 2006 Oct 11. PMID: 17033883; PMCID: PMC2780686.
[20] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 49(1), No. 61, Acts of Parliament, 1985 (India)
[21] The Narcotic Drugs and Psychotropic Substances Act, 1985, Section 4(3), No. 61, Acts of Parliament, 1985 (India)
[22] The Mental Healthcare Act, 2017, Section 5, No. 10, Acts of Parliament, 2017 (India)

the NDPS Act, while acknowledging the government's role in the identification and treatment of addicts, fall short in recognizing the rights of individuals using drugs to decide on treatment or create advance directives. Section 39 gives power to the court that, when a person is found guilty for offence of consumption or possession of small quantities, then having regard to the background of the convict, can release the convict on probation to seek treatment. And Section 64A provides immunity to the persons who are accused for consumption and possession of small quantities of drugs that, if they volunteer to undergo treatment, shall be released provided if they do not undergo treatment, shall have to face the punishment.

Conflict with regard to the autonomy in treatment raises ethical concerns. The Mental Healthcare Act (MHA) champions the importance of autonomy in treatment, acknowledging its pivotal role in fostering effective recovery. In contrast, the NDPS Act opts for a compulsory treatment approach undermining the capacity of individuals convicted for possession of small quantities of drugs to make treatment decisions. This method, primarily aimed at 'addicts,' overlooks the diverse treatment needs arising from distinct stages of drug use. Moreover, it introduces a coercive element by linking treatment compliance to the threat of punishment, disregarding the complexities of cases involving withdrawal and other factors that may impact an individual's decision-making capacity. The clash between autonomy-driven recovery under the MHA and the coercive treatment model of the NDPS Act highlights the need for a nuanced and empathetic approach to address the complexities of substance use disorders and mental health in the legal framework. Advocating for respect of autonomy promises a more positive response to treatment, challenging the ethical implications of compulsory treatment and reinforcing the principle of informed and voluntary decision-making in healthcare, as emphasized by the MHA.

COMPULSORY TREATMENT: ETHICAL DILEMMA

Compulsory treatments, a legal recourse for enforcing treatment on individuals with mental illnesses who resist therapeutic intervention, raise complex ethical questions. Some advocate for this strategy perceived usefulness in clinical practice, protection of patients, and duty to protect individuals with mental illness.[23] But those who take an opposing view argue that this

[23] Martinho, S.M., Santa-Rosa, B. & Silvestre, M. Where the public health principles meet the individual: a framework for the ethics of compulsory outpatient treatment in psychiatry. *BMC Med Ethics* **23**, 77 (2022). https://doi.org/10.1186/s12910-022-00814-8

approach implies that persons suffering through mental illness might lack the ability to judge, gain insight, or make decisions, making them incapable of independently deciding about their health.[24] In the delicate dance between ethics and treatment for those grappling with substance use disorders, two key legislations in India, the Mental Healthcare Act (MHA) and the Narcotic Drugs and Psychotropic Substances Act (NDPS Act), find themselves at odds.

The MHA states that "an independent patient shall not be given treatment without his informed consent."[25] Informed Consent according to MHA means "consent given for a specific intervention, without any force, undue influence, fraud, threat, mistake or misrepresentation, and obtained after disclosing to a person adequate information including risks and benefits of, and alternatives to, the specific intervention in a language and manner understood by the person."[26] Thus, the MHA hails the free will and individual autonomy of the persons suffering through mental illness and informed consent becomes the linchpin of providing mental healthcare.

On the other hand, NDPS Act, with provisions in Section 39 and Section 64A that veer towards compulsory treatment, introduce ethical complexities. Provisions underscoring the compulsory treatment may conflict with the objectives of MHA on the points such as the persons possessing small-quantity quantity of drugs may face compulsory treatment irrespective of need, persons with substance use disorder may not be given information of risks, benefits and alternatives about the treatment, absence of informed consent, threat of punishment may be form of coercion, disregard for individual treatment needs, lack of consideration that whether the chosen treatment method is the least restrictive.

The United Nations Office on Drugs and Crime (UNODC), in their discussion paper titled 'From Coercion to Cohesion: Treating Drug Dependence through Health Care, Not Punishment,'[27] critically examines compulsory treatment. Their evaluation highlights potential breaches of UN conventions and urges justifiable use only in emergencies, with a short-term focus and withdrawal post-acute interventions. Long-term, non-consensual residential

[24] *Id.*
[25] The Mental Healthcare Act, 2017, Section 86, No. 10, Acts of Parliament, 2017 (India)
[26] The Mental Healthcare Act, 2017, Section 2(i), No. 10, Acts of Parliament, 2017 (India)
[27] Gilberto Gerra, Nicolas Clark, *From coercion to cohesion: Treating drug dependence through health care, not punishment,* Discussion paper based on a scientific workshop UNODC, Vienna October 28-30, 2009, https://www.unodc.org/docs/treatment/Coercion_Ebook.pdf

treatment is likened to a form of low-security imprisonment, drawing ire for disputed therapeutic effects, high costs, and human rights violations.

In the tug-of-war between the MHA's emphasis on informed consent and the NDPS Act's nod to compulsory treatment, a call echoes for a right-based approach. Need-based and voluntary treatment is a step towards acknowledging the complexities of human experiences and fostering a compassionate response to those in need. This approach urges treatment ethics, patient-centric care and encourages participatory recovery of the persons who use drugs.

UPHOLDING RIGHTS IN THE FACE OF STIGMA: A HUMAN-CENTRIC EXAMINATION

The preamble of the NDPS Act, 1985, defines the objective of the act is to 'to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances'[28] and sets a stern tone. This mission statement unmistakably reveals the punitive stance adopted by the NDPS Act. The criminalization of drug use, and ignorance of stages of drug use fuels stigma and negative attitude towards drug use and brings the person who uses drugs in the scope of punishment rather than treatment. Other provisions relating to presumption of guilt, punishment for attempt, abatement etc. further contribute to prejudice. Further, according to the provisions of the NDPS Act, the authority mentioned to divert the accused or the convict to the treatment is the judge or judicial officer and not a mental healthcare professional. Thus, the person responsible for diverting the accused to treatment might not be appropriately trained to ascertain the diagnosis of substance use disorder and respective treatment need of the person ultimately resulting in lack of proper care and protection of the person using drugs. Entry into treatment should be driven by medical indications rather than coercive measures, and treatment options must be tailor-made to suit the unique needs of each individual.[29] Thus, the provisions within the NDPS Act, as discussed above, can be deemed violative of the rights to health, which inherently encompass the rights to diagnosis and treatment.

[28] The Narcotic Drugs and Psychotropic Substances Act, 1985, Preamble, No. 61, Acts of Parliament, 1985 (India)

[29] United Nations Office on Drugs and Crime, 2019, World Health Organization, 2019, *Treatment and care for people with drug use disorders in contact with the criminal justice system - Alternatives to Conviction or Punishment*,https://www.unodc.org/documents/UNODC_WHO_Alternatives_to_conviction_or_punishment_ENG.pdf (last visited on Nov. 25, 2023)

MHA, endorses the rights of the persons suffering through mental illness or substance use disorder. Right to access evidence-based drug dependence treatment on a voluntary basis [30] is considered as a primary rather fundamental right within the realm of the MHA. MHA further extends its protective umbrella to encompass the right to community living,[31] protection from cruel, inhuman, and degrading treatment,[32] and the right to equality and non-discrimination.[33] Moreover, the MHA places an obligation on the government to actively take measures aimed at reducing the stigma associated with mental illness.

In essence, while the NDPS Act makes provisions for treatment but not as a right and punishment becomes primary objective. Treatment in the shadow of punishment will fail to be effective as the nuances of the drug use are seldom addressed in this approach. Whereas, in the MHA, as the substance use disorder comes under the purview of mental illness, the right to access healthcare, and protection from discrimination, demeaning treatment becomes primary objective which are in contrast with the effects of the provisions of the NDPS Act. NDPS Act leans towards exclusions rather MHA leans towards empathy and inclusion.

CONCLUSION

In conclusion, the discord between the NDPS Act and the Mental Healthcare Act illuminates a critical tension within the legal frameworks addressing substance use and mental health in India. The contrasting definitions of mental illness, the divergent approaches to treatment decisions, the ethical issues surrounding compulsory treatment, and the acknowledgment of the rights of individuals with mental illness or substance use disorders underscore the need for a nuanced and balanced approach. The NDPS Act, rooted in a punitive and criminalizing paradigm, stands in stark contrast to the rights-based approach adopted by the Mental Healthcare Act. The acknowledgment of drug use as a mental illness within the MHA challenges traditional moralistic views and encourages a shift toward understanding substance use within a mental health context. This research advocates few reformative changes that can be adopted to strike balance between these two crucial legislations. Adopting neutral terminology in legislative provisions, decriminalizing substance use, and recognizing substance use disorder as a health issue are crucial steps. Inclusive terminologies which are

[30] The Mental Healthcare Act, 2017, Section 18, No. 10, Acts of Parliament, 2017 (India)
[31] The Mental Healthcare Act, 2017, Section 19, No. 10, Acts of Parliament, 2017 (India)
[32] The Mental Healthcare Act, 2017, Section 20, No. 10, Acts of Parliament, 2017 (India)
[33] The Mental Healthcare Act, 2017, Section 21, No. 10, Acts of Parliament, 2017 (India)

endorsed by WHO like ‘substance use’, ‘persons who use drugs’ and ‘substance use disorder’ can be incorporated in place of ‘consumption’, ‘addict’ and ‘addiction’ respectively. Introducing a diversion program that integrates clinical treatment with the criminal justice system, with authority vested in both the judiciary and mental healthcare professionals, is imperative. Screening processes should identify treatment needs, and individuals should be informed about the details and implications of treatment. Respecting the decision-making capacity of individuals who use drugs, providing autonomy for choosing the least restrictive practice, and avoiding compulsory treatment, except in exceptional situations, are paramount. Guidelines for these exceptional situations should be aligned with international human rights standards, specifically the Convention on the Rights of Persons with Disabilities and its Optional Protocol of 2006. This holistic approach aims to reconcile the conflicting legal frameworks, uphold individual rights, and foster a compassionate response to substance use disorders in India.