

BOOK REVIEW: INDIA'S MENTAL HEALTHCARE ACT, 2017: BUILDING LAWS, PROTECTING RIGHTS, BY RICHARD M. DUFFY AND BRENDAN M. KELLY (SPRINGER, 2020)

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This book by two Irish psychiatrists examines what they assert – with some justification – to be “essentially the largest experiment ever undertaken in the field of rights-based mental health law” (page xix), India’s Mental Healthcare Act 2017 (‘the MHCA’), which received and was formally commenced on 29 May 2018. The legislation expressly seeks to align itself with the Convention on the Rights of Persons with Disabilities (‘CRPD’), and also to create an express, justiciable, right to mental healthcare. Against this background, the book aims to provide a comprehensive context to the new Indian legislation, along with a detailed description of the 2017 Act itself and an analysis of it in the context of the CRPD and WHO standards for mental health law.

Given that the book is relatively short – just shy of 300 pages – it is perhaps unfortunate that it spends a little time getting going, with the first Part (‘Mental Health Law and International Standards’) essentially serving as a primer on these matters without any specific reference to India. Most readers would be likely to be coming to this book for what it has to say about the MHCA, so are therefore likely to move swiftly through the first 50 pages. However, things pick up considerably in Part 2, when the historical context of mental health legislation in India is addressed, including both colonial-era legislation and – as an important framing reference – the 2016 Rights of Persons with Disabilities Act (‘RWPDA’), enacted to give effect to the CRPD.

The MHCA is then outlined in detail in Chapter 6, before, in Part 3, the Act is tested against international human rights standards. In an editorial decision which might raise some eyebrows, much of the testing is done against the ‘Checklist on Mental Health Legislation’ published in the World Health Organisation’s 2005 Resource Book on Mental Health Legislation. Whilst this is a tool that the authors have used to test other legislation, the Resource Book has been withdrawn by the WHO because it was composed prior to the CRPD. The authors defend their decision to use the 2005 Resource Book because it “still has much in common with the CRPD and remains the most comprehensive human rights tool available for the analysis of mental health legislation in relation to human rights standards” (page 109).

The authors conclude that the:

India’s MHCA and Rights of Persons with Disabilities Act, 2016 have done much to bring India’s legislation in line with the WHO RB. Owing in large part to these two ambitious pieces of legislation, Indian legislation currently meets

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68.0% (119/175) of the WHO RB's criteria. This far surpasses other countries whose legislation has been compared to the WHO RB, e.g. legislation in England and Wales meets 54.2% of the standards, while Irish legislation meets just 48.2% (Kelly 2011). Regarding the standards that remain unmet in India, eight relate to areas where direct comparison is essentially impossible and 10 are in areas of well-justified non-concordance, with the Indian legislation delivering nuanced positions that embrace the principles of human rights in a more insightful way than the WHO RB does. Many of the remaining unmet standards are not addressed directly in the legislation but provision exists for them to be addressed in policy. When areas of complex comparison are excluded from the analysis and areas of justified non-concordance are considered concordant, an impressive 77.2% (129/167) of the WHO RB standards are met in Indian legislation.

The authors then go on to assess the concordance of both the RWPDA and the MHCA with the CRPD, suggesting that they provide a "carefully considered example of what is possible" (page 203). They note that the most contentious article in the CRPD in the mental health context is Article 12, the right to equal recognition before the law, and dedicate a whole chapter to analysing the concordance of the Indian legislation with the Article. Their analysis encompasses the debates about the very meaning of Article 12, and the chapter is a helpful stress-testing of real world legislation against the different interpretations of the Article. They make the plausible suggestion (page 223) that "[a]reas of non-concordance are generally the product of efforts to balance competing CRPD rights with each other," noting that "this balancing act is often directly reflected in the text of the MHCA." It is, perhaps, a shame that the authors did not undertake the same exercise by reference to Article 14 CRPD, the right to liberty, about which the debates rage nearly as fiercely.

The authors then seek (in Chapter 10) to widen the lens back out again, exploring whether the divergences identified in the MHCA and RPWDA with the WHO Resource Book and the CRPD "represent necessary and appropriate flexibility to facilitate person-centred care, or, on the other hand, a failure by legislators to deliver CRPD-concordant provisions" (page 228). Whether or not the reader agrees with their conclusions, the chapter is helpfully thorough in pulling out the key underpinning ethical issues, and highlighting areas for further research, both in the Indian context (for instance the role of families in supporting decision-making) and more broadly.

The final chapter, an implementation update, is by Dr Soumitra Pathare, of the Centre for Mental Health Law and Policy at the Indian Law Society, Pune, India, and Arjun Kapoor. Dr Pathare had been a driving force behind the MHCA, and his chapter serves as much as anything else as a call to arms, opening with the critical reminder that:

The promise of India's Mental Healthcare Act, 2017 (MHCA), as outlined in the previous chapters of this book, will remain just that—a promise—without effective implementation of the legislation. Readers who are not familiar with India will be more than a little surprised by the idea of a law existing on statute but not being implemented. However, India has a history of enacting

progressive social sector legislation which remains unimplemented and 'customary practices' continue unhindered. For example, the previous Mental Health Act, 1987 was enacted by Parliament in 1987 but only brought into force six years later in 1993—a significant delay. As late as 2013, many state governments had not established a State Mental Health Authority as required under the 1987 Act. Glaringly, there continue to be anecdotal examples, frequently reported by popular media, of magistrates issuing Reception Orders under the Indian Lunacy Act, 1912, which was repealed by the 1987 Act!

As at the date of writing this review (June 2021), full implementation of the legislation remains some way off, and the call to action in the chapter just as relevant, not least given the impact of the COVID-19 upon mental, as well as physical, health in India.

Although not all of the editorial decisions taken by the authors of the book necessarily serve their purposes, overall, it is an extremely useful guide to legislation which seeks to take on the challenge of operationalising the CRPD in the mental health context in a way that few other jurisdictions have sought to do. It therefore serves, or should serve, as a useful provocation for law reformers in other jurisdictions as they grapple with the question of how to reshape mental health legislation for the 21st century.