THE FLAWED CONSTRUCTION OF THE MODERN LEPER* AND ITS IMPACT ON MENTAL HEALTH POLICY

(This is the draft outline of a working paper and is not for circulation)

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“It occurred to me that the mad in India are not the mentally ill, they are simply mad. They have no other identity...Mad is an everyday, ordinary word. It is compact. It fits into songs. It can become a phrase...It can be everything you choose it to be: a mad whirl, a mad idea, a mad March day...a mad mad mad mad world, a mad passion, a mad hatter, a mad dog”.

- Jerry Pinto, Em and the Big Hoom

In the excerpt above Pinto captures perfectly that caprice that characterizes the definition (both legal and medical) of mental illness in this country, and how the definition of mental illness is in fact the socially constructed idea of “madness” masquerading as the objective truth. The definition of mental illness is so capacious that it belies its own claims to objectivity and formulaic precision. The narratives that inform the social construct of disability and the definition of mental illness are the prerogative of the able-minded. Cite Foucault on silences. It is within this context of the legal, medical, and social constructs of disability speaking to each other to the exclusion of persons with disabilities that I seek to locate this paper.

The central hypothesis of the paper is the definition of disability itself has discrimination in-built and in forcing an individual to inhabit the marginalized identity it creates, is militating against the stated objectives of the law.

Situated within the referred context the objectives of this paper are fourfold. First, it seeks to determine the effect medical and social constructs have on the legal definition of disability and the process of certifying an individual as ‘disabled’. Second, it seeks to understand the impact the legal definition coupled with the constructs have on the person with disability. Second, it examines whether this legal definition furthers the stated objectives of the law. Fourth, it assesses whether the law needs to reconsider the way it conceptualizes disability.

* Foucauldian take on the stigma attached to leprosy being transferred to the mentally ill
The need for analyzing the legal definition of disability stems from the fact that choice of definition has a determinative impact on the recognition of rights of persons with disabilities. It further determines how effectively or (ineffectively) disability policy is implemented so as to ensure the substantive realization of the enumerated rights.

This paper is limited to examining the legal definition of disability in relation to mental illness. This is not to imply that the narrative surrounding physical impairment is not one loaded with stigma. However, both the nature of physical disability, and the characterisation of its stigma is vastly different from that associated with mental impairment (for instance, physical impairment is relatively more easily diagnosed and thus perceivably more palpable than mental impairment. Further, a person with physical disability is not viewed as a threat to society, in contrast to a person with mental disability) and merits separate treatment as such.

At this juncture I would like to introduce a caveat. Social and medical constructs have been institutionalized over the years. It is not my claim that statutory reform alone is sufficient to reconfigure them. However, the manner in which legal definitions are constructed can have a determinative impact on how individuals perceive themselves as well as on how society views them. ¹ If there is a case to be made for a change in the institutional narratives, one needs to critically analyse legal definitions to discern whether they seek to reinforce social prejudice or obliterate it.

Another caveat to be borne in mind is that Indian disability law uses “disability” and “mental illness” interchangeably, i.e., it conflates disability with impairment. (cite) In the course of this paper thus, when I refer to the legal definition of disability, I will in fact be examining the legal definition of mental illness.

In the first segment this paper provides a descriptive overview of the legal definition of disability in mental health and disability legislations, as well as of the process for determining an individual is disabled. In the course of this description I will focus on three elements – the model of disability that informs the definition, the threshold of ‘disability’ below which one cannot avail of entitlements provided for PWDs and the process for determining whether someone satisfies the threshold criterion.

In the second segment the paper engages in a critical examination of the definition and the process. The purpose of this exercise is to determine whether the definition and process aid in furthering the purported objective of disability law, i.e., social integration and empowerment.

The third segment attempts to propose an alternate model for defining disability.

**PART I**

The fashion in which we construct notions of mental health has a determinative impact on how we understand what constitutes mental illness. Our understanding of illness is informed by the model we use to conceptualise health. The World Health Organisation’s definition of mental health serves as a useful starting point. “Mental health is defined as a state of well-being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community”. The WHO also cautions that the mere absence of a mental disorder is an indicator of mental health. It espouses a holistic notion of mental health going beyond the pragmatic account of mental health.

Though the definition is well intentioned, the emphasis on the abilities of the individual reveals something of note. Now, while it would be a stretch to accuse those who drafted this definition of ableism, what it does reveal is our preference for ability as a collective. Acknowledging we are biased towards ability helps reflectively think through the social’s perception of disability. In the present context, an awareness of the primacy we accord ability, aids in a critical examination of the definitions of disability or mental illness we formulate and adopt.

The WHO offers no corresponding definition of mental illness. The lack of a definition of mental illness is not be construed as an oversight on the part of the WHO. While the clinical symptoms of mental illnesses will be universal by and large, the conceptual understanding of what it means to be mentally ill varies across cultures. On account of this variance, mental illness cannot be easily defined.

The absence of a universal definition poses a rather fundamental problem for the law. As Garth observes: “Law is seen as a way of organizing the world into categories and concepts which, while

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2 World Health Organization
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providing spaces and opportunities, also constrains behavior and serves to legitimate authority”.4 Definitions then, are crucial to the functions of categorization and conceptualizing. This segment of the paper examines how the law grapples with the foundational question of defining mental illness/disability.

Broadly speaking there are two models that inform the manner in which disability is defined– the medical model and the social model. The medical model conceptualizes disability as a function of biological impairment, seeing it as the inability of an individual to function normally.5 (cite) (give illustration) The social model on the other hand views disability as a social construct and not inherent in biological impairment.6 (cite) (give illustration).

Indian mental health legislations rely on the medical model in framing definitions of mental illness. As mentioned, in India, law’s understanding of disability dovetails with the legal definition of mental illness. It would be warranted then, to infer that the law also views disability through the lens of the medical model.

For instance, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 [PWD Act], which a legislation aimed at social integration of PWDs, defines mental illness as “any mental disorder other than mental retardation”.7 One could surmise, given the resemblance it bears to the language used in defining the “mentally ill person”, that the framers of this legislation looked no further than the Mental Health Act, 1987 in their attempt to draft a definition.8 Interestingly however, the focus of the Mental Health Act unlike the PWD Act was custodial treatment.9

Another related definition that one must take note of is that of the “person with disability” in the PWD Act. “Person with disability means a person suffering from not less than forty per cent of the disability as certified by the medical authority”.10 This serves as a useful illustration of the fact that Indian law views disability through the lens of impairment locating it in the sphere of the

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5 TARSHI
6 Oliver
7 PWD Act
8 Mental Health Act
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10 PWD Act Section 2
pathological as opposed to the social. This definition informs the legal process through which beneficiaries under the PWD Act are identified and can claim benefits.

In order to claim any benefits under the Act a person must qualify as a person with disability as per Section 2 of the PWD Act. In determining whether a person satisfies the threshold requirement of forty percent a medical board relies on the Indian Disabilities Evaluation and Assessment Scale. The IDEAS is constituted by a series of questions designed to help determine the level of disability an individual is afflicted with. The questions that aid in quantifying disability are categorized under four heads – self care, interpersonal activities, communications and understanding, and work (which includes employment, education and housework).  

Subsequent to being rated on the IDEAS, the person must procure a certificate from the medical board that attests to his or her eligibility for benefits under the PWD Act.

The process through which a PWD can negotiate his or her claim to benefits under the Act is heavily influenced by the legal definition. The definition thus has a deterministic impact on the identification of beneficiaries as well as the substantive realization of their claims. Therefore both the definition and the process merit critical examination.

PART II

In her essay “Insanity, gender and the law”, Dhanda observes that by relying on the medical model, the law serves as a validating tool for psychiatric knowledge.  Admittedly, paying heed to psychiatric vocabulary bodes well for a law that is concerned with treatment of the mentally. However, the uncritical acceptance of such vocabulary in the definitions of an anti-discrimination legislation, is indicative of law being colonized by the discipline of psychiatry.

The undesirability of such acceptance is demonstrated on two counts. First, in its reliance on ‘objective’ medical terminology, law has constructed mental illness as a monolith. Second, in light

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11 Office of the Chief Commissioner for Persons with Disabilities, Disability Guidelines P 62
12 Dhanda P 349
13 Veena Das
of the forty per cent threshold, one can only assume that the turn of phrase is an attempt at the enumerative precision that the law fixates on. What the legal narrative fails to account for is the amorphous nature of disability and impairment. In its obsession with precision it perpetuates the culture of biomedicalism which views impairment and thereby disability only in terms of a deficit.\textsuperscript{14} This approach is analogous to Peirce’s theory of pragmatism wherein he argued that objective medical truths should be completely divorced from the social milieu.\textsuperscript{15}

The primacy accorded to medical truths is owing to the expertise the discipline of medicine boasts of.\textsuperscript{16} The knowledge that is constitutive of the field of medicine is not only touted as true, but also objective.\textsuperscript{17} A critical appreciation of these objective truths however, reveals how enmeshed they are in the social. I will demonstrate this by examining the IDEAS, the process of certification, and the standard certificate.

The IDEAS which was originally developed by the members of the Indian Psychiatric Association has been purportedly calibrated to suit the purpose of the PWD Act.\textsuperscript{18} It abandons all pretense of medical objectivity in its explanation to the first category that reads “Self care – This should be regarded as activity guided by social norms and convention”.\textsuperscript{19} Through a series of questions it focuses on appraising the performance of the PWD vis a vis socially approved activities. It is worth noting that the questions test for ability not discrimination. This focus on ability of PWDs to perform activities that are informed by ableist notions precludes the need to examine whether activities themselves need to be informed and designed as per more inclusive notions.

Further its criteria for identifying an individual with mental illness is better suited to the quacks of the days of yore, than it is to practitioners of modern medicine. IDEAS seeks to pathologise human

\textsuperscript{16} Foucault, Rabinow Reader, p 44
\textsuperscript{17} Foucault made a similar observation in the context of the pathologization of sex: “The mere fact that one claimed to be speaking about it from the rarefied and neutral viewpoint of science in itself is significant” (Foucault Rabinow p 53.)
\textsuperscript{18} P 61
\textsuperscript{19}
behavior. It writes off anyone who is an embarrassment to their family, who interferes with social rules, and is a housewife who is anything short of a domestic goddess, as potentially mentally ill.\textsuperscript{20} The process of certification serves as an illustration of medical expertise being abandoned for the sake of convenience. The process involves a medical board constituted by a Chairperson, a psychiatrist, and a physician issuing a certificate.\textsuperscript{21} The quorum for the process is a minimum of two members including the Chairman. This effectively means that the presence of a psychiatrist is optional in determining whether and to what extent someone is mentally ill.

The standard template for each certificate for government benefits requires an attested photograph as proof of disability.\textsuperscript{22} Pragmatically imposing this evidentiary burden on people with physical disabilities is understandable. It guards against the free-rider problem. However, in their zeal for objectivity and palpable proof, those who drafted the standard template of the certificate for government benefits require that such proof be demonstrated, via a photograph, even in cases of mental retardation.\textsuperscript{23} I allude here to the zeal for objectivity because the alternative is that these mass produced certificates are the result of a clerical error. While the process relies on the grammar of medical science, what it is in fact doing is reinforcing the widely harboured, but erroneous social perception of disability as a monolith. A perception that is so deeply entrenched that one does not give pause for thought before demanding tangible proof of an impalpable illness such as mental retardation.

A possible reason for such a skewed perception is that we do not actually understand what it means to be mentally ill. The language of the definition itself obscures more than it reveals. It is focused on what is excluded from the purview of mental illness, i.e. mental retardation. It constructs a “screen discourse”\textsuperscript{24} that allows one to evade the complexities of mental illness. As on can infer from the definition of mental illness, there is no enquiry into understanding mental illness. Instead it is simply viewed as something that must be isolated, contained, and fixed.

Another possible reason for the lack of understanding of mental illness is how far removed the social is from the realities of the PWD. The language used in the IDEAS seeks to “caricature the

\begin{footnotes}
\item[20] Office of the Chief Commissioner for Persons with Disabilities, Disability Guidelines p 63
\item[21] Office of the Chief Commissioner for Persons with Disabilities, Disability Guidelines p 63
\item[22] Office of the Chief Commissioner for Persons with Disabilities, Disability Guidelines, Annexure B p 58.
\item[23] Office of the Chief Commissioner for Persons with Disabilities, Disability Guidelines, Annexure B p 58.
\item[24] Foucault makes a similar observation in relation to the discourse on sex.
\end{footnotes}
mad man” as someone who laughs and cries without reason and talks to himself. It confines the mad man to the singular dimension of irrationality. In defining the mentally ill thus, the language is engaging in performing a distancing act. In caricaturing the mentally ill it dehumanizes them thereby othering them. Their dehumanization amounts to a strategic denudation of their personhood which then provides for a conducive environment for their marginalization. The architecture of the language used is akin to the architecture of the asylum – focused on exclusion and containment.

Having undertaken a standalone critique of the definition let us now examine the definition in relation to law. As mentioned earlier, the purpose of the PWD Act was to create an institutional framework that would be conducive for the empowerment and social integration of PWDs. Given that the definition of a legislation must be in tandem with its stated objectives one would think that the definition adopted here would be calibrated to suit the purpose of the Act. However, the definition seems to have been blindly lifted from the Mental Health Act that serves a completely different purpose. This has dire consequences for some PWDs. For instance the Mental Health Act excludes mental retardation from the definition of mental illness because it is primarily a treatment focused legislation. The PWD Act in all its wisdom does the same. Except the concern of the PWD Act, which is an anti-discrimination legislation, should not be treatability. The fact that mental retardation is not perceived as treatable does not mean that persons with this affliction are not discriminated against. In leaving them out of the purview the definition is underinclusive. What we witness here is a huge rift between the definition and the objectives of the law.

PART III