

# A Review of Advance Directives As Per Mental Health Care Act 2017

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## Abstract

The year 2017 is surely a milestone year for the professionals of mental health and the mentally ill patients. The year marks the historic moment of the Mental Health Care Act (MHCA). The utmost significance of this act cannot be ignored because it has come as a ray of hope because, for the first time, people with mental illness have been granted few rights, such as the right of the mentally ill person to make advance directives. Hence, it can be said that its arrival is an important accomplishment and a ray of hope for the millions of mentally ill people. It is an important critical step in addressing mental illness and focuses the public's attention on the current status of the mentally ill patients. The attempts to have its implementation would surely face several challenges. Understanding the values relevant to ADs is important for clinicians because they have a major role to act in coping with severe and chronic mentally ill person. The object of this article is to gather the brilliant flashes and the boring aspects as well as drawbacks of the act. To start recognizing the strengths and anticipating challenges in their implementation and the future solution.

**Keywords:** Mentally ill patient, Mental Healthcare Act 2017, Advance Directives, Nominate representatives, Central authority.

## Introduction

Advance Directives (ADs) are the legal and the explicit rights of any adult person who has the mental capacity to decide while making ADs, regardless of the previous medical condition as set out in the Mental Health Care Act (MHCA) 2017.<sup>1</sup> In ADs, one can state

in written form one's desires for care and/or deny and/or authorize/nominate a delegate (NR) who may take any kind of future treatment decisions on his behalf if he/she lacks the intellectual capacity to do so. Once the person can make the decision, it is worth remembering; then at any time, or if one wishes, one can override the ADs previously written. Following the definitive regulations of the Central Authority (MHCA, 2017), this can of course be withdrawn, changed or cancelled by the person who made this. The person must take care of existing laws during the formation or revocation of ADs, and follow the absolute regulations established and enforced by the central authority. The person writing ADs and his NR is responsible for making sure the treating organization and the practitioners have the right to access to it whenever it is possible. It is the

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obligatory responsibility of every in-charge medical officer/physician in charge of a person's treatment to provide medication upon appropriate ADs. If the person concerned has reason not to follow the ADs, whether he/she or the caregiver/NR; if so, the appropriate board can order it (MHCA, 2017). For example, while MHCA 2017<sup>1</sup> provides any insurer the option of offering medical insurance for mental illness treatment on the same basis as physical illness coverage is provided. Within the same vein, in 2000, Anil Gumber found that "over 90% of the Indian population and nearly all the elderly are not covered by any kind of health insurance scheme of government or private." Their healthcare needs are met mainly by direct cash expenses spending on public and private sector facilities.<sup>2</sup> This also prevents individuals from an insufficient, unwanted or possibly harmful treatment; and helps prevent crises and the resulting use of involuntary medication or preventive measures such as isolation or seclusion. It also helps prevent untoward outcome by retaining greater control over their own mental health services; avoids compulsory medication and promotes person-centered care and shared decision-making.<sup>3</sup> Many a times the physical abuse has been used as a method to teach discipline in such mentally ill children in rural area for which there was a need for Mental Health Care act. <sup>4</sup> The use of Psychomotor and Affective Domains has been found to be an effective way of integrated teaching in such mentally ill persons. <sup>5</sup> The use of electronic media has been found to affect the psychological development of mentally ill children with some of them predisposing to substance abuse.

### **Criteria's for making or assessing ADs:**

Three criteria should be considered for making ADs:

1. **Assessment of age:** Any adult, who is a major, has the right to make an advance directives.
2. **Assessment of mental status:** A person can offer an advance directive under subsection (1), regardless of his or her past mental illness or treatment as per MHCA, 2017[1]. Nonetheless, determining whether the person actually suffers from a mental condition that may involve an acute confusion, delirium, delusion or drug dependence condition is critical; as it may be insensitive or even incompetent to let someone go home with poor memory, impaired judgment, and little risk awareness.
3. **Assessment of Mental capacity:** A leading move to tackle the punitive nature of mental health

legislation is to replace the test which clinically evaluates with the mental ability assessment (in) as a basis for incarceration and mandatory care.<sup>7,8</sup> A decision-making capacity assessment can be carried out, especially where the lack of capacity to decide on treatment/admission for care is concerned. When evaluating a person's skill, it should be borne in mind that any kind of active psychiatric impairment due to any kind of pathological problem impairs this capacity, and subjective evaluations of physicians 'abilities without scientific tools are often unreliable.<sup>9</sup> Chapter 3 of MHCA (2017), [1] i.e., "Advance Directive" consists of 9 Sections (5-13) are presented in the important points for the effective understanding and its applications as:-

- I. **Eligibility for making and executing the Advance Directives (ADs):** In India "advance directive" stands for the advance directive of an individual in compliance with the section 5(1) of the MHCA 2017. The ADs are the form of legal and valid rights of any adult person who has the intellectual ability to make a written decision and thought at the time of making ADs. It is irrespective of one's any kind of previous mental illness, unless it is contrary to any existing legislation in force. In ADs, one can nominate its care wishes or deny any kind of treatment, and authorize/name a Nominated Representative (NR) who can execute any kind of future decisions; in the situation on one's behalf and where the one lacks the capacity to do so.

Simply put, ADs are the executionable powers of any adult who is major (18 years of age) and mentally capable of making decisions, whereby a number of desires may be expressed in writing, for its futuristic care, including care preferences and refusals, and the appointment of a person (s) capable of making treatment decisions on his or her behalf, in the event the person lacks the decision-making capacity. It should be further noted, however, that a person who is a minor is not capable of making ADs, but in compliance with Mental Health Care Act 2017 his "legal guardian shall have the right to make an advance directive in writing for a minor and all provisions relating to the advance directive shall extend to such minor until such time as he reaches a majority."

The United Kingdom Mental Capacity Act<sup>10</sup> grants British citizens an additional right that can be made in a written or in an oral form, with the exception of any conditional decisions to refuse or to deny any form of

life-sustaining care which ought to be written, signed and had to be witnessed for confirmation.

**II. Invoking of ADs and its validity:** The MHCA 2017 states soundly that 'An advance directive made pursuant to subsection (1) shall only be enforced if the person stops to have the ability to take decisions on his/her mental health or any kind of treatment and remains valid until amount of time that the person regains the ability to make decisions on mental health care or treatment.

**III. To over-ride the ADs:** Under the MHCA 2017 if a person has the ability to make a decision, then it is possible, at any time, to bypass the previously written ADs or, if desired, ADs can, of course, be removed, altered or subdued by the patient by following the regulations established by the central authority. Consequently, any ADs which are actually in effect contrary to any statute shall be deemed unconstitutional from the outset. Simply put, it is to be presumed that having mental ability makes any written ADs ineffective beforehand. The person can change it if he/she wishes to change it, given he/she has the ability to do so.

**IV. Procedure to formulate an Advance Directive?:** The Mental Health Care Act, 2017 stipulates that 'Advance Directives shall be constructed in the manner defined by the Central Authority's regulations.' It should be noted that legal ADs in certain Western countries must adhere to a particular format involving witness identification and notarization; Mental Healthcare Rules 2017 state the rules for the creation of ADs as below: a) An AD shall be in written form in the format as CR-A; b) if a NR (Nominated Representative) is mentioned in the AD it shall sign the AD indicating its willingness to function as an NR; c) all forms of ADs shall be signed by two witnesses attesting to the fact that the AD was signed by the person producing the AD in their physical presence.; d) The person making an AD shall obligatory keep a copy of the executed AD with himself and will also share a written copy of the same with the NR.

**V. Maintaining the ADs with an E-register:** The MHCA 2017 stipulates that [clause (a) of subsection 91] "each board shall maintain an electronic record of all the advance directives recorded with it and make them available to the mental health practitioners concerned as and where applicable."

It is beyond doubt that a simple and secure access to medical data through the internet has many advantages; and it is accepted fact that our country will also benefit from those facilities as set out in the 2017 Mental Health Care Rules that ADs must be made display online within the time period of 14 days of registration with the board of importance. Such register will be maintained by the concerned in the dedicated software by the concerned board online.

**VI. Procedure to amend or cancel the ADs:** The MHCA 2017 makes it a transparent fact that the person making it may revoke, change or cancel ADs at any point of time. The process for amending or canceling any kind of advance directives shall be as that for executing an advance directive under section 6 (i.e. the Central Authority's regulations on ADs). The Mental Capacity Act of the United Kingdom<sup>10</sup> states that this can be amended at any time when one has the ability to do so.

**VII. Circumstantial validity of ADs:** The MHCA 2017 states that the ADs is not extendable to a person who has made the ADs for any kind of an emergency treatment which is included under section 103 (e.g., Code of Criminal Procedure, 1973, etc., i.e., an offender is involved in any kind criminal court proceedings or under trial). However, the Mental Capacity Act, 2005 makes it transparent that there are some circumstances where, for example, if any kind of threat is present to themselves or others or if one is placed under the UK Mental Health Act, this may be overridden.<sup>10</sup>

**VIII. Need of doctors to follow ADs:** According to the MHCA 2017 "It is the responsibility of each medical officer in charge of a mental health facility and of the psychiatrist in charge of the treatment of a person to prescribe or treat a person with a mental disorder in compliance with his or her lawful advance directive."<sup>1</sup> It should be remembered that mental health professionals are not responsible for non-observance of a valid advance directive until they have obtained a readable copy of the relevant advance directive.

**IX. Duties of the executioner of ADs and their NRs:** The 2017 MHCA<sup>1</sup> lays out the various obligations on the person who made the ADs as well as his or her NR. The person who wrote the ADs and their corresponding NRs will be absolutely responsible

for ensuring that the providers of mental health will have access to the ADs where applicable. Additionally, if any, the person concerned or the NR shall provide necessary information to the mental health professional of the new ADs. The Act also gave the authority to the legal guardian the right to make ADs in writing for a minor, and before achieving a majority all laws relating to such ADs shall be applied to the minor in question.

**X. The power to review and modify in any ADs making procedure:** According to the 2017 MHCA<sup>1</sup> the Central Authority periodically and yearly tracks the use of ADs. It also provides the prescription for the same and lay down the specifications the procedure for making and executing the ADs. It also addresses the legal procedure to safeguard the absolute rights of the people with psychiatric disorders. This may also adjust the ADs process or make additional regulations relevant to the ADs process.

**XI. Liability of health professionals to follow ADs:** Mental health employees and professionals must obey the ADs. If there are any sort of reasons not to do so, a report must be lodged with the board concerned. The MHCA 2017<sup>1</sup> makes it very transparent that no mental health worker and professional shall be medicolegally held responsible for any adverse effects in case if one follows valid ADs; nor shall anyone be held liable for failure to follow valid and clear ADs, unless a desired copy of the same is given.

**XII. Are there any additional regulations, regarding the procedure of advance directive?:** Recently, MHCA 2017 refer to several other regulations relating to the ADs process, which can be stated as a) All forms of ADs are registered with the Mental Health Review Board, which has jurisdiction where the individual resides; b) for registering an AD no fees is paid with the Mental Health Review Board; c) all ADs are made available online within 14 days of registration; (d) The individual concerned or the NR shall brought to notice to the mental health professional about the new ADs if any after modification; (e) information contained in the AD shall not be revealed to any unauthorized person or media.

### Conclusion

Bridging the gap between the demand for care and

the treatment facilities has become a major challenging problem from generation for healthcare professionals and finding and addressing barriers to the efficient provision of the ethical practice is critical. The information on medical knowledge and the available care option, we will be in a stronger and effective position to take the systematic, coordinated and appropriate treatments that are in the best cause of the individual health. The recent acts on mental health from both within and outside our home country have acted as an absolute reminder of ADs need.

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