

LEGAL CAPACITY, REPRESENTATION AND THE PROBLEMS FACED BY MENTALLY ILL WOMEN

Written by **Shaileja Verma**

3rd year B.A. LL.B. (Hons.) student at National Law School of India University, Bangalore

ABSTRACT

Mental illness, as a disability affects a substantial number of people. Those suffering from the same, lack autonomy due to their legal incapacity to take decisions and are provided with representation. Our present disability laws are out of sync with international conventions and in order to tackle the same, the Mental Health Care Bill, 2016 and the Rights of Persons with Disabilities Bill, 2014 were formulated. This paper reads between the lines of the two Bills and identifies and addresses its loopholes and flaws. Reproductive rights are at times taken away from mentally ill women. Sterilisations and hysterectomies are performed on them without their consent, for the sake of mere convenience of their guardians. Even in cases of abortion, these women are often not consulted. It discusses the discrimination and hurdles mentally ill women potentially face in the arena of marriage and divorce personal laws, as the presence of such an illness readily provide for grounds for divorce or annulment. With marriage being contractual in nature, it is vital to look at whether the mental illness in question renders one incapable of understanding the concept of a marriage and its rights and duties. For discussing these issues, the paper draws out pertinent legislations and case law, and where relevant, it looks at case law from other jurisdictions like the USA, UK.

INTRODUCTION

The United Nations defines disability as a restriction on a person or his or her lack of capacity to perform functions the way a normal person can.¹ Society has often been unkind to disabled people and they face discrimination in many facets of life. Social exclusion and lack of access to amenities are factors that further add to this discrimination. Furthermore, a sizeable portion of India's

¹ Convention on the Rights of Persons with Disabilities art. 1, Mar. 30, 2007, 2515 UNTS 3.

population is disabled and as per the Census of 2011, nearly twenty-seven million suffer from some kind of disability, and mental illness accounts for 2.7%² of this population.

In India, mental illness has been defined to mean, “a 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.....”³ People with mental illness are associated with a lack of legal capacity required to take decisions on their own and although there is no universally accepted definition of the term ‘legal capacity’, the author of this paper takes it to mean the recognition of a person’s decisions by the law which, thus confers legal rights and obligations on such a person⁴ and consequentially, a lack of the same results in the need for a guardian. It is vital that the society and the legal system treat mentally ill persons as individuals with the ability to exercise their legal capacity and as those who have the potential to indulge in life’s activities. It is also clear that one important area of concern for mentally ill persons is to ensure that equal rights are available to them, such rights are enforced without discrimination and that their legal incapacity does not often render them vulnerable.

In light of this, the paper will broadly focus on mental illness as a disability, the legal capacity associated with it and the representation provided to those who suffer from the same. Furthermore, it specifically strives to analyse **THE PROBLEMS FACED BY WOMEN SUFFERING FROM MENTAL ILLNESS WITH REGARD TO THEIR RIGHTS RELATING TO MARRIAGE AND REPRODUCTION.** This paper has been divided into three parts. The first part briefly looks at the reforms that have been

² Out of the total disabled population, around 1,500,000 suffer from mental retardation and around 700,000 suffer from mental illness. For more details, refer to- OFFICE OF THE REGISTRAR GEN. & CENSUS COMM’R, INDIA, MEASUREMENT OF DISABILITY THROUGH CENSUS NATIONAL EXPERIENCES: INDIA (2011), <http://unstats.un.org/unsd/demographic-social/meetings/2016/bangkok--disability-measurement-and-statistics/Session-6/India.pdf>.

³ Cl. 2(1)(r), Mental Health Care Bill 2016, Bill No. LIV-C of 2013 (introduced in Rajya Sabha on August 19, 2013).

⁴ Council of Europe: Commissioner for Human Rights, *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities*, 10 (April 2012), available at <http://www.refworld.org/docid/50f7e2572.html>.

debated in the new Bills with the aim of repealing existing disability laws. The second part highlights the challenges that have been faced by women with mental illness in terms of their rights in matters of reproduction. The third part of this paper looks at the discrimination faced by mentally ill women in marriage and divorce laws.

REFORMS IN THE PRESENT DISABILITY LAWS

Two new bills, namely the Mental Health Care Bill, 2016 and the Rights of Persons with Disabilities Bill, 2014⁵ were introduced in order to introduce reforms in the existing legislation. These Bills repeal the Mental Health Act, 1987 and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 so as to ensure that the legislation is in harmony with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), 2006, which was ratified by India in 2007 and approved by the Parliament in 2008. The Convention shows a remarkable shift in the issue of disabilities, for it is not only treated as a social welfare issue but as a human rights one as well. This paradigm presumes legal capacity, dignity and equality of the disabled.⁶

The Convention very succinctly lays down in Article 12(2) that persons with disability (PWD) have the right of exercising their legal capacity “on an equal basis with others in all aspects of life.”⁷ Articles 12(3) and 12(4) confer a duty on the State to provide PWD any support they might need while exercising their legal capacity and to also enforce safeguards to ensure that this system of support is not abused respectively.⁸

⁵ The former Bill, passed by the Rajya Sabha in August 2016 is yet to be passed by the Lok Sabha, whereas the latter Bill is still pending in Parliament.

⁶ CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: WHY A CONVENTION?, <http://www.un.org/disabilities/convention/questions.shtml> (Last visited on September 25, 2016).

⁷ Convention on the Rights of Persons with Disabilities art. 12(2), Mar. 30, 2007, 2515 UNTS 3.

⁸ Convention on the Rights of Persons with Disabilities art. 12(3), 12(4), Mar. 30, 2007, 2515 UNTS 3.

THE MENTAL HEALTH CARE BILL, 2016

Its definition of ‘mental illness’ was looked at earlier and due to its broad nature,⁹ it has the potential of bringing under it mental illnesses that are minor in character.¹⁰ A more concise and clear-cut definition that will ensure that intervention by the law is limited will be of immense help in ensuring that people aren’t frivolously labelled as mentally ill and thus robbed of their legal capacity, for example- under this definition the possibility of labelling say, depressed women (for example- in an unhappy marriage) as ‘mentally ill’ exists. The Bill has taken a progressive step by introducing the concept of advance directives, as it helps assert a mentally ill person’s legal capacity. It is an enabling provision, legally binding in nature, which allows a person to (when they are of sound mind) lay down directions as to how they would like to be treated and how they would like to not be treated in case of them being mentally ill in the future. It also enables them to list the names of people who they would like to appoint to act as their nominated representative or guardian.¹¹ This brings mentally ill people at a better footing with people who have been appointed guardians, by trying to ensure that they are conferred with some level of autonomy when it comes to decision-making.

THE RIGHTS OF PERSONS WITH DISABILITIES BILL, 2014

The Rights of Persons with Disabilities (RPD) Bill was introduced by the Government in 2014 and ever since has been subject to protest and controversy for being completely different from its earlier Drafts (Draft of 2011 and 2012) and for being incongruous with the UNCRPD. Article 12 can be deemed to be one of the Convention’s core principles as it deals with equal recognition before the law and recognises legal capacity of the disabled on an equal basis in every facet of

⁹ Cl. 2(1)(r), Mental Health Care Bill 2016 defines ‘mental illness’ as follows- “A *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...*”.

¹⁰ James T. Antony, *The mental health care bill 2013: A disaster in the offing?*, 56(1) INDIAN J. OF PSYCHIATRY 3, 5 (2014).

¹¹ Cl. 5, Mental Health Care Bill 2016, Bill No. LIV-C of 2013 (introduced in Rajya Sabha on August 19, 2013).

life.¹² In comparison to this Article, Clause 12 of the Bill talks about “support arrangements” and how there should be no conflict of interest/ undue influence exercised by the person providing support¹³, however, like mentioned earlier, the safeguards mandated by Article 12(4) of the Convention have not been provided for in the Bill. Without such safeguards, mere provisions on conflict of interest/undue influence will not be of much help because even if one fails to adhere by these provisions, a lack of remedy for the same renders them futile, and it may be argued that this goes against the ethos of the Convention.

Unlike the 2011 Draft that provided for all current plenary guardianships to be converted to limited guardianships, Clause 13 of the RPD Bill deals with both kinds of guardianships for the mentally ill. It provides for how a limited guardian can be appointed “to take care of such mentally ill person and take all legal binding decisions on his or her behalf in consultation with such person”, in simpler words, he or she makes joint decisions with the mentally ill person. It also provides for awarding plenary guardianship to a mentally ill person under certain “extraordinary situations”.¹⁴ Here, there are two issues that need to be addressed- (1) the phrase dealing with how a limited guardian can “take all legal binding decisions on his or her behalf in consultation with such person” is slightly skewed in the favour of the guardian as the final decision making power lies more or less with this person. There is a need for a shift from substituted decision making to supported decision making where the person with disability is the decision maker and is accorded as much support which would enable him or her to make use of their legal capacity to the greatest extent.¹⁵ (2) What comes under these “extraordinary situations” is not specified and this flaw in the provision can possibly lead to its misuse, because when plenary guardianship is granted to mentally ill persons, they have no say in the process of decision making, their preferences and wishes are

¹² Convention on the Rights of Persons with Disabilities art. 12, Mar. 30, 2007, 2515 UNTS 3.

¹³ Cl. 12(3), 12(4), The Rights of Persons with Disabilities Bill 2014, Bill No. I of 2014 (introduced in Rajya Sabha on February 7, 2014).

¹⁴ Cl. 13(1), The Rights of Persons with Disabilities Bill 2014, Bill No. I of 2014 (introduced in Rajya Sabha on February 7, 2014).

¹⁵ Amba Salelkar, *A Critique of The Draft Rights of Persons with Disabilities Bill, 2014*, KAFILA (February 3, 2014), <http://kafila.org/2014/02/03/a-critique-of-the-draft-rights-of-persons-with-disabilities-bill-2014-amba-salelkar/>.

irrelevant and there is also a possibility of the guardian acting against their interests. In this system of guardianship, they are stripped of almost all their civil rights.

CHALLENGES FACED IN PRESERVING REPRODUCTIVE RIGHTS

Before the author proceeds, a distinction needs to be made between medical and legal insanity. A person may be medically insane and can still be capable of leading a normal life but this does not always mean that he or she suffers from legal insanity which more or less comes into play when a person cannot function on their own or enter into legally binding decisions without a representative. So a slight departure from a well-balanced mind (example- cases of depression) is a case where one is considered to medically insane and not legally insane.¹⁶

STERILISATION AND HYSTERECTOMY

When one is born with a disability, the very fact that such a disability exists is enough to give rise to situations where priority isn't given to self-autonomy and self-determination. Their right to reproduce is influenced by what others think is 'good' for them and for society or what others think they would want.¹⁷ In the landmark United States case of *Buck v. Bell*¹⁸ Justice Oliver Wendell Holmes argued:

"We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The

¹⁶ John F. W. Meagher, *Crime and Insanity the Legal as Opposed to the Medical View and the Most Commonly Asserted Pleas*, 14(1) J. CRIM. L. & CRIMINOLOGY 46, 49 (1923).

¹⁷ SHELLA A.M. MCLEAN & LAURA WILLIAMSON, IMPAIRMENT AND DISABILITY: LAW AND ETHICS AT THE BEGINNING AND END OF LIFE 108 (2007).

¹⁸ *Buck v. Bell*, 274 U.S. 200, 208 (Supreme Court of the United States).

principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes....Three generations of imbeciles are enough.”

Even in the United Kingdom, many a times the Courts have concluded that there is no particularly significant loss to women with disabilities, when they are (non-consensually) deprived of their capacity to reproduce.¹⁹ British Courts have always been more inclined towards thinking that sterilisation is a better option in cases where a person is mentally ill, however, this was refuted in a Canadian case²⁰ where the Court opined that a woman should only undergo sterilisation when it would solely be in her interest and be beneficial for her and not for any third party. The assumption that sterilisation is a more convenient option when mental illness is prevalent should not be made unless it can be shown that harm or inconvenience will be caused to that person unless sterilisation is performed.

In India, there have been several cases where hysterectomies are forcefully conducted on mentally ill or retarded women.²¹ Poor hygiene during menstruation, difficulty faced by care-givers who have to deal with uncooperative women, unwanted pregnancies in the case of sexual assault are few justifications that are used for conducting such operations. However, these justifications have no legitimate basis for stripping women of their right to menstruate and reproduce and the consent of a parent or a guardian just isn't enough.²² The UNCRPD provides that every person has a right to respect for their respective physical as well as mental integrity²³ and the common practice on conducting hysterectomies on mentally ill women violates this right along with their right to bear children. Every woman (mentally ill or not) should be considered to have the legal capacity to take

¹⁹ Re X (*adult patient: sterilisation*) [1998] 2 FLR 1124; Re Z (*medical treatment: hysterectomy*) (1999) 53 BMLR 53; Re W (*mental patient sterilisation*) [1993] 1 FLR 381 are few examples.

²⁰ Re Eve [1986] 2 SCR 388.

²¹ In 1994 where over 17 hysterectomies were performed on mentally disabled women living in Shirur Home (Pune) and in 2008 petitions regarding the Government allowing hysterectomies to be performed on over 300 women living in five government homes were heard by the High Court of Bombay. For more information, refer to- Divya Sreedharan, *The Silenced Wombs*, THE HINDU (August 4, 2013), <http://www.thehindu.com/features/the-yin-thing/the-silenced-wombs/article4985813.ece>

²² PHOEBE S LIEBIG & S. IRUDAYA RAJAN, *AN AGING INDIA: PERSPECTIVES, PROSPECTS, AND POLICIES* 101 (2003).

²³ Convention on the Rights of Persons with Disabilities art. 17, Mar. 30, 2007, 2515 UNTS 3.

decisions regarding her reproductive organs by herself. Guardians cannot be conferred with unbridled power to make decisions regarding hysterectomies and therefore, this reiterates need for implementing a strong system of supported decision making arises.

In *Anant Phadke v. State of Maharashtra*²⁴, the High Court of Bombay precluded any kind of sterilisation on women and children which was conducted in a forceful manner while being of the opinion that such procedures that aren't medically necessary cannot be allowed only for convenience sake as it violated one's right to reproduce.

The justifications mentioned earlier cannot function as reasons for conducting such operations and mentally ill women should be given the opportunity to exercise their inherent rights to the greatest extent possible and decisions that are theirs to make cannot be taken on their behalf. Furthermore, the possibility that these women are or will be interested in having children cannot be simply disregarded. Even if a person is mentally ill, they might still have the capacity to take care of themselves or to raise a child and if this capacity is present, then they cannot be deprived of their right to do so.²⁵ Accordingly, in consonance with Article 23(1)(c) of the UNCRPD which provides for the right of a person with a disability of retaining his or her fertility, the RPD Bill prohibits medical procedures that robs person of their fertility unless it takes place with their informed and willing consent.²⁶ However, this Bill lacks a provision supplied in the Draft of 2011, where penalty for the same was given. This again brings to focus the haste with which this Bill was introduced and how it has missed out many relevant provisions that ought to have been embedded into it. Accordingly, the laws should have provisions which make consent of a mentally ill person mandatory as it might help in disallowing a guardian from facilitating such operations to take place and provisions for punishment in case the same occurs should also be provided. Guardians cannot be allowed to exercise complete power over their mentally ill wards as it can go against the ward's

²⁴Anant Phadke v. State of Maharashtra, Writ Petition No. 1527 of 1994 (High Court of Bombay).

²⁵ Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 35(5) DUKE L.J. 806, 820-22 (1986).

²⁶ Cl. 9(2), The Rights of Persons with Disabilities Bill 2014, Bill No. I of 2014 (introduced in Rajya Sabha on February 7, 2014).

interests and that is why the need for doing away with the concept of plenary guardianship should be strongly reiterated in every law concerned with the same.

PREGNANCY AND ABORTION

Motherhood is often denied to women with disabilities on the grounds that they won't be able to take care of their children or that they cannot aptly perform their duties as a mother and will not be able to ensure that the best interests of their children, if born, are upheld.²⁷ Recently, in *Suchita Srivastava v. Chandigarh Administration*²⁸, the Supreme Court observed that having ratified the UNCRPD, its provisions were binding on our legal system. It was held that every person has the right of making decisions with regard to issues like reproduction and to either accept or reject abortion, as this is guaranteed under the Medical Termination of Pregnancy Act, 1971²⁹ and should be made applicable to persons suffering from mental illness as well in view of Article 6 of the UNCRPD which emphasises on ensuring the well-being of women, complete enjoyment of human and fundamental rights and measures that need to be adopted for the same. Section 105 of the RPD Bill shows some level of progress in the campaign for rights of women with disabilities as it provides for punishment of termination of pregnancy of a woman with disability without her consent. In essence, it is argued that if a woman who is mentally ill still has the capacity to raise a child, then her right to do so should not be taken away from her and she should not be placed in an adverse position where she is discriminated against on the basis of such illness.

PROBLEMS OF MARRIAGE FACED BY THE MENTALLY ILL

²⁷ 3 Sarasu Esther Thomas, *The Draft Rights of Persons with Disabilities Bill, 2012: Some Loud Thinking on its Implications for Mental Health Provisions in Personal Laws*, in SOCIAL EXCLUSION AND RIGHTS OF PERSONS WITH DISABILITY 85, 90 (Nimushakavi Vasanti and Sarasu Esther Thomas eds., 2013).

²⁸ *Suchita Srivastava v. Chandigarh Administration*, A.I.R. 2010 S.C. 235 (Supreme Court of India).

²⁹ In the Medical Termination of Pregnancy Act, No. 34 of 1971, §3(4) only mandates for consent to be taken from an adult woman who does not suffer from any mental illness.

Article 23 of the UNCRPD aims at eliminating discrimination perpetuated against PWD with regard to matters that range from family to marriage. It lays emphasis on how each State Party should recognise every such person's right to marry and to have a family. It also lays down how PWD have a right to decide the number of children they want and should have access to education on reproduction and family planning.³⁰ Marriage being an important social institution lays the foundation of family life. It is a means of making sexual intercourse socially acceptable, having children, preserving the purity of blood lines, socialisation and keeping families together. Legal capacity in a way enables one to enter into contracts, make a valid will and get married among other things and marriage as a contractual agreement requires soundness of mind and the capability of assenting to the marriage. It is often claimed that the primary reason for existence of a mental disability at the time of marriage as a ground for its annulment (or dissolution) is to try and prevent people who do not have the capability or the capacity of understanding the nature of a marriage (and its contractual nature) and the duties and undertakings that are part and parcel of a marital relationship.³¹

PROVISIONS IN PERSONAL LAWS:

Most of the marriage laws discriminate against persons with mental illness because of the requirement of soundness of mind during the time of marriage and provisions regarding annulment of the marriage or divorce in case this requirement wasn't fulfilled.

Section 5 of The Hindu Marriage Act (HMA), 1955, lays down certain conditions that should be fulfilled during the time the marriage is solemnised, conditions like one should be of sound mind to give valid consent, fit for marriage and procreation of children and should be free from recurring attacks of insanity. Under Section 12 the marriage is voidable if it took place in contravention of these conditions and can be annulled by a decree of nullity. Under Section 13 one of the grounds for divorce is incurable insanity subsequent to the marriage or mental disorder for a continuous or

³⁰ Convention on the Rights of Persons with Disabilities art. 23(1), 23(2), Mar. 30, 2007, 2515 UNTS 3.

³¹ WILLIAM P. STATSKY, FAMILY LAW: THE ESSENTIALS 109 (3rd edn. 2014).

intermittent amount of time so as to make it unreasonable to expect the other spouse to live with him or her. Similarly, the Special Marriage Act, 1954 has the same conditions that should be fulfilled for the solemnization of a marriage.³² However, unlike the HMA, this Act allows for the marriage to be declared void.³³ The Divorce Act, 1869, provides for a decree of nullity of a marriage which may be granted if either of spouses was an idiot or a lunatic at the time of marriage.³⁴ And Section 10 of this Act says a marriage may be dissolved on the filing of a petition of the ground that the respondent “*has been incurable of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition.*” Under the Parsi Marriage and Divorce Act, 1936, unsoundness of mind at the time of marriage isn’t considered to be a ground for annulment, but it is a ground for divorce.³⁵ In Muslim Personal Law, a *nikah* arising out of a *nikahnama* requires the usual conditions required for a valid contract to be fulfilled. Therefore, a person who is mentally ill or of unsound mind cannot enter into this contract of marriage and any such marriage arising out of the same is void.

Basically, under most of these laws (Parsi law being an exception), presence of mental disability at the time of marriage is grounds for annulling it. Such provisions can cause hurt to people whose mental illnesses are curable or controllable in nature as their spouses can make use of the provisions regarding annulment of marriage even after such an illness no longer exists. Also, provisions for unsoundness of mind being a ground for divorce throw light on how people with disabilities are put at a disadvantage solely based on their disability.³⁶ The author believes that although these laws aim at safeguarding the interests of the sane spouses, there should be a balance between the interests of a mentally ill person and her or her spouse. The rights conferred under Article 23(1)(a) of the UNCRPD³⁷ should be imported to the RPD Bill and can worded in such a

³² Special Marriage Act, No. 43 of 1954, §4(b).

³³ Special Marriage Act, No. 43 of 1954, §24.

³⁴ Indian Divorce Act, No. 4 of 1869, §19(3).

³⁵ Parsi Marriage and Divorce Act, No. 3 of 1936, §32(b).

³⁶ Rohan Saha, *Harmonizing Indian Laws with the UNCRPD with Specific Reference to Articles 13, 23 and 29*, CENTRE FOR DISABILITY STUDIES, <http://www.disabilitystudiesnalsar.org/bcp-harmonising-law.php> (Last visited on September 4, 2016).

³⁷ “States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that: (a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized.”

manner so as to overcome its inconsistency with the existing (personal) laws, where existence of a mental illness and the stigma associated with it provides the other spouse with an easily accessible ground for annulment or divorce. Accordingly, it is suggested that a *non obstante* clause in the Bill might be able to overcome this shortfall.

CAPACITY TO CONSENT AND ROLE OF THE GUARDIAN

In most cases concerning marriage, capacity of the person to be able to make sense of the contract of marriage is required. Consent and the ability to understand the duties and obligations that follow once a marriage is solemnised is necessary. Someone who is mentally ill may not be able to make sense of the marriage, however it is important to note that the capacity of understanding and role functioning varies from person to person. A person with a mild form of mental illness (like anxiety) is fairly capable of giving consent and understanding the concept of marriage, whereas a person with a more severe mental disorder (like schizophrenia) might not be able to do the same.³⁸ Therefore, before any measure regarding the nullity or dissolution of a marriage is to be taken, there is a need to look into whether a mentally ill person has the legal capacity to make decisions on her own accord and to have a sufficient level of understanding of her rights, duties and obligations arising out of this marriage.

Furthermore, the author opines that the guardian of a mentally ill person should only be given so much authority as to provide whatever inputs or support such a person needs to take decision. A guardian should ensure that anything that would directly be in contravention to what is good or if anything could cause further detriment to the mental health (example- stress arising from marriage) such an action doesn't take place. In *Raju Skariya v. Sheela*³⁹ it was alleged that the wife was a lunatic and the Court based on findings reiterating her unsoundness of mind, was of the opinion

³⁸ Siva Nambi & Siddarth Sarkar, *Mental Illness and Nullity of Marriage: Indian Perspective*, 37(3) INDIAN J. OF PSYCHOLOGICAL MEDICINE 366, 368 (2015).

³⁹ *Raju Skariya v. Sheela*, A.I.R. 1999 Ker. 381 (High Court of Kerala).

that she did not have the capability of understanding things or representing herself and appointed her mother as her legal guardian. Her mother then stated that her daughter was a lunatic at the time of marriage. In its decision, the Court used the ratio of *Ram Narain v. Rameshwari*⁴⁰ where it was held the extent of the mental disorder needs to be assessed and only if the extent is great enough that the spouse seeking divorce cannot reasonably be expected to continue staying with his/her wife then a decree of divorce should be granted. The Court further said that since her mother failed to adequately represent her and protect her interests, a fresh guardian should be appointed.

The author believes that marriage and divorce laws should only try and prevent or declare marriages as null and void or dissolved only in cases where the mental illness is severe and precludes one who is affected by such an illness from discharging their marital duties and responsibilities.⁴¹

CONCLUSION

It is important to read between the lines while analysing the changes being brought about to the disability laws. At first sight, the two new Bills might seem to be in complete harmony with the UNCRPD, however, both of them are not free from flaws and they need to be addressed. The author looked at several clauses in both the Bills and the provisions of the UNCRPD and it is clear that there are gaping holes in the provisions that can be related to mentally ill women. Before further active steps are taken to pass these Bills, they need to be reviewed thoroughly.

The paper addressed the issue of how mentally ill women have often been forced to undergo sterilisation or hysterectomy or have been stopped from having children. The reasoning behind this being the inconvenience faced by their caretakers or guardians is brimming with a lack of

⁴⁰ *Ram Narain v. Rameshwari*, A.I.R. 1988 S.C. 2260 (Supreme Court of India).

⁴¹ *Nambi & Sarkar*, *supra* note 38, at 369.

understanding for these women. It is also strongly argued that why should they be made to undergo such operations or be prevented from having children merely on the basis of a perceived disability? If they have the capability and capacity to lead a normal sexual life, then decisions regarding the same are no one's but theirs to make.

The author also looked at how marriage and divorce laws display one-sidedness by disfavours mentally ill persons, provisions of annulling the marriage merely on the basis that one was of unsound marriage at the time of marriage, irrespective of whether this unsoundness of mind is still present or not, greatly puts the mentally ill at an adverse and unfavourable position where their spouse can exercise such power over them. The requirement for the capacity to consent and understand the institution of marriage should be made flexible as the extent of a mental illness varies from person to person and not everyone should be barred from marrying on the reason of 'unsoundness of mind'. The *Raju Skariya* case threw light on how apathetic and insensitive guardians could be with regard to matters of ensuring maximum welfare for their wards. There is a need for bringing in better and more stringent laws that mandate such guardians to tread with caution while dealing with matters of marriage (and other family related issues) of the mentally ill while ensuring that everything plays out in accordance with their best interests.

BIBLIOGRAPHY

BOOKS

1. Phoebe S Liebig & S. Irudaya Rajan, AN AGING INDIA: PERSPECTIVES, PROSPECTS, AND POLICIES (2003).
2. Sarasu Esther Thomas, *The Draft Rights of Persons with Disabilities Bill, 2012: Some Loud Thinking on its Implications for Mental Health Provisions in Personal Laws* in SOCIAL EXCLUSION AND RIGHTS OF PERSONS WITH DISABILITY Vol. 3 (Nimushakavi Vasanti & Sarasu Esther Thomas eds., 2013).

3. Shella A.M. McLean & Laura Williamson, *IMPAIRMENT AND DISABILITY: LAW AND ETHICS AT THE BEGINNING AND END OF LIFE*, (2007).
4. William P. Statsky, *FAMILY LAW: THE ESSENTIALS* (3rd edn. 2014).

ARTICLES

1. Divya Sreedharan, *The Silenced Wombs*, THE HINDU (August 4, 2013), <http://www.thehindu.com/features/the-yin-thing/the-silenced-wombs/article4985813.ece>
2. Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 35(5) DUKE L.J. 806 (1986).
3. James T. Antony, *The mental health care bill 2013: A disaster in the offing?*, 56(1) INDIAN JOURNAL OF PSYCHIATRY 5 (2014).
4. John F. W. Meagher, *Crime and Insanity the Legal as Opposed to the Medical View and the Most Commonly Asserted Pleas*, 14(1) J. CRIM. L. & CRIMINOLOGY 46, 49 (1923).
5. Siva Nambi & Siddarth Sarkar, *Mental Illness and Nullity of Marriage: Indian Perspective*, 37(3) INDIAN J. OF PSYCHOLOGICAL MEDICINE 366 (2015).

WEB SOURCES

1. Amba Salelkar, *A Critique of The Draft Rights of Persons with Disabilities Bill, 2014*, KAFILA (February 3, 2014), <http://kafila.org/2014/02/03/a-critique-of-the-draft-rights-of-persons-with-disabilities-bill-2014-amba-salelkar/>.
2. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: WHY A CONVENTION?, <http://www.un.org/disabilities/convention/questions.shtml>.
3. Rohan Saha, *Harmonizing Indian Laws with the UNCRPD with Specific Reference to Articles 13, 23 and 29*, CENTRE FOR DISABILITY STUDIES, <http://www.disabilitystudiesnalsar.org/bcp-harmonising-law.php>.

MISCELLANEOUS

1. BLACK'S LAW DICTIONARY (Brayan A. Garner ed., 9th edn. 2009).
2. Council of Europe: Commissioner for Human Rights, *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities*, 10 (April 2012), <http://www.refworld.org/docid/50f7e2572.html>.
3. Office of the Registrar Gen. & Census Comm'r, *India, Measurement of Disability through Census National Experiences: INDIA (2011)*, <http://unstats.un.org/unsd/demographic-social/meetings/2016/bangkok--disability-measurement-and-statistics/Session-6/India.pdf>.

STATUTES

1. **HINDU MARRIAGE ACT, 1955.**
2. **INDIAN DIVORCE ACT, 1869.**
3. **MEDICAL TERMINATION OF PREGNANCY ACT, 1971.**
4. **PARSI MARRIAGE AND DIVORCE ACT, 1936.**
5. **SPECIAL MARRIAGE ACT, 1954.**

BILLS

1. **MENTAL HEALTH CARE BILL, 2016.**
2. **RIGHTS OF PERSONS WITH DISABILITIES BILL, 2014.**

TREATIES

1. **CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, 2006.**

CASES

1. Anant Phadke v. State of Maharashtra, Writ Petition No, 1527 of 1994.
2. Buck v. Bell, 274 U.S. 200.
3. Raju Skariya v. Sheela, A.I.R 1999 Ker. 381.

4. Ram Narain v. Rameshwari, A.I.R 1988 S.C. 2260.
5. Re Eve [1986] 2 SCR 388.
6. Re W [1993] 1 FLR 381.
7. Re X [1998] 2 FLR 1124.
8. Re Z (1999) 53 BMLR 53.
9. Suchita Srivastava v. Chandigarh Administration, A.I.R 2010 S.C. 235.

