

## **Legal Framework for PwD/PMI in India**

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The Rights of Persons with Disabilities Bill (2014) is to give effect to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and for matters connected therewith or incidental thereto. (Ratified by India without reservations). The new Mental Health Care Bill 2013 and RPD Bill 2014 are both to be read together. The former is only a Health Bill and the latter is for all other rights such as equality & non-discrimination, community life, protection from cruel and inhuman treatment, protection from abuse, violence and exploitation, protection and safety, home and family, reproductive rights, accessibility to voting, access to justice, education, skill development and employment, social security, health, rehabilitation and recreation, duties and responsibilities of appropriate governments, financial rights, special courts, national fund for persons with disabilities, Offences and penalties.

In the absence of a protective mechanism, people with mental disabilities are vulnerable to abuse besides their rights being violated. Evidence worldwide shows that mental disorders are amongst the leading causes of disability and impose exorbitant economic costs and impact quality of life of persons affected with mental disabilities. Despite the new National Mental Health Policy 2014 (India), we do not have a comprehensive response system to address mental health issues.

The National Mental Health Policy 2014 aptly summarizes the problem. "...incidence and severity of mental illnesses are on the rise. The World Health Organisation estimates that at any given time 10% of global population suffers from some form of mental illness and one in four persons will be affected at least once in their life time. Further, estimates suggest that by 2020, depression, the most common mental disorder, will be the second leading cause of disability worldwide, trailing only ischemic heart disease. The accurate figures of India are not available.

Mental illness is a key predictor for an increase in suicide and suicide attempts that affect a cross section of society particularly the youth and distressed. Poverty, deprivation and other vulnerabilities further exacerbate the ground situation.

Untreated mental illness results in stigma, marginalization and discrimination often worsening one's quality of life. This leads to a substantial loss of social and human capital, adversely impacting a large number of individuals and families"

In India persons with disabilities, as per Census 2001 are 2.19 Crore and are 2.13 percent of the total population of the Country. These include persons with visual, hearing, speech, locomotor and mental disabilities. It thus raises human rights issues. For ensuring the rights therefore of the persons with disabilities (PwD) a proper legal frame work has to be in place. Let us examine the existing International and National legal frame works for PwD and the other endeavours made by the Government of India.

### **International Legal framework**

#### The Role of Disability Legislation

Persons with disabilities often are excluded from the mainstream of the society and denied their human rights. Discrimination against persons with disabilities takes various forms, ranging from invidious discrimination, such as the denial of educational opportunities, to more subtle forms of discrimination, such as segregation and isolation because of the imposition of physical and social barriers. Effects of disability-based discrimination have been particularly severe in fields such as education, employment, housing, transport, cultural life and access to public places and services. This may result from distinction, exclusion, restriction or preference, or denial of reasonable accommodation on the basis of disablement, which effectively nullifies or impairs the recognition, enjoyment or exercise of the rights of persons with disabilities.

Most disability legislation and policies are based on the assumption that persons with disabilities simply are not able to exercise the same rights as non-disabled persons. Consequently the situation of persons with disabilities often will be addressed in terms of rehabilitation and social services. A need exists for more comprehensive legislation to ensure the rights of disabled persons in all aspects - political, civil, economic, social and cultural rights - on an equal basis with persons without disabilities. Appropriate measures are required to address existing discrimination and to promote thereby opportunities for persons with disabilities to participate on the basis of equality in social life and development.

One of the dominant features of legal thinking in twentieth century has been the recognition of law as a tool of social change. Though legislation is not the only means of social progress, it represents one of the most powerful vehicles of change, progress and development in society. Legislation at country level is fundamental in promoting the rights of persons with disabilities. While the importance - and increasing role - of international law in promoting the rights of persons with disabilities is recognised by the

international community, domestic legislation remains one of the most effective means of facilitating social change and improving the status of disabled persons. International norms concerning disability are useful for setting common standards for disability legislation. Those standards also need to be appropriately reflected in policies and programmes that reach persons with disabilities and can effect positive changes in their lives.

#### *International Legal Framework*

*(a) International treaties that are binding on States and create legal obligations to the States Parties.*

All international human rights instruments protect the human rights of persons with disabilities, as they apply to all persons. This principle of universality is reinforced by the principles of equality and non-discrimination, which are included in human rights instruments.

The core United Nations human rights human rights conventions are:

- *International Covenant on Civil and Political Rights;*
- *International Covenant on Economic, Social and Cultural Rights;*
- *Convention on the Elimination of All Forms of Racial Discrimination;*
- *Convention on the Elimination of All Forms of Discrimination against Women*
- *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment ;*
- *Convention on the Rights of the Child;*
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*

Some international and regional human rights conventions protect the rights of persons with disabilities specifically, or have provisions concerning persons with disabilities. These include:

- *ILO Convention concerning Vocational Rehabilitation and Employment (Disabled Persons)*
- *Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities*
- *Convention on the Rights of the Child (article 23);*
- *African Charter of Human and People's Rights (art. 18(4));*
- *The African Charter on the Rights and Welfare of the Child (article 13);*
- *European Social Charter (article 15); and*
- *Protocol of San Salvador (Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ) (article 6 & 9)*

*(b) International instruments that are non-binding, such as declarations and rules, and are useful in interpreting international standards and implementing them in national legislation.*

International instruments, such as declarations, resolutions, principles, guidelines and rules, are not technically legally binding. They express generally-accepted principles and represent a moral and political commitment by States. They also can be used as guidelines for States in enacting legislation and formulating policies concerning persons with disabilities.

General policy instruments, such as the outcome documents of world summits and conferences, are applicable to persons with disabilities. These instruments include, for example, the Copenhagen Declaration and Programme of Action adopted at the World Summit for Social Development (6-12 March 1995), and the Millenium Declaration and the Millenium Development Goals adopted at the United Nations Millenium Summit in September 2000.

Several disability-specific non-binding international instruments have been adopted at the international level. The instruments include:

- *Declaration of the Rights of Mentally-Retarded Persons,*
- *Declaration on the Rights of Disabled Persons,*
- *World Programme of Action concerning Disabled Persons,*
- *Tallinn Guidelines for Action on Human Resources Development in the Field of Disability,*
- *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care,*
- *Standard Rules on the Equalization of Opportunities for Persons with Disabilities,*
- *ILO Recommendation concerning Vocational Rehabilitation of the Disabled,*
- *ILO Recommendation concerning Vocational Rehabilitation and Employment (Disabled Persons),*
- *Sundberg Declaration on Actions and Strategies for Education, Prevention and Integration, adopted by the UNESCO World Conference on Actions and Strategies for Education, Prevention and Integration, Malaga (Spain), 2 - 7 November 1981,*
- *Salamanca Statement and Framework for Action on Special Needs Education, adopted by the UNESCO World Conference on Special Needs Education: Access and Quality, Salamanca (Spain), 7 - 10 June 1994 .*

The comity of nations adopted the *United Nations Convention for Rights of Persons with Disabilities* (UNCRPD) in 2006, making a paradigm shift from a social welfare to a human right in respect of disabilities including mental disability. There are eight guiding principles that underlie the Convention and each one of its specific articles:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons
- b. Non-discrimination
- c. Full and effective participation and inclusion in society
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- e. Equality of opportunity
- f. Accessibility
- g. Equality between men and women
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities

India signed the UN Convention on 30th March, 2007, the day it opened for signatures.

#### **Developments in India - Legal Frame work**

The legislations in past were pertaining to the custodial aspects of persons with mental illness and protection of the society. Indian penal and commercial laws are also concerned with competency, rights, duties & responsibility of mentally disabled persons and balancing with societal interests. *The Mental Health Act 1987 and Persons with Disability Act 1995* are being amended/redrafted /revised. The debate for provisions for legal capacity for persons with mental illness in absolute terms continues because of diverse views. Historically the laws in respect of persons with mental disabilities can be traced to the British period.

Mental disabilities have different connotations in law than how a psychiatrist will deal with it. While the psychiatrist's concern is with the diagnosis of mental disorders and the treatment of the patient, the court is concerned with criminal or civil liability in determining competency, threat and responsibility due to mental disability. Earlier legislations though were concerned with this, however it gradually shifted to the rights of the mentally disabled/ill persons.

### *Initiatives of the Government of India w.r.t., Pwd/PMI*

- *Ministry of Social Justice and Empowerment (MoSJE) has come out with a draft proposal for issue of UDID (Unique Disability ID card) for all disabled persons. This includes PMI under the 8 disabilities presently identified under PWD Act 1995; PMI also figure in the 19 disabilities identified under the Draft RPDA Bill 2014.*
- *Two Departments : "Department of Social Justice and Empowerment" and "Department of Disability Affairs" created under the Ministry of Social Justice and Empowerment (MoSJE) with effect from May 14<sup>th</sup>, 2012*

### **Constitutional Provisions**

Article 21 of the constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedures established by law. Further the Representation of People Act, 1950 lays down that a person is disqualified for registration in an electoral roll if he is of unsound mind and stand so declared by a competent court. Consequently the persons so disqualified cannot hold constitutional posts or others as laid down by the law.

The Constitution of India ensures equality, freedom, justice and dignity of all individuals and implicitly mandates an inclusive society for all including the persons with disabilities. The Constitution in the schedule of subjects lays direct responsibility of the empowerment of the persons with disabilities on the State Governments. (Entry 9 State List, Seventh schedule). Therefore, the primary responsibility to empower the persons with disabilities rests with the State Governments. In addition the Directive Principles of State Policy in Article 39-A & Article 41 specifically provide for equal justice and free legal to PwD, besides right to work, to education and to public assistance.

Under Article 253 of the Constitution read with item No. 13 of the Union List, the Government of India enacted "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995", in the effort to ensure equal opportunities for persons with disabilities and their full participation in nation-building. The Act extends to whole of India except the State of Jammu and Kashmir.

India is a signatory to the Declaration on the Full Participation and Equality of People with Disabilities in the Asia Pacific Region. India is also a signatory to the Biwako Millennium Framework for action towards an inclusive, barrier free and rights based society. India signed the UN Convention on

Protection and Promotion of the Rights and Dignity of Persons with Disabilities on 30<sup>th</sup> March, 2007, the day it opened for signature. India ratifies the UN Convention on 1<sup>st</sup> October 2008.

#### *Laws enacted during British period*

For the care and treatment of the mentally ill the following laws were enacted during the British period:

- The Lunacy (Supreme Courts) Act, 1858
- The Lunacy (District Courts) Act, 1858
- The Indian Lunatic Asylum Act, 1858 (with amendments passed in 1886 and 1889)
- The Military Lunatic Acts, 1877.

These Act's, however, dealt with the process of admitting mental patients besides the procedure or guidelines for establishing a mental asylum. Later with growing public awareness about the pitiable conditions of mental hospitals highlighted as a part of the growing political awareness and nationalistic views spearheaded by the Indian literati and culturati, resulted in the the Indian Lunacy Act, 1912 (ILA-1912). While the new Act improved over the earlier legislations in many ways the focus still was on shielding the society from dangerousness of mentally ill and taking care that no sane person is admitted in these asylums. After the Universal Declaration of Human Rights, The Mental Health Act 1987 (No. 14 of 1987) replaced ILA-1912, due to consistent efforts by various organisations.

#### **The Mental Health Act 1987**

Salient features of the Mental Health Act (MHA) are as under :

- Definition of mental illness in a progressive way and introducing modern concept of their treatment with stress on care and treatment rather than on custody.
- Establishment of Central/State Mental Health Authority to regulate and supervise the psychiatric hospitals/nursing homes and to advise Central/State Governments on Mental Health matters.
- Admission in special circumstances in psychiatric hospital/nursing homes. Provisions of voluntary admission and admission on the reception orders were retained.
- Role of Police and Magistrate to deal with cases of wandering PMI and PMI cruelly treated.
- Protection of human rights of PMI.
- Guardianship and Management of properties of PMI.
- Provisions of penalties in case of breach of provisions of the Act.

Despite improvements over ILA 1912, MHA 1987 was subjected to criticism as it failed to address the issues relating to human rights and mental health care. MHA-1987 is presently under revision to make it UNCRPD compliant.

*Persons with disability (equal opportunities, protection of rights, full participation) Act, 1995 (PDA-95)*

With a view to provide equal opportunities, protection of rights and full participation to PWD's vis-à-vis non-disabled persons, PDA was enacted in 1995. The act was also meant to prevent abuse and exploitations of PWD. It provides alternative means of access to the development programmes, responsibilities of the government to plan strategies for comprehensive development programmes and also provisions for integration of PWD's into the social mainstream. This Act is also being redrafted/revised/ amendment in the light of UNCRPD-2006.

However the MoSJE ,Deptt. Of Empowerment of Pwd GOI has issued a scheme for implementation of MHA 1995 on 11<sup>th</sup> February 2015 under which grants-in-aid will be released to the State Governments for implementing the scheme.

*Rehabilitation Council of India Act, 1992*

The Act provides for constitution of the Rehabilitation Council of India for regulating the training of rehabilitation professionals, maintenance of a Central Rehabilitation Register, recognized rehabilitation qualifications, minimum standards of educations etc.

*National trust Act-1999*

This Act was enacted in the year 1999 for the welfare of persons with autism, cerebral palsy, mental retardation and multiple disabilities to enable and empower them to live as independently and as close to the community to which they belong and to facilitate the realization of equal opportunities and protection of rights. This Act is also revised to make it UNCRPD-2006 compliant & comprehensive. Management of properties of PWD's /PMI's is supposed to be covered under the amended Act.

*United Nations convention for rights of persons with disabilities-2006 and Indian laws*

UNCRPD was adopted in December, 2006. It was ratified by the Parliament of India in May, 2008. Countries that have signed and ratified the UNCRPD are required to bring their laws and policies in harmony with it. Therefore, all the disabilities laws in India are currently under process of revision. The convention marks a paradigm shift in respect of disabilities from a social welfare concern to a human right issue. The new paradigm is based on presumption of legal capacity, equality and dignity. According

to article 2 of the convention, PwD will enjoy legal capacity on an equal basis for all aspects of life. Article 3 calls the state to take appropriate measures to provide access to support by PwD to exercise the legal capacity. Article 4 calls for safeguards to prevent abuses of the system of support required by PwD. There is no explicit prohibition of forced interventions in the UNCRPD, but neither does the Convention permit compulsory mental health care.

*Provisions for PwD/PMI in other Acts in India:*

The provisions under the following heads are enumerated below:

- *Indian contract laws*
- *Marriage and divorce*
- *Capacity to make a will /Testamentary Capacity*
- *Criminal Liability*

Under the Indian Contract Act, 1872 a person has to be of of sound mind to make a valid contract. Soundness of mind means that the person at the time when he makes the contract is capable of understanding it and of forming a rational judgment as to its effect upon his interest. A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Under Hindu Marriage Act, 1955,(HMA) Section 5 interalia provides the conditions of marriage as under:

(ii) at the time of the marriage, neither party -

(a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity or epilepsy;

HMA further provides (Sec 12) that any marriage shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

(b) that the marriage is in contravention of the condition specified in clause (ii) of

Section 5; (as stated above) and section 13 provides that a divorce can be sought on the ground that the spouse has been incurably of unsound mind, or has suffering continuously or intermittently from mental

disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Under Special Marriage Act, 1954, the grounds for marriage, divorce and judicial separation are practically the same as those in the Hindu Marriage Act, 1955. The Special Marriage Act, 1954 is meant for any person in India and Indian nationals abroad, irrespective of the faith that the individual may profess. A marriage solemnized in any other form can be registered under this Act.

Under the prevalent Muslim Law, marriage is a type of contract. Therefore, a Muslim who is of sound mind and has attained puberty is qualified to marry. According to Muslim Marriage Act, 1939, a woman married under Muslim Law is entitled to obtain a decree of divorce if her husband has been insane for a period of 2 years.

Under Christian Law, marriage is voidable, if either party was a lunatic or idiot. Christians can obtain divorce under Indian Divorce Act. 1869 (as amended in 2001) on grounds of unsoundness of mind provided: (i) it must be incurable (ii) it must be present for at least 2 years immediately preceding the petition. Divorce is not admissible on ground of mental illness under the Parsi Marriage and Divorce Act, 1936. However, divorce can be obtained if the defendant at the time of marriage was of unsound mind, provided the plaintiff was ignorant of the fact and the defendant has been of unsound mind for a period of 2 years upwards and immediately preceding the application.

#### *Capacity to make a will/Testamentary capacity*

Section 59 of the Indian Succession Act, 1925 provides that the following conditions be fulfilled for the testamentary capacity of a person:

- That the person be of sound mind not being a minor may dispose of his property by will.
- A person who is ordinarily insane may make a will during interval in which he is of sound mind.
- No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

The law requires that the person should be in his senses (mentally sane) while signing and confirming the will (voluntarily) and should be aware of his assets and how he desires or wants the same to be appropriated after his death. It has to be voluntarily done without any duress or coercion.

### *Liability under the Criminal Law*

Indian Penal Code, 1860 states that “Nothing is an offence, which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.”

McNaghten Rules define the criminal responsibility of mentally ill in our courts and it has been incorporated in the sec 84. Burden of proof lies on the person claiming insanity as a defence under the Indian Penal Code. Sec 89, IPC provides protection for any action done in good faith for the benefit of a person of unsound mind by or by consent of the guardian or other person having lawful charge of that person. Sec 305, Indian Penal Code (IPC) provides for punishment of death or imprisonment of life for abetment of suicide by an insane person.

### **The salient features of the Rights of Persons with Disabilities Bill, 2014/ Mental Health Care Bill 2013**

Some of the salient features are: (i) Nineteen specified disabilities have been defined; (ii) the persons with disabilities enjoy various rights such as right to equality, life with dignity, respect for his or her integrity, etc., equally with others; (iii) duties and responsibilities of the appropriate Government have been enumerated; (iv) all educational institutions funded by appropriate Government shall provide inclusive education to the children with disabilities; (v) a National Fund is proposed to provide financial support to persons with disabilities; (vi) stakeholders’ participation in the policy making through Central and State Advisory Boards; (vii) increase in reservation in posts from existing three per cent. to five per cent. in the vacancies for persons or class of persons with benchmark disabilities in every establishment and reservation of seats for students with benchmark disabilities in higher educational institutions; (viii) setting up of National Commission and State Commission to act as Grievance Redressal Mechanism, monitor implementation of the proposed legislation replacing the Chief Commissioner and State Commissioners for persons with disabilities, respectively; (ix) guidelines to be issued by the Central Government for issuance of certificates of specified disabilities; (x) penalties for offences committed against persons with disabilities; and (xi) Court of Session to be designated as Special Court by the State Government in every district to try offences.

The new **Mental Health Care Bill 2013** marks a major shift in the perspective towards PMI. For one, it recognizes their rights on par with other Indian citizens. It also makes right to treatment as a

fundamental right. Besides, it gives powers to PMI to identify a person of their choice (Nominated Representative) and also choose their line of treatment (Advance Directives) but with caution. It is an entirely rights based proposal and hence ushers a new era of hope for the PMI. Critics however are not happy with this bill and argue that the definition of PMI should be narrower so that the various agencies are able to take care of PMI besides their dissatisfaction with funding and penal provisions.

### **Conclusion**

Majority of the laws discussed above dealing with PMI in Indian legal framework were framed during the colonial rule or can be traced to British Rule and consequently the imprint of the Britisher's can easily be seen. Laws relating to PMI's are presently on crossroad as most of them are being revised to make them UNCRPD-2006 compliant. Issues pertaining to legal capacity to PMI's in absolute terms are being raised for inclusion. The question of free legal capacity of the PMI and capacity to manage their own financial matters are matters of concern. The rights of legal guardian for PMI in MHA 1987 is replaced by self-rights with or without support from others. The nature and extent of support depends on the degree of need based on mental impairment. However, to conclude, the paramount aim of any legal provision should be the welfare of the PMI and the society at large.

### *Articles/Acts/Conventions relied upon:*

1. <http://kafila.org/2014/02/03/a-critique-of-the-draft-rights-of-persons-with-disabilities-bill-2014-amba-salelkar/>
2. <http://indianjpsychiatry.org/article.asp?issn=0019-5545;year=2013;volume=55;issue=6;spage=177;epage=181;aulast=Narayan>
3. <http://www.un.org/esa/socdev/enable/disovlf.htm>
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5. [www.un.org/esa/socdev/enable/disovlf.htm](http://www.un.org/esa/socdev/enable/disovlf.htm)
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12. Indian Lunatic Act 1912.
13. The Mental Health Act 1987.
14. Rehabilitation Council of India Act, 1992.
15. Persons with disability (equal opportunities, protection of rights, full participation) Act, 1995.
16. National trust Act-1999.
17. United Nations convention for Rights of Persons with Disabilities-2006
18. Mental Health Care Bill 2013.
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