

## Potential for Matrimonial Initiatives for Persons with Mental Developmental Disabilities

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### Abstract

Persons with Mental Developmental Disabilities(MDD) are still yearning for their basic rights. Whether they are considered as human beings or not is a big question mark because of the attitude of the legal jurisprudence and society at large. Thanks to the international conventions on the rights of the persons with disabilities and progressive judgments of the Supreme Court of India, the persons suffering from the given disabilities who are at the borderline are mandated to enjoy marital life, which is a fundamental human right of every individual and such individuals cannot be barred from enjoying such rights on the pure grounds of legal consent, medical condition, social customs, traditions, and religious practices. The frontiers of justice have to be enhanced so that the dignity of persons with MDD is practiced at par with other human beings. They are as much human as the others.

**KEYWORDS:** Mental Developmental disabilities, marital laws, right to marry, rights of persons with disabilities

### *Table of Cases:*

<b>S Particulars</b>	<b>Citation</b>
1 Ram Narain Gupta v. Smt. Rame: Gupta	AIR1988SC2260 (MANU/SC/0402/1988)
2 Pinninti Venkataramana v. State	AIR 1977 A. P. 43
3 Babui Panmato Kuer v. Ram Aagya S	AIR 1968 Pat 190
4 Sharda Vs. Dharmpal	AIR2003SC3450 (MANU/SC/02 60/2003)
5 Vinita Saxena Vs. Pankaj Pandit	AIR2006SC1662 (MANU/SC/8038/2006)
6 Rita Nijhawan v. Balkrishan Nijhawan	MANU/DE/0031/1973

### *The urgency for Taking up the Issue of Marriage of the Mentally Disabled on Legal Platforms*

“Mentally retarded individuals have the same legal rights to marry, drive cars, and own homes as any other American”, says Dr. Richard Redding of the University of Virginia's Institute of Law, Psychiatry, “and Public Policy, and they need not pass any competency

tests. So long as a mentally retarded individual can pass the DMV tests, he may drive a car; so long as he can pay the rent, a mentally retarded person may live where he pleases".<sup>i</sup>

Unfortunately, it is a world wide phenomenon that jurisprudence has given a deaf ear to the rights of mentally challenged persons, despite the fact that they are as much human as one can claim to be. In a developed country like the USA, more than 30 states prohibit a matrimonial alliance for mentally challenged persons. If a person gets a chance to get married out of the ambit of law, when a case comes to the courts, the persons appearing for the parties as a guardian, senses coercion or collusion behind this matrimonial alliance. Despite this, the benefit of equality before law or equality of law is available to all the citizens of most of the nations. Apart from that, the right to liberty of life is open to all human beings in most legal jurisprudences. The mandate of the Constitution of America or any other country like India, confirms these rights in unequivocal words. Apart from the constitutional dictum, the Indian legislature has ignored the needs of individuals with disabilities in particular. Specifically, current law puts severe restrictions upon individuals with mental developmental disabilities from enjoying a marital life. There is a need for amending such restrictions on marriage because they violate the rights of the individual, rights that India has ratified as real in the international arena and therefore is obligated to recognize nationally by amending its municipal laws. For the purpose of our broad understanding of the given discussion, one must go through the changing definition of Marriage as it is understood in the legal and social context.

As per Merriam Webster dictionary, Definition of *marriage*

*1a: the state of being united as spouses in a consensual and contractual relationship recognized by law*

*b: the mutual relation of married persons: WEDLOCK*

*c: the institution whereby individuals are joined in a marriage*<sup>ii</sup>

As per The Free Dictionary by Farlex, Marriage

*The legal status, condition, or relationship that results from a contract by which one man and one woman, who have the capacity to enter into such an agreement, mutually promise to live together in the relationship of **Husband and Wife** in law for life, or until the legal termination of the relationship.*<sup>iii</sup>

English Oxford living dictionaries, Marriage

*The legally or formally recognized union of two people as partners in a personal relationship (historically and in some jurisdictions specifically a union between a man and a woman)*<sup>iv</sup>

Historically, marriage is understood to be a relationship between a male, a female and their families whose primary purpose is to raise offspring.<sup>v</sup> However, today many people use the word to describe a committed, loving relationship with or without children. In many societies Marriage is often viewed as a civil contract.

Article 16 of the Universal Declaration of Human Rights declares that "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses."<sup>vi</sup> The Cairo Declaration on Human Rights in Islam gives men and women the "right to marriage" regardless of their race, color or nationality, but not religion.<sup>vii</sup>

Thus, from the given definitions people marry for many reasons, but usually one or more of the following: legal, social, and economic stability; the formation of a family unit; procreation and the education and nurturing of children; legitimizing sexual relations; public declaration of love; or to obtain citizenship.

In recent times the marital life has undergone several changes. The conventional model of marriage is replaced by more extensive and radical modifications. Now marriage is broadly understood to be not only a just legal sanctity but outside it as living relationship heterosexual affair or a relationship within the same sex affair, called as a civil union for personal emotional needs and physical gratifications which is recognized by many States in the recent times.

Those who adhere to the conventional model of marriage are vehemently opposed to any kind of marital relations entered into by the Persons with mental challenges. Such proponents put forward a basic argument that individuals with mental developmental disabilities are unable to express consent and therefore cannot enter into a contract such as marriage. But without going in to the root of the problem they fail to acknowledge that legal precedence has established two relevant circumstances in which consent is not required for a contract. First, there are cases where, children have validly married, where their guardians' consented to, and second, individuals with mental developmental disabilities have to undergo medical procedures that generally require consent even if they are legally unable to give it. These two cases provide a valuable stereo type insight into the issue presently at hand, and indicate that the state can amend family law to grant individuals with mental developmental disabilities their deserved right to marry and draw emotional comfort by ensuring physical companionship as others do. In several cases, where mental retardation is not the real impediment in enjoying such relations, they could validly be married by obtaining a relevant certificate from a psychiatrist or a body of such competent persons empowered by the State to issue such licence, where they could be declared functional for the purposes of marriage.

### ***Violation Of Matrimonial Rights Is Against The Rights Enumerated Under Supreme National Law:***

First and foremost--The Indian Constitution states in the Preamble that the goal of government is to, among other things, "secure to all its citizens... equality of status and of opportunity." This principle is one of the guiding ideals of the Indian legal system. Marriage bans violate such ideals by discriminating against persons with disabilities.

Simply having a mental disability is not sufficient grounds for divorce. The Supreme Court found in Ram Narain Gupta v. Smt. Rameshwari Gupta that:

The context in which the ideas of unsoundness of ‘mind’ and ‘mental disorder’ occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of the ‘mental disorder’. Its degree must be such that the spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities are not recognized as grounds for the grant of the decree. If the mere existence of any degree of mental abnormality could justify the dissolution of a marriage few marriages would, indeed, survive the law.<sup>viiiix</sup>

Merely possessing a mental disorder is not grounds for divorce since some do not make inhibit the success of a marriage, and yet the Hindu Marriage Act of 1955 and other religious personal laws exclude even individuals with those disorders from marrying.

For example, the Hindu Marriage Act of 1955 notes in chapter 2, article 5 clause i.b that for a marriage to be valid, it is required that neither individual “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.” Laws such as these perpetuate a wrong idea that the mentally disabled are unable to maintain an emotional relationship. The use of the word “unfit” in the phrase “unfit for marriage” is particularly unsettling, as it suggests that these individuals are somehow less worthy or less desirable.

The courts have recognized the importance of respecting persons with disabilities. The Supreme Court observed in *Ram Narain Gupta Vs. Rameshwari Gupta* that the reason why an individual must demonstrate how the spouse’s mental impairment is of such a degree and extent as to make marriage impossible can be explained as follows:

This medical-concern against too readily reducing a human being into a functional non-entity and as a negative-unit in family or society is law’s concern also and is reflected, at least partially, in the requirements of Section 13 (1) (iii).<sup>x</sup>

However, while Divorce Law places such rules, marriage law does not and discriminates against persons with disabilities by reducing them to the label of disabled and stripping them of their rights.

Thus, family law must be amended so that it fits the principles introduced in the Constitution.

***In Violation Of Rights Enumerated By Relevant International Law:***

Secondly—Matrimonial sanctions on the mentally disabled violate international laws that India has pledged to uphold. Specifically, Article 23 of the UN Convention on the Rights of Persons with Disabilities states that “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.”<sup>xi</sup> Additionally, the World Health Organization (WHO) has acknowledged the right of the mentally disabled to marry. In a report suggesting what legislation countries should pass to protect persons with disabilities, it clearly declares that “persons with mental disorders are entitled to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights,” and among the rights listed in the document is the right to marry (WHO 13).<sup>xii</sup> India may not be bound to follow these recommendations, especially since the WHO document is only a suggested reference for lawmakers. However, the fact that these international organizations are making such proposals reveals that the right of persons with disabilities to marry is widely recognized and that India ought to do the same.

On October 1, 2007 India ratified the Convention. Doing so means that India agrees to abide by all principles it sets forth and reform domestic laws should they be in contravention. Although the UN does not have an enforcement arm and so cannot force India to do so, it reflects poorly on the Indian government to fail to conform, but the Constitution of India, Article 253 mandates the Parliament of India to enact laws to give effect to international conventions “Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the Territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any International Conference, Association or Other body.”<sup>xiii</sup> Ratifying is significant in the international arena because it holds meaning as a promise and a commitment, and if countries fail to uphold this, then ratification will lose its meaning. The Indian Parliament enacted the RPWD Act to provide lip service to a family life of persons with disabilities under Section 9 and 10 of the act. It did not give any direct reference to the marital rights of persons with disabilities in general and rights of mental developmental disabilities in particular.<sup>xiv</sup>

***Thirdly-- The National Government Must Protect the Rights of Persons with mental developmental disabilities, since now the definition of legal consent has been widened for specific purposes:***

Having established these rights, there are two reasons why the Indian government is obligated to protect the rights of individuals with disabilities. First, by ratifying the UN Convention on the Rights of Persons with Disabilities India acknowledged that persons with disabilities are entitled certain rights and privileges.

Second, under Indian matrimonial laws persons with mental developmental disabilities may not be considered legal consenting persons, however they are entitled to be treated with dignity and respect and therefore still possess certain human rights. Harvard philosopher Martha Nussbaum explains in her book Frontiers of Justice that “dignity does not rest on some actual property of persons” and therefore does not require any pre-requisite traits from the individual (Nussbaum 7). Even if an individual is severely disabled and does not possess the capacity to reason, he or she still is a valuable individual who can contribute in a different way to society, perhaps by providing love, comfort, or inspiration to a family member, etc.

***Fourthly--The Issue of Consent:***

Proponents of the status quo may argue that even if these rights exist and also if the government has an obligation to uphold them, in the real world there is no way to do so because individuals with mental developmental disabilities cannot legally give consent. Therefore, they might argue, there is no way to tell whether a mentally disabled individual wishes to marry or not, and it is a more significant violation of rights to allow the families of such individuals make decisions for them. Thus, it is best to prohibit such marriages.

However, individuals do not lose their rights simply because they cannot consent. A perfectly healthy person who in old age contracts Alzheimer's and loses his memory so that he can no longer give legal consent, has not suddenly lost all of his rights. An individual who is heavily under the influence of alcohol or narcotics loses his ability to provide legal consent but he also does not lose his powers. There is always the possibility that an individual with a disability will be cured and become healthy. Even if this possibility does not exist, disability is still simply a condition and it does not change the existence of fundamental human rights. Therefore, it is essential to emphasize a capability-building approach and provide a method for individuals with mental developmental disabilities to actualize their rights.

***Fifthly--Sliding Scale of Consent: Silent Consent/Non-Verbal Consent:***

Specifically Indian matrimonial laws currently require that individuals be able to explicitly give consent for it to be legal. However, this excludes many individuals who could enjoy a beautiful marriage, simply because they cannot express themselves in that fashion.

The capabilities of the mentally disabled must be built so that they can express their interest or disinterest in another individual. One way in which this can be accomplished is by adopting a "sliding scale of consent" based on how significant the decision is to the individual. Proposed by Brock D. Buchanan, the sliding scale of consent allows caretakers to best provide for individuals with disabilities. For example, no permission may be needed to give a person food—even if the individual resists, the caretaker can demand he or she obeys. On the other hand, a caretaker cannot force an individual who is mentally disabled to do something hazardous because that would require explicit consent. Marriage falls between these two points. It is a significant decision that a caretaker should not force on someone who is disabled, but it is also not so dangerous that the lack of a legal verbal consent should prohibit it. Silent consent, for example, would be sufficient.

Of course, this does not mean that an individual should be forced to marry someone against his or her own will. There will still be a standard of consent and an expression of distaste or dislike for the future spouse would therefore be enough to prevent a marriage. The judge would be responsible for evaluating the case and determining whether the mentally disabled individual wishes to consent or, in the case of silent consent, is not opposed to the marriage.

### ***Sixthly--Legality of Nonverbal Consent:***

Those opposed to this change may argue that even if the mentally disabled are entitled to marry based on general principles that the Indian government and international organizations have made, this simply is not practical since these individuals are unable to give consent. However, there are two case precedents that indicate that this is not a reason to reject amending current family laws.

#### **Case 1: Child Marriage**

First, in child marriages the child's legal guardian gives consent for the union, allowing the wedding to take place even though the child is legally unable to give consent. This was upheld by the Supreme Court in *Pinninti Venkataramana v. State*<sup>xv</sup>. This case established that although child marriages are prohibited by the Child Marriage Restraint Act, once a child marriage is solemnized, it is valid under the law. This is because the guardian is responsible for the child and can therefore legally make decisions for him or her. Similarly, the mentally disabled are in the care of their guardians and follow the decisions made by their caretakers. Thus, the legal guardians of the mentally disabled can give consent for marriage.

This was also illustrated in the case *Babui Panmato Kuer v Ram Aagya Singh*, an appeal under section 28 of the Hindu Marriage Act, 1955.<sup>xvi</sup> The appellant petitioned for dissolution of her marriage with the respondent on the grounds that her consent was obtained by fraud. Her parents arranged her marriage and then allowed her to overhear them discussing his appeal. Misled, she silently consented to the wedding. The court found in her favor and annulled the marriage. The reason was not that her consent was silent, but that it was obtained fraudulently. Therefore, this case established that silent consent is sufficient for arranged marriages. Thus, since the courts already recognize silent consent and marriage for non-legal persons (children) if the parents approve, it follows that the mentally disabled ought to be permitted to marry if their guardians approve.

#### **Case 2: Medical Procedures**

Second, medical procedures can be completed on a mentally disabled person who is unable to give consent if that procedure is deemed necessary for the health and well-being of the mentally incapacitated individual.

The courts have established that in the case of medical procedures, "if the patient is incapable of giving or refusing consent, either in the long term or temporarily... the patient must be cared for according to the authority's judgment of the patient's best interests."<sup>xvii</sup>

Additionally, the World Health Organization has declared that "involuntary patients should also be treated on a voluntary basis except in certain rare situations, e.g. if they lack the capacity to give consent and if treatment is necessary in order to improve mental

health and/or prevent a significant deterioration in mental health and/or prevent injury or harm to the patients or other people” (WHO 4).

Here it should be noted with emphases that marriage is vital in fulfilling both biological and emotional needs of the individual, and it is an essential aspect of inclusion and community integration, especially for women.

In the case of Vinita Saxena Vs. Pankaj Pandit the appellant claimed that she was “denied the matrimonial bliss of physical relation by the respondent because of his incompetence which itself constitute cruelty for a married woman.” The court ruled in her favor.<sup>xviii</sup> It referred to the case Rita Nijhawan v. Balkrishan Nijhawan in which the Division Bench observed that:

It cannot be denied that sexual activity in marriage has an extremely favorable influence on a woman’s mind and body. The result being that if she does not get proper sexual satisfaction it will lead to depression and frustration.<sup>xix</sup>

Marriage is not just a social phenomenon it is also a health issue, and so it requires a lower threshold of consent.

### ***Concluding Notes:***

Therefore, marriage laws must be amended to conform to nationally and internationally accepted standards of equality for the developmentally disabled. The rules must protect the developmentally disabled because their human dignity is just as valuable as any other individuals’. Although some may claim that the developmentally disabled are unable to give consent, this is only because the proper changes have not been made to make it possible for them to express their feelings. Only when the notions of consent change will the mentally disabled be able to enjoy the benefits of marriage and live a more balanced and enjoyable life.

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- <sup>xiv</sup> RPWD ACT 2016, S.9 (1) No child with disability shall be separated from his or her parents on the ground of disability except on an order of competent court, if

required, in the best interest of the child. (2) Where the parents are unable to take care of a child with disability, the competent court shall place such child with his or her near relations, and failing that within the community in a family setting or in exceptional cases in shelter home run by the appropriate Government or non-governmental organization, as may be required. S.10. (1) The appropriate Government shall ensure that persons with disabilities have access to appropriate information regarding reproductive and family planning. (2) No person with disability shall be subject to any medical procedure which leads to infertility without his or her free and informed consent.

Retrieved on 2.5.19 from  
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<sup>xv</sup> Pinninti Venkataramana v. State, AIR 1977 A. P. 43

<sup>xvi</sup> Babui Panmato Kuer v. Ram Aagya Singh, AIR 1968 Pat. 190. Iv

<sup>xvii</sup> As stated in Sharda Vs. Dharmpal, AIR2003SC3450 (MANU/SC/02 60/2003):  
“In re M.B. [(As Adult: Medical Treatment) 1997 (2) F.C.R. 541] when surgical or invasive treatment may be needed by a patient, certain guidelines had been enumerated in St. George’s Healthcare N.H.S. Trust v. S. Regina v. Collins and Ors. Ex parte S. reported in 1998 (3) Weekly Law Reports 936.”

<sup>xviii</sup> Vinita Saxena Vs. Pankaj Pandit, AIR2006SC1662 (MANU/SC/8038/2006):  
the appellant requested a divorce on the grounds that the respondent was of unsound mind and had subjected her to physical and mental cruelty.

<sup>xix</sup> Rita Nijhawan v. Balkrishan Nijhawan, MANU/DE/0031/1973