A NOTE ON ADVANCE DIRECTIVE UNDER THE MENTAL HEALTHCARE ACT, 2017

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ABSTRACT

The Mental Healthcare Act, 2017 ("Act") came into force to give effect to India's obligation under the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"). This paper analyzes the provisions relating to advance directives in the Act. Advance directive is an essential tool to affirm personhood and autonomy for persons with psychosocial disabilities. Currently, the provisions on advance directives are contrary to the letter and spirit of the UNCRPD. The Act provides for suspension of advance directives during an emergency treatment when it should be honoured the most. It also provides for revocation of the directives by others which compromises the integrity of this instrument. The Act provides for community living, an essential shift from substituted capacity to supported capacity, to realize universal legal capacity under Article 12 of the UNCRPD. This paper argues that for an effective implementation of advance directives deinstitutionalization and a shift to community living is essential. We must look to the General Comment I (on universal legal capacity) and General Comment V (on living independently and being included in the community) of the UNCRPD to strengthen advance directives under the Act.

I. INTRODUCTION

In this note, I argue that the provisions relating to advance directive under the Mental Healthcare Act, 2017 (**"**Act**"**) must be interpreted to affirm legal capacity of persons with psycho-social disabilities.[1] Further, I suggest that it is essential to strengthen the right to community living which will provide support for persons with disabilities to affirm their legal capacity through effective use of advance directives. A prerequisite for this is to move away from institutionalization as a method of treatment. In doing this, attention must be given to the General Comment I and V adopted by the Committee on the Rights of Persons with Disabilities. These General Comments provide crucial guidelines to State Parties on realizing the rights under Article 12 and Article 19 of the United Nations Convention on the Rights of Persons with Disabilities (**"**UNCRPD**"**) on the right to legal capacity and the right to independent living and being included in the community respectively.

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[1] I use the phrase psycho-social disability to indicate that psychological disabilities also are also socially determined.

The Act came into force to align and harmonize existing laws with the UNCRPD which India has signed and ratified. At the heart of the UNCRPD is Article 12 on universal legal capacity[2] which provides that, *"States parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life"*. General Comment I defines legal capacity as *"the capacity to be both a holder of rights and an actor under the law. Legal capacity to be holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes the person as an agent with the power to engage in transaction and create, modify or end legal relationships*."[3] Despite the coming into force of the Act, full realization of legal capacity of persons with disabilities is yet to be achieved.[4]

Advance Directive is one tool towards realizing legal capacity of persons with psycho-social disabilities. Section 5 of the Act provides for every person who is not a minor to have a right to make an advance directive under the Act to specify the ways to be followed and not to be followed for care and treatment. The directive is executed in the manner set out in the Act. The directive is made at a prior time to ensure that when the person is not able to articulate their decisions, they can be made in accordance with the directive.

This instrument is often characterized as the Ulysses contract which draws upon the Greek text Odyssey. The story is of Ulysses who wants to listen to the sirens which is beautiful but deadly. To ensure that he does not go insane by listening to the sirens, he asks his men on the ship to tie him to the mast. Thus, he gave a command to others to bind him to the mast so he can listen to the siren without being driven by it to commit certain acts.[5]

In this oft quoted account of the Ulysses, he gets binded by asking others to bind him when he is about to hear the sirens. However, I suggest that advance directives should not be an instrument that binds oneself or asks others to bind a person. It should be seen as an injunction of others from doing or restraining from doing certain acts. In the case of medical treatment, a directive binds the caregiver, healthcare provider to the words of the person with disability from a prior time. When we understand advance directive this way, the need to provide pre-eminence

[2] G. Ranganathan, *Mental Healthcare Act: An Evaluation*, 4(2) NLUJ Law Review, (2017).
[3]*General Comment No. 1. Article 12: Equal recognition before the law,* UN Committee on the Rights of Persons with Disabilities, CRPD/C/11/4, (11/04/2014), available at https://digitallibrary.un.org/record/779679?ln=en, last seen on 31/01/2020.
[4] Laws denying legal capacity continue to be in force. This includes laws relating to contract, voting, marriage etc. For a discussion of some of these laws see Bhargavi V Davar, *Legal frameworks for and against people with psychosocial disabilities*, 47 Economic & Political Weekly 123, 125 (2012).
[5]Sarin, A., Murthy P. & Chatterjee S., *Psychiatric advance directives: potential challenges in India*, 9 Indian J Med Ethics 104, 105 (2012).

to the words of the person with disability becomes clearer. Unfortunately, the current provisions of the Act undermine the words of the person with disability during crucial times like emergency treatment. I suggest that a system of support which includes deinstitutionalization is essential to realize the full potential of advance directives.

A person with disability should have the full and unhindered right to choose the nature of their treatment in the advance directive. This may include the choice to not being institutionalized. The problems and rights violations at institutions providing mental healthcare are well documented.[6] I suggest that not only should one be able to opt out of institutionalization as a mode of treatment, but deinstitutionalization is a prerequisite to uphold legal capacity of persons with disability. Further, strengthening the right to community living as set out in Section 19 of the Act is essential towards deinstitutionalization. Community living will provide adequate support for executing advance directives that are free from duress and in turn advance directives can seek community living as a mode of care and treatment instead of institutionalization.

II. ADVANCE DIRECTIVE UNDER THE ACT

The Act provides details on advance directives in Chapter III. This includes procedure to be followed and the need to register the directives. The two primary problems with Section 5 on advance directives are with regard to Section 5(9) and Section 5(11). Section 5(9) provides that advance directive shall not apply to emergency treatment under Section 103. Section 5(9) wrongly mentions the provision relating to emergency treatment as Section 103, the correct provision is Section 94. Apart from this minor error, the matter of grave concern is that an advance directive is suspended during times of emergency treatment.

Section 94 lists out emergency treatment to include treatment to prevent death or irreversible harm to the health of a person; or the persons inflicting serious harm to himself or to others; or the person causing serious damage to property belonging to himself or to others where such behavior is believed to flow directly from the person's mental illness. It restricts emergency treatment to seventy-two hours and may extend to seven days if an emergency is declared by the appropriate government. This provision negates advance directive when it is most crucial to be honoured.[7] Non-consensual psychiatric intervention is contrary to the

[6] *Treated Worse Than Animals: Abuses Against Women and Girls with Psychosocial or Intellectual Disabilities in Institutions in India*, Human Rights Watch, available at https://www.hrw.org/report/2014/12/03/treated-worse-animals/abuses-against-women-and-girls-psychosocial-or-intellectual, last seen on 12/12/2020.

[7] For a detailed analysis of the Act in light of the UNCRPS see, *How the Celebrated Mental*

text and spirit of Article 12 of the UNCRPD.[8] Situations described as requiring emergency treatment under the Act are the ones when a person's autonomy needs to be respected the most.

The other problem is in Section 5(11) which provides for review, alteration, modification or cancelation of the advance directive. This can be done at the behest of a mental health professional or a relative or caregiver and can be granted by the Mental Health Board constituted under the Act. As discussed earlier, the advance directive is a tool to bind the action of others which will have an impact on the person with disability. Section 5(11) grants power to alter or revoke the advance directive to the very persons whose actions ought to be bound by the advance directive. Thus, the Act can be used to further forced treatment including institutionalization and obscure legal capacity of persons with psycho-social disabilities. Further, the Act does not include an explicit right to legal capacity like Article 12 of the UNCRPD. In order to uphold the letter and spirit of the UNCRPD and to truly harmonize the Act with UNCRPD, we must focus on deinstitutionalization and, independent and community living. We must look to General Comment I and V to achieve this.

III. FROM SUBSTITUTED TO SUPPORTED CAPACITY

One of the concerns regarding the effectiveness of advance directives in India is that there is not sufficient support to draft and execute them. There are also concerns around misuse of these directives by forcing people to execute it. Advance directive is a way to further the realization of legal capacity. Currently, legal capacity for persons with psycho-social disabilities is substituted by another person through systems of guardianship or such similar delegation. However, the General Comment I categorically encourages State Parties to the UNCRPD to move to a system of support based legal capacity where support is provided to persons with psycho-social disabilities to realize complete capacity.

The nature of support varies with the nature of disability and other factors. I focus on one kind of support that may be provided for persons with psycho-social disabilities which is to facilitate community living. The UNCRPD provides for the right to independent living and being included in the community. Article 19 of the Act emphasizes on community living but should be read to include independent living as

Healthcare Act Restricts Individual Liberty and Fails to Comply with International Standards, THE CARAVAN, available at https://caravanmagazine.in/vantage/mental-healthcare-act-restricts-individual-liberty-fails-international-standards, last seen on 08/03/2020.

[8] See Generally, Tina Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from nonconsensual psychiatric interventions*, 34 Syracuse J. Int'l L. & Com., 405 (2006).

well. Facilitating living in a community where persons with psycho-social disability feel safe and can trust others will provide them support to make advance directives that captures their will and preference sufficiently. The General Comment I require that a person's will and preference be the guiding force behind any kind of support that is provided. Being supported by a community of their choice, persons with psycho-social disabilities can make choices regarding their treatment in the advance directive that affirms their rights and honours their legal capacity.

Currently, institutionalization is a dominant form of treatment. A shift to providing support through community living is essential to address the concerns around effectiveness of advance directives. Thus, deinstitutionalization, and shift to forms of support that are in line with the letter and spirit of the UNCRPD, is an essential prerequisite for the effective use of advance directives.

IV. CONCLUSION

Advance directive is a crucial tool to affirm the right to legal capacity for persons with psycho-social disabilities. It allows for reinforcing capacity when a person needs them the most. Unfortunately, the Act tries to undo this essential feature by making it revocable for emergency treatment and allowing other persons to revoke or alter it. These provisions are contrary to the UNCRPD. Further, for the effective use of advance directives, it is essential to move away from institutionalization and provide support through community living in addition to other kinds of supports. The guidelines to State Parties under General Comment I and V have to be taken seriously when these provisions are being used.