

DOI: 10.5281/zenodo.12426759

# AGING WITHOUT AGENCY: RETHINKING GUARDIANSHIP LAWS FOR DEPENDENT NOT INCAPACITATED SENIOR CITIZENS

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Received: 17/12/2025  
Accepted: 17/04/2026

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## ABSTRACT

*Around 10.4 crore of India's population consists of elderly people. It is projected to be over 31 crores in 2050 and will make 20 percent of India's population. The Indian statutory framework offers no coherent solution to address a situation where a senior citizen who is mentally sound and his or her physical and mental condition does not reach the threshold of incapacity but is dependent on his or her immediate domestic family for economic, physical and legal maintenance. These individuals are the ones who retain partial cognitive capacity but still show a significant reliance. The framework's gap arises when such individuals face coercion, physical and psychological abuse and they are deprived from financial autonomy from the same relied immediate domestic family. The current framework involves the Maintenance and Welfare of Parents and Senior citizens Act of 2007 which are applicable to the extent of financial exclusion and maintenance and the Mental Healthcare Act of 2017 and the National Trusts Act of 1999 apply only to persons formally falling under the ambit of mentally or physically disable. The Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill, 2019, which acknowledged the increasing neglect of the elderly consequent to the gradual breakdown of the joint family system, lapsed with the dissolution of the Seventeenth Lok Sabha, thereby leaving the recognised legislative gap unresolved. It is pertinent to note that a senior citizen in such a condition might not be able to redress the concerns and make legal decisions which is of concern. The paper dissects the structural gap between dependence and incapacity as the Guardianship laws in India deals with minors and such dichotomous approach fails to capture the inevitable reality of ageing. This paper reimagines guardianship modals which acknowledge situation based guardianship and calls for legislative reform that provides dignity to the ageing population.*

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**KEYWORDS:** The Maintenance and Welfare of Parents and Senior citizens Act of 2007, Mental Healthcare Act of 2017, National Trusts Act of 1999, Guardianship, Incapacity.

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## INTRODUCTION

India is going through a real demographic transition in which there are going to be more than 310 million elderly people by the year 2050, which would be about 20% of India's population.<sup>1</sup> With this are socio-economic changes like breaking down of traditional joint families into rural-urban migrations along with feminization of old age.<sup>2</sup> In fact, over 80% of older persons living in developing countries are not members of any formal pension scheme, with elderly women suffering compounding vulnerabilities to poverty coupled with violence and systematic exclusion.<sup>3</sup>

The Madrid International Plan of Action on ageing in 2002 touched a watershed in global policy concerning older persons; really not as resources dependent consumers but as active participants in sustainable development.<sup>4</sup> The 2017 framework further portrayed older persons as "active agents of societal development" and linked their participation and protection to achieving Sustainable Development Goals related to poverty eradication, health, gender equality, and economic growth by the United Nations Development Program.<sup>5</sup>

While there have been those international recognitions, there has simply been no coherent statutory framework that protects the vulnerable elderly in India. The crucial gap exists in respect to those who are financially dependent on family members but cognitively competent enough to be excluded from existing guardianship regimes. The architecture of elder protection in India lacks coordination among different laws; none provide a comprehensive guardianship mechanism for dependent but capable older people.

Under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 [**hereinafter "MWPSCA"**], adult children are required to provide maintenance amounts for parents, but it does not offer claim to any form of guardianship mechanism for the transfer of the authority of decision making. While preventive in terms of redress for aged people, such 'remedy' makes it very difficult for them to complain to the tribunal-most dependent elders do not enjoy the luxury of independent legal assistance that would enable them to sue.<sup>6</sup> The majority of elderly

individuals require their family members and designated heirs and other informal representatives to handle their legal matters because their age-related health issues and financial limitations and social isolation make it impossible for them to obtain legal representation on their own. The presence of pension insecurity makes this situation worse because Indian informal workers and private sector working class does not have access to formal pension benefits and the Government has specifically mentioned that Atal Pension Yojana targets workers who do not possess formal pension benefits. The National Pension System replaced the earlier defined-benefit pension system for Central Government employees who began their service on or after 1 January 2004. Pertinently, the legal aid system in Delhi provides partial protection against this risk. The Delhi State Legal Services Authority states that senior citizens with annual income below ₹4 lakh are eligible for free legal services and NALSA confirms that senior-citizen eligibility is subject to the relevant State ceiling citing Delhi's ₹4 lakh threshold. The problem extends beyond maintenance needs because it requires a support system which helps older adults move through the legal system while guarding their rights and maintaining their ability to fight their cases.

The Mental Healthcare Act of 2017 [**hereinafter "MHA"**], has a historical and pioneering importance concerning the will and preferences approach in accordance with the UN Convention on the Rights of Persons with Disabilities<sup>7</sup> but applies solely to persons with diagnosed mental illness thereby excluding seniors who suffer vulnerabilities from age-related factors.

Although the Rights of Persons with Disabilities Act of 2016 [**hereinafter "RPDA"**], has made provisions for minimal guardianship-bolstered by modern features such as time limits and court oversight, this again does not apply to those who suffer as a result of old age. Age-related cognitive decline or frailty without recognized disabilities receives no protection. In terms of implementation, slow progress has been made where most of the governments have not established designated

<sup>1</sup> United Nations Population Division (2019) World population ageing 2019: highlights. United Nations, New York

<sup>2</sup> Rajan SI, Sarma PS, Mishra US (2003) Demography of Indian aging, 2001-2051. *J Aging Soc Policy* 15(2-3):11-30. [https://doi.org/10.1300/J031v15n02\\_02](https://doi.org/10.1300/J031v15n02_02)

<sup>3</sup> HelpAge International (2015) Global AgeWatch Index 2015: Insight report. HelpAge International, London

<sup>4</sup> United Nations (2002) Political declaration and Madrid international plan of action on ageing. United Nations, New York

<sup>5</sup> United Nations Development Program (2017) Ageing, older persons and the 2030 agenda for sustainable development. UNDP, New York

<sup>6</sup> Saxena D, Chandra M (2019) Implementation of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007: challenges and prospects. *Indian J Gerontol* 33(1):45-58

<sup>7</sup> United Nations (2006) Convention on the Rights of Persons with Disabilities. United Nations, New York

authorities.<sup>8</sup> The archaic Guardians and Wards Act of 1890 [hereinafter "GWA"], produce perverse outcomes when applied to seniors, rendering capable elders "civilly dead" and granting guardians plenary authority without requirements to respect the ward's preferences or autonomy.<sup>9</sup>

This is where the legal vacuum occurs: that intersection between dependence and capability. These often involve an older adult wholly dependent on family members for finances, physical care, and legal representation while retaining sufficient cognitive capacity to understand her situation, consider rational choices, and communicate preferences. While this individual meets the mental capacity standard established by existing statutes, sheer dependency creates a glaring vulnerability to coercion, economic exploitation, denial of healthcare choices, and control over fundamental life decisions, leaving the individual entirely defenceless within the current legal framework.

The Constitution defines equality before law,<sup>10</sup> freedom of expression,<sup>11</sup> and the right to life with dignity.<sup>12</sup> The Supreme Court interpreted and recognised that autonomy to be a fundamental constitutional right tied with dignity.<sup>13</sup> However, sadly, such implied protection under existing law failed to provide real constitutional autonomy to dependent elderly persons.

Three central questions the paper seeks to answer are: First: What protections are there for older adults who are wholly dependent on family but are cognitively capable? Second: What are the doctrinal borders between "dependence" and "incapacity," and why does current law not recognize dependence as deserving special protection? Third, what institutional model would provide limited, court-reviewable guardianship oriented by the elder's will and preferences?

Protection shall be argued on the basis that Indian law operates on the binary of minors/incapacitated

individuals versus capacitated adults, thereby systematically excluding a significant section of dependent elderly persons. The line between "dependence" and "incapacity" is a translation misrepresentation for structural failure in a typical outmoded capacity-family-vulnerability perspective. Current jurisprudence, especially *Shafin Jahan*<sup>14</sup> and subsequent rulings,<sup>15</sup> suggests expanding the *parens patriae* doctrine to include protections for those overborne by coercion or undue influence.

Grounded in this emerging jurisprudence, in addition to international human rights norms from the Convention on the Rights of Persons with Disabilities<sup>16</sup> and comparative models from Britain<sup>17</sup> and Japan,<sup>18</sup> this paper proposes a comprehensive framework for situation-based guardianship that protects dignity while promoting agency. Balancing autonomy with support enables older persons to exercise rights in exercising acts toward development as active agents.

#### DEVELOPMENT FRAMEWORK: FROM MADRID TO THE SUSTAINABLE DEVELOPMENT GOALS

International recognition of older persons by the policy signifies the paradigm shift-attitudinally-from understanding population aging as a development discourse. The 2002 Madrid International Plan of Action for Ageing set three guiding principles: the full realization of human rights and fundamental freedoms of older persons; recognition that older persons are active development agents rather than passive recipients of care; and acknowledgment that partnerships and multisectoral approaches are indispensable when addressing demographic aging.<sup>19</sup> In fact, the adoption of this international policy tool was the first time dealing with aging as a development issue confronting national policies, including those which deal with fiscal policy, labour markets, pensions, education, health care, and economic development, instead of only regarding aging as a social welfare issue.<sup>20</sup>

<sup>8</sup> Narayan CL (2018) Disability law in India: paradigm shift or evolving discourse? *Econ Polit Wkly* 53(3):81-88

<sup>9</sup> Dhanda A (2007) Legal capacity in the disability rights convention: stranglehold of the past or lodestar for the future? *Syracuse J Int'l L & Com* 34:429-462

<sup>10</sup> Constitution of India, Art 14

<sup>11</sup> Constitution of India, Art 19

<sup>12</sup> Constitution of India, Art 21

<sup>13</sup> *Common Cause v Union of India* (2018) 5 SCC 1

<sup>14</sup> *Shafin Jahan v Asokan KM* (2018) 16 SCC 368

<sup>15</sup> *Lata Singh v State of Uttar Pradesh* (2006) 5 SCC 475; *Shakti Vahini v Union of India* (2018) 7 SCC 192

<sup>16</sup> United Nations (2006) Convention on the Rights of Persons with Disabilities. United Nations, New York

<sup>17</sup> Mental Capacity Act 2005, c 9 (UK)

<sup>18</sup> Adult Guardianship Act 1999 (Japan)

<sup>19</sup> United Nations (2002) Political declaration and Madrid international plan of action on ageing. Second World Assembly on Ageing, Madrid, 8-12 April 2002. United Nations, New York

<sup>20</sup> Sidorenko A, Walker A (2004) The Madrid International Plan of Action on Ageing: from conception to implementation. *Ageing Soc*

Five months after Madrid, the Berlin Ministerial Conference was convened to develop regional strategies for implementation under the auspices of the UN Economic Commission for Europe in September 2002.<sup>21</sup> The Berlin Ministers committed to "mainstream aging concerns in all policy fields with the aim of securing gender-sensitive and evidence-based coordinated and integrated policies to bring society and economies into harmony with demographic change."<sup>22</sup> They viewed the equitable and sustainable distribution of resources between employed and non-employed populations as a fundamental economic concern. Rather than framing aging as an unmanageable burden, Ministers articulated an economic strategy as one of sustaining economic growth and productivity in the recognition that older persons can be contributors, and their continued involvement is critical for fiscal sustainability.<sup>23</sup>

By 2022, the Synthesis Report on Madrid Plan Implementation in the UNECE region documented the harmonization of the retirement age, flexible work arrangements, support for informal caregivers, and review of gender pension gaps operative for the mainstreaming of aging in public policy by the member States.<sup>24</sup>

The UNECE Ministerial Conference on Ageing in Lisbon reaffirmed aging as a real development issue with three components: the recognition of older persons as agents of change in communities, the promotion of longer working lives and employability, and the assurance of dignity in old age.<sup>25</sup> The change so realized was stark, away from looking at older persons exclusively as beneficiaries of social programs, towards respecting them as

contributors to economic growth, social cohesion, and community development.<sup>26</sup>

In July 2017, the UNDP, alongside HelpAge International and AARP, prepared an Issues Brief distilling the various positions on aging and placing it centrally with respect to the attainment of Sustainable Development Goals.<sup>27</sup> The Brief reframed older persons as "active agents of societal development" whose protection and participation are key to inclusive outcomes; it argued that policies that inhibited the autonomy of old persons would undermine development while those that empowered their economy contributions and political participation will accelerate the SDG progress.<sup>28</sup>

According to WHO's 2017 Global Strategy and Action Plan on Ageing and Health, eight SDGs are crucial for older persons' functional ability and well-being.<sup>29</sup> SDG 1: ending poverty which emphasizes older persons' economic engagement by workforce participation, tax contributions, spending, and asset transfer.<sup>30</sup> SDG 3: healthy lives and well-being which aims at promoting healthy aging by universal health coverage consisting of prevention, treatment, and rehabilitation.<sup>31</sup> SDG 4: quality education which has relevance to aging in regard to lifelong learning, as older workers are increasingly required to maintain high productivity in the face of shrinking working-age populations.<sup>32</sup> SDG 8: decent work and economic growth which confronts age discrimination and policies on flexible employment applicable to older workers.<sup>33</sup>

#### CONCEPTUAL FOUNDATIONS AND INDIAN SOCIAL CONTEXT

A careful delineation of four interrelated yet distinct concepts- capacity, dependence, vulnerability, and

24(2):147-165. <https://doi.org/10.1017/S0144686X03001661>

<sup>21</sup> United Nations Economic Commission for Europe (2002) Berlin Ministerial Declaration: a society for all ages in the UNECE region. UN ECE Ministerial Conference on Ageing, Berlin, 11-13 September 2002. UNECE, Geneva

<sup>22</sup> *Ibid*, para 11

<sup>23</sup> United Nations Economic Commission for Europe (2002) Regional implementation strategy for the Madrid International Plan of Action on Ageing 2002. UNECE, Geneva, p 8-12

<sup>24</sup> United Nations Economic Commission for Europe (2022) Synthesis report on the implementation of the Madrid International Plan of Action on Ageing in the UNECE region between 2018 and 2022. UNECE, Geneva

<sup>25</sup> United Nations Economic Commission for Europe (2017) Lisbon Ministerial Declaration: a sustainable society for all ages: realizing the potential of living longer. Fourth UNECE Ministerial Conference on Ageing, Lisbon, 21-22 September 2017. UNECE, Geneva

<sup>26</sup> United Nations Economic Commission for Europe (2017) Conference conclusions and recommendations. Fourth UNECE Ministerial Conference on Ageing, Lisbon, 21-22 September 2017. UNECE, Geneva, p 3-5

<sup>27</sup> United Nations Development Programme (2017) Ageing, older persons and the 2030 agenda for sustainable development. Issues Brief prepared by UNDP, HelpAge International, and AARP. UNDP, New York

<sup>28</sup> *Ibid*, p 2

<sup>29</sup> World Health Organization (2017) Global strategy and action plan on ageing and health. WHO, Geneva

<sup>30</sup> United Nations (2015) Transforming our world: the 2030 agenda for sustainable development. UN General Assembly Resolution A/RES/70/1. United Nations, New York. See also World Health Organization (2017) Global strategy and action plan on ageing and health. WHO, Geneva, p 18-20

<sup>31</sup> World Health Organization (2017) Global strategy and action plan on ageing and health. WHO, Geneva, p 21-23

<sup>32</sup> *Ibid*, p 24-25

<sup>33</sup> *Ibid*, p 26-28. See also International Labour Organization (2018) Decent work and the 2030 agenda for sustainable development. ILO, Geneva

autonomy- is necessary for an understanding of the legal void addressed in this paper. Existing Indian law conflates these principles, thus creating the statutory gap that this paper wishes to address.

The very essence of legal capacity, according to the RPDA of 2016, is the ability to understand information relevant to a decision, retain it, use or weigh it during the decision-making process, and communicate the decision.<sup>34</sup> Capacity is always defined under the specific circumstances of each decision-a person may be allowed to make a decision concerning his healthcare but incapable of making a decision concerning his financial affairs. Capacity can also fluctuate from time to time, and in most adult cases, it is presumed unless convincingly demonstrated otherwise.<sup>35</sup> The burden of proof lies upon those who challenge capacity, according to the UK Mental Capacity Act of 2005, the basis upon which most of Indian jurisprudence is built.<sup>36</sup>

Dependence signifies a state of being reliant materially and practically on another for sustenance, physical care, or securing legal rights. An elder may be totally dependent on an adult child to bathe, dress, or eat, yet she retains unimpaired decision-making ability. Dependence is equal to relativity arising out of an intersection between the needs of an elder and the capacity and willingness of the caregiver and can change with altered living circumstances, hired help, or increased support, none of which have an effect on the cognitive capacities of the elder individual.<sup>37</sup>

Vulnerability, however, is not an inherent condition; it is contingent on relationships and circumstances, whereby autonomy of a competent individual is prevented by some extraneous factors such as dependence, isolation, coercion, or deprivation of access to information; not mental incapacity.<sup>38</sup> An aged woman is said to be vulnerable when she is placed in a structurally dependent situation upon a family member who is not acting in her best interest; for example, when her son embezzles her pension, and she has no means to seek legal redress or alternatives. This vulnerability arises from the circumstance and the power asymmetry rather than

cognitive impairment. A person, who has full cognitive faculties, nevertheless may not have the real freedom to act.

Autonomy means the right to make substantial decisions concerning one's body, property, social life, and life trajectory, without unlawful interference or coercion. In the Indian constitutional order, autonomy is enshrined under the bundle of rights.<sup>39</sup> In *Shafin Jahan v. Asokan K.M.*, the Supreme Court stated that autonomy encompasses choice expression, and its restriction extinguishes the very personhood.<sup>40</sup> Autonomy, in the substantive sense, is an entitlement to script one life, to make choices on marriage, faith, bodily integrity, relationships, and property, which are oftentimes deemed by others as unsound choices.<sup>41</sup> In such a sense, the autonomy of dependent elderly people encompasses their rights to make decisions regarding their own lives and design their own dignity.

At the heart of the said problem is the need to very clearly separate these concepts. One could be dependent and still fully legally capable; one may be vulnerable and yet not incapacitated; an individual can be autonomous but nevertheless needs protection. However, Indian guardianship law postulates the reverse link between autonomy and protection: protected are mostly incapable, whereas capable never require protection. This scheme, however, misses the very real protection needs of those elders who are dependent-yet-capable and whose voice should be respected.

This social reality of aging in India has undergone great changes in the last thirty years, which explains the contexts of dependence and vulnerability. Elders used to be supported, respected, and protected by the traditional joint family system wherein socioeconomic and caregiving roles were intergenerationally shared.<sup>42</sup> Elders preserved household roles including a say in decision-making and material security through filial obligations and traditions. While definitely romanticized, the system afforded some protection.<sup>43</sup>

This system has now virtually collapsed, particularly

<sup>34</sup> Rights of Persons with Disabilities Act 2016, s 2(j), No 49 of 2016 (India)

<sup>35</sup> Dunn MC, Clare ICH, Holland AJ (2008) To empower or to protect? Constructing the 'vulnerable adult' in English law and public policy. *Leg Stud* 28(2):234-253. <https://doi.org/10.1111/j.1748-121X.2008.00085.x>

<sup>36</sup> Mental Capacity Act 2005, c 9, s 1(2)-(3) (UK)

<sup>37</sup> Fine M, Glendinning C (2005) Dependence, independence or inter-dependence? Revisiting the concepts of 'care' and 'dependency'. *Ageing Soc* 25(4):601-621. <https://doi.org/10.1017/S0144686X05003600>

<sup>38</sup> Mackenzie C, Rogers W, Dodds S (2014) Introduction: what is vulnerability and why does it matter for moral theory? In: Mackenzie C, Rogers W, Dodds S (eds) *Vulnerability: new essays in ethics and feminist philosophy*. Oxford University Press, Oxford, p 1-29

<sup>39</sup> Constitution of India, Art 19(1), Art 21

<sup>40</sup> *Shafin Jahan v Asokan KM* (2018) 16 SCC 368, para 55

<sup>41</sup> *Puttaswamy v Union of India* (2017) 10 SCC 1, paras 143-149 (Chandrachud J)

<sup>42</sup> Shah AM, Rajan SI, Sharma KL (1998) *The family in India: critical essays*. Orient Longman, New Delhi, p 45-67

<sup>43</sup> Lamb S (2000) *White saris and sweet mangoes: aging, gender and body in North India*. University of California Press, Berkeley, p 23-45

in the urban centers and semi-urban fringes. The joint family structure has been dismantled by urbanization, economic migration, nuclear family growth, and smaller household set-ups.<sup>44</sup> Increased participation of women in the workforce has reduced their potential for caregiving without a corresponding increase in caregiving participation from men.<sup>45</sup> Older persons are often found alone or dependent on one adult child, with no extended family to intervene against exploitation or provide an alternative. The MWPSA Amendment Bill of 2019 to "the breakdown of joint families, nuclearization tendency and rural-urban migration have led to abandonment and distress of senior citizens."<sup>46</sup>

In nuclear family setups, elder dependents upon their adult children fosters exploitative power relations. The widow may have no control whatsoever in respect to finances, medical care, or legal representation while living along with her son and daughter-in-law; not because of incapacity, but because of son-controlled property and income. A widower could live with his daughter and be denied contact with friends, prohibition of rituals, and choice of doctor. These elders are very vulnerable to exploitation, psychological abuse, neglect, and physical violence under so-called "protective" arrangements.<sup>47</sup>

Rajya Sabha MP Ms. Sumitra Balmik demanded that all employees should receive 45 days of paid leave each year to take care of their parents who have reached 60 years of age during the February 2026 Budget Session. The parliament of India must consider an urgent need to address the country's senior citizen population crisis. The population of senior citizens in India has reached 14.9 crore in 2026 according to Ms. Balmik who explained the challenges faced by adult children who must balance their job responsibilities with their role as caregivers for their parents.<sup>48</sup> The process of urban migration causes families to become separated which creates a situation where elderly people who need medical

assistance require someone to be with them while their workplaces mandate that employees take specific time off. She requested that sons and daughters should receive leave time to care for their sick parents just as mothers spend two decades caring for their children. The demand proves the existence of the dependency-vulnerability relationship which this paper investigates. The exploitation of dependent elderly people will continue until society establishes comprehensive support systems for their caregivers. The implementation of time-off policies requires the addition of situation-based guardianship to enable permanent restoration of elder independence when family caregivers are incapable of providing all necessary assistance. The two initiatives create solutions which match SDG 8 by enabling employees to fulfill their family obligations while maintaining their jobs which stops pension deficiencies and economic exclusion.<sup>49</sup>

Gender aggravates these vulnerabilities; the older woman, particularly where she is a widow with no son, faces discriminatory inheritance, was denied access to property under customary laws, or was illegally evicted on the basis of a false accusation.<sup>50</sup> With data from the UNDP, it shows that elderly unmarried women have properties that are less valuable than those of elderly unmarried men, receive lower pensions, and suffer more than elderly unmarried men from widowhood, divorce, and gender violence.<sup>51</sup> This makes them doubly vulnerable by age and gender in an economically deprived situation, and this is especially true in rural and semi-urban contexts where they face systemic obstacles to property, pension, and protection from marriage-related injuries and gender violence.<sup>52</sup>

#### EXISTING STATUTORY FRAMEWORK AND IDENTIFIED GAPS

The MWPSA of 2007 constitutes the statute that serves as an entry point for the understanding of

<sup>44</sup> Datta R, Datta K, Hossain A (2015) Transformation of the Indian family: changing status, structure, and the emerging need of a national family policy. *Int J Sociol Stud* 3(3):85-94. <https://doi.org/10.11114/ijss.v3i3.763>

<sup>45</sup> Rajan SI, Kumar S (2003) Living arrangements among Indian elderly: new evidence from National Family Health Survey. *Econ Polit Wkly* 38(1):75-80

<sup>46</sup> Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill 2019, Statement of Objects and Reasons, para 2

<sup>47</sup> Chokkanathan S, Lee AEY (2006) Elder mistreatment in urban India: a community based study. *J Elder Abuse Negl* 17(2):45-61. [https://doi.org/10.1300/J084v17n02\\_03](https://doi.org/10.1300/J084v17n02_03)

<sup>48</sup> The Hindu (2025) Parliament Budget Session: Rajya Sabha MP seeks 45-day leave for care of elderly parents. *The Hindu*, 12.02.2026

<sup>49</sup> Balmik S (2026) Demand for 45-Day Paid Elderly Wellness Leave to Support India's Senior Citizens. In: *Rajya Sabha Debates*, 6 February 2026. Rajya Sabha, New Delhi, p 18

<sup>50</sup> Agarwal B (1994) *A field of one's own: gender and land rights in South Asia*. Cambridge University Press, Cambridge, p 233-267

<sup>51</sup> United Nations Development Programme (2017) *Ageing, older persons and the 2030 agenda for sustainable development*. UNDP, New York, p 12-14

<sup>52</sup> Srivastava S, Gill A (2020) Untold stories: a qualitative study of older women victims of domestic violence in India. *J Elder Abuse Negl* 32(2):128-147. <https://doi.org/10.1080/08946566.2020.1736699>

India's statutory vacuum. The law provides for older parents of sixty and above to claim legally enforceable maintenance from children and sometimes the state, if circumstances warrant.<sup>53</sup> This Act establishes District Maintenance Tribunals that provide for adjudication of disputes and also relief in the form of monthly allowances, housing, and health care provision.<sup>54</sup> Though it addresses a real need making adult children financially liable, it is limited to a narrow view of maintenance and residential protection. Most importantly, it does not make provision for either guardianship or transfer of decision-making authority or enable elders to delegate their financial or health care management to trusted representatives.<sup>55</sup> It is, in fact, remedial, rather than preventive, in that it compels dependent elders to file complaints before the tribunal, which is itself prohibitive for those without legal aid, knowledge of rights or independence from their family.<sup>56</sup> In fact, it presumes that provisions for maintenance should provide all the subsistence needs while failure to maintain implies non-subsistence or absolute deprivation rather than the very many contexts of dependent elders who may have some provision but not have control over their healthcare or property and income-related decisions.<sup>57</sup>

The MHA of 2017 is the turning point, embedding UN Convention on the Rights of Persons with Disabilities [hereinafter "CRPD"] human rights principles.<sup>58</sup> It moves away from the custodial MHA, 1987 to a rights-based model promoting autonomy, dignity, and supported decision-making with Section 2(l) providing a definition of a 'nominated representative' as one from whom the person with mental illness selects to exercise their rights and participate in healthcare.<sup>59</sup> The act recognizes that

people suffering from mental illness still have capacities in many areas, with their will and preferences defining treatments even with the support.<sup>60</sup> But the drawback of the act lies in its application: first, this act applies only to people with 'mental illness' recognized by statute and applies to age-related cognitive declines, early dementia, or mild cognitive decline that do not fulfill psychiatric criteria but affect functional capacity in very old people.<sup>61</sup> Secondly, this act is not only applicable for mental healthcare treatment decision making but also covers financial management, overall guardianship, property, and legal control representation.<sup>62</sup> Thirdly, implementation is slow because not many courts or practitioners know about it.<sup>63</sup>

It incorporates the CRPD framework into Indian law through the RPDA, 2016, with provisions for 'limited guardianship' for certain persons with restricted decision-making capacities on limited matters defined in Section 14.<sup>64</sup> It provides for full guardianship for those who are in need of total assistance and partial guardianship for certain matters, respecting the will and preferences of the individual.<sup>65</sup> This comprehensive scheme allows for time-bound appointments, with courts overseeing preference respects, and provides for supported over substituted decision-making.<sup>66</sup> However, this is only for those rights defined under the law as 'disabilities'; physical, sensory, mental, intellectual, and multiple. Age-related cognitive decline or frailty that does not qualify under any of the recognized categories is excluded; thus, an 85-year-old with mild impairment and frailty without diagnosed 'intellectual disability' or 'mental illness' falls outside protection.<sup>67</sup> Implementation of Section 14 presents a very slow pace since the majority of the states do not have any

<sup>53</sup> Maintenance and Welfare of Parents and Senior Citizens Act 2007, s 4, No 56 of 2007 (India)

<sup>54</sup> *Ibid*, s 5-7

<sup>55</sup> Bhan G, Gautham M (2020) Elder law in India: situating the rights discourse. *Indian J Gerontol* 34(2):145-162

<sup>56</sup> Saxena D, Chandra M (2019) Implementation of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007: challenges and prospects. *Indian J Gerontol* 33(1):45-58

<sup>57</sup> Brijnath B (2012) *Unforgotten: love and the culture of dementia care in India*. Berghahn Books, New York, p 112-135

<sup>58</sup> Mental Healthcare Act 2017, Preamble, No 10 of 2017 (India). See also United Nations (2006) Convention on the Rights of Persons with Disabilities. United Nations, New York

<sup>59</sup> Mental Healthcare Act 2017, s 2(l), No 10 of 2017 (India)

<sup>60</sup> *Ibid*, s 4, s 89

<sup>61</sup> Kala S (2018) The Mental Healthcare Act, 2017: a boon or a bane for persons with mental illness? *Indian J Med Ethics* 3(4):302-306. <https://doi.org/10.20529/IJME.2018.064>

<sup>62</sup> Pathare S, Shields LS, Narasimhan L (2019) Supported decision-making for persons with mental health problems: developing a rights-based model. *Indian J Psychiatry* 61(Suppl 4):S537-S544. [https://doi.org/10.4103/psychiatry.IndianJPsychiatry\\_505\\_18](https://doi.org/10.4103/psychiatry.IndianJPsychiatry_505_18)

<sup>63</sup> Math SB, Basavaraju V, Harihara SN et al (2019) Mental Healthcare Act 2017 – aspiration to action. *Indian J Psychiatry* 61(Suppl 4):S660-S666. [https://doi.org/10.4103/psychiatry.IndianJPsychiatry\\_580\\_18](https://doi.org/10.4103/psychiatry.IndianJPsychiatry_580_18)

<sup>64</sup> Rights of Persons with Disabilities Act 2016, s 14, No 49 of 2016 (India)

<sup>65</sup> *Ibid*, s 14(1)-(2)

<sup>66</sup> *Ibid*, s 14(3)-(5)

<sup>67</sup> Narayan CL (2018) Disability law in India: paradigm shift or evolving discourse? *Econ Polit Wkly* 53(3):81-88

designated authorities, like District Commissioners or Judges, for appointing guardians, making the section largely non-operational across India.<sup>68</sup>

The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, creates the national trust and state trusts that provide guardianship and trusteeship for specified developmental disabilities.<sup>69</sup> However, it restricts its coverage to autism, cerebral, and intellectual disability, as well as multiple disabilities, and does not provide any remedies for all elder vulnerabilities due to age, dependence, or coercion in relationship.<sup>70</sup>

GWA, 1890 does not merely cover minors, as it extends to include other persons, namely those who are "of unsound mind."<sup>71</sup> Nineteenth-century thinking that pervaded this legislation sought to give plenary power to the guardians over wards' persons and property with little supervision and no obligation to respect the wards' preferences.<sup>72</sup> Such an application to dependent elders yields contradictory results: dependent individuals are treated as "civilly dead" and are silenced in proceedings; permanent incapacity is presumed from situational dependence; and a minor-focused regime is imposed on adults.<sup>73</sup> Courts hesitate to apply it because mental incapacity must be proven, leaving many elders without a solution.<sup>74</sup>

#### THE DEPENDENCE-INCAPACITY GAP AND JURISPRUDENTIAL RESPONSES

The statutory void can be visualized in a two-dimensional space. One axis represents cognitive capacity stretching from total incapacity; whereby an individual cannot know, remember, weigh, or relay information relating to the decision – to full capacity whereby an individual fully understands and chooses. The other axis shows material dependence stretching from independence, where one can fulfill basic needs, physical care, and legal assistance with no help, to complete dependence, where the

individual is fully reliant on family for material, physical, and legal support.<sup>75</sup>

Presently, Indian law tackles two corners of this framework. Persons with high incapacity and high dependence are covered by the MHA 2017, the RPDA, 2016, and probably the GWA 1890, among other things. For low dependence and low incapacity, there is nothing short of a presumption of autonomy, and therefore the general contract, property, and succession laws apply, and the courts tend to respect their choices.

The law fails in the case of high dependence and low incapacity; this would describe an elderly person with profound cognitive abilities, able to understand information, compare options, and relay choices, but utterly dependent on family for economic survival, physical care, legal representation, and information access. Such an elder may be legally and formally existent but would not satisfy mental incapacity requirements under the existing laws. Because of their dependence, they face structural vulnerability to coercion, financial exploitation, denial of healthcare autonomy, and control over their life choices. There are no avenues for them to seek recourse to protect their autonomy or delegate their decision-making to chosen representatives. Thus, they are trapped in a void; neither getting guardianship for incapacitated persons nor an effective measure for safeguarding autonomy for independent capable adults.<sup>76</sup>

The Supreme Court envisages the fundamental doxastic support to fill this void. The case of *Shafin Jahan* involved a 24-year-old married woman whose parents invoked *parens patriae*, i.e. the inherent power of the state, exercised through the judiciary, to act as parent for those unable to care for themselves, to "protect her from her own decision" by attempting to annul her interfaith marriage.<sup>77</sup> The Court held that *parens patriae* could only apply in extraordinary cases, that is to say, for minors, mentally incapacitated persons, or persons without guardians

<sup>68</sup> Mehrotra N (2020) The Rights of Persons with Disabilities Act, 2016: does it address the needs of the persons with mental illness? *Indian J Psychiatry* 62(1):4–10. [https://doi.org/10.4103/psychiatry.IndianJPsychiatry\\_351\\_19](https://doi.org/10.4103/psychiatry.IndianJPsychiatry_351_19)

<sup>69</sup> National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999, s 3, s 14, No 44 of 1999 (India)

<sup>70</sup> *Ibid*, s 2(a)–(j)

<sup>71</sup> Guardians and Wards Act 1890, s 4, Act VIII of 1890 (India)

<sup>72</sup> Dhanda A (2007) Legal capacity in the disability rights convention: stranglehold of the past or lodestar for the future? *Syracuse J Int'l L & Com* 34:429–462, 438–441

<sup>73</sup> Stavert J (2015) The exercise of legal capacity, supported decision-making and Scotland's Mental Health and Incapacity legislation: working with CRPD challenges. *Laws* 4(2):296–313. <https://doi.org/10.3390/laws4020296>

<sup>74</sup> *Smt Kanta Devi v State* (2012) 179 DLT 547

<sup>75</sup> *Ibid*, paras 63–67

<sup>76</sup> Dhanda A (2007) Legal capacity in the disability rights convention: stranglehold of the past or lodestar for the future? *Syracuse J Int'l L & Com* 34:429–462, 445–448

<sup>77</sup> *Shafin Jahan v Asokan KM* (2018) 16 SCC 368

or protectors. It strongly deprecated using *parens patriae* to override capable major adults' autonomy by holding that once a person understands and freely chooses—however much under pressure, emotional attachment or social dignity; the courts cannot interfere in a paternalistic manner.<sup>78</sup>

The Court stressed that by making choices, the legal system facilitates the development of an individual personality; however, the limitation on choice for purposes of obedience to society destroys such individuality.<sup>79</sup> In this manner, it closes any avenues for paternalistically overriding troubling choices, even outweighed against family consent. However, *Shafin Jahan* leaves a doctrinal window to recast guardianship law. It admits that *parens patriae* may apply when an incapacity-to-choose is "overborne" by coercion or undue influence such that the "true consent" is vitiated. Citing the UK jurisprudence on vulnerable adults, the Court made a distinction between "incapacity of the mind" and "incapacitated of wills", laying the foundation for protective intervention in dependent elderly cases beyond strict cognitive incapacity.<sup>80</sup>

This doctrinal innovation, therefore, establishes two types of incapacity. Incapacity of the mind is inability of understanding, reasoning, or retaining information due to cognitive deficit or mental illness. Incapacity of the will exists when circumstances prevent one from free exercise of choice or converting understanding into action, although understanding, reasoning, and cognitive capacities are intact.<sup>81</sup> Article 12 of the UN Convention on the Rights of Persons with Disabilities stipulates that the term "support" is relevant when autonomy is constricted through cognitive limitations or situational hindrances.<sup>82</sup> General Comment No. 1 (2014) on Equal Recognition Before the Law states that support must be person-centered and follow the individual's own "will and preferences" rather than paternalistically presume what is to their "best interests".<sup>83</sup>

Either way, an elderly person coerced by family members, deprived of information, barred from legal assistance, and utterly dependent on family

forbearance has lost the practical capacity to exercise her rights. She faces will incapacity: crippled by circumstances to the point that she cannot act on her intact understanding. She may understand that her son is stealing her pension entitlements, that she has a right to refuse treatment, and how to change her will; but nonetheless, accessing lawyers goes beyond her powers, seeing independent physicians is something she cannot do, and she cannot leave the house without somebody else's permission. She is cognitively intact; her agency has been snatched away from her through circumstantial exclusion. An appropriate guardianship framework would not deny or infantilize her capacities, instead restoring the material conditions requisite for her autonomous choice: including access to information, independent legal representation, and control over her own finances, protection from coercion, and unimpeded communication of her preferences to impartial decision-makers unhindered by conflicted family intermediaries.<sup>84</sup>

The courts seem to have accepted the incapacity-of-will framework for guardianship in recent Indian case laws. Justice Prathiba Singh of the Will and Preference Test conferred *parens patriae* on *N.A. v. NCT of Delhi* (2023)—"clearly a vacuum" regarding the 95-year-old person in a vegetative state because no savings were provided by the Rights of Persons with Disabilities Act and the Mental Healthcare Act.<sup>85</sup> Through this innovative approach, the Court applied *parens patriae* for the appointment of a guardianship committee instead of an individual guardian as a way of trying to take care of cases on incapacity occurring within situations not covered by any statute. The inclusion of mechanisms for accountability-including consensus decision-making, six-monthly financial reporting, court permission for asset disposal, and removal for non-compliance—that within its purview inapplicable Mental Healthcare Act applied a "will and preferences" test.<sup>86</sup> In *Jayesh Manharlal Gandhi v. State of Gujarat* (2022), the Gujarat High Court held habeas corpus applications by elderly persons maintainable and intervened to safeguard elder

<sup>78</sup> *Ibid*, paras 47–55

<sup>79</sup> *Ibid*, para 51

<sup>80</sup> *Ibid*, paras 63–67

<sup>81</sup> Donnelly M (2009) Best interests, patient participation and the mental capacity act 2005. *Med Law Rev* 17(1):1–29. <https://doi.org/10.1093/medlaw/fwn024>

<sup>82</sup> United Nations (2006) Convention on the Rights of Persons with Disabilities. United Nations, New York, Art 12

<sup>83</sup> United Nations Committee on the Rights of Persons with Disabilities (2014) General Comment No 1: Article 12: equal recognition before the law. UN Doc CRPD/C/GC/1, paras 21–29

<sup>84</sup> Series L, Devereux J, Tobin J et al (2017) Enabling autonomy for older persons with dementia through support and intervention. *Bioethics* 31(9):650–659. <https://doi.org/10.1111/bioe.12395>

<sup>85</sup> *N.A. v NCT of Delhi* (2023) SCC OnLine Del 41

<sup>86</sup> *Ibid*, paras 18–25

parents against undue family aggression without any formal declaration of incapacity.<sup>87</sup> The mother's intentions regarding her elder son and their transfer became clear since the letter was sent in court, who thus verified her independent articulation. This was seen as court help on recognizing elders' preferences using habeas corpus and recognizing independence fettered by family, even with preserved capacity, and would intervene to restore it when preference is expressed. In *Uma Mittal v. Union of India* (2020), regarding a comatose person, this High Court found the National Trust Act and Mental Healthcare Act lacking.<sup>88</sup> A *parens patriae* guardian was provisionally created with unique features—pre-appointment court involvement, specific powers of a guardian, biannual reporting and supervision, asset monitoring, and provisions for removal for misconduct. This demonstrated the courts implementing procedural and substantive norms where no clear statute practically existed, basing such application on *parens patriae* protection especially for dependent aged persons. Provisionally, these cases could be regarded as forming the jurisdictional basis for emerging consensus. Strictly based on interpretation, *parens patriae* correctly comes in where autonomy of old people is hindered by dependence, compulsion, or seclusion, even without incapacity. It is not paternalism, but recreating the circumstances for making autonomous choices; these would include the dependency-circumstances incapacity of a person who cannot take care of self without in the absence of any other protection where intervention will foster or uphold autonomy and rights.<sup>89</sup> This is subject to very strict scrutiny by the courts here, time-limited, and just on behalf of the individual, indulgently taking individuals' wishes and deliberations into consideration. Guardianship thus becomes not permanent authority but supportive decision-making assistance for those weighed down by non-cognitive constraints. This connects Shafin Jahan's paradigm upholding competent adult autonomy with protection for vulnerable elders, recognizing that autonomy can be constrained by circumstances beyond cognition and attempting to restore conditions for actual legal choice without denying rights-bearing status.

#### COMPARATIVE PERSPECTIVES FROM THE UNITED KINGDOM AND JAPAN

Jurisprudentially important; In *re L* (Vulnerable Adults with Capacity: Jurisdiction of the Court) (No 2) [2013] created such a class.<sup>90</sup> The case involved a woman in her 50s who had the capacity to decide but was manipulated by an overpowering partner. The English Court of Appeal, according to Lord Justice McFarlane, held that the High Court had inherent jurisdiction to protect vulnerable persons distinctively along with and apart from the Mental Capacity Act 2005 which dealt only with persons of cognitive capacity.<sup>91</sup> The judgment acknowledged that while some had capacity according to the Mental Capacity Act others lacked practical freedom to exercise their capacity on account-of coercion, undue influence, or control by others. Most importantly, judgement analyzed not formal incapacity or understanding but practical diminished choice. McFarlane held that inherent jurisdiction protects adults when decision making capacity has been "overborne" by coercion, control, isolation, and information deprivation. It must not paternalistically "best interest" decisions", but should instead remove obstacles so that autonomous choice can be reinstated, thus restoring practical freedom.<sup>92</sup>

In *re L* thus produced really substantial doctrinal legitimacy for India, which readies the ground for establishing criteria to assess legally capable persons who, are practically unable to exercise their autonomy due to various circumstances. The reflection of how the courts may intervene for persons in this situation without infringing their status as rights bearers is also there. It's as if the inherent jurisdiction manifests equity and keeps vulnerable persons from *parens patriae* in the Indian constitutional framework. *Parens patriae* intervention can cover situational incapacity without affront to autonomy or paternalism regarding otherwise-capable adults.<sup>93</sup>

Japan gets old before the rest of the world indeed, as more than 28% of its population is beyond 65 years.<sup>94</sup> Though lesser than India's proclamation, Japan also had in place a highly integrated model of legal guardianship with long-term care and social welfare. Before 2000, guardianship was plenary like the

<sup>87</sup> *Jayesh Manharlal Gandhi v State of Gujarat* (2022) SCC OnLine Guj 1589

<sup>88</sup> *Uma Mittal v Union of India* (2020) SCC OnLine All 777

<sup>89</sup> Herring J (2016) *Vulnerable adults and the law*. Oxford University Press, Oxford, p 87-112

<sup>90</sup> *In re L* (Vulnerable Adults with Capacity: Court's Jurisdiction) (No 2) [2013] 1 FLR 1384 (Fam)

<sup>91</sup> *Ibid*, paras 47-52

<sup>92</sup> *Ibid*, paras 58-66

<sup>93</sup> Clough B (2018) Exploring the potential of relational approaches to mental capacity law. *Cambridge Law J* 77(3):501-529. <https://doi.org/10.1017/S0008197318000612>

<sup>94</sup> Statistics Bureau of Japan (2021) Population estimates. Ministry of Internal Affairs and Communications, Tokyo

Guardians and Wards Act of 1890 in India. The reforms linked with the Long-Term Care Insurance Act of 2000 and the amendments to guardianship introduced the tiered approach: full guardianship for severe incapacity, limited guardianship for partial incapacity in specific domains: and support-based decision-making for people needing aid to support their primary agency.<sup>95</sup> The Japanese system links fully guardianship with their long-term care insurance intertwined into their welfare infrastructure. Aged persons who require care usually undergo a holistic assessment, case management, the coordination of health and social supports, and possibly the necessary obtaining of support persons or guardians. Clear-cut findings indicate that guardianship is a springboard rather than an obstacle to services.<sup>96</sup>

By community introduce this innovation, Japan has guardianship referred to trained volunteers or else professionals outside family networks, mostly in contrast to other family context issues of potential exploitation or paternalistic control against the elder person's wishes. These guardians report to court and welfare authorities, thus minimizing exploitation risks.<sup>97</sup> Even under guardianship, wards hold rights and are required to engage in discussions over significant life events. Guardianship is temporary and supportive rather than permanent and controlling, with built-in periodic reviews allowing amendment or termination as circumstances evolve.<sup>98</sup>

Japan's model indicates tiered guardianship that would be integrated into the community, at a larger scale for economies under similar demographic pressure as India. Proportionality in tiered guardianship in step with pension and healthcare systems, trained community guardians, periodic reviews, and autonomy preservation under guardianship are indicated.<sup>99</sup>

#### PROPOSED SITUATION-BASED GUARDIANSHIP FRAMEWORK

The framework is based on six major design principles that encompass constitutional law,

international human rights instruments, and some features of the emerging jurisprudence in India. The legal presumption should be that all individuals, irrespective of their age, are actually able to take decisions themselves.<sup>100</sup> Such intervention should be manifestly needed and specific to certain deprivations or vulnerabilities. Advice should focus on proving protective intervention to be necessary and proportionate and not on proving that the elder person is unable to participate in decision-making. Findings from the elder's will, preferences, and understanding should be pursued in courts, and should guide the operation of a guardianship committee. The elder's voice will not be overshadowed by "best interest" concepts as viewed by the committee.<sup>101</sup> Otherwise, any other desire directs but if there can be an expression of preference, then that has to be followed. Then can any of those advance directives carry significant weight. The time-specific guardianship, normally between two and three years, must as well concern the exact issues involved. The committee does not have jurisdiction on some issues, and its scope is narrowly tailored to address specific dependence and vulnerability. Such severe sensitive areas include marriage, faith, bodily integrity, and fundamental life choices, which are not subject to committee authority.<sup>102</sup> Guardianship is situational by an assessment of dependency, of threats, and vulnerability particular to the elder. The two elders with equal cognitive profiles would have a different need for superiority: one requiring only financial protection and the other needing coordination of healthcare. The guardianship committees should normally make court reports every six months, and the court may periodically review their necessity for continued guardianship. Elders, if capable, or any concerned person can request review anytime. Accountability mechanisms ensure removal of committee members who abuse power or misbehave. Guardianship is supportive instead of controlling. The restoration of elder autonomy lies in provisions for access to information, representation, financial control, and protection

<sup>95</sup> Ikegami N, Yamada Y (2002) The long-term care insurance law in Japan: impact on institutional care facilities. *Int J Geriatr Psychiatry* 17(3):217-221. <https://doi.org/10.1002/gps.538>

<sup>96</sup> Nakashima T, Urano T, Ogawa A et al (2011) The adult guardianship system in Japan: the first decade. *Int J Law Psychiatry* 34(4):294-300. <https://doi.org/10.1016/j.ijlp.2011.07.008>

<sup>97</sup> *Ibid*, p 296-297

<sup>98</sup> Nomura K, Nakashima T (2012) Legal capacity and adult guardianship in Japan. *Int J Law Psychiatry* 35(5-6):392-397. <https://doi.org/10.1016/j.ijlp.2012.09.012>

<sup>99</sup> Arai H, Ouchi Y, Toba K et al (2015) Japan as the front-runner of super-aged societies: perspectives from medicine and medical care in Japan. *Geriatr Gerontol Int* 15(6):673-687. <https://doi.org/10.1111/ggi.12450>

<sup>100</sup> Mental Capacity Act 2005, c 9, s 1(2) (UK). See also Rights of Persons with Disabilities Act 2016, s 13, No 49 of 2016 (India)

<sup>101</sup> United Nations Committee on the Rights of Persons with Disabilities (2014) General Comment No 1: Article 12: equal recognition before the law. UN Doc CRPD/C/GC/1, para 21

<sup>102</sup> *Puttaswamy v Union of India* (2017) 10 SCC 1, paras 143-149 (Chandrachud J)

against coercion or undue influence, with no denial of agency. The elder remains a rights bearer: guardianship is a form of temporary support.<sup>103</sup>

This framework does not provide for the appointment of a guardian, but rather more of a tripartite guardianship committee that consists of three individuals rather than a single guardian who necessarily could have property interests. The first member comprises a suitable and willing family member by the elder's own choice or, if that choice is not possible, through familial connection. The second is picked from the elder's social environment: a friend, social worker, NGO representative, community elder, religious leader, or person trusted by the elder and acceptable to the court. The third is a court-appointed member: a senior citizen advocate, social welfare officer, retired judge, law professor with elder law expertise, or court-designated relevancy to elder.<sup>104</sup>

The committee acts by means of consensus; all three members have to feel the same way about a decision. If consensus is not arrived at after specified directed deliberations, decisions can be made by majority vote but any dissenting views are recorded and reported to court. Consensus protects against one member making his/her decision against the judgment of all the others. The tripartite model brings in family, personal, and institutional perspectives, ensuring that such interests of the elder are looked into from as many angles as possible. This was observed in the case of *N.A. v. NCT of Delhi*, whereby the High Court of Delhi appointed a guardianship committee rather than appointing an individual guardian, observing that committees raise protection against monopolizing or misusing powers from guardianship.<sup>105</sup>

Specific areas only are those wherein the committee authority is exclusively limited: management of bank accounts, pensions, and regular incomes; execution of ordinary financial transactions concerning bills, rent, healthcare expenses, and utilities; representation in legal matters about property and contracts, with court authorization needed for selling or significantly changing assets; and coordinating health and social support services. Clear areas on which the committee has no authority

would be the choices that the elder makes in terms of medical treatment except for emergency treatment when unconscious or incapable of communicating; religious or cultural practices; intimate relationships, marriage, or family contacts; the elder's choice of residence meaning freedom to move, change caregivers, or end family-imposed visitation restrictions; and charitable giving or personal value expression. This distinction aims to guarantee independence in intimate and private matters while providing the elder with protections against risks emanating from dependence on financial and administrative issues.<sup>106</sup>

The proposed framework provides for elaborate procedural safeguards as emerging from Indian jurisprudence. Direct engagement of the elder by the court before appointing the guardianship committee: The courts should mandatorily interact directly with the elder by private conversation without family members present to determine understanding of the proposal and will or preference before appointing the guardianship committee.<sup>107</sup>

Advance directive recognition allows elders to execute advance directives specifying preferences concerning medical treatment, property management, family contact, and other subjects. These directives guide committee operations and become critical in decision-making.<sup>108</sup>

Judicial reviews will be conducted periodically: Every six to twelve months, a court would typically be required to review the operation and continued necessity of the committee under guardianship. Any review could be initiated at any time by the elder, if able, or any person with reason to be concerned. It connects financial disclosure and recording to court committees, external bodies auditing large funds, and the keeping of court records of guardianship orders and monitoring reports accessible to other family members and the elder.

In terms of grievance and complaints mechanisms, complaints are lodged against committee misconduct and will be promptly taken by the courts that investigate these complaints and take the remedial action. The abusive member will be removed and another nominated; however, the guardianship procedure does not terminate.

<sup>103</sup> Gooding P (2017) A new era for mental health law and policy: supported decision-making and the UN Convention on the Rights of Persons with Disabilities. Cambridge University Press, Cambridge, p 145-167

<sup>104</sup> *N.A. v NCT of Delhi* (2023) SCC OnLine Del 41, paras 22-24

<sup>105</sup> *Ibid*, para 23

<sup>106</sup> Bartlett P (2012) The United Nations Convention on the Rights of Persons with Disabilities and mental health law. *Mod Law Rev* 75(5):752-778. <https://doi.org/10.1111/j.1468-2230.2012.00923.x>

<sup>107</sup> *Jayesh Manharlal Gandhi v State of Gujarat* (2022) SCC OnLine Guj 1589, paras 15-18

<sup>108</sup> Kong C, Dunn M, Parker M (2018) Psychiatric advance directives: do they really help? *BJPsych Bull* 42(1):37-42. <https://doi.org/10.1192/bjb.2017.6>

A proper definition for time limits and renewals will stipulate specific terms of a maximum of two to three years, thereby requiring a court determination as to whether conditions have changed before renewal: this allows civil death not to last indefinitely while encouraging assessment around alterations that may occur in the life of the elder.

The further right challenge is preserved. Any elder can petition the courts to modify or terminate the guardianship on the grounds of change of circumstances or on account that the committee does not act in his or her best interests. In this way, the collective safeguards protect that after the guardian has taken protective action as warranted, it shall not become an instrument of extortion or offensive control.<sup>109</sup>

#### PATHWAYS AND CONCLUSION

Through three synergistic pathways tailored to varied timelines and levels of government, the envisioned framework can be achieved.

First pathway: Amendment of the MWPSCA of 2007 to create a new chapter for situation-based guardianship for senior citizens operating through the existing District Maintenance Tribunals and Officers, specifying the scope of guardianship, committee structure, safeguards, and judicial procedures, to ensure statutory protection at a national level.

Second pathway: Rules framed by governments or directions issued by constitutional courts would set forth guidelines for appointing guardianship committees for the dependent elderly under the *parens patriae* principle and the RPDA of 2016. This would allow implementation immediately without national legislation, with High Court's most probably adopting a common framework for the sake of consistency of jurisdiction.

Third pathway: Full Adult Guardianship and Supporting Decision-Making Code for all adults this would include older persons suffering from mental illness, intellectual disabilities, and undue influence with the intent of harmonizing the Rights of Persons with Disabilities Act, Mental Healthcare Act, and

elder-specific provisions- an ambitious but holistic effort.<sup>110</sup>

Our suggestion would be an amalgamation of the first and the second pathways: Use the first pathway to create legislative authority through an amendment and utilize the second pathway for institutional mechanisms ensuring prompt action through intervention of governments and constitutional courts.

By 2050, there will be 310 million persons above 60 in India, one in five Indians.<sup>111</sup> With reforms or millions with a clear choice ahead-dependence or destitution, family control or abandonment, silent abuse or infantilizing guardianship inuring upon capacity and dignity. This paper breaks out into an alternative vision – a framework that recognizes the inalienable right to protection, along with autonomy and agency. Dependency is a relational situation, not a state of permanent incapacity. Vulnerability arises out of coercion and context; it is neither a function of an illness nor an impairment. The law can provide conditions for exercising autonomous choice without violating human dignity.

Much more than the individuals are pertinent. How aging societies treat elders serves as the litmus test for their commitment to dignity, equality, and rights.<sup>112</sup> Governance defined by the autonomous will and preferences of old persons provides a reality check against paternalism and best-interest reasoning. Such a framework invigorates agency within the economy and society, therefore executing this development where the long-term growth appeals out of every constituent of society for poverty eradication that requires universal security and inclusive development that leaves no group behind.<sup>113</sup>

India has grounds to build on: the constitutional ground of *Shafin Jahan*, international commitments through the Madrid Plan and Sustainable Development Goals, jurisprudential growth in *N.A. v. Delhi*,<sup>114</sup> *Jayesh Gandhi*,<sup>115</sup> and *Uma Mittal*,<sup>116</sup> and some comparative examples from the UK and Japan. The road is now paved. Will India make a move to protect, by the year 2050, the projected 310 million

<sup>109</sup> Flynn E, Arstein-Kerslake A (2014) Legislating personhood: realising the right to support in exercising legal capacity. *Int J Law Context* 10(1):81–104. <https://doi.org/10.1017/S1744552313000384>

<sup>110</sup> Narayan CL (2018) Disability law in India: paradigm shift or evolving discourse? *Econ Polit Wkly* 53(3):81–88

<sup>111</sup> United Nations Population Division (2019) World population ageing 2019: highlights. United Nations, New York

<sup>112</sup> Lloyd-Sherlock P, McKee M, Ebrahim S et al (2012) Population ageing and health. *Lancet* 379(9823):1295–1296. [https://doi.org/10.1016/S0140-6736\(12\)60519-4](https://doi.org/10.1016/S0140-6736(12)60519-4)

<sup>113</sup> United Nations Development Programme (2017) Ageing, older persons and the 2030 agenda for sustainable development. UNDP, New York, p 5–8

<sup>114</sup> *N.A. v NCT of Delhi* (2023) SCC OnLine Del 41

<sup>115</sup> *Jayesh Manharlal Gandhi v State of Gujarat* (2022) SCC OnLine Guj 1589

<sup>116</sup> *Uma Mittal v Union of India* (2020) SCC OnLine All 777

elderly people who would, in some way, need this protection, in the creation of elder law recognizing

old citizens whose rights autonomy and productive capacity demand accountability in law?

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11. Constitution of India, Art 14
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