

Differently abled Persons and Human Rights: Issues and Responses

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Abstract

Disability is a class in itself that any one may fall victim at any time. It can come about as a result of a sudden accident, a fall down a flight of stairs or disease. Disability maintains no socio-economic boundaries. Since disability catches up with most people in its fold and any of us may fall in it someday. Women, men and children with disabilities are too often amongst the most marginalized in all societies and face unique challenges in the enjoyment of their human rights. Though the Universal Declaration of Human Rights stated that all human beings are born free and equal in dignity and rights. Nevertheless, this is far from being a reality for around 500 million differently abled persons around the globe. This paper will explore the human rights aspect of disability and its present status in India. The part I of the paper discusses the relation between human rights and disability while the part II deals with the international framework pertaining to the rights of the differently abled persons. Part III has focused on the national initiatives and the rights at stake are elucidated in Part IV of the paper.

I Introduction:

“We know that equality of individual ability has never existed and never will, but we do insist that equality of opportunity still must be sought.” Franklin D. Roosevelt

Human rights are the rights of an individual by virtue of being human. Our ancient Vedic set up explains the concept of human rights as the right to happiness and universal brotherhood (Vasudeva Kutumbakam). Human rights are inalienable and inherent rights. These principles are recognized in natural law but discrimination in our society still continues to exist due to ignorance and prejudices.

The people suffering from disabilities do have human rights but such rights are frequently violated. Their living conditions are always worse than those of other citizens.

They are very often isolated and socially marginalized. They face discrimination in virtually all aspects of life¹. These persons often have no voice or a very feeble voice in the democratic process. Even where they have a strong voice, they are not necessarily paid heed to. A lack of participation in the political debate results in policy being formed without the active involvement of groups likely to be affected by its outcome. It can lead to alienation from democratic processes and cynicism about the possibility of achieving justice through law. It also leads to passivity and dependence, the factors that serve to reinforce stereotypes, compounding and perpetuating the invisibility of persons with disabilities². The fact is that these differently abled persons have historically been invisible in the human rights system and have been overlooked in human rights work which is not acceptable. Over two thirds of them live in developing countries. They are treated as second-class citizens and are forced to confront segregation, discrimination, barriers and stereotypes. An entire range of disability issues such as the causes of disability, care, rehabilitation, empowerment, mainstreaming through education, employment, health care, and transportation need to be addressed. But not enough steps were being taken to eliminate the barriers to their full participation in society.

Over the past two decades, dramatic shift in the perspective has taken place from an approach motivated by charity towards persons with disabilities to one based on rights.

Disability is positioned as an important dimension of human culture by human rights model. According to human rights model all human beings irrespective of their disabilities have certain rights, which are unchallengeable. By emphasizing that the differently abled Persons are equally entitled to rights as others, this model builds upon the spirit of the Universal Declaration of Human Rights, 1948, according to which, 'all human beings are born free and equal in rights and dignity'. This model emphasis on viewing persons with disabilities as subjects and not as objects thus locating the problem outside the disabled persons and addresses the manners in which the economic and social processes accommodate the differences of disability.

Human rights defines disability as "it is the disadvantage or restriction of activity caused by a society which takes little or no account of people who have impairments and thus excludes them from mainstream activities".

¹ S.R. Chauhan, N.S. Chauhan (Ed.), "Disabled Persons Rights", *International Dimension of Human Rights*, at 335(2006).

² Shruti Pandey, Priyanka Chirmar, Deepika D'souza, *Preface, Disability and the Law*, at 4, (2005).

The shift to the human rights perspective has been authoritatively endorsed at the level of the United Nations over the past two decades. This is best exemplified by the United Nations Standard Rules on the Equalization of Opportunities for People with Disabilities, adopted by the General Assembly in resolution 48/96 of 20 December 1993. These Rules and especially the role played by the Special Rapporteur, continue to make a vital contribution to the process of raising consciousness about the human rights of persons with disabilities and in stimulating positive change throughout the world³.

The shift to the human rights perspective is also reflected in the fact that national institutions for the promotion and protection of human rights throughout the world have begun to take an active interest in disability issues. This is important since these institutions help in providing a bridge between international human rights law and domestic debates about disability law and policy reform. The national institutions are strategic partners in the process of change and their increasing engagement on the issue of human rights for persons with disabilities is a highly encouraging sign for the future⁴.

Use the skills that I have got.

Do not focus on what I have not.

Of course, I am aware of my limitation.

Yet, I am a part of God's wonderful creation..... William E. Lightbourne

II The International Framework and Human Rights of Differently abled Persons:

An international legal awareness related to the rights of differently abled Persons started in 1961 when the declaration on Social progress and Development was adopted by United Nations General Assembly. The Declaration on rights of Mentally Retarded persons was also adopted by General assembly in 1971 which emphasized that the mentally challenged persons have the same rights as other normal human beings. It further stipulated that any restriction or denial of their rights in education, medical or social sectors should be in accordance with the proper legal safeguards so that any abuse of their rights can be prevented. In 1975

³ Amrit pal kaur, Rights of Disabled, Aged and Infirm, Chapter 11 of P.G Diploma of Human Rights and Duties, University School of Open Learning, Panjab University, Chandigarh at 134

⁴ Ibid at 135

the adoption of Declaration on Rights of Disabled persons began a new era in which it was stipulated that Disabled persons have the inherent right to respect for their human dignity. It was also mentioned that irrespective of the origin, nature and seriousness of their handicaps and disabilities they have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.”⁵ The year 1981 was declared as International Year of Disabled Persons and plan of action was called for. Consequently, an important formulation of World Programme of Action came into existence in the year 1982 which was adopted by resolution 37/521. In order to implement the activities recommended in World Programme of Action, the period of 1983-1992 was declared as UN Decade of disabled persons. Thereafter in 1993 General Assembly adopted Standard Rules on Equalization of Opportunities with an object to emphasize on the responsibilities of the states in removal of barriers in promotion and protection of the rights and freedoms of the persons suffering from disability. In 2002 Biwako Millennium Framework was adopted with an idea to work towards an inclusive, barrier free and right based society for persons with disabilities. In 2006 a much awaited document namely the Convention on Rights of Persons with Disabilities was adopted. The purpose of these documents is to encourage the implementation of international standards by government and ministries at the state levels and also to expand the opportunities for full participation of disabled persons. The central aim is that the states must work hand in hand to eradicate social stigmas associated with disabled persons and must consider the best ways to give effect to the rights given in the Convention.

III The National Initiatives:

The Constitution of India premised on the principle of social justice and human rights. Indian Constitution does not specifically deals with the prevention of discrimination on the grounds of disability. But the Preamble, the Directive Principles of State Policy and the Fundamental Rights enshrined in the Constitution stand testimony to the commitment of the State to its people including disabled persons. These provisions envisaged a very positive role for the State in the upliftment of the status of disadvantaged groups. For example, Article 41 enjoins

⁵ The Declaration on Rights of Disabled persons, 1975, para 3 available at <http://www.globalhealthrights.org/instrument/declaration-on-the-rights-of-disabled-persons/> accessed on 9th January, 2014

that, “The State shall, within the limits of its economic capacity and development make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement”. More specifically, Article 46 stipulates that, “The State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular, of the Scheduled Castes and the Scheduled Tribes and shall protect them from social injustice and all forms of exploitation”.

In addition to the constitution provisions there are many other statutes which deal with the promotion of the rights of disabled persons. In India there is a long list of legislations and regulations which protect and govern the rights and interests of the physically challenged persons such as the Payment of Gratuity Act 1972, Equal Remuneration Act 1976, The Factories Act 1948, Dockworkers/safety, Health and Welfare Act 1986, the National Policy on Education 1986, the Persons With Disabilities (Equal opportunity, protection of rights and full participation) Act 1995(persons with Disabilities Act).

Until 1995 there was no law that even defined discrimination against people with disabilities. It is only with the 'Persons with Disabilities Act,' passed in 1995 that discrimination specifically against persons with disabilities came under the purview of the law. This act is a legislative attempt which places physically challenged persons on a slippery slope of policies and programmes. Infact this statute was passed by Indian government due to an international pressure especially under Asia Pacific Decade of Disabled persons (1993-2002). Thus this legislation is a big step forward to protect and promote the rights of physically challenged persons. In fact till that time most of the welfare measures taken in India were by way of affirmative action. The Ministry of Social Welfare was largely concerned with problems of physically challenged persons and providing privileges to this section of the society. It was during early 1980's that some landmark developments in the International Disability Rights Movement brought about a change in the attitude of the Government of India.⁶

The Persons with Disabilities Act, 1995 is a landmark in the history of disability sector because for the first time it stated that people with disabilities had the right to equal opportunities and full participation and that these rights would be protected by the law. The Act elaborates to some extent the duties of the government

⁶ <http://www.preservearticles.com/201101233658/complete-information-on-the-rights-of-a-disabled-person-in-india.html> accessed on 5th August,2013

at various levels and the other establishments under their control. It also provides useful guidance regarding the type and nature of measures that would equalize opportunities for the enjoyment of basic rights and freedoms.

It is significant to note that most disability statutes such as Americans with Disabilities Act 1990 and the Disability Discrimination Act 1995 of UK have been primarily anti-discrimination laws which are protecting equality through civil and political rights, but Person with disabilities Act is an example of the statute based on redistributive social policy giving rise to positive measures on the part of the state, but without the backing of the human rights.⁷

Furthermore, the definition of disability has been shifted across the world from medical problem to social disability. This has been recognized in United Kingdom in Disability Discrimination Act, 1995 as well as in United States as Americans Disability Act (ADA), 1990. But in Indian law the term disability so defined under Section 2 (i) of the Persons with Disabilities Act, 1995 still deals with the problem only as medical disability.

In addition to the People with Disabilities Act 1995, there are three other legislations which are relevant to the rights of people with disabilities. These include the National Trust Act 1999 and the Government of India has adopted National Policy on Disability in February 2006. The policy recognized that Persons with Disabilities are valuable human resources for the country and seeks to create an environment that provides them equal opportunities, protection of their rights and full participation in society. Its aim is to ensure better coordination between various wings of the State and Central Governments.⁸

IV Rights at Stake⁹:

The differently disabled persons suffer from discrimination based on society's prejudice and ignorance. In addition, they often do not enjoy the same opportunities as other people because of the lack of access to essential services. There are many stereotyped presumptions prevailed about the differently abled persons in our society such as differently abled people have always been dependent or they need

⁷ Jayana Kothari, Future of Disability Law in India, Oxford University Press, (2012)

⁸ Kumar A. Draft of National Policy for Persons with Disability. Ministry of Social Justice and Empowerment, New Delhi, 2005. available at <http://www.disabilityindia.org/draftpolicy.cfm>

⁹ Human Rights of Persons with Disabilities, available at http://www.hrea.org/index.php?doc_id=416 (accessed on January 4, 2013)

helping hands and charity or they are the victims of their own bad luck or it is a kind of punishment for sins that they have committed in their previous life. This approach towards differently abled persons perpetuates the stereotype setup in such a way that the victims are seen as the objects of pity and charity.

Many differently abled persons live in extreme poverty, in institutions, without education or employment opportunities and face a range of other marginalizing factors. In some countries they are denied the right to own property and it is common for differently abled persons to be denied the right to make decisions for themselves. The discrimination they face is widespread, cutting across geographical boundaries and affecting people in all spheres of life and all sectors of society¹⁰.

The entry into force of the International human rights law determines that every person has the following rights whereby the policy regarding disabilities is often dominated by the notion of "equalization of opportunities", which means that society must employ its resources in such a way that every individual, including persons with disabilities, has an equal opportunity to participate in society. The central aim is to consider the differently abled persons as holder of rights not the objects of charity. Hence they are entitled to:

1. The equal right to education
2. The right to employment
3. The right to health
4. The right to non-discrimination
5. The right to equal opportunity
6. The right to full integration
7. The right to security

Charity Approach	Human Right Approach
Dependence	Independence
Sympathy	Empathy
Discrimination	Equality

¹⁰ Monitoring the Convention on the Rights of Persons with Disabilities, Guidance for human rights monitors, Professional training series No. 17, Office Of High Commission of Human Rights available at http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf accessed on 6th December, 2014

Institutionalization	Integration
Exclusion	Inclusion
Dependence	Independence/Autonomy
Segregation	Integration
Barriers/Hurdles	Barrier-free environment
Disempowerment	empowerment
Belittling	Dignifying

Sadly the current system is fundamentally flawed and the major issues of concern are:

1. Disability as a reason for discrimination
2. Lack of education opportunities both at the primary and higher levels
3. Lack of employment and livelihood opportunities
4. Lack of physical Access in the built infrastructure
5. Lack of access to information in accessible formats
6. Denial of rights to promotion and emoluments to those who do find employment
7. Denial of reasonable accommodation in employment, education and so on
8. Denial of access to most Civil and Political rights
9. Marginalisation and discrimination faced by women with disabilities

It is apparent that these rights are extensively violated in our so called 'modern society'. The violation of basic human rights is discussed as follows:

Right to Education:

The majority of schools in India are poorly designed and few are equipped to meet the unique needs of students with disabilities. The lack of disability friendly transportation services and accessible buildings are considered by some to be far greater problems than social prejudice and negative attitudes¹¹.

Quite understandably, the right to education for persons with disabilities has evolved new approach to disability. This right has been given to the physically challenged persons in consonance with UN and its bodies and the Government of India has elaborated the content of this right from the perspective of human rights. The appropriate government is required under the Act to provide free education to disabled children by setting up special schools with vocational training facilities. It

¹¹ Chatterjee, G. The global movement for inclusive education, (2003, April) available at <http://www.indiatogether.org/2003/apr/edu-inclusive.htm>

has been provided that an endeavor should be to promote the integration of students in the normal schools.¹² The appropriate government should conduct special part time classes for drop-out differently abled children also. The government shall make schemes for imparting them education through open schools or open universities.¹³ It is also enjoined to train adequate number of teachers to make sufficient manpower available. But the Act has completely ignored some vital aspects such as: Pre-school education of disabled children, special problems of the parents of the disabled, special problems of the female disabled, games, sports and cultural activities, exploitation of disabled by their own families, higher education of the disabled.¹⁴

Right to Employment:

The differently abled persons are considered as burden on their families. Job opportunities for these persons are very important. If the differently abled persons find good employment, only then they will be able to pull their families out of poverty. In most of the companies in India the employers are following a charity approach but the truth is that indeed such companies get benefit from competent staff with disabilities, provided that the persons concerned have skills the companies need. The major challenge here is that there are far too few measures of this sort. The human-resource departments of most corporations have not been convinced of employing differently abled persons yet. They neither invest in training nor modifying workplaces in a way that would suit persons with special needs.

Women suffering from disabilities are facing great difficulties in public and private spheres as they have no access to vocational training and employment. They are more likely to be institutionalized¹⁵. They also experience inequality in hiring, promotion rates, pay for equal work, access to training and retraining, credit and other productive resources, and rarely participate in economic decision making.¹⁶

At present, reservation for the disabled is 3% in the ratio of 1% each for physically, visually and hearing-impaired persons. But in actual practice this three percent reservation becomes one percent of the total vacancies and the present act does not cover the employees in the private sector. Consequently more than 95 percent of the jobs in the government sector

¹² Section 26 of PWD Act

¹³ Section 27 of PWD Act

¹⁴ <http://www.preservearticles.com/201101233658/complete-information-on-the-rights-of-a-disabled-person-in-india.html> accessed on 6th December,2014

¹⁵ Miloon Kothari, Women and Adequate housing, Study by Special Repporteur on adequate housing as a component of the right to an adequate standard of living/CN.4/2005/43,para.64

¹⁶ Arthur O'Reilly "Employment barriers for women with disabilities", Skills Working Paper No. 14, Geneva, International Labour Organization, 2003.

has excluded differently abled persons from its preview.¹⁷ Recently in an important move the Rights of Persons with Disabilities Bill, 2014 has been introduced in Rajya Sabha. The new bill, if passed, will extend the quota by 2%, covering two additional categories mentally disabled and people with multiple disabilities.¹⁸ It seems to be a good step in the right direction.

Right to Health:

To look after the health needs of the differently abled persons is the prime duty of the appropriate government. A special care drive is to be promoted for research in this area to diagnose and take preventive steps towards children at risk and mothers at pre-natal and post natal stage. It needs special kind of the training of medical professionals. But the other side of the coin is that the differently abled persons in India are forced into mental hospitals and institutions, where they face unsanitary conditions, risk physical and sexual violence, and experience involuntary treatment, including electroshock therapy. They are treated worse than animals.¹⁹ Without appropriate community support and a lack of awareness, people with psychosocial disabilities are ridiculed, feared, and stigmatized.²⁰

In a shocking revelation, the Delhi Government has stated in an affidavit filed in the High Court that 228 inmates of Asha Kiran, a Government run shelter home for children and adults with mental disabilities, have died since 2005! The shelter home is in the middle of an inquiry and Public Interest Litigation (P.I.L.) for human rights abuses, overcrowding and unhygienic living conditions that have allegedly led to several deaths.²¹

In another case of Suchita Srivastva vs Chandigarh Administration²² the apex court dealt with the reproductive rights of a woman with mental retardation residing at a government run welfare institution in Chandigarh who became pregnant due to a rape by an in-house staff and who wanted to keep the baby and carry on the pregnancy to full term. The Chandigarh Administration filed a petition in the high court seeking permission to terminate her pregnancy under the Medical Termination of Pregnancy Act, 1971 ("MTP Act") on the ground that she was not capable of carrying on with the pregnancy and would not be able to look after a child. Although the expert body found that the woman had expressed her wish to bear her child, the high court directed the termination of the pregnancy. The woman, through

¹⁷ Parmanand Singh, *Disability, Discrimination and Equality of Opportunities: A comparative Analysis of the Legal Framework*, Journal of Indian Law Institute, Vol 45, 2003

¹⁸ Government moves bill on raising quota for disabled in jobs, *The Times of India*, 8th February, 2014

¹⁹ Human Rights Watch, *India: Women With Disabilities Locked Away and Abused*, December 3, 2014

²⁰ *Ibid*

²¹ Disability New and Information Service, Volume 9 Issue 12, September 01, 2012

²² 2009 (9) SCC 1.

an amicus, appealed to the Supreme Court and one of the main issues before the Supreme Court was regarding the legal capacity of a woman with mental retardation to decide on her pregnancy. The court clearly recognized the right to legal capacity of women with mental retardation to take independent decisions on her pregnancy. The Supreme Court held that “Her reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter.”²³ Therefore, the Supreme Court laid out the specific right to legal capacity which was not subject to an understanding of one’s situation and capacities. This case clearly follows the spirit of protection of legal capacity under Article 12 of the CRPD.

Right to Access:

It means the differently abled persons have barrier free access to buildings, public spaces and any other place a person might need to go for work, play, education, business, services, etc. It includes things like accessible routes, curb ramps, parking and passenger loading zones, elevators, signage, entrances, and restroom accommodations. Infact when an able bodied person is walking on the road he seldom pays an attention to any curbs, thresholds, stairs, sidewalk gratings, obstructions, narrow passages. But for a differently abled person these are barriers. Airport loudspeaker announcements are often difficult to understand for people with perfect hearing but for those who are deaf or hard of hearing, they might as well not exist. Signs, no matter how well-placed they are and how much information they carry, are of no value for a person who is vision impaired unless they are at predictable places and can be read by touch. In simple words the physical features that people without physical disabilities take for granted can present serious problems for people with different abilities, mostly because their needs haven’t been considered in designing those features. That lack of consideration can also be extended to the ways people with disabilities can be treated when they seek employment, education, or services. In over 50 countries, this situation has been recognized and addressed, at least to some extent, by laws that protect people with disabilities from discrimination, and guarantee them at least some degree of access to public facilities, employment, services, education, and/or amenities.

In India, the persons with disability Act have stipulated several provisions to overcome these barriers. Chapter VIII of the Act deals with the provisions of non-discrimination. It deals with the provision that in the transport sector steps shall be

²³ See SuchitaShrivastava (n 5) at Para 10.

taken to permit easy access to disabled persons. The appropriate government is to provide auditory signals at red lights, provide facilities on pavements for wheelchair users, engrave the surface of zebra crossing or on the edge of railway platforms for the blind persons or persons with low vision.²⁴ It is further required that there shall not be discrimination in the built environment i.e. ramps in the public buildings, special toilets for wheel chair users, Braille symbols, auditory signals in lifts etc²⁵. Access in the classroom has helped improve education opportunities and independence for people with disabilities. But the appropriate government and local authorities are directed to take all these measures within the limits of the economic capacity and development. Unfortunately, this is the major drawback of the Persons with Disabilities Act, 1995. It may be a question of jurisprudence for legislators but it is a question of existence for a person suffering from disability. A narrow interpretation of this term has reduced the act to nothingness. Consequently, the target group is deprived of many benefits guaranteed under the act²⁶

Conclusion:

The right to have an independent life, right to barrier free access, education, employment, equality of opportunities and non-discrimination are the major rights of differently abled persons. Thus the programmes related to an awareness-raising, social support are necessary to change the way society operates and to dismantle the barriers that prevent persons with disabilities from participating fully in society are needed urgently. The international hard and soft laws have accorded human rights status to the differently abled persons and mandates that the opportunities should be offered to differently abled persons so as to enable them to participate fully in the society and claim their rights adequately.

Interestingly, there is a demand for a complete overhaul the Persons with disabilities Act in India. It is argued that the Act must be recast to comprehensively provide for all the rights recognized under the Convention. The need of an hour is that support must come from all quarters. India will have right to say it is democracy which can provide equality and justice to the entirety of its people. No doubt justice,

²⁴ Section 45 of PWD

²⁵ Section 46 of PWD

²⁶ P.S.Seema, *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995-A Critique*, Karnatka Law Journal, Vol 4, 2005

equality framework is not straightforward as it seems. Special measures have to be taken into account with respect to physically challenged persons. In the employment sector too, there is discrimination towards disabled persons but it is heartening to note that recently policy makers have begun to focus on turning Indian into a knowledge economy therefore the governments are taking up development of skills in a major way. The National Skill Development Mission is going to train 500 million youth. The object is to create a talent pool to contribute to the growth of the domestic economy as well as to reap in a demographic dividend from migrants employed in the world's ageing nations. India's new government under the BJP's Narendra Modi should continue this programme and explicitly include disabled persons, with earmarked financial allocations. New technology platforms are being developed in the context of the Mission, and they should be designed in a way that allows access to differently abled persons. Finally, it is back to the basics giving children with disabilities access to quality education. India has to invest in inclusive education to ensure that children with disability learn and find gainful employment.

Apparently, there are a number of aspects to assure access for people with disabilities. The major challenge is physical access such as designing of building or changing structures and spaces to conform to the needs of all members of the community, including those with disabilities. In addition, however, there are social aspects, such as non-discrimination in employment and service delivery and equal treatment in all situations of people with and without disabilities. And finally, the political considerations can play a significant role to strengthen and enforce the laws that do exist and working for laws to protect people with disabilities in countries that don't have them. For instance in India the Right to persons with Disabilities Bill has been hanging fire since 2011 and still in 2014 its fate is uncertain. Perhaps most important is raising the consciousness of those who design and/or build facilities, employers and the community and society about the rights and needs of people with disabilities²⁷. It is time for the Ministry of Social Justice and Empowerment and other concerned government departments to go full throttle and prepare a timeline for implementation of key deliverables, with departmental accountability. It's time now for some real action.²⁸

²⁷ Ensuring Access for People with Disabilities available at <http://ctb.ku.edu/en/table-of-contents/implement/physical-social-environment/housing-accessibility-disabilities/main> accessed on 6th December, 2014

²⁸ Deepanjali Bhas, National policy for the disabled, no-clear roadmap for action, available at <http://infochangeindia.org/disabilities/features/national-policy-for-the-disabled-no-clear-roadmap-for-action.html> (accessed on 18th December, 2013)

“Our vision is recognition of disability as diversity, where human rights are acknowledged and respected and where there is total inclusion in all spheres of life”²⁹

²⁹

Rajive Raturi, Director Disability Rights Initiative available at <http://www.hrln.org/hrln/disability-rights.html> accessed on 6th December,2014