

Rights of Persons with Disabilities and Responsiveness of Law

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Abstract

Persons with disabilities are important part of human diversity. With increase in population there come various challenges in before disabled people. Their conditions in respect of dignified living are continue to be complicated. Though after constitution of United Nations Convention for the Rights of Persons with Disabilities (UNCRPD), there come significant changes in respect to the rights of disabled people. This paper tries discussing contemporary laws and its responsiveness towards people with disabilities. It is also dealing with constitutional commitments towards persons with disabilities. The paper concludes despite having laws and polices related to disabilities, there is need to change the societal attitude towards disability. This can be achieved by following the CRPD's mantra of 'nothing about us, without us'.

Keywords: Disability, diversity, autonomy, dignity.

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INTRODUCTION

A considerable percentage of world's population is affected by some form of disability. According to World Health Organization (WHO) report there are about one billion people with disabilities, among them around 110-190 million are suffering from very significant difficulties. This corresponds to about 15% of the world's population and it is higher than previous data, which was 10%. The prevalence of disability is increasing because of the global increase of the average human age and advancement in the medicines [1]. The patterns of disability in particular countries are influenced by trends in health conditions, environment and various other factors. Further, it is found in studies that disability disproportionately affects vulnerable populations. Lower income countries have a higher prevalence of disability than higher income countries [2]. The argument is also justified by

UNCRPD, where in preamble itself it relates disability and poverty [3]. In recent times the approach towards disability is changing. It reflects a shift from medical model of disability to the social model of disability. The United Nations Convention on Rights of Persons with Disabilities has also emphasized disability as a social problem. As a result disability rights movement has taken a significant direction towards right-based and act-based jurisprudence. Disability scholarship started discussing the rights, freedoms and choices (including sexual choices) of persons with disabilities. The said trend gained its momentum during 1980s-90s, when different national, international laws started discussing disability related issues [4].

¹ WORLD HEALTH ORG., Disability and Health, Fact Sheet No.352 (2014), available at <http://www.who.int/mediacentre/factsheets/fs352/en/> last visited 21/09/2017, 7:00 am

² Factsheet: Main Messages and Recommendations, World Report on Disability, available at: https://www.icrc.org/sites/default/files/topic/file_plus_li

st/wrd_-fact_sheet_en.pdf last visited on 12/12/2017, 3:00 am.

³ Preamble of UNCRPD, Clause (t)- 'Highlighting the fact that the majority of persons with disabilities lives in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities.'

⁴ For example, American with Disabilities Act, 1990

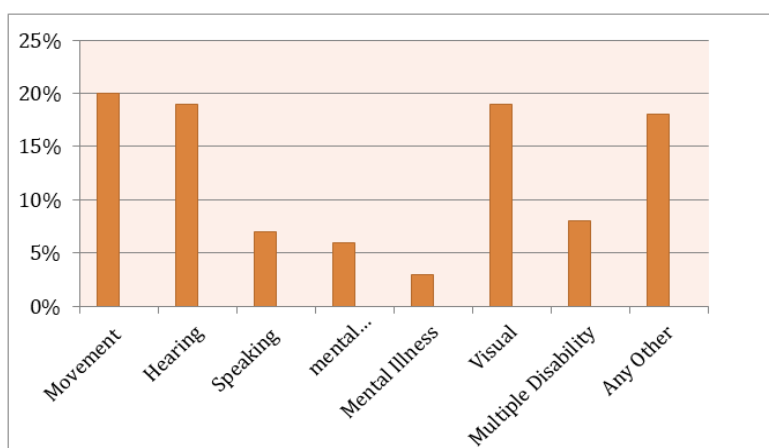


Figure 1: source: census data of 2011

Disability under International Law

At international level, prior to United Nation Convention on Rights of Persons with Disabilities, 2006 [5] there were different covenants including Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It provides for universal rights that cover all human beings including persons with disabilities. Though the said covenants nowhere specifically used the term 'persons with disabilities'. The Convention on Rights of Child was the only international document that specifically mentioned disability [6]. The national policy for persons with disabilities recognizes that persons with disabilities are valuable source for the country. It is committed to create an environment that provides equal opportunities, protection of rights and full participation in society. The said commitment is also demonstrated by different international and regional documents. Along with United Nation Convention on Rights of Persons with Disabilities, India is signatory to Declaration on the Full Participation and Equality of People with Disabilities in the Asia Pacific Region (2000) and Biwako Millennium Framework (2002) for action towards an barrier free, right based inclusive society. Biwako Plus Five (2007) puts further effort towards an inclusive barrier free, right-based society in Asia and Pacific. The Incheon Strategy to 'Make the Right Real' for persons with disabilities in Asia and Pacific (2012) provides the Asian and Pacific region and the world with the first set of regionally agreed disability inclusive development goals. The Incheon strategy will enable to track progress towards improving the quality of life, and the fulfillment of rights of region's persons with disabilities. The sustainable development goals (2015) has pledged for leaving no one behind. Recognizing

⁵ The convention will be separately discussed in next part.

⁶ Article 2 of CRC calls on states to prohibit discrimination on the grounds of disability

that the dignity of human being is fundamental, and the aim of these goals is to reach out to a last person.

After drafting of the UNCRPD a need was felt to develop and update domestic disability laws as per with convention. In order to do the same constant "efforts" were made [7]. In India The Persons with Disability Act, 2016, and Mental Healthcare Act, 2017 are the outcome of said effort. These legislations promise the dignity, autonomy of persons with disability. In order to understand the implementation of related policies and laws, there is need to have a sound database of persons with disabilities. This is also the obligation of state under Article 31 of CRPD to collect and analyze the data related to persons with disabilities [8]. In this process it is logical to glance at the national statistical survey report.

Ground Position in India: Data National Statistical Survey Report

The data on persons with disabilities is collected through the decennial population census and through NSSO surveys. The census 2011 is the latest data related to the same. Office of the registrar general and census commissioner, India, conducted the survey. According to it in India out of 121 Cr population, 2.68 Cr persons with disabilities.

Among the disabled population 56% are males and 44% are females. In the total population the male and female percentage is 51% and 49% respectively.

⁷ The researcher is skeptical of using word 'effort', as state tried confining the disability as diversity expression. Initially different draft-proposals were submitted to the government and were trimmed or altered as per their requirements.

⁸ The argument is discussed at length in next chapter related to UNCRPD. The researcher is suggesting the use certain indicators to test the status of persons with disabilities and consent related to their day-to-day matters. For detail please refer to page no.

Survey further shows that majority of persons with disabilities lives in rural areas, it is 69% against 31% that resides in urban areas. The percentage of persons with disabilities among males and females are 2.41%

and 2.01% respectively. The overall percentage of population of disabled persons has majority of males in comparisons to women.

Population, India 2011			Persons with Disabilities, India 2011		
Total Population	Female	Male	Persons with Disabilities	Female	Male
121.08 Cr	58.76 Cr	62.32 Cr.	2.68 Cr	1.18 Cr	1.5 Cr

Source: Ministry of Statistics and Programme Implementation, Government of India

Proportion of Persons with Disabilities by social Groups in India, 2011 Census			
Social Group	Persons with Disabilities	Female	Male
Total	2.21	2.01	2.41
Schedule Caste	2.45	2.2	2.68
Schedule Tribes	2.05	1.92	2.18
Other than SC/ST	2.18	1.98	2.37

Source: Ministry of Statistics and Programme Implementation, Government of India

The data shows that number of male population with disability is more in comparison to women. The reason of this probably the social setup of society. It is found in different sociological studies on women that gender stereotype is still prevalent in our society. The women particularly in rural areas are supposed to stay at home and manage household affairs. They are living behind the walls and therefore the exact data of women with disabilities is difficult to get ^[9]. Therefore women with disabilities are more vulnerable to discriminations including sexual abuses, because without identification, it is impossible to aware them about their right to sexual consent and autonomy. Primarily this is the reason that many cases of sexual abuse against women including women with disabilities are not reported.

During 2001-2011, an increase in the number of disabled persons was observed both in rural and urban areas. The said increase is also found in proportion among males and females. The percentage of persons with disabilities to the total population increased from 2.13% in 2001 to 2.21% in 2011. In rural areas the increase was from 2.21% in 2001 to 2.24% in 2011. Similarly in urban areas it increased from 1.93% to 2.17% during this period. The percentage decadal change in disabled population during 2001-2011 is 22.4, whereas for the total population, the percentage decadal change is 17.7 ^[10].

⁹ It is found in survey that there is high risk of sexual abuse against persons with disabilities living within families or community settings then those living alone. Every year number of incidents of sexual abuse with persons with disabilities are not reported as they got settled by families or people with disabilities are taken less seriously, Report of National Crime Victimization Survey (NCVS), 2011.

¹⁰ It is substantiating the world health report that disability population is increasing, Disability and Health, Fact Sheet No.352 (2014), available at <http://www.who.int/mediacentre/factsheets/fs352/en/>

With the overall growth of population a stress is developing among people. The prime reasons for the same is bases on the simple principle of demand and supply. If supply is not meeting the demand then it will result in stress. It is important to note here that though earth has plenty of natural resources to accommodate its population, but because of the commercialization or internationalization these resources become scared ^[11]. It is bourgeoisies' societies that are controlling the same and a hegemonic dialogue was created to get consent of masses ^[12].

The detail of population with disabilities

According to the census report, 20% of persons with disabilities are having disability in movement, 19% are having visual disabilities and another 19% are having hearing disabilities. Further, among the male disabled, 22% are having disability in movement, 18% each has visual and hearing disabilities, while 8% of them are having multiple disabilities. Whereas in case of female, 18% are facing disability in movement, 20% are having visual and hearing disabilities and 8% of them are having multiple disabilities.

Age-wise disability

17% of the disabled population is in the age group 0-19 years and 16% of them are in the age group 20-39 years. Elderly people having age of 60 and above constitute 21% of population of disabled persons. Out of total disabled in the age group of 0-19, 20% are having disability in hearing followed by 18% visual disability and 9% are having multiple disabilities. Among the disabled in the age group 20-39 years, 22% are having disability in movement, 18% are having hearing disability and 6% are facing multiple disabilities. In the age group of 40-59, 23% are having

¹¹ Marcuse, One Dimensional Man

¹² Gramsci, Idea of Hegemony, similarly a narrative was constructed to commercialize and present human bodies, sexuality and consent.

disability in movement, 19% are having visual disability and 5% are facing the multiple disabilities. Lastly in the age group of elderly persons, 25% are facing the disability in movement and visual disability respectively. 12% of people of that age group are having hearing impairment and same percentage of people is facing multiple disabilities.

Education Status

As per Census 2011, the literacy rate at all India level is 72.98% and the literacy rate for females and males are 64.63% and 80.9% respectively. Whereas of total disabled population, nearly 55% (1.46 Cr are literate). Out of the male disabled population, 62% are literate and among the female disabled 45% are literate. In rural areas 49% of disabled are literates while in urban the said percentage is 67%. Whereas the overall literacy percentage for man and women is 66.77% and 84.11% in rural and urban areas respectively. Among the total disabled persons, 45% are illiterates. 13% of them has matric/secondary education but are not graduate and only 5% are graduates and above. Among the male disabled persons 38% are illiterate. 16% of them have matric/ secondary education but are not graduate and 6% are graduate and above. Among female disabled persons, 55% are illiterates. 9% are matric/secondary education and 3% are graduate and above. On the other hand the same percentage is higher for male in female in general [13].

Comparison of Literacy status of disabled persons by sex and by residence in India:

	Literate		Illiterate	
	Rural	Urban	Rural	Urban
Persons	49	67	51	33
Male	58	72	42	28
Female	37	61	63	39

Source: Ministry of Statistics and Programme Implementation, Government of India

The education level of disabled persons is better in urban areas as compare to rural areas in India. In urban areas 67% of persons with disabilities are literate as compare to 49% in rural areas. The prime reason for the same is again accessibility. Further in today's constructed-competitive world lack of education has become the added vulnerability for unemployment. This may create a barrier for individual economic prosperity and also weakened her opportunity to marriage and family life [14].

¹³ For detail kindly visit the website of Ministry of Statistics and Programme Implementation, Government of India, available at: http://www.mospi.gov.in/sites/default/files/reports_and_publication/statistical_publication/social_statistics/W_M16Chapter3.pdf, last visited on 27th May 2018.

¹⁴ Education, employment is also related to marriage etc. because generally in our society in "middle-class"

Indian Constitution & Rights of Persons with Disabilities: A Discourse

Indian Constitution is said to be the masterpiece of drafting. The constitution makers tried addressing the individual and state issues in a balanced manner. It underlines the schema of basic values and responsibilities of state in protecting and preserving the autonomy and dignity of individuals. This was done with the introduction of constitutional morality. While defining the same Dr. B.R. Ambedkar has introduced the purpose and role of constitution [15]. It provides the mechanism for protecting and promoting the democratic values including discourses related to policy making. The opportunity of such discourse is not limited to parliamentary and includes the common citizen as well [16]. People are free to criticize, comment or suggest changes in text. These comments play a significant role in the understanding of the law. The proposition is in reference of Prof. Upendra Baxi's work on constitutionalism, where he insisted upon the point interpretation of constitution from a common men perspective [17]. Further, Lon Fuller in his writing on Morality of Law discussed the story of king Rex. Rex tried making the law for his subjects, in each such attempt he was failed miserably. The important point to know is that each attempt of law making was received with resentment and criticism (discourse) from his subjects [18]. Therefore one question for inquiry is that whether the basic mantra of UNCRPD, 'Nothing about us without us' is followed in law making process or defining sexual citizenship of persons with disabilities? [19].

Although the constitution doesn't mention term persons with disabilities in its text, and it is assumed that it has been incorporated in WE THE PEOPLE...and used under Art. 21 of the constitution. The preamble of our Constitution laid the foundation of rights that guarantees the Justice, (social, political and economic) and equality (status, opportunity) to the people of this country. Everyone has the liberty of thought, expression, belief, worship and faith. These way people with disabilities are included in the discourse of rights jurisprudence. The rights guaranteed

families, while approaching someone for marriage, one inquires about employment etc. Researcher had experienced the same during the survey related to matrimonial websites, where phone calls were made to inquire specially about income.

¹⁵ Constitutional Assembly Debates.

¹⁶ The said power to exercise the freedom of speech and expression is guaranteed by the constitution itself- this way it provides the opportunity to citizen of the country to comment on any law, policy including laws related to persons with disabilities.

¹⁷ Prof. Upendra Baxi's idea of Demosprudence.

¹⁸ Lon Fuller, Essay on Morality of Law.

¹⁹ The argument will be discussed in later part of this chapter.

under Part III of the constitution including right to equality, right to opportunity and employment, right to life, including right to choice, right to health, sexual and reproductive rights, healthcare, privacy etc. are equally applicable to persons with disabilities [²⁰]. Indian Judiciary tried interpreting the rights of persons with disabilities in several judgments. For example in *National Federation of Blind v. Union Public Service Commission* [²¹], a writ petition was filed against discrimination of visually impaired persons in competing the civil services; Supreme Court has directed the government to allow them to write the examination in Braille or with the help of a scribe. Similarly in *B.R. Kapoor v. Union of India* [²²] court has directed the government to provide the healthcare, rehabilitation facilities to mentally ill under-trials languishing in jails. In case of *Indra Sawhney & Ors. v. Union of India & Ors* [²³]. (Mandal commission case), SC has extended the substantive equality philosophy of Art. 14 while relying on subsequent articles 15, 16 of the constitution. This case is significant from disability rights perspective because an intervention application filed by National Federation of Blind. Advocate lawyer S.K. Rungta, representing the persons with disabilities argued on the specific issue of whether ‘backward classes of citizen’ could also include persons with disabilities. It was examined as the sub-issue within the larger issue. It was held by majority judgment that even though ‘backward classes of citizens’ as used in clause (4) of Art. 15 and 16 does not expressly covered the persons with disabilities, the constitutional scheme and spirit of Articles 14, clause (1) of Art. 15 & 16 allowed for reservation and other kinds of affirmative action in favor of persons with disabilities. This judgment has upheld the opinion rendered earlier by a five-judges constitutional bench in *K.C. Vasanth Kumar v. State of Karnataka* [²⁴].

After discussing the constitutional contribution towards protecting the rights of persons with disabilities it is important to analyze the proposition that did interpretation made in general parlance affect rights negatively? [²⁵]. Though the part three of the constitution deals with the fundamental rights of people, these broadly classified as right to equality, right to freedom, right to life with dignity. Each of these rights are widely interpreted by Supreme Court and other high courts in various cases. The said interpretations are helpful in expanding the scope of rights. But the

relevant question remains whether judgment given in general parlance are accommodating persons with disabilities? One may interpret it in affirmative, but at the same time there are number of examples where it has potential to do otherwise. For illustrating this fact researcher is drawing the inference from recent judgment of Supreme Court [²⁶] on justifying the legal status of advanced directives in the matter of passive euthanasia, which is long back recognized by the same court in *Aruna Shanbaug* in 2011.

While mentioning about the individual’s right of executing the advance directives, Supreme Court has enumerated certain safeguards:

The first among them is that, advance directive can be executed only by an adult who is of a sound and healthy state of mind and in a position to communicate, relate and comprehend the purpose and consequences of executing the document; It must be voluntarily executed, without any coercion or inducement or compulsion; It should have the characteristics of an informed consent given without any undue influence or constraint; It shall be in writing clearly stating as to when medical treatment may be withdrawn or no specific medical treatment shall be given which will only have the effect of delaying the process of death that may otherwise cause him/her pain, anguish and suffering and further put him/her in a state of indignity.

CONCLUSION

The paper concludes in recent past there is increase in disability related laws and policies. With the advent of Disability Act of 2016 there comes various changes at policy level, which aims at protecting the rights of disabled people. The law ensures the safety, security and autonomy to people with disabilities. It guarantees them the right to choice and self-determination. But at the same time there is need address the societal outlook towards disability. As it is observed in various studies people with disabilities are continue to face various challenges because of the stigmatized attitude of society. There are number of incidents of discrimination and violence against disabled people. There is need to understand and practice the Constitution spirit of diversity, which aims at treating everyone with respect and dignity. Thus, under the transformative constitutional promises state is under the obligation to provide open and equitable environment to everyone including people with disabilities. This includes accessible resources for livelihood, accessible modes of communication and transportation. Further, special need is to be given towards accessible healthcare facilities.

²⁰ Though citing the eugenic model of interpreting the ability, autonomy and choices can refute this assumption.

²¹ AIR 1993 SC 1916.

²² AIR 1990 SC 662.

²³ AIR 1992 3 SC 217.

²⁴ AIR 1985 SCC 714.

²⁵ Because of “unequal” bargain positions, persons with disabilities are placed at the weaker end of the society. There are high chances of influencing their consent.

²⁶ *Common Cause v. Union of India*, Writ Petition (civil) No. 215 of 2005, decided on march 9th 2018 (the reference is simply made for illustration purpose).