

LEGAL ISSUES & CHALLENGES OF THE DISABLED PERSONS IN INDIA: AN ENQUIRY INTO THE CONSTITUTION OF INDIA

Delna Davis

*Student of law
School of Legal Studies
Reva University, Bangalore
kjonsa2018@gmail.com
&*

Aliya Hussain

*Student of law
School of Legal Studies
Reva University, Bangalore
benetjrf@gmail.com*

Abstract:

Disability is a neurological, intellectual or physical impairment which an individual face due to different reasons. The issues faced by disabled persons are not limited, they extend to various situations that they encounter on a daily basis. From losing their confidence and abilities for performing basic functions to not being able to integrate into society, they face extreme alienation and despondency. Disability is only a part of an individual's identity and each one of those facing a disability has the right to make one's own decisions and to be an active member of the society. They have fought battles against centuries of biased assumptions and harmful stereotypes. This stigmatisation of disability results in economic and social marginalisation. Until decades ago, it seemed impossible for the disabled to progress. Today, even though perceptions are changing and many national and international governments and agencies are working towards making a change for the better, India has a long road ahead. There are a number of provisions in Indian legislation for the disabled like Right of Persons with Disabilities Act, 2016, Hindu Succession Act, 1956, Designs Act, 1911 and so on but yet there are major gaps to be fulfilled to make sure these legislations are effectively implemented. Issues like only 1% of the disabled getting employed, the reservation for the disabled not taken seriously and a dearth of general facilities is the reason why this research paper aims at establishing clear objectives on how to achieve answers for the said issues and to enforce stronger legislation for the present and future with measures that need to be implemented and the best ways to create a positive impact in the lives of

disabled persons. After all being disabled does not mean the lack of being qualified or lack of access from any aspect of life.

Key Words: Disabilities, Legislative, Constitution of India, Provision & Discriminative Force.

INTRODUCTION

In the years to come, the number of disabled people in India is around 40 to 80 million persons. For the said reason, the paper is based on the legal aspect of providing more resources and to prevent such individuals from the mental trauma faced by the society. From the conceptual point of view, there is no universal definition of what constitutes a disability or of who should be considered as having a disability. In general, the term disability means any continuing condition that restricts everyday activities. To be more authoritative the Rights of persons with Disability Act (2016) defines ‘disability’ as a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others.¹ (Ahmed, 2015) Impairment is considered as a problem in body structure or function; activity limitation is a difficulty that’s encountered by a person in executing an action or task.

Stephen Hawking once said that, “People with disabilities are vulnerable because of the many barriers we face: attitudinal, physical, and financial. Addressing these barriers is within our reach and we have a moral duty to do so..... But most important, addressing these barriers will unlock the potential of so many people with so much to contribute to the world. Governments everywhere can no longer overlook the hundreds of millions of people with disabilities who are denied access to health, rehabilitation, support, education, and employment—and never get the chance to shine.”

As per Census 2011, in India, out of the 121 Cr population, about 2.68 Cr persons are ‘disabled’ which is 2.21% of the total population.² (Gowda, 2020) This emphasizes the need for strengthening policies based on disability in the country. One of such policy is the National policy for persons with Disabilities³ which recognizes that people with disabilities

¹As per Section 2(s) of Rights of person with Disabilities Act, 2016.

² Disabled Person in India, A Statistical Profile 2016.

³ National Policy for person with Disabilities (2006)

are valuable human resources for the country and seeks to create an environment that provides equal opportunities, protection of their rights and full participation in society.

1. THE EVOLUTIONARY PAST OF DISABILITY

When looking back till the period of 1970s, most of the people who suffered from disability were considered as outcasts from the mainstream society and were looked down upon. Moreover, it may sound politically incorrect when any disabled person is treated like dirt in the Indian society. Predominantly, they were either seen as beggars. Even the system thought of them as a liability. A wrong superstitious belief or a misconception where many people believe that disability is a result of someone's previous life's sins and thus held them responsible for their condition. Further, the sources to uplift them were not focused by the government and there was lack of technology to uplift them with all kinds of resources like we have in the present. During the early period of time, it was a question of their right being exercised in the society as they were considered to be a little use to society and hence their concerns were severely disregarded. This absurdity led to various forms of injustices in India.

Throughout the 1970s, many NGOs across the country were running with the help of foreign aids and charity from the economically well-off sections of the society. The disability sector was ruled and controlled by NGOs with either parents or professionals at the helm of affairs. The government had recognized the need for such legislation in 1980. But since the legislative power regarding disability was kept on the State List, the matter could not be pursued. However, Article 253 of the Constitution of India enables the Parliament to override the federal distribution of powers and to give effect to a treaty entered with a foreign power or an international body, even if the matter of legislation relates to an entry in the State List. With the signing of the Proclamation of Equality and Full Participation of People with Disabilities in the Asian and Pacific Region, the PWD Act was enacted by Parliament in 1995.

The PWD Act was focused more on rights. The substantive provisions of the Act relate to prevention and early detection, education, employment, affirmative action, non-discrimination/barrier free access, research and manpower development, and institutions for persons with severe disabilities. After the PWD ACT, 1995 was enforced, a 3 percent reservation (comprising 1 percent reservation each for those with locomotor disability, hearing disability, and visual disability) was offered to the PWD category in educational

institutions and government services.⁴ (Jha, The History of India's Disability Rights Movement, 2016)

2. ISSUES AND CHALLENGES WHERE DISABILITY PREVAILED BEFORE THE COURT OF LAW

1. Kritika Purohit and Anr. v. State of Maharashtra and Orj

Facts:

The petitioner was a visually impaired student who sought admission to the course in Bachelor of Physiotherapy but was not permitted to apply for the same. The petitioner contended that although the post of a physiotherapist was considered to be suitable for blind persons, the denial of courses in physiotherapy for blind persons ran counter to Section 39 of the PWD Act and that the respondents were obliged to make all accommodations for the Petitioner in conformity with Article 24(2) of the CRPD. (Kritika Purohit and Anr. v. State of Maharashtra and Orj, 2020)

The respondents contended that it was not practical for the petitioner to be involved in the course. However, the court also noted the petitioner's reliance on the circular of the Mumbai University in mandating that resources should be made available to visually impaired student to allow them to complete their courses. In view of these materials, the court observed that the respondents had shown a negative attitude towards persons with disabilities and "have not cared to consider the object underlying the provisions of Disabilities Act, 1995". Therefore, by an interim order dated 2 August 2010, it directed the Commissioner of Disabilities to consider all the materials and make suitable instructions to the respondents for making necessary arrangements for admission of visually challenged students. It also directed that the petitioner should be provisionally admitted for the course and should be provided with resources for translation of the material to Braille.⁵

Court's decision:

Subsequently the court found that the petitioner had completed the first exam and had secured 62 per cent in the same. Therefore, it held that she should be allowed to be admitted and complete the course. However, the court noted that the state government had accepted the

⁴History of India's Disability Rights Movement, 2016.

⁵ KritikaPurohit and Anr. v. State of Maharashtra and Ors., W.P. 979/2010, Bombay High Court, order dated 17 November 2011.

guidelines of the Maharashtra State Council for Occupational Therapy and Physiotherapy that visually impaired candidates are not fit for the physiotherapy course. On this, it noted the contentions of the Petitioner and also Xavier's Resource Centre for the Visually Challenged who claimed that a physiotherapist is not required to perform all the functions of physiotherapy and visually impaired physiotherapists can perform all functions with assistance if necessary. They also pointed out various physiotherapists who were working in Maharashtra successfully for many years. The court held that "We are, therefore, of the view that the stand of the respondent authorities is clearly discriminatory and adversely affects the Right to Life and equal opportunities of the petitioner as also other such students similarly situated. The fact that petitioner though being visually impaired not only passed her first year examination with 62% marks and is successfully studying in 2nd year, and several visually impaired persons have been working as professional physiotherapists in India as well as abroad appeals to us not to allow the petitioner as also others in the same position to be discriminated against or disqualified on that ground."

Thus, the court stayed the decision of the state government and directed the respondents to consider candidates with visual disability for admission to the course in physiotherapy.

2. Deaf Employees Welfare Association v Union of India

Facts:

This petition was filed seeking a Writ of Mandamus directing the Central and state governments to grant equal transport allowance to its government employees suffering from hearing impairment as what was being given to blind and other disabled government employees. The allowance given to the hearing impaired employees was significantly lower than the allowance granted to other employees with disabilities (Deaf Employees Welfare Association v Union of India, 2020).

Court's Verdict:

The Supreme Court allowed the petition and directed the Respondents to grant transport allowance to speech and hearing impaired persons also on par with blind and orthopedically disabled government employees. The court held that "there cannot be further discrimination between a person with disability of 'blindness' and a person with disability of 'hearing impairment'. Such discrimination has not been envisaged under the Disabilities Act." It held that equality of law and equal protection of law afforded to all persons with disabilities while participating in government functions. The court held that the dignity of persons with hearing

impairments must be protected by the state. Even the assumption that a hearing or speech impaired person is suffering less than a blind person is, in effect, marginalizing them; and as such, the same benefits must be given to them, as are awarded to blind citizens. Any move made by the state to further this objective is in consonance with the principles enshrined in Articles 14. This case held that deaf and mute people should also be given transportation allowances on par with blind and orthopedically handicapped employees of the government.⁶

The aforementioned case law, gives us a clear picture of the trauma and mental agony faced by a disabled person. The court has observed and produced a verdict considering their fundamental right to education, Right to Life, Right to discrimination and other equal opportunities. The verdict of this case stands as an aid to other disabled persons who are facing the mental trauma in the society. As we know, they are disabled not only by their bodies but by society as well. Thus disability isn't only a health problem. It's a complex phenomenon that reflects the interaction between the features of an individual's body & characteristics of the society in which the person lives in.

THE PRESENT VIEW OF DISABILITY

As per the statistical profile 2016, the census rate of 2011 is categorized into 8 categories such as in seeing, in hearing, in speech, in movement, mental retardation, mental illness, multiple disability and any other. Initially, the census of 2011 only collected information of five types of disability. Whereas, now in the present 2011 census collected data of eight types of disability. The reason for such variation in number is very ambiguous and vague in nature. On the contrary, the final census was taken only in 2011 and no initiation was taken in the future. Presently, as per the statistical profile 2016 of Disabled person in India, out of 121 Cr. population, 2.68 Cr people are disabled which is 2.21% of the total population. Among such disabled population 56% are males and 44% are females. In the total population, the male and female population are 51% and 49% respectively. (enabled.in, 2017)

What Is and What Ought To Be

While the entire world including our very own country is witnessing changes that have occurred in the status bestowed and the treatment given to persons with disabilities, the trace of traditions and beliefs from the past still leave an impactful mark on the progress of the disabled. The societal perception towards persons with disabilities is a kaleidoscope that

⁶ Civil Petition 107 of 2011, decided on December 12, 2013.

reflects emotions like tolerance, hatred, love and respect. History is evidence that factors like ignorance, neglect and superstition are social factors that have caused the isolation of persons with disabilities. (Thomas, 2012) Today, India has a population of 26.8 million of those who face disabilities. This is as per the population census of 2011 but in reality the number goes far beyond this. Has anyone ever questioned as to why the number of persons facing disabilities has been increasing at such a rapid pace? To begin answering this question and before we as citizens and a country turn our backs towards persons facing disabilities, it is important to understand that there are two types of disabilities. One, where the person is born with a disability and the other is when a person acquires a disability. There is vast difference in these two categories. In the first case, it is a direct consequence of the lack of medical facilities which are provided to a new-born as well as to a pregnant woman. There is a close association with being “disabled” and being “poor”. This does not signify that those who are outside the scope of poverty do not face the circumstances and consequences which are related to disability but they have a better platform to face this issue with open opportunities which the people living in poverty could not have avoided. Access to healthcare in India, especially having an urban prejudice, results in the rural areas facing an additional handicap. This can be proved by a report published in ‘Frontiers in Public Health’ which states that 3% of the major illnesses are untreated in metro areas and the same of 12% remains untreated in rural areas. (Logan, 2017) We are a country facing the horrifying consequences of not vaccinating our children with Polio. We are talking about vaccinating 172 million children twice a year. (Vashishtha, 2013) Not only does the huge number of population act as a hindrance but also due to the unhygienic conditions of most of the people living in our country, the immunity levels are deeply affected thus lowering the impact of the vaccinations. Indeed, cleanliness is next to godliness and this needs to be implemented by all means. Our citizens cannot be expected to be in perfect health conditions when they live in and out of sewers, have no clean access to drinking water, defecate in the open and are constantly exposed to a horrendous number of diseases. A strict methodology must be followed by administering qualified professionals to immunize those in need and to prevent incidents of multiple-immunization. Further, women in the rural areas who are expecting are forced to work till the later stages of pregnancy due to their forced conditions. As per the Maternity Benefit Act, 1961⁷, relief is granted to the person who is an employee in a factory, mine or a plantation. That leaves little scope for the other women who are forced to work in places which do not fall under the ambit of an “establishment”. Measures must be taken to ensure that such illegal companies and organisations must be shut down and not exploit labourers due to their weak economic conditions. In the case of *Suchita Srivastava v. Chandigarh Administration* (*Suchita Srivastava v. Chandigarh Administration*, 2009)⁸, a woman who was mentally retarded living in a government run institution in Chandigarh was pregnant after she was raped and wanted to carry on the pregnancy. The Chandigarh Administration filed a petition seeking to terminate her pregnancy on the ground that she is not mentally capable to look after the child. However, through an appeal to the Supreme court, the apex court quoted

⁷Maternity Benefit Act, 1961.

⁸*Suchita Srivastava v. Chandigarh Administration* 2009 (9) SCC 1

the provisions of the Pregnancy Medical Termination Act, 1971⁹, wherein if a woman is pregnant out of rape and contemplates the termination of pregnancy then the consent of the woman is mandatory and in exception to this is if the woman is “mentally ill” then the consent of her guardian must be taken. This signifies that a mere indifferent opinion towards those suffering from a type of a disability has never been a solution. The courts of law have to uphold this practice and interpret the legal statutes available in this regard in the best interests. Many are driven by such meagre opinions and indifferences which would need to be curbed and this can be achieved only through effective legal measures. It must be noted that 69% of the disabled are from the rural areas. The second reason has a number of factors which cause it, that can be either accidents, wars, disasters, etc. All these result in an individual acquiring permanent disability which not only hinders his/ her life but also declines the physical potential of a nation. A lack of inclusion hurts the entire economy because human capital cannot bear full fruit, national productivity suffers and governments are forced to increase spending and lose tax revenues at the same time. According to other studies, disabilities reduce global GDP by five to seven percent.¹⁰(Report, 2010)

This being said, I hope we now understand what causes 26.8 million to face what they are going through today and how important it is to provide them with better access, better opportunities and benefits to overcome such setbacks. However, the improvements don't have to come from the government's side only, we citizens play a huge role even if we are not directly involved in such situations. Knowing we are an agriculture dominated country, the very disabled or the elderly refrain from working in this sector. However, even for those persons with disabilities who are able to contribute with whatever potential of their own are not socially recognised, it excludes them even from education and keeps them constrained to very low income jobs which does not let them come out of poverty. It is a myth that just by providing a few vocational skills to PWDs, they will become independent enough to earn their living, but in order to establish a source of living and to maintain that takes a lot more than a few skills taught. In addition to this, out of the 17 government-run Vocational Rehabilitation Centres in India, 16 are in state capitals which results in only 1.5% of the PWDs in the rural areas receiving vocational training. There is no end to the burdens which befalls a person with disability. Apart from struggling for health facilities, education and employment, they face institutional barriers where certain policies, laws and practices have even if unintentionally, but excluded them from the real world. This is the gap that needs to be emphasized upon. Accessibility is a big factor which needs to be considered. For instance, a person on a wheelchair cannot travel as easily or fend for himself as others or it is difficult for the blind or the deaf to save themselves in times of a natural disaster. Hence, whether from the government's side or the humanitarian organisations', such issues must be addressed. Separate escalators must be built, better transportation facilities must be provided, larger awareness and education camps must be conducted, etc. This is the gap that separates them from the real world, stops them from achieving their dreams and denies them the basic dignity of being able to live like a normal human being. It is not difficult to identify groups because people with disabilities are in every community. All that needs to be done is to tap

⁹Pregnancy Medical Termination Act, 1971.

¹⁰ Report by World Bank in 2004.

their potential in the right way in order to include them in all projects, from planning to implementation to supervising and evaluation.

The Government of India expressed their willingness to bring a change in the lives of PWDs by enforcing the Rights of Persons with Disabilities Act, 2016 which today has increased the scope of disabilities not restricting to a certain type of disability. Hence, today it includes 21 existing types of disabilities as compared to the previous 7. For instance, as held by the Supreme Court, in the case of *National Federation of Blind v. UPSC*¹¹, (*National Federation of Blind v. UPSC*, 1993) the UPSC may be directed to allow blind persons. for appearing in the examinations for Indian administrative and allied Services. Another aspect of this particular legislation is that it increases the reservation in higher education (not less than 5%) and in government jobs (not less than 4%). Yet, today seats remain vacant and the major reason being that is that the concerned people do not have a strong foundation to count on. When the Indian education system is unable to prepare and equip them with what contributes to their employability factor then what is the use of reserving seats and letting them go idle? Problems like these need to be solved from the root and not with temporary training. We suggest a full-proof programme to be made mandatory wherein the PWDs can be trained and educated for a fixed number of hours in order to make them more prepared to face the world. In fact, the whole reason this Act was passed was in our obligation towards the UN Convention on the Rights of Persons with Disabilities which in a nutshell stipulates a higher standard of living along with economic and social development, universal recognition and rights and fundamental freedom for all persons with disabilities regardless of race, sex, language or religion. The Constitution of our country rightly prescribes various measures to protect the rights of PWDs, especially those which are enshrined under the Fundamental Rights in Part III from Article 15 to 32. It is a matter of having a stronger hold over the effectiveness and enforcement of these rights. This is a constant process of not only monitoring the enforcement of their fundamental rights but also protecting such rights in the face of unjustified situations. This is upheld in *Kunal Singh v. Union of India and Anr*¹². (*Kunal Singh v UOI & Anr*, 2003), where a constable who worked with the Special Service Bureau of India for 17 years was being dismissed due to suffering from the amputation of a leg which was a result of an injury caused on duty. The Apex court held that being incapacitated is no ground for dismissing an individual from his/her service. If the held post is no more suitable then he/she can be shifted to another post on the same pay scale.

In the past few words are explained the conditions and circumstances that revolve around the daily lives of a person facing a disability in a country which is finding it difficult to handle the basic infrastructure of accessibility to such persons. Now imagine being a person suffering with a type of a disability and yet skilled enough to be a sportsman or a sportswoman. Indeed, in the past and even today, there are tales of triumph of many who have crossed all barriers and made their mark in the sports world, not only this but some have outdone themselves and made the nation proud. Yet, this constitutes a very small number of people when in totality, sports is something which has been inaccessible to an estimate of seven crore persons with disabilities. Not only does this shine light upon the necessity of

¹¹*National Federation Blind v. UPSC 1993 AIR 1916, SCR (2) 556*

¹²*Kunal Singh v. Union of India and Anr. Appeal (civil) 1789 of 2000*

having a more comprehensive and effective policy for opportunistic provisions but it also asks for a change in approach by various sports associations and organisations. The state of affairs is such that PWDs are looked upon with sympathy and underestimated for what they can achieve, when in reality some of them even surpass those who have every part of their body functioning properly. Devendra Jhajharia and Deepa Malik are fine examples of those individuals who proved to the world that disability is not synonymous with inability and have made the country proud at international levels. Both excelling equally well in their respective fields. (Kazi, 2018)

In retrospect, every individual born free in this democratic country that we call India, must be given the opportunity to participate, to earn, to excel in any field that he/she chooses to. Whether that person is suffering from a disability or not should not be in anyway a means of restricting their potential. Coming back to the social factors which were mentioned in the beginning, if we stuck to such ideologies, our past superstitious beliefs and continued to encourage the feeling of hatred and discrimination, we are depriving this nation of some of its greatest human resources. Ajit Jogi who had all four limbs paralysed, was selected in the IAS batch of 1971 and continued to serve as a member of the Parliament from 2004 to 2008. Suresh Advani who is affected with polio is also the pioneer of hematopoietic stem cell transplantation in India. Boniface Prabhu who was affected by paralysis of the four limbs, went on to become the first Indian to win a medal in the International Paralympic Games. Just like these personalities, there are hundreds and thousands of individuals who are either at the edge of making a mark in this world or in the process of doing so and for their sake, for this hindered progress of our country, the Centre and the State together need to tackle this issue with utmost dedication and genuineness.

Conclusion

The 2030 Agenda for Sustainable Development is an important step in the direction of strengthening the PWDs. The 2030 Agenda opposes every form of discrimination and mentions people with disabilities explicitly in this context for the first time. December 3rd, 2019 was celebrated as the International Day of Persons with Disabilities. The theme of this day revolved around promoting the participation and of such people and their leadership as well as empowering them for an inclusive, equitable and sustainable development. This must not only be a reminder to be achieved once a year but has to be a constant effort throughout the year, until India achieves its final goal.

Disability refers to the disadvantage or restrictions of activities that have caused and are continuing to cause barriers by the way a society is organised which takes little or no account of people who have physical, sensory or mental impairments. Disability is an unfortunate aspect of human life which ends up affecting not only the general way of living but also discourages the strength and power needed to overcome this obstacle. The Government of India has achieved one and many milestones but even today we are not where we should be. The legislation is intact; the policies are spread out but merely on paper. This needs constant attention and evolving comprehensive methods to be the backbone of those people living amongst us who face disabilities of any kind. Yet, today several schemes and benefits for the

disabled persons have come up as relief and has successfully served to provide equal opportunities to the disabled section.

Bibliography

(2017, August 28). Retrieved from enabled.in.

Ahmed, R. (2015). Rights of Persons with Disability in India. Create Space Independent Publishing Platform .

Deaf Employees Welfare Association v Union of India. (2020, February 18). Retrieved from ebcwebstore.com: www.ebcwebstore.com/index.php?cPath=5002_267

Gowda, D. S. (2016). Retrieved from mospi.nic.in.

Jha, M. (2016). The History of India's Disability Rights Movement. Current Affairs Magazine.

Jha, M. (2017, December 3rd). Retrieved from thewire.in.

Kazi, S. (2018, July 13). Retrieved from kreedon.com.

Kritika Purohit and Anr. v. State of Maharashtra and Orj. (2020, February 18). Retrieved from lawlex.org:
<http://www.eyeway.org/?q=ms%20A0kritika%20A0purohit%20A0%20A0a%20nr-vs-the%20A0state%20A0of%20A0maharashtra-through%20A0the%20A0secretary%20A0department-of%20A0medical>

Kunal Singh v UOI & Anr, appeal (civil) 1789 of 2000 (Supreme Court of India February 13, 2003).

Logan, M. M. (2017, July 17). Health and Children with Disabilities. Retrieved from Frontierin: <https://www.frontiersin.org/articles/10.3389/fpubh.2017.00175/full>

National Federation of Blind v. UPSC, 556 (Supreme Court March 23, 1993).

Report, W. B. (2010, July 1). Making Services Work for Poor People. Washington D C: The International Bank for Reconstruction and Development/The World Bank. Retrieved from documents.worldbank.org.

Suchita Srivastava v. Chandigarh Administration , Civil Appeal 5845 (Supreme Court of India August 28, 2009).

Thomas, C. (2012, June 27). Retrieved from link.springer.com: <https://link.springer.com>

Vashishtha, J. J. (2013, May). Retrieved from ncbi.nlm.nih.gov.