



# Privileges As Well As Legislative Shield For Disabled Persons

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## ABSTRACT

All humans are born free and every human being has certain inalienable, eternal, and universal natural rights. These rights are considered as fundamental human rights, providing assurance of equality in dignity. The basic rights of all humans include the right to life, equality, liberty, thought and speech, protection from exploitation, and security. From Sophocles 'Antigone' in 441 BC to the Universal Declaration of Human Rights in 1948 AD, we may trace the growth of human rights around the world. On December 9, 1975, the United Nations General Assembly adopted the "Declaration on the Rights of Disabled Persons", which was marked as the beginning of campaign to safeguard the rights of disabled people. Historically, there has been a troubling trend of discrimination against disabled people including denial of rights, exclusion, or restriction as well as preference. Unquestionably, this kind of prejudice has a serious and profound effect on a variety of areas, notably work, health, education, service accessibility, and many more. When disability-based prejudice interacts with discrimination based on social, cultural, gender, and caste, things get more complicated. The researcher has attempted to illustrate a progressive change with respect to the legal and social perspective on protection for the disabled. The paper starts with a succinct summary of the several jurisprudential perspectives that examine the legal and social responsibilities pertaining to people with disabilities, as well as the paradigm shifts that have occurred over time. Following this discussion of the evolving boundaries of international disability laws, the paper will examine how the Indian perspective on these laws has progressively developed, with focus on the "Rights of Persons with Disabilities Bill, 2011".

**Index Terms:** Disabled Persons, Indian Constitution, UN Convention, Legislation.

## INTRODUCTION

In a democratic nation where the "Doctrine of Rule of Law" and numerous humanitarian principles of various theories are enumerated under the "The Constitution of India," disability represents greater challenges in obtaining one's lawful share. Disability is defined as the inability to perform one's job as abled persons. Disabled persons<sup>1</sup> face various forms of discrimination and obstacles to accessing their livelihood, food, health, education, employment and other socio-economic opportunities. They are one among the vulnerable groups<sup>2</sup> in India. In every practical aspect of society, the disabled remain stigmatized and sidelined since society has historically viewed those with disabilities with sympathy, charity, and pity. This mindset focuses more on the limitations than the possibilities of people with impairments. For a disabled person to live life with dignity, it is necessary to take steps to help them become as self-reliant. This can become possible by means of four sorts of positive approaches which are socio-political, psychological, medical, and professional. To help them overcome their physical limitations to some extent, the medical approach calls for medical assistance and treatment. Developing their independence and avoiding treating them like second-class citizens would be the psychological approach. The socio-political approach is providing them with all the privileges and rights as are provided to able-bodied<sup>3</sup>.

## HUMAN RIGHTS FRAMEWORK

India is a country with a diverse social, cultural, and economic setting. As a result, the values of affirmative action, fairness, inclusion and even reasonable accommodation have been embedded in the formulation of Indian policy. Unfortunately, these have yet not been developed and incorporated into Indian legal system regarding disability laws. Since many people are frequently denied their basic human rights because of their disability, it is currently felt that it is crucial to address the infringement of those rights since it will help them become more visible in the general public, reinforcing their demand for equality and inclusion.

The last few years have seen efforts to include all these and other concepts as outlined in Convention on Rights of Persons with Disability, 2007. To satisfy India's international commitment to this cause, "The Rights of Persons with Disability Bill, 2011" was enacted. This Act gave disabled people a lot of rights, but it wasn't enough, thus a more comprehensive law is needed to fully adopt the human rights perspective. While the Part III of Indian Constitution's does not specifically address ending discrimination against disabled people, Articles 14<sup>4</sup> and 21<sup>5</sup> are pertinent. The three universal principles of human rights-equality,

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<sup>1</sup>The term "disabled persons" has been defined in the United Nations (UN) Declaration on the Rights of Disabled Persons, 1975, G.A. Res. 3447 (XXX) (Dec. 9, 1975) (hereinafter, DRDP). According to Art. 1 of the DRDP the term "disabled person" means "any person unable to ensure by himself, or herself wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities".

<sup>2</sup>Vulnerable Groups means those groups of persons who are discriminated in all walk of their life and they were the victimized group in a civilized society. These group of persons includes Women, Scheduled Castes (SC), Scheduled Tribes (ST), Children, Aged, Disabled, Poor migrants, People living with HIV/AIDS and Sexual Minorities.

<sup>3</sup> Justice Dharmadhikari's, Human Values & Human Rights, Colloquium on "Disability and the law" P-143

<sup>4</sup>INDIAN CONSTITUTION., Art. 14 states that the "State shall not deny to any person equality before the law or equal protection of the laws within the territory of India".

<sup>5</sup>INDIAN CONST.ITUTION, Art. 21 states that "No person shall be deprived of his life or personal liberty except according to procedure established by law"

life and liberty are outlined in these two articles. Additionally, article 39A and 41 of the directive principles of state policy also pertain to the protection of disabled people.

Although the individual's fundamental rights as guaranteed by Articles 14 and 21 are enforceable, the State's obligation as stated in Articles 39A and 41 are not enforceable because they are a component of State policy's guiding principles. Despite this, the DPSP's and fundamental rights are regarded as being equally important, notwithstanding the question of enforceability<sup>6</sup>. A robust law safeguarding their rights is necessary to fulfil this duty and the duties of a welfare state. Because the PWD Act's definition of disability<sup>7</sup> is so broad and impairment-based, many handicapped people are denied access to it despite of the benefits it offers. On the other hand, according to the CRPD of 2007, "disability" must be a dynamic notion that encompasses more than just impairment for effective participation. The evolving knowledge of the issues surrounding disability is highlighted to incorporate abroad definition of "disability" in the writing of Bill, 2011<sup>8</sup>. Similarly, despite the PWD Act's reference to "barriers," whether social or physical, no effort was taken to define and develop the idea as a means of facilitating structural improvements

The landmark judgements in cases like "National Federation of the Blind People case"<sup>9</sup> and "Ramachandra Tandi vs. State"<sup>10</sup> had brought significant changes in the way the judiciary and policymakers had addressed these challenges, yet their rights have not been recognized and promoted on an equal basis as the international framework currently requires. The fundamental framework of rights for disabled individuals is established by national laws under our dualist system, even though India has ratified all conventions and international legal instruments. Talking about above "Article 253" of the Constitution states that "The Parliament may enact laws for all or a portion of India's territory to carry out any treaty, agreement or convention with another country". Additionally, under the heading of "Relief of the disabled and unemployable"<sup>11</sup> Article 246(3) of Indian constitution grants "the Legislature of any state the sole authority to enact legislation protecting people with disabilities".

Lawmakers in India have addressed the problems of people with disabilities in a variety of contexts. There are laws in place to provide care and treatment for mentally ill individuals, building trust, rehabilitation, and ensuring that those with impairments are fully included and treated equally. The primary laws in this category are the following:

- (i) The Persons with Disabilities (Equal Participation) Act 1996.
- (ii) National Trust for Welfare of Person with Austin, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

<sup>6</sup>Minerva Mills Ltd. v. Union of India, A.I.R. 1980 S.C. 1789

<sup>7</sup>2(4), Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, No. 1, Acts of Parliament (1996), defines 'person with disability' to include only "a person suffering from not less than forty per cent of any disability as certified by a medical authority".

<sup>8</sup>Cl. 2(25), The Rights of Persons with Disabilities Draft Bill, 2011 (Bill, 2011), defines 'persons with disability' as "persons with any physical, mental, intellectual, developmental or sensory impairments which in interaction with various barriers may hinder full and effective participation in society on an equal basis with others".

<sup>9</sup>National Federation of Blind v. Union Public Service Commission; A.I.R. 1993 S.C. 1916

<sup>10</sup>Ramachandra Tandi v. State, A.I.R. 1994 Ori. 228;

<sup>11</sup>INDIA CONST., entry (9) of List II (State List) of the Seventh Schedule.

(iii) The Mental Health Act of 1987.

(iv) The right of person with disability act, 2016

(v) The Workmen's Compensation Act of 1923 and the Motor Vehicles Act of 1988 are two other enactments pertaining to disabilities.

## **THE RIGHT TO HEALTH OF PERSONS WITH DISABILITY**

### **INTERNATIONAL HUMAN RIGHTS FRAMEWORK IN CONTEXT TO RIGHT TO HEALTH**

As discussed below, the “World Health Organization” (WHO) and the United Nations are constantly working to safeguard, promote, and realize everyone's right to health care, including those with disabilities.

#### **a ) World Health Organisation**

Over the past 50 years, the World Health Organization has been instrumental in directing national and international health policy creation and action, with the goal of guaranteeing and achieving the best possible health care for everyone on the planet. Furthermore, "The people have the right and duty to participate individually and collectively in the planning and implementation of their health care," as stated in WHO's Alma Ata Declaration. Thus, in addition to providing a broad definition of "health," WHO also outlined "vision of health care for all by 2000" in the world health assembly and “Alma Ata Declaration.” The medical welfare approach is a crucial strategy made to address the issues faced by individuals having disabilities in realizing their access to health care. Stated differently, disability is a personal tragedy. Reliance on physicians, rehabilitation specialists, and non-profit organizations is encouraged by such a viewpoint. This method is supported by the WHO's 1980 classification of impairment.

#### **b) United Nations**

A number of resolutions were made by the UN General Assembly to protect the right to healthcare. Article 12<sup>12</sup> of the ICCPR and Article 25<sup>13</sup> of the UDHR are two examples of provisions that demonstrate this strategy. Additionally, “The Convention on the Elimination of All Forms of Racial Discrimination 1966”, “the Convention on the Elimination of All Forms of Discrimination Against Women 1979”, and “the Convention on the Rights of the Child 1989” guarantee everyone's right to quality healthcare, including women, children, and other disabled people. As a result, the 1971 UN Declaration on the Rights of Mentally Retarded Persons mandates that individuals with mental retardation receive the kind of medical

<sup>12</sup>Art. 12 of the International Covenant on Economic, Social, and Cultural Rights 1966 (hereinafter, ICESCR), G.A. Res. 2200A (XXI) (Dec. 16, 1966), inter alia, states: “The States party to the present Convention recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”

<sup>13</sup>Art. 25 of the Universal Declaration of Human Rights 1948, supra note 17 states: “Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing, and medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.

attention and rehabilitation that will enable them to improve their capacity to maximum possible outcome. Also, the UN Declaration on the Rights of Disabled Persons, 1975 expressly grants the right to functional, psychological and medical treatment. CRPD, 2007 grants disabled people the right to the best possible health care, as permitted by the country in which they reside. In addition to guaranteeing all other rights, the CRPD, 2007 adds the right to equality, meaning that disabled people's health should be on par with that of people without disabilities.

## B. INDIAN HUMAN RIGHT FRAMEWORK IN CONTEXT TO RIGHT TO HEALTH

### a. General Right to Health

The "right to health for all" guarantees that everyone has access to healthcare and instructs the government to take action to improve everyone's health. When considering this constitutional right to health under Articles 21, 41 and 47 of the Indian Constitution in the matter of *State of Punjab v. Ram Lubhaya Bagga*<sup>14</sup>, the Supreme Court noted that a person's right corresponds to a duty owed to another, whether that duty is imposed by a government agency or an individual employer.

The apex Court expanded the application of Article 21 in *Paschim Banga Khet Mazdoor Samity and Ors. v. State of West Bengal & Anr.*<sup>15</sup> by citing India's status as a welfare state to support government hospitals' obligations to provide healthcare in to protect human life. Article 21 is violated when a government hospital fails to provide prompt medical care to the needy. However, the apex Court has permitted the partial restriction of certain constitutional rights when weighed against another person's right to health. In case of *Mr. X v. Hospital*<sup>16</sup> it was held that it is the hospital's duty to notify the petitioner's fiancé of his HIV infection to protect her right to health.

### b. Right to Health of disabled persons

"The Mental Health Act" of 1987 is a comprehensive law that establishes government responsibility to cover the maintenance costs of such individuals housed in mental and psychiatric asylums, make regulations controlling their admission and detention and above all—to protect their human rights. With the express purpose of recognizing and regulating the behaviour of educational institutions and other facilities, the "Rehabilitation Council of India Act" was passed by the Parliament in 1992, establishing a Rehabilitation Council at national level.

"Section 25" of the Person's with disability act places this responsibility on the government for early detection and prevention of disabilities in the state, requiring the relevant governments and local authorities to take specific actions to prevent the occurrence of disabilities within the bounds of their economic capacity and development. Section 18 calls for the establishment of the "Rehabilitation Council" at the national level with the specific goal of recognizing and regulating the conduct of institutions providing education and other facilities. In addition, Section 42 of the Act stipulates that the relevant

<sup>14</sup> *State of Punjab v. Ram Lubhaya Bagga*, (1998) 4 S.C.C. 117

<sup>15</sup> *Paschim Banga Khet Mazdoor Samity & Ors. v. State of West Bengal & Anr.*, (1996) 4 S.C.C. 37

<sup>16</sup> *Mr. X v. Hospital*, (1998) 8 S.C.C. 296.

government to create schemes to provide aids and applications to persons with disabilities. The Bill of 2011, which is based on the CRPD, 2007 establishes the right to equality and health for the disabled based on the idea of reasonable accommodation, shows promise for change. Additionally, the Bill acknowledges their equal entitlement to insurance and instructs healthcare providers to adhere to their code of ethics while treating the disabled, which includes informed consent and confidentiality. If properly executed, people are starting to acknowledge the human rights of disabled people and start viewing them as fellow humans rather than as charity cases.

## **RIGHT TO EDUCATION OF PERSONS WITH DISABILITY**

### **A. INTERNATIONAL HUMAN RIGHTS FRAMEWORK IN CONTEXT TO RIGHT TO EDUCATION**

#### **a) General Right to Education**

The “UN Charter” marked the beginning of the contemporary era of human rights, but it was only in last few decades that the worldwide human rights movement gained momentum under human rights instruments and conventions. On the recommendation of the then-Director-General of UNESCO, the ICESCR was created, and Article 13 of that document recognizes the right to education in comprehensive terms. In the Article 26 of the UDHR and Article 10 of the Convention on Elimination of all form of Discrimination against Women lies the provision pertaining to the “right to education” which reflects principle of equality of opportunities in educational matters. The “UN Committee on Economic, Social, and Cultural Rights” (CESCR) elaborated Article 13 of the ICESCR in cooperation with UNESCO, drawing on UNESCO's experience and focusing on the Convention against discrimination in education.

#### **b) Right to Education in context of disabled person**

Although the “right to education” of people with disabilities is not explicitly listed, it is included in several human rights instruments. According to United Nations Convention on the Rights of the Child, 1989 children with disabilities are entitled to special rights. As with the “UN Declaration of the Rights of the Disabled Persons” (1975), the major goal is to uphold dignity, and one way to do this is by assisting the disabled in realizing their full potential in a variety of fields and integrating into society. The Declaration affirms that such people have the right of social integration, self-reliance, educational, vocational training and dignity. Parties must acknowledge it, according to the CRPD, 2007.

## B. INDIAN HUMAN RIGHTS FRAMEWORK WITH CONTEXT TO RIGHT TO EDUCATION

### a. General right to education

“The right to education” is guaranteed under Article 45 along with 46 and 41 under Directive Principle of State Policy. This establishment of basic education as a fundamental right in India today is based on the complementary nature of the rights outlined in Part III & IV. The Apex Court issued two significant rulings that cleared the path for the right to education to be proclaimed a Fundamental Right, fully acknowledging the interconnectedness of social and political rights. Until 1992, the hon'ble SC's ruling in *Mohini Jain v. State of Karnataka*<sup>17</sup> was mainly disregarded as a vital tool for attaining this socio-political justice. While establishing the fundamental right to free primary education, it was decided in *Unni Krishnan v. State of A.P.*<sup>18</sup> that the right to education was not an absolute one, and that its scope was determined by the language of Articles 45 and 41 for the progressive realization of the right to education. Declaration on “right to education” as a Fundamental Right have been further upheld and recently confirmed by the eleven-Judge Constitutional Bench in *T.M.A.Pai Foundation v. State of Karnataka*<sup>19</sup>.

### b. Right to Education in context of disabled persons

India has acknowledged unique “right to education” for people with disabilities in addition to general right to education. According to the “Chapter V of Person With Disability Act”, the State is required to “promote setting of special schools” for impaired children and guarantee the free education till 18 years. Additionally, the State must create plans that include transportation for kids so they can get to school and removal of any architectural barriers from educational institutes imparting vocational and professional training. The Delhi High Court ruled in “*Kumari Rekha Tyagi v. Vice Chancellor, University of Delhi*”<sup>20</sup> that Section 39 of PWD Act, 2011 is not applicable for seating reservations for students with disabilities in educational institutions. However, the High Court ruled in *Harsha Shivaram v. National Law School of India*<sup>21</sup> that the reservation would only apply to government-aided institutions and would not affect independently funded institutions like the National Law School of India.

The Supreme Court put an end to the debate over the reservation provided under Section 39 in “*All Kerala Parents’ Association of the Hearing-Impaired v. State of Kerala*”<sup>22</sup>, ruling that the language of Section 39 clearly refers to reservation for admissions.

## RIGHT TO WORK IN CONTEXT OF PERSONS WITH DISABILITY

### A. INTERNATIONAL HUMAN RIGHTS FRAMEWORK IN CONTEXT TO RIGHT TO WORK

<sup>17</sup>*Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666. In this case, the Supreme Court, while declaring the charging of capitation fees is illegal, categorically stated that “the right to education flows directly from the right to life” since “the right to life and the dignity of an individual cannot be assured unless it is accompanied by the right to education”.

<sup>18</sup>*Unni Krishnan v. State of Andhra Pradesh*, (1993) 1 S.C.C. 645.

<sup>19</sup>*T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 S.C.C. 481

<sup>20</sup>*Rekha Tyagi v. Vice Chancellor, University of Delhi*, XC III DELHI LAW TIMES 813 (2001). The Court reasoned that since § 39 occurred in Chapter VI dealing with “employment”, the word “post” has to be used to imply seats. Thus, three percent of posts can be reserved for these categories in educational institution under Sec. 39.

<sup>21</sup>*Harsha Shivaram v. National Law School of India*, A.I.R. 1999 Kar 173.

<sup>22</sup>*All Kerala Parents’ Association of the Hearing Impaired v. State of Kerala*, 2002 (3) KLT 423 (SC).

According to conventional wisdom the “right to work” or employment is another crucial aspect of human rights that are necessary for a person to live a dignified life, and no one should be denied of this right. The disabled now have the right not only to work but it includes the right to be employed and have full access to working environment.

#### **a) General Right to Work**

Article 6 of the ICCPR, 1966, affirms that everyone has the right to work and earn a living. Article 7 on the other hand, ensures working environment and conditions which are “just and favourable” for all. It explicitly establishes the principle of equality and enjoyment of the “right to work”. Apart from this, it also envisages the promotion of the right to “equal opportunity for everyone” to “an appropriate higher level, subject to no considerations other than those of seniority and competence.” A sufficient standard of living is another significant right protected by the ICESCR. The right to the best possible standard of living is guaranteed by Article 12. It is impossible to separate this right from the right to work and employment as they are so closely related. Since the significance of this was recognized far earlier in human rights movement, economic rights were regarded as “indispensable” for “dignity and full personal development,” in addition to social and cultural rights. Articles 22 to 27 further talk about right to work and equitable pay into economic rights.

#### **b) Right to Work in context of disabled persons**

Equality as per UDHR, 1948 acknowledges the right to work and instruct states to guarantee equality to everyone who suffers from disability. The 1993 Vienna Declaration and “Programme of Action” and the more current CRPD, 2007 both unequivocally affirm disabled people's right to employment. States are also supposed to make sure that people with impairments receive “reasonable accommodations” at work. This brings a significant change from the prior compensation-based approach which reduced the right to only the right to subsistence.

### **B. INDIAN HUMAN RIGHTS FRAMEWORK WITH CONTEXT TO RIGHT TO WORK**

#### **a) General Right to Work**

The “right to livelihood” was not originally included in Article 21 of Indian constitution but now it is. The idea that livelihood is essential to “the right to life” has been generally accepted by the courts, but it has not yet been recognized as a positive right. In establishing this right, the court noted in *Olga Tellis v. Bombay Municipal Corp.*<sup>23</sup> that if someone is denied this right without a fair and just procedure being followed, they may contest it as a breach of Article 21. As a result, the court established the “right to livelihood” as a crucial economic right.

The state has now included this right in Part IV of the Constitution. Additionally, Article 39 requires the state to provide ‘citizens’ “right to an adequate means of livelihood,” whereas gives the state the authority

<sup>23</sup>(1985) SCC 603

to guarantee the right to labour, within the state's "economic capacity" serving as the sole restriction. The state has responded to these responsibilities by establishing several employment guarantee programs in both rural and urban areas, such as the widely talked-about "National Rural Employment Guarantee Program".

## **b) Disability Specific Right to Work**

Legislative action is frequently used to protect the "right to work", as in the case of the disabled. "The Persons with Disabilities (Equal Opportunities, Protection of Rights, and Full Participation) Act, 1995" requires the government to designate positions and set aside at least 3% of seats for those with motor disabilities and those who are blind or visually impaired. Additionally, the Act requires the state to provide training, lower the upper age restriction, control employment, guarantee workplace safety and health precautions, and more. The state's financial capacity affects this entitlement as outlined in Part IV. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act of 1999 also aims to empower people with disabilities to live independently and it offers the establishment of a setting that guarantees them chances to make a living. The victim in "Virender Kumar Gupta v. Delhi Transport Corporation (DTC)" <sup>24</sup> who had been a conductor before, sustained injuries and was deemed medically fit for desk work only. The victim applied for a suitable position at the bus depot but was granted early retirement instead. It was decided that this was against a person's entitlement to continue working for the same company in a different capacity at the same salary and benefits as before the handicap occurred. Additionally, Article 16 of the Indian Constitution provides the "right to equal opportunity" in areas pertaining to public employment and prohibits discrimination based on caste, religion, or other factors that could disqualify someone from holding any office or job. Article 14 of the Indian Constitution guarantees the right to equality before the law and prohibits any unjustified discrimination to reinforce and augment these rights.

## **CONCLUSION**

Disability has a direct impact on health and physical aspects, as well as indirect implications on education, transportation, physical access and welfare programs, housing, healthcare, recreational opportunities, social contact, and most importantly, the workplace. Disability was traditionally seen as the domain of medical specialists, and this method was known as the medical welfare approach but as previously discussed, the disability rights movement has altered the dominant perception of disability at that time. As a result, the medical welfare method gave way to the "social welfare approach", which was then superseded by the "human rights approach" at the basic level. After first emphasizing on care concepts, remuneration, and capacity building, the laws and programs now concentrate on integration by means of structural adjustments. As a result, the fundamental philosophical presumptions for the protection and

<sup>24</sup>Virender Kumar Gupta v. Delhi Transport Corporation (DTC), 2002 (61) DRJ 355.

advancement of disabled people are changing, with “paradigm shift” from social and medical welfare to human rights. As a result, the idea of subjective equality paradigm has gained prominence and power in the context of disability.

