Protecting The Disabled Persons Under The Human Rights Regime – The Shift From Welfare To Rights

Roopali Adlakha & Shouvik Kumar Guha*

Discrimination against disabled persons has historically exhibited quite a disturbing trend of assuming hydra-headed shapes, ranging from forms invidious to subtle distinction, exclusion, restriction or preference, or denial of rights. Undoubtedly, such discrimination has a significant and severe impact in diverse fields such as education, health, employment, access to services and many others. The waters become murkier in interaction between disability-based discrimination and social, cultural, gender and caste-based discrimination. In the course of this paper, the authors have sought to portray a gradual shift in the legal and societal stance vis-à-vis protection to the disabled. Once perceived strictly as a welfare or even charitable measure, such protection or grant of equality has eventually been recognized as a right that the disabled can and ought to claim for themselves. The paper begins with a brief overview of the various jurisprudential approaches of looking at the social and legal obligations relating to the disabled and the paradigm shift from one to the other in course of time. After this discussion regarding the shifting frontiers in the laws for disabled on the international front, the paper shall move on to analyze the manner in which the Indian perspective of the same has gradually taken shape, with special emphasis on the Rights of Persons with Disabilities Bill, 2011. The authors shall also strive to delineate the evolution of the Indian legal scenario to inculcate the principles highlighted in the UN Convention on the Rights of Persons with Disabilities, 2007. While doing so, the efforts made under the Indian human rights framework to secure the rights of the disabled have been

* 3rd year BA/B.Sc. LLB and LLM Final Year students respectively at the W.B. National University of Juridical Sciences, Kolkata.

analyzed. In this endeavour, three specific sectors, viz. health, education and employment, have been concentrated upon by the authors, who have sought to trace both the international and national legal scenes with respect to the disabled in these sectors. The paper concludes with an emphasis of the entire discussion having served as a touchstone to highlight the paradigm shift from welfare to rights for the disabled in the global arena and the Indian domestic front.

I. Introduction

Today disabled persons[1] constitute the largest minority in the world; more than 650 million individuals i.e. 10 percent of the world's total population suffer from some type of disability.[2] In the majority of countries, at least 1 out of 10 persons has a physical, mental or sensory impairment, and at least 25 per cent of the entire population

---

1 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". The DRDP definition contains three elements: (i) undesired difference from a normal person, (ii) incapable of enjoying a social life, and (iii) deficiency in physical or mental capacity. In India the third element of DRDP definition has been elaborated and the term "disability" has been defined under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, No. 1 of 1996, Acts of Parliament 1996 (*hereinafter,* the PWD Act). § 2(i) of PWD Act provides that "disability" means : (i) blindness ; (ii) low vision; (iii) leprosy - cured ; (iv) hearing impairment ; (v) locomotive disability; (vi) mental retardation , (vii) mental illness.

2 World Health Organization (*hereinafter*, WHO). It is unfortunate that till 2001 census no serious effort was made in India even to know the number of persons suffering from disability. A country wide survey conducted by the National Sample Survey Organization (*hereinafter*, NSSO) reveals that in 1991, 16.5 million persons i.e. 1.9 percent of the country's population suffers from one or other kind of disability. These figures only cover persons suffering from one of the four types of physical disability, namely, visual, speech, hearing, and locomotive. It does not, however, cover the mentally handicapped persons.

is adversely affected by the presence of disabilities.[3] These figures show with considerable clarity the enormous size of the problem, and this paper seeks to highlight the gravity of the issue by analyzing the complexity of the problem and the flaws in the approach with which it is currently being dealt.[4] Throughout history, disabled persons have been discriminated against in various ways, ranging from invidious discrimination, such as the denial of education opportunities, to more subtle forms of discrimination, such as segregation and isolation because of the imposition of physical and social barriers. Effects of disability-based discrimination have been particularly severe in fields such as education, health care, employment, housing, transportation, cultural life and access to public places and services.

This may result from distinction, exclusion, restriction or preference, or denial of reasonable accommodation on the basis of disablement, which effectively nullifies or impairs the recognition, enjoyment or exercise of the rights of disabled persons.[5] The problem becomes more complex with interaction between social, cultural, gender and caste-based discrimination. This issue of double discrimination is often not even recognized let alone discussed and resolved.[6]

---

3 *Id.*

4 *Id.*

5 For disability based discrimination, *see generally*, S.K. Verma & S.C. Srivastava, Rights of Persons with Disabilities (2002); G.N. Karna, Disability Studies in India : Retrospects and Prospects (2001). G.N. Karna, United Nations and Rights of Disabled Persons (1999); Brain Doyle, *Disabled Workers Rights, the Disability Discrimination Act and the UN Standard Rules*, 25 Ind. L.J. 1-14 (1996); Amy Bryant, *Limping Along: Persons with Disabilities Act, 1995*, 11 The Lawyers Collective 4-11(1996); Yolan Koster-Dreese, Human Rights and Disabled Persons (Theresia Degener ed., 1994). Gary L. Albrecht, Katherine D. Seelman & Michael Bury, Handbook of Disability Studies (2001).

6 Discriminatory practices against disabled persons result from social and cultural norms, which may be termed as "social stigma", because the condition of disability is considered as "undesired differentness" from socially defined norm of "normality". The core aspect of stigma occurs when the prevailing social norms treat disability as universally discrediting. The society and its institutions are designed for the "normals" and not for the people with stigmatized traits. The subordinate status of the disabled individuals rests on animus and prejudice. It is well recognized today that the causes

In this context, one may mention the differences in the general stances of the pre-modern Indian society and its modern counterpart vis-à-vis disability, which, in the opinion of the authors, can go a long way in highlighting the progress of the rights approach towards the disabled. In pre-modern Indian society, disabled people were eliminated through killing programmes and sterilization and were considered as non-persons and second–class citizens. Whereas modern society recognizes that discrimination should not be practiced against the disabled and takes steps to minimize such discrimination, the pre-modern society not only discriminated against the disabled but also justified such discrimination at religious levels. This was evident in the *prima facie* approach of Hinduism, Islam as well as Christianity towards the disabled.[7]

---

of disabilities consist of both *general causes* and *specific causes*. The *specific causes* include torture, ill treatment, amputation, environmental pollution, etc. where disability is the direct or indirect consequences of violations of human rights and humanitarian law, while the *general causes* do not necessarily entail violations of human rights, such as natural disasters, irreversible diseases and old age. For further details, *see*, Special Rapporteur on the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Human Rights and Disabilities, United Nations Publication, UN Sales No. E. 92. XIV. 4 (1993) (by Mr. Leandro Despoury); Parmanand Singh, *Disability, Discrimination and Equality of Opportunities: A Comparative Analysis of the Legal Framework*, 45 JOURNAL OF THE INDIAN LAW INSTITUTE 173-199 (2003); *see also,* Samuel R. Bagenstos, *Subordination, Stigma and Disability*, 86 (3) VIRGINIA LAW REVIEW 397(2000).

7 Discrimination in Hindu societies, specially in succession to property, against the disabled may be divided into four categories: (a) *physical disability* – blind, deaf, dumb and the deficient in any vital body limb such as hand and foot constituted this category. This category also included the impotent males. (b) *mental disability* – This category includes the idiots and the lunatics. (c) *disability due to disease* – This category specially includes the victims of leprosy because the disease resulted in ugliness and impairment of limbs. It was considered to be contagious in all its forms. (d) *assumed physical disability* – sexual intercourse outside legal wedlock in certain circumstances disinherited women but not men. Pre – modern Hindu law discriminated against the disabled on two grounds: (a) according to *Baudhayana* because they are incapable of transacting legal business, (b) may be believes that there was discrimination against the disabled because they were unable to perform religious ceremonies. *See* Vinod Dixit, *Historical Foundations of Disability Discrimination in Classical Hindu Law*, 20 DELHI LAW REVIEW 65-70 (1998); DERRETT, INTRODUCTION TO MODERN HINDU LAW 372-75 (1963).

However, even while this discriminatory approach of the pre-modern era underwent changes, disability as a legal issue in the initial stage has commonly been addressed as an aspect of social security and welfare legislation, health law or guardianship. Thus disabled persons were depicted not as subjects with legal rights but as objects of welfare, health and charity programs. The underlying social policy behind such a legal response has been one that segregates and excludes people with disabilities from mainstream society, providing them with special schools, workshops, housing and transportation. Most disability legislation and policies are based on the pervasive assumption that persons with disabilities simply are not to exercise the same rights as non-disabled persons, since the former are incapable of coping with either society at large or all most major life activities. Having said that, the last few decades have witnessed a shift at the foundational level, which has changed the underlying philosophical assumptions that are driving the process of change from welfare to rights.

Jurisprudentially, there are three approaches of looking at the social and legal obligations relating to the disabled - the medical welfare approach, the social relations approach, and the human rights approach. The medical welfare approach as represented by the World Health Organization (WHO) in its classification of disability in 1980[8], considers disability as a mere diseased state falling entirely under the clinical framework. It perceives a disabled person as a deviation from the norm requiring only professional help (medical, paramedical and rehabilitation) and charity. They are considered to be biologically and psychologically inferior to their able-bodied counterparts and thus perceived to be lacking the capacity to decide for themselves. This approach centered on provisions of care to the disabled as a humanitarian gesture.[9]

---

[8] International Classification of Impairments, Disabilities and Handicaps, World Health Assembly Res. 54/21 Geneva, WHO (1980).

[9] An examination of the various assumptions made by this approach ought to reveal that it sought to reduce disability to impairment and locate it within the body or mind of the individual while the power to define, control and treat disabled individuals was located within the medical and paramedical professionals. For instance, WHO's classification of terms like "handicap", "impairment" and

On the contrary, the social relations approach[10] regards disability as a consequence of the interaction between societal barriers and the impairment, thus shifting the focus to how the environment and society as a whole fail to consider human differences.[11] Thus, this approach provided for a more inclusive and integrated approach towards the disabled. Nevertheless the laws and entitlements provided under this approach were compensatory in nature. They also focused on capacitating the individual to "fit in" the environment.

Attempts at making physical and social environment disabled–friendly had started with the change in welfare approach; it could be so changed to identify and include in its scheme of things all human differences, only in the recent human rights approach. This approach

---

"disability", which is in conjunction with this approach, overlooks the fact that discrimination experienced by a disabled individual is the product of society's negative reaction towards impairment and disability.

[10] Interestingly enough, one of the reasons why governments all over the world started paying more attention to this approach can be traced back the World War II, which had rendered thousands of people disabled and unemployed. Instances can be cited of the Federal Parliament of Germany *(Bundestag)* that had approved comprehensive legislations protecting disabled persons in 1953, 1961, 1974, 1976 and 1986. In 1986 the *Bundestag* approved a major amendment to its existing comprehensive law affecting the disabled persons, with the main object being to eliminate employment discrimination and prejudices against the disabled and to promote their employment opportunities. At present, the GERMANY CONST., called *Basic Law* (*Grundgesetz*) contains Cl. 3 in Art.3 to the effect that "No person shall be disadvantaged on account of his or her disability". The extension of the disability discrimination provision in the *Basic Law* has consolidated the position of the people with disabilities because it contains a provision that it is the duty of the state to take steps to ensure that people with disabilities can participate in the life of the society. In Germany, every person with a physical, mental or psychological disability is entitled to claim a social right to the assistance necessary to prevent the disability or to remove it. The "social right" is thus the legal and guiding principle for Germany's rehabilitational and disability policy.

[11] One of the key characteristics of this process is its recognition that inaccessibility problems are not inevitably raised by mobility, visual or hearing impairments, but instead are a corollary of political decisions to build steps but not ramps, to provide information in printed letter version only, or to forgo sign language or other forms of communication etc.

focuses on recognizing and providing fundamental human rights to disabled persons by condemning segregation, institutionalization and exclusion which are typical forms of disability-based discrimination. The authors would also like to mention herein that the disability rights discourse, especially from the human rights perspective, insists on a concept of equality that is based on the needs of *all* members of the society rather than on those deemed "normal". The demand for equality is based upon the concept of *human autonomy*, which consists of personal capacities to have an access to the opportunities that society offers to all the people.[12]

The three main ways of understanding equality are as formal or juridical equality, equality of results, and equal opportunity or structural equality. Formal or juridical equality prohibits direct discrimination and aims at shifting the focus of a potential discriminator away from such characteristics as race, gender, disability, or sexual orientations.[13] Since legitimizing unequal treatment on the basis of such characteristics is deemed to be arbitrary, juridical equality requires society to ignore the differences. This concept meets the demands of disability rights activists who try to overcome the medical model of disability, and it underlines the notion that disability is not the source of the problem.[14] Equality of results essentially examines disability through an outcome-analysis. Thus,

---

[12] *See*, for instance the comments made by Joseph Raz: "the ideal of personal autonomy is the vision of people controlling to some degree, their own destiny fashioning it through successive decisions throughout their lives". John Rawls describes personal autonomy "as the ability to frame, to revise and to pursue a conception of the good and to deliberate in accordance with it". For further details, *see*, JOHN RAWLS, POLITICAL LIBERATION 72 (1993).

[13] INDIA CONST., arts. 14-18 constitute the fundamental right to equality. Art. 14 deals with the general principle of equality before law. It states that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". However, the disabled persons are not specifically protected under Arts. 14 to 18.

[14] Relying on the theory of formal or juridical equality, INDIA CONST., art 15 was drafted as a specific application of the principle of equality. Art. 15 runs as: "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth – (1) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them …"

according to equality of results, disabled workers who receive equal pay but bear an unequal cost of living burden with regard to their personal needs are discriminated against. The human rights theory that all human beings have equal value and dignity stands at the core of this way of understanding equality. As there can be no justification for inherently equal beings to own common resources unequally, this theory legitimizes the demand for equal allocation of resources.[15] The third way in which to view equality is "equal opportunity", a concept less rigid than the other two in that it seeks to provide equal chances without ensuring equal results. In this regard, equal opportunity is more compatible with the market economy. It looks at the history of group discriminations and identifies traditional or classic forms of discrimination.

There has been a paradigm shift from the medical welfare approach to the social relations and finally to the human rights approach which bases the demand for equality upon the concept of personal capacities. With the evolution of civil rights legislations for disabled persons such as the *Americans With Disabilities Act, 1990* (ADA), Australian *Disability Discrimination Act, 1992* (ADDA), United Kingdom's *Disability Discrimination Act, 1992* (DDA) and Indian *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* (PWD Act), national legal paradigms are shifting even further, from welfare to civil rights law. This equal opportunity paradigm is currently the most frequently applied equality concept in disability law. *The World Programme of Action concerning Disabled Persons* (WPA) adopted by the UN *General Assembly* in 1982 applied the principle of equal opportunity.

The Human Rights framework includes both general and specific rights ranging from political, cultural and social rights to economic rights and elimination from discrimination, and right against torture and inhuman and degrading treatment, among others.

---

[15] The theory of equality of results has been reflected in the INDIA CONST., cl. b, art. 39. Art. 39 deals with the matter relating to certain principles of policy to be followed by the state. According to Art. 39(b), the state shall, in particular, direct its policy towards securing-"that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good".

In accordance with the purposes and principles of the Charter of the United Nations and the International Bill of Human Rights[16], not only are persons suffering from any form of disability entitled to exercise all the rights stated above, embodied in these and other instruments, but they are recognized as being entitled to exercise them on an equal basis with other persons.[17] Developing and supplementing United Nations Declaration of Human Rights, 1975 (UDHR), the International Covenant of Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR) came into force in 1976. While the former in Article 2 guarantees all rights enunciated in the Covenant to all individuals without any discrimination, the latter in its Article 2 provides for an effective remedy in case of violation of rights. Various instruments have also been enacted that seek to prevent torture methods and punishment that could lead to temporary or permanent disabilities, for instance the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 thus recognizing the right to prevention of disability. The Convention for Rights of Child, 1989 also highlights the need for protection of rights of disabled children.

Under the international human rights regime, disabled persons had been rather ignored during the first three decades of the United Nations (UN) existence. Disability specific rights began to be recognized only in 1970s. According to the *Declaration on the Rights of*

---

16 For the texts of UDHR, ICCPR and ICESCR, *see*, Human Rights: A Compilation of International Instruments, UN Publication, Sales No. E. 92.XIV.4 New York (1988). ICCPR and ICESCR GA. Res. 2200 (XXI) (Dec.16, 1966). India had ratified / acceded ICCPR and ICESCR on 17.3.1979.

17 These statements are founded both on general provisions, such as Arts. 55 & 56 of the Charter of United Nations, which refer to the fact that all member states have undertaken to promote "higher standards of living, full employment, and conditions of economic and social progress and development", and on specific provisions, such as Art. 25 (1) of Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res./217(III) (Dec. 10, 1948), which recognizes that everyone has "the right to a standard of living adequate for the health and well-being of himself and of his family" as well as "the right to security in the event of unemployment, sickness, disability, widowhood , old age or other lack of livelihood in circumstances beyond his control."

Mentally Retarded Persons (MRD) of 1971[18] a person with intellectual disability has the same rights as other human beings, and such rights cannot be restricted without due process.

The object of the UN *Declaration of the Rights of the Disabled Persons* (DRDP) of 1975[19] is to promote "the dignity and worth of the human person and the necessity… of assisting disabled persons to develop their abilities in most varied fields of activity and promoting in so far as possible of… their integration into… normal life"[20]. The declaration proclaims the right of disabled persons to dignity, self-reliance, medical rehabilitation treatment, assertive aids, educational and vocational training, and social integration[21]. Similarly, the *World Programme of Action Concerning Disabled Persons* (WPA) of 1982[22] and the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (UNSR) of 1993 were instrumental in shifting focus to the human rights and human worth of the disabled and thus marked a significant global strategy for achieving equality for people with disabilities.

Though only the principles of equality and non-discrimination envisaged in MRD and DRDP are legally binding as customary law, the rest of the safeguards provided therein are considered soft law. The UN Convention on the Rights of Persons with Disabilities, 2007 (CRPD, 2007) is the first disability specific "hard" international human rights

---

[18] Declaration on the Rights of Mentally Retarded Persons (MRD) of 1971, G.A. Res 2856 (XXVI), 26 UN GARO Supp. no. 29 at 99 UN doc. A/8429 (1971). Rosenthal, *International Human Rights in Mental Health Legislation*, 21 New York Law Journal of International and Comparative Law 469-536 (2002). This instrument also recognizes a right to integration in the community and inclusion in society by establishing that "the mentally retired person should live with his own family or worth foster patents and participate in different forms of community life".

[19] UN Declaration of the Rights of the Disabled Persons (DRDP) of 1975, G. A. Res. 3447 (XXX) (Dec. 9, 1975).

[20] *Id*; Preamble.

[21] *Id*; Arts. 6-8.

[22] World Programme of Action Concerning Disabled Persons, G. A. Res. 37/52.63 (December 1982).

treaty that emphasizes full inclusion and participation in society.[23] Article 12(2) of the Convention recognizes that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life". The notion of respect for "equality and "non-discrimination" must be the basis for affirmative action by the government, to ensure that all measures that relate to the exercise of legal capacity, provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. The convention emphasized two key concepts- legal capacity and reasonable accommodation, which are yet to find a stable place in Indian jurisprudence. These principles have now become internationally accepted as integral for provision of equality to the disabled.

Having discussed the shifting frontiers in the laws for disabled on the international front, the paper shall now analyze the change in Indian understanding of the same with special emphasis on the Rights of Persons with Disabilities Bill, 2011. In Parts III, IV and V of the paper, the authors shall further analyze how the Indian laws have been evolving to include the valuable principles highlighted in CRPD, 2007.

II. Promotion And Protection Of The Persons With Disabilities Under Indian Human Rights Framework

As the cliché goes, India is a land of social, cultural and economic diversity. Thus, principles of equality, non-discrimination, affirmative action and even reasonable accommodation have also become deeply embedded in the Indian policy making process. Unfortunately they are yet to expand and form a part of Indian jurisprudence of laws relating to disability. The human rights approach to disability has at its root the right to full and equal participation in society. This is now believed to be essential to tackle violation of basic human rights of the disabled - rights which are understood, or

---

[23] UN General Assembly adopted in Convention on the Rights of Persons with Disabilities (*hereinafter,* CRPD) and opened for the ratification the same w.e.f. Mar. 30, 2007, *see*, UN. Doc. A/61/611. For the text, *see*, 46 ILM 443 (2007).

more aptly, rumoured, to be inherent in all human beings – as often many people are deprived of the same on the basis of their disability. This also helps increase their visibility in the mainstream, reaffirming their claim for inclusion and equality.

In the recent past, attempts have been made to incorporate all these principles along with others as discussed in CRPD, 2007. The Rights of Persons with Disability Bill, 2011(Bill, 2011) has been drafted to fulfill India's international commitment to the cause by signing the 2007 declaration. Though the PWD Act provided for many rights to the disabled, it proved to be insufficient and thus for a complete shift to the human rights approach, a more inclusive law is required.

Although the Constitution of India does not contain any specific provision in the chapter on fundamental rights for elimination of discrimination against disabled persons, Articles 14[24] and 21[25] are relevant. These two Articles provide for the three *universal human rights* doctrines: equality, life and liberty. The doctrine of equality is the philosophical foundation of the human rights of disabled persons. Also, there is a close link between equality and life/liberty. Articles 39A and 41 are two specific provisions in the chapter on directive principles of State policy in connection with the protection of disabled persons. Article 39A imposes upon the State a duty to ensure that "opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities". It is also a duty of the State, under Article 41, to make effective provision for securing "the right to work, to education and to public assistance in cases of ...old age, sickness and disablement…"

---

[24] INDIA CONST., 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".

[25] INDIA CONST., art. 21 states that "No person shall be deprived of his life or personal liberty except according to procedure established by law".

While the fundamental right to equality, life and liberty of the individual guaranteed under Articles 14 and 21 are enforceable[26], the duty of the State embodied in Articles 39A and 41 are not[27] since they are part of the directive principles of State policy. Despite the issue of enforceability, Directive Principles and Fundamental Rights are considered to be on a similar footing in terms of importance.[28] Thus there is a constitutional mandate for protecting and promoting the rights of persons with disabilities.

For fulfillment of this mandate and obligations of a welfare state, a strong law for promoting their rights is inevitable. As stated above, the current statutes have proved to be insufficient. The very definition of disability in the PWD Act is exhaustive and impairment based, thus depriving numerous disabled persons from even those entitlements that it provides.[29] Contrarily CRPD, 2007 requires 'disability' to be an evolving concept based not only on impairments but also attitudinal and environmental barriers hindering full and

---

[26] India Const., arts. 32 & 226 deal with the matter relating to remedies for "*enforcement*" of fundamental rights conferred by Part III. Art. 32 (1) runes as thus: "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed". For the scope and ambit of Art. 32, *see*, Fertilizer Corporation Kamgar v. Union of India, (1981) I S.C.C. 568; People's Union for Democratic Rights v. Union of India, (1982) 3 S.C.C. 235; M.C. Mehta (II) v. Union of India, (1988) 1 S.C.C. 471; Supreme Court Employees Welfare Assn. v. Union of India, (1989) 4 S.C.C. 187; Federation of Bar Assns. v. Union of India, (2000) 6 S.C.C. 715. India Const., art. 226 of has also vested jurisdiction on High Courts for "*enforcement"* of fundamental rights.

[27] India Const., art. 37, deals with the matter relating to application of the directive principles of State policy (Part IV, Arts. 36 to 51). Art. 37 runs as thus: "Application of the principles contained in this Part. – The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be duty of the State of apply these principles in making law".

[28] Minerva Mills Ltd. v. Union of India, A.I.R. 1980 S.C. 1789.

[29] § 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".

effective participation.[30] Attempts to include a wide-definition of disability have been made in the drafting of Bill, 2011,[31] highlighting the changing understanding of the problems of disability. Similarly, though 'barriers', whether physical or social, were mentioned in the PWD Act, attempts to define and evolve it as a concept to help in structural changes, were not made. The Bill, 2011 also includes a wide definition[32] of the same, making it easier for policy makers and the judiciary to interpret law and make more effective policies for the disabled.

Cases like the *National Federation of the Blind People* case[33] and *Ramachandra Tandi v. State*[34] have helped evolve Indian jurisprudence in this area by recognizing that helping the physically handicapped to become self-supporting active members of the society was a primary duty of the State and structural changes for the same are

---

30 RAWLS, *supra* note 12.

31 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".

32 Cl. 2(d), Bill, 2011, defines 'Barrier' to mean "any factor that impedes or obstructs the effective participation, of a person with disability in society. This will include attitudinal, social, economic, environmental, institutional, political or structural obstructions".

33 National Federation of Blind v. Union Public Service Commission*;* A.I.R. 1993 S.C. 1916; In this case, Supreme Court allowed the petition for permitting blind persons to compete in the Indian Administrative and Allied Services examination conducted by the Union Public Service Commission. Though the executive order did not allow for writing the examination in the Braille script, it allowed the blind candidates to take the aid of a scribe, thus ushering in a major structural change.

34 Ramachandra Tandi v. State, A.I.R. 1994 Ori. 228; This case dealt with a petition against the decision of the State of Orissa to not accord recognition and financial assistance to a school for the deaf and dumb on the grounds of preventing unnecessary expenditure. In some other cases guidelines have been issued by the Supreme Court on the living and treatment conditions, education, training and rehabilitation facilities to be present in such institutions. However, such guidelines and measures usually do not suffice and structural changes are necessary to ensure all rights to the disabled.

quintessential. Though some change in the way judiciary and policy makers have approached the issues of disabled has undergone a change, recognition and promotion of their rights on an equal footing as international framework now demands, is yet to happen.

Ours being a dualist system, national legislations form the basic framework of rights for disabled people, though India is a signatory to all the conventions and international law instruments discussed above. According to Article 253 of the Constitution, the Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Also, under Article 246(3), the Legislature of any state has exclusive power to make laws for the protection of persons with disabilities under the head of "Relief of the disabled and unemployable"[35].

The conditions of persons with disabilities have been dealt with by legislations in India in different kinds of situations. Some legislations have been enacted for providing treatment and care for mentally ill persons, establishment of trust, rehabilitation, and full participation and equality of the people with disabilities. Main legislations in this category are : (i) *National Trust for Welfare of Person with Austin, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999;* (ii) *Persons with Disabilities (Equal Participation) Act,1995;* (iii) *The Rehabilitation Council of India Act, 1992;* (iv) *The Mental Health Act, 1987;* and (v) *The Rehabilitation Finance Administration Act, 1948*. Some other legislations determine compensation on the occurrence of disability, be it on the road or at the work place. *The Motor Vehicles Act, 1988* and the *Workmen's Compensation Act*, 1923 are two statutes illustrating such disability related legislations.[36]

---

[35] India Const., entry (9) of List II (State List) of the Seventh Schedule.

[36] The context gives rise to a fair decree of conflict which courts are required to adjudicate, decisions have in the main been liberal in awarding disability pension and compensation. Some judicial decisions which illustrate this approach and wherein the courts turned down all efforts at non-grant of disability pension are Virendra Kumar v. Union of India, (1981) 1 S.C.C. 485; Anand Bihari v. Rajasthan

Surprisingly, these legal obligations have been construed rather narrowly and thus their objectives have not been fulfilled yet. PWD Act does not even recognize the principles of legal capacity and reasonable accommodation which are at the center of the current international framework India subscribes to. The Bill, 2011 has tried to statutorily incorporate them in order to make the shift to the human rights approach faster. Recognizing the legal capacity of an individual is one of the most important initial steps to ensuring him his fundamental and other basic human rights especially the right to equality.[37] Capacity of a disabled cannot be denied[38] or questioned and can be exercised without discrimination at his will and preference.[39] Similarly the concept of reasonable accommodation[40] has been recognized by the Indian judiciary[41] and policy makers as it forms the basis of the right to equality in general and affirmative action in particular. This principle has been specifically recognized in the recent Bill as part of all basic human rights like right to equality, liberty, justice, education, employment and health.[42]

Road Transport Corporation, (1991) 1 S.C.C. 731; Gurnam Singh v. Union of India, 1992 Lab I.C. 1594; Gurudas Singh v. Union of India, 1994 Lab I.C. 2170; Joginder Singh v. Union of India, (1995) 30 Administrative Tribunal Cases 637; Rajanna v. Union of India, A.I.R. 1995 S.C.1966; Shashi Kumar Mishra v. Union of India & Ors., 1995 Lab I.C. 881.

37 Cl. 4(5), Bill, 2011 states that, "any measure, intervention, interpretation which has the effect of denying or withdrawing or eliminating the legal capacity of any person with disability shall constitute discrimination".

38 Cl. 21, Bill 2011.

39 Cl. 18, Bill, 2011.

40 Reasonable Accommodation as a concept is defined in Cl. 2(30), Bill, 2011 and includes all reasonable steps (including providing information for the same) that can reasonable be taken to eliminate disadvantage that may be caused to a person due to certain provisions, criteria, practices, physical features or prohibited grounds for applications.

41 Ranjit Kumar Rajak v. State Bank of India, W.P. No. 576/2008 in the High Court of Judicature at Bombay ¶ 21; the Court observed that, "*Reasonable accommodation, if read into Art. 21, based on the U.N Protocol, would not be in conflict with Municipal law. It would give added life and dimension to the ever expanding concept of life and its true enjoyment*".

42 Cls. 4, 23, 33, 40, 56 & 65 recognize the principle of reasonable accommodation as part of the rights to equality, liberty, justice, education, employment and health respectively under this bill.

The complexities of interaction between disability and gender based discrimination have also begun to find place in discussion forums of laymen and experts alike. This has led to recognition of some basic human rights of disabled women to employment, health, family and reproduction, which were so far being denied in numerous ways. Even the aggravation of disability related problems that children face has been recognized under the Bill.

Thus one may observe that though there is time, in coming of an era where disabled in India shall have equal and effective human rights as their able counterparts, a transition in policy making and legal scenario in this context is gradually ushering.

III. Persons with Disabilities and the Right to Health

A. International Human Rights Framework and Right to Health

Right to health especially of the persons with disability, has been an area of much discussion and activity. Health services and medical negligence has been a matter of much concern in international human rights standard setting activities. The constant endeavour of the *World Health Organization* (WHO) and the *United Nations* for the protection, promotion and realization of the right to health care for all including persons with disabilities[43] has been discussed below.

---

[43] Apart from these two organizations, a number of international agencies have provided support for realization of the right to health care. Also for the first time, the international community formally recognized the rights of persons with disabilities with the adoption of the UN Declaration on the Rights of Mentally Retarded Persons, 1971, *supra* note 18. Moreover, a detailed declaration covering all forms of disabilities was adopted by the UN in 1975. Art.1 of the UN Declaration on the Rights of Disabled Persons 1975, *supra* note 1, defines the term "disabled person" to mean "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 deficiency, either congenital or not, in his or her physical or mental capabilities". For a critical discussion on health problem in India, *see*, Gauri Pada Dutta, Promised but not Implemented: Treatise of Health Policy (2003). Verma et. al., *supra* note 5.

a. *World Health Organization*

The World Health Organization has played a pivotal role for the last fifty years in guiding health policy development and action at both the global and national levels, with the overall objective of ensuring and attaining the highest standards of health care for all the people around the world.[44]

The Constitution of WHO requires it to elevate international health standards.[45] Besides, WHO's Alma Ata Declaration[46] concisely states that "The people have the right and duty to participate

---

[44] The Preamble to the World Health Organization's Constitution, *inter-alia,* provides that: (i) enjoyment of the highest standards of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic and social condition, (ii) health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and states, (iii) achievement of any state in the promotion and protection of health is of value to all, (iv) unequal development regarding the promotion of health and control of disease, especially communicable diseases, in different countries is a common danger, (v) healthy development of the child is of basic importance; the ability to live harmoniously in a constantly changing environment is essential for such development, (vi) the extension of the benefits of medical, psychological and related knowledge to all people is essential for the fullest attainment of health, (vii) informed opinion and active co-operation on the part of the public are of the utmost importance for the improvement of the health of all people, and (viii) governments' responsibility towards the health care of all their people can be fulfilled only by adopting adequate health and social service measures.

[45] Art. 2 of the World Health Organization's Constitution, adopted in International Health Conference, Off. Rec. Wld. Hlth. Org., 2, 100 (Jul. 26, 1946) provides for several functions: (a) to act as the directing and co-ordinating authority on international health work; (b) to propose "Conventions, Agreements and Regulations", make recommendations with respect to international health matters, and perform such duties as may be assigned thereby to the organization consistent with its objective; and (c) to develop, establish and promote international standards with respect to food, biological, pharmaceutical and consumer products.

[46] Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, USSR, Sept. 6-12, 1978, *available at* http://www.searo.who.int/LinkFiles/Health_Systems_declaration_almaata.pdf (last visited July 8, 2012).

individually and collectively in the planning and implementation of their health care". Therefore, WHO did not only broadly define "health", but also articulated the "vision of health care for all by 2000" in the World Health Assembly and Alma Ata Declaration.

An important approach to solve the problems of realization of the right to health care of persons with disabilities is the medical welfare approach[47]. As discussed, this approach treats disability as an inherent personal characteristic and not something on which the social context has any bearing. In other words, disability is a matter of personal tragedy. Such a view encourages reliance on doctors, rehabilitation professionals and charities. This approach finds support in the classification of disability made by WHO in 1980. WHO defined the term "handicap" as a disadvantage for a given individual resulting from an impairment or a disability, that limits or prevents the fulfillment of a role that is normal (depending on age, sex, social and cultural factors) for that individual, whereas "impairment" has been defined as any loss or abnormality of psychological, physiological or anatomical structure or function.[48] The term "disability" indicates a restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.[49] The WHO classification of "handicap", "impairment" and "disability" brings home the fact that discrimination experienced by an individual with disabilities is the product of society's negative reaction towards impairment and disability.[50]

---

47 Popular approaches comprise the medical welfare approach, social relations approach and equal opportunity approach.

48 International Classification of Impairments, Disabilities and Handicaps, *supra* note 8.

49 *Id.*

50 The reasons the authors hold this opinion are manifold, ranging from the use of repeated use of negative terms and connotations in relation to the disabled, signifying the societal perspective of their nature as an aberration, to holding the activities that the disabled are unable to perform as "normal" standard for all human beings. This essentially reverts back to the days when the medical welfare approach used to be in vogue.

b. *United Nations*

The UN General Assembly adopted various resolutions to safeguard the right to health care. Provisions illustrating this approach include Article 25 of the UDHR and Article 12 of the ICCPR.[51] Apart from these, 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, inter-alia,* provide for the protection of the right to adequate health care of all persons including women, children and other disadvantaged sections of society, such as the persons with disabilities.[52]

The right to health care includes the right of everyone to enjoyment of the highest attainable standard of physical and mental health. This right is obviously violated when necessary measures are not undertaken to prevent undernourishment or malnutrition, when proper medical care is not provided, when the persons with disabilities are not provided rehabilitation services, when general living conditions are not conducive to mental health, when immunization campaigns for the prevention of diseases (causing disabilities) are not regularly carried

---

[51] 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 well-being 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". 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".

[52] According to the World Development Report 1997, public-private deliberation is not just desirable but in fact critical to the success of reforming the health system. Community participation is the key element of the international action plan (known as Agenda 21), designed to bring about sustainable development for the twenty first century. This plan has been endorsed by over 150 nations at the *Earth Summit held at Rio* de *Janeiro in 1992.* Furthermore, the fourth *International Conference on Health Promotion, held in 1997* in Jakarta, reaffirmed the importance of community participation as a basic element of health for all.

out, when people live in squalid and overcrowded habitations etc. Therefore, the UN *Declaration on the Rights of Mentally Retarded Persons 1971* requires that mentally retarded persons should be provided such medical care and therapy that they can develop their ability to the maximum potential.[53] Furthermore, the UN *Declaration on the Rights of Disabled Persons 1975*[54] specifically endows disabled persons with the right to treatment of medical, psychological and functional nature.

CRPD, 2007 also gives disabled persons the right to enjoy the highest attainable health standard as the nation they dwell in can ensure.[55] As mentioned earlier CRPD, 2007 adds a dimension of right to equality while providing for all other rights and thus right to health of disabled persons should be at par with those not disabled. This equality should be substantive and not merely formal equality. Mention may also be made in this context of the UNSR, which enshrines the principle that "persons with disabilities must be empowered to exercise their human rights" and recognizes that the "equalization of opportunities for persons with disabilities is an essential contribution

---

53 Art. 2, UN Declaration on the Rights of Mentally Retarded Persons, 1971, *supra* note 43 states "The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability to the maximum potential".

54 Art. 6 of the UN Declaration on the Rights of Disabled Persons, *supra* note 1 states that: "Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthopedic appliances, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counseling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes of their social integration or reintegration". Besides the UN, its other agencies have adopted conventions, declarations and recommendations towards the protection and empowerment of persons with disabilities. They are: The UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (1993), G.A. Res. 48/96 (Dec. 20, 1993) Vocational Rehabilitation and Employment (Disabled Persons), 1983 ILO Convention 159 etc.

55 Art. 25 of the UN CRPD, *supra* note 23 states that: "States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender sensitive, including health related rehabilitation".

in the general and worldwide effort to mobilize human resources". Most significantly, the UNSR places nation states under "an obligation to enable persons with disabilities to exercise their rights ... on an equal basis with other citizens" and states that "national legislation should provide for appropriate sanctions in case of violations of the principles of non-discrimination". The health care vision articulated by WHO and all resolutions/declarations adopted by the UN and other agencies together constitute the global health policy. Although WHO's health policy regarding persons with disabilities speaks of a traditional medical welfare approach, the UNSR recognized a social model of disability, a concept indicating "the close connection between limitations experienced by individuals with disabilities, the design and structure of their environment and the attitude of general population".

It emerges from the discussion that the fundamental human right to health care is essential for all persons with disabilities and has been, therefore, recognized under the international human rights framework comprising international instruments such as conventions, declarations, standard rules, constitutions and programmes of action. It must be noted that the international human rights framework regarding the right to health care innately contains the general principle of "equality" which is the foundational principle of human rights reflected in both the ICCPR and the ICESCR. The international human rights framework is also binding on India as it has ratified/acceded to both ICCPR and ICESCR[56]. Against this international human rights framework regarding the right to health care of persons with disabilities, we may now discuss the issue of right to health care of such persons under the Indian human rights framework.

B. Indian Human Rights Framework and Right to Health

a. *General Right to Health*

The general "right to health for all" provides for the health care of the people and directs the state to undertake measures for the

---

[56] Texts of UDHR, ICCPR and ICESCR, *supra* note 16.

improvement of health conditions of all the people. The Supreme Court, while examining the issue of the constitutional right to health under Articles 21, 41[57] and 47[58] of the Constitution of India in *State of Punjab* v. *Ram Lubhaya Bagga*[59], observed that the right of one person correlates to a duty upon another, an individual employer or a government authority. Hence, the right of a citizen under Article 21 casts an obligation on the State, which is further reinforced under Article 47. In pursuance of this duty, the government has established a large number of government hospitals and health centers, but to be meaningful, these must be within the reach of all the people, and of sufficiently good quality. Since right to health care is one of the most sacrosanct and valuable rights of a citizen, and an equally sacred obligation of the state, each citizen of India looks to the state for giving this obligation top priority, which includes the allocation of sufficient funds.

The Supreme Court in *Paschim Banga Khet Mazdoor Samity and Ors.* v. *State of West Bengal & Anr.*[60] while widening the scope of Article 21used the argument of India being a welfare state to extend the duty of

---

[57] India Const., art. 41,"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, and in other cases of undeserved want".

[58] India Const., art. 47, "Duty of the State to raise the level of nutrition and the standard of living and to improve public health: The State shall regard the raising of the level of nutrition and the standard of living of its peoples and the improvement of public health as among its primary duties and in particular, the State shall endeavour to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health". For judicial decisions on public health, *see generally*, Arjun Das v. State, A.I.R. 1958 P H 400; Ghaio Mall & Sons v. State of Delhi, A.I.R. 1956 P H 97; Rajakbhai Issakbhai Mansuri v. State of Gujrat, 1993 Supp(2) S.C.C. 659; State of Bombay v. FN. Balsara, A.I.R. 1951 S.C. 318; Pritpal Singh v. Chief Commr. of Delhi, AIR 1966 P H 4; Tapan Kumar Sadhu Khan v. Food Corporation of India, (1996) 6 S.C.C. 100; State of Punjab v. Ram Lubhaya Bagga, (1998) 4 S.C.C. 117.

[59] State of Punjab v. Ram Lubhaya Bagga, (1998) 4 S.C.C. 117.

[60] Paschim Banga Khet Mazdoor Samity & Ors. v. State of West Bengal & Anr., (1996) 4 S.C.C. 37.

government hospitals to provide medical assistance to safeguard human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment, results in violation of his/her right to life guaranteed under Article 21.[61] Even in cases such as *Mr. X v. Hospital*[62], where the primary issue was pertaining to other constitutional rights, the Supreme Court has been known to have approved partial restriction of such rights when compared to the right to health of another person. While this case, involving the hospital's obligation in intimating the petitioner's fiancé of his HIV affliction to safeguard her right to health, bears no direct relation to the present discourse concerning right to health of the disabled persons, yet it can be used to indicate the judiciary's respect towards the said right in general and therefore its sanctity with respect to the disabled in particular as a logical corollary.

Therefore, the Supreme Court through landmark judgments has rendered medical facilities an integral part of life and liberty, and imposed the duty not only upon the state and its instruments but even on the private employer[63] to provide health services during and after employment. This, in other words, briefly outlines the evolution of a general framework of the right to health care of all, including persons with disabilities.

b. *Disability Specific Right to Health*

The specific right to health for persons with disabilities is an important emerging area in the arena of health law[64] in India. The

---

61 Akhil Bharatiya S.K. Sangh v. Union of India, (1981) 1 S.C.C. 246; Pt. Parmanand Katara v. Union of India & Ors., A.I.R. 1989 S.C. 2039. For constitutional right to health care for convicts and undertrails, *see,* SC Legal Aid Committee through Hon. Secretary v. State of Bihar & Ors., (1991) 3 S.C.C. 482.

62 Mr. X v. Hospital*,* (1998) 8 S.C.C. 296.

63 For right to health care, *see generally*, Dilip Ukey, *Human Rights, Health Care and Curative Regime - An Ignored Illness*, 27(2) Indian Bar Review 71-92 (2000).

64 India is a founder member of the United Nations and has ratified various Conventions for the protection of the rights of the people. Adoption of declarations at the international level has had a tremendous impact on the Indian legislature. The government for the first time in 1987 enacted the Mental Health Act. During the 1990s, the government laid down three comprehensive legislations for the

Mental Health Act 1987 is a comprehensive legislation providing for the creation of Mental Health Authorities[65], establishment and regulation of psychiatric hospitals and nursing homes[66], rules governing admission and detention of patents[67], liability of the government to meet the cost of maintenance of mentally ill persons detained in psychiatric hospitals and nursing homes, and most importantly the protection of the human rights of mentally ill persons. The Rehabilitation Council of India Act was enacted by the Parliament in 1992, providing for the setting up of the Rehabilitation Council at the national level with the specific objective of recognition and regulation of the conduct of institutions providing education and other facilities. The Council under section 18 of the Act is mandated to prescribe minimum standards of education required for granting a recognized rehabilitation qualification.

Section 25 of the PWD Act[68] imposes on the state, the responsibility for early detection and prevention of disabilities. It provides that the appropriate governments and local authorities take certain steps for the prevention of occurrence of disabilities within the limits of their economic capacity and development. It also provides that the state is to be responsible for undertaking research regarding the cause of occurrence of disabilities, promoting various methods

---

protection and rehabilitation of persons suffering from various forms of disabilities. The enactment of the Rehabilitation Council of India Act, 1992, No. 34, Acts of Parliament, 1992 (India). The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995, *supra* note 2. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999, No. 1, Acts of Parliament 1996 (India) are steps in the right direction. Recognizing the plight of children, especially juveniles, the government enacted the Juvenile Justice (Care and Protection of Children) Act 2000, No. 56, Acts of Parliament 2000 (India).

65 §§ 3 & 4, Mental Health Act 1987, No. 14, Acts of Parliament 1987 (India).

66 *Id.*, §§ 4-14.

67 *Id.*, §§ 15-36.

68 The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995, No. 1, Act of Parliament 1996 (India).

of preventing disabilities, providing training facilities for the staff at primary health centers, creating awareness amongst the masses through television, radio and other mass media and other such measures. Section 42 of the PWD Act further provides that the appropriate government shall, by notification, make schemes to provide aids and appliances to persons with disabilities. Besides, the PWD Act contains provisions for regulating the establishment of institutions[69] as well as for social security including rehabilitation measures[70].

Persons with disabilities constitute a minority group who live in an extremely vulnerable and disadvantaged political, social and economic environment. In the context of health care, persons with disabilities are often disfavored because of stereotypes, misconceptions and unfounded fears about increased costs and decreased productivity. The UNSR's approach vis-à-vis this particular concern has already been discussed before. One must remember that the UN notion of disability embraces "a great number of functional limitations" and individuals "may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness (which may be) permanent or transitory in nature".[71] The Indian constitutional right to health care is general in nature while section 25 of the PWD Act is preventive. Therefore, the right to health care of persons with disabilities in India does not provide much hope constituting a shift from charity and welfarism to civil rights and social integration of such people. Besides, one misses the enforcement of rights of the persons with disabilities through a disability tribunal or special disability court established with the express purpose of providing relief to individuals against discrimination meted out to persons with disabilities.

The hope of change in the Indian context is visible in the Bill, 2011 which, based on CRPD, 2007, introduces the right to health for the disabled, coupled with right to equality based on the concept of

---

69 *Id.*, §§ 51-56.

70 *Id.*, §§ 66-68.

71 *See,* UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the UN G. A. Res. 48/96, annex, of Dec. 20, 1993.

reasonable accommodation.[72] It also requires the disabled to participate in the making of health policies and schemes for provision of this right, besides mandating structural changes in all health care centers to increase accessibility.[73] The Bill also recognizes their right to insurance on equal basis[74] and directs medical professionals to follow their ethical code regarding informed consent and confidentiality while dealing with the disabled[75]. If implemented well, some of these rights and others as provided for in the Bill or discussed in various forums, are beginning to recognize the human rights of the disabled and are beginning to consider them as fellow humans rather than mere pathologically inferior beings or charity cases. Thus one can conclude that though slowly, even in India the approach is beginning to change.

IV. Persons With Disabilities And Right To Education

A. International Human Rights Framework and Right to Education

a. *General Right to Education*

Though the modern era of human rights commenced with the adoption of UN Charter, international human rights movement gained momentum only in the last few decades under international human rights conventions and instruments. The right to education has been recognized under Article 13 of the ICESCR, which had been drafted on the suggestion of the UNESCO's then Director-General and lays down the right to education, in comprehensive terms[76]. It contains a

---

72 Bill, 2011.

73 Cl. 65(2), Bill, 2011.

74 Cl. 66, Bill, 2011.

75 Cl. 67, Bill, 2011.

76 Art. 13, ICESCR, *supra* note 16, provides that "The State Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by

provision similar to Article 4 of the *Convention against Discrimination in Education*. The States party to the ICESCR recognize the universal right to education (Article 13(1)) with a view to achieve full realization of this right.[77]

Provision regarding the right to education also occurs in other United Nations instruments, for example Article 26 of the UDHR, Articles 28-30 of the CRC and Article 10 of the CEDAW. They reflect the principle of equality of educational opportunities.[78] General Comment No. 13 on Article 13 of the ICESCR elaborated by the UN Committee on Economic, Social and Cultural Rights (CESCR) in collaboration with UNESCO, draws on UNESCO's experience and dwells upon the Convention against Discrimination in Education.[79]

---

every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved."

77 Art. 13(2)(d) of the ICESCR, *supra* note 16 provides that "Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education."

78 Art. 28 of CRC, in particular, stipulates that "State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) make primary education compulsory and available free to all…." As the Human Development Report 2000 puts it, to assert a human right to free elementary education is to claim much more than that it would be a good thing for everyone to have an elementary education or even that everyone should have an education. In asserting this right, we are entitled to a free elementary education, and that, if some persons avoidably lack access to it, there must be some culpability somewhere in the social system. Human Development Report 2000 21 (2000).

79 The General Comment further provides that "education must be accessible to all, especially the most vulnerable groups, without discrimination on any of the prohibited grounds" and lays emphasis on accessibility and provides that "educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party …." *See* The right to education (Art.13): 12/08/1999. E/C.12/1999/10. (General Comments).

Similarly, the World Conference on Education for All (1990)[80] and the Delhi Declaration (1993)[81] promise to "eliminate disparities of access to basic education arising from gender, age, income, family, cultural, ethnic and linguistic difference and geographic remoteness". Thus, the general right to education encompasses all persons, including those with disabilities.

b. *Disability Specific Right to Education*

As has thus been stated, there is no dearth of support for the general right to education, be it at the national or the international levels. However, while disabled persons can obviously avail of such rights, yet the very nature of their special needs requires a further step forward if the shift from welfare to rights based approach is to be vindicated with respect to disability. In other words, the disabled persons are entitled to certain specific rights capable of addressing the problems that frequently afflict their educational processes and status. While the specific right to education of persons with disabilities finds no formal listing, references to it are made throughout a number of human rights instruments. UN Convention on the Rights of the Child 1989 provides certain specific rights to the child with disabilities.[82] Similarly, the primary objective of the UN Declaration

---

[80] Recalling that "education is a fundamental right for all people, women and men of all ages, throughout our world", the World Declaration of Education for All, adopted at the World Conference for Education For All (Thailand, Mar. 1990), it stipulates that "Basic education should be provided to all children, youth and adults. To this end, basic education services of quality should be expanded and consistent measures must be taken to reduce disparity" (Art. 3). The Declaration provides that "Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic leaning needs".

[81] The Delhi Declaration was made on 16 December 1993 by the "Education for All Summit" of Nine High Population Developing Countries. It is noteworthy that the E-9 countries, comprising Bangladesh, Brazil, China, Egypt, India, Indonesia, Mexico, Nigeria and Pakistan, account for more than 50 per cent of the world's population.

[82] Art. 19(1) of the CRPD, *supra* note 23 imposes the responsibility upon the State to accord a wide-ranging protection to the child, while Art. 23(3) recognizes the need to provide a disabled child with conditions conducive to his/her special needs,

of the Rights of the Disabled Persons 1975 (DRDP) is to promote human dignity and one of the modes of such promotion is to help the disabled achieve their true potential in different disciplines and integrate them in the mainstream.[83] The Declaration proclaims the right of persons with disabilities to dignity, self-reliance, medical rehabilitation treatment, assertive aids, educational and vocational training, and social integration. CRPD, 2007 provides that parties shall recognize the right of persons with disabilities to education.[84] With a view to realizing this right without discrimination and on the basis of equal opportunity, state parties shall ensure an inclusive education system at all levels and life-long learning directed to the full development of human potential.[85] In realizing this right, state parties shall ensure that persons with disabilities are not excluded from the general education system on the basis of disability. Hence, one may infer that the persons with disabilities are entitled to both general as well as the specific right to education.

---

irrespective of the family's financial conditions. Art. 19(1) of the UN Convention on the Rights of the Child, G.A. Res. 44/25 (Nov., 20, 1989) requires the State to "protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation". Furthermore, Art. 23(3) recognizes "the special need of a disabled child, such assistance extended….shall be provided free of charge whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, healthcare services, rehabilitation services, preparation for employment and recreation opportunities in a manner conductive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development".

83 The Declaration thus seeks to recognize "the dignity and worth of the human person and the necessity … of assisting disabled persons to develop their abilities in most varied fields of activities and promoting in so far as possible….their integration into … normal life".

84 Art. 24, CRPD, 2007, *supra* note 23.

85 *See,* UN Convention on the Rights of Persons with Disabilities, 2007, *supra* note 23, *available at* http://www.un.org/disabilities/convention/conventionfull.html (last visited June 12, 2012)

B. Indian Human Rights Framework and Right to Education

In India, the journey of the right to education – from being initially enumerated in the Directive Principles to being declared a Fundamental Right – has been both a huge struggle and a triumph, for child rights activists, academicians and NGOs, all over the country. Under the Constitution of India, this right is a general right applicable to all including persons with disabilities. The difference between general rights and specific rights, especially with regard to education, and the need for the latter have been already referred to in the previous parts of this article. Besides, the specific right to education has also been recognized for persons with disabilities in the legislative framework of India.

a. *General Right to Education*

Provision of the right to education is a part of the Directive Principles of State Policy provided in Part IV of the Constitution under Article 45[86], along with Articles 41[87] and 46[88]. The theory of the complementary nature of rights declared in Part III and Part IV, and the harmonious interpretation of these rights has been the foundation for the realization of primary education as a Fundamental Right today in India.

Two crucial judgments of the Supreme Court of India paved the way for the declaration of the right to education as a Fundamental Right, giving full recognition to the interdependence argument of social

---

[86] India Const., art. 45, "The State shall endeavour to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of fourteen years".

[87] India Const., art. 41, "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, and in other cases of underserved want".

[88] India Const., art. 46, "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".

and civil/political rights. Education as a necessary means of achieving socio-political justice was largely ignored until the 1992 Supreme Court judgment in *Mohini Jain* v. *State of Karnataka*[89].

The zeal demonstrated in *Mohini Jain*[90] was sustained in the decision of the Constitution Bench in *Unni Krishnan* v. *State of A.P.*[91] where the Court articulated that the fundamental right to education flows from Article 21. While declaring the right to education a Fundamental Right, it was held not to be an absolute right, and its content was defined by the parameters of Articles 45 and 41. In *Unni Krishnan*[92] the Court relied upon the UDHR and Article 13 of ICESCR and for the first time declared education to be a "social" right. This was one of the first Judgments in which the Court employed ICESCR language for the progressive realization of the right to higher education while declaring the fundamental right to free primary education. Declarations of the right to education as a Fundamental Right have been further upheld and recently confirmed by the eleven-Judge Constitutional Bench of the Supreme Court in *T.M.A. Pai Foundation v. State of Karnataka*[93].

---

89 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". Considering the interdependence of the right guaranteed in Part III and Part IV, the Court held that the directive principles, which are fundamental to the governance of the country, cannot be isolated from the Fundamental Rights guaranteed under Part III, and both are supplementary to each other.

90 *Id.*

91 Unni Krishnan v. State of Andhra Pradesh, (1993) 1 S.C.C. 645. This judgment partly overruled Mohini Jain v. State of Karnataka, (1992) 3 S.C.C. 666.

92 *Id.*

93 T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 S.C.C. 481. For various issues on the right to education, *see*, Virendra Kumar, *Minorities' Right to Run Educational Institutions : T.M.A. Pai Foundation in Perspective*, 45 JOURNAL OF THE INDIAN LAW INSTITUTE 200-238 (2003).

The much-debated, controversial Eighty-third Amendment was providing for right to primary education for children below the age of fourteen, finally passed in 2002 and was inserted in the Constitution as Article 21-A[94].In addition to the judicial decisions and the amendment declaring the right to education a Fundamental Right, several States in India have passed legislations making primary education compulsory[95]. Despite the general nature of the above mentioned decisions, amendment and legislations, they are applicable to persons with disabilities too.

b. *Disability Specific Right to Education*

Besides the general right to education, specific right to education for persons with disabilities has been recognized in India. Chapter V[96] of the PWD Act is titled "Education" and it deals with all aspects relating to the rights and privileges guaranteed to the persons with disabilities. The PWD Act provides that the State shall ensure that every disabled child has access to free education until the age of 18 years and "promote setting of special schools" for such children[97]. The State shall also frame schemes making provisions for transportation facilities for children to enable them to attend schools and "for removal of architectural barriers from schools, colleges and other institutions imparting vocational and professional training[98]. A provision[99] for reservation for disabled in educational institutions has also been made, but if it duty-bounds the government to do so, was a

---

94 INDIA CONST., art. 21-Astates "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine".

95 They are : Assam, Andhra Pradesh, Bihar, Goa, Gujarat, Haryana, Jammmu & Kashmir, Karnataka, Madhya Pradesh, Maharashtra, Punjab, Rajasthan, Tamil Nadu, Kerala and West Bengal; UTs : Chandigarh, Delhi, Pondichery and Andaman & Nicobar Islands.

96 §§ 26-31, PWD Act, *supra* note 1.

97 *Id.,* § 26.

98 *Id.*, § 30.

99 *Id.*, § 39.

grey area. In *Kumari Rekha Tyagi* v. *Vice Chancellor, University of Delhi*[100] the High Court of Delhi held that Section 39 has no application for reservation of seats for education in educational institutions for persons with disabilities. However, in *Harsha Shivaram v. National Law School of India*[101], the said High Court has held that this reservation would apply only to government institutions or institutions receiving aid from the government and has no bearing on self-financed institutions such as National Law School of India.

Putting the controversy over reservation provided under Section 39 to rest, the Supreme Court held in *All Kerala Parents' Association of the Hearing Impaired v. State of Kerala*[102] that, the language of Section 39 clearly indicates that it refers to reservation for admissions.

The recent Bill, 2011 besides the provision of right to education[103] by ensuring structural changes and proper training of teachers,[104] also requires the Education Reform Committee to aid the advancement of a disability rights perspective in their reforms[105]. More strikingly, to ensure equal treatment of disabled students in educational institutions, the bill provides for 'reasonable accommodation' not only in broadly conferring this right but also in disciplinary measures taken by the school.[106] Such

---

[100] Kumari 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 §39. *See also*, Binita Senapati v. State of Assam, A.I.R. 2000 Gau 1 and Deputy Secretary, Department of Health & Family Welfare v. Sanchita Biswas, A.I.R. 2000 Cal 202. The latter found that the absence of reservations for persons with physical handicap in medical colleges, the court found to be an infringement of both the PWD Act and the Constitution.

[101] Harsha Shivaram v. National Law School of India, A.I.R. 1999 Kar 173.

[102] All Kerala Parents' Association of the Hearing Impaired v. State of Kerala, 2002 (3) KLT 423 (SC).

[103] Cl. 35, Bill, 2011.

[104] Cls. 37 & 41, Bill, 2011.

[105] Cl. 48, Bill, 2011.

[106] *Supra* note 41; Cl. 40, Bill, 2011.

incorporation of CRPD, 2007 principles in the Bill and to an extent, above mentioned judgments, show that even in the area of education, the shift has started atleast in discussion of not only NGOs and experts but also policy makers and the judiciary.

V. Persons with Disabilities and Right to Work

A. International Human Rights Framework and Right to Work

As has been the general understanding, right to work or employment is another integral facet of human rights which are essential to a dignified human life. For one's maintenance and development, the need for a source of livelihood is inevitable, thus making right to work or employment a basic right that one should not be deprived of. Distinct from the isolation of the medical approach, the disabled are now being vested with the right to not only live in the society but also to conduct work and business like their non-disabled counterparts. This is one of the most basic human rights. Thus to provide this right in the true sense, one must appreciate the fact that right to work is rather a two-fold right. The right to work includes the right to be employed and the right to suitable working conditions. The right to be employed by merely providing for reservation for the disabled or other similar inclusive mechanisms is rendered futile if suitable working conditions compatible with the requirements of a disabled person are not provided. Thus the right to work can be said to be effectively vested in one only if it contains both the right to be employed and the right to access and utilize the working environment.

a. *General Right to Work*

The ICESCR, 1966 under Article 6 recognizes the right to work as protected human right "which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". 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 in the conferment and enjoyment of the right to work. Apart from recognizing the right to equal pay for

equal work, it also envisages the promotion of the right to "equal opportunity for everyone"[107] to "an appropriate higher level, subject to no considerations other than those of seniority and competence."[108] Another important right guaranteed by ICESCR is that of an adequate standard of living[109] Article 12 ensures the right to highest attainable standard of living. The right to work and employment is so intricately associated with this right that it is practically impossible to dissociate them. The importance of this right was realized much earlier in the human rights movement as a result of which, along with social and cultural rights, economic rights were also considered "indispensable" for one's "dignity and free and full personal development"[110]. Articles 22 to 27 expand the fundamental right to social security to include economic rights like right to work, and fair remuneration. Similar economic rights were guaranteed to women under the Convention on Elimination of All Forms of Discrimination against Women, 1979 to ensure equality.

b. *Disability Specific Right to Work*

Equality in the international resolutions and declarations recognize the right to work and direct member states to ensure the same for all disabled people and ensure equality in the field of employment. DRDP, 1975 envisages guaranteeing such equality. Article 5 declares that the disabled persons are entitled to measures for making them "self-reliant". Article 7 specifically ensures disabled persons the "right to economic and social security" and "a decent level of living". It elaborates on these set of rights to include securing and retaining employment, and attaining remuneration. Article 8 protects their special interests by entitling them to their special needs during this process of their economic integration in the mainstream.

---

[107] Art. 7, ICESCR, 1966, *supra* note 51.

[108] *Id.*

[109] Art. 11, ICESCR, 1966, *supra* note 51.

[110] *A United Nations Priority*, *available at* http://www.un.org/rights/HRToday/declar.htm (last visited Jan. 20, 2012).

On similar lines ILO Convention Concerning Vocational rehabilitation and Employment (Disabled Persons), 1983 ensures "equality of opportunity and treatment for disabled"[111] workers. It also clarifies that any positive measure for an effective inclusion of the disabled workers could not be regarded as discrimination.[112] Article 2 of this convention imposes a duty on members to review, modify or change their national policies to fall in line with the international obligations to ensure equal right to work to the disabled. The UN Standard Rules on the Equalization of Opportunities for persons with disabilities, 1993 aim at making the physical environment more accessible for the disabled.[113] Rule 7 specifically lays down the rules with regards to employment emphasizing on inclusion and making of working environment in particular more accessible to ensure equality effectively.

The Vienna Declaration and Programme of Action, 1993 and the more recent CRPD, 2007 categorically recognize the right to work and employment of disabled persons. Under Article 27 of CRPD, equality in "conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions" is ensured. Members are also expected to ensure the provision of "reasonable accommodation"[114] to persons with disabilities in the workplace. This is a major shift from the previous compensation-based approach in which the right to employment was overshadowed by monetary allowance reducing the right to a mere right to livelihood. CRPD recognizes the human need and right to

---

111 Art. 4, Vocational rehabilitation and Employment (Disabled Persons), 1983, *supra* note 54.

112 *Id.*

113 Rule 5, UN Standard Rules on the Equalization of Opportunities for persons with disabilities, 1993, *supra* note 54.

114 Art. 2, CRPD, *supra* note 23 " 'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

work and earn livelihood. Thus the emphasis is also laid on structural changes to provide for work that the person would like to do over merely providing him with a job that would then be easily adaptable according to his needs.

B. Indian Human Rights Framework and Right to Work

The right to work comprising of various aspects as discussed above has been recognized by the Indian legal system. The Constitution of India guarantees every citizen of the country the right to livelihood, equality of opportunity in employment, right to "equal wage for equal work", the right to work, right to "just and humane conditions of work", maternity relief, a living wage, participation of workers in management of industries and the right to avoid children working in hazardous workplaces.

a. *General Right to Work*

Though the interpretation of Article 21 (right to life and personal liberty) initially did not include the right to livelihood[115], it now does.[116] Despite the fact that the courts have largely agreed on the principle that livelihood is integral to right to life, it has not been yet recognized as a positive right. Thus in *Olga Tellis v. Bombay Municipal Corp.*, recognizing this right, the court observed that the implication of such a right is that a person deprived of this right without just and fair procedure being followed can challenge the same as violation of Article 21. The court thus developed a right to livelihood as a significant economic right.[117] But the problem arises as the Supreme Court till date has not regarded the right to work as a positive fundamental right against the state.[118]

---

[115] In Re: Sant Ram, A.I.R. 1960 S.C. 932.

[116] Board of Trustees of Port of Bombay v. Dilipkumar R. Nandkarni, A.I.R. 1983 S.C. 109.

[117] M.P. Jain, Indian Constitutional Law 1612 (2007).

[118] Secretary, State of Karnataka v. Umadevi, A.I.R. 2006 S.C. 1806.

Instead the state has included this right as a part of public policy as indicated in Part IV of the Constitution. Article 39, imposes an obligation on the state to ensure that the citizens have "the right to an adequate means to livelihood" while Article 41 categorically entrusts the state with the responsibility of providing the right to work, with the only limitation being the "economic capacity" of the state for the same. In response to these obligations, the state has launched numerous Employment Guarantee Schemes, both rural and urban, including the much discussed National Rural Employment Guarantee Scheme. Through this scheme, the government ensures a minimum time period of employment to all people who wish to utilize the opportunity.

b. *Disability Specific Right to Work*

The right to work is often ensured through legislative intervention like in case of the disabled. The *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, in its chapter on Employment mandates the government to identify posts and reserve a minimum of 3 percent seats for the visually or temporally impaired and people with locomotive disability. The Act further imposes a duty on the state to train people, relax upper age limit, regulate employment, ensure safety and health measures at work places etc. This right as specified under Part IV is subject to the economic capability of the state. Similarly, the object of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 is to enable the disabled to live as independently as possible, and it provides for the creation of an environment to ensure them opportunities of earning a living.

In *Virender Kumar Gupta v. Delhi Transport Corporation (DTC)*[119], the victim who was initially a conductor suffered injuries and was declared medically suitable for only desk jobs. The victim sought for an appropriate job at the bus depot but instead was given early retirement

[119] Virender Kumar Gupta v. Delhi Transport Corporation (DTC), 2002 (61) DRJ 355.

after a report from the medical board of DTC. This was held to be violative of a person's right to continue service in an alternative job with the same employer at the same pay scale and service benefits as were received by him before the occurrence of the disability.

Also, the Constitution of India, in Article 16 guarantees the right to equal opportunity in matters of public employment and also ensures lack of any discrimination on grounds like religion, caste, sex and that other such grounds could not render a person illegible for any employment or office. To supplement and strengthen these rights, Article 14 of the Constitution of India ensures right to equality before law and makes any unreasonable discrimination unconstitutional. As has been long established in the jurisprudence of the concept of equality, this right provides for equality among equals and thus reading both these articles together, one may conclude that the state should make special provisions to ensure equality of opportunity for the disabled especially in the area of right to work.

A series of cases have analyzed the application of Article 14 and 16 with regards to the right to work of disabled. In *Amita v. Union of India*,[120] with regard to the right to employment of a visually impaired lady, the Supreme Court reaffirmed that equality provides for differential treatment among differently placed individuals.[121] Similarly in *Syed Bashir-ud-din Qadri v. Nazir Ahmed Shah*[122], the provisions of PWD Act were interpreted in the light of Article 21 and broadly

---

[120] Amita v. Union of India, (2005) 13 S.C.C. 721. In this case a blind lady challenged the denial for permission for her to sit for the examination for the post of Probationary Officer in a bank. The Supreme Court held that Art. 14 allows for equal treatment amongst equals and thus such a denial, because she fulfilled all the criteria for the post with regards to age and qualifications would not be sustained and she should be allowed to sit for the relevant examination. It also clarified that such a restriction on right to employment could only be imposed if the post is such that it is unsuitable for a blind person as held and enlisted in National Federation of Blind v. Union Public Service Commission, (1993) 2 S.C.C. 411.

[121] National Federation of Blind v. Union Public Service Commission, (1993) 2 S.C.C. 411.

[122] Syed Bashir-ud-din Qadri v. Nazir Ahmed Shah, (2010) 3 S.C.C. 603.

interpreted to include rights of weaker sections of society and protection of mentally and physically ill and handicapped, destitute and children. Thus, an affirmative action conforming to Articles 21 and 14 to ensure employment to disabled is held to enable them to live a life of purpose and human dignity.

Though these judgments steered the direction of law towards the rights approach, no major change in jurisprudence became evitable until recently. The Bill, 2011 not only recognizes this right but also mandates appropriate governments to take necessary steps for non-discrimination in matters of recruitment, promotion and other related issues.[123] It incorporates the principle of reasonable accommodation by obligating an establishment to take "adequate measures"[124] to make their employment schemes more inclusive. This is done by not only mandates for Equal Opportunities Policy[125], Special Employment Exchanges[126] and increased reservation of no less than seven percent[127] but also incentivizing establishments which conform to the provisions of the Bill. This is done to ensure that at least ten percent of work force is composed of persons with disabilities.[128] Vocational Training, rehabilitation and self-employment is also encouraged under the bill.[129] Concession on interests for loans to promote self-employment has also been provided for. [130]

---

123 Cl. 56, Bill, 2011.

124 Cl. 56(4), Bill, 2011 defines 'Adequate measures' to "include, but are not limited to the provision of necessary aids and equipment, adequate healthcare facilities, necessary physical changes in buildings to ensure accessibility at workplaces, flexible work timings, continuous monitoring with regard to necessary support, or any arrangements or facilities created for equality with regard to competitive public service examinations and other such service related tests".

125 Cl. 58, Bill, 2011.

126 Cl. 63, Bill 2011.

127 Cl. 57, Bill, 2011.

128 Cl. 61, Bill, 2011.

129 Cl. 60, Bill, 2011.

130 *Id.*

Policy decisions like this Bill coupled with the changing understanding of courts, stand in testimony of the shift to human rights approach. Though compensation-based policies persist, rights and dignity of the persons with disabilities is being reaffirmed through their right to work. Independence, especially economic is integral to human dignity and liberty and thus all human rights.

VI. Conclusion

The effects of disability are felt directly in the medical and health dimensions and then indirectly in the spheres of education, transport, physical access and the built environment, social and welfare schemes, housing, health services, leisure activities and social interaction and above all in the field of employment. Traditionally, disability was considered the subject of medical and paramedical professionals and this approach was termed as the medical welfare approach. However, the disability rights movement, as is analyzed above, has changed the then prevailing attitude towards disability. Hence, there is a shift in the foundational level from medical welfare approach to social welfare approach, which was again replaced by the human rights approach. The laws and programmes that once centered around concepts of ***c****are* and then ***c****ompensation* and ***c****apacity-building*, are now focusing on integration through structural changes. These changes are essential to make the social environment more sensitive to diversity and not deprive the disabled of opportunities due to their medical conditions.

Thus the underlying philosophical assumptions for promotion and protection of disabled persons are in the process of change and the paradigm shift from medical welfare and social welfare to human rights. It is also evident that under the international human rights framework the disabled persons have been protected under equal opportunities doctrine. In the context of disability, the notion of subjective equality or genuine equality model has grown in status and authority. The substantive equality concept implies affirmative action programmes must be undertaken to make provisions for reasonable accommodation to ensure the social participation and social integration of persons with disabilities besides ensuring that

they are not deprived of their legal capacity. The new approach also requires the disabled to be included in the decision-making process so that this evolving jurisprudence of their rights is more comprehensive and rooted in reality.[131]

As is evident from the discussion above and debates on rights of disabled and the laws protecting them, this shift is rather essential for providing even basic relief to these people. Just like in India, though the shift is nascent and much needs to be done, it is gradually picking pace. New policies promise for incorporation of this change in international jurisprudence but this would remain an empty promise till the principle of equality along with much-discussed concepts of legal capacity and reasonable accommodation are not implemented in actuality. Implementation of this principle in entirety would place the disabled in a much better position to help them and participate in the development of society and economy alike. Thus these shifting frontiers are certainly the hope for a better future for the persons with disability and others alike.

---

[131] This kind of participation in policy- making has been incorporated under Cl. 95, Bill, 2011 so that the policies and laws being formulated are more effective and efficient.