

CHAPTER 1

HUMAN RIGHTS OF THE PERSONS WITH DISABILITIES: HISTORICAL AND CONCEPTUAL DEVELOPMENT

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PROLOGUE:

People with disabilities constitute the largest minority of the world. Between 5 to 10 per cent of Indians have some impairment or disabling condition. People with disabilities are among the most marginalized sections of society cutting across castes, creed, community etc.¹ The disabled populations have been deprived of services and facilities available to the non-disabled and consequently are subjected to discrimination, prejudice, neglect and exclusion in every walk of life. A disability is often understood as the malfunctioning, disturbance or loss in the ordinary execution of physical, mental or psychological processes, or a problem in the capability to learn, or adjust socially, which interferes with a person's normal growth and development. Disability causes social stigma, because the condition of disability is measured as "undesired differentness" from socially defined norm of normality. The foundation of stigma lies in the fact when the prevailing social standards treat disability as universally disgraceful. The society and its institutions are designed for the 'normals' and not for the ones with stigmatized traits. The sole cause of disability discrimination can be attributed to the thoughtlessness and indifference of the society as a whole.² It has been through ages that disability

1. P.C. Sikligar, "Institutional Arrangement for Upliftment of Persons with Disabilities: A study in North India", *IASSI Quarterly*, vol.23 no. 4 (2005), pp. 67-80 at p. 67

2. Parmanand Singh, "Disability, Discrimination and Equality of Opportunities: A Comparative analysis of the Legal Framework", *Journal of Indian Law Institute*, vol. 45:2 (2003), pp. 173-199 at p. 173

has far reaching consequences for the personality of an individual, a belief that has led to the development of false notions and prejudices in the community. Our notions about disability and disabled people are generally negative. We were not born with these notions. Our ideas about disability come from what we see and hear, and the fact remains that we have rarely seen disabled people in everyday roles like others. Our perceptions also reflect society's non-acceptance of a person with disability as a person. This calls for an urgent analysis of existing attitudes and feelings towards disability, in order to determine an informed and realistic approach to the matter.³ It is the apathy of the society to address such differently able people as handicapped. The origin of the word handicapped is popularly believed to have been derived from the phrase "cap in hand" referring to the medieval custom where the beggars would extend their cap to receive the handouts. It is thus a derogatory term.⁴ This is where it becomes obligatory to promulgate laws for the benefit of such underprivileged people. Though legislations concerning the disabled persons have been framed throughout and a number of international conventions have also been initiated, but assessment of the hard laws and soft laws will be meaningless if a proper study of the concept of disability is not undertaken.

Since the study of any branch of law is incomplete until we assess its origin and development. The first step towards the study of any area involves its background, as to how that particular thing came into being. To appreciate the true nature of disability law in India it is of utmost importance to review the situation prevailing in India during the ancient times, during the medieval period, prior to the independence and the gradual development of

3. Perspectives to Disability, viewed at http://www.thenationaltrust.in/yahoo_site_admin/assets/docs/Perspectives_to_Disability.96114418.doc

4. Anuradha Mohit, Meera Pillai, Pratiti Rungta, "*Rights of the Disabled*", 1st Edition (National Human Rights Commission. New Delhi. 2006), p. 9

particular laws concerning the disabled after independence. In addition it is equally important to define and delimit the field of its study. Hence it is desirable to appraise the variety of definitions that have come up for our consideration. In this Chapter the spotlight shall be to evaluate the gradual development of the concept of disability, the various models of disability, and the diverse definitions of disability. The different nuances of the term 'disability' shall also be highlighted viz. handicap and impairment along with the factors that attribute to disabling a differently able person. Since the purpose of this work is to appraise the human rights of the persons with disability it also necessary that the human rights approach to disability be reviewed in particular.

A. DISABILITY: HISTORICAL PERSPECTIVE—

Society values regularity rather than multiplicity. Thus there is a propensity to analyse ourselves as either normal or deficient. The potential of homogeneity lies in the possibility of redefining society's concept of 'normalcy'. When people are given the right to belong, they are given the right to diversity. Since India is a fusion of cultures, religions, languages, philosophies and beliefs, customs and climates. But despite their religious, social, economic, political and geographical differences, there are two distinct features that are shared by most Indians. One is tolerance and the other is an engrained conviction in tradition and socio-cultural norms. These two characteristics have been responsible for the preservation and maintenance of a social structure based on caste and class, and reception of injustice, discrimination, exploitation and abuse as part of one's karma or fate.⁵

The problem of disability and movement for disability is as old as mankind. In Hindu mythology, the portrayal of people with disabilities is

5. Rubina Lal, "Disabilities: Backgrounds and Perspective",
<http://www.infochangeindia.org/Disabilities/bp.jsp> accessed on 20.12.2007

overwhelmingly negative, but also exhibits a strong gender bias in terms of the perceived capacities of disabled men and women. Disabled men in the Hindu myths are in some cases powerful and capable people. However, the visually impaired king Dritarashtra and the orthopedically impaired Shakuni side with the forces of evil in the Mahabharata war. Such images of powerful but evil and cruel disabled men have been reinforced by historical figures such as Taimur Lang. In contrast, women with disabilities in Hindu mythology are simply irrelevant. A prime example comes in a story from the *Karthik Poornima*, where Lord Vishnu refuses to marry the disfigured elder sister of Lakshmi, saying that there is no place for disabled people in heaven. The sister is instead married to a peepul tree.⁶ But at the same time, the great holy epic of ‘Ramayana’ also contains a female negative character of Manthara. These created a negative impact on the mindset of people about persons with disabilities who were seen as sin or punishment by God for wrong done in past life.⁷

The philosophy of ‘Sankya’ points out the different kinds of intellectual disabilities. Around 1000 BC, the *Garba Upanishad* suggested that the distressed parents give birth to defective babies. Society and religion looked down upon the family members of the disabled, specially the mother. In the ‘Aadi Parv’ of the Mahabharata, Ambika, mother of blind Dhritrashtra started lamenting in fear but could not escape the reproach of the Brahmins and the elders of the society. In 500 BC, the ‘childish mind’ model was given in the *Upanishad* explaining mental retardation.⁸

6. People with Disabilities in India: From Commitments To Outcomes, *Human Development Unit, South Asia Region, The World Bank*, May 2007, p.22

7. Kishor Bhanushali, “Changing Face of Disability Movement: From Charity to Empowerment”, <http://www.disabilityindia.org> accessed on 7.6.2007

8. For details visit,

http://www.bhojvirtualuniversity.com/ss/online_cou/b_ed/secp_04/cp4b2u1p2.asp accessed on 23.5.2008

The ancient Hindu Constitution, *Manusamhita* contains a number of provisions which points out disability to be the payment for the sins one commits in one's last birth.

Annaharttamayabitvam mekyim vanpaharakah.

Vastrapaharakah shwetram pangutamshwa harakah.

(Chapter 11 Section 51)

It means one who steals grains, suffers from indigestion. Reciting the Vedas without the guru's consent will make him dumb; one who steals others clothes will have white patches over his body and who steals horse shall be born disabled. In the eighth chapter of *Manusamhita*, it has been mentioned in the 93rd Section that one who gives false information shall be born blind:

Namnomundaha kapalen bhiksharathi kshut nipasittah.

Andhah shatru kulam gachheg jah sakshat manritam vadet.

(Chapter 8 Section 93)

Ayurveda, a traditional Indian system of medicine, refers to disability, and provides guidelines for treatment. Particular mention has been made of mental retardation. Charaka and Susruta, famous ancient apothecaries, referred to mental retardation as '*manasmandyam*' or weak head caused by genetic, nutritional and environmental factors. But both of them maintained that these causative factors occurred as a result of '*graha*' or planetary influences. This line of thinking, in which the past, present and future are attributed to supernatural powers, typifies Indian philosophical thought with its belief in 'karma' and is accepted largely to this day. Indian history provides that people with disability were either regarded as objects of pity or ridicule. Dwarfs and

hunchbacks were often employed as jesters in the courts of Indian rulers.⁹ However mortifying, the royal patronage afforded the disabled persons some measures of social security basically out of charity. During 185-71 BC Patanjali included disabled person for yoga therapy. The blind during the medieval period would become minstrel and sing hymns in praise and worship of God. Surdas is the epitome. He was a blind poet who worshipped Krishna and Spread Krishna Bhakti cult. Similarly, a blind Muslim could memorise Quran to become a hafiz. The reign of Chandra Gupta Maurya stands out unique in its arrangement of workshops for the vocational rehabilitation of the physically disabled as well as other socially and economically disadvantaged members. Kautilya the renowned political economist of the Maurya period and author of Arthashastra enjoined the king to provide the orphans, the aged, the infirm, the inflicted and the helpless with maintenance. For their self reliance and economic independence, he suggested awarding work on priority to women who were widowed, single, crippled and abandoned. Emperor Ashoka had developed an elaborate public health system. His edicts record that 'the king erected hospitals along the highways and deputed physicians and made arrangements for medicines, food and drinking water.' Gopas were instituted at the village level to maintain record of birth, death, caste and also to provide for the ill, infirm and those in need of help.¹⁰

Islam, as a religion, makes a distinction between the person with intellectual disability and mental disorder, but both are found legally incompetent in the Koran and the Hadith. The society according to Islam is obliged to assess, assist and respect the person with intellectual disability and give the person an equal life chance. Mohammad, the Prophet, implied the importance of child welfare, education, well-being, and supporting children

9. *Supra* note 5

10. Chapter 3: The Indian Scenario, *National Human Rights Commission Disability Manual*, (National Human Rights Commission, New Delhi, 2005), pp. 27-38 at pp. 35.36

other than your own, all which can be seen as the expression of Islamic compassion. Islam recognizes the right of the needing person for help and assistance, as God tells us in the Qurvan (Koran): “And in their wealth there is acknowledged right for the needy and the destitute” (51:19). In Islamic tradition, it has been stated that the best therapy is the one directed to enhance the health of the person, his psyche and spirit, in order for him to fight illness. His environment should be beautiful, filled with music and people he likes.¹¹ Even during the Mughal period, institutions established for welfare continued to thrive under ‘*Zakat*’, a system by which part of the income was set apart for the central fund for maintaining social institutions. In fact, the Mughals instituted a special department with a head called ‘*Sadr*’ to supervise and manage ‘*Zakt*’.

Though there is a long-tradition in India of caring for the weak and vulnerable by family members at a great personal sacrifice, yet the role of the family as a sole support for the disabled grew out of the failure of colonial rulers in maintaining social safeguards that were available throughout ancient and medieval India.¹² Nevertheless, regular efforts for the treatment and education of disabled began when Christian missionaries established homes for the rehabilitation of leprosy patients. The first artificial limb centre was set up during the Second World War.¹³ But unfortunately the concept of charity got introduced in India during British rule to basically control evils of destitution, beggary, crime and delinquency which grew out of proportion with the diminishing of social safeguards that existed earlier. It was from this point that the society perceived the issue of disability as an individual problem and considered family as the chief institution responsible for dealing with it.¹⁴

11. Mohammed Morad, Yusuf Nasri, Joav Merrick, “Islam and the Person with Intellectual Disability”, in William C. Gaventa, Jr., David L. Coulter (ed.), *Spirituality and Intellectual Disability –International Perspectives on the Effect of Culture and Religion on Healing Body, Mind and Soul* (Haworth Press, New York, 2001) pp.65 – 72.

12. Supra note 10 at *Ibid*.

13. *Ibid*

14. Supra note 5

After India gained independence, as a heritage of the colonial rule the Government relied on the charitable institutions to deliver basic services for persons with disabilities. For example, in the first three Five Year Plans (1951-66) the only support to the disabled involved grants-in-aid to NGOs and the establishment of national institutions to prepare eligible personnel, primarily to serve in charitable institutions. The government also established the Central Social Welfare Board to back voluntary agencies in arranging welfare programmes for certain vulnerable groups including persons with disabilities. This approach continues to mark the policy approach as the Steering Committee on Social Welfare for the Tenth Five Plan recorded its deep concern over diminishing response of traditional voluntary organizations, and the accompanying support to the welfare of people with disabilities. In its report the Committee notes there is an urgent need to ‘again activate both the community and voluntary sector, and the corporate sector to contribute to the well being of the deprived classes.’¹⁵

Another aspect of studying the historical perspective is a close connection between religion and discrimination against the disabled, prevalent not only in India but also in most societies of the world. The pre-modern societies discriminated against the disabled, perhaps because it was justified at religious level. Hindu, Islam as well as Christianity discriminated against the disabled at different levels.¹⁶ Disability was viewed as a punishment for actions in a previous life or this one, as a result of anger on the part of ancestors or a God. Many religions and cultures have held these views. In the Bible, for example, impairment is usually linked to being unclean and/ or processed by

15. *Ibid*

16. Vinod Dixit, “Historical Foundations of Disability Discrimination in Classical Hindu Law”, *Delhi Law Review*, vol. XX (1998), pp. 65-70 at p. 65.

demons. Jewish and Arab texts make similar connections. Another aspect was viewing people with disabilities as an impurity. Some societies have taken this notion to the extent of killing people with disabilities. In ancient Spartan society, laws were passed to ensure the killing of babies with disability. Martin Luther, a religious leader in Medieval Germany, endorsed the killing of babies as incarnations of the devil. The English Eugenicists of the nineteenth century, motivated by Darwin's idea of the survival of the fittest, argued for the same approach. The German Nazi euthanasia programme killed both adults and children with disability.¹⁷

B. DEFINING DISABILITY:

The definition of disability is significant, since it is the sensitivity of the problem that will define the solution. The perception of disability differs from society to society. Since approaches towards disability are intensely embedded in socio-cultural values, the term 'disability' has been defined in many ways.¹⁸ Further owing to improved health services disabled people are living longer, their presence in society is becoming more visible and their numbers are growing. Defining disability is difficult because there are dozens of definitions – each with a purpose to it. These range from the very narrow to the very broad, from the medical to the social, from the cultural to the local, from the one intended to integrate them in society to the one for exclusion and segregation. People are labelled as disabled or handicapped because they look different from the rest of the society on account of their appearance, behaviour or capacity to learn.¹⁹ Far from being a mere physical fact, disability is also a

17. Lesson 17--Disability, Handicap and Impairment, for details visit <http://www.rocw.raifoundation.org/healthcare/B.Phy/Physiotherapypracticeprologue/lecture-notes/lecture-17p.d.f> accessed on 27.12.2007

18. Supra note 5

19. Ali Baquer. Anjali Sharma, "Disability-- Challenges vs Responses", <http://www.healthlibrary.com/reading/disability/3chap/html> accessed on 12.1.2008

normative, cultural, and legal construct. What a society at a particular time in its history considers to be a disabling condition reflects its conception of a normal and socially functional human being; and hence in a way it reflects society's self image.²⁰ Simply speaking, disability is the disadvantage or restriction of activity caused by a society that takes little or no account of people who have impairments and thus excludes them from mainstream activity (*British Council of Organisations of Disabled People*).²¹ In India different definitions of disability are introduced for various purposes and as such, they have been based on various criteria. No single standard exists in India in order to evaluate disability. In common parlance, different terms such as disabled, handicapped, crippled, physically challenged are used interchangeably.²² In this section firstly, the approaches of defining disability shall be taken into account; secondly, the international definitions shall be analysed succeeded by the definitions existing in India.

(a) Different approaches of defining disability:

The definition and classification of disabled persons have gone through a number of changes over the centuries.

(i) Biomedical Definition: -

A number of definitions in use consider disability as individual pathology, a condition grounded in the physiological, biological and intellectual impairment of an individual. Medical model of disability identifies people with disabilities

20. Chapter 1: Disability: Definitions, Estimates and Causes. *National Human Rights Commission Disability Manual* (National Human Rights Commission, New Delhi, 2005), pp. 9-17 at p. 9.

21. <http://www.karmayog.org/library/libartdis.asp?r=1528&libid=213-18k> accessed on 26.3.2008

22. Kishor Bhanushali, "Dimensions of Disability in India". <http://www.disabilityindia.org> accessed on 6.7.2007

as ill, different from their non-disabled peers and unable to take charge of their own lives. Moreover, the diagnostic parameters of a medical definition do not take note of the imperfections and deficiencies in the basic social structures and processes that fail to accommodate the difference on account of disabilities.²³

(ii) Philanthropic Definition: -

Disability is regarded as a tragedy or object of sympathy and charity. People with disabilities are therefore pitied, given handouts and cared for in separate institutions.

(iii) Economic Definition: -

Disability is defined as a social cost caused both by extra resources that children and adults with disabilities require and by their limited productivity at work, relative to able-bodied people.²⁴

(iv) Social Definition:-

The change in understanding of disability from an individual pathology to a social construct is best reflected in this model. This model defines disability from a perspective that emphasizes social conditions which disable a group of individuals by ignoring their needs of accessing opportunities in a manner conducive to their circumstances.

(v) Human Rights Definition:-

23. Supra note 19

24. *Ibid*

25. Supra note 20 at p.11

The definition of disability adopted by the British Council also takes into account the social conditions which disable a group of individuals by ignoring their needs of accessing opportunities in a manner different from others. However, it also views these social conditions as infringing upon human rights of disabled and as instances of discrimination against them. According to this definition, 'disability is the disadvantage or restriction of activity caused by a society which takes little or no account of people who have impairments and thus excludes them from mainstream activities.' Therefore, like racism or sexism, disability is described as a consequence of discrimination and disregard to the unique circumstances of people with disabilities.²⁵

(b) International definitions:

According to **Helander** the simplest and possibly one of the earliest definition of a disabled person appears to be the following: A person who in his/her society is regarded as disabled, because of a difference in appearances and/or behaviour in combination of a functional limitation or an ability limitation.

In most instances, a disabled person has functional limitations and/or activity restrictions. A 'functional limitation' disability may be defined as 'specific reductions in bodily functions that are described at the level of the person'. 'Activity restriction' disability may be defined as 'specific reductions in daily activities that are described at the level of the person'.²⁶

The **WHO Manual of 1976** defines impairment, disability and handicap separately.

26. Supra note 17

27. Supra note 5

Impairment is any loss or abnormality of psychological, physiological or anatomical structure or function.

Disability is any 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.

Handicap is 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 and social and cultural factors) for that individual.

This definition illustrates the medical model. The WHO definitions have often been criticized for focussing only on the individual and failing to reflect the extent to which the lives of disabled people are disadvantaged by the social structures of the society to which they belong.²⁷ Such a description identifies people with disabilities as ill, unlike their non-disabled peers and incapable of taking charge of their own lives. Besides, the indicative parameters of a medical definition do not take note of the flaws and deficiencies in the basic social structures and processes that fall short to accommodate the difference on account of disabilities. The disability sector around the world found the WHO's 1976 description of impairment, disability and handicap perplexing, principally for policy-making and political action, and complicated from the rights perspective. Retorting to the growing unease, the WHO redefined the relationship between impairment, disability and handicap establishing that 'impairment' refers to organ level functions or structures: 'disability' refers to person-level limitations in physical and psycho-cognitive activities, and 'handicap' to social abilities or relation between the individual and society. The **WHO International Classification of Impairments, Disabilities and Handicaps, 1996** is fairly practical as it makes a clear division between impairment, disability and handicap, though concerns have been

expressed that in its definition of the term handicap, the categorization is still too medical and centred on individual, and does not satisfactorily explain the interaction among societal conditions or expectations and distinctive circumstances of a disabled individual.²⁸

The **ILO** defines a disabled person as an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment.

According to the **Standard rules on the Equalisation of Opportunities for Persons with Disabilities, United Nations, 1994** the term 'disability' summarises a large number of diverse functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness.

Such impairments, conditions or illnesses may be permanent or transitory in nature. A distinction has been made between disability and handicap. A handicap is considered a loss or limitation of opportunities to take part in community life on an equal level with others. The purpose of this distinction is to emphasise the focus on the shortcomings in the environment and in many organised activities in society that handicap a disabled person. Hence it can be said that Standard Rules have defined disability from a perspective that emphasises social conditions which disable a group of individuals by ignoring their needs of accessing opportunities in a manner conducive to their circumstances.²⁹

28. *Supra* note 4 at p. 10

29. *Ibid* at p. 11

Americans with Disabilities Act 1990 (ADA) classifies an individual as disabled who (1) has a physical or mental impairment that substantially limits one or more life activities; or (2) has a record of such impairment; or (3) is regarded as having such an impairment.

In the '**Disability Discrimination Act, 1992**' of Australia, 'disability' in relation to a person, means –

- i. total or partial loss of the person's bodily or mental functions; or
- ii. total or partial loss of a part of the body; or
- iii. the presence in the body of organisms capable of causing disease or illness; or
- iv. the presence in the body of organisms causing disease or illness; or
- v. the malfunction, malformation or disfigurement of a part of the person's body; or
- vi. a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- vii. a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour and includes a disability that :
 - a. presently exists; or
 - b. previously existed but no longer exists; or
 - c. may exist in the future; or
 - d. is imputed to a person

According to the **Disability Discrimination Act, 1995** of England, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities. In order to apply

durability test, the British Act uses three different terms: loss of faculty, disability and disablement. These are meant to be separate concepts.

Loss of Faculty– Loss of faculty is any pathological condition or any loss or reduction of normal physical or mental functions of an organ or part of the body. A loss of faculty in itself may not be a disability but is an actual cause of one or more disabilities, eg., the loss of one kidney.

Disability – A ‘disability’ means incapacity to perform a normal bodily or mental process. It could either be complete inability to do something (such as walking) or it can be partial inability to do something (such as one can lift weights but not heavy ones).

Disablement – It is the sum total of all the separate disabilities an individual may suffer from. It means an overall inability to perform the normal activities of life. The loss of - health, strength and power to enjoy a normal life. While assessing an individual his/her physical and mental condition, inconvenience, genuine embarrassment or anxiety is taken into account.³⁰

(c) Definitions prevailing in India:

In the Indian scenario, the **Planning Commission of India**, defines a disabled person to mean a person who is

- i) blind;
- ii) deaf;
- iii) having orthopaedic disability; or
- iv) having neurological disorder;
- v) mentally retarded

The definition includes ‘any person who is unable to ensure himself/herself, wholly or partly, the necessities of a normal individual or social life including work, as a result of deficiency in his/her physical or mental capability’.

30. Supra note 17

In 1986, The Ministry of Welfare, Government of India issued orders prescribing a standard set of definitions along with standard tests for the purposes of certification of disability. These definitions (whose suitability in the light of new legal safeguards must be carefully examined) were adopted and used.

Visually handicapped – The blind are those who suffer from either of the following conditions:

- a. total absence of sight;
- b. visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with correcting lenses.
- c. limitation of the field of vision surrounding an angle of degree 20 or worse.

Locomotor Handicapped –Those who have restriction in the activity of arms, limbs or other parts of the body on account of damage to the bones, muscles or nerves. Persons suffering from more than 40 per cent disability would be entitled to facilities/concessions provided by Central/State governments.

Hearing Handicapped – The deaf are those in whom the sense of hearing is non-functional for ordinary purposes in life. They do not hear/understand sound at all even with amplified speech. The cases included in this category will be those having hearing loss of more than 70 decibels in the better ear (profound impairment) or total loss of hearing in both ears.

Mental Retardation – Mental retardation means sub average general intellectual functioning associated with mal-adaptive behaviour, occurring in the developmental period. Mental retardation is divisible into the following four categories -

1. Mild retardation IQ - 50 - 70
2. Moderate retardation IQ - 35 - 49
3. Severe retardation IQ - 20 - 34
4. Profound retardation IQ under 20

Another set of definitions has been provided for in the **Rehabilitation Council of India Act, 1992**. These are as follows:

Hearing handicap means deafness with hearing impairment of 70 decibels and above in the better ear or total loss of hearing in both ears.

Locomotor disability means a person's inability to execute distinctive activities associated with moving, both himself and objects, from place to place, and such inability resulting from affliction of either bones, joints, muscles or nerves.

Mental retardation means a condition of arrested or incomplete development of mind of a person, which is specially characterised by sub-normality of intelligence.

Visually handicapped means a person who suffers from any of the following conditions, namely:

- i. total absence of sight; or
- ii. visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with the correcting lenses; or
- iii. limitation of the field of vision subtending an angle of degree 20 or worse.

Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995, (PWD Act, 1995) defines Disability as-

1. Blindness
2. Low vision

3. Leprosy cured
4. Hearing impairment
5. Mental retardation
6. Mental illness

'*Blindness*' refers to a condition where a person suffers from any of the following conditions, namely -

- i. total absence of sight; or
- ii. visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with correcting lenses; or
- iii. limitation of the field of vision subtending an angle of 20 degrees or worse.

'*Person with low vision*' means a person with impairment of visual functioning even after treatment or standard refractive correction but who uses or is potentially capable of using vision for the planning or execution of appropriate assistive device

'*Cerebral Palsy*' means a group of non-progressive conditions of a person characterised by abnormal motor control posture resulting from brain insult or injuries occurring in the pre-natal, peri- natal or infant period of development.

'*Hearing impairment*' means loss of sixty decibels or more in the better ear in the conversational range of frequencies.

'*Leprosy cured person*' means any person who has been cured of leprosy but is suffering from -

- i. loss of sensation in hands or feet as well as loss of sensation and paresis in the eye and eye-lid but with no manifest deformity;

- ii. manifest deformity and paresis but having sufficient mobility in their hands and feet to enable them to engage in normal economic activity ;
- iii. extreme physical deformity as well as advanced age which prevents him from undertaking any gainful occupation, and the expression 'leprosy cured' shall be construed accordingly.

'Locomotor disability' means disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy.

'Mental illness' means any mental disorder other than mental retardation.

'Mental retardation' means a condition of arrested or incomplete development of mind of a person, which is specially characterised by subnormality of intelligence.

'Person with disability' means a person suffering from not less than forty per cent of any disability as certified by a medical authority.

Census of India 2001 also used its own definitions of disabilities as the concepts and definitions of disabilities along with measuring its extent and types contained in the PWD Act, 1995 were found to be very inconvenient. Accordingly Census of India defines five types of disabilities viz. seeing, speech, hearing, movement and mental.

Visual/ Seeing disability: It means a person who cannot see at all (has no perception of light) or has blurred vision even with the help of spectacles will be treated as visually disabled. A person with proper vision only in one eye will also be treated as visually disabled. Where a person may have blurred vision and had no occasion to test whether her/his eyesight would improve by using spectacles. Such persons would be treated as visually disabled.

Speech disability: A person will be recorded as having speech disability if she/ he is dumb. Similarly persons whose speech is not understood by a listener of normal comprehension and hearing, she/ he will be considered to having speech disability. Persons who stammer but whose speech is comprehensible will not be classified as disabled by speech.

Hearing Disability: Hearing disability includes a person who cannot hear at all (deaf), or can hear only loud sounds will be considered as having hearing disability. A person who is able to hear, using hearing aid will not be considered as disabled under this category. If a person cannot hear through one ear but her/ his other ear is functioning normally, should be considered having hearing disability.

Movement Disability: It means a person who lacks limbs or is unable to use the limbs normally will be considered as having movement disability. Absence of a part of a limb like a finger or a toe will not be considered as disability. However, absence of all the fingers or toes or a thumb will make a person disabled by movement. If any part of the body is deformed, the person will also be treated as disabled and covered under this category. A person who cannot move herself/himself or without the aid of another person or without the aid of stick, etc. will be treated as disabled under this category. Similarly, a person would be treated as disabled in movement if she/he is unable to move or lift or pick up any small article placed near her/ him. A person may not be able to move normally because of problems of joints like arthritis and has to invariably limp while moving, will also be considered to have movement disability.

Mental Disability: A person who lacks comprehension appropriate to her/his age will be considered as mentally disabled. This would not mean that if a person is not able to comprehend her/his studies appropriate to her/his age and is failing to qualify her/his examination is mentally disabled. A mentally disabled person may generally depend on her/his family members for performing daily routine. It should be left to the respondent to report whether

the member of the household is mentally disabled and no tests are required to be applied by you to judge the member's disability.

National Sample Survey Organisation, 2002 (NSS) in its 58th Round has also given its own set definitions regarding disability. According to the NSS, a person is considered disabled if the person has restrictions or lack of abilities to perform an activity in the manner or within the range considered normal for human beings. Disability is thus defined overall as an activity limitation.³¹

Visual Disability: By visual disability it is meant loss or lack of ability to execute tasks requiring adequate visual acuity. Visually disabled includes (a) those who do not have any light perception-both eyes taken together and (b) those who have light perception but cannot correctly count fingers of hand (with spectacles or contact lenses) from a distance of 3 metres (or 10 feet) in good daylight with both eyes open. Night blindness is not to be considered as visual disability.

Speech Disability: This refers to persons' inability to speak properly. Speech of a person is judged to be a disorder if the listener does not understand the person's speech. Persons with speech disability will include those who cannot speak, speak only with limited words or those with loss of voice. It also includes those speech is not understood due to defects in speech, such as stammering, nasal voice, hoarse voice and discordant voice and articulation defects, etc.

Hearing Disability: This refers to persons' inability to hear properly. Hearing disability is to be judged taking into consideration the disability of the better ear. In other words, if one ear of a person is normal and the other ear has total hearing loss, then the person is to be judged as normal in hearing. Hearing disability will be judged without taking into consideration the use of hearing aids (i.e. the position for the person when hearing aid is not used). Persons with

31. *Ibid*

hearing disability may have different degrees of disability, such as profound, severe or moderate. A person will be treated as having “profound” hearing disability if he/she cannot hear at all or can hear only sounds, such as, thunder or understands only gestures. A person will be treated as having “severe” hearing disability if he/she can hear only shouted words or can hear only if the speaker is sitting in the front. A person will be treated as having “moderate” hearing disability if his/her disability is neither profound nor severe. Such a person will usually ask to repeat the words spoken by the speaker or will like to see the face of the speaker while he/ she speaks or will feel difficulty in conducting conversations.

Locomotor Disability: A person with—(a) loss or lack of normal ability to execute distinctive activities associated with the movement of himself/ herself and objects from place to place and (b) physical deformities, other than those involving the hand or leg or both, regardless of whether the same caused loss or lack of normal movement of body—will be considered as disabled with locomotor disability. Thus, persons having locomotor disability will include those with (a) loss or absence or inactivity of whole or part of hand or leg or both due to amputation, paralysis, deformity or dysfunction of joints which affects his/her “normal ability to move self or objects” and (b) those with physical deformities in the body (other than limbs), such as, hunch back, deformed spine, etc. Dwarfs and persons with stiff neck of permanent nature who generally do not have difficulty in the normal movement of body and limbs will also be treated as disabled.

Mental Disability: Persons who have difficulty in understanding routine instructions, who do not carry out their activities like others of similar age or exhibit behaviours like talking to self, laughing/crying, staring, violence, fear and suspicion without reason would be considered as mentally disabled. The “activities like others of similar age” will include activities of communication (speech), self-care (cleaning of teeth, wearing clothes, taking bath, taking food,

personal hygiene, etc.), home living (doing some household chores) and social skills.

A perusal of the above definitions also brings forth the disparity among the various definitions existing in India. Broadly speaking, the definitions given in the PWD Act, 1995, Census 2001 and NSS Survey 2002 disclose starkest antagonism. Since PWD Act, 1995 is the most important legislation regarding the persons with disability its disagreement with the Census and NSS is absolutely undesirable. Moreover since the two main official sources of nationwide disability statistics are the NSS and the Census a difference of definition has also affected the disability estimates. Although it might be argued that while the former uses a nationally representative stratified sample and the census is an enumeration of the entire population but definitional differences substantial variations have come up in the estimates of disability across the two data sources.³² The definition of mental disability and mental retardation also conflict as given in the PWD Act, 1995 and by the Planning Commission of India. The definition of mental retardation given by the Planning Commission of India, based on IQ levels is outmoded. It is not possible to decide retardation just on the basis of IQ levels since IQ tests' usefulness is limited to indicating how well a person may do in education and not how well he or she might do at work or life. While it may be argued that there could not be a universal blueprint of definitions, it is, however, necessary to have a fresh look at the definitions and include other categories such as disability due to epilepsy, learning disability, the definitions should be uniformly used throughout the country for the schemes of concessions/facilities provided for people with disabilities.³³

32. Sophie Mitra, Usha Samabmoorthi, "Disability Estimates in India—what the census and NSS Tell Us", *Economic and Political Weekly*, Vol. XLI No. 38, pp. 4022-4026 at p. 4022.

33. *Supra* note 6 at p. 20.

Truly speaking there are complexities in defining the expression 'disability' in a manner which reflect the social dimensions of disability, avoid considering of persons with disabilities as abnormal or inferior and reflect the fact that disability is frequently dependent on context and is required to be defined or described for certain purposes. The word 'disability' should presage (a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body, (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness, (c) the malfunction, malformation or disfigurement of a part of a person's body, (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or (e) a condition, disease or illness which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour.³⁴ Hence, it is not easy to envisage a rigid and exact definition acceptable to all those providers, who in order to quantify the supply of their inadequate services in the face of massive demand, choose to use definitions which exclude even genuine people with disabilities. On the other hand, it is likewise difficult to contain the expectations of those who use a flexible definition to take in even those at the borderline. There are hundreds of different disabilities and there are as many causes of these. Some people are born with disabilities; others become disabled later on in their lives. Some disabilities exhibit themselves only periodically like fits and seizures while others are constant conditions and are life-long. The severities of some stay the same; others get progressively worse; some are hidden and not obvious; some disabilities can be controlled and cured, others still perplex the experts. Thus, finding a consensus on the different and

34. Justice R.K. Abhichandani, "The Rights Handicapped", viewed at <http://www.cestat.gov.in/Articles%20by%20President/THE%20RIGHTS%20HANDICAPPED.DOC> accessed on 23.6.2008.

frequently varying definitions of disabilities, whether sophisticated or practical is very difficult if not impossible.³⁵

Hopefully after the passing of the United Nations Convention on the Protection of Rights of the Persons with Disabilities in 2006 and after its coming into effect in May, 2008 it is anticipated that these definitional dilemma shall be put to rest. The Convention, in Article 1, does not limit to only the seven disabilities (Blindness, Low vision, Leprosy-cured, Hearing impairment, Loco motor disability, Mental retardation and Mental illness) that have been mentioned in the Persons with Disabilities Act, 1995 but has opened up a wider definition as - "*People with disabilities who have long-term impairments, for example, physical, psycho-social, intellectual and who cannot get involved in society because of different reasons, such as attitudes, language, stairs, and laws, which prevent people with disabilities from being included in society.*" This broad based meaning and the appreciation of various barriers posed by society assists us to develop a more holistic and sensitive approach in addressing the discriminations faced by persons with disabilities in society. But nevertheless it is wished that the language of the definition would be more explicit and clear-cut to provide an unquestionable solution to the existing problem.

C. REASONS OF DISABILITY:-

It is an innate inadequacy of the welfare model to treat only the apparent symptom of a problem rather than treating the problem itself. Scrutiny of the causes of disability from a medical or bio-centric perspective tends to emphasise disease, inherited and birth defects over systemic and environmental factors. Accordingly the focal point of preventive programmes has been more

35. Supra note 19

on exterminating diseases such as measles, leprosy, polio, goitre, rubella, etc. There are a plenty of purposes to prevent the incidence of disability so that people can live healthier lives free from disease and its life-long implications. Then again, identification of further deep-rooted reasons that bring about and aggravate disability is decisive in designing any policy to overcome the consequences of disability. The *World Programme of Action (WPA), 1982* in Article 40 provides for a an all-encompassing range of causes of disability that includes factors like wars, civil conflicts, poverty, overcrowding and unhygienic living conditions; constraints of resources, geographical distance and physical and social barriers, industrial, agricultural, and transportation-related accidents, natural disasters, stress and psycho-social problems. As a consequence these considerations go further than the medical facet of disability and establish its causes beyond the precincts of the body of an individual.³⁶ In the following lines the various cause of disability shall be assessed.

(a) **Poverty:** There is a high correlation between disability and poverty. Majority of the disabled person live in rural and semi-urban areas and belong to the poor sections of the society. By and large, people with disabilities are estimated to make up to 15 to 20% of the poor in developing countries. Unbalanced economic and social policies seem to be the backdrop of poverty. Poor families often do not have sufficient income to meet their basic needs. Adding with this are inadequate shelter, unhygienic living conditions, lack of sanitation and clean drinking water shared with poor access to health facilities lead to disability. People with disabilities are also very vulnerable to poverty, if they are not already poor, since disability often results in loss of income and demands additional expenditure on medical treatment, purchase and maintenance of special devices, and travelling to access rehabilitation and medical facilities. A survey of people with disabilities in India found that the

36. Supra note 20 at p. 12

direct cost of treatment and equipment varied from three days to two years income, with a mean of two months.³⁷

(b) Malnutrition: Malnutrition in its various forms is not only one of the causes of disability but also a causal factor in other diseases that amplify vulnerability to disabling conditions. While malnutrition indicates poverty, lack of nutritional security is also a mark of unfairness and political indifference. For example in many families in India in boys and men comparatively get better and more food and nutrition than female children and women. Common micro-nutrient deficiencies that influence disability include:

- Vitamin A deficiency – blindness
- Vitamin B complex deficiency – beriberi (inflammation or degeneration of the nerves, digestive system and heart), pellagra (central nervous system and gastro-intestinal disorders, skin inflammation) and anaemia
- Vitamin D deficiency – rickets (soft and deformed bones)
- Iodine deficiency – slow growth, learning difficulties, intellectual disabilities and goitre
- Iron deficiency – anaemia, which impedes learning and activity, and is a significant cause of maternal mortality

37. *Ibid* at p. 13

- Calcium deficiency – osteoporosis
(fragile bones)

According to the Human Development in South Asia Report (2001), incidence of anaemia among expectant and nursing mothers between the age group of 15 to 19 years is highest in India in the SAARC region. It is projected that currently 515 million Asians are chronically undernourished; accounting for about two thirds of the world's famished population. At the current rate, by the year 2010 there could still be some 680 million chronically undernourished people whose disabilities are likely to have roots in micro-nutrient deficiencies. Largely susceptible to insufficient diet will be girl children, women and older persons. Due to the lack of food and nutrition security for the poor, about 30% of all infants born in India are born weighing less than 2,500 grams, which is the WHO cut-off level to determine low birth weight with a lower chance of survival and high risk of disability. Contemporary scientific advances in the field of immunology and cell biology demonstrate that the role of nutrition as a major determinant of health is much wider and more pervasive than was believed earlier. Consequently, it is now acknowledged that a sufficient and nutritious diet is essential not only for the achievement of optimal physical growth and development, but also to ensure mental well being, the ability to withstand the inevitable process of ageing with minimal disability and functional impairment.³⁸

(c) Occupational Hazards: Around 90% of the workforce in India is in the unorganised sector, which is characterised by low standards of safety and hazardous working conditions added by low levels of technology. With a view to maximise profits, production is often located wherever costs are lowest, regulations slack and least organised workers. The outcome is--high rates of

38. *Ibid*

accidents, poisoning from toxins, loss of hearing and vision, and health deterioration, all of which add to short term and long term disability. workers employed in stone quarrying, leather industry, glasswork, weaving, diamond cutting, hand embroidery, and children employed in carpet, cracker and match industry are the victims of occupation-related health problems. Though such occupational diseases have been recognised but have not received suitable and unrelenting attention by those responsible for regulating work standards. Even in developed countries, permanent disablements as a result of industrial and highway accidents outnumber war casualties. For example, 44,000 people lost their limbs in industrial accidents during the period of Vietnam War in which 17,000 American soldiers became disabled. Akin to industrial workers in the unorganised sector, poor farmers and peasants too are very vulnerable to disability as they work for long hours exposed to sunlight, dust and smoke. Wheat harvesting and amputations, paddy sowing and muscular diseases, coconut picking and spinal cord injuries are some common hazards associated with typical agricultural activities. However, parallel improvements in the primary health system have not been achieved as it lacks the capacity to deal with agricultural accidents, which occur at the village level. ³⁹Proper implementation of the health and safety measures in factories in accordance with the *Factories Act, 1948* and improved design of agricultural implements will surely help curb the happening of accidents as well as occupational diseases resulting in disability.

(d) Wars: With a view to advance various particular interests human civilization right from its origin has engaged itself in wars. No matter what may be the reason for an armed conflict and the advantage it gives to particular interests, the catastrophe it creates for the majority of human beings is fathomless. War has been the single largest factor accountable for bringing about permanent

39. *Ibid* at p. 13

disablement not only to soldiers in the combat zone but also to civilians who are forced to endure the peril of lethal, chemical and nuclear weapons.⁴⁰

(e) Crime: Violent crimes underline shortcomings in the social, political and economic arrangements of a society. There are hardly any studies that have analysed the nexus between disability and crime. However there are instances of maiming, amputing, incessant beating, blinding, or attempting to murder that have been reasons behind a large number of disabled persons. There have been instances where during dacoity or robbery the victims were stabbed or gunned resulting in physical disablement. Rape causes mental scar on the victim. Bombarding by anti-social or anti-national groups has also deprived many of their physical well being. Thus criminal acts not only result in physical deformities but also affect mental integrity. Many children and women are abducted to be used in prostitution, slavery and beggary. In such cases, the risk of emotional, mental and physical disabilities increases manifold. Unfortunately, even law enforcement agencies themselves are known to commit acts of torture and inhuman treatment particularly to persons in detention. Custodial crimes, which include death, rape and disability, have drawn attention of public, media, legislature and human rights organisations.⁴¹ Thus it is the obligation of the State as well as the society to check criminal activities through stringent measures. Awareness on this aspect of disability should be spread so that the society at least become responsible for its acts by not taking law in its own hands by beating, burning, blinding or maiming a wrong doer. Human prostitution should also dealt with a strong hand.

(f) Traffic Hazards: Unplanned cities with narrow roads, rapid growth in number of vehicles and disregard of traffic regulations have been responsible

40. *Ibid* at p. 14

41. *Ibid* at p. 15

for increasing the number of road accidents in India and hence one of the leading cause of death and disability in the country. As per the Central Bureau of Health Intelligence Report of 1997-98, 69,800 people died in road accidents that year. The number of dead in rail accidents was approximately fifteen thousand. Improvements in vehicle design and medical facilities, as well as stronger enforcement of traffic regulations concerning compulsory use of seat belts (car use) and helmets (motorcycle use), and restrictions on alcohol consumption and other intoxicants need to be treated more seriously than it has been. It is estimated that by 2020, road traffic accidents will be graded as the third foremost basis of disability in the Asian and Pacific region. Quadriplegia, paraplegia, brain damage and behavioural disorders are some common disabilities among survivors of traffic accidents. Therefore, any norm, which undervalues investment in securing right to life and health, is insufficient and uninvited.⁴²

(g) Barriers: Disabled Persons are rightly differently able; but they are unable to perform up to their fullest because of the barriers put up by the society. Disabled persons often prove to be as productive and efficient as the non-disabled in barrier free and non-discriminatory conditions. There are many cases in all walks of life where persons with disabilities have outshined. Regrettably, many barriers become impediments in their lives. These barriers are of four types:

(i) Environmental Barriers: These are inaccessible public and private buildings, hospitals, schools, colleges, offices, factories, shops, hotels and restaurants, places of entertainment, parks, transport, and communication systems etc. As most establishments do not provide for facilities for the disabled, the result is that they are excluded from the mainstream of society.

42. *Ibid*

(ii) *Institutional Barriers*: These consist of exclusion and isolation from major social institutions relating to education, employment, health, law and justice, recreation, etc. Direct and indirect bigotry against person with disabilities precludes them from accessing services provided by such institutions.

(iii) *Attitudinal Barriers*: In society there is a widespread conjecture that persons with disabilities are incompetent, inadequate, a drain on family resources, etc. However, this is in reality the consequence of injustice resulting from ignorance, superstition and misconceptions. It is therefore essential to transcend these barriers in understanding and to appreciate the potential of person with disabilities to contribute to the gross Domestic Product or GDP of the society.

(iv) *Information Barriers*: Persons with disabilities and their families, particularly their parents are often victims of a communication gap. The parents are not at all times informed the reality about the disability of their child, not told early for timely and appropriate intervention as well as with sensitivity. In a number of cases they are not informed of appropriate referral services. The affected persons are often not sentient of the schemes, benefits and concessions available to them.⁴³

(h) *Onset of old age*: This is also one of the causes of disability. With better medical facilities and increased life expectancy, the percentage of old persons suffering from a variety of disabilities is constantly on the rise. With old age the person suffers from a variety of problems ranging from hearing impairment to visual impairment to loco motor disability.

(i) *Environmental Pollution*: As the world is progressing pollution has also been on the rise. Soil Pollution, Noise Pollution, Water Pollution and Air

43. Supra note 1 at *ibid*

Pollution are the principal forms of pollution. Due to increasing levels of pollutants in the environment, health of human beings has also been affected adversely. As a consequence various diseases are setting in, which go to the extent of disabling an individual. Constant loud noise above the bearable limits has given rise to hearing problems. Similarly inhaling polluting air and drinking polluted water have added to the mental and physical disabilities of human beings.

Thus the above lines surely reveal that disability is not a curse or the result of some sin committed in the past. It occurs chiefly due to genetic and medical problems, faulty dietary habits, improper birth practices, malnutrition, non-immunization against common diseases, unhygienic living conditions, accidents, old age, criminal activities affecting human body. Wars as well as accidents are also a major cause of disability. A new cause of disability is attributed to the barriers which contribute to the failure of the differently able persons. For instance where a college building can be accessed only by using stairs it surely proves to be an impediment for a person with locomotor, visual disability or cerebral palsy. Building of a ramp would be an appropriate solution to enable to exploit their abilities. Analysing the above grounds of disability is to bring in focal point aspects beyond the biological and intellectual make up of a human being. It is a truth that disability would always continue to be one of the characteristics of human society, but the causes may endure alteration. Wrapping up this discussion it may be pointed out that the remedy of disability does not lie in the prevention of medical factors alone. It calls for reorientation of diagnostic factors and involvement ahead of the narrow medical concerns, which can be accomplish by means of a social order in which social, economic and political justice is realized by curtailing dissimilarities in income, status, facilities and opportunities.⁴⁴

⁴⁴. Supra note 15

D. DISABILITY, IMPAIRMENT AND HANDICAP—CONCEPTUAL DIFFERENCE:

The terms 'impairment', 'disability' and 'handicap' are often used interchangeably. There is however a difference in their meaning. As traditionally used, impairment refers to a problem with a structure or organ of the body; disability is a functional limitation with regard to a particular activity; and handicap refers to a disadvantage in filling the role in life relative to a peer group.⁴⁵ **Impairment, disorder, and disability** are terms which were introduced by the World Health Organization (WHO) in 1976. In the International Classification of Impairments, Disabilities and Handicaps, 'An *impairment* is any loss or abnormality of psychological, physiological or anatomical structure or function; a *disability* is any 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; a *handicap* is a disadvantage for a given individual, resulting from an impairment or a disability, that prevents the fulfillment of a role that is considered normal (depending on age, sex and social and cultural factors) for that individual'.⁴⁶

By applying the WHO definitions, distinctions are made that apply to how one functions as a result of impairment. Not all impairments result in disabilities. One may also be disabled but not handicapped. Because of a problem or impairment in body function or structure (e.g., hearing loss), an individual may or may not have difficulty in the performance of activities (e.g., communicating, listening, speaking). Participation refers to an individual's

45. Supra note 12

46. Supra note 4 at p. 9

involvement in life situations and society's response or reaction to the individual's level of functioning.⁴⁷

According to advocates of the disability movement, the *World Health Organisation* has mystified the terms 'disability' and 'impairment'. They uphold that impairment refers to physical or cognitive limitations that an individual may have, such as the incapacity to walk or speak. In contrast, disability refers to socially enforced limitations, that is, the system of social constriction that is imposed on those with impairments by the inequitable practices of society. Thus, the *Union of the Physically Impaired against Segregation* has defined impairment and disability in the following manner. An 'impairment [is] lacking part have or all of a limb, or having a defective limb, organism or mechanism of the body'. 'Disability [is] the disadvantage or restriction of activity caused by contemporary organisation which takes no or little account of people who have physical impairments and thus excludes them from the mainstream of social activities'.⁴⁸

As per the *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities*: The term "disability" encapsulates a large number of diverse functional limitations happening to the populace in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or ephemeral in nature. The term "handicap" means the loss or limitation of opportunities to take part in the life of the community on an equal level with others. It portrays the encounter between the person with a disability and the environment. The purpose of this term is to accentuate the focus on the inadequacies in the environment and in

47. <http://www.asha.org/public/hearing/disorders/impair-dis-disab.htm-36k> accessed on 15.3.2008

48. http://www.dpa.org.sg/definition_disability.htm-18k accessed on 15.3.2008

many organized activities in society, for example, information, communication and education, which prevent persons with disabilities from participating on equal terms.⁴⁹

A person can be handicapped in a particular environment without being disabled, or have a disability but not be handicapped in many places. A disability is commonly defined as the malfunctioning, disturbance or loss in the normal functioning of physical, mental or psychological processes, or a difficulty in the capacity to learn, or adjust socially, which interferes with a person's normal growth and development. A handicap is a problem experienced by a person because of the nature of the environment in which she finds herself. For example, even if an individual has a locomotor disability she will still be moving as long she can get around in a wheelchair. On the other hand, if the building in which she has to work has no ramps or lifts that have room for wheelchairs, the environment of the building handicaps her. Then again an able-bodied person who does not know how to swim or row a boat is handicapped when he has to cross a river unless he can find someone to ferry him across. For this reason, handicap is neither exceptional nor a synonym to persons with disabilities, it barely refers to an environmental aspect that an individual finds tough to conquer.⁵⁰

In short, *impairment* is the varied condition of body structure, appearance, and organ or system function. *Disability* refers to the consequences of impairment for the individual the difference in instances of sight, hearing, intellectual functioning, mobility, speech as well as mental health. *Handicap* refers to a social disadvantages experienced as a result of impairments and disabilities. A handicap is not an attribute of a person, but rather, a restriction or loss of ability to participate in community life on an equal level with others due

49. *Ibid*

50. *Supra* note 4 at p. 9

to physical and social barriers in the community. It represents the social consequences that arise from having a disability in an environment which does not cater to disability.⁵¹The distinction between the three terms can be best explained with an example--- 'X' has a form of cerebral palsy called spastic diplegia. This causes 'X's legs to be stiff, tight and difficult to move as a result of which he can neither stand nor walk. The inability to move legs easily at the joints and failure to bear weight on the feet is *impairment*. Without orthotics and surgery to release abnormally contracted muscles, 'X's level of *impairment* may increase as imbalanced muscle contraction over a period of time can result in hip dislocation and deformed bone growth. 'X's inability to walk is *disability*. His level of disability can be improved with physical therapy and special equipment. For instance, if he learns to use a walker with braces his level of disability will improve considerably. Lastly 'X's cerebral palsy is *handicapping* to the extent that it prevents him from fulfilling a normal role at home and in the community. "Normal" activities denotes to those activities which can be easily done by children/ people of the same age group. However appropriate services and equipment can reduce the extent to which cerebral palsy prevents 'X' from fulfilling a normal role in home or the community.⁵²

E. DISABILITY MODELS-- TRANSITION FROM CHARITY TO HUMAN RIGHTS:

Different people conceptualize the phenomenon of disability differently. In view of that every individual will have a diverse connotation designed for the term disability and rehabilitation strategy to be pursued. Consequently, notion concerning disability have undergone transformation from time to time, from place to place, and from person to person. The implication of disability for a doctor is dissimilar from that of psychologist, economists and

51. Supra note 17

52. *Ibid*

social worker. As a result, different models of disability have progressed from disability worldwide.⁵³

(a) Moral Model: -

It is the oldest model of disability. This model sees persons with disabilities as sin and refers to the attitude that people are *morally responsible* for their own disability. This attitude can be seen as a religious fundamentalist offshoot of the original animal roots of human beings, back when humans killed any baby that could not survive on its own in the wild.⁵⁴ Holy epics of Ramayana and Mahabharata have reference to this issue in the form of negative characters of Manthara, Dhritrashtra and Sakuni. Disability was held as a punishment from the Almighty for a wrong act done in the past. They were deprived of all their basic rights of subsistence. They had no right to live in the mainstream society and their family was also looked down upon. The society or the government was not concerned with their problems.⁵⁵

(b) Asylum Model: -

Asylums were one of the earliest identifiable organizational responses to disability. People with every kind of disabilities were grouped together in the same institution. Workhouses, which followed, were the historical predecessors of sheltered workshops. The model reflects the need to protect society by locking away those who might threaten society and the responsibility to ensure at least basic food and shelter for all.⁵⁶

(c) Charity Model: -

53. Supra note 4

54. Supra note 7

55. Supra note 7

56. Supra note 25

'Charity' is defined as almsgiving; the private or public relief of unfortunate or needy persons.⁵⁷ This model treats persons with disabilities as helpless and unfortunate victims needing care and protections. It speaks for the segregation of persons with disabilities from the mainstream education and employment. This model relies profoundly on charity and benevolence rather than justice and equality. The charity model asks for social support mechanism for the advantage of persons with disabilities. Primary efforts of the Government and individuals were based on this model. Government was apportioning large amount of fund for the welfare of persons with disabilities as direct benefit or support to voluntary organizations. At the same time the mass of NGOs working for this section of people also relies on the donations and government grants.⁵⁸

(d) Medical Model: -

The term 'medical' is defined as "the science and practice of medicine. The medical model views disability as a personal tragedy.⁵⁹ The medical model is presented as viewing disability as a problem of the person, directly caused by disease, trauma, or other health condition which therefore requires sustained medical care provided in the form of individual treatment by professionals as well as rehabilitation. Any person with any functional or structural impairment is considered disabled, whether such individual experiences limitations in his or her life activities or not. For instance, individuals with any brain injury or condition such as multiple sclerosis are held as disabled under this model.⁶⁰ Disabled people, in this model, are regarded as people with limitations who cannot ensure a reasonable quality of life because of their impairment. The medical model also expects individuals to find ways of

57. Supra note 12

58. Supra note 7

59. Supra note 12

60. Supra note 32 at *ibid*

adapting to society. It puts the duty of adjusting and adapting to the society of able-bodied or people and their environment on the disabled.⁶¹ In the medical model, management of the disability is aimed at "cure", or the individual's adjustment and behavioural change that would lead to an "almost-cure" or effective cure. In the medical model, medical care is viewed as the main issue, and at the political level, the principal response is that of modifying or reforming healthcare policy.⁶²

(e) Social Model:-

The social model of disability sees the issue of "disability" mainly as a socially created problem, and basically as a matter of the full integration of individuals into society. In this model disability is not an attribute of an individual, but rather a complex collection of conditions, many of which are created by the social environment. Hence, in this model, the management of the problem requires social action, and thus, it is the collective responsibility of society at large to make the environmental modifications necessary for the full participation of people with disabilities in all areas of social life.⁶³ Hence, the social model presents disability as a consequence of oppression, prejudice and discrimination by the society against disabled people. It is the society, which constructs economic, social, health, architectural, legal, cultural, and other barriers in order to deliberately prevent people with impairments enjoy full benefits of the society. The social model shifts the emphasis from a disabled individual to the society and its disabling attitudes and environment.⁶⁴

(f) Economic Model: -

61. Supra note 14

62. Supra note 17

63. *Ibid*

64. Supra note 14

The economic model tries to establish the linkages between the individual and society in term of their contribution to productive capabilities of the society. The emphasis here is on health related limitations on the amount and kind of work performed by persons with disabilities. Unlike other models, this model puts forward the suggestion that the modifications in the persons with disabilities in the form of education, training and employability, rather than changing the environment and the worksite changes or change in the perception of employees is the most desirable means of fulfilling the social and economic needs of the disadvantaged strata of the society.⁶⁵

(g) Welfare Model:-

The term welfare model has been derived from a general accepted phrase 'the welfare state'. While the word 'welfare' implies the state of faring well or well being; the term 'welfare state' connotes a state in which the welfare of the people in such matters as social security, health and education, housing, and working conditions is the responsibility of the Government. The model echoes the view that all people should have at least basic social welfare and that governments are the apposite authority to ensure that it is provided. The provision of disability pensions by Government is an example of this model.⁶⁶

(h) Human Rights Model:-

Disability is sited as an important facet of human culture by human rights model. By emphasising that the disabled are equally entitled to rights as others, this model builds upon the spirit of the Universal declaration of Human Rights, 1948, according to which "all human beings are born free and

65. Supra note 6 at p. 1

66. Supra note 32

equal in rights and dignity.” This model highlights that all human beings irrespective of their disability have certain rights which are incontrovertible. This model accentuate on viewing persons with disabilities a subjects and not as objects thus locating the problem outside the disabled persons and addresses the manners in which the economic and social processes accommodate the differences of disability or not, as the case may be.⁶⁷ Hence the Human Rights Model considers that every human being has the right to partake fully in societal institutions and gain fully of the services offered to a country’s public, regardless of ability. In other words, governments have a duty to make mainstream institutions responsive and flexible so that all persons, including those with disabilities, can make use of them.⁶⁸

Thus there has been a transition of the society in the form of its approach towards the persons with disabilities from charity to rights based. The Charity Model depicts disabled people as victims of circumstance, deserving of pity. This and Medical Model are probably the ones most used by non-disabled people to define and explain disability. The human rights or social model by contrast is presented as focussing on the interaction between a person and their environment, highlighting the role of a society in labelling, causing or maintaining disability within that society, including through attitudes or accessibility and favoring the majority.⁶⁹ However it is beyond doubt that where human rights are the order of the day, conviction on this model should be acknowledged throughout. The Charity Model and the Medical Model are against the basic rights of the persons with disability as they view this section of the population as objects of pity, and instead of making them self-reliant only show their sympathy due to their inabilities instead of believing in their different abilities. Hence the attitude of society towards persons with disability

67. Supra note 7

68. Supra note 4 at p. 13

69. Supra note 32

requires to be altered from one of charity to endowing with fair opportunities, bestow them their rights and consider them as an integral part of families and communities. Regrettably in India, the guidelines and schemes of government are steered by medical model rather than human rights model. Dominant efforts on the part of government are restricted to physical rehabilitation in the form of preventive action, stipulation of aids and appliances etc. Efforts in the course of human rights model has lingered on paper because of the unawareness on the part of the persons with disabilities along with voluntary organisations.

F. DISABILITY AND HUMAN RIGHTS APPROACH:

After having examined the legal expression of disability as well its approaches, it is clear that human rights model of disability is the most wanted for it reflects the spirit of human rights vital for human subsistence. At present a novel model of thinking is breaking grounds where disability is perceived as an essential part of society. There is also acknowledgment to the fact that persons with disabilities come across numerous difficulties due to insensitivity and attitudinal barriers. Policies that are based ideologically on the human rights model begin by recognising barriers in society that curb disabled persons' participation. This has in total altered the perception of disability and the approach to it. Formerly the prominence was on correcting the impairment and rehabilitating the individual so they may 'fit in' to society. Now there is appreciation that disability is not a divergence and for that reason, all systems and structures of the society must be improved upon so as to allow equal access and full participation.⁷⁰

International efforts for recognising basic human rights for persons with physical and mental disabilities were the product of political action

70. Supra note 4 at p. 13

and lobbying, primarily in the United States and throughout the world from the early 1960s.⁷¹ Disabled people during the 1970s used their personal experience of disability and institutional life to show that it wasn't their impairments that caused the problem but the way in which society failed to make any allowances for their differences and instead locked them away.⁷² It has long been insisted that the recognition for persons with disabilities is empty and meaningless if there are no explicit mechanisms for enforcing these rules. Before examining the approach to disability human rights, it is essential to take into account the legal expression of 'human rights for persons with disabilities.'

There are four basic types of legal expression of human rights of persons with disabilities. Though these are not exclusive as most countries throughout the globe rely on cluster of laws, policies and programmes that fit into more than one category. However they are nevertheless important paths of putting human rights into law. They are---

- a. ***Enforceable anti-discrimination legislation:*** Commonly speaking anti-discrimination legislation recognizes grounds for discrimination on the grounds of race, gender, religion or disability and area of protection, namely employment, education, housing and transportation. Anti-discrimination also sets out complaint and adjudication procedures and provides some form of enforcement mechanism. An important premise of this approach to human rights is that a violation of rights is a form of discrimination, treating people unequally on grounds or for unjustifiable reasons.⁷³ The main justification of the antidiscrimination approach to disability human rights is that any act of prejudice results in the

71. Jerome E Bickenbach, "Disability Human Rights, Law and Policy," in Gary L. Albert, Katherine D. Seelman and Michael Bury (ed.), *Handbook of Disability Studies* (Sage Publications, 2005), pp. 565-583 at p. 565

72. Supra note 17

73. Jerome E Bickenbach, *op.cit.* at pp. 569-570

inability of persons with disabilities to enjoy their basic rights and to reach their objectives of equal participation, opportunity and respect for difference. It is implicit that admittance to needed resources and full participation in social life will be realized when artificial and unreasonable impediments are removed. This approach obligates the state to get rid of barriers and also hear and adjudicate complaints.

- b. Constitutional guarantees of equality:* The Constitution of a country sets forth its political and legal structures and such provisions are above every legislation or Government action of a State. Leaving aside a few countries like Canada or Germany, the majority of the constitutional provisions do not unequivocally deal with mental or physical disability as protected grounds. The Constitutional guarantee in most countries guarantees equality and forbids discrimination on general grounds like, “religion, personal convictions, political opinion, race, sex or any other ground;” the latter phrase is understood to include disability.⁷⁴When human rights are guaranteed constitutionally, the enforcement of these rights has its own troubles. Mostly cases concerning equality in the Constitution is a branch of the body of law construing the highest law of the land, there is disinclination on the part of judges to move too far or too fast.
- c. Specific Entitlement Programmes:* Many countries, whatever else they have in place to give legal expression to disability human rights, have programmes that create entitlements for persons with disabilities. As entitlements, these benefits are enforceable. A person who is eligible to receive the benefits or opportunities a programme delivers can call upon a court, tribunal, or other

⁷⁴ *Ibid* at p. 571

adjudicating body to enforce his or her claim to those benefits or opportunities. There is a vast range and variety of such programmes. From subsistence income to educational and pre-employment development grants, from employment to free transportation into workplace, from financial assistance to purchase or repair of assistive devices to exemptions in tax payment. Moreover, most countries have social security programmes in entitlement form, including permanent and temporary disability benefits, disability pensions and work related injury benefits.⁷⁵

- d. Voluntary Human Rights Manifestos:* The ultimate legal expression of disability human rights is based on a social commitment that is not imposed by any state, legal or administrative mechanism. It may be squabbled that legal commitments are in fact manifestos or public statements of the moral entitlements that the persons with disabilities have to human rights. Manifestos serve the important function of bringing legitimate claims to public attention, and, in this sense, they do not express a commitment. Voluntary manifestos are expressions of a sense of duty among members of society to ensure independence of persons with disabilities and their full participation.⁷⁶

A look at the aforesaid four expressions makes it abundantly understandable that the grand goal of human rights approach to disability policy are equal opportunity, full participation and respect for difference. All the models project one or other expression of 'disability equality'. Whether the stress is on voluntary approach, constitutional mandate, anti-discriminatory laws or entitlement programmes, the actuality underlying all these approaches or

^{75.} *Ibid*

^{76.} *Ibid* at p. 572

expressions can be reached only through 'universalism in disability policy'. The matter of human rights should not be restrained to mere concepts or theories in different parts of the world, but these concepts must be put into practice unconstrained by mock social and political barriers. In view of the fact that equality demands that social roles and positions be open to everyone, where full participation is limited by social barriers, as well as the failure to assist or accommodate difference, these ought to be addressed to fulfill the directive of human rights. To thereby put the human rights agenda on a firmer foothold, one must give substantial thought to recognizing the attitudinal, social and political hindrances to the goals of disability advocacy, as well as to developing the tools needed to move the debate from the piecemeal reaction to inequality to an unrelenting development of equality in all arenas of human participation.⁷⁷

A SUM UP:

A look at the above lines reveals the transition of the concept of disability from ancient times to the contemporary human rights approach. It is seen that religious mandates created a negative impact on the mindset of the community regarding people with disabilities. During ancient times the persons with disabilities were considered as sin or punishment by God for wrong thing done in the past. Although this perception has changed over a period of time and persons with disabilities are either looked down with pity or ridicule or at the most of charity. In spite of their proving themselves as normal citizens, it has affirmed time and again that disability lies in the social system and not within the persons with disabilities themselves. Their actual need is recognition of their rights and equal opportunities in place of pity or charity. The real setback is the viewing by an able bodied people as tragedy, loss or deficiency which elicits punishment, curiosity, impurity, disease, shame, inability or advantage.

77. *Ibid* at pp. 581, 582

The various causes of disability have been attributed to genetic and medical factors, faulty dietary habits, improper birth practices, malnutrition, non-immunisation against common diseases, unhygienic living conditions, accidents, old age, wars, internal conflicts, rising crimes against human body as well as acts of the law enforcement officials.

So far as the definition of disability is concerned there seems to be no consensus. Generally speaking, disability may be said to be a condition of the physical or mental health of an individual arising out of moral, charitable, medical, social, economic and fundamental rights deficiency, situating within the realm of human existence. It is very unfortunate that even to this day a satisfactory, unanimous and all pervading definition of the term has not evolved, even when human rights and disability movement has gained momentum throughout the world. There is lack of sensitivity on the issue of disability throughout the world principally due to its different approaches and definitions. However, contemporary international thinking is of the view that disability is the result of interaction between societal barriers and the impairment rather than a product of the limitation imposed by physical or mental deficiencies.⁷⁸ It is also to be noted that the definition of disability in most cases includes only physical deformities or impairments and in some cases mental deficiency, but even in the outset of 21st century there is no place for transgender or people belonging to the third sex, commonly known as eunuchs or *hijras* who are even more humiliated because of their sexual status. A proper definition along with legal rights of this class of the populace is absolutely necessary to meet the demands of every class of disabled persons. The society or the State cannot remain oblivious to their demands in this era of human rights. A disability may thus be defined as, “*a state or function pronounced to considerably impair an individual in relation not only*

78. Compendium on Member States' Policies on Equality of Opportunity for People with Disabilities, Employment and Social Affairs, European Commission, 1998.

to the usual standard of an individual of his/her group but also due to limitation imposed by the societal and attitudinal barriers”. Thus the definition of disability apart from including physical disability or impairment, physical ailments, psychiatric illness, intellectual or psychological or anatomical structure or function, sexual disabilities as well as societal barriers must also be included. The United Nations Convention for Rights of the Persons with Disabilities, 2006 has put forward such an inclusive definition to meet the national and international demands; but unfortunately this definition too needs to be worked upon and polished to bring out its lustre.

Finally the human rights approach should be encouraged in every possible way to enable the persons with disabilities to fulfill their dreams of enjoying meaningful human rights. The voluntary approach to human rights must be entailed by the disabled to open the door of those rights through which they can get the gems of normalisation, equalization, inclusion and rehabilitation in the normal social life. The social, cultural and attitudinal barriers have to be done away with. Above every thing else the non-disabled have to understand the disabled ones and not look down upon them with pity or do anything with a feeling of charity.

Thus the following suggestions may be put forward to transform the concept of disability from morality or pity to that of human rights:

- ✓ Public awareness must be increased so that their attitude towards this section changes. The responsibility here is both of the society as well as the state and all voluntary organisations working in this field.
- ✓ The present definition of disability existing in India has been described by most disabled people as being associated with a medical model of disability. This approach must be done away with. The definition must be

such as to include not only physical or mental incapacities but also societal and attitudinal barriers, as mentioned above.

- ✓ The human rights approach to disability policy must be adopted unanimously throughout the globe irrespective of political or cultural boundaries.
- ✓ The State must take initiatives at the earliest to shed off the approach of morality and charity and concentrate on the human rights model. The governmental policies and schemes must move from the medical to the human rights model. As a whole the different nuances of the human rights model must be adopted in every possible way.