

**PROTECTION OF HUMAN RIGHTS OF THE PERSONS WITH
DISABILITY UNDER THE INDIAN LEGAL SYSTEM,
WITH SPECIAL REFERENCE TO THE CONDITIONS IN NORTH BENGAL**

*Thesis submitted to the University of North Bengal For the Award of
the Degree of Doctor of Philosophy in Law.*

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This to certify that Mrs. Sangeeta Roy (Maitra) has pursued research work under my supervision for more than two years and fulfils the requirements of the Ordinances relating to Doctor of Philosophy of the University. She has completed her work and the thesis is ready for submission. To the best of my knowledge and belief the thesis contains the original work done by the candidate and it has not been submitted by her or any other candidate to this or any other University for any degree previously. In habit and character the candidate is a fit and proper person for the Ph.D. Degree.

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Preface

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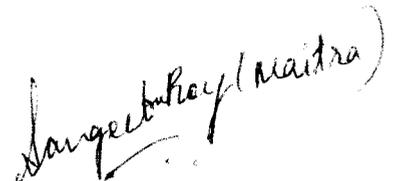

Sangeeta Roy (Maitra)

TABLE OF ABBREVIATIONS

ADA	American's with Disabilities Act
AIIMS	All India Institute of Medical Sciences
AIR	All India Reporter
ALIMCO	Artificial Limb Manufacturing Corporation
CAT	Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
CWP	Civil Writ Petition
DDA	Delhi Development Authority
DDRC	District Disability Rehabilitation Centre
DLT	Delhi Law Times
DSSSB	Delhi Subordinate Services Selection Board
DTC	Delhi Transport Corporation
EEA	Employment Equity Act
EVM	Electronic Voting Machine
FAPE	Free, Appropriate Public Education
IAS	Indian Administrative Service

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IEP	Individualized Educational Programs
ILO	International Labour Organisation
IQ	Intelligence Quotient
IRO	International Refugee Organisation
JIAFM	Journal of Indian Association of Forensic Medicine
LIC	Life Insurance Corporation
LLC	Local Level Committee
LRE	Least Restrictive Environment
NCPEDP	National Centre for Promotion of Employment for Disabled People
NGO	Non- Governmental Organisation
NHFDC	National Handicapped and Finance Development Corporation
NHRC	National Human Rights Commission
NHRC	National Human Rights Commission
NSSO	National Sample Survey Organisation
PET	Physical Education Teacher
PIL	Public Interest Litigation
PWD	Persons with Disabilities
Raj.	Rajasthan
RCI	Rehabilitation Council of India
RCI	Rehabilitation Council of India
SAARC	South Asian Association of Regional Co-operation

SC	Supreme Court
SCC	Supreme Court Cases
U.K.	United Kingdom
U.P.	Uttar Pradesh
U.S.A	United States of America
UN	United Nations
UNCRPD	United Nations Convention on the Rights of the Persons with Disabilities
UNESCAP	United Nations Economic and Social Commission for Asia and Pacific
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNSR	Standard Rules on the Equalization of Opportunities for Persons with Disabilities
UPSC	Union Public Service Commission
VRC	Vocational Rehabilitation Centres
WHO	World Health Organisation
WP	Writ Petition
WPA	World Programme of Action
www	world wide web

LIST OF TABLES

<u>S. No.</u>	<u>Table No.</u>	<u>Subject</u>	<u>Page no.</u>
1.	Table 6.1	Opinion Survey among the Persons with Disabilities in Malda District.	459
2.	Table 6.2	Opinion Survey among the NGO workers in Malda District.	460
3.	Table 6.3	Opinion Survey among the Common People in Malda District.	461
4.	Table 6.4	Opinion Survey among the Government Employee in Malda District.	461
5.	Table 6.5	Opinion Survey among the Persons with Disabilities in Uttar Dinajpur District.	462
6.	Table 6.6	Opinion Survey among the NGO workers in Uttar Dinajpur District.	463
7.	Table 6.7	Opinion Survey among the Common People in Uttar Dinajpur District.	464
8.	Table 6.8	Opinion Survey among the Government Employees in Uttar Dinajpur District.	464
9.	Table 6.9	Opinion Survey among the Persons with Disabilities in Dakshin Dinajpur District.	465
10.	Table 6.10	Opinion Survey among the NGO workers in Dakshin Dinajpur District.	466
11.	Table 6.11	Opinion Survey among the Common People in Dakshin Dinajpur District	467
12.	Table 6.12	Opinion Survey among the Government Employees in Dakshin Dinajpur District.	467
13.	Table 6.13	Opinion Survey among the Persons with Disabilities in Darjeeling District.	468
14.	Table 6.14	Opinion Survey among the NGO workers in Darjeeling District.	469
15.	Table 6.15.	Opinion Survey among the Common People in Darjeeling District	470

<u>S. No.</u>	<u>Table No.</u>	<u>Subject</u>	<u>Page no.</u>
16.	Table 6.16	Opinion Survey among the Government Employee in Darjeeling District	470
17.	Table 6.17	Opinion Survey among the Persons with Disabilities in Jalpaiguri District.	471
18.	Table 6.18	Opinion Survey among the NGO workers in Jalpaiguri District.	472
19.	Table 6.19:	Opinion Survey among the Common People in Jalpaiguri District.	473
20.	Table 6.20	Opinion Survey among the Government Employee in Jalpaiguri District	473
21.	Table 6.21	Opinion Survey among the Persons with Disabilities in Coochbehar District.	474
22.	Table 6.22	Opinion Survey among the NGO workers in Coochbehar District.	475
23.	Table 6.23	Opinion Survey among the Common People in Coochbehar District.	476
24.	Table 6.24	Opinion Survey among the Government Employee in Coochbehar District	476
25.	Table 6.25	Overall response among the Persons with Disabilities in North Bengal	477
26.	Table 6.26	Overall response among the NGO workers in North Bengal	478
27.	Table 6.27	Overall response among the Common People in North Bengal	479
28.	Table 6.28	Overall response among the Government Employee in North Bengal	479

**LIST OF STATUTES, RULES, REGULATIONS,
INTERNATIONAL AND REGIONAL INSTRUMENTS.**

INDIAN STATUTES

1. Building and Other Construction Workers (Regulations of Employment and Conditions of Service) Act, 1996
2. Children Act, 1960
3. Children with Cerebral Palsy or Mental Retardation (Care, Educational Facilities and Welfare) Bill, 2005.
4. Code of Civil Procedure, 1908
5. Code of Criminal Procedure, 1973
6. Designs Act, 1911
7. Evidence Act, 1872
8. Factory Act, 1948,
9. Government Savings Banks Act, 1873
10. Hindu Marriage Act, 1955
11. Hindu Succession Act, 1956
12. Income Tax Act, 1961
13. Indian Divorce Act, 1869,
14. Indian Lunacy Act, 1912
15. Indian Penal Code Contract Act, 1872
16. Indian Securities Act, 1920
17. Indian Succession Act, 1925
18. Juvenile Justice (Care and Protection of Children) Act, 2000
19. Legal Services Authorities Act, 1987
20. Limitation Act, 1963
21. Medical Termination of Pregnancy Act, 1971
22. Mental Health Act of India, 1987

23. Mines Act 1952
24. Motor Vehicles Act, 1988
25. Narcotic Drugs and Psychotropic Substances Act, 1985
26. National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.
27. Parsi Marriage and Divorce Act, 1936,
28. Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995
29. Plantation Labour Act, 1951
30. Prevention of Food Adulteration Act, 1954
31. Prisoners Act, 1900
32. Registration Act, 1908
33. Rehabilitation Council of India Act, 1992.
34. Special Marriage Act, 1956
35. State Employees Insurance Act, 1948
36. Workmen's Compensation Act, 1923.

Rules and Regulations.

1. Rehabilitation Council of India Regulations, 1997.
2. The All India Service (Special Disability Leave) Regulations, 1957.
3. The Board of Trust Regulations, 2001
4. The Central Mental Health Authority Rules, 1990.
5. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 1999.
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8. The Rehabilitation Council of India (Standards of Professional Conduct, Etiquette and Code of Ethics for Rehabilitation Professionals) Regulations, 1998.
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2. Act on Equal Treatment of Students at Universities, 2002. (Sweden)
3. Act on the Rights of People with Disabilities, 1998. (Hungary).
4. American with Disabilities Act, 1990. (U.S.A.)
5. Civil Rights Act, 1964. (U.S.A.)
6. Disability Discrimination Act, 1992. (Australia)
7. Disability Discrimination Act, 1995. (United Kingdom)
8. Disability Services Acts, 1980. (Australia)
9. Disabled Persons (Employment) Act, 1944. (United Kingdom).
10. Disabled Persons Employment Act, 1960. (New Zealand)
11. Disabled Workers Act, 1991. (Luxembourg)
12. Education Act 1996. (United Kingdom)
13. Education of Persons with Special Educational Needs Act, 2004. (Ireland)

14. Employment Equality Act, 1998. (Ireland)
15. Equal Opportunities Law for People with Disabilities, 1996. (Costa Rica)
16. Equal Status Act, 2000. (Ireland)
17. Equality Act, 2004. (Ireland)
18. Grundgesetz. (Germany)
19. Human Rights Act, 1985. (Canada)
20. Human Rights Act. 1993. (New Zealand)
21. Human Rights Commission Act, 1981. (Australia)
22. Individuals with Disabilities Education Improvement Act, 2004. (U.S.A.)
23. Law of Equal Opportunities, Non- Discrimination, and Universal Access for Persons of Disability, 2003. (Spain)
24. Law on the Social Integration of the Disabled, 1982 (Spain)
25. Mental Health Act of 1983. (United Kingdom)
26. National Institute for the Protection of the Blind Act, Law 2171, 1957. (Costa Rica)
27. National Institute of Rehabilitation Act, Law 3695, 1966. (Costa Rica)
28. Prohibition of Discrimination Act, 2003. (Sweden)
29. Prohibition of Discrimination in Working Life of People with Disability Act, 1999. (Sweden)
30. Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. (South Africa)
31. Protection of Persons with Disabilities Act, 1996. (Guatemala)
32. Rehabilitation Act of 1973. (U.S.A.)

33. Schwerbehindertengesetz. (Germany)
34. Skills Development Act, 1998. (South Africa)
35. Special Educational Needs and Disability Act 2001. (United Kingdom)
36. The Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill, 2008. (New Zealand)
37. The Disabled Persons Act, 1992. (Zimbabwe)
38. The Employment Equity Act, 1998. (South Africa)
39. The Labour Relations Act, 1998. (South Africa)
40. The Law on the Protection of Disabled Persons, 1990. (China)
41. Vocational (Re) Integration of the Disabled People Act, 1998. (Netherlands)

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1. Beijing Declaration on the Rights of Disabled Persons, 1992.
2. Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, 1984
3. Convention on Elimination of Racial Discrimination, 1965
4. Convention on the Elimination of All forms of Discrimination Against Women, 1979.
5. Convention on the Rights of Persons with Disabilities, 2006.
6. Convention on the Rights of the Child, 1989.
7. Declaration on the Rights of the Disabled Persons, 1975
8. Declaration on the Rights of the Mentally Retarded Persons, 1971
9. International Covenant on Civil and Political Rights, 1966

10. International Covenant on Economic, Social and Cultural Rights, 1966.
11. ILO Recommendation concerning Vocational Rehabilitation and Employment (Disabled Persons), 1983
12. Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991)
13. Resolution 1998/31
14. Resolution 2000/51
15. Resolution 48/3, 1992
16. Resolution 56/ 168, 2001
17. Standard Rules on the Equalization of Opportunities for Persons with Disabilities (UNSR), 1993
18. Universal Declaration of Human Rights, 1948
19. Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development, 1995
20. Vienna Declaration, 1986
21. Vocational Rehabilitation and Employment (Disabled persons) Convention, 1983
22. World Programme of Action Concerning Disabled Persons, 1982

REGIONAL INSTRUMENTS:

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2. The Inter American Convention of Human Rights, 2001.

TABLE OF CASES

A

<i>Ahmedabad Victoria Iron Works Ltd. v. Maganlal</i>	
<i>Keshavlal Panchal</i>	228
<i>All Kerala Parents Association v. State of Kerala</i>	392, 437
<i>Alsbrook v. City of Maumelle Arkansas</i>	127
<i>Aman Hingorani v. Union of India</i>	376, 434
<i>Anand Bihari & others v. Rajasthan State Road Transport Corporation</i>	415, 429
<i>Anka Toppo v. AIIMS</i>	387
<i>Archibald v. Fife Council</i>	415
<i>Ashwani Kumar Mishra v. P. Muniam Babu & others</i>	430

B

<i>Baljeet Singh v. DTC</i>	416
<i>Ball v. William Hunt and Sons Ltd.</i>	223
<i>Banshidhar v. Ramchandra</i>	228
<i>Binita Senapati v. State of Assam</i>	288, 390
<i>Bragdon v. Abbott</i>	127, 439

C

<i>Calcutta Licenced Measures Bengal Chamber of Commerce v. Md. Hossain</i>	222
<i>Canara Public Conveyance Co. v. Usman Khan</i>	232
<i>Chandan Kumar Banik v. State of West Bengal</i>	186, 435

Collins v. Royal National Theatre Board Ltd...... 120, 414

D

D.N.Chanchala v. State of Mysore.....373
Daya Ram Tripathi v. State of UP & Another.....370, 373
Death of 25 Chained Imates in Asylum Fire in Tamil Nadu.....435
Delhi Admn v. Presiding Officer.....418
Delhi Development Authority v. Chief Commr. for Disabilities.....426
Deputy Secretary (Mart), Dept. of Health and Family Welfare v. Sanchita Biswas & Others.....289, 390, 393, 437
Dhawal S. Chotai v. Union of India and Others.....388
Disability Rights Group v. Chief Election Commissioner.....323, 438
Dr. Jagadish Saran & Ors. v. Union of India.....169, 400
Dr. P.D. Benny v. State of Kerala & others.....394

E

Eaton v. Brant County Board of Education.....129

F

G

Garrett v. University of Alabama at Birmingham Board of Trustees.....127
Godawari Bai v. DDA & others.....375
Govt. of NCT of Delhi v. Bharat Lal Meena and Anr......311, 402

H

<i>Harsha Shivaram v. National Law School of India</i>	396
<i>HURST v State of Queensland</i>	137

I

<i>Inder Das v. DTC</i>	416
<i>Indian Bank's Association, Bombay and Ors. v.</i> <i>Devkala Consultancy Service and Ors</i>	20, 350, 430, 438
<i>Indian Council of Legal Aid and Advice v.</i> <i>Union of India & others</i>	426
<i>Indira Sawhney v. Union of India</i>	19, 169, 373, 399

J

<i>J.Rajkumar (Minor) v. Secy. Educational Deptt.,</i> <i>Government of Tamil Nadu</i>	391
<i>Jacoab M. Puthuparambil v. Kerela Water Authority</i>	372
<i>Jaswant Singh v. State of Punjab</i>	406, 429
<i>Javed Abidi v. Union of India & Others</i>	19, 172, 438

K

<i>Kesavananda Bharati v. State of Kerala</i>	372
<i>Krishan Kumar v. Secretary, Govt. of NCT of Delhi and Ors</i>	402
<i>Kunal Singh v. Union of India</i>	311, 418

L

<i>L.K. Koolwal v. State of Rajasthan</i>	173
---	-----

<i>Lance Dafadar Joginder Singh v. Union of India and others</i>	375
<i>LIC of India v. Chief Commissioner for Disabilities</i>	304
<i>Life Insurance Corporation of India v. Chief Commissioner of Disabilities, Ministry of Social Justice and Empowerment and Others</i>	400

M

<i>M.C. Mehta v. State of Tamil Nadu</i>	172
<i>M.C. Mehta v. Union of India</i>	172,438
<i>Mahesh Gupta and Others v. Yashwant Kumar Ahirwar and Others</i>	411
<i>McAuley Catholic High School v. C</i>	414
<i>Meike v. Nottinghamshire County Council</i>	120
<i>Minister of Health v. Treatment Action Campaign</i>	439
<i>Mohini Jain v. State of Karnataka</i>	385
<i>Ms. Anubha Bhargava v. Union of India and Others</i>	409
<i>Mst.Teka Devi v. Gopal Das</i>	433

N

<i>Nandakumar Narayan Rao Ghodmare</i>	375
<i>Narendra Kumar Chandla v. State of Haryana and others</i>	415
<i>National Association for Blind v. Govt. of NCT of Delhi and Others</i>	386
<i>National Federation of Blind v. Central Board of Secondary Education</i>	388
<i>National Federation of Blinds UP Branch v. State of Uttar Pradesh</i>	425, 426, 429
<i>National Federation of the Blind v. Registrar, Andhra University</i>	390, 391
<i>National Federation of the Blind v. Union Public Service Commission</i>	19, 374
<i>Naveen Kumar A. v. University of Delhi</i>	391

O

.....

P

<i>Palak Kailashchandra Jain v. Union of India</i>	391
<i>Pennsylvania Department of Corrections v. Yeskey</i>	127
<i>People of New York ex rel. Spitzer v. County of Delaware</i>	127
<i>Perambaduru Murali Krishna v.</i>	
<i>State of Andhra Pradesh</i>	311, 402, 404, 405
<i>PGA Tour, Inc. v. Casey Martin</i>	378
<i>Phool Chand v. DTC</i>	416
<i>Pratap Narain Singh Deo v. Srinivas</i>	224
<i>Pushkar Singh & Ors v. University of Delhi</i>	406, 413

Q

.....

R

<i>R.C. Narayan v. State of Bihar</i>	376, 434
<i>Ram Kishen v. Ms. Rukmimi Devi</i>	434
<i>Raman Khanna (Dr.) v. University of Delhi</i>	393, 406
<i>Ramchandra Tandi and 30 others v.</i>	
<i>State of Orissa and others</i>	376, 429
<i>Rampal v. DTC</i>	416
<i>Ranbir Singh v. DTC</i>	419, 420
<i>Ravi Kumar Arora v. Union of India and</i>	
<i>Union Public Service Commission (UPSC)</i>	402
<i>Rekha Tyagi v. Vice-Chancellor, University of Delhi and Others</i>	392
<i>Relaxation Group v. Rhys Harper</i>	120

S

<i>S.R. Kapoor v. Union of India</i>	376, 434
<i>Sanjay Kumar Jha v. AIIMS and Another</i>	427
<i>Satyabir Singh v. DTC</i>	417
<i>Sheela Barse v. Union of India</i>	187, 430
<i>Shree Satish Prabhakar Padhye v. Union of India</i>	424
<i>Shri Dilbagh Singh v. Delhi Transport Corporation</i>	420
<i>Shri Suhas Vasant Karnik v. Union of India and Others</i>	421
<i>Smt. Shruti Kalra v. University of Delhi & Ors</i>	406
<i>Social Jurist v. Government of National Capital Territory of Delhi & Others</i>	396
<i>Social Jurist v. Union of India</i>	397
<i>Supreme Court Legal Aid Committee v. State of MP</i>	376, 434
<i>Swatantra Kumar v. Qamar Ali & others</i>	429

T

.....

U

<i>Union of India and Anr. v. Jagmohan Singh and Ors</i>	422
<i>Union of India and Ors. v. Suresh Kumar</i>	421, 422
<i>Union of India v. Sanjay Kumar Jain</i>	420
<i>Unnikrishnan J.P. and others v. State of Andhra Pradesh and others, Union of India</i>	385

V

Vijay Kumar Agarwal v. State of Rajasthan.....288, 391, 393
Vijender Singh v. DTC.....417, 418
Virender Kumar Gupta v. DTC..... 417

W

.....

X

.....

Y

.....

Z

.....

CONTENTS

<i>Preface</i>	i
<i>List of Abbreviations</i>	iii
<i>List of Tables</i>	vi
<i>List of Statutes, Rules, Regulations, International and Regional Instruments</i>	viii
<i>Table of Cases</i>	xiv

INTRODUCTION	1-29
---------------------------	-------------

CHAPTER 1

HUMAN RIGHTS OF THE PERSONS WITH DISABILITIES:

HISTORICAL AND CONCEPTUAL DEVELOPMENT.....30-80

Prologue.....	30
A. Disability- Historical Perspective.....	33
B. Defining Disability.....	39
(a) Different approaches of defining Disability.....	39
(i) Biomedical Definition.....	39
(ii) Philanthropic Definition.....	40
(iii) Economic Definition.....	40
(iv) Social Definition.....	40
(v) Human Rights Definition.....	40
(b) International definitions.....	41
(c) Definitions prevailing in India.....	45
C. Reasons of Disability.....	55
a) Poverty.....	56
b) Malnutrition.....	57
c) Occupational Hazards.....	58
d) Wars.....	59
e) Crime.....	59
f) Traffic Hazards.....	60
g) Barriers.....	61
i. Environmental Barriers.....	61
ii. Institutional Barriers.....	62
iii. Attitudinal Barriers.....	62

iv. Information Barriers.....	62
(h) Onset of old age.....	62
(i) Environmental Pollution.....	62
D. Disability, Impairment and Handicap—Conceptual Difference.....	63
E. Disability Models—Transition from Charity to Human Rights.....	67
(a) Moral Model.....	68
(b) Asylum Model.....	68
(c) Charity Model.....	68
(d) Medical Model.....	69
(e) Social Model.....	70
(f) Economic Model.....	70
(g) Welfare Model.....	71
(h) Human Rights Model.....	71
F. Disability and Human Rights Approach.....	73
a) Enforceable anti-discrimination legislation.....	74
b) Constitutional guarantees of equality.....	75
c) Specific Entitlement Programmes.....	75
d) Voluntary Human Rights Manifestos.....	76
A Sum up.....	77

CHAPTER 2

CIVIL RIGHTS OF THE PERSONS WITH DISABILITIES UNDER THE INTERNATIONAL LEGAL

FRAMEWORK.....81-162

Prologue.....	81
A. The concept of 'Hard Law and Soft Law' in International Law.....	85
B. Civil and Economic Rights of the Persons with Disabilities under the United Nations Framework.....	89
C. Developments around the Globe.....	112
a. Europe.....	113
(i) European Union.....	113
(ii) United Kingdom.....	120
(iii) Germany.....	124
b. North America.....	126
(i) U.S.A.....	126
(ii) Canada.....	131
c. South America.....	132
(i) Costa Rica.....	132
(ii) Guatemala.....	134

d. Australia.....	138
(i) Australia.....	138
(ii) New Zealand	141
e. Asia.....	142
(i) India.....	142
(ii) China.....	147
f. Africa.....	149
(i) South Africa.....	149
(ii) Zimbabwe.....	152
D. Comparative Analysis of the Various Legal Systems.....	154
A Sum up.....	159

CHAPTER 3

PROTECTION OF HUMAN RIGHTS OF THE PERSONS WITH DISABILITIES UNDER THE INDIAN LEGAL SYSTEM.....163-258

Prologue.....	163
A. Constitutional Guarantees for Persons with Disabilities.....	165
(a) Equality and non-discrimination.....	167
(b) Right to Freedom	170
(c) Protection of Life and Personal Liberty.....	171
(d) Other fundamental rights.....	173
(e) Directive Principles of State Policy and Disability Rights	173
B. Major Laws on the Persons with Disabilities.....	178
(a) The Mental Health Act of India, 1987---An Overview.....	178
(i) Mental Health and Human Rights.....	178
(ii) Backdrop and Object of the Act.....	180
(iii) Meaning of Mental Health under the Act	181
(iv) Rights under the Act.....	181
I. Right to admittance into and discharge from psychiatric hospitals or psychiatric nursing homes.....	181
II. Protection of human rights of the mentally ill.....	185
III. Other benefits as envisaged by the Act.....	187
(v) Efficacy of the Rights Guaranteed.....	189
(b) Rehabilitation Council of India Act, 1992-An Overview	192
(i) Backdrop of the Act.....	192
(ii) Objects of the Act.....	193
(iii) Meaning of Rehabilitation, and Rehabilitation Professionals under the Act.....	194
(iv) Rights of disabled persons emanating from the Act.....	196

(v) Constitution and functions of the Rehabilitation Council of India.....	197
(vi) Implementation of the Act.....	203
(c) National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999: An Overview.....	206
(i) Backdrop of the Act.....	206
(ii) Object of the Act.....	208
I. Enabling and empowering persons with disability.....	208
II. Strengthening the facilities required to provide support to persons with disability to live within their own families.....	208
III. Extending support to registered organizations.....	209
IV. Dealing of problems of persons with disability who do not have family support.....	209
V. Promoting care and protection in case of death of parent/guardian.....	209
VI. Procedure for appointment of guardians and trustees.....	210
VII. Facilitating equal opportunities, protection of rights and full participation.....	210
VIII. Residual Power.....	210
(iii) Constitution of the Trust.....	211
(iv) Powers and Duties of the Board.....	213
(v) Ancillary Functions of the Board.....	214
(vi) Rights to persons with disabilities under the Act.....	216
(vii) Implementation of the Rights.....	217
(d) The Children with Cerebral Palsy or Mental Retardation (Care, Educational Facilities and Welfare) Bill, 2005.....	219
C. Minor Laws dealing with the Rights of Persons with Disabilities.....	220
a) The Workmen's Compensation Act, 1923.....	221
b) Employees' State Insurance Act, 1948.....	230
c) Other Labour Laws.....	237
d) Motor Vehicles Act, 1988.....	237
e) Provisions for Disabled in Various Other Legislations.....	240
(i) Indian Penal Code.....	240
(ii) Contract Act, 1872.....	241
(iii) The Evidence Act, 1872.....	241
(iv) The Government Savings Banks Act, 1873.....	242
(v) Prisoners Act, 1900.....	242
(vi) Registration Act, 1908.....	243
(vii) Code of Civil Procedure, 1908.....	244
(viii) Designs Act, 1911.....	244
(ix) Indian Securities Act, 1920.....	245
(x) Indian Succession Act, 1925.....	246
(xi) Hindu Succession Act, 1956.....	246

(xii) Children Act, 1960.....	247
(xiii) Income Tax Act, 1961.....	247
(xiv) The Limitation Act, 1963.....	248
(xv) Medical Termination of Pregnancy Act, 1971.....	249
(xvi) Code of Criminal Procedure, 1973.....	249
(xvii) Legal Services Authorities Act, 1987.....	250
(xviii) Building and Other Construction Workers (Regulations of Employment and Conditions of Service) Act, 1996	250
(xix) The Juvenile Justice (Care and Protection of Children) Act, 2000.....	251
(xx) Other minor provisions.....	251
A Sum up.....	254

CHAPTER 4

PROTECTION AND PROMOTION OF HUMAN RIGHTS OF PERSONS WITH DISABILITIES IN INDIA WITH REFERENCE TO PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995.....259- 365

Prologue.....	259
A. Government Policy and National Plan towards Persons with Disabilities.....	262
a) Backdrop of Current Disability Policy.....	262
b) Framework of the policy.....	264
c) Implementation of the Policy.....	266
d) State Level Disability Policy.....	268
B. Human Rights of the persons with Disabilities under The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995: A Critical Study.....	270
a) Background.....	271
b) Salient Features.....	274
i. Definition of disability and its prevention.....	275
ii. Applicable to Central Government, State Government, and local authorities.....	275
iii. Equalisation aspect.....	275
iv. Administrative mechanism for implementation.....	275
v. Monitoring Mechanism.....	276
c) Concept of 'Disability' and 'Persons with Disability'.....	276
d) Rights under the Act.....	282
(i) Prevention and Early Detection.....	282

(ii) Education.....	286
(iii) Employment.....	302
(iv) Affirmative Action and Non-Discrimination.....	315
e) Other features of the Act.....	325
(i) Mechanism of implementing the provisions of the Act.....	325
I. Constitution, Powers and Functions of the Central Coordination Committee and Executive Committee.....	326
II. Constitution, Powers and Functions of the State Coordination Committee and Executive Committee.....	333
III. Chief Commissioner and Commissioners for Persons with Disabilities.....	336
(ii) Research, Manpower Development and Recognition of Institutions for Persons with Disabilities and Severe Disabilities.....	343
(iii) Social security.....	347
C. Issues to be Addressed.....	350
A Sum up.....	357

CHAPTER 5

ROLE OF INDIAN JUDICIARY IN PROTECTING THE CIVIL AND ECONOMIC RIGHTS OF THE PERSONS WITH DISABILITIES.....366- 440

Prologue.....	366
A. Constitutional Guarantees and Judicial Remedies.....	371
B. Judiciary and the Rights of the Persons with Disabilities.....	377
a) Access for persons with disabilities.....	378
b) Educational opportunities.....	384
c) Employment Opportunities.....	398
(i) Rights of the PWD to secure employment.....	399
(ii) Rights of the persons acquiring disability during the employment.....	413
d) Mandatory notification of schemes.....	425
e) Social Security.....	429
C. Other Disability Laws.....	433
A Sum up.....	436

CHAPTER 6

CONDITIONS OF PERSONS WITH DISABILITES IN NORTH BENGAL.....441- 483

Prologue.....	441
A. Sampling Universe.....	442
B. Sample Design.....	443
(i) Persons with disabilities.....	443
(ii) NGO workers.....	450
(iii) Common People.....	456
(iv) Government Employees.....	457
Tables.....	459
C. Data Analysis.....	480
D. A Sum up	483

CHAPTER 7

CONCLUSION AND SUGGESTIONS.....485—512

SELECT BIBLIOGRAPHY.....513-527

INTRODUCTION

INTRODUCTION

“Disabled people are not only the most deprived human beings in the developing world, they are also the most neglected”. --- Amartya Sen

STATEMENT OF PROBLEM:

The expression “human rights” is of comparatively recent origin having come into everyday parlance only since World War II and the founding of the United Nations in 1945. However, the idea of human rights is as old as the history of human civilization. These right were called natural rights or rights of man or duties of the King by different philosophers, but the aim of all those was the same that is to protect and provide certain basic rights . Human rights are sometimes characterized as fundamental rights, or natural rights or basic rights. Broadly speaking human rights may be regarded as those fundamental and natural rights which are essential for decent life as a human being.¹ Human rights date back to the Vedic Period where the basic human right has been pointed to be the right to happiness “*sarvajana sukhino bhavantu*” (“Let all people be happy “).² The Oxford Companion to Philosophy says that in their strongest sense, rights are justified claims to the protection of persons’ important interests. Human rights are not the gift or bounty of any political superior. Human rights are possessed by every human being irrespective of his or her nationality, race, religion, sex, colour, simply and only because he or she is a human being. Human rights and fundamental freedoms allow us to fully develop and use our conscience and to satisfy us physical, spiritual

1. Gurjeet Singh, Dinesh Kumar. “Human Rights: A Historical Perspective”, *Indian Socio Legal Journal*, vol. XXXI (1 &2), (2005), pp. 25-44 at p. 25.

2. Justice S.B. Sinha, “Disability Law vis-à-vis Human Rights”, *Supreme Court Cases*, (2005) 3 SCC, pp. 1-14 at p. 1.

(Gurjeet Singh)
27.10.2008

Nalla Chandrababu Naidu
27.10.2008
Supervisor

and other needs, as human beings. They are founded upon mankind's increasing demand for normal life in which the inherent dignity and worth of each human being will receive regard and respect, protection and parental care. Human rights have been rightly described as the sure and sound guarantees of democracy. Hence, human rights and their respect, obviously and evidently confirms the degree and the status of civilization of a nation. They aim at promoting social progress and better standards of life in larger freedom. According to *Richard Wasserstorm* it means, "one ought to be able to claims as entitlements (i.e. human rights) those minimal things without which it is impossible to develop ones capabilities and to live life as human beings." Thus Human Rights is about balancing the rights of all of us as individual within the community. The upholding of rights is essential for maintaining human dignity. Jack Donnelly pointed out that human rights are the new standard of civilization. 'All human rights for all' is the goal of the century and the aim is to ensure that human rights are universally accepted and respected.

Persons with disabilities---a vulnerable group:

Persons with disability are found in each part of the world as well as at all stratum of the social structure. Their number is ever escalating. Over 600 million people – or approximately 10 per cent of the world's total population – have a disability of one form or another. Over two thirds of them live in developing countries. As while their living conditions vary, they are united in one common experience: being exposed to various forms of discrimination and social exclusion. This negative attitude, which is rooted in ignorance, low expectations and prejudice, leads to exclusion and marginalisation of persons with disabilities. This phenomenon also deprives societies of active participation and contribution by a significant societal group. People with disabilities are habitually deprived of access to basic services such as primary health care and education. Employment opportunities are extremely limited, hindering economic self-sufficiency. In some cases, children and adults with disabilities do not receive adequate nutrition or

shelter and are particularly vulnerable to abuse and violence. The reasons and consequences of disability depend upon diverse socio-economic and medical conditions as well as upon political conditions of turmoil in different corners of the world. It also depends upon the steps taken by different Governments as to the well being of the persons with disabilities. There have been particular factors that have had an impact on the living conditions of persons with disabilities. For instance, social factors such as ignorance, neglect, superstition and fear have been the impediment in the development or progress of the persons with disabilities. They were and are still considered as having limited potential of contributing to social betterment. Even the programmes for their improvement were aimed at providing them institutional care, medical rehabilitation or living allowances. Regrettably, these actions armoured their isolation and did not make for their involvement or participation in community life. At the same time it is to be appreciated that the world for and of the disabled is altering at a fast pace and the objectives as well as outlook of the persons with disabilities is also varying and they must be at liberty to exercise their civil, political, social, economic and cultural rights on an identical basis with others. The full participation of persons with disabilities advantages the society as their individual contributions augment every sphere of life; moreover this is a fundamental part of individual's and society's well being and advancement for a society for each and every one whether with or without disabilities. *Helen Keller* represents the mind of such disabled persons when she says, "*I am only one; but still I am one. I cannot do everything, but still can do something; I will not refuse to do something I can do.*"

International approach to disability human rights:

Human rights are a subject of international concern and their advocates and guardians do exercise prolific influence across geographical and cultural boundaries. The human rights movement has daringly and positively budged the thought of policy makers from the simple provision of charitable services to

strongly protecting the basic right to dignity and self-respect. After the coming into being of the United Nations in 1945 an institutionalized framework of human rights began to evolve. The concept of human rights became the corner stone of post world war when the General Assembly of United Nations adopted “Universal Declaration on Human Rights” on December 10th 1948. This is the primary international enunciation of the fundamental and inalienable rights of all members of human family. It lays down common standard of achievement for all people and all nations. The rights embodied in the Declaration were separated into two distinct Covenants known as International Covenant on Economic, Social and Cultural Rights (1966) and International Covenant on Civil and Political Rights (1966). The United Nations has defined human rights to mean generally as “*those rights, which are inherent in our nature and without which we can not live as human beings.*” Further, Conventions concerning the rights of the various vulnerable and minority groups also gradually came into existence. Amongst the various vulnerable sections, disabled people are a vast minority group, which has been subjected to direct and indirect discrimination for centuries in most countries of the world, counting India as well. Due to their vulnerability there is always a need to attend to their special requirements. Progress in medical and surgical sciences, advancement in technology, better perception of the causes of disability and improved ways of dealing with it, growing realization of civil rights and the surfacing of people with disabilities presenting skills and knowledge to perk up their own lives, are some of the aspects which have contributed to the new thinking that the disabled deserve a dignified status in society on the same stipulations as the non-disabled. In the new scenario, the disabled are viewed as individuals with a wide range of abilities and each one of them willing and capable to utilise his/her potential and talents.

International efforts to recognize basic human rights for individuals with physical and mental disabilities were the product of political action

and lobbying, initially in the United States and throughout the world from the early 1960s on. This call for a human rights approach to disability law and social policy was played out and continues to be played out against a background of specific entitlements and other social policy provisions found primarily in the areas of health, rehabilitation, education and employment. This human rights approach of the rights of the persons with disabilities entitled to enjoy the full range of internationally guaranteed rights and freedoms without discrimination on the ground of disability. This human rights approach also creates an obligation on the part of the State to take positive measure to ensure that in reality persons with disabilities get enabled to exercise the rights guaranteed to them. There is a need of insistence on the full measure of general human rights guarantees in the case of persons with disabilities as well as developing specific instruments that refine and give detailed contextual content of those general guarantees. There should be full recognition of the fact that persons with disabilities are integral part of the community, equal in dignity and entitled to enjoy the same human rights and freedoms. The core principle of the Universal Declaration of Human Rights, is that "All human beings are born free and equal in dignity and rights." This has guided the United Nation's Disability Programme. The notion of human dignity and human rights for the disabled should be fundamental to every society. Human dignity means self-determination, self-respect and integrity. The very concept of human rights implies that they are common to all human beings and must therefore be universally applicable.³ 'All human rights for all' is the goal of the century and the aim is to ensure that human rights are universally accepted and respected. The seven freedoms essential are:

- Freedom from discrimination – by gender, race, ethnicity, national origin or religion.
- Freedom from want – to enjoy a decent standard of living.

3. Sadiq Ahamad Jilani Syed , "Legal Framework for Social Integration of Persons with Disabilities", in S.K. Verma and S.C. Srivastava, (ed.), *Rights of Persons with Disabilities* (Indian Law Institute, New Delhi, 2002), pp. 154- 167 at p.166, 167

- Freedom to develop and realize one's human potential.
- Freedom from fear – of threats to personal security, from torture, arbitrary arrest and other violent acts.
- Freedom from injustice and violations of the rule of law.
- Freedom of thought and speech and to participate in decision-making and form associations.
- Freedom for decent work – without exploitation.

International instruments, such as declarations, resolutions, principles, guidelines and rules, are not technically legally binding. They express generally accepted principles and represent a moral and political commitment by States. They also can be used as guidelines for States in enacting legislation and formulating policies concerning persons with disabilities. Several disability-specific non-binding international instruments have been adopted at the international level. These include: *World Programme of Action concerning Disabled Persons (1982)*; *The Standard Rules for the Equalization of Opportunities for Persons with Disabilities (1993)*; *Declaration on the Rights of Disabled Persons (1975)*; *Declaration on the Rights of Mentally Retarded Persons (1971)*; *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991)*; *Proclamation of the Economic and Social Commission for Asia and the Pacific on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region (1993)*; *Tallinn Guidelines for Action on Human Resources Development in the Field of Disability* amongst others. Till recently there was no international convention dealing exclusively with the rights of disabled persons until the Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007. At the start of the 21st century, few countries have also passed significant disability rights

legislation into law — Australia in 1991, the United Kingdom in 1995, and the United States in 1990 being the most prominent.⁴

India and disability rights:

In India life has been a continuous struggle for persons with disabilities. By all accounts, India is home to the largest number of persons with disability in the world. The dominant social outlook towards persons with disability has been one of pity, from which results in alarming forms of discrimination - the ultimate cause of their segregation and extreme seclusion. Much of the literature on disability in India has pointed to the importance of the concept of karma in attitudes to disability, with disability perceived either as punishment for misdeeds in the past lives of the disabled person, or the wrongdoings of their parents. According to the *Manusamhita*, one shall be born disabled to pay for the sins of his previous birth. In the 49th Section of Chapter 11 of the *Manusamhita* it has been laid that, thieves who steal gold shall be born with ugly nails in the next birth. In the 50th Section of the same Chapter it has been said that that one who steals grains shall be born maimed and one who sells adulterated grains will be born with multiple limbs:

Pishu nah voutinasikayam suchakah putivakritam

Dhanya chourahanghinatva maatireikantu mishraka

(Section 50, Chapter 11, Manusamhita)

(One who keeps pointing out others mistakes, is born with a nose giving out foul smell, one who spreads false rumours about innocent people is born with mouth giving out bad odour. He who steals grains is born maimed and those selling adulterated grains are born with multiple limbs.)

4. Chapter 2: Approaches to Disability, *National Human Rights Commission Disability Manual*, (National Human Rights Commission, New Delhi, 2005), pp. 18-27 at p. 22.

To this day the struggle continues whether be in the field of education or employment or access to public places. So far as the need to include the disabled in mainstream activities is concerned there is a flicker of responsiveness about it in the bigger cities. But in rural areas, people with disabilities are amongst the most marginalized segment of the populace. There is a lack of special services that would let them to lead self-sufficient and successful lives. The biggest battle for disabled people in India is to fight cultural prejudices. While numerous marginalized social groups have been able to put forward their precise social experiences of prejudice and their hopes and desires on the wider social plane for discussion and debate, involvement from the disabled have been nominal as they lead secluded social lives that make their discrimination appear as individual problems. Government support for the disabled has been long in coming and is mostly insufficient. Disability concern is evidently a low priority for a government which is struggling to provide basic necessities such as food and water. It is often witnessed that they are sympathized but not accepted in the mainstream. Most common, their lives are handicapped by social, cultural and attitudinal barricades which impede their full participation and enjoyment of equal rights and opportunities. This can be termed as the worst form of discrimination against the disabled. As a matter of fact the non-disabled people generally look upon the disabled ones with pity. The universal reaction is that these 'invalid people' are incompetent of doing anything in life. They are a burden on the society and the society has to bear the same. Although disabled people no longer see their physical or mental limitations as a source of shame or as something to overcome in order to inspire others. What non-disabled people do not realize is that persons with disabilities also have some rights, hopes and aspirations as any other human being. They do not want to depend on others. They want to prove to the world at large that notwithstanding their disabilities they can be the masters of their own lives. In the fight for equal participation by people with mental and physical disabilities, it has been common for decades to recognize the "the human rights approach" to

disability support as an imperative political development. The goal of a human rights approach to disability is to ensure the equal dignity and equal effective enjoyment of all human rights by people with disabilities.⁵ What are referred to as disability rights and the human rights of people with disabilities are not extra protections or a separate and special category of rights, but part of the full range of human rights available to everyone. All people have the right to participate and to exercise self-determination as equals in society.

India has ratified the ICCPR (1966), the ICESCR (1966), the CERD Convention (International Convention on the Elimination of All Forms of Racial Discrimination (1965), the CEDAW Convention (Convention on the Elimination of All Forms of Discrimination against Women) (1979) and the Convention on the Rights of the Child, 1989. It has signed but not ratified the Torture Convention. It has not ratified any of the Optional Protocols to these instruments, or accepted any of the individual complaints procedures under those conventions it has ratified. It has entered substantive reservations to the ICCPR, ICESCR, and the CEDAW Convention. India is signatory to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region and has taken the remarkable step of signing the Convention on the Rights of Persons with Disabilities 2006 and signed and ratified by India in 2007.

The Constitution of India, though not expressly, right from the Preamble to the Fundamental Rights to Directive Principles of State Policy has opened its doors securing the interests of the disabled. The opening words of the Preamble of the Constitution are “We, the people of India”. The word “people”, used in the Preamble signifies that no discrimination amongst the people of India on any ground whatsoever; be it religion, race, colour, creed, caste or even disability was envisioned by the Constitution makers. The word “people” included people

5. A.K. Sikri, “Human Rights of the Disabled: World in a Slow Motion”, *Journal of Constitutional and Parliamentary Studies*, vol. 38, number 1-4 (January- December 2004), pp. 1-49 at pp. 10, 11.

suffering from disability, whether they were blind, physically disabled or even mentally retarded and an assurance was given in the Preamble “to secure to all its citizens: justice, social, economic and political” as also equality of status and of opportunity and to promote fraternity so as to uphold the dignity of the individual. The concept of equality held up in Article 14 of the Constitution of India itself enjoins duty on the State to bring about a situation where the fundamental rights can be put into effect on the footing of equality. Inevitably therefore, a disabled person is permitted to a right to be placed at the level at which he can enjoy the rights. The duty of the State to enact special provisions to enable the disabled persons to exercise their fundamental rights is thus provided in Article 14 itself. In the background of this fundamental right to equality, the directive principle of State policy contained in Article 39A of the Constitution assumes significance. Under that provision, the State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Therefore, no disability shall deny to any citizen an opportunity to secure justice on the basis of equal opportunity. There is also an important directive principle contained in Article 41 enjoining a duty on the State *within the limits of its economic policy and development* to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want.⁶

6. Justice R.K. Abichandani, “THE RIGHTS HANDICAPPED”, viewed at cestat.gov.in/Articles%20by%20President/THE%20RIGHTS%20HANDICAPPED.DOC, accessed on 23.7.2008

The Centre has been late in recognising of the rights of Persons with Disabilities. *The Mental Health Act of India, 1987* was passed with a purpose to afford protection to the rights of the persons with intellectual and psychological impediments, since they are most vulnerable and are discriminated both outside and within the other disabled persons. The Act lays down rational criteria for admission in the psychiatric hospitals and nursing homes and for well being of his person, his property and its management. *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability Act, 1999* has provisions for legal guardianship of the four categories and creation of enabling environment for as much independent living as possible. *The Rehabilitation Council of India Act, 1992* deals with the development of manpower for providing rehabilitation services. Unfortunately these legislations are simply a part of the legal framework and mere policy documents, rather than actually redressing their special needs. The foremost legislation in this regard -- the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, which provides for education, employment, creation of a barrier-free environment, social security etc, was enacted as late as 1995. In the 13 years since its enactment, this too has met with very little success even in issues as basic as ensuring a barrier-free environment and generating employment. Equalization of opportunities is a fundamental right. However, persons with disabilities have always been outpaced in this equal race. There were an evident need to create a level playing ground for them, to provide for equal opportunities for education, health services and livelihoods. The primary concern of every civilized society is to protect the rights of the weaker sections such as those of the disabled. The question that naturally arises here is 'what are these rights?' These rights are none other than those enshrined in the Constitution. They include the right to health, the right to education, right to livelihood, right to information and the right for the freedom of movement. These are taken for granted in the case of ordinary citizens but from the time immemorial

these have been denied either wholly or in part to persons with disabilities. The third clause in the title of the Act is full participation. Full participation implies that a person with disability shall lead as full a life as may be reasonably commensurate with his or her type or degree of disability and social environment. The term not only refers to the hither stated rights of education, health, information, livelihood and freedom of movement but it also aspires for social inclusion of Persons with Disabilities in private, family and communal life. All too often Persons with Disabilities have been neglected in the social sphere and so marginalizing them even more completely. While the attitude of the Act thus embodies a key step forward in disability policy in India, its fundamental philosophy can be considered an amalgam amid medical and social models of disability. The Act however has failed to attain the objectives of its enactment principally due to non-realisation of the equalization of opportunities as assured. The rehabilitation services are mostly available only in the urban areas and the rural and backward areas have not been accessed. Mental illness has not been sufficiently dealt with. The Act principally aims to act through Committees, but these committees have not been convened according to the frequency specified in the Act. Moreover these committees have failed to make any remarkable impact on policies of the respective Governments either at the national or state level. In short the Committees have failed to assert their existence. Prevention and early intervention of disability is not in sharp focus and appear more as health programmes rather than measures for prevention of disability. Education is so vital for human development that its importance can hardly be exaggerated. Though the Act contains provision for free and education to a child with disability until he/she is 18 and also spells out different means to attain this goal, but it does not set down any deadline to achieve this goal. Unless a deadline is fixed the goal becomes defeated to a great extent. Moreover, there is no legislation in India dealing with the special educational needs of disabled persons as found in USA (Individuals with Disabilities Education Improvement Act, 2004) and

UK (Special Educational Needs and Disability Act, 2001). Employment opportunities though guaranteed have been denied ghastly at the private sector.

However, despite all efforts, persons with disabilities are still denied equal opportunities and remain isolated in many of our societies. According to conservative estimates, approximately 6 % of India's population is disabled. And if we go by what the United Nations officials or various other experts have to say, the figure could very well be in double digits. Australia officially estimates that some form of disability affects 18% of its population. United Kingdom's disabled population is estimated at 14.2% whereas for the United States, it is 9%. The numbers are so high for the developed countries because their definition of 'disability' is much broader than ours. The disabled in such countries would include, 'people with internal conditions'. These are individuals where the disability of the person is not visible: say a person with one lung or a person with one kidney or a person with a severe heart ailment. In certain countries, even diabetics come under the umbrella of disability. Such countries and societies are now looking at disability as a 'social' issue and not as a 'medical' one, as is the case with India. In India disability means to be a person without a leg or without an arm or without eyes or to be twisted or worse, crooked. Some form of disability affects a very sizeable section of our population. Javed Abidi, noted disability rights activist points out, *"If we agree on the conservative estimate of 6%, we are talking about the welfare and wellbeing of nearly 60 million of our citizens. most probably without even realizing it, is to have left this 6% of our population totally behind. To the point that our brothers and sisters, are no longer visible. They have become 'the invisible minority' of our otherwise great nation."*⁷ He further asserts that the biggest mistake our policy makers and decision makers have made is to have looked at disability as welfare issue whereas it was, it is and it should rightly be a

7. Javed Abidi. "Disability Law and Status of Disability in India Today", *Alpjan Quarterly: A Chronicle of Minorities*, Vol. 4(4), (2004- Jul- Sep), pp.5-6 at p. 5.

development issue, a progress issue as well as an economic issue. No country or society can ever progress or develop leaving 6% of its population behind. If this huge mass of 60 million Indians was to sit idle, as “prisoners of circumstances” at home, and remain dependant on charity, then what impact would that have on the nation’s future prospects, its progress and its economy?⁸ There is no sign of decline in the number of persons with disabilities even as the kind and pattern of disability may transform over the years. Quite the reverse, with life expectancy going up, disabilities due to old age are expected to rise. Correspondingly, with a declining infant mortality rate, more babies at risk are likely to survive with morbidity and disability. A projected 70 million disabled Indians are treated as second-class citizens facing segregation, bias, barriers and stereotypes. The total extent of disability issues ranging from causes of disability, care and rehabilitation, empowerment and mainstreaming through education, employment, health care and transportation -remain to be virtually determined. The disabled are moreover not a homogenous group. Every disabled person’s tribulations, desires are dissimilar from one another and each person has to be taken care of and supported on an individual basis.⁹

Another aspect of this work is to highlight the conditions of the disabled persons in North Bengal. North Bengal consists of the six districts of the northern part of West Bengal. These are Darjeeling, Coochbehar, Uttar Dinajpur, Dakshin Dinajpur, Jalpaiguri and Malda. Though these areas are the full of natural beauty and are the home to many wildlife species; but the development of this region has been particularly less than the remaining districts of the State. Be it education, employment or health care, facilities are limited. Hence the researcher took up this area to put forth the conditions of the persons with disabilities

8. *Ibid*

9. Leni Chaudhari, “*Disability, Health and Human Rights*”, CEHAT, Mumbai (2006), p. 1, viewed at www.cehat.org/humanrights/lenichaudhury/pdf, accessed on 12.1.2008.

prevailing in this part of the country. Particularly the issue of awareness of the basic rights guaranteed by the much publicized *Persons with Disabilities Act, 1995* has been taken up to assess the true position of disability human rights. The condition of persons with disabilities cannot be studied in isolation. Therefore, apart from the disabled the researcher has also spoken to the management personnel running the NGOs who are very much a part of the protective system for the disabled persons. Since it is the government which formulates the policies, government employees across the six districts were questioned as to what they know about the persons with disabilities' rights. Sensitisation of the common people has always been an issue and hence they too have been assessed with their knowledge of disability rights. And the results have been shocking---the awareness of the people in this part of the nation is far from satisfactory.

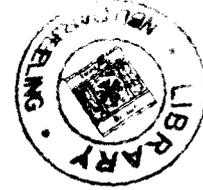
OBJECTIVE OF STUDY:

Whatever the provisions on paper, India's approach towards the rehabilitation of the disabled reflects the confused state of mind of a person who wants to be emancipated and modern while preserving age-old traditional values. Government policy, legislative actions, schemes and provisions for the disabled give the impression of a State that is committed to human rights and equal opportunities. But the ground reality is quite different. Assessing the Constitutional Provisions in our country considering the rights enshrined in Part III and Part IV as well provisions contained in *Persons with Disabilities (Equal Opportunities, Protection of Rights and full Participation) Act, 1995*, it is experienced that they are not adequate in view of International law on the subject. There is growing recognition that disability is not included in development and human rights a sufficient extent, for example, existing International Instrument application to persons with disability are not used to their fullest extent to protect the rights of persons with disabilities. The lack of a disability perspective in human rights and

development results in a disproportionate number of persons with disabilities who live in poverty in urban as well as rural areas, and who are discriminated against in many areas of life. There is also a growing recognition that the strong link between development and human rights is not sufficiently reflected in human rights and development work at the national as well as at local level. Development initiatives are needed for the implementation of human rights standards, especially economic, social and cultural rights, and development goals must provide concrete targets for the implementation of human rights standards, which sometimes seen vague or merely theoretical. Thus, the present legislations that deal with the protection of the basic rights of the persons with disability do not in fact secure these people's interests to the greatest extent, nor do they fulfill the constitutional objective of equality in all its might. Further, along with absence of proper law there is weak implementation machinery and failure of existing protective machinery. As *Rabindranath Tagore* puts it, "*The problem is not how to wipe out all differences but how to unite with all differences intact.*"

IMPORTANCE OF STUDY IN PRESENT DAY CONTEXT: JURISTIC VIEW:

Human Rights is a universal phenomenon because rights have been imbibed in our society over the years. It is a realisation that without Human Rights (HRs) we cannot live as human beings. The three generations of human rights have already completed a cycle of human entitlements. Now humble humans are basking at the anvil of a new generation of human rights i.e fourth generation of human survival kit wherein right to development vis-à-vis – disability has got new imperative impetus while breaking new grounds for equality. But in reality, persons with disability are often excluded from mainstream society due to physical and social barriers. Exclusion and abuse of people with disabilities are violations of their human rights. People with disabilities are entitled to enjoy the same rights as



all others.¹⁰ Most of the disability-specific instruments adopted at the international level are non-binding international instruments. By adopting Declarations as Conventions would increase the accountability of the state-parties to it, who would be required to comply with the norms set in the convention to protect the rights of disabled persons. It is only recently that the International Convention for the Disabled has been adopted only in 2006. Since protection of Human Rights of the persons with disability is an issue that attracts global norms transcending national boundary, therefore, the object of this work is to take into account the development of the law relating to the persons with disability in the international and national field as well as the part played by the judiciary, as far as the protection and enhancement of these special classes of citizens is concerned. The rights-based approach to disability essentially means viewing persons with disabilities as subjects of law. Its final aim is to empower disabled persons, and to ensure their active participation in political, economic, social, and cultural life in a way that is respectful and accommodating of their difference. This approach is normatively based on international human rights standards and operationally directed to enhancing the promotion and protection of the human rights of persons with disabilities. Strengthening the protection of human rights is also a way to prevent disability. Four core values of human rights law are of particular importance in the context of disability:

- the *dignity* of each individual, who is deemed to be of inestimable value because of his/her inherent self-worth, and not because s/he is economically or otherwise “useful”;
- the concept of *autonomy* or self-determination, which is based on the presumption of a capacity for self-directed action and behaviour, and requires that the person be placed at the centre of all decisions affecting him/her;

10.Mohd. Zafar Mahfooz Nomani, “Human Rights to Development and Persons with Disabilities: Breaking new Grounds for Equality in India”. *Aligarh Law Journal*, vol. XIII, (1998), pp.91-104 at p. 91.

- the inherent *equality* of all regardless of difference; and
- the ethic of *solidarity*, which requires society to sustain the freedom of the person with appropriate social supports.¹¹

The Declaration of the Rights of the Disabled Persons (General Assembly Resolution 3447 (XXX)) of 9th Dec 1975 U.N High Commission for Human Rights states that:

"Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever their origin, nature of seriousness of their disabilities have the same fundamental rights as their fellow citizens which implies first and foremost the right to enjoy a decent life as normal and full as possible."

One of the great world leaders, Nelson Mandela had said:

"All countries today need to apply affirmative action to ensure that the women and the disabled are equal to all of us."

Noted international disability rights activists, *Quinn and Degener* point out:

"A human rights perspective on disability means viewing people with disability as subjects and not as objects. It entails moving away from viewing people with disabilities as problems towards viewing them as holders of rights. Importantly, it means locating problems outside the disabled person and addressing the manner in which various economic and social processes accommodate the difference of disability...disability rights is about ensuring the equal effective enjoyment of all human rights, without discrimination,...it is inspired by the values that underpin human rights: the inestimable dignity of each and every human being, the concept of autonomy or self determination that demands that the person be

11. Visit www.un.org. for details.

placed at the centre of all decisions affecting him/her, the inherent equality of all regardless of difference, and the ethic of solidarity that requires society to sustain the freedom of the person with appropriate social supports.”

JUDICIAL PERSPECTIVE:

The judiciary has also upheld the need of equal rights for the persons with disabilities. The case which may be particularly mentioned here is that of *Indira Sawhney v. Union of India*¹² which has been witnessed to be the most important judgement, where the court has held that, mere formal declaration of the right would not make unequals equal. To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip type disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. *National Federation of the Blind v. Union Public Service Commission*¹³ is another case where a Public Interest Litigation was filed by *National Federation of the Blind* and a Division Bench of the Supreme Court comprising of Justice Kuldip Singh and Justice N.M. Kasliwal directed the Government of India and Union Public Service Commission to permit blind and partially blind eligible candidates to compete and write Civil Services Examination in Braille-script or with the help of scribe. The Government of India was also commended to decide the question of providing preference/reservation to the visually handicapped persons in groups “A” and “B” posts in Government and public sector undertakings expeditiously.

But perhaps one of the most remarkable decisions was given in *Javed Abidi v. Union of India*.¹⁴ In spite of the legislative activities, further steps were not taken to implement the scheme of the Persons with Disabilities Act. Since

12.AIR 1993 SC 477

13.AIR 1993 SC 1916

14. (1999) 1 SCC 467

the Parliament had not enacted these Laws for being kept within the almshouses or libraries, a petition under Article 32 of the Constitution was directly filed in the Supreme Court by Mr. Javed Abidi, himself a disabled person, for many reliefs including the relief that the disabled persons may be allowed concessional tickets by Indian Airlines like blind persons who had already been granted that concession and that they would be provided aisle seats. While disposing of this petition, the Supreme Court held

“that the Court cannot ignore the true spirit and object with which the Act was enacted to create barrier free environment for persons with disabilities and to make special provisions for the integration of persons with disabilities into the social mainstream apart from the protection of rights, provision of medical care, education, training, employment and rehabilitation which are some of the prime objective of the Act. The Supreme Court, bearing in mind the discomfort and harassment a person suffering from locomotor disability would face while traveling by the Indian Airlines to grant of 80% concession which the Airlines is giving to those suffering from blindness.”

Another case worth mentioning is that of *In Indian Banks' Assn. v. Devkala Consultancy Service*¹⁵ while ruling that the banks were indeed at fault for excessively charging Rs 723.79 crores annually from borrowers by way of resorting to rounding up of the rate of interest, the Supreme Court directed the amount to be transferred to a trust under the chairmanship of the Comptroller and Auditor General of India so that the moneys could be utilised for various programmes for the welfare of persons with disabilities. This case is one of the few cases where the judiciary has *suo moto* taken steps to secure the rights of the disabled persons.

In a number of other cases also the High Court and Supreme Court of India has upheld the rights of the persons with disabilities. The Court has in a number of cases taken initiatives to interpret the laws from a broader perspective so

15. (2004) 11 SCC 1

that it is of greater benefit to bigger disabled populace. But it cannot be denied that such decisions have not been able to sensitize the people towards the disabled people. They are still deprived and disrespected. It has been the experience of the researcher that though the NGOs consider themselves to be the biggest well wishers of the disabled persons, but the reality is that their approach is one of charity and not human rights. Where the maximum work for the disabled has been entrusted to the NGOs, such attitude on their part will be the biggest hurdle in realization of the human rights approach towards disability issues. Disappointingly, the Disability Commissioner too seems to have restricted itself to celebration of the World Disabled Day. Able bodied persons have always looked down upon the differently abled as of no use and have questioned their abilities. Perhaps the most pathetic part is the apathy of the persons with disabilities and their guardians who are least aware of the legislative or judicial developments.

SOCIO-ECONOMIC IMPORTANCE OF STUDY:

The present study is significant from the socio-economic point of view also as the work seeks to address issues of education, employment, social security and non-discrimination which will assist in uplifting the conditions of this “invisible minority”. Since these are the areas where the PWDs are lagging the most, hence proper remedies directed in this direction will help raise their conditions. Such attempts may be made from a legal point of view by necessitating amendments to the existing legislative machinery.

RESEARCH QUESTIONS:

The present study involves the following basic questions, as to who are considered to be persons with disability? What rights have been granted to them under the national and international instruments? What is the current position of the persons with disabilities? Are the existing laws on the disabled persons sufficient?

If not, what is to be done in this regard? How far the People with Disabilities (Equal Opportunities, Full participation and Protection of Rights) Act, 1995 has been successful in redressing the rights of the persons with disabilities? What has been the role of the Executive organs and the Judiciary in securing the rights of the persons with disability? What is the position of the persons with disabilities in North Bengal? And last but not the least, how to make the law relating to the persons with disabilities more effective?

HYPOTHESIS:

Hence in practicality there is a need to protect as well as uphold the human rights of the persons with disabilities in a world which neglects their abilities and prefers to address them as handicapped. Therefore protection of human rights of the persons with disabilities requires to be intensively studied. With this view the author has been inspired to proceed with the present work on “ Human Rights of the Persons with Disability under the Indian Legal System, with Special Reference to the Conditions in North Bengal” on the **hypothesis** that **“in the social order that is fast changing, where human rights of each and every individual is the priority, the existing legislative policy fails to secure and protect the rights of the persons with disabilities and are insufficient and inadequate to address their special social situation.”**

ETYMOLOGICAL JUSTIFICATION OF TITLE OF WORK:

A look at the title of the present work “Human Rights of the Persons with Disability under the Indian Legal System, with Special Reference to the Conditions in North Bengal” ----- the key words used in the title may be analysed with reference to their usage by national and international authors as well as standard dictionaries:

‘Human Rights’: Human Rights are those rights which are inherent in human existence and belong to all human persons irrespective of gender, race, caste, ethnicity, religion etc. Human rights are not the gift or bounty of any political superior. The laws are meant to reaffirm and recognize human rights and to provide the mechanism for their enforcement. Human rights are sometimes characterized as fundamental rights, or natural rights or basic rights.

‘Persons with disability’: Persons who are disabled as a result of mental, physical or sensory impairment and unable to enjoy life due to physical or social barriers, but they are more aptly specially abled or differently abled.

‘Indian Legal system’: Laws including Constitution of India, principal Acts, delegated legislations, precedents and other relevant substantive and procedural laws.

‘North Bengal’: North Bengal specifically is the northern part of the State of West Bengal consisting of the six districts of Darjeeling, Coochbehar, Uttar Dinajpur, Dakshin Dinajpur, Jalpaiguri and Malda. Identified by its natural bounty, this part of the State is less developed than its counterpart South Bengal, consisting of the remaining districts of West Bengal.

LITERATURE REVIEW:

Although, the main thrust of this work is on the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which can be said to be the watermark in assessing disability human rights, the work revolve around the other enactments also. The present attempt thus would also include the following principal enactments amongst others for the purpose of our study:

1. *Constitution of India, 1950.*
2. *The Mental Health Act, 1987*
3. *Rehabilitation Council of India Act, 1992*

4. *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.*
5. *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999*
6. *The Workman's Compensation Act, 1923*
7. *Income Tax Act, 1961*
8. *Motor Vehicles Act, 1988.*

Under these laws several rules, regulations, by laws and orders have been framed by the executive organs of the State. As a natural consequence all these delegated legislations come under the purview of this work. In addition there are certain laws and enactments which are in some way connected with the human rights of the persons with disabilities. However the laws only with wider scope and applicability shall be taken into consideration. Old laws have been mentioned or referred only to explain the present scenario and to serve as backdrops to explain the changing facets of human rights protection in the legal systems nationally and internationally.

The protectional rights available to the persons with disabilities find place in various Human Rights Instruments, International Conventions, Covenants and Declarations as well as in the Constitution of India. The present research may be designated as doctrinal as well as non-doctrinal. The methodology of this research is mainly analytical as the present study intends to examine the efficacy of the existing laws and analyze them to make a critical evaluation of the human rights of the persons with disabilities in India. Though the work is mainly confined to the Indian position, a brief reference to the position as well as provision of law in other countries and at the international level shall be made as and when necessary. In the present work the researcher has highlighted all the major international instruments as well as the laws concerning the human rights of the disabled persons across the

continents. Major nations include the USA, Canada, European countries including UK, the European Union, Australia, South Africa amongst others.

Further the sphere of our investigation is limited to the analysis of the landmark judicial pronouncements chiefly of the Apex court and the High Courts available in the leading reports and unreported cases available from the official records of the Courts in the area of human rights protection for the persons with disabilities. Out of the numerous cases, only those which can be considered as representative in character have been highlighted. In most of the cases only the ratio decidendi have been relied upon for the purpose of investigation.

RESEARCH METHODOLOGY:

For the purpose of collection of data from primary sources an opinion survey has been conducted by the present researcher in six districts of North Bnegal, namely Darjeeling, Coochbehar, Jalpaiguri, Uttar Dinajpur, Dakshin Dinajpur and Malda among the persons with disabilities, the management personnel running the institutions of persons with disabilities, government employees and common people to assess the conditions of the of the persons with disabilities from the legal perspective. For the said purpose, the initial universe was fixed at 500. But with a view to give equal weightage to each of the categories, the universe has been revised at 504. Accordingly, 126 structured questionnaires were distributed amongst the person with disabilities, the NGO workers, government employees and common people evenly in all the six districts i.e. 21 persons from each of the categories in each of the districts. The questionnaire has been distributed and information collected on stratified random sampling method. There are three sets of questionnaires. One each for the persons with disabilities and the management personnel running the institutions for the disabled and a common questionnaire for government employees and the common people. The questionnaire in the first two

categories consists of 10 questions having both positive and negative answers to be selected by putting tick mark and in some questions to give specific answers to question put forward. The questionnaire meant for the government employees and the common people consisting of five questions is wholly based on putting tick mark to the choices. On the basis of the response inference has been drawn through meticulous analysis.

SIGNIFICANCE:

It may be noted down here that so far as the knowledge of the researcher goes, very little research work has been done or undertaken till date in the field of human rights of the persons with disabilities, particularly emphasising on the human rights approach to disability rights. Although some work has been done on disability rights, most of it has been from the sociological perspective. In fact there has hardly been any research concentrating upon the rights conferred and benefits assured to this section of the population by the legislative machinery, as well as the judicial behaviour in this respect. This research work would hence, examine the problem not only from the legal point of view but would also include the sociological and judicial approach. There is also a need to analyse the origin of these rights as well a critically analyse the legislations available in this field in India as well as globally.

In the estimation of the researcher this work shall be useful to reformers, legislators, judicial institutions, academicians, government officials including law enforcement agencies, Human rights Commission and national as well as international NGOs and also to the common people and more so to the persons with disabilities and their guardians who are to be made aware of their rights and guarantees.

CHAPTERISATION:

Accordingly the present work has been divided into seven chapters. Human rights of the persons with Disabilities: Conceptual and Historical Retrospect (Chapter 1), Civil rights of the Persons with Disabilities in the International Legal Framework. (Chapter 2), Legal Protection of the Rights of the Persons with Disabilities in India (Chapter 3), Protection and Promotion of the Rights of Persons with Disabilities in India with Reference to the Persons with Disabilities (Equal Opportunities, Full Participation and Protection of Rights) Act, 1995 (Chapter 4), Role of the Judiciary in Protecting the Civil and Economic Rights of the Persons with Disabilities (Chapter 5), Scenario in North Bengal (Chapter 6) and Conclusion and Suggestions (Chapter 7).

Under the head Disability: Conceptual and Historical Retrospect , in Chapter 1 focus is on the conceptual and historical development of disability and disability human rights, the causes of disability, the definitional differences as well as disability estimates. 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 this work intends to appraise the human rights of the persons with disability it also necessary that the human rights approach to disability be reviewed in particular.

Chapter 2 deals with the international developments and concentrates on the various United Nations instruments and the legislations concerning disability rights across the continents. UN and regional Instruments and Declarations with respect to disability rights have been discussed as well as disability laws of Europe including the European Union, U.K. and Germany; North America including U.S.A. and

Canada; Costa Rica in South America; Australia including New Zealand; South Africa and Zimbabwe in Africa and Asia including China and India. The chapter also intends to focus on the convergences and divergences of the disability laws of the aforesaid countries.

Chapter 3 highlights the various rights of the disabled persons available in India and includes the Constitutional mandate and the critique of the major legislations concerning disability, namely *The Mental Health Act of India, 1987*, *The Rehabilitation Council of India Act, 1992* and *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability Act, 1999* as well as some other minor laws.

Chapter 4 has been solely devoted to highlight the rights guaranteed by the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*. The Chapter analyses each and every aspect of the Act in detail and also puts forth the remedies to correct the existing flaws.

Chapter 5 deliberates on the role of the judiciary in upholding the rights of the persons with disabilities which have had the effect of expanding horizons of disability rights and disability rights movements in India.

Chapter 6 concerns with the condition of the persons with disabilities in the six districts of North Bengal namely Darjeeling, Jalpaiguri, Coochbehar, Uttar Dinajpur, Dakshin Dinajpur and Malda. The situation shall be assessed with the aid of structured interview method and opinion survey in the form of questionnaire framed for this purpose.

Finally, in Chapter 7 the work is concluded by advancing the common drawbacks and the appropriate remedies for the improvement of the existing disability laws as

well as motivating the disability rights movement to improve the position of the specially able.

Though the words disabled persons and persons with disability have been used in the work, it is strongly asserted that this class of the population is specially able or differently able. It is also one of the purposes of this work to highlight these special abilities, which make them God's special children and set aside the prejudicial attitudes of the conservative society that does not acknowledge their capabilities. And this is perhaps the greatest challenge of this work--- to spread awareness and change the mindset of the society. As William Shakespeare in *Twelfth Night* says,

*"In nature there is no blemish but the mind;
none can be called deformed but the unkind."*

CHAPTER 1

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

CHAPTER 1

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

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.cesat.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.⁷⁴ When 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.

CHAPTER 2

CIVIL RIGHTS OF THE PERSONS WITH DISABILITIES UNDER THE INTERNATIONAL LEGAL FRAMEWORK.

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PROLOGUE:

Persons with disabilities have been from the very early times looked down upon as objects of pity and charity. The general populace has always looked down upon this section of the society with sympathy or contempt. Their position is further aggravated by the lack of a reasonable definition of the term disability. The human rights movement has boldly and categorically moved the concentration of policy makers from the mere provision of charitable services to vigorously protecting their basic right to dignity and self-respect. Human Rights is a universal experience because rights have been imbibed in our society over the years. It is a realisation that without Human Rights we cannot live as human beings. Human rights can be elucidated in one sentence that is, human rights are all about the rights to life, liberty, equality, dignity and security of men, women, youth and child. They comprise of all fundamental freedoms and are footed on mankind's persistence for a life in which the instinctive dignity and significance of each human being will obtain respect and protection. Since disability was in olden times seen as an individual pathology or disease, disregard of the rights of people with disabilities had not been adequately addressed by the international human rights system for a considerable length of time. But a swing to a human rights perspective is now evident at the international level. The 1970s marked a new approach to disability. The concept of human rights for disabled persons began to become more accepted internationally. In the new setting, the disabled are viewed as individuals with a broad range of capabilities and every one of them keen and able to utilise his/her potential and aptitude. Society, on the other hand,

is observed as the actual cause of the misery of people with disabilities because it continues to put numerous barriers as expressed in education, employment, architecture, transport, health and dozens of other activities. Progress in medical and surgical sciences, breakthroughs in technology, greater understanding of the causes of disability and improved methods of coping with it, increasing consciousness of civil rights and the emergence of people with disabilities displaying skills and knowledge to improve their own lives, are some of the factors which have contributed to the new thinking that the disabled deserve a dignified status in society on the same terms as the non-disabled.¹

At the nucleus of human rights model lie veneration for differences in human cultures and the appreciation that individuals are unlike on a number of issues such as gender, race, language, religion and other factor. High regard for human diversity emphasizes two vital beliefs. One, regardless of their obvious disparities all people is same in relation to their rights and dignity. And two, the equivalence of rights and dignity does not imply that all people should be treated in the same or alike means. The two thoughts may appear conflicting, but in actuality they are complimentary to each other. In concert they comprise a guide to build an equitable and just society without forcing basically dissimilar human beings to a single mould.² Acknowledgment of the natural equality of all human beings with equal entitlement of each individual to all human rights forms the heart of the human rights doctrine. In international human rights law, equality is set up upon two corresponding principles: non-discrimination and reasonable differentiation. The principle of differentiation is of special importance to persons with disabilities, some of whom may require specialised services or support in order to be substantially equal to others. Variations of treatment between

1. Priya Bansal. "Right to Employment of Disables: A Law Merely on Paper", viewed at <http://www.legalserviceindia.com/articles/dab.htm> accessed on 23.8.2007

2. Chapter 2: Approaches to Disability, *National Human Rights Commission Disability Manual*, (National Human Rights Commission, New Delhi, 2005), pp. 18-27 at p. 22

3. *Ibid* at pp.23, 24

individuals are not unfair if they are based on 'reasonable and objective justification'.³

A reference of international legal principles is incomplete without a reference to the United Nations. The United Nations since its origin in 1945 has adopted a number of international human rights standards, some in the form of binding treaties, others in the form of non-binding instruments. "*Dignity and justice for all of us*" is the theme of the 60th anniversary of the *Universal Declaration of Human Rights* as well as the International Day for Persons with Disabilities to be observed on 3rd December 2008. Dignity and justice for all persons are established universal principles. Since its inception, the United Nations has recognized that the inherent dignity and the equal and inalienable rights of all members of the human family are the foundations of freedom, justice and peace in the world. These principles, along with equality and non-discrimination, have guided the work of the United Nations for the past 60 years and are enshrined in various instruments such as the UN Charter and the Universal Declaration of Human Rights, as well as in treaties such as the International Covenants on Human Rights, and the Convention on the Rights of Persons with Disabilities. These instruments are among those which make up the international human rights framework, are complementary and reaffirm that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing.⁴ A brief description of a few of the more leading international instruments on human rights that have been adopted by the United Nations (UN) shall be taken up in this Chapter. The instruments and bodies portrayed are only a branch of the massive body of human rights model that have been shaped by the UN and regional bodies over the preceding sixty years of its existence.

4. For details visit, <http://pib.nic.in/release/release.asp?relid=43470>, accessed on 9.10.2008

As noted that the various approaches to disability human rights include Enforceable anti-discrimination legislation, Constitutional guarantees of equality, Specific Entitlement Programmes and Voluntary Human Rights Manifestos. Following this, at the national level, there has been a wave of changes in policy and law. Currently 45 nations in the world have provisions for the protection of the rights of the disabled. While some countries guarantee disability rights and equality in national constitutions; like Austria, Brazil, Canada, Finland, Fiji, Gambia, Germany, Malawi, New Zealand, South Africa, Switzerland and Uganda. Other countries have anti-discrimination legislation which prohibits discrimination on the basis of disability. These include Australia, Canada, Chile, Costa Rica, Ethiopia, Germany, Ghana, Guatemala, Hong Kong, Hungary, India, Ireland, Israel, Korea, Madagascar, Mauritius, Namibia, Nigeria, Philippines, South Africa, Spain, Sri Lanka, Sweden, the United Kingdom, the United States, Zambia and Zimbabwe. In some cases these laws are very extensive and encircle all aspects of life. In others they are specific to, for example, employment, education, housing, etc. Likewise, in some countries the anti-discrimination laws are universal, while in others they are disability-specific.⁵ In this backdrop it is pertinent to note that the study of any law with respect to its national legal system is unfinished without a learning of the international legal regime. More so in the case of a topic like human rights disability law in India because the foundation of the principal statute dealing with the human rights of the Persons with Disabilities in India owes its origin to the *Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region* adopted at Beijing in 1992. It is equally important to assess the international scenario through a reference to the various international instruments. The various United Nations initiatives shall be taken into account considering the concept of 'hard law' and 'soft law'. Since there are 45 nations throughout the globe having disability laws, it is not possible to undertake a study of each of those in this work. Hence

5. Supra note 2 at p.26

with a view to assess the worldwide situation of the rights of the persons with disabilities, study of legislations of a few countries has been undertaken in this study to understand the convergences and divergences of these laws. Thus an attempt has been to refer to the Disability Laws of Europe including the European Union, Germany and U.K.; North America including U.S.A. and Canada; Chile and Costa Rica in South America; Australia; South Africa, and Zimbabwe in Africa and Asia including China and India.

A. THE CONCEPT OF 'HARD LAW AND SOFT LAW' IN INTERNATIONAL LAW:

Prior to making a foray into the various international instruments brought out by the United Nations and other foras it is essential to understand the doctrinal difference of 'hard law' and 'soft law'. The statute of the International Court of Justice (ICJ) enumerates the sources of international law as treaties, custom, general principles of law recognized by civilized nations, judicial decisions and juristic work on international. Another source added under the modern international law is the resolutions and declarations of international organs or institutions. Whereas the first three are the law-creating processes, the others are the means for the determination of alleged rules of international laws. In the case of law creating process, the emphasis lies on the forms by which any particular rule of international law is created. This is being done by law-determining agencies, which verify an alleged rule. Those rules of international law which fall under the category of law creating processes are considered to be 'hard law' and others in the category of 'soft law' since they cannot be classified as full fledged rules of international law like custom, treaties or general principles of law. They have their set mechanism for coming into force as a full-fledged rule of law and they are binding and enforceable against a State. There is always a set

procedure for its enforceability and compliance. If any violation of the rule takes place, the consequences will ensue there from. 6

International human rights treaties are binding on State parties that have ratified the instruments. Some universal instruments, such as the Universal Declaration of Human Rights, and some specific provisions, such as the principle of non-discrimination, have become part of customary international law and are considered binding on all States, even those that have not ratified a human rights treaty that embodies norms of customary law. These are generally termed as 'hard law'. International instruments, such as declarations, resolutions, principles, guidelines and rules, are not technically legally binding. They express generally accepted principles and represent a moral and political commitment by States. They also can be used as guidelines for States in enacting legislation and formulating policies concerning persons with disabilities. These are the 'soft laws' in international law. Whilst the 'hard laws' bind the nations ratifying them, the soft law instruments lack such a power and it is upon the wishes of any particular nation to abide by the principles laid down in the soft law instruments. However once the non-binding obligations of the Declarations are legislated at the municipal level by a State, they create the binding obligations for the state.⁷ In the context of international law, the term "soft law" covers such elements as:

- Most Resolutions and Declarations of the UN General Assembly, for example, the Universal Declaration of Human Rights;
- Elements such as statements, principles, codes of conduct, codes of practice etc.; often found as part of framework treaties;

6. S.K.Verma, "International legal Regime on the Rights of the Persons with Disability: Its Relevance to National Legal System". in S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002), pp.43-50 at p. 45.

7 *Ibid* at pp. 45, 46, 47

- Action plans (for example, Agenda 21);
- Other non-treaty obligations

In spite of being the largest minority groups in the world, encompassing 600 million persons, of which two out of three live in developing countries, disabled people had been rather neglected during the first three decades of the United Nations' existence. The drafters of the International Bill of Human Rights did not include disabled persons as a distinct group vulnerable to human rights violations. There are three legal instruments, which make up the International Bill of Human Rights. These are the Universal Declaration of Human Rights, passed by the General Assembly of the United Nations in 1948, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966. International human rights law has not always adequately acknowledged people with a disability as part of what the 'human', in human rights, means.⁸ If disability is raised as an issue in these documents, it is only in connection with social security and preventive health policy. Most of the efforts of the UN concerning the disabled population has been by way of a number of soft law instruments with a clear focus on disability, e.g. World Programme of Action concerning Disabled Persons (1982), The Standard Rules for the Equalization of Opportunities for Persons with Disabilities (1993), Declaration on the Rights of Disabled Persons (1975), Declaration on the Rights of Mentally Retarded Persons (1971), Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991), Proclamation of the Economic and Social Commission for Asia and the Pacific on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region (1993) and Tallinn Guidelines for Action on Human Resources Development in the Field of Disability. These soft law instruments are non-

8. Anuradha Mohit, Meera Pillai, Pratiti Rungta, "*Rights of the Disabled*", 1st Edition (National Human Rights Commission, New Delhi, 2006), at p. 17

binding in nature which means governments are not bound to consider them while formulating policy or law.

The Hard law instruments include International Covenant on Civil and Political Rights (1966) (ICCPR), together with the two Optional Protocols to the Covenant, International Covenant on Economic, Social and Cultural Rights (1966) (ICESR), International Convention on the Elimination of All Forms of Racial Discrimination (1965) (CERD), Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW Convention) and the Optional Protocol to the Convention (1999), Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT), Convention on the Rights of the Child (1989)(CRC), and its two Optional Protocols (on the involvement of children in armed conflict, and on the sale of children, child prostitution and child pornography) and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).⁹ Only recently the first hard law instrument dealing specifically with the rights of the Disabled has come into force and is called United Nations Convention on the Rights of the Persons with Disabilities (UNCRPD) adopted in 2006 and came into force in 2008. States that are parties to an international convention are legally bound to implement the provisions contained in the convention within their country. International law leaves it to the countries to adopt legislative and other measures that are consistent with their constitutional processes to give effect to the convention and to ensure that any person whose rights are violated have access to effective remedies before independent courts. There are three main methods available to implement international legal instruments in domestic law: -

9. Supra note 2 at Chapter 4: International Human Rights Law and Its Relation to National Law, pp. 39-58 at pp. 41, 42.

1. Direct incorporation of rights recognised in the international instrument into what may be termed a “bill of rights” or fundamental rights of citizens in a country.
2. Enactment of different legislative measures in the civil, criminal and administrative laws to give effect to the rights recognised in international legal instruments
3. Self-executing operation of international legal instruments in the national legal order.

In relation to economic, social and cultural rights, implementation will differ from one country to another, depending on their level of development. Yet, all countries require major programme efforts. The obligation of States Parties in the international human rights instruments to promote progressive realisation of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disability.¹⁰

B. PROTECTION OF CIVIL AND ECONOMIC RIGHTS OF THE PERSONS WITH DISABILITES UNDER THE UNITED NATIONS FRAMEWORK:-

The United Nations was established on the principle of equality for all. The Preamble of the Charter asserts the self-esteem and significance of every human being and gives key weightage to the support of social justice. Persons with disabilities are, in reality, permitted to all the fundamental rights upheld by the Charter. In 1948, United Nations General Assembly proclaimed the Universal Declaration of Human Rights, in which Article 25 says that each person has ‘the right to security in the event of

10. *Ibid*: Supra note 7

unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'. UN's commitment to assist the disabled had evolved since it began addressing the needs of individuals injured in the World War II. In 1950, a conference was organised to discuss about the coordination among the specialised agencies to rehabilitate the disabled, in which UN Secretariat, the ILO, WHO, UNESCO, the International Refugee Organisation (IRO), and UNICEF participated and arrived at an agreement to establish international standards for the education, treatment, training and placement for disabled persons, with particular emphasis on the needs of the blind in under-developed areas. These organisations have focused on delivery of services and have been managed by non- disabled persons, with need based care and protection for persons with disabilities.¹¹

Since the birth of the United Nations after the Second World War the concern on the differently able populace may be studied under various phases. In the 1940s and 1950s the United Nations focused on promoting the rights of the persons with physical disabilities through a range of social welfare approaches.¹² The focus of the United Nations on disability issues shifted in the late 1950s from a welfare perspective to one of social welfare. A re-evaluation of policy in the 1960s led to de-institutionalisation and spurred a demand for fuller participation by disabled persons in an integrated society.¹³ Further, in direct response to initiatives from within the community of persons with disabilities in 1960s, the United Nations initiatives embraced the notion of human rights for persons with disabilities, their full participation in all areas of society through an equalization

11. Ajitha Saravanan, "Conquering disability-the ICT way", viewed at <http://www.itu.int/wsis/tunis/newsroom/highlights/16nov.html>, accessed on 7.10.2008

12. 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. 573.

13. Saurabh Jain, "Effectiveness of the Indian disability Law to enforce Human Rights of Persons with Disabilities". *AIR (Journal)* Vol. 91 (April, 2004), pp. 118-127 at p. 119.

of opportunities.¹⁴ In fact the real awareness of the problems of disabled and their human rights in international thinking came to the fore in the 1970s when United Nations took a number of initiatives which embrace the growing international concept of human rights of persons with disabilities and equalization of opportunities to them. As stated above, the disabled despite being the greatest minority group in the world were not paid much attention by the United Nations in the first three decades of its coming into being. None of the equality clauses of any of the three instruments comprising the Bill of Human Rights (Universal Declaration of Human Rights, passed by the General Assembly of the United Nations (1948), the International Covenant on Civil and Political Rights (1966) (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)) mention disability as a protected category. If Disability is raised as an issue in these documents, it is only in connection with social security and preventive health policy.

Nevertheless, the United Nations has been active in promoting the well-being and rights of persons with physical disabilities through a range of social welfare approaches and has provided assistance to governments in disability prevention and rehabilitation of disabled persons through advisory missions, workshops for the training of technical personnel and setting up rehabilitation centres.¹⁵ The 1970s marked a new approach to disability. It was in this period that the notion of human rights for disabled persons began to grow to be more accepted internationally. Two major Declarations on the disabled were adopted by the General assembly in that decade. In 1971, the General assembly adopted the *Declaration on the Rights of the Mentally Retarded Persons*.¹⁶ This was followed in 1975 by the more inclusive rights document, the

14. A.K.Sikri, Human Rights of the Disabled: World in a Slow Motion, *Journal of Constitutional and Parliamentary Studies*; Vol. 38, Number 1-4; January- December 2004, pp. 1-49 at p.14.

15. *Supra* note 2, at Chapter 1: Disability: Definitions, Estimates and Causes, pp. 9-17 at p.14.

16. General Assembly Resolution No. 2856(XXVI) of December 20, 1971.

*Declaration on the Rights of the Disabled Persons.*¹⁷ A brief discussion of these documents is followed in these lines.

In 1971 General assembly adopted the *Declaration on the Rights of the Mentally Retarded Persons 1971*. The Declaration calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of the rights of the disabled persons, which are enumerated as follows:

1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
3. The mentally retarded person has a right to economic security and a decent standard of living. He has a right to perform productive work or to engage in any meaningful occupation to the fullest possible extent of his capabilities.
4. Whenever possible, the mentally retarded person should live with his or her own family or with foster parents and participate in community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
5. The mentally retarded person has a right to qualified guardian when this is required to protect his personal well-being and interests.
6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.

17. General Assembly Resolution 3447 (XXX) of 9 December 1975.

7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restrictions or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and the right of appeal to higher authorities.¹⁸

Declaration on the Rights of the Disabled Persons, 1975, was adopted by the General Assembly, keeping in view “the necessity of preventing physical and mental disabilities in the most varied fields of activities and of promoting their integration as far as possible in normal life. The Declaration lays down the following principles¹⁹:

1. The disabled person²⁰ shall enjoy all the rights contained in this Declaration without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of health, birth or any other situation applying either to the disabled person himself or herself or to his or her family.
2. The disabled persons have inherent rights to respect for their human dignity and irrespective of their origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age which implies the right to enjoy a decent life, as normal and full as possible.

18. Gursharan Varanandani, “Law Relating to Disable Persons and the Proposed Remedial Measures in the Context of Prospective Action Plan, Disability and Law?” In S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002), pp.78-89 at pp.78, 79.

19. *Ibid* at pp. 79, 80.

20. “Disabled Person “ has been defined as any person unable to ensure himself or herself, wholly or partly, the necessities of normal individual and/or social life, as a result of deficiency either congenital or otherwise, in his physical or mental capabilities.”

3. Disabled persons have same civil and political rights as other human beings.
4. Disabled persons are entitled to the measures designed to enable them to become as self- reliant as possible.
5. Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthotic appliances to medical and social rehabilitation, education, vocational training and rehabilitation aid, counseling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the process of their social integration or reintegration.
6. Disabled persons have the right to economic and social security, including the right, according to their capabilities to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions
7. Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.
8. Disabled persons have a right to live with their families or with foster parents and to participate in all social, creative or recreational activities.
9. Disabled persons have a right to live with their families or with foster parents and to participate in all social, creative or recreational activities.
10. Disabled persons shall be protected against all exploitation and treatment of a discriminatory, abusive or degrading nature.
11. Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their personal property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

Thus the above lines clearly reveal that the declarations are a comprehensive instrument with a clear focus on the rights of 'Persons with Disabilities'. Even so these early instruments still reveal a concept of disability that falls within the medical model, according to which disabled persons are primarily seen as individuals with medical problems, reliant on social security and welfare and in need of segregated services and institutions. It was also during this time that the General Assembly clearly declared that disabled persons were covered by the "other status" category listed in the equality provisions found in the International Bill of Human Rights.²¹

The year 1981 was observed as International Year of the Disabled Persons with its central theme as "Full Participation and Equality".²² It thus set the trend of human rights in the disability arena as the Nations assumed responsibility to guarantee enjoyment of full citizenship and fundamental rights by persons with disability.²³ The principal outcome of this event was the formulation of the *World Programme of Action Concerning Disabled Persons*; adopted by the General Assembly in December 1982. The World Programme of Action was a global strategy to enhance disability prevention, rehabilitation and equalization of opportunities. The first two goals of the World Programme of Action, 1982 (WPA) were prevention and rehabilitation, which echoed a more traditional approach to disability law and policy, but the third goal, equalisation of opportunities, set the outlook for alteration at the international level. "Equalisation of Opportunities was defined as: the process through which the

21. Theresia Degener and Gerard Quinn, "A Survey of International, Comparative and Regional Disability Law Reform", for details visit http://www.dredf.org/international/degener_quinn.html, accessed on 23.12.2007.

22. "We share in 1981 a responsibility which will be historically judged by future generations. Persons with disabilities shall be treated as true citizens of their respective countries, enjoying all the rights man is heir to...If we are to live up to the principles embodied in the goals of the Year... Governments must work to equalize opportunities...in all aspects of daily life...This requires the development of new approaches towards rehabilitation which de-emphasize the institutional approach". --Mrs. Leticia Shahani, Assistant Secretary-General, Chief of the Centre for Social Development and Humanitarian Affairs, United Nations secretariat.

23. Supra note 9 at pp. 14, 15.

general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all.²⁴

On the heels of this was the proclamation of the *United Nations Decade of Disabled Persons, 1983- 1992*. The Decade intensified the debate on equal opportunities and non- discrimination. Recognition of the inherent equality of all human beings as well as the entitlement of each individual to all human rights forms the core of human rights.²⁵ Hence throughout the decade, the equal rights component of disability policy and law became the prime goal of the rising international disability rights movement. The social and humanistic sheen to right to development assumes significance in the context of Persons with Disabilities in equalization of opportunity and meaningful enjoyment to life. The exemplary shift i.e. development is more than development itself holds a great promise in translating the human right to development for Persons with Disabilities into practice. This trend is discernable in *Vienna Declaration*²⁶ when it says that ‘persons including person with disability is born equal and has same rights to life and welfare, education and work, living independently and active participation in all aspects of society’. Any direct discrimination or negative discriminatory treatment of Persons with Disabilities is violation of Human Rights.²⁷ Therefore, persons with disabilities should be guaranteed equal opportunity through the elimination of all socially determined barriers, be they physical, social and psychological, which exclude or restrict full participation in society.²⁸ The Declaration gave a clarion call to General assembly, Economic

24. Supra note 12 at *ibid*.

25. Supra note 21

26. Supra note 9 at p.15.

27. The Vienna Declaration on Human Right, 1986

28. *Ibid*, Article 63, Article 64.

and Social Council and other states to draft standard rules on the equalization of opportunities for persons with disabilities.²⁹

Other chief influences that facilitated a standard change from the medical model to the human rights model were two thematic reports, one on human rights in the field of mental health and the other on human rights violations with consideration to disabled person; both prepared by the United Nations Commission on Human Rights. These reports were the first to identify disability as thematic issue within the human rights division of the United Nations, which in turn assisted disabled persons to be considered not only as beneficiaries of charity measures but as subjects of human rights violations. A few other noteworthy guidelines and standards were adopted during the decade, but schemes for a binding treaty on the human rights protection of disabled persons did not find majority support within the 3rd Committee of the General Assembly in either 1987 or 1989.³⁰

The next important action of the UN was in the form of *Standard Rules on the Equalization of Opportunities for Persons with Disabilities (UNSR)* which were adopted by the General Assembly on December 20, 1993³¹ with the purpose of achieving affirmative and complete inclusion of persons with disabilities in every facet of society under the leadership role of the United Nations.³² The Standard Rules set out explicit standards of law and policy for member states, standards that, if adhered to in practice, are designed to achieve equalization of opportunities and equal participation for persons with disabilities in all major areas of social life. It outlines in detail, what policies and practices serve to guarantee rights to education, work, social security and protection from

29. *Ibid*, Article 65.

30. *Supra* note 21

31. The United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities 1993 (UNSR). U.N.Doc A/ Res/48/96.

32. *Supra* note 12 at *ibid*

inhuman or degrading treatment.³³ As stated in the Preamble the purpose of UNSR is:

1. To stress that all actions in the field of disability pre-supposes adequate knowledge and experience of the conditions and special needs of the people with disabilities.
2. To emphasise that the process through which every aspect of societal organization is made accessible to all is a basic objective of socio-economic development.
3. To outline the crucial aspects of social policies in the field of disability, including as appropriate, the active encouragement of technical and economic co-operation.
4. To provide models for the political decision- making process required for the attainment of equal opportunities, bearing in mind the widely differing technical and economic levels, the fact that the process must reflect keen understanding of the cultural context within which it takes place and the crucial role of the persons with disabilities.

The UNSR recognizes four pre- conditions for equal participation by persons with disabilities in society, namely, the raised awareness in society about the rights, needs, potential and contributions of persons with disabilities, the provisions of effective medical care and rehabilitation services to people with disabilities and finally the development and supply of support services including assistive devices for persons with disabilities. This has been laid in Rules 1 to 4 of the Declaration.³⁴ Eight target areas are recognized. These include accessibility, in terms of the physical environment and information and communication, education, employment, income maintenance and social security, family life and

33. *Ibid.*

34. 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, pp. 181,182

personal integrity, culture, recreation and sports and religion.³⁵ Rule 15 in particular, mandates that all states have the full responsibility to create the legal bases for all measures required to achieve the objectives of full participation and equality for persons with disabilities.³⁶ The standard rules contain a powerful message to the world. The message is that the concept of equality implies the notion of the indivisibility, interrelation and interdependence of the two sets of human rights: civil and political rights on the one hand and economic and social rights on the other hand. The rules proclaim:

“Equalization of opportunities means the process through which the various systems of society and environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities. The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for planning of societies and that all resource must be employed in such a way as to ensure that every individual has equal opportunity of participation. People with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within their local communities. They should receive the support they need within the ordinary structures of education, health, employment and social services. It is hoped that the rules can become customary rules when they are applied by a great number of states with the intention of respecting a rule in international law.”³⁷

In contrast with the other non-binding international disability instruments, the UNSR have a Special Rapporteur and a panel of experts who have been given the mandate to promote and monitor the implementation of the rules. The report of the panel, consisting of ten representatives from six major international non-governmental organizations in the disability field, reflects a clear human rights orientation towards monitoring.³⁸ Thus it can be said to be the most remarkable development in terms of soft law instruments. Adopting what could be referred to as a social model of disability; they set out a number of

35. Supra note 27, Rules 5-12

36. Supra note 34

37. Supra note 12 at pp.573-574

38. Supra note 27, Introduction Para 14.

practical measures for achieving substantive equality for persons with disabilities. The areas for development listed in the Standard Rules include awareness building, education, information and research, and national monitoring and evaluation of disability programmes. The Standard Rules exemplified the shift from a charity-based approach to disability to one that is based on human rights³⁹

The United Nations Decade of Disabled Persons, 1983—2002, concurred with a phase of economic vigor right through much of the Asian and Pacific region. The ultimate years of the United Nations decade also witnessed principal breakthroughs in peace building in the region marked by considerable enhancement in conflict resolution and rapprochement between various States. It was in this warm background that the Social Development Strategy for the ESCAP Region towards the Year 2000 and beyond was adopted by the Fourth Asian and Pacific Ministerial Conference on Social Welfare and social development, held at Manila in October 1991. The Strategy has the ultimate aim of improving the quality of life of all people of the ESCAP region. With that end in view, the indispensable objectives of the Strategy are the eradication of absolute poverty, the apprehension of distributive justice and the expansion of popular participation. Within the framework of those aims and objectives, the Strategy assigns priority to the region's disadvantaged and vulnerable social groups, including persons with disabilities. Further to the priority given to the concerns of persons with disabilities in the regional Social Development Strategy, thirty-three countries attending the forty-eighth ESCAP session in April 1992 joined in backing of *Resolution 48/3* on an Asian and Pacific Decade of Disabled Persons, 1993-2002. In adopting the resolution, the Governments of the region articulated their united vow to the full participation and equality of people with disabilities. The Asian and Pacific Decade of Disabled Persons provides an opportunity for

³⁹ Supra note 21

the 56 countries and areas of the ESCAP region to consolidate the efforts initiated during the preceding UN Decade through a new emphasis on regional co-operation in support of progress at the national level. In particular, it provides a context for the intensifying of technical co-operation among developing countries, as well as between the regions's developing and developed countries, in the resolution of key issues that affect the lives of people with disabilities. To accomplish the objectives of the Asian and Pacific Decade of Disabled Persons, an agenda for action is needed that translates the World Programme of Action concerning Disabled Persons into an Agenda for the Asian and Pacific region, in response to the review and appraisal of the achievements of the United Nations Decade of Disabled persons, 1983-1992, in the Asian and Pacific region as contained in document SD/DDP/1, 1992. The present document provides a framework for the formulation of that agenda for action. The framework consists of the major policy categories under which efforts for the implementation of ESCAP resolution 48/3. These basic policy categories include: National Co-ordination; Legislation; Information; Public Awareness; Accessibility and Communication; Education; Training and Employment; Prevention of causes of disabilities; Rehabilitation services; Assistive devices; self-help organizations; and Regional co-operation. Each of the policy categories constituting the framework contains a roll of areas of concern of direct relevance to the development of policies in support of the full participation and equality of people with disabilities in Asia and the Pacific.⁴⁰ Some other major developments include - The *International Conference on Population and Development* is held in Cairo in 1994. It recognized the importance of equalizing opportunities for people with disabilities; The World Summit for Social Development was held in Copenhagen in March, 1995. It adopted the *Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development*.

40. For details on UN Instruments visit. <http://www.un.org/documents/ga/res/48/a48r096.htm>, accessed on 2.10.2008.

A meeting held at Bangkok in June 1995 examined the progress made since the introduction of the decade and adopted 73 targets and 78 recommendations concerning the implementation of the Agenda for Action, including the gender dimensions of implementation. Of the 12 policy areas under the Agenda for Action, ESCAP has focused its efforts on areas that were not covered by the mandates of other United Nations instruments and bodies. The policy areas include national co-ordination, legislation, information (in particular, disability statistics), accessibility, assistive devices and self-help organizations of disabled persons. A comparative advantage of the ESCAP disability programme was the development of active inter-divisional collaboration, including the ESCAP Human Settlements Section in the Promotion of non-handicapping environments, the Rural Development Section in poverty alleviation among rural disabled persons, the General Transport Coordination and Communications Section and the Tourism Unit in the promotion of accessible public transport and the promotion of barrier-free tourism.⁴¹

The United Nations Commission on Human Rights also passed two significant resolutions in 1998 and 2000. The resolutions recognized that national governments are responsible for the protection of the rights of people with disabilities and that the U.N. has an important role in promoting development in this area. *Resolution 1998/31* of the Commission on Human Rights recognizes that inequality and discrimination related to disability are violations of human rights. *Resolution 2000/51* called for an examination of measures to strengthen the protection of human rights of people with disabilities. The UN General Assembly in its *Resolution 56/ 168, 2001* recognises that governments, UN Bodies and NGOs have not been successful in promoting full and effective participation of the opportunities for the 'persons with disabilities' in economic, social, cultural and political life. Expressing deep concern "about the

⁴¹ Gautam Banerjee, *Disability and the Law*, Commercial Law Publishers (2005), pp. 124, 125.

disadvantages faced by 600 million disabled persons around the world” the General Assembly passed a resolution to establish an ad hoc Committee to consider proposal for a comprehensive and integral international convention taking into account the recommendations of the Commission for Human Rights and the Commission for Social Development. This resolution is a clear example of attention to disability rights at the international level. The Ad Hoc Committee has held several sessions for governments to consider a disability rights treaty and a working group prepared a draft text of disability rights treaty which recognized disability as a human rights issue of international concern by creating legally binding human rights obligations specific to the needs and situation of people with disabilities.⁴²

In addition to the above in 1983, the ILO provided guidelines for employment opportunities for the disabled people in the form of *Vocational Rehabilitation and Employment (Disabled persons) Convention, 1983*.⁴³ The Convention for its application defines the term ‘disabled person’ in Article 1(1) as, “ an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment”. The Convention also lays down the principles of vocational rehabilitation and employment policies for disabled persons. In addition to this there are a few other non-binding instruments, which are: Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991); Tallinn Guidelines for Action on Human Resources Development in the Field of Disability; Sundberg Declaration on Actions and Strategies for Education, Prevention and Integration adopted by the UNESCO World Conference on Actions and Strategies for Education, Prevention and Integration Malaga (Spain), 2-7 November, 1981 amongst others.

42. For details on UN Resolutions, visit [http:// www.un.org](http://www.un.org).

43. ILO Vocational and Rehabilitation and Employment (Disabled Persons) Convention No. 159 (1983)

So far as the hard law developments are concerned, disability was a forgotten category when the International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966) were drafted, these treaties are currently interpreted in a way that supports the human rights approach to disability. General Comment⁴⁴ No. 18 to the International Covenant on Civil and Political Rights (1966), which deals with the right to equality,⁴⁵ clearly rejects the concept of formal equality in the human rights context. The Comment affirms that equal treatment does not always mean identical treatment, and that States have a duty to take steps to eliminate conditions that perpetuate discrimination. The Committee on Economic, Social and Cultural Rights went even further and adopted a General Comment on how to interpret and implement International Covenant on Economic, Social and Cultural Rights (1966) with respect to persons with disabilities. General Comment No. 5, which the Committee adopted in 1994, was the only legal United Nations document that broadly defines 'disability based discrimination' as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.⁴⁶ Here the Committee makes an analysis of disability as a human rights issue and makes a clear demand for anti-discrimination legislation. The Committee states: "The Covenant does not refer explicitly to 'persons with disabilities'. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and since the

44. General Comments are authoritative statements of the committee of its understanding of rights enshrined in the International Covenant on Economic, Social and Cultural rights. General comments, adopted by most human rights treaty bodies may be used to guide States in the implementation of international human rights norms, and to measure the level of compliance of state parties with regard to their specific rights contained in human rights conventions—United Nations enable website <http://www.un.org/esa/socdev/enable>, cited in *Halsbury's Laws of India*, Vol. 23, pp.400, 401.

45. See International Covenant on Civil and Political Rights (1966), Article 25.

46. *Supra* note 21.

Covenant's provisions apply fully to all members of society, 'persons with disabilities' are clearly entitled to the full range of rights recognized in the Covenant. Moreover, the requirement contained in Article 2 of the Covenant that the rights enunciated will be exercised without discrimination of any kind based on certain specified grounds or other status clearly applies to cover persons with disabilities".⁴⁷

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was created to deal with particular groups or categories of persons who are at risk of discrimination. Convention on the Elimination of all Forms of Discriminations against Women (CEDAW), 1979 is a human rights treaty with focus on women in general and marginalized and vulnerable women in particular. This treaty also recognizes that disability combined with gender stereotype causes multiple disadvantages and recommends the State amongst others, to include information on women with disabilities in

To illustrate the relevance of various provisions of ICECSR, a few articles are examined below: *Article 6* stipulates 'the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses and accepts'. Thus, when there is a denial of job opportunity on the ground of disability, the aforesaid article is clearly infringed. *Article 7* refers to the "right of everyone to the enjoyment of just and favourable conditions of work which ensures adequate remuneration". The just and favourable conditions of work have been interpreted and *Article 7* refers to the "right of everyone to the enjoyment of just and favourable conditions of work which ensures adequate remuneration". The just and favourable conditions of work have been interpreted and translated into the domestic labour standards by several governments. The concept of reasonable accommodation and barrier free work environment is in fact premised on the notion set out in Article 7 of "providing or modifying devices, services or facilities or changing practices or procedures in order to afford participation on equal terms." Examples of "reasonable accommodation" includes installation of a wheel-chair ramp and elevators for people with mobility impairments, introduction of part time work schedules for workers with severe impairment conditions, availability of readers for visual impairment, and sign translation for people with hearing impairments. *Article 11* recognizes that everyone has the "right to an adequate standard of living for himself and his family, including adequate food, clothing and housing." Available statistics show that word over this Article is grossly violated in the case of 'persons with disabilities'. High correlation between disability and poverty, and disproportionate number of disabled children in orphanages, visible presence of maimed, blinded and mentally ill persons amongst beggars are some examples. *Article 15* recognizes the "right of everyone to take part in cultural life." This right is as relevant for 'persons with disabilities' as it could be for any other group. Connectivity and accessibility of places of cultural activities is thus critical for the effective integration of the 'persons with disabilities'.

their periodic reports with respect to their exercise of several rights contained in the Convention.⁴⁸ The Committee on the Elimination of Discrimination Against Women has adopted General recommendations that ask State Parties to include specific information on the status of disabled women, and has addressed the issue of disability in other thematic recommendations.⁴⁹ These treaties generally serve two purposes. First, they establish the principle of non-discrimination with respect to the enjoyment of all human rights for the categories of persons covered. Secondly, they add specificity to the general International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights rights, tailoring those more directly to the circumstances of the groups covered. Then, the Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, 1984 which highlights the plight of millions of people with disabilities who are subjected to inhuman and degrading treatment in the institutions meant for their care and development, and calls upon the Member states to prevent such torture. Also, the Convention on the Rights of the Child (CRC), 1989 emphasise the rights of the disabled child to effective access and reception of education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development including his or her cultural and spiritual development. Unlike the other international human rights instruments, the CRC contains two provisions relating to disability. Article 2 expressly prohibits any discrimination in respect of the enjoyment of Convention rights on the ground of disability. Most importantly, the Convention includes a specific provision on the rights of children with disabilities (Article 23).⁵⁰

48. *Supra* note 9 at p. 16

49. *Supra* note 21

50. "The evolution of the international law on disability", viewed at <http://www.indlaw.com/ActionAid/?Guid=FD45006F-B2BC-4BCD-A672-5DB54948609D>, accessed on 1.9.2008.

While arguing for the Disability Convention, the Asia and Pacific Forum of National Institutions for Human Rights emphasized that “a coherent and integrated human rights approach to disability cannot be developed under the present treaty system” and an exclusive convention would give “status, authority and visibility” to disability in the human rights area which cannot be achieved through the process of reform of existing instruments and monitoring mechanisms. Adding a new treaty would also complement existing international standards for the rights of the disadvantaged. Favouring thematic treaty on disability rights, Gerard Quinn states, “It would make much more sense to encapsulate the relevant human rights standards in a single legal instrument. It would clarify state parties’ obligations and it would give disability NGOs a clear target---one that is dedicated to disability rights in a holistic sense. This, in turn, could potentially enable international law to accelerate positive developments within states”.⁵¹ Consequently the much awaited and historic convention marking the paradigm shift took place when The Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007. The Convention has come into force from 3rd May 2008 with 20 countries ratifying this. India too is a signatory excluding the Optional Protocol and thus committed to follow the convention. Jamaica was the first nation to ratify the Convention and Ecuador the 20th. It is the first broad human rights treaty of the 21st century and the first human rights convention to be open for signature by regional integration organizations. The Convention is projected as a human rights instrument with an explicit, social development facet. It espouses a broad classification of persons with disabilities and reaffirms that all persons with all types of disabilities should gain from all human rights and fundamental freedoms. It elucidates and qualifies how all kinds of rights relate to persons with disabilities and categorizes areas where adjustments have to be made for persons with

51. Supra note 11 at pp. 17,18

disabilities to proficiently implement their rights and areas where their rights have been dishonoured, and where protection of rights must be toughened.⁵²

The new Convention comprises of fifty articles. *Article 1* of the Convention says, “*The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*” The Convention, in Article 1, further 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 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.”⁵³ *Article 3* of the Convention has stipulated the underlying principles of this convention as:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;

52. Supra note 42

53. C. Mahesh, “A Paradigm Shift From ‘Charity’ to ‘Rights and Dignity’ - A write-up based on the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)”, viewed at <http://accessability.co.in/community/about721.html> accessed on 1.10.2008.

- (h) Respect for the evolving capacities of children with disabilities, and respect for the right of children with disabilities to preserve their identities.

Some of the major provisions are:

1. Prohibition by State parties of all discrimination on the basis of disability, and take all appropriate steps to ensure that reasonable accommodation is provided.⁵⁴
2. State parties are to guarantee that persons with disabilities enjoy their inherent right to life on an equal basis with others. They would ensure the equal rights and advancement of women and girls with disabilities and also protect children with disabilities. In addition, they shall adopt appropriate measures to raise awareness throughout society, to foster respect for the rights and dignity of persons with disabilities and to combat stereotypes, prejudices and harmful practices relating to them. Similarly, on the fundamental issue of accessibility, the Convention requires State parties to identify and eliminate obstacles and barriers, and ensure that persons with disabilities can access their transportation, public facilities and services, information and communications.⁵⁵
3. Countries must also guarantee freedom from torture, cruel, inhuman or degrading treatment or punishment, and prohibit medical or scientific experiments without the consent of the person concerned and protect the physical and mental integrity of persons with disabilities.⁵⁶
4. State parties are also obliged to ensure the equal rights of all persons with disabilities to live independently in the community, with choices equal to others, and shall take effective measures to facilitate full enjoyment by

54. Article 5.

55. Articles 6-10

56. Articles 15 and 16

persons with disabilities of this right, and their full inclusion and participation in the community.⁵⁷

5. Children with disabilities would have equal rights, would not be separated from their parents against their will, except in their best interests, and would in no case be separated from their parents on the basis of a disability of either the child or the parents. The same article also talks about the elimination of discrimination relating to marriage, family and personal relations. Persons with disabilities should be able to choose their own living arrangements, and have rights to protection against involuntary institutionalisation.⁵⁸
6. *Article 24* enjoins State-Parties to ensure that there is an inclusive education system at all levels and life long learning directed towards full development of their personality, talents, creativity, mental and physical abilities to their fullest potential.
7. According to the Convention, persons with disabilities have the rights to the highest attainable standard of health without discrimination on the basis of disability. They would receive the same range, quality and standard of free or affordable health services as provided to other persons and not be subjected to discrimination in the provision of health.⁵⁹
8. State parties have been enjoined to take necessary steps to prohibit discrimination in matters regarding work and employment. This protraction against all forms of discrimination, apart from the ideal situation of attitudinal change in society, can also be achieved through the use of anti-discriminatory legislations.⁶⁰
9. States Parties have been asked to take steps to safeguard and promote that realization of the right to an adequate standard of living and social protection, including ensuring “access by persons with disabilities and

57. Article 19

58. Article 23

59. Article 25

60. Article 27

their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care”.⁶¹

10. States must set up national focal points governments in order to monitor implementation of the Convention's precepts. States must also set up independent monitoring mechanisms, which usually take the form of an independent national human rights institution.⁶²

It can thus be seen that the rights assured under the UNCRPD are wide-ranging and deal with all facets of the life of persons with disability. If executed in its true spirit, there will, undeniably, be extensive transformation in the lives of not just persons with disabilities but as well in the lives of other citizens of the country. Hence apart from creating awareness on the issue there is also a need to build up proper strategies to review existing laws, policies, programmes and monitoring mechanisms of Govt. Non-Government Organisations and other agencies. Further, this Convention by proposition is not restricted to only Govt. establishments. The Convention states that private businesses and organizations that are open to the public parties have to take enterprise to “eliminate barriers that people with disabilities face in buildings, the outdoors, transport, information, communication and services”. It is no longer enough to be content with providing a few “good willed” services such as a “wheelchair” or a “hearing aid” or “disability pension”. It is going to be whether the laws, policies, programmes and schemes are in line and reinforce the principles of the Convention that focus on Dignity, Ability to choose, Independence, Non-discrimination, Participation, Full inclusion, Respect for difference, Acceptance of disability as part of everyday life, Equality of opportunity, Accessibility, Equality of men and women and Respect for children. By signing and ratifying this Convention, it is now legally binding on India and

61. Article 28

62. Article 33

other countries of the UN to create and promote an atmosphere where persons with disabilities are competent to put into effect their civil, political, social and cultural rights fairly and without bias.⁶³

Thus the UN has recognized the status and problems being faced by the persons with disabilities around the world and has reminded the nations from time to time to give priority to their all round development by formulating the decadal and yearly plans. The World Programme Action has been prolonged with the support of the UN and it is aimed at achieving a society for all by the year 2010. Further the UN designated December 3 as the “International Day of the Disabled Persons”. But the greatest achievement has been by way of the *Convention on the Rights of Persons with Disabilities*. The Convention is dreams come true for the innumerable persons with disabilities, the NGOs working for them and the disability rights activists. But since it has just come into force it would be too early to comment on its efficacy or drawbacks. But the success of the Convention undoubtedly lies on the member states that have ratified it and assured to usher changes in their domestic laws accordingly.

D. DEVELOPMENTS AROUND THE GLOBE:

As per the UN Convention, a need subsists for more inclusive legislation to guarantee the rights of disabled persons in all aspects - political, civil, economic, social and cultural rights - on an equivalent basis with persons without disabilities. Legislation at country level is essential in encouraging the rights of persons with disabilities. While the significance and increasing position of international law in upholding the rights of persons with disabilities is recognised by the international community, domestic legislation remains one of

63. Supra note 53

the most effective means of facilitating social change and improving the status of disabled persons.⁶⁴ The United Nations is at present building up monitoring system to encourage and assist member states in their efforts to implement the recommended measures in conformity with the rules. The states though have the ultimate responsibility to take steps in consonance with the standard rules.⁶⁵ In the lines to follow we shall discuss the legal developments at the regional level and ascertain how far the norms set up by the UN have been implemented and also what solution has been provided to the unequal treatment of disabled people. It is not feasible to go into the detailed legal framework or policy of each of the countries securing the civil rights of the persons with disabilities throughout the world. However an attempt shall be made to assess the legal framework in each of the continents, namely Europe (The European Union including Hungary, Sweden, Spain and Ireland; United Kingdom and Germany), North America (U.S.A., Canada), South America (Chile and Costa Rica), Africa (South Africa and Zimbabwe), Australia (Australia and New Zealand) and Asia (China and India). A reference to some other anti discriminatory laws may also be made as and when relevant.

(a) Europe

(i) European Union

In most of the countries of the European Union the protection of human rights of the disabled people is a matter of social policy rather than a matter of social legislation. Most countries in Europe already have disabled-friendly laws and people with disabilities are entitled to help and assistance to mitigate their problem. The general goal is to overcome, as much as possible, the

64. For details on the UNCRPD visit <http://www.indlaw.com/ActionAid/?Guid=F7DCF339-E339-4F83-B9E5-0380E90A0623>, accessed on 12.9.2008 .

65. Supra note 34 at p. 183

disability's effects and to enable the disabled to participate in all areas of society, especially in the labour market and in community life. The most outstanding event has been the amendments to the Treaty of Rome 1957 on October 1997, which took effect from May 1, 1999 as a result of which the member states have been enabled to pass legislations for the protection of the persons with disability. The system of law of the European Union is inimitable, as the protected rights are made accessible to the individuals.⁶⁶ Of the several countries making up the Union, only four nations have civil anti discrimination legislations to their credit. The four nations are Ireland, Sweden Hungary and Spain. A brief description of the prevailing laws is as under.

In Belgium, there is no direct legislation on disability. However, the disability policy focuses on education, social integration, and entry into labour work, the improvement of living conditions and greater independence for people with disabilities.⁶⁷ In Denmark, the government accords high priority to the United Nations Standard Rules in the national handicap planning of activities.⁶⁸ In Austria, the Federal Ministry for Labour, Health and Social Affairs defends the welfare of disabled people and implements the constitutional pledge to the people with disabilities. In July 1997, Article 7 of Austria's Federal Constitution was extended to incorporate the prohibition of discrimination on ground of disability. Article 7 of the constitution also includes a national commitment to ensure that people who are disabled are taken care of in the same way as non-disabled people.⁶⁹ In France, the disability rights have been laid down in two basic texts, namely Act of 30 June 1975---- on guidance for people with disabilities and the Act of 10 July 1987--- on the promotion of the employment of disabled people. The theory underlying the French policy is main concern for assimilation of the

66. *Ibid.*

67. *Ibid* at p. 184.

68. *Ibid*

69. *Ibid*

disabled people into an ordinary environment.⁷⁰ The Greek Parliament has endorsed the World Programme Action by Act No. 2430 of 1996 and a Committee has been set up to organize a national action plan for the people with disabilities.⁷¹ Italy has issued a declaration of policy under the title “*Framework Law on the Care, Social Integration and Rights of the Disabled People*” (Law 104/92) encircling subjects relating to prevention and diagnosis, treatment and rehabilitation, right to educational, vocational and social integration of the people with disabilities.⁷² In Luxembourg, the Minister for Disabled people synchronizes disability policies in the field of education, employment and social integration of the people with disabilities. *Disabled Workers Act* of 12 November 1991 seeks integration of disabled people in the labour market.⁷³ In Netherlands, *The Vocational (Re) Integration of the Disabled People Act* came into effect on July 1, 1998 and aims vocational rehabilitation of people with a disability and also takes care of social integration of disabled people. Portugal has passed Law no. 35.96 of May 1996 for execution of policies concerning the rehabilitation and integration of people with disabilities. In Finland, the National Council on Disability published a national disability programme in 1996 on empowerment of disabled people in the fields of education, employment and social integration.⁷⁴

In Spain, the officially recognized disability policy is expressed in law and in guidelines adopted by the Government. The prominence - in descending scale - is on: individual support, rehabilitation, prevention, accessibility measures and anti-discrimination law. The rights of persons with disabilities are protected by a combination of special and general legislation. The judicial mechanism available to protect the rights of persons with disabilities is due process (legal remedy through courts). Administrative and other non-judicial

70. *Ibid*

71. *Ibid* at pp. 184, 185

72. *Ibid* at p. 185

73. *Ibid*

74. *Ibid*

bodies include: an Ombudsman, a Governmental body (administrative) and a special arbitration/conciliation body. The main Legislations include *Law on the Social Integration of the Disabled (LISMI)* enacted in 1982 and “*Law of Equal Opportunities, Non- Discrimination, and Universal Access for Persons of Disability*”, 2003. LISMI is typical as it deals with the prevention, diagnosis and assessment of disability, the establishment of a system of benefits in cash and kind, medical and vocational rehabilitation, community services, integration at work, etc. The only anti-discrimination provision in the Act states that any discriminatory disability-based provision found in labour regulations, collective agreements, individual contracts or unilateral decisions shall be null and void. Further, an action plan for disabled people was adopted in 1996 for social integration of people with disabilities. The latter when basically describing its sphere of application refers to telecommunications and information society, public spaces with outline planning permission, infrastructures and building, transport, property and services for the public use, and relations with public authorities, and as a supplementary source for employment.⁷⁵ Spain has ratified the UN Convention on Disability on 3rd December 2007. Hence it can be hoped that the country will surely make the required changes in its domestic legislation to match up with the Convention.

Ensuring that people with disabilities have power and influence over their everyday lives has long been the prime goal of Swedish disability policy. A national action plan on disability policy, “From Patient to Citizen,” adopted in 2000, has shifted the emphasis in Swedish policies targeting disabled people. Before, government action in this area largely centered on social issues and welfare matters. In pursuit of this goal, the focus has now shifted to democracy and human rights. Therefore, Swedish disability policy is now concentrating on

75. *Supra* note 21

- identifying and removing obstacles to full participation and full equality in society,
- preventing and fighting discrimination,
- promoting equality between disabled girls and boys, women and men.

Sweden has four laws prohibiting discrimination, one of the grounds cited being disability. The first, the *Prohibition of Discrimination in Working Life of People with Disability Act*, was adopted in 1999. This was followed in 2002 by the *Act on Equal Treatment of Students at Universities* and in 2003 by the *Prohibition of Discrimination Act*, which applies among other things to trading in goods and services. In 2006, a law was added prohibiting the discrimination of children with disabilities, etc, at preschool and school. Sweden does not have a law specifically establishing the rights of all people with disabilities. Instead, certain laws contain clauses that apply specifically to disabled people, including the *Planning and Building Act* and the *Social Services Act*. Also, the *Act concerning Support and Service for Persons with Certain Functional Impairments (LSS)* was introduced in 1994. This is a rights law supplementing other legislation. Its aim is to give people with extensive disabilities greater opportunities for leading an independent life and to assure them of equal living conditions and full participation in community life. Support may take the form of personal assistance in everyday life, counselling, housing with special services, or relief provision for the parents of children with disabilities.⁷⁶ A Disability Ombudsman has been appointed to appraise the measures adopted by the government to realize the United Nations Standard Rules. The Disability Ombudsman can attend to complaints of disabled people, but has no power to take action before the court. The policies for vocational rehabilitation, employment, accessibility and social integration of disabled people have also been adopted.⁷⁷

76. For details on Swedish disability Policy, visit http://www.sweden.se/templates/cs/FactSheet_____17674.aspx accessed on 2.10.2008.

77. Supra note 34 at p. 185.

The disability movement in *Ireland* began in the 1990s. In Ireland, the government has undertaken a number of enterprises since 1993 for upholding equal opportunities for people with disabilities together with the establishment of the *Commission on the Status of the People with Disabilities and Irish Council of People with Disabilities*. Its main focus was on people with disabilities as people and equal citizens in a changing Irish society. It was made up of representatives from the government, advocates, people with disabilities and their family members. The *Employment Equality Act* was enacted in 1998 to provide for equality in matters of employment to persons with disabilities.⁷⁸ In 2004, the *National Disability Strategy* was launched. It builds on existing policy and legislation, including the policy of mainstreaming public services for people with disabilities. Many important pieces of legislation have been developed along the way, including the *Equal Status Act of 2000* and the *Equality Act of 2004*, which amends the former as well as the *Employment Equality Act, 1998*. *Education of Persons with Special Educational Needs Act (EPSEN)* was also enacted in 2004. So far as UN Convention on Rights for People with Disabilities is concerned the Irish officials played a key role in drafting the Convention but the Government has yet to say when it will ratify it. But the disability rights activists and the organizations working have raised a very strong voice favouring the quick ratification of the Convention.⁷⁹

Hungary is one of the leading pioneers that have made substantial efforts in order to ensure equal opportunities and to eliminate the discrimination against persons with disabilities on the one hand, and to ensure equal treatment, including positive actions, on the other. As regards the legal framework, Hungary in adopted the *Act on the Rights of People with Disabilities* in 1998. The Act was adopted in order to ease the disadvantages of persons living with disability, to lay

78. *Ibid.*

79. Visit <http://www.dredf.org> for detailed laws on disability

the foundations for their equality of opportunity and to shape the attitude of the society. The aim of this Act is to:

- define the rights of persons living with disability
- define the instruments for the exercise of these rights
- regulate the complex rehabilitation to be provided for persons living with disability,
- ensure equality of opportunity, independent living and active participation in the life of society for persons living with disability.⁸⁰

In this Act person living with disability means anyone who is to a significant extent or entirely not in possession of sensory – particularly sight, hearing – locomotor or intellectual functions, or who is substantially restricted in communication and is thereby placed at a permanent disadvantage regarding active participation in the life of society. The Act touches upon a number of issues including rights entitled by persons living with disability; target areas for the equalisation of opportunities which touch upon Health care, Education, training, Employment, Place of residence and Culture and sport. Rehabilitation and disability support also find place in the Act. Chapter VI provides for National Disability Affairs Council to assist the Government in carrying out its tasks related to disability affairs. It is interesting to note that the Hungarian Act is one whose aims and basic principles fully correspond with the United Nations Convention. Rights ensured to people with disabilities are also quite similar to the ones foreseen by the Convention. The implementation of the Act has been facilitated by subsequent, multi-annual National Programmes on Disability Affairs. The most recent one being adopted in 2006. Hungary has not only ratified the UN Convention on Disability Rights but also the Optional Protocol. Thus at this juncture it is beyond doubt that Hungary will lag behind in any way in the protection of the human rights of the especially able.

80. Chapter I, *Act on the Rights of People with Disabilities, 1998*.

As a result it can be seen that majority of the European Union nations put emphasis on equality on matters of employment but very few countries have an all-pervasive disability specific legislation. The Acts concentrate on one area while segregating the rest. In fact the Hungarian Law is the most explicit and wide ranging both in terms of content as well as application. However a general feature of shifting towards the human rights approach to disability rights is worth noticing. With the Disability Convention in place and the European Commission having accepted to be a party to it as well as individual nations too consenting to ratify the Convention, it is anticipated that the nations shall take all steps necessary to bring changes to their existing legal structure and accommodate the rights of the persons with disabilities. It is also worth mentioning that the European nations have chose to keep themselves away from ratifying the Optional protocol to the Convention.⁸¹

(ii) United Kingdom

Disability discrimination, or the second-class treatment of individuals living with physical, mental and/or emotional disabilities, is both unsuitable and in various circumstances unlawful in the United Kingdom. A variety of legislation makes discrimination against individuals with disabilities prohibited in the United Kingdom.⁸² The *Disabled Persons (Employment) Act, 1944* was the earliest legislation, which dealt with the protection of the disabled workers through which a method of statutory job quota prevailed upon employers of twenty or more employees. However, today the most comprehensive legislation in the U.K. dealing with the rights of the disabled is the *Disability Discrimination Act, 1995* (amended in 2001 and 2005). The Act defines disabled person as a “person who has (or has had) a disability” and a person has a disability “if he has

81. Supra note 42

82. Supra 34 at p. 185

a physical or mental impairment which has substantial and long term adverse effect on his ability to carry out day to day activities".⁸³ Discrimination means "for a reason which relates to the disabled person's disability" the employer "treats or would treat others to whom that reason does not or would not apply". However, the employer can take the plea of justification where it can be shown that the less favourable treatment of disabled person is a reason that "is both material to the circumstances of a particular case and substantial".⁸⁴ The Act prohibits disability related discrimination in terms of employment and contract work or by trade unions, employer's associations and trade or professional organizations.⁸⁵ The Act makes it illegal for employers to discriminate against disabled persons in recruitment and selection, in terms of employment and in employment opportunities in general.⁸⁶ The employment provisions of the Act are enforceable by litigation in the industrial tribunal system. The tribunal can make award of unlimited compensation to a successful complainant. The tribunal can also make recommendations to prevent future discrimination.⁸⁷ The quota system has been repealed⁸⁸ and the Act is applicable to all employers with 20 or more employees. This enactment enjoins employers to ensure a whole range of non-discriminatory rights, such as adjustment as to premises, assignment of duties, reasonable allowance for rehabilitation, treatment, etc.⁸⁹ The failure to make such adjustments results in discrimination, or "less favourable treatment of a disabled employee, for which the employer is statutorily denied the right to claim justification, in an action brought about by the employee"⁹⁰. The House of Lords,

83. *Disability Discrimination Act, 1995*, Ss. 1-2, Schedules 1-2, cited in Supra note 34 at pp. 185-187.

84. *Disability Discrimination Act, 1995*, S. 5

85. *Ibid*, Ss. 4-12 and 13-15.

86. *Ibid*. Ss. 17, 18 and 4 (1), (2)

87. *Ibid* S.8

88. *Ibid* S. 32

89. *Ibid* S. 6

90. *Collins v. Royal National Theatre Board Ltd*, 2004 (2) All ER 851; *Meike v. Nottinghamshire County Council* 2004 (4) All ER 97

in its decision reported as *Relaxation Group v. Rhys Harper*⁹¹ observed that the Act, like other enactments, which ensured gender equality, was meant to foster non-discriminatory practices:

“Discrimination can take a variety of forms but all involve treating the person less favourably than others. Ensuring that all employees in similar positions have the same contractual rights is only a start. Employment is just as much about opportunities as about rights.”
(Emphasis supplied)

A service provider is required to take reasonable steps to change a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled people to make use of its services and provide an auxiliary aid or service if it would enable (or make it easier for) disabled people to make use of its services. In addition, where a physical feature makes it impossible or unreasonably difficult for disabled people to make use of services, a service provider has to take reasonable steps to remove the feature; or alter it so that it no longer has that effect; or provide a reasonable means of avoiding it and provide a reasonable alternative method of making the service available. The Act also prohibits discrimination against disabled persons in respect of provision of goods, services and facilities and in relation to disposal and management of premises.⁹² Educational institutions have been placed under a duty to encourage access for and the integration of the disabled pupils and students at all levels of education.⁹³ The Act demands new accessibility standards for disabled users of taxis, public service vehicles and railways.⁹⁴

Although the Act meets many objectives of the United Nations Standard Rules it makes no direct reference to the rules. But perhaps the most unfortunate part of the Act lies on its reflection of the medical model, which has

91. 2003 (4) All ER 1113

92. *Supra* note 84, Ss. 19-24

93. *Ibid* Ss. 29-31

94. *Ibid* Ss. 33-49

become obsolete, instead of the social model recognized not only by the United Nations Standard Rules but also by disability rights activists. Particularly after the coming into being of the Disability Convention the English Act needs to be thoroughly reviewed.

In the UK, an amendment by the *Special Educational Needs and Disability Act 2001* was introduced to amend Part 4 of the *Education Act 1996*. The *Special Educational Needs and Disability Act 2001* amends and extends the DDA, and the *Mental Health Act of 1983* protects the rights of individuals with learning disabilities and/or mental health concerns. The Act has prohibited discrimination in relation to school admissions, exclusions, and the education or associated services provided to pupils, further and higher education admissions, exclusions, and student services. Divided into three parts, the Act has 43 sections and 9 schedules. The Act has been enacted with a view to make “provisions against discrimination, on grounds of disability, in schools and other educational establishments; and for connected purposes”. The Act broadly deals with special educational needs and disability discrimination in education with emphasis on mainstream education. It lays down that the responsible bodies for schools and further and higher education institutions must make reasonable adjustments to ensure that disabled pupils or students (or prospective pupils or students) are not placed at a substantial disadvantage in comparison with their non-disabled peers. Responsible bodies for further and higher education are also required to provide auxiliary aids or services and have a duty to make adjustments to physical features. It also provides procedures for enforcement and provision of remedies for discrimination.⁹⁵ This is in fact one of the exemplary laws dealing specifically with the educational rights of the disabled throughout the world, which in every circumstance must be encouraged and upheld to farther the educational rights of the disabled.

95. *Special Educational Needs and Disability Act, 2001*

The United Kingdom was one of the first countries in the world to sign the United Nations Convention on the Rights of Persons with Disabilities, in March of 2007, an international treaty that protects the international rights of individuals with disabilities. However in the UK 'disabled people' is the term used rather than people with disabilities. Hence they prefer to call it the UN Convention on Disability Rights. The United Kingdom also worked expansively to draft this document, and the Convention itself is now recognised as the one international document to include universal principles for the rights of individuals with disabilities. Government departments and the devolved administrations are currently checking to see whether legislation, policies, practices and procedures are consistent with the convention's obligations. The UK Government does not usually sign or ratify optional protocols to UN human rights treaties because it does not consider them to be sufficiently compelling need to accept individual petition to the UN. Also, the practical value to the individual citizen is unclear. The position on the optional protocol, which was not signed by the UK, will be kept under review as part of the work being done to enable the UK to ratify the Convention.⁹⁶

(iii) Germany

During the Second World War, millions of soldiers and civilians were disabled. Their disability rendered them unfit for employment. As a result the German Government took numerous initiatives to pass disability laws. Preceding to the union of the two Germanys as well as the period following, several wide-ranging legislations were passed to protect the disabled persons. The German Constitution, called Basic Law (*Grundgesetz*) in Article 3 clause (3)

96. For details on UN Convention and UK, visit <http://www.officefordisability.gov.uk/working/unfaqsdetails.asp#q5>, accessed on 11.10.2008.

provides that “no person shall be disadvantaged on account of his or her disability.”⁹⁷ The German Parliament or “Bundestag” initiated a major alteration to its comprehensive disability law, *Schwerbehindertengesetz* or *Schwbg*, in 1986. *Schwbg* has been principally enacted to eliminate employment discrimination and prejudices against the disabled and to encourage their employment prospects. The law defines a disabled person as an individual who suffers from a functional disability or *Behinderung*, which affects that person’s capacity for social integration, as a consequence of the effects of an irregular physical, mental or psychological condition. According to *Schwbg* any public or private business, which has a minimum of 16 positions for employees, is required to fill 6 percent of those places with disabled persons. The employers are not only bound by 6 percent quota but also by the course of action prescribed by the statute for terminating a disabled worker. Failure to comply with the quota obligations entails a civil penalty of DM 200 per month, since 1990, for every job not filled by a disabled person and in case of serious breach, criminal fine up to DM 5000 might be imposed. The proceeds of this penalty are spent on disabled employment policies. Further, to qualify under the quota law as a disabled person (*Schwerbehinderter*), disability is measured at 50 percent or more whatever the actual effect upon life activities; and the disability must have duration of at least six months and limits functional freedom of ability by at least 20 percent. A disabled person who is unable to find or retain employment, without assistance or whose disability is measured at 30 percent or more is also treated as disabled (*Gleichgestellte*). Disputes concerning a person’s disability are heard by a social court rather than a labour court. The law also provides adequate safeguards against wrongful dismissal.⁹⁸

Though the law is all encompassing, but the major defect is in the methodology of determining disability. The determination of disability has been

97. The Amendment to Basic Law, introduced in 1994, cited in Supra note 65 at p.187.

98. *Ibid* at p.188

entrusted to administrative personnel instead of medicos. Secondly, the law involves a lot of statistics. It treats disabled people as a class to be statistically assisted and they do not receive any individualized treatment or relief. Thirdly, non-compliance of law simply punishes the offender with monetary punishment, and affluent often escape the quota requirement by paying a paltry sum of DM 200 each month for violation of the law.⁹⁹

(b) North America:

(i) United States of America

The equal opportunities model has grown in status and authority at the international level and in the United Nations system. The United Nations Standard rules of 1993 undoubtedly provided the key moral imperative for change on a worldwide basis, but there equally can be no doubt that the enactment of the *American with Disabilities Act, 1990* showed that change was both possible and practicable.¹⁰⁰ The history of U.S. disability discrimination law shows that states often begin initiating anti discrimination provisions for disabled persons in social welfare legislations. This is the legal area where disability law tends to be first developed. The U.S.A. first prohibited certain forms of discrimination against disabled people in the *Rehabilitation Act of 1973*. The 1988 amendment to the Fair Housing Act, which prohibits discrimination in housing matters, was first step towards including disability as ground of discrimination in general U.S. civil rights legislation. The final step was taken with the 1990 adoption of the Americans with Disabilities Act.¹⁰¹ IDEA or the *Individuals with Disabilities Education Improvement Act* was enacted in 2004, which specifically dealt with special education to eligible children with disabilities.

99. *Ibid* at p.189

100. *Supra* note 21

101. *Ibid*.

The Americans with Disabilities Act, 1990 (ADA) is a civil rights law that deals with prohibition of discrimination solely on the basis of disability in employment, public services and accommodations. Its primary purpose is “to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities”.¹⁰² “Disability” implies with respect to any individual 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.¹⁰³ If an individual is unable to meet the definitional requirement of disability, that individual receives no protection under the Act.¹⁰⁴ In addition the disabled person must be qualified for the programme, service or job. The ADA prohibits discrimination on the ground of disability in employment, housing, public accommodation, education, transport, communications, recreation, institutionalization, health services, voting etc. It requires all new public transport to be accessible to the disabled people and existing public rail system must be made accessible during the course of time. Architectural barriers in existing buildings must be designed and built to be accessible to individuals with disabilities. Under title I, no employer may discriminate against a person with disability as a result of such disability.¹⁰⁵ Other individuals who are protected in certain circumstances include 1) those, such as parents, who have an association with an individual known to have a disability, and 2) those who are forced or subjected to reprisal for assisting people with disabilities in asserting their rights under the ADA. The Act is binding on all employers with 15 employees. These employers are required to provide reasonable accommodation for qualified individuals with a disability unless they

102. *The Americans with Disabilities Act, 1990*, 42 U.S.C. S. 12101(b) (i)

103. *Ibid.*, 42 U.S.C. S. 12101 (a) (8)

104. *Supra* note 94, 42 U.S.C. S. 12112 (a)

105. *Ibid.*, S. 12112 (b) (5) (A).

can show that it would impose an undue hardship on that business.¹⁰⁶ Thus, while the employment provisions of the ADA apply to employers of fifteen employees or more, its public accommodations provisions apply to all sizes of business, regardless of number of employees. State and local governments are covered regardless of size. The Act incorporates similar powers procedures and remedies employed in title VII of the *Civil Rights Act, 1964*. Any person aggrieved can file a charge with the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory act. EEOC has no enforcement powers may permit the aggrieved person to sue. In such a case the individual can then file a suit within 90 days from the date of issuance of letter from the Commission.¹⁰⁷ The act provides remedies in the form of equitable relief requiring hire, reinstatement, back pay, seniority and, cessation of unlawful employment practice and such affirmative action as may be appropriate.¹⁰⁸ Any person who proves intentional discrimination is entitled to compensatory and punitive damages ranging between U.S. \$ 50,000 to 3, 00,000 depending upon the number of employees.

Prior to 2000, several claimants attempted to force the U.S. Supreme Court to rule on whether the ADA was constitutional. Before 1998, virtually all of the cases that were not settled out of court ended at the Circuit Court Level, with the U.S. Supreme Court “decided not to decide” ADA cases. Between 1998 and 2001, however, the Supreme Court chose to grant certiorari in an unprecedented number of cases, which some observers believe have only further complicated and confused American Disability Policy. There were only eight major cases heard by the Court in the eleven years after the ADA was enacted, and none before 1998.¹⁰⁹ In *Pennsylvania Department of Corrections v.*

106. *Ibid* S. 2000 e-5 (f) (l) (1988), cited in Supra note 64 at p.191.

107. *Ibid* S. 2000 e-5 (g) (1991)

108. 524 U.S. 206 (1998)

109. Jacqueline Vaughn Switzer, “*Disabled Rights—American Disability policy and the Fight for Equality*”, (Georgetown University Press, Washington D.C., 2003), p. 135

*Yeskey*¹¹⁰ state officials challenged whether Title II of the ADA is applicable to state prison systems and the Supreme Court agreed that prisons were not exempt. Most filed cases reached the U.S. Circuit Courts of Appeal dealt with whether Congress had the authority to waive individual state's sovereign immunity when the law was enacted. One of these cases, *Alsbrook v. City of Maumelle Arkansas*¹¹¹ was granted certiorari and was scheduled for oral arguments in April 2000 but was dismissed in March that year because the parties reached a settlement. At the same time, the Supreme Court granted certiorari in *Garrett v. University of Alabama at Birmingham Board of Trustees*.¹¹²

One of the initial Title III cases in the Supreme Court that helped define the rights of a person with a disability was *Bragdon v. Abbott*¹¹³, in which a dentist refused, outside a hospital setting, to fill the cavity of a person who was HIV- positive. The dentist argued that he would be at undue risk of contracting a life threatening illness if the patient were not treated in a hospital setting and that he had the right not to treat her at all because she was not defined as a person with a disability. The patient however argued that she was entitled to the ADA's protection even though she was asymptomatic because HIV interfered with the major life activity of reproduction. In this test case of Title III protections, the courts concluded that Abbott was an individual with a disability and therefore was entitled to injunctive relief.¹¹⁴ Regarding accessibility, in *People of New York ex rel. Spitzer v. County of Delaware*¹¹⁵, the court ruled that a country that had failed to provide accessible polling places for citizens with disabilities was required to do so.

110. 184 F. 3d 999 (8th Cir. 1999).

111. 193 F.3d 1214 (11th Cir. 1999).

112. 524 U.S. 624 (1998)

113. Supra note 107 at p. 139.

114. Supra note 109.

115. 115. 82 F. Supp. 2d 12 (N.D.N.Y. 2000)

Although held as model legislation, the Act does not directly provide for free, appropriate, public education. There is also no funding to implement services, nor does it specify evaluation and placement procedure. It also does not specify procedural safeguards related to special education. Moreover, considering the employment scenario, if a business does not have requisite number of employees, it would not come under the safe arms of the ADA. The Act also excludes persons with psychosis or personality disorders from its ambit. The Act deals with individuals and does not treat the disabled as a class.

The Individuals with Disabilities Education Improvement Act 2004 have met the flaw of the ADA in not including education of the disabled. The Act aims at providing federal financial assistance to State and local education agencies to guarantee special education and related services to eligible children with disabilities. The Act protects children between 3 to 21 years who are determined by a multidisciplinary team to be eligible within one or more of 13 specific disability categories and who need special education and related service. Categories include autism, deafness, deaf-blindness, hearing impairments, mental retardation, multiple disabilities, orthopedic impairments, other health impairments, serious emotional disturbance, specific learning disabilities, speech or language impairments, traumatic brain injury, and visual impairments.¹¹⁶

It is quite astounding that America which has propagated itself to be a visionary on all global matters has chosen to keep itself away from the United Nations Convention on the Protection of Rights of the Persons with Disabilities. The UN Convention on the Rights of Persons with Disabilities provides the opportunity for tides of change across the globe. U.S. officials have indicated that domestic laws, especially the ADA, are stronger than those of the Convention. Despite all the advancements under the ADA, there is still so much inequality left to combat in America itself. The disability rights activists opine

¹¹⁶ Supra note 21

that the U.S. must sign and ratify the treaty and take a lead role in translating broad commitments into national action and to live up to their status as a world leader in the global fight for disability rights.¹¹⁷

Canada

Taking cue from the experience of U.S.A. that every individual is equal before law and has a right to the equal protection and equal benefit of law without discrimination and in particular without discrimination based on race, nationality or ethnicity, region, colour, religion, sex, age or mental or physical disability. Section 15 of the Canadian Charter of Rights and Freedoms incorporated these principles and came into effect in 1985.¹¹⁸ Disability is one of the grounds of discrimination in Section 15's equality clause. The Canadian Constitution also aims to secure a right to full inclusion and participation of the people with disabilities, in a barrier free society and prohibits discrimination due to mental or physical deficits. The Canadian Supreme Court, in *Eaton v. Brant County Board of Education*¹¹⁹ has offered important protection to disabled children. The Canadian *Human Rights Act, 1985* also lays down various grounds of discrimination and prohibits certain discriminatory practices.¹²⁰ Section 3(1) also prescribes disability as one of the grounds of discrimination. Disability has been referred to as "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or drug."¹²¹ The Act attends direct as well as indirect discrimination encompassing every aspect of life including employment and also prescribes what employment policies and practices would amount to be discriminatory.¹²²

117. Supra note 79.

118. Justice Jitendra N. Bhatt, *Handicapism—Disabling Images or Images Disabling?* *Supreme Court Cases (Journal)*, vol.8, (2003), pp. 1-13 at p. 11.

119. (1997) DLAR 385 (SCC), cited in Supra note 34 at p. 192.

120. *Human Rights Act, 1985*, S. 2.

121. *Ibid* S. 25

122. *Ibid* Ss. 7, 10, 12 & 44.

Hence, the Act covers discrimination in the provision of goods, services, facilities, or accommodations that are available to the general public, including transportation. It also prohibits discrimination in the provision of commercial premises or housing. The Act not only protects persons who presently have a disability but also persons who were disabled in the past. In addition, discrimination committed by a business, non-business organization, government department, public agency, institution (e.g. educational institution) or individual is prohibited.¹²³ Canada has signed the UN Convention on 30th March 2007 and has pledged to take all necessary steps to put the provisions of the Convention into effect in their domestic laws as effectively as possible.

(c) South America

(i) Costa Rica

Persons with disabilities living in Costa Rica have a series of legally binding instruments at the international, regional, and national levels, which recognize and serve as a basis for the protection of their human rights. Costa Rica has traditionally ratified international human rights instruments. In addition to the fundamental UN Conventions on human rights, Costa Rica has ratified the *International Labor Organization's Discrimination (Employment and Occupation) Convention, 1958* and the *Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983*. Despite the country's relative good respect for human rights and our democratic system, disabled people still do not enjoy equal rights and participation in all aspects of society. Among the factors that prevent disabled people from full citizenship are negative attitudes

123. Supra note 21

against disability. These negative images lead to the discrimination of all disabled people, in particular, in the labour market.¹²⁴

Some early legislation specifically related to disability rights protection includes: the *National Institute for the Protection of the Blind Act, Law 2171*, dated 21 October 1957; the *National Institute of Rehabilitation Act, Law 3695*, dated 14 June 1966; and *Law 5347* that created the CNREE, dated 3 September 1973. The most important legislation is the *Equal Opportunities Law for People with Disabilities, 1996*. The law is based on international documents such as the *Standard Rules on the Equalization of Opportunities of Disabled People, 1993*, the *Inter American Convention of Human Rights, 2001*, the *United Nations Convention on the Rights of the Child, 1989*. Its philosophy consists of the principles of non-discrimination and equalization of opportunities, defined as the process of adapting the environment, services, information, activities as well as attitudes to the needs of all people. In its Article 4, the law establishes as the obligations of the State: "To include in all policies, programs and services of state authorities the principles of equalization of opportunities and access, and to eliminate attitudes and actions that promote discrimination or prevent the access to programs and services to disabled people. This implies that all government institutions and regulations have to undergo revision and change, if deemed necessary."¹²⁵

The *Equal Opportunities for Persons with Disabilities Act (Law 7600)*, which came into force on 29 May 1996 identifies a disability as: "Any physical, mental or sensory impairment that substantially limits one or more essential activities of an individual." The law covers the areas of health services, education, access to public buildings and spaces, housing, the media and

124. For details on Costa Rica -2004 IDRM (International Disability Rights Monitor) Country Report, Publications - - IDRM, at <http://www.ideanet.org/content.cfm?id=5358> accessed on 10.10.2008

125. *Ibid*

transportation, employment, commerce and the role of organizations of disabled people. The new law entails changes in 13 existing laws in the area of health, education, trade, family, and others that contained discriminatory aspects.¹²⁶

Though the Act has ushered in a lot of positive changes in the lives of the disabled but there does not yet exist a control and monitoring system for the effective implementation of the law. Hence areas like inclusive education, employment and accessibility have not been able to accomplish the desired outcomes. Though Costa Rica has been one of the signatories to the UN Disability Convention yet it has still not ratified the Convention itself or the Optional Protocol. It is probable that through the ratification the negative areas can be successfully dealt with.

Guatemala

The Political Constitution of Guatemala uses the term “*minusválidos*”, when directly quoting that term may be translated as “handicapped.” Guatemala has made very little effort to reliably identify people with disabilities. Although disability rights are guaranteed by a number of international treaties and Conventions including the *United Nations Standard Rules on the Equalization of Opportunities for People with Disabilities, 1993* and the *Convention on the Rights of the Child, 1989*. Guatemala ratified the *Vocational Rehabilitation and Employment (Disabled Persons) Convention (Convention 159) of the International Labor Organization (ILO)* on 5 April 1994. On 8 August 2002, Guatemala ratified the *Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities*, and it deposited the instrument on 28 January 2003. Guatemala has also ratified the *Protocol of San Salvador*, which focuses on economic, social, and cultural rights

¹²⁶. *Ibid*

and has a specific chapter on disability rights. Even if the government of Guatemala supports and signs all international instruments protecting human rights, it has not yet moved towards effective enforcement.¹²⁷

Guatemala also has a number of national legal instruments to protect the rights of people with disabilities. *Section 53* of the *Political Constitution of the Republic* provides that “the state guarantees the protection of the handicapped and of individuals with physical, psychiatric, or sensory limitations.” It also declares that it is in the national interest to provide health and social care to people with disabilities as is the promotion of policies and services that enable rehabilitation and social integration. The most comprehensive legislation on the area is *Legislative Decree 135-96*, also known as the *Protection of Persons with Disabilities Act, 1996*. Other national legislation includes the *Social Insurance Act* and the *Comprehensive Protection of Children and Youth Act* which includes a specific chapter on children and youth with disabilities. The latter serves as a basis for Guatemala's public policy on the protection of children and youth. *Section 3* of *Protection of Persons with Disabilities Act, 1996* defines a disability as “any congenital or acquired physical, mental or sensory impairment substantially limiting the execution of one or more of the activities considered normal for an individual.” The Act expands on the guarantees of the Constitution and provides the disability community with guarantees for exercising their economic, social, and cultural rights. The *Protection of Persons with Disabilities Act* covers areas such as health, education, employment, accessibility to the physical environment and transportation, access to information and communication, culture, and sports. The United Nations Standard Rules on the

127. For details on Guatemala -2004 IDRM (International Disability Rights Monitor) Country Report, Publications - - IDRM, visit <http://www.ideanet.org/content.cfm?id=5B5D73>, accessed on 12.10.2008.

Equalization of Opportunities for Persons with Disabilities served as a model in the drafting of the decree.¹²⁸

However it is unfortunate that the Act does not contain any penalties for non-compliance. There have been several initiatives to amend it in order to bridge this legal gap, but none have been successful so far. Furthermore, the Act does not yet have regulations, which are essential to enforcing the law. Although the law came into force ten years back, regulation drafting and adoption are still in process. Overall, few people are aware of the contents of this law, and there is little to no compliance. Rather than adhering to a rights-based approach, the government's institutional stand toward the disability community has been very traditional, characterized by welfare assistance programs and a charitable approach. The various programs undertaken by ministries and presidential secretariats have been designed following this model. There are still serious violations of the human rights of people with disabilities, mainly related to marginalization, exclusion, and discrimination. Human rights protection and advocacy institutions that do not focus on disability rights provide inadequate support to this sector of the population. The creation of offices specifically devoted to protecting disability rights illustrates the challenges facing general human rights organizations.

The national legislation contains barriers that limit or hinder the opportunities of people with disabilities to participate in different activities on an equal footing with the rest of the society. One major barrier is found in *Section 13* of the *Civil Code*, which provides that any individual who is congenitally blind or deaf or acquired his or her disability during childhood can be declared legally incapable, which means they are deprived of exercising their civil and legal rights. Many people with psychiatric disabilities and individuals with severe

128. *Ibid*

mental/intellectual disabilities are placed in institutions after having been abandoned and institutionalized on the basis of a court decision. They are declared legally incapable and are often subjected to medical treatment, and in some cases to psychiatric therapy, having no right to refuse treatment. Additionally, some of these institutions—particularly mental health institutions—do not offer adequate physical and sanitary conditions nor do they have enough qualified staff to provide proper and decent care. , there are serious limitations in the practical ability of people with disabilities to exercise their civil rights. *Legislative Decree 135-96* mandates access for people with disabilities to information and communication. Nevertheless, there is neither a national information system nor a specific communication network available to people with disabilities. Alternative information formats, such as Braille materials, tape-recorded texts, electronic formats, sign language interpretation, and captioning on television, among others, are virtually non-existent. Education for people with disabilities is predominantly provided in a private segregated educational system. Because there are no penalties for non-compliance the actual employment situation for persons with disabilities is precarious. Moreover, there are no effective job opportunity programs or vocational trainings for people with disabilities. There is a shortage of programs that provide housing for people with disabilities. Most people live in isolation, with their families or with their caregivers.¹²⁹

Though Guatemala was one of the signatories to the UN Disability Convention, it has neither ratified the Convention nor the Optional Protocol. The country must take immediate efforts to ratify the same as it is one of the potent ways to address the defects of the existing legislative machinery and a hope for the disabled people.

¹²⁹. *Ibid*

(d) Australia:

(i) Australia

The impact of international human rights developments on disability and human rights in Australia began as in many other countries, with the 1981 International Year for people with disabilities. In the early 1980s those States which already had anti-discrimination legislation, covering grounds such as race and sex discrimination, added coverage of disability. Other later State and Territory discrimination laws followed suit. 1981 also saw the passage of the federal *Human Rights Commission Act*. The new Commission's jurisdiction was defined by reference to a number of international instruments - including the *Declaration on the Rights of Disabled Persons, 1975* and the *Declaration on the Rights of Mentally Retarded Persons 1971*. This Act, and the *Human Rights and Equal Opportunity Commission Act* which followed in 1986, incorporated the rights listed in these Declarations into federal law - but only very indirectly and incompletely. These laws only applied to actions of the federal government, not to matters within State government administration or the private sector (except in the employment area). Also, they did not create any enforceable rights or duties - only a power for the Commission to investigate complaints, seek to resolve them by conciliation, and report to Parliament on matters that could not be resolved. Some of the content of international declarations on disability was given more definite legal form in the *Disability Services Acts*, which were passed later in the 1980s. These set standards for how specific services for people with disabilities should operate - including provisions for dealing with complaints of abuse and for participation in how services operate. However, these laws did not create any

enforceable right for people who require support, assistance or other services to enable them to receive it.¹³⁰

The principal legislation relating to discrimination on the ground of disability, in Australia is known as the *Disability Discrimination Act, 1992*. The objects of the Act include, to eliminate, as far as possible, discrimination amongst persons on the grounds of disability in the areas of work, accommodation, education, access to premises, clubs and sport and the provision of goods, facilities, services and land. It also seeks to ensure equality of the persons with disability and recognize that the persons with disabilities have the same fundamental rights as the rest of the people.¹³¹ The Act has been divided into seven parts and the parts into divisions. Part 1 deals with the preliminary matters.¹³² Part 2 concerns with the various measures for disability discrimination. It deals with Discrimination in work,¹³³ discrimination in other areas,¹³⁴ discrimination involving harassment,¹³⁵ offences¹³⁶ and exemptions.¹³⁷

In *Hurst v State of Queensland*¹³⁸ question arose regarding “requirement or condition” that hearing impaired child be taught in English rather than Auslan, a native Australian sign language and whether ability to “cope” without Auslan assistance meant that child was “able to comply” with “requirement or condition”, pursuant to s 6(c) of the *Disability Discrimination Act 1992*. Issue arose as to whether child would suffer “serious disadvantage” without Auslan assistance and whether suffering “serious disadvantage” meant child could

130. Dr Sev Ozdowski, “Disability discrimination legislation in Australia from an international human rights perspective: History, achievements and prospects”, viewed at www.hreoc.gov.au/disability_rights/speeches/2002/history02.htm - 42 -, accessed on 9.8.2008.

131. The Disability Discrimination Act, 1992, Objects

132. *Ibid*, Ss. 1-14

133. *Ibid*, Ss. 15-21

134. *Ibid*, Ss. 22-34

135. *Ibid*, Ss. 35-40

136. *Ibid*, Ss. 41-44

137. *Ibid*, Ss. 45-58

138. [2006] FCAFC 100

not comply with “requirement or condition”. The judge held that an ability to “cope” without Auslan assistance meant that child was “able to comply” with “requirement or condition”; and the evidence showed that child would suffer serious disadvantage without Auslan assistance, and therefore child “not able to comply” with “requirement or condition”, pursuant to s 6(c) of the *Disability Discrimination Act 1992*. Hence the child be imparted education not in English, but Auslan.

Part 3 revolves around the Action Plans.¹³⁹ Part 4 lays down the methods of inquiries and civil proceedings.¹⁴⁰ Part 5 deals with other offences.¹⁴¹ Part 6 lays down about the appointment, qualifications, and remuneration etc. of the Disability Discrimination Commissioner.¹⁴² The miscellaneous provisions are laid in Part 7.¹⁴³

The Act defines disability to include past, present and even imputed disability, and even disability, which may arise in future. HIV individuals are also included. Thus the Act prohibits both direct and indirect discrimination on the ground of disability. But the record of achievements from 1993 on can be summed up as encouraging, but uneven and incomplete. In addition to being a barrier to employment, physical access continues to be a constant and pervasive barrier for people with disabilities in many aspects of their life. To make a significant impact on access and opportunity, the numbers of buildings made accessible need to be not in the dozens or even hundreds each year, but in the hundreds of thousands. There are some question marks on the efficacy of the provisions of the Act and their applicability by the disabled in telecommunications, banking services, education as well as transport. Further

139. *Supra* note 131, Ss. 59-65

140. *Ibid.*, Ss. 66-106F

141. *Ibid.*, Ss. 107-112

142. *Ibid.*, Ss. 113-120

143. *Ibid.*, Ss. 121-132

setting of standards is only provided for in some of the areas covered by the legislation. Unfortunately, very less has been achieved for some sections of the disability community so far than for others using the Disability Discrimination Act. In particular, people with intellectual or psychiatric disabilities have not had the same clear benefits as people with physical or sensory disabilities.¹⁴⁴ Finally, Australia participated as one of the original signatories in March 2007 but they have not yet ratified the UN Disability Convention. Ratification of the treaty by Australia will confirm the Governments commitment to the realisation of full human rights for people with a disability.

(ii) New Zealand

The Human Rights Act, 1993, seeks to empower people with disabilities by providing legal defence against discrimination on the ground of disability in New Zealand. The Act gives a very comprehensive definition of disability to include physical disability or impairment, physical illness, psychiatric illness, intellectual or psychological disability or impairment, any loss or abnormality of psychological, physiological or anatomical structure or function, reliance on guide dog, wheelchair or other remedial means etc.¹⁴⁵ The provisions pertaining to employment prohibit discrimination against disabled people in all aspects of employment process taking into account hiring, training, compensation and benefits. The Act also requires an employer reasonably to accommodate a qualified individual with a disability to perform a job.¹⁴⁶ The Employment Services Workbridge Programme assists the employers for providing reasonable accommodation to the disabled workers. The *Human Rights Act* applies in only in case of open employment. But those disabled persons who fail to qualify for a job in open employment is enabled to seek job in the labour market. For such

144. Supra note 130.

145. *Human Rights Act, 1993*, S. 21.

146. Supra note 34 at p. 193.

individuals, the *Disabled Persons Employment Act, 1960* provides for sheltered workshops where disabled people are employed.¹⁴⁷

So far as the United Nations Disability Convention is concerned, New Zealand has been a leader in negotiations on the Convention. The country was the spirit behind modelling and evolving the Convention text through participation of the disabled people. New Zealand has been one of the signatories to the Convention on 30th March, 2007. Subsequently on 1st July 2008, *The Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill* was introduced to Parliament with a view to removes inconsistencies within current legislation that will enable New Zealand to ratify the Convention. Amendments are also proposed to the *Human Rights Act 1993* to clarify its obligation to accommodate the needs of disabled people. Thus New Zealand has proved itself to be global leader in ascertainment of disability rights.¹⁴⁸

(b) Asia

(i) India

India is a party to five out of seven core United Nations human rights conventions, namely, *International Covenant on Civil and political Rights, 1966*; *international Covenant on Economic, Social and Cultural Rights 1966*; *Convention on the Elimination on All Forms of Racial Discrimination 1965*; *Convention on the Elimination of All Forms of Discrimination Against Women 1979* and the *Convention on the Rights of the Child 1989*. India has also ratified the *United Nations Convention for the Protection of the Rights of the Persons with Disabilities, 2006* in October 2007. Under the Constitution of India 1950,

147. *Ibid* at p. 194.

148. For details on New Zealand's Approach towards Disability Convention, visit New Zealand Government's Official website at <http://www.beehive.govt.nz/release/disability+issues+bill+to+enable+un+convention+rati+ficatio+n>, accessed on 10.10.2008.

some provisions for the protection of the disabled have been laid down. In addition to the Constitutional guarantees, India has four principal Acts on the area. In 1987, the Mental Health Act of India was passed. Three more legislations covering diverse aspects of the lives of the persons suffering with disabilities came to be passed after the Beijing conference. The four Acts on the Statute book governing the law on the subject are:

1. *The Mental Health Act of India, 1987*
2. *The Rehabilitation Council of India Act, 1993.*
3. *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*
4. *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 .*

Besides there are a few other legislations which contain provisions for protection and empowerment of various sections of disabled such as the *Juvenile Justice (Care and Protection of Children) Act, 2000*, which facilitate, among others, integration of persons with disabilities into mainstream of society; The Income tax Act, 1961 which speaks of certain exemptions to the disabled lot. Moreover there are legislations under the labour laws such as the *Workmen's Compensation Act, 1923*, the *Employees' State Insurance Act, 1948* and the *Public Liability Insurance Act, 1991*, which protects and promotes the rights of persons disabled during the course of employment.¹⁴⁹

The United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities and the World Program of Action both successfully moved the focal point of disability legislation all over the world, including India from aiding the disabled person to adapting with their surroundings to permit equal participation in the society. The UN Convention on

149. Supra note 34 at p. 160

Disability is an inclusive policy promising the same rights to people with disabilities. After India ratifying it, it is clear that its domestic legislation is lacking and needs to be amended. It may be by and large recognized that persons with intellectual and psychological impediments are most helpless and discriminated both outside as well as within the families. *Mental Health Act, 1987* was passed with a rationale to afford protection to their rights and lays down criterion for admission in the psychiatric hospitals and nursing homes and for the protection of his person, property and its management. However, the accomplishment of this Act has been poor and enforcement mechanism is weak with the effect that conditions of persons suffering from this type of disability are still distant from satisfactory.¹⁵⁰ With regard to the Disability Convention there are serious doubts as to the usefulness of this legislation for securing the protection of the person, property and privacy of communication of mentally ill. It gives ample opportunity for the abuse of power by the police, medical officer or magistrate. The proportion of involuntary admissions is in most cases very high and the condition laid in *Section 19* which permits admission under certain exceptional circumstances by a relative or a friend are being commonly misused. The basic limitation of the Act is that it perceives institutional care as the sole technique for the care and security of persons with mental illness.¹⁵¹

In the year 1986, the Rehabilitation Council of India was set up by the Government of India as a society to regulate and homogenize training policies and programmes in the field of rehabilitation of the persons with disabilities. By passing of *The Rehabilitation Council of India Act in 1993*, the status of this Council was raised to that of a statutory body. However, the Act's conceptualization and arbitrariness in formulation and implementation have proved to be major setbacks. In addition, disciplinary action against failure to comply with the RCI norms and inadequate definition of the term rehabilitation

150. Supra note 8 at p. 18

151. Supra note 10

professionals has added to the woes. The RCI Act disempowers any person not in its rolls for from carrying out any work with/for the disable. It forbids any person from teaching, training, or providing recreation, leisure etc until and unless the stipulation of registration is satisfied. This departs against the very spirit and standard of the UN Convention whose endeavour is the betterment of the disabled as contrasting to the directive of rehabilitators. It is a situation that seeks to isolate the person with a disability, in breach with the principles of the Convention.¹⁵²

Similarly, *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* deals with the constitution of a national body for the welfare of persons covered under this Act.¹⁵³ The Act aims at consolidation of the body at the national level for the benefit of persons with autism, cerebral palsy, mental retardation and multiple disabilities and connected and incidental matters thereto. The Act is an acknowledgement of a broad range of competencies among individuals with autism, cerebral palsy, mental retardation and multiple disabilities and is an positive action in favour of these persons by setting up a National Trust to shore up programmes which promote individuals, facilitating guardianship where necessary and address the concerns of those who do not have family support and to strengthen families and protect the interest of such persons.¹⁵⁴ This Act too has defects in its implementation part.

However the most important Act in relation to the protection of the rights of the disabled in India is *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*. In order to implement the proclamation on the full participation and equality of people with disabilities in the Asian and Pacific region, the Parliament enacted the aforesaid Act. The Act provides for the protection of the rights of the persons of disabilities

152. *Ibid*

153. *Supra* note 8 at p. 19.

154. *Ibid* at p. 20.

as well as for making enabling provisions to equate persons with disabilities, to compete on equal terms with non- disabled people.¹⁵⁵ Though there have been a number of programmes, schemes and services for disabled people in India but prior to this Act there was no separate law to uphold the interests of the disabled.¹⁵⁶ The Act provides for preventive as well as promotional aspects of rehabilitation like education, employment and vocational training, reservation, research and manpower development, creation of barrier- free environment, rehabilitation for persons with disabilities, unemployment allowance for type disabled, special insurance scheme for the employees and establishment of homes for persons with disability, etc.¹⁵⁷ This important piece of legislation too has failed to live up to its expectations. There has been huge debate on the definition of disability as provided in the Act. The PWD act has firm provisions as to what counts as disability; however, the Convention includes all long-term physical, mental, intellectual or sensory impairments, which may hinder their full and effective participation in society. The Act lacks in a number of areas when considered in the backdrop of the Convention. The Convention speaks of use of maximum possible resources as against the Act's stipulation of 'within the economic capacity and development of the State'. In addition no separate provisions have been made for the betterment of women and children, which is one of the key features of the Convention. Again, there are neither guidelines nor deadlines for the authorities concerned to comply with the Act. Further, the prevention an early intervention has not received serious and systematic attempt. The implementation of this Act has been particularly very weak which has left this legislation as mere policy document than a law. India has not signed the Optional Protocol to the Convention and has even indicated its reluctance to do so

155. Santosh Rungta, "Rights of Persons with Disability- An Overview", in S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002), pp. 142-147 at p. 142.

156. *Supra* note 8 at p. 21.

157. Lakshman Prasad. "Human Rights of Disabled", in S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002) pp. 148-153 at p. 149.

in the future. Signing the Optional Protocol would signify that the domestic situation of the disabled would become the accountability of the international community. There is a varied response to the pronouncement of the Indian Government. While some have expressed contentment with the assurance of the Government of India to remedy any grievances within, others point out that such a practice would have been useful in the case of non-implementation of the Convention.¹⁵⁸

(ii) China

China is the largest developing country in the world. However, people with disabilities remain a vulnerable group and many still encounter specific difficulties in a society whose economy is experiencing a tremendous market-oriented transition. Much remains to be done in order to ensure the full realization of "Equality, Participation and Sharing" for people with disabilities. Before early 1980s, discriminatory terms such as "*can fei*," which means "the handicapped and useless", were used to refer to individuals with disabilities. However, general social attitudes regarding disability have undergone a gradual but fundamental change since late 1980s, thanks to the active advocacy of the disability community and governmental support for disability initiatives.¹⁵⁹

China is a State Party to some 20 international human rights treaties. It joined a few of countries launching the Asian and Pacific Decade of Disabled Persons, and also supported the actions of its extension, namely the second Decade. China supports actively the UN Standard Rules on Equalization of Opportunities for Persons with Disabilities and the ongoing UN efforts to draft an international convention on the rights of people with disabilities. It has ratified ILO Convention 159 Concerning Vocational Training and Employment (Disabled

158. Supra note 79

159. Eric Zhang, "The Protection of Rights of People with Disabilities in China". For full Article visit http://www.disabilityworld.org/01_07/china.shtml accessed on 10.10.2008.

Persons). The Constitution (enacted in 1982 and amended in 1988, 1993, 1999 and 2004) provides a general principle on protection of people with disabilities. In addition, more than 30 national laws contain specific provisions concerning people with disabilities and the protection of their rights, including the Election Law, the Civil Law, the Civil Procedure Law, the Criminal Law, the Criminal Procedure Law, the Law of Education, the Law on Higher Education, the Labor Law, the Marriage Law, the Law on the Protection of Rights of Women, the Law on the Protection on Rights of Elderly People, the Law on Inheritance, the Adoption Law, the Insurance Law, and so on.¹⁶⁰

The Law on the Protection of Disabled Persons (adopted in 1990 and enacted in 1991) is of significant importance to the protection of the rights of people with disabilities. It contains 54 articles and 9 chapters that address rehabilitation, education, employment, cultural life, welfare, access, legal liability, etc. It specifically deals with “the lawful rights and interests of, and developing undertakings for, disabled persons, and ensuring their equal full participation in social life and their share of the material and cultural wealth of society.”¹⁶¹ Separate definitions of disabled person and disabled persons have been provided. The Act defines a ‘disabled person’ as one “who suffers from abnormalities or loss of a certain organ or function, psychologically or physiologically, or in anatomical structure and has lost wholly or in part the ability to perform an activity in the way considered normal.” Hence ‘Disabled Persons’ refers to those with visual, hearing, speech or physical disabilities, mental retardation, mental disorder, multiple disabilities and/or other disabilities.¹⁶² The Act also provides for rehabilitation, education, employment, cultural life, welfare, environment and legal liability of the persons with disability. The Law has some unique features. For example, Article 46 of Chapter

160. *Ibid*

161. Law of the People’s Republic of China on the Protection of Disabled Persons, 1990, Article 1.

162. *Ibid*, Article 2

7 deals with environment and establishes that "the State and society shall gradually create a sound environment to improve the conditions for disabled persons to participate in social life"¹⁶³ and sets requirements for an accessible physical environment, i.e., accessible public roads and buildings. Accessible information and communication, such as Braille and sign language, and the right to mobility (transportation) are discussed separately in Article 38, on Cultural life, and Article 44, on Welfare. Chapter 7 also refers to Articles 47 and 48 to promote a culture and ethic of respect for people with disabilities and concludes by declaring the third Sunday of each May as the National Day for Assisting Disabled Persons.¹⁶⁴ The Act though encompasses almost every aspect of development of the person/ persons with disability and in spite of the general prohibition on discrimination against disabled persons, it does not specify that means or how society is organized. A textual analysis of the statute reflects the traditional medical model of disability, i.e. institutionalization and segregation, forms the framework of the Act. The law also conveys a rather limited concept of equality as Article 29¹⁶⁵ is the only detailed anti-discrimination provision in the entire Act. The medical model underpinnings of the law are also evident in some provisions on the obligations of the disabled persons.¹⁶⁶ China too is a signatory to the UN Disability Convention and it is expected that the existing drawbacks in the legislation will be sufficiently addressed.

(f) Africa

163. *Ibid* Article 45.

164. *Ibid*

165. "Article 29—' Concentrated Employment'- The state and society shall set up welfare enterprises for disabled persons, work- rehabilitation centres, tuina- massage hospitals and other enterprises and institutions of welfare nature as a way of providing concentrative employment for disabled persons." It means that employment prospects are provided in special welfare enterprises and institutions. Within these special institutions, prejudice against disabled persons concerning recruitment, employment, promotion, the awarding of professional or technological titles, payment, welfare, and other aspects of employment is barred.

166. *Supra* note 21

(i) *South Africa*

The period since the elections in 1994, various changes have been implemented at the policy as well as legislative level including the level of service delivery and government accountability. During this period various disability policies and legislations too surfaced. In November 1997, the South African government adopted the *White Paper on an Integrated National Disability Strategy*, known as INDS, which is premised on the social model of disability. The INDS provides government and society as a whole with guiding principles that will advance non-discriminatory development planning, programme implementation, and service delivery. The INDS is not yet legislation. The government departments are, however, required to devise their disability policies and strategies in line with the provisions of the INDS. Apart from the INDS, the government has passed legislation that is designed at enforcing the rights of the persons with disabilities. The major legislations/ policies with disability components include:¹⁶⁷

- The Employment Equity Act, 1998
- Skills Development Act, 1998
- Promotion of Equality and Prevention of Unfair Discrimination Act, 2000
- The Labour Relations Act, 1998
- White Paper 6 on Special Needs Education
- AgriBEE Broad-Based Black Economic Empowerment Framework for Agriculture

The *Employment Equity Act, 1998* (EEA) has two principal purposes, namely:-

¹⁶⁷. *Ibid*

- To execute affirmative measures to eradicate discrimination in employment
- To provide guidelines for companies to encourage occupational impartiality by encouraging the equitable representation of employees in terms of race and gender, as well as of disabled people.¹⁶⁸

The EEA Act protects disabled people from inequitable discrimination on the grounds of their disability and entitles them to positive action measures. Disabled people have been defined as “people who have a long- term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.” Although equal employment opportunities are anticipated to enable disabled people to take part in the economy. But unfortunately, it is estimated that as many as 99% of South Africans with disabilities are not employed meaningfully.¹⁶⁹

The Skills Development Act, 1998 has been enacted with a view to execute structures and processes with a view to alter skills development in South Africa. One of the purposes of the aforesaid Act is to perk up the employment prospects of persons previously disadvantaged by unfair discrimination, and to level out those disadvantages through training and education. In this regard, people with disabilities in particular, among other disadvantaged groups, shall be targeted. The Act also offers diverse forms of assistance to the persons with disabilities.¹⁷⁰

168. Andrew K Dube. “The role and effectiveness of disability legislation in South Africa”; Edited by Eleanor Stanley, March 2005, p.16. For full article, view [www. disabilitykar.net/docs/legislation-sa-ex.doc](http://www.disabilitykar.net/docs/legislation-sa-ex.doc). Accessed on 12.1.2008.

169. *Ibid* at p. 17

170. *Ibid*

Promotion of Equality and Prevention of Unfair Discrimination Act 2000 is one of the most important pieces of legislations for disabled people in South Africa. The significance of the legislation lies in its recognition of the ways in which discrimination is conspicuous in society and the necessity to put into place concrete mechanisms to address discrimination and promote equality. The Act deals with prevention, prohibition and elimination of unfair discrimination, hate speech and harassment, and states that neither the State nor any person may unfairly discriminate against any person on the ground of disability.¹⁷¹

The *Labour Relations Act, 1998* deals with the regulation of unfair treatment in the workplace with a provision on unfair labour practices. The Act specifically lists the kinds of treatments that shall be regarded as 'unfair' and also defines four such kinds of treatments.¹⁷²

White Paper 6 on Special Needs Education evolved from the requirement for changes to be made to the provision of education and training to make it responsive and sensitive to the wide range of learning needs. This was in consonance with the fact that learners with disability experienced great difficulty in gaining access to education. *White Paper 6* sketches out what an inclusive education and training system is, provides the outline for setting up such an education and training system, details a funding strategy and lists the vital steps to be taken for establishing such a system in South Africa.¹⁷³

AgriBEE or Broad- Based Black Economic Empowerment Framework for Agriculture implies economic empowerment of all black people,

171. *Ibid* at p. 23

172. *Ibid* at pp. 25-26

173. *Ibid* at p. 31

including women, workers, youth, disabled people, and people living in rural areas, through diverse but integrated social or economic strategies.¹⁷⁴

Though the positive policy environment in South Africa presents unique opportunities for disabled people to address their various rights. The present legislations in the form of *The Employment Equity Act, 1998*, *Skills Development Act, 1998*, *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000* and others, have helped create a fresh sense of awareness of the demands of the disabled people. Sadly, with the exception of a few policies the execution of these policies has had a trivial impact on the lives of the majority of the disabled population of the country. Troubles associated with, amongst others, lack of budgetary allocations, ignorance of civil servants charged with the responsibility of implementing these policies, and bureaucratic bottlenecks have been recognized as some of the key reasons of ‘policy evaporation’ in South Africa.¹⁷⁵ Fortunately, South Africa has not only signed the UN Disability Convention but also its Optional Protocol. Therefore the present lacunae in the domestic framework will be adequately addressed as well as cooperation of the international community will also assist this nation to achieve high standards for the differently able.

(ii) Zimbabwe

The Zimbabwean legislation guaranteeing the rights of the persons with disabilities is *The Disabled Persons Act, 1992*. It was enacted “to make provision for the welfare and rehabilitation of disabled persons; to provide for the appointment and functions of a Director for Disabled Persons’ Affairs and the establishment and functions of a National Disability Board; and to provide for matters connected with or incidental to the foregoing”. The Act consists of ten sections. Apart from the appointment and functions of Director for Disabled

174. *Ibid* at p. 26

175. *Ibid* at p. 39

Persons' Affairs ¹⁷⁶and the establishment and functions of a National Disability Board,¹⁷⁷ the Act also prohibits denial of access to public premises, services and amenities to disabled persons.¹⁷⁸ Equality in employment has also been provided.¹⁷⁹“Disabled person” has been defined as a person with a physical, mental or sensory disability, including a visual, hearing or speech functional disability, which gives rise to physical, cultural or social barriers inhibiting him from participating at an equal level with other members of society in activities, undertakings or fields of employment that are open to other members of society.¹⁸⁰

The Act though concerns itself with the disabled persons, but the sure misses are provisions for special education and training of disabled people. Further, it has been provided that disability may be legitimate excuse for employment discrimination, and the denial of any public service or amenity seems to be excused if it is “motivated by a genuine concern for safety of disabled people.”¹⁸¹These factors have surely proved to be blots of the Act and made its entire accomplishment unfeasible. Since Zimbabwe has not yet ratified the UN Convention, hence the expectation of remedying the defects is almost improbable if not impossible. Hence the Zimbabwean Government must take initiatives to be member of the Convention and provide better facilities to their disabled populace.

D. COMPARATIVE ANALYSIS OF THE VARIOUS LEGAL SYSTEMS.

Disability anti-discrimination laws around the world take various approaches. Disabled persons may be protected against discrimination in

176. *The Disabled Persons Act, 1992*, S. 3

177. *Ibid* , Ss. 4 -7

178. *Ibid* S. 8

179. *Ibid* , S. 9

180. *Ibid* , S. 2

181. *Supra* note 21

constitutional, criminal, civil, or social law. However, the most comprehensive legal approach to preventing and protecting against disability based discrimination seems to be the enactment of civil rights legislation.¹⁸² Taking a look at the various legislations discussed above, it can be deduced that the legislations have some common features and some differences. The areas where most of the countries meet are:

(1) Majority of the countries (Hungary, Spain, Sweden, UK, USA, Costa Rica, Guatemala, India, China, South Africa, Zimbabwe, Australia and Australia) provide a definition of the terms “disability” and “persons with Disability” or “people with disability”.

(2) These laws make some provisions for their enforcement as well. Thus, the Australian *Disability Discrimination Act* establishes the Human Rights and Equal Opportunity Commission and a Disability Discrimination Commission. The Canadian *Human Rights Act* is enforced by a Human Rights Commission and a Human Rights Tribunal. In the U.K., a Disability Rights Commission is the watchdog of the *Disability Discrimination Act*.

(3) A significant number of acts entrust representatives of disability organisations with the monitoring of the law. For instance, the *Law of the People's Republic of China on the Protection of Disabled Persons* establishes the China Disabled Persons' Federation, which has the responsibility to represent and protect the rights and interests of disabled persons in China. The Hungarian discrimination act establishes a National Disability Affairs Council in which disability organisations must be represented. The Indian law establishes a rather elaborate multi-

182. Theresia Degener, “Disability as a Subject of International Human Rights Law and Comparative Discrimination Law”. in Stanley S. Here, Larry Ogalthorpe Gostin, Harold Hongju Koh (ed.), “*The Human Rights of Persons with Intellectual Disabilities: Different but Equal*”. (Oxford University Press, 2003), pp. 151-184 at pp. 160, 161; Supra note 21

sectoral planning and monitoring mechanism: a Central Coordination Committee is headed by the Chief Commissioner for Persons with Disabilities, and several State Coordination Committees manage disability matters at the state level. The law also requires a certain number of seats in each committee to be filled by disabled persons.¹⁸³

(4) Majority of the laws is based on a structural equality concept. Therefore this includes the commitment that society has to change in order to guarantee true equal opportunity for persons with disabilities. The key phrase in this respect is reasonable accommodations or reasonable adjustments, which have to be undertaken by the employer, service provider, government, or any other entity under anti-discrimination obligations. The following countries have included such a provision in their anti-discrimination laws, even though it does not always apply to all areas covered by the discrimination prohibition: Australia, Canada, Hungary, Ireland, New Zealand, Sweden, UK, the U.S.A., and Zimbabwe.¹⁸⁴

(3) The presence of affirmative action provisions are found in most of the nations relying on the structural equality concept underlying a discrimination law, as they indicate the understanding that positive actions may have to be taken in order to achieve true equality. Most of them have affirmative action provisions in their laws, most of them relating to quota schemes. (Canada (*Human Rights Act*), India, South Africa (*Employment Equity Act*, but specifically excluding quotas), Spain, the U.S.A.).¹⁸⁵

183. *Ibid*

184. *Ibid* at p. 163

185. *Ibid*

(4) Most anti-discrimination laws focus on the area of employment discrimination. (UK, U.S.A., India, China, Australia, South Africa, Hungary, Spain, Sweden, Canada, Germany, Costa Rica, New Zealand). However, it should also be recalled that employment rights fall into the realm of economic, social and cultural human rights. But it is all the more remarkable to assess that some of the disability discrimination statutes examined here explicitly guarantee non-discrimination with respect to civil and political rights for persons with disabilities. Others do not mention civil and political rights explicitly, but may still cover them through anti-discrimination provisions directed at ensuring accessibility to public premises, services and accommodations.¹⁸⁶

(5) A look at the definitions reveal that the majority of these definitions define discrimination as unfavorable treatment on the basis of disability (Australia, Canada, Germany, Guatemala, Ireland, New Zealand, South Africa, Sweden, U.K.); whereas a minority of the statutes define discrimination as unjustified differentiation. Some laws distinguish between direct and indirect forms of discrimination (Australia, New Zealand, South Africa, Sweden) with the latter commonly defined as the general application of requirements or conditions with which disabled persons usually have more difficulty complying.¹⁸⁷

(6) A few of the Acts have provisions requiring access to public places, buildings, transportation, etc., but the fact of inaccessibility is not defined as a discriminatory practice. (China, Costa Rica, Guatemala). In the effect, accessibility seems to be

^{186.} *Ibid*

^{187.} *Ibid*

granted as a welfare service where access is not formulated as an individual right.¹⁸⁸

(7) Some of the discrimination laws characterize acts of harassment and victimization as prohibited forms of discrimination. (Australia, Canada, Sweden and U.K.)

(8) Some discrimination laws also address the issue of exploitation or abuse of persons with disabilities. (Costa Rica, U.K.)

(9) While few anti-discrimination laws actually support the principle of segregated education for students with disabilities, only a minority of the Acts contain a clear statement that separate education is inherently unequal and a classic form of disability discrimination. (Canada, Hungary, and USA).¹⁸⁹

(10) In addition to protecting persons who presently have a disability, some laws also protect persons who were disabled in the past (Australia, Canada, New Zealand, the U.K. and the U.S.A.), may be disabled in the future (Australia, Sweden) or who are regarded as being disabled (Australia, New Zealand, and the U.S.A.).

(11) Majority of the Acts came to be enforced after the UN Standard Rules came into being in 1993 (Costa Rica, Germany, Hungary, India, Ireland, South Africa, Sweden and UK).

(12) Almost all of them pledge to the various human rights instruments of the UN and those at the regional level.

(13) Almost all the laws have shown a shift from the medical model to the human rights model.

However apart from the points of concurrence, there are divergences in the following areas:

188. *Ibid* at p. 163

189. *Ibid*

- (1) There is no universal definition of disability-based discrimination and no concept of what equalisation of opportunities for disabled person truly entails.
- (2) Despite the fact that most of the laws hope to establish equal opportunities for disabled persons, they do not identify and prohibit inaccessibility, segregation, or the denial independent living as forms of discrimination.
- (3) Some countries have chosen to distance themselves from the UN Disability Convention making it difficult, to a certain extent to view disability issues from a common point of view and taking collective measures to address the problem.
- (4) The concept of inclusive education has not been adopted except for a few countries; international law too lags behind to implement this facet of disability discrimination.

A SUM UP :

Regardless of being one of the principal minority groups encompassing approximately 10% of the world population; regrettably disabled people have been unobserved during the first three decades of the United Nations' existence. The International Bill of Human rights did not include disabled persons as a vulnerable group requiring protection against human rights violations. None of the equality clauses mentions disability as a protected category. The 1970s marked a new approach to disability. The concept of human rights for disabled persons began to become more accepted internationally. Two major declarations on the disabled were adopted by the General Assembly in the new decade. The *Declaration on the Rights of Mentally Retarded Persons* of 20 December 1971 provided a framework for protecting rights through national and international action. The Declaration stated that mentally retarded persons had, to the degree feasible, the same rights as other human beings, including a right to proper

medical care and education, to economic security, to a qualified guardian, as required, to protection from exploitation and to access to legal procedures. The *Declaration on the Rights of Disabled Persons*, adopted by the General Assembly on 9 December 1975, encouraged national and international protection of the rights of the disabled. Recognition was given to the fact that disabled persons were entitled to the same political and civil rights as others, including measures necessary to enable them to become self-sufficient. Though heavily reliant on the medical model these two declarations sowed the seeds of disability movement.

Subsequently after declaring 1981 as *The International Year of the Disabled*, the developments gave some impetus to the disability rights movement. But the most remarkable of them was the *Standard Rules for Equalisation of Opportunities* in 1993. But unfortunately the exclusive developments in this field were restricted to soft law instruments. For many years, disability related organisations and UN members have discussed and lobbied for the possibility of a convention specific to disabled people. Although existing human rights laws seem to provide equal rights for the disabled 10 per cent of the world population, the reality, in practice, is that these instruments have failed to protect the human rights and fundamental freedoms guaranteed to disabled people. Early initiatives did not receive too much attention, and it was not until April 2000 that the UN Commission on Human Rights invited the UN High Commissioner for Human Rights to examine measures to strengthen the protection and monitoring of the human rights of 'persons with disabilities' in its resolution 2000/51. The General Assembly then established an Ad Hoc Committee (hereafter the Committee) in its resolution 56/168, in December 2001, on a "Comprehensive and Integral International Convention on Protection and Promotion of the Rights of Dignity of Persons with Disabilities" to consider proposals for a convention to protect and promote the rights of disabled people. Discussions at its first meeting included the underlying principles and a human rights based approach was preferred for this new convention. The greatest boost to the human rights approach as well as

securing of domestic laws for the protection of persons with disabilities came around only recently with the adoption of the *United Nations Convention for the Protection of Rights of the Persons with Disabilities* in 2006 and which has very recently come into force in 2008. The convention requires states to establish a 'framework', including one or more independent mechanisms as appropriate, to promote, protect and monitor implementation of the Convention.

Though the above discussion on international approach to disability law surely brings to the fore that in international disability law is classified as a human rights issue, nevertheless there are a lot of issues, which remain to be addressed. Since the Disability Convention has just come into being its efficacy or applicability in national legislative schemes will take a reasonable time. So it is necessary that matters like treatment of disability issues should not only be taken a strict human rights issue but as subjects for normal rehabilitation and equal opportunities. Segregation of people with disabilities in institutions is one of the worst forms of discrimination; hence deinstitutionalization will surely help in the efforts towards normalization and rehabilitation. Further a look at the laws in the various countries reveals that they had and even now have an impression that they cannot enjoy the same rights as the normal people. This thinking needs to be changed and it needs to be propagated that discrimination on the basis of disability is unlawful. Though there a lot of convergences, but the aim of international law should be turn the world into a global village where citizens can move freely without the complexities of legal procedures. More so in case of disabled persons this approach of universality should be adopted and encouraged. It is unfortunate that at this hour a number of countries have stayed away from being a part of the historic Convention.

Promotion and enforcement of human rights must respect the concept of universality: the fundamental premise of the *Universal Declaration of Human Rights* that all human beings are equal in dignity and rights, without

division of any kind. The protection of the human rights of people with disabilities is an instantaneous and critical concern worldwide. Increasing the participation of people with disabilities in their societies benefits everyone and is key to achieving equality and justice. Hence each and every nation should come forward to be a part of the Disability Convention, give their invaluable comments on the working of the provisions of the Convention as well as its optional protocol and make the differently able feel all the more special by recognizing their capacities and encouraging their spirits.

CHAPTER 3

PROTECTION OF HUMAN RIGHTS OF THE PERSONS WITH DISABILITIES UNDER THE INDIAN LEGAL SYSTEM

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PROLOGUE:

After having assessed the international scenario regarding the protection of rights of the Persons with Disabilities we have noticed some convergences as well as divergences. The vast international legal framework consisting of Declarations, Conventions, Conferences, Statutes-- all contributing in their respective ways in the protection of the rights of this class of vulnerable people. In the previous chapter, we have discussed the various civil anti-discrimination legislations. India too has legislations dealing with the protection of the rights of the persons with disabilities. In fact the Constitution of India also lays down provisions ensuring equality, freedom, justice and dignity of every individual and implicitly mandates an inclusive society for all including persons with disabilities.

Though the most comprehensive legislation is *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, there are some other major as well as minor laws which need to be discussed here. Since human rights is not merely confined to availability or enjoyment of right to food, shelter, education or employment but also extends to those particular requirements that are essential for the enjoyment of the basic rights, the absence of which shall render the existence of the basic human rights

of no effect. The major Laws include--- *The Mental Health Act of India, 1987, The Rehabilitation Council of India Act, 1993* and *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999*. The minor laws regarding this subject matter include---*The Workmen's Compensation Act, 1923, the Employees' State Insurance Act, 1948, The Factories Act 1948, The Plantation Labour Act, 1951, The Mines Act, 1952, The Motor Vehicles Act, 1988, The Indian Penal Code, 1862, the Public Liability Insurance Act, 1991, Juvenile Justice (Care and Protection of Children) Act, 2000, Income Tax Act, 1961* amongst others.

In this Chapter we shall discuss the constitutional provisions as well as the major laws on the area in detail (except *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, which shall be discussed in the succeeding chapter), including the delegated legislation concerning these particular areas of study. So far as the minor laws are concerned the *Workmen's Compensation Act, 1923* is by far the most important. The other laws deal more with the preventive aspect and are of limited application, hence only a small discussion of the relevant provisions shall suffice. This Chapter intends to focus on areas of mental health, rehabilitation of disabled persons through constitution of a statutory body, and dealing with persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities through the formation of a national trust. In fact the *Persons with Disabilities Act of 1995* have not covered the area of mental health. Further the minor laws too cover a variety of areas that have not been adequately dealt with by the aforesaid Act. However, the major and minor laws too are not proficient enough to address every human rights aspect of the disabled population.

A. CONSTITUTIONAL GUARANTEES FOR PERSONS WITH DISABILITIES:

Equality, dignity, sovereignty and liberty are the founding on which international human rights law is premised. These ideals have amply influenced the elementary law of democratic polity and are echoed in Constitutions of most democratic nations counting India as well. The Constitution of India premised on the principle of social justice and human rights. The Preamble, the Directive Principles of State Policy and the Fundamental Rights enshrined in the Constitution stand testimony to the commitment of the State to its people. These provisions envisage a very positive role for the State in the upliftment of the status of disadvantaged groups.¹

The opening words of the Preamble of the Constitution are “*We, the people of India*”. The word “people”, used in the Preamble, itself indicates that no discrimination was envisaged by the Constitution makers amongst the people of India on any ground whatsoever; be it religion, race, colour, creed, caste or even disability. People suffering from disability, whether they were blind, physically disabled or even mentally retarded, were included in the word “people” and an assurance was given in the Preamble “to secure to all its citizens: justice, social, economic and political” as also equality of status and of opportunity and to promote fraternity so as to uphold the dignity of the individual.² Further, the Preamble to the Constitution of India expressly declares to, “.... secure to all citizens; Justice, social, economic and political; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation.

1. Anuradha Mohit, Meera Pillai, Pratiti Rungta, “*Rights of the Disabled*”, 1st Edition (National Human Rights Commission, New Delhi, 2006) p. 17

2. For details on the Speech delivered by Hon’ble Chairperson of the Rajasthan Human Rights Commission on Disabled Day, visit <http://rshrc.nic.in/htm/e-SpSagir-E%2011.htm>, accessed on 12.3.2008

Hence although the Constitution of India does not specifically forbid prejudice on the ground of 'disability' but includes non-discriminatory provisions, which pledge equality and equal opportunities for all citizens.³ At the time when the Constitution was being framed, a provision had been incorporated that special legislation can be made for women, children and for the advancement of those belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.⁴ Unfortunately at that point of time there was lack of public as well as national awareness regarding the cause of the disabled, and hence there was no provision made for any special legislation in favour of the disabled as in the case of women, children and those belonging to the backward classes. However, Part III of the Constitution of India provides for fundamental rights available to all citizens of India taking into account people with physical and mental disabilities as well. These rights relate to the wide array of rights which citizen enjoys by way of constitutional guarantees.⁵ The Constitution explicitly commands the state to endeavour for an egalitarian society founded on equality, liberty and welfare ideals. It not only guarantees right to life and personal liberty but also directs the state to make effectual provisions for securing the right to work, to education and to public assistance, in cases of unemployment, old age, sickness and disablement, and in cases of other unmerited want.⁶ The Constitution also directs the State to make certain that disability does not turn out to be a rationale to refute to any citizen opportunity for securing justice.⁷ Here it would be useful to examine the various Constitutional provisions that apply to non-disabled as well as disabled persons.

3. Sadiq Ahamad Jilani Syed, "Legal Framework for Social Integration of Persons with Disabilities" in *Infra* Chapter 2 note 6, pp. 154- 167 at p. 159

4. Constitution of India, Article 15(3) & (4).

5. Gautam Banerjee, *Disability and the Law*, Commercial Law Publishers (2005), p. 145

6. *Supra* note 1 at *ibid*

7. *Ibid*

(a) *Equality and non-discrimination*

In order to achieve the objectives set out in the Preamble through the mechanism of the Constitution, certain very important and relevant provision were incorporated as, for example, Articles 14, 15 and 16 guaranteeing equality before law and equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.⁸ *Articles 14 to 18* constitute the right to equality. *Article 14*⁹ ensures that all persons are equal before the law and that equal protection of the law will be available to all persons within the territory of India irrespective of their ability or disability. Equal protection implies equal protection in similar circumstances in privileges conferred as well as liabilities imposed. The thought is not to give equal treatment to the unequal, save there is a coherent relation to the object sought to be achieved by the law. Thus *Article 14* forbids discrimination between persons who are substantially in similar circumstances or conditions. It does not forbid different treatment of unequal. Hence application of the same laws uniformly to all of them will, therefore, be inconsistent with the principle of equality.¹⁰ Therefore, this implies that the concept of equality enshrined in Article 14 of the Constitution of India itself enjoins duty on the state to bring about a situation where the fundamental rights can be exercised on the footing of equality. It follows; therefore, that a disabled person is entitled to a right to be placed at a level at which he can enjoy the rights.¹¹

8. Supra note 2

9. Constitution of India, Article 14, Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

10. V.N. Shukla, *Constitution of India*, 10th Edition, (Eastern Book Company, 2007), p. 38

11. A.K.Sikri, Human Rights of the Disabled: World in a Slow Motion, *Journal of Constitutional and Parliamentary Studies*; Vol. 38, Number 1-4; January- December 2004, pp. 1-49, at p. 9.

Even *Article 15* enjoins that “no citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any liability, restriction or condition with regard to- (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.” Thus disability will not by itself amount to a liability or restriction with regard to access to any of the places aforesaid. However the public facilities mentioned in *Article 15* are designed on the assumption that every person is able-bodied who can walk, hear, see or use their limbs devoid of any physical or mental disability.¹² While many marginalized social groups have been able to project their specific social experiences of discrimination and their aspirations onto the wider social plane for discussion and debate, interventions from the disabled have been minimal as they lead dispersed social lives that make their discrimination appear as individual problems. This is exemplified in the Constitution of India that prohibits discrimination on grounds of religion, race, caste, sex or place of birth under *Article 15*, but does not explicitly mention persons with disability as a group to be protected against discrimination.¹³

Article 16 guarantees equality of opportunity to all citizens in the matter of appointment in any office or other employment under the State. The exception to this rule of equal opportunity has also been stated. Thus under this article every citizen has a right, whether disabled or not to apply for any post under the government of and the right to be considered on the merits for the post applied for. What has been guaranteed is equality of opportunity and not any right to be appointed to the post under the State. Though there has

12. *Supra* note 1

13. Introduction. *National Human Rights Commission Disability Manual*. (National Human Rights Commission, New Delhi, 2005), pp. 3-8 at p. 4

been no uniform response regarding 'reservation' as a way to secure equality among unequal, the judiciary has had several instances to scrutinize the legitimacy of such concept as well as its consistency with the right to equality as enshrined in the Constitution.¹⁴ However the most remarkable judgement which is exemplary in putting to rest all controversy is *Indra Swahney v. Union of India*.¹⁵ This case is held to be of particular significance for persons with disability as the Supreme Court reviewed the issue of reservation, taking into account the legality of reservation in favour of the disabled who have not been explicitly covered under Article 16 of the Constitution. The Court observed:

“... mere formal declaration of the right would not make unequals equal. To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip type disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Articles 14 and 16(1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them.”

The comment of Krishna Iyer J. in *Jagdish Saran v. Union of India*¹⁶ also needs to be mentioned here. It was observed that even apart from Articles 15(3) and 15(4), equality is not degraded or neglected where special provisions are geared to the larger goal of the disabled getting over their disablement consistent with the general good and individual merit.

*Article 17*¹⁷ puts forward two declarations. Firstly, “untouchability” has been abolished and its practice in any form has also been forbidden; and secondly, it declares that enforcement of any disability as a

14. *Ibid.* Chapter 3-The Indian Scenario, pp.27-38 at pp. 27,28

15. AIR 1993 SC 477

16. (1980) 2SCC 768; AIR 1980 SC 820

17. Constitution of India, Article 17: Abolition of Untouchability--- “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.

result of untouchability shall be an offence punishable in accordance with law. The word 'untouchability' has not been used in this article in its literal or grammatical sense, but refers to those regarded as untouchables in the course of historical development. Though the literal construction of the term would take into account persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic, contagious disease or on account of social observance such as are associated with birth or death or on account of social boycott resulting from caste or other disputes.¹⁸ Thus persons with disability, whether physical or mental may also find themselves as victims of the practice of untouchability.¹⁹ Hence this Article too implicitly provides that the State should take all reasonable steps to ensure the abolition of untouchability in all its forms, irrespective of his physical or mental status.

(b) Right to Freedom

Article 19 guarantees the six fundamental freedoms that are exercisable by them throughout the territory of India and include--- freedom of speech and expression; freedom of assembly; freedom of association; freedom of movement; freedom of residence and settlement; and freedom of profession, occupation, trade or business. However the six freedoms are not absolute. Absolute individual rights cannot be guaranteed by any modern state. If citizens were given total and unconditional liberty without any social control the consequence would be ruin. Thus the guarantee of each of the aforesaid rights is hence constrained by the Constitution itself by bestowing upon the State an authority to impose by law reasonable restrictions as may be necessary in the larger benefit of the society. The limitations on these freedoms are contained in clauses 2 to 6 of

18. Supra note 10 at p. 96

19. Supra note 5 p. 148, 149

Article 19 of the Constitution.²⁰ Reasonable restrictions can be placed on grounds of sovereignty and integrity of India, security of State, friendly relations with foreign States, public order, decency or morality, contempt of court, defamation, incitement to offence, breach of peace, etc. Thus this Article intends to provide the “fabric of free and equal democratic society.”²¹ This Article is available to both disabled as well as non-disabled and no disabled person can either be deprived of the freedoms assured by this Article, nor evade the restrictions by reason of his/her disabled status.

(c) *Protection of life and personal liberty*

*Article 21*²² though couched in a negative language, confers on every person the fundamental right to life and personal liberty and a person can be deprived of his life and personal liberty if two conditions are complied with, firstly, there must be a law; and secondly, there must be a procedure prescribed by that law, provide that the procedure is just, fair and reasonable. Right to life has a very wide ambit and includes the right to live with human dignity, the right to minimum subsistence, the right to livelihood, right to shelter as well as dignity of a person. The expression personal liberty implies freedom from physical restraint of a person and includes the right to move about freely, right to privacy, right to free legal aid, right to speedy trial, right against solitary confinement, etc. In fact, though this Article only directs that no person shall be dispossessed of his life and liberty except according with law, the construal given to expressions ‘life’ and ‘liberty’ have invented so many rights. The negative language of *Article 21* and use of the word

20. Dr. J.N.Pandey, *Constitutional Law of India*, 38th Edition, (Central Law Agency, 2002), p. 151

21. *Supra* note 3 at p. 15

22. Constitution of India, Article 21: Protection of life and personal liberty—No person shall be deprived of his life or personal liberty except according to procedure established by law.

'deprived' was supposed to inflict upon the State the negative duty not to interfere with the life or liberty of an individual without the endorsement of law, activist judges have now imposed an affirmative obligation upon the State to take steps for ensuring to the individual an enhanced pleasure of his life and dignity. With this outlook of the judiciary in interpreting Article 21 and taking human rights in terms of human development, foreseeable conclusion would be that even persons suffering from disability have fundamental rights in the form of Article 21 to enjoy their life and freedom, notwithstanding physical or mental disabilities and enjoying other rights warranted to the people of this country.²³ In short, the Constitution pledges "Right to Life" to all its citizens which means that every person including disabled has a right to live with dignity. This also implies that the "Disabled" like other citizens or people, possess all the basic human rights particularly because they are "Human Beings"²⁴

Environmental pollution has been one of the major causes of pollution in the modern world, which is also one of the causes of disability. The Supreme Court expanded the Fundamental Right under Article 21 to include environmental protection and health. Since taking appropriate precautions can prevent disability, hence the judiciary has stepped forward to address the situation. In Ganga Pollution (Tanneries) Case i.e. *M.C. Mehta v. Union of India*,²⁵ the court observed, "We are conscious that closure of tanneries may bring unemployment, loss of revenue, but health and ecology have greater importance to the people."²⁶ Environmental protection is

23. Supra note 1 at p. 8

24. Supra note 4

25. (1987) 4 SCC 463

26. Dr. Padma. "Environmental Pollution and Disability—Its Dimensions". *Indian Bar Review*, vol. 27 (3 &4) 2000, pp. 217-228 at p. 223

necessary for the fundamental right to life was reiterated in *L.K. Koolwal v. State of Rajasthan*,²⁷ *Kinkri Devi v. State of Himachal Pradesh*,²⁸ etc.

(d) Other Fundamental Rights

Apart from the above fundamental rights, the fundamental rights under Articles 20 (*Protection in respect of conviction for offences*); 21A (*Right to education*); 22 (*Protection against arrest and detention in certain cases*); 23 (*Right against exploitation*); 24 (*Prohibition in employment of children in factories etc.*); 25 (*Right to freedom of religion*); 26 (*Freedom to manage religious affairs*); 27 (*Freedom as to payment of taxes for promotion of any particular religion*); 28 (*Freedom as to attendance at religious instruction or religious worship in certain educational institutions*); 29 (*Cultural and Educational rights—Protection of interests of minorities*); 30 (*Right of minority to establish and administer educational institutions*); and 32 (*Right to Constitutional remedies—Remedies for enforcement of rights conferred by this Part*) are enjoyable by the disabled along with the non-disabled.

(e) Directive Principles of State Policy and Disability Rights:

Directive Principles as laid down in Article 38-47 of the Constitution are guaranteed to each and every citizen. However, Article 41 is the only Article in the entire Constitution that spells out the term 'disablement'. Apart from Article 41, Articles 39, 42, and 47 impliedly provide certain assurances to be initiated for the prevention of disability. However these Articles nowhere use the term 'disability', whether physical or mental.

27. AIR 1988 Raj. 2

28. AIR 1988 H.P. 4

*Article 41*²⁹ directs the State to make effectual provisions in order to secure the right to work, education and public assistance in case of unemployment, sickness and disablement. The expression ‘in other cases of undeserved want’ also relates to persons with disabilities and furthermore takes in its sweep disabilities as are being steadily acknowledged by the medical world.³⁰ Though, *Article 41* does not confer a justiciable right, the Supreme Court has, by its own interpretation, bearing in mind the goal of socio-economic, held that the Courts should so interpret a statute as will advance the objective underlying *Article 41*.³¹

Article 38 though provides that the State shall endeavour to promote the welfare of the people by securing and protecting the social order in which social, economic and political justice shall prevail; inequality of income have to be minimized and equal facilities and opportunities have to be made available to individuals and groups of people living in different areas or engaged in diverse occupations. The assurance is available to disabled as well as non-disabled, whether men or women. The idea is that the State will play the role of a welfare model and create a social order except which political democracy will be meaningless. But the provision of clauses (e) and (f) of this Article surely speaks of steps to be taken to prevent disability in every Indian. While clause (f) provides that “that the health and strength of workers, men and women, and the tender age of children are not abused and the citizen are not forced by economic necessity to enter avocations unsuited to their age or strength”; the clause implies that no person whether, male, female, tender children or workers shall be abused in any manner and none of them is

29. Constitution of India, Article 41: Right to work, to education and to public assistance in certain cases—the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement.

30. *Supra* note 3 at p. 158

31. *Jacob M. Puthuparambil v. Kerala WaterSupply* (1999) 1 SCC 28=ARI 990 SC 2228.

coerced to take up any avocation which is harmful for their age as well as strength. Therefore any act or avocation which shall pose a threat to ones health shall be prevented to be taken up. In *M.C. Mehta v. State of Tamil Nadu*³², it has been held that in view of Article 39 the employment of children within the match factories directly connected with the manufacturing process of matches and fireworks cannot be allowed, as it is hazardous. Children can, however, be employed in the process of packing but it should be done in area away from the place of manufacturing to avoid exposure to accidents. Thus this step to stop children from being employed in hazardous employment is to prevent future disablement of such children or disability as a result of accidents. Similarly clause (f) also aims to protect the children and youth from any harmful effects that might affect their physical or mental capacities.

Article 42³³ directs the State to make all efforts to secure just and humane conditions of work and maternity relief. Physical disability is a condition which is not always acquired. If a pregnant mother is not looked after well and during the period of pregnancy, does not get proper nourishment, the embryo may not fully develop and some deformity may set in some part of the embryonic body. Children born in such condition, after full period of gestation, may have either visible or latent deformity which, as the child grows in age, may make him a disabled child. What is, therefore, necessary is that full care must be taken of mother and child both of the per-natal and post-natal stages.³⁴ Hence the provision is meant to protect every person engaged in any profession to be safeguarded in his place of work so that he is not exposed to any danger, which might affect his well-being and thus save him from probable disablement, which might ensue due to lack of

32. (1991) 1 SCC 283.

33. Constitution of India. Article 42: Provisions for just and humane conditions of work and maternity relief—The State shall make provision for securing just and humane conditions of work and maternity relief.

34. Supra note 2

such provision. Similarly maternity relief to a would-be mother would also result in her giving birth to a healthy child. Accordingly Maternity Benefit Act 1961 has been framed to entitle workingwomen to maternity leave.

Article 47³⁵ enjoins upon the State to raise the level of nutrition, the standard of living of the people and also improve public health. The State shall particularly proscribe the consumption of intoxicating drugs or drinks, detrimental to health except for therapeutic purpose. Thus this Article also intends to protect the health of its citizens so as to prevent future disablement, whether due to lack of nutrition or due to accidents or physical or mental degeneracy owing to use of intoxicating drugs or drinks.

Finally, *Article 249* of the Constitution empowers the Parliament to legislate on any subject falling in any list in order to fulfill its international obligations. Consequently the Persons with Disabilities Act, 1995 was framed.

Thus, a perusal of the above lines reflects the constitutional norms in protection of human rights of the persons with disability, which is more implied in the Directive Principles of State Policy. The Fundamental Rights are somewhat silent on the wants of this vulnerable group. The Constitution in Articles 15 and 16 prohibits discrimination in the matter of employment and access to public facilities on grounds of religion, race, caste, sex and place of birth, but is silent on disability. Where 'Human Rights Model' is the want of the day, reliance on the 'Medical Model' surely echoes the apathy of the lawmakers. Although, rights covered under Article 14 to Article 32 form parts of fundamental/enforceable rights and Article 36 to

35. Constitution of India, Article 47: Duty of the State to raise the level of nutrition and the standard of living and to improve public health—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Article 51 comprise directive principles and are theoretically non-justiciable. However, in Article 37, the Constitution clarifies:

(a) That the directive principles are fundamental in the governance of the country, and

(b) It shall be the duty of the State to apply these principles in making laws.

In view of these obligations, disability has been an integral component of policy planning. There appears to be a complete unanimity of judicial opinion that the Directive Principles and the Fundamental Rights are inter-related and interdependent. The Supreme Court of India declared, "The directive principles contained in Part IV constitute the stairs to climb the high edifice of a socialistic State and the fundamental rights are the means through which one can reach the top of the edifice." Highlighting the significance of the Directive Principles, the Supreme Court stated, in *Kesavananda Bharati*, that it is relevant in this context to remember that in building up a just social order it is sometimes imperative that the Fundamental Rights should be subordinated to the Directive Principles.³⁶

Thus courts in India particularly the Supreme Court of India has played a very significant role in giving an extensive and comprehensive interpretation of these principles in relation to fundamental rights. In addition by balancing the Directive Principles with the Fundamental Rights, the Apex Court has put the argument of economic capability at rest and has fairly paved way for the safeguard of all life related rights devoid of difference of immediate or progressive nature of realization. Hence where the judiciary has in its various decisions reiterated a positive approach in securing the rights of the disabled, taking a cue from it, the Constitution must also be reasonably amended to include and address the needs of the persons with disabilities. It is unfortunate that after sixty years of independence and almost the same period

36. Supra note 1 at p. 20

since the Constitution has been enacted; there is not a single provision which specifically aims at securing the human rights of the persons with disabilities. Where Constitution is the supreme law of the land, its ennuui towards this issue surely pinches. Particularly after India's ratification to the UN Disability Convention it needs to bring about the necessary changes as a responsive nation.

B. MAJOR LAWS ON THE PERSONS WITH DISABILITIES:

As already mentioned, apart from *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, which is the most important legislation concerning the disabled persons, there are three other statutes which also address the issue. India has been a signatory to all the major international instruments dealing with the mental and physical well being of the persons with disabilities. An analysis of *The Mental Health Act of India, 1987*, *The Rehabilitation Council of India Act, 1993* and *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* shall be undertaken to assess the role of these three statutes in protecting the need of the disabled lot, particularly from the human rights point of view.

(a) The Mental Health Act of India, 1987³⁷: An Overview--

(i) Mental health and human rights:

The World Health Organization defines health as "a state of complete physical, mental and social well-being and not merely absence of disease or infirmity". Hence the stress is laid on physical as well as mental and social health. Unfortunately, the instances of mental disorders are

37. Act No. 14 of 1987, dt. 22-5-1987

augmenting and major mental disorders are taking an immense toll in all societies resulting in human sufferings, disability and loss of community resources.³⁸ In India, 40-50 million people are in need of mental health care. The attitude of the society towards a person with mental illness has been one of hatred and contempt. Persons acquiring mental illness are stigmatized and they have to swallow the anguish of neglect and deprivation all through their life. It is very disheartening that in this age of human rights where measures have been taken to recognize the rights of ordinary citizens, including prisoners, the requirements of mentally sick have been ignored and they are compelled to live the life of 'non-human beings'. Mentally ill persons are treated differently in educational institutions and are shorn of the basic human rights that other people enjoy under similar circumstances.³⁹

Thus, the mentally ill persons ought to have similar privileges as enjoyed by average human beings. This connotes a right to improved and more accessible care, facilities for good recovery and better hopes for reintegration in the social order. But it is the stigma, residual disability and an approach of prejudice towards them; and most outstandingly, the inability of the mentally ill to protest against exploitation have all made basic human rights of the mentally ill a key concern. Consequently, the human rights of a mentally ill person are twofold—*firstly*, to endow them with the same privileges as enjoyed by other members of the community, and *secondly*, ensuring them defence against exploitation. Such exploitations include economic, sexual, physical, verbal and other forms of abuse and degrading treatment.⁴⁰

38. Shalu Nigam. "Patient's Right and Mental Health Care", *Legal News and Views*, vol.15 no.4 (April, 2001), pp. 2-3 at p. 2

39. Subhash Chandra Singh, "Neglect of the Rights of Mentally Sick in the Age of Human Rights", *Legal News and Views*, vol. 17 no. 9 (September, 2003), pp. 39-41 at p. 39

40. *Supra* note 26 at *ibid*

(ii) *Backdrop and object of the Act:*

The earliest Act regulating mentally ill persons or “lunatics” as they were termed under the *Indian Lunacy Act, 1912*. With the advancement made in medical science and social thoughtfulness of the nature of this illness, it became indispensable to have a fresh law with provisions for treatment of mentally ill persons in accordance with the new approach.⁴¹ The Government of India had initiated the National Mental Health Programme in 1982 with the objective of improving mental health services at all levels of health care (primary, secondary, and tertiary) for early recognition, adequate treatment and rehabilitation of the patients with mental health problems within the community and in the hospitals. However, the programme did not make much headway either in the Seventh or the Eighth Plan. Mental hospitals remained in poor shape. The States could not or did not provide sufficient funds for those mentally ill requiring inpatient treatment despite the Supreme Court having directed the Centre and the States to make necessary provision for these hospitals so that the inmates do get humane and appropriate care.⁴²

Hence a duty to establish, maintain and supervise mental health facilities by the Governments under a legislated Act was considered a progressive step, more effective than mere recommendations or suggestive programmes. The requirement was finally met in 1987 with the enactment of *The Mental Health Act*. But in spite of the Act being drafted in 1987, it came into effect in every State and Union Territory in April 1993. Divided into ten chapters and ninety-eight sections, the long title of the Act lays down that, the Act intends to “*consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provision with respect to their property and affairs and for matters connected therewith or incidental thereto.*”

41. *Supra* note 3 at p. 317

42. Source: Ninth Five Year Plan, Government of India.

(iii) Meaning of Mental Health under the Act:

Although the Act deals with 'mental health', the Act neither defines 'mental health' or 'mental illness'. However the Act as per section 2 (l) defines 'mentally ill person' as a person who is in need of treatment by means of any mental disorder other than mental retardation. While mental disorders require treatment ranging from mild neurosis to violent psychoses, all these disorders do not require in-patient treatment. The definition given in the Act says that only those persons are mentally ill who are exposed to psychiatric treatment. But looking at the wide range of mental disorders, the definition does not reflect that only in-patient persons will be described as mentally sick within the purview of the Mental Health Act, 1987. Hence in terms of this meaning, one is considered mentally disordered person by reason of the simple fact that he or she is in need of psychiatric treatment or one who receives psychiatric care. This definition is therefore insufficient as it leaves out many people who for one reason or the other who are potentially diagnosable as mentally ill.⁴³

(iv) Rights under the Act:

The rights of a mentally ill person may be summarized under the following heads:

- I. Right to admittance into and discharge from psychiatric hospitals or psychiatric nursing homes⁴⁴--

The Act makes provision for psychiatric hospitals and nursing homes, it provides for the establishment or maintenance of psychiatric hospitals or psychiatric nursing homes by the Central or State government

43. Subhash Chandra Singh, "Legal and Ethical Rights of Persons with Mental Disability", *Indian Socio-Legal Journal*, vol. 32 (1&2), (2006), pp.27-40 at p. 28

44. *Mental Health Act, 1987*, Section 2(t)—"psychiatric hospital" or "psychiatric nursing home" means a hospital, or as the case may be, a nursing home established or maintained by the Government or any other person for the treatment and care of mentally ill persons and includes a convalescent home established or maintained by the Government or any other person for such mentally ill persons; but does not include any general hospital or general nursing home established or maintained by the Government and which provides also for psychiatric services.

within the limits of their jurisdiction.⁴⁵ It also provides for establishment of psychiatric hospitals or psychiatric nursing homes by any private citizen only on holding a valid licence under the Act.⁴⁶ A right to be admitted, treated and taken care of in a Psychiatric hospital or Psychiatric nursing home established or maintained by the Government or any other person for the treatment and care of mentally ill persons (other than general hospitals, or nursing homes of the Government). Treatment at Government hospitals and nursing homes mentioned above can be had either as in patient or as out-patients. Even mentally ill prisoners and minors have a right to treatment in psychiatric hospitals or psychiatric nursing homes of the Government. Minors who are under the age of 16 years, persons who are addicted to alcohol or other drugs which lead to behavioural changes and those convicted of any offence are, entitled to admission, treatment and care in separate Psychiatric hospitals or nursing, homes established or maintained by the Government. provision has also been made for the treatment of mentally ill persons in the psychiatric hospital / nursing home, as an out - patients, in case his condition does not warrant his admission or an in - patient.⁴⁷

So far as admission and detention is concerned the Act deals with admission on voluntary basis, admission under special circumstances and admission with reception orders. Mentally ill persons can seek voluntary admission in such hospitals or nursing homes⁴⁸ and minors can seek admission through their guardians.⁴⁹ Section 18 lays down the detailed procedure for discharge of voluntary patient from the psychiatric hospital or psychiatric nursing home. Relatives of mentally ill persons on behalf of the

45. *Ibid*, Section 5

46. Ss. 6, 7, 8, 9, 11, 12 provide The procedure of making the application for licence, the grant or refusal of licence by the licencing authority, duration and renewal of licence, revocation of licence; and, appeal in case where a licence has been refused has also been laid down.

47. Section 14

48. Ss. 15 and 17

49. Ss. 16.

latter can seek for admission. Any mentally ill persons who does not, or is unable to, express his willingness for admission as a voluntary patient, may be admitted and kept as an in-patient in a psychiatric nursing hospital or psychiatric nursing home on an application made in that behalf by a relative or a friend of the mentally ill persons if the medical officers-in-charge is satisfied that in the interest of the mentally ill persons it is necessary so to do.⁵⁰ Unfortunately the percentage of involuntary admissions is often found to be very high and the provisions of Section 19 which permits admission under certain special circumstances by a relative or a friend are being widely abused. Applications can also be made to the local magistrate for grant of reception orders.⁵¹ At the same time the Act seeks to control admittance to for mentally ill persons who either do not have sufficient understanding to seek treatment willingly and consequently remain neglected but also to care for such persons and their rights whilst they are detained in these hospitals or nursing homes.

Although establishment of licencing authorities, provision for new hospitals and out-patient care, simple procedure for admission and discharge of mentally ill person to and from hospitals are a few of the significant changes to the old Lunacy Act of 1912, the basic limitation of the Act relates to its perception of institutional care as the sole arrangement for the care and safeguard of mentally ill persons. Above all, due to the lack of a proper review mechanism of involuntary admissions, the likelihood of human rights violations increases by leaps and bounds, since all resolutions regarding admission, type of treatment and release are decided either by professionals or family members. As a matter of fact the Act leaves enough space for the abuse of power by the police, medical officer or magistrate. Further licencing

50. S. 19.

51. S. 20

authorities do not have a doctor, who would surely be the best judge to ascertain the facilities and services of the psychiatric hospitals/psychiatric nursing homes. Leaving out General Hospitals and Health Centres from the purview of treating mentally ill persons, the Act rules out the provision of better health care, particularly in the rural areas where Health Centres are the only provision of health care. Although the Act lays down an easier discharge procedure, but there is no stipulation regarding post discharge care and rehabilitation of patients. The Act misses on the penalties, if the relatives and officers request unnecessary detention of a person in such hospitals. The Act also does not point out that in cases where no relative comes forward for discharge of patient, for what period he/she will be detained and even if the Govt. bears the expenses then what is the maximum period of such forbearance. The Act also adopts a separate approach for Government and Private Hospitals. In India, the psychiatric hospitals or psychiatric nursing homes work as custodial centres only. There are reports that mental hospitals are poorly lighted, uncomfortable, crowded, unsanitary and inadequately staffed, patients are chained and often suffer cruel treatment.⁵² There are scarcely any meaningful attempts to assimilate them in the mainstream of society. Rehabilitation, occupational therapy and social integration are equally poor. Many mental hospitals are detrimental to the self-esteem, sense of privacy and autonomy of patients.⁵³

52. *Supra* note 43 at p. 38. Section 12 of the Protection of Human Rights Act, 1993 provides that the National Human Rights Commission (NHRC) is to visit Government run mental health institutions to study the living conditions of inmates and make recommendations thereon. The NHRC in addition to the discharge of this responsibility has been giving special attention to the human rights of the mentally ill persons because of their vulnerability and need for special attention. In course of its regular visits, the Commission was surprised to find the old and primitive methods of diagnosis and treatment in vogue in most places. Further, the project report of the Commission on Quality Assurance in Mental Health Institutions confirms that the percentage of involuntary admissions is very high and there is a wide abuse of the provisions of Section 19. For details on the NHRC visit [http:// www.nhrc.nic.in](http://www.nhrc.nic.in).

53. *Ibid* at p. 39

II. Protection of human rights of the mentally ill:

Chapter VIII of the Act specifically deals with the protection of human rights of mentally disabled people. It consists of only one section i.e. **Section 81.**⁵⁴ The Section provides that mentally ill persons are to be treated without violation of human rights. The section is based on the principle that mentally ill persons deserve the protection of law as a matter of human right. This section therefore provides that no mentally ill person will be subjected, during his treatment in any psychiatric hospital or psychiatric nursing home to any kind of physical or mental indignity or cruelty. He shall not be used for the purposes of research unless such research is for his benefit, for better diagnosis or treatment or where he is voluntary patient and has given his consent in writing or by his guardian (in case of minor) for such research. But the provision of research with the consent of guardian amounts to treating them like inanimate objects. Hence, though a provision to protect human rights, the section itself amounts to gross human rights violation. This section also provides that no letters or other communications sent by or to a mentally ill person under treatment shall be intercepted, detained or destroyed. The purpose is to prevent any vexatious or derogatory communication that is detrimental to the treatment of mentally ill person from adversely affecting his human rights.⁵⁵

54. The Mental Health Act, 1987, Section 81--- Mentally ill persons to be treated without violation of human rights--- (1) No mentally ill person shall be subjected during treatment to any indignity (whether physical or mental) or cruelty.

(2) No mentally ill person under treatment shall be used for purposes of research, unless—
(i) such research is of direct benefit to him for purposes of diagnosis or treatment; or
(ii) such person, being a voluntary patient has given his consent in writing or where such person (whether or not a voluntary patient) is incompetent, by reason of minority or otherwise, to give valid consent, the guardian or other person competent to give consent on his behalf, has given his consent in writing, for such research.

(3) Subject to any rules made in this behalf under section 94 for the purpose of preventing vexatious or defamatory communications or communications prejudicial to the treatment of mentally ill persons, no letters or other communications sent by or to a mentally ill person under treatment shall be intercepted, detained or destroyed.

55. *Supra* note 5 at p.375

But reality is that little preference has been accorded to mental health care and infringement of human rights of mental patients. The intricate problem of mental health care system can be tackled only through an unremitting programme of education and awareness generation along with improving the infrastructure of treatment. The demand is to transform the frame of mind and the attitude of the society towards the mentally ill. The necessity is to move the spotlight from mental illness to mental well-being.⁵⁶ Till a few years ago many of them were confined to jails and subjected to inhuman treatment, which is far below the laid norms. In *Chandan Kumar Banik v. State of West Bengal*⁵⁷ The Supreme Court investigated the inhuman conditions of the mentally ill patients in a mental hospital at Mankundu in Hooghly district of West Bengal. The Court condemned and discontinued the practice of tying up with iron chains of patients who were unruly or not physically controllable and ordered drug treatment for these patients. The administration of the hospital was also removed from the Sub-divisional Officer and replaced by a competent doctor with requisite administrative ability and powers. The Supreme Court gave directions to remove other deficiencies in the care to ensure that the patients now detained in the mental hospitals would receive appropriate attention in all respects in a humane condition.⁵⁸ According to the report of the Supreme Court Commission, more than 90 per cent of the mentally ill persons in the jails of West Bengal were found to be persons arrested under Section 13 of the Indian Lunacy act, 1912. They were sent to jail on applications made by police officials, generally without personal examination or medical observation and safe custody. Once admitted on the order of magistrates, the non-criminal lunatics cannot be discharged, even after recovery, without the permission of the committing

56. Supra note 39 at p. 37

57. (1995) Supp.4, SCC 505

58. Supra note 8 at pp. 19-20

magistrate. The Supreme Court Commission has reported the presence of a number persons in jails whose release awaits magisterial orders.

The housing of persons with mental illness in jails was declared unconstitutional by the Supreme Court in *Sheela Barse v. Union of India*⁵⁹. Their appalling conditions were noted by the Supreme Court, which observed:

1. That admission of non-criminal mentally ill persons to jails is illegal and unconstitutional.
2. That the function of getting mentally ill persons examined should vest with Judicial Magistrates who, upon advice of mental health psychiatrists, should assign the mentally ill person to the nearest place of treatment and care.⁶⁰

Lately, there has been a shift of concern from basic living conditions of the mentally ill to concern about suitable treatment. In *Collaso v. State of Goa*,⁶¹ it was held that administration of Electroconvulsive Therapy without anesthesia is barbaric and violates *Article 21* of the Constitution as well as *Section 81* of the Mental Health Act.⁶²

III. Other benefits as envisaged by the Act:

In addition to the above principal features the Act also seeks to protect society from those mentally ill persons who have or become or might become a danger, menace or annoyance to others; to protect citizens who may be forced in the psychiatric hospitals or nursing homes without satisfactory causes; to fix and regulate responsibilities for the maintenance of mentally ill persons who are admitted to such hospitals or nursing homes; to make available facilities for establishing guardianship or custody for mentally ill

59. (1993) 4 SCC 204; Supra note 40 at p. 37

60. Supra note 11 at p. 20

61. Writ petition no. 257/98

62. Supra note 38 at p. 3

persons who become unable of managing their needs and affairs or taking decisions in their interest.⁶³ Where mentally ill persons own properties including land, which they cannot themselves, manage, the District Court upon application has to protect and secure the management of such properties by entrusting the same to a Court of Wards, by appointing guardians of such mentally ill persons or appointment of managers of such property.⁶⁴ Mentally ill persons who are entitled to any pay, pension, gratuity or any allowance from the Government (such as Government servants who become mentally ill during their tenure) are not to be denied such payments.

Besides, by virtue of this Act, the Central Authority and State Authorities at the State levels, for mental health services have been set up. Central Authority for Mental Health Services is an authority established by the Central Government for mental health under the superintendence, direction and control of the Central Government; and such authority shall regulate the development, direction and co-ordination with regard to the mental health services, agencies (including places where mentally ill persons may be kept and detained) under the control of the Central Government. The Authority also has to advise the central Government on all matters relating to mental health and discharge such other functions as may be required by the Central Government concerning mental health. The expression 'Mental Health Services' has been explained to include, in addition to psychiatric hospitals and psychiatric nursing homes, observation-wards, day-care centres, inpatient treatment in general, hospitals, ambulatory treatment facilities, convalescent homes and half-way-homes for mentally ill persons.⁶⁵ *Section 4* deals with

63. *Supra* note 43 at *ibid*

64. *Mental Health Act, 1987*, Sections 54-62

65. *Ibid*, S. 3. Also refer *The Central Mental Health Rules, 1990* that deals with the constitution of the Central Authority; ground of disqualification of members; appointment of Chairman and tenure of office; meetings of the Authority and appointment, powers and functions of Secretary (Rules 3-13)

provision of establishing a State Authority for Mental Health Services by the State governments;⁶⁶ and such an authority has to function under the directives and within the control of the State government in the same manner as the Central Authority under the Central Government. The State Mental Health Authority has been authorized to regulate the licensing and control of psychiatric hospitals and nursing homes for mentally ill persons. The State Governments have been empowered to provide legal aid to mentally ill persons at State expenses in certain cases.⁶⁷

(v) Efficacy of the Rights Guaranteed

Compared to the *Indian Lunacy Act, 1912*, the *Mental Health Act, 1987* has surely replaced some of the terms that degraded the dignity of mentally ill person. Establishment of licencing authorities, provision for new hospitals and out-patient care, simple procedure for admission and discharge of mentally ill person to and from hospitals, appointment of guardians for maintaining the person and property of mentally ill person, upholding of human right by prohibiting such persons a subjects of research and provision for separate places for children, addicts and convicted persons are surely some of the positive features of the Act.⁶⁸ However there are serious question marks on the efficacy of this legislation to guarantee the protection of the person, property and privacy of communication of mentally ill. Although hypothetically, the use of soft terms might appear to be good, but mere use of terms will not remove the humiliation attached to the illness. Apart from the inherent defects in the Act, the implementation of this act has been poor and

66. Also refer to the State Mental Health Rules, 1990 (G.S.R. 1005(E), dt. 29-12-1990) which deals with important definitions; constitution of the State Authority; rules concerning proceedings before the authority; appointment, powers and functions of the secretary; rules regarding application, grant, refusal, renew or revocation of licences; manner and conditions of maintaining psychiatric hospitals or psychiatric nursing homes; rules regarding treatment of in-patients and out patients; rules regarding admission and detention amongst others. (Rules 1-28).

67. Supra note 42 at *ibid*.

68. Dr. Prateek Rastogi, "Mental Health Act, 1987-an analysis", *JIAFM*, vol. 27(3), (2005), pp. 176-179 at pp. 176, 177.

enforcement mechanism is weak with the result that conditions of mentally ill persons are still far from satisfactory.⁶⁹ The principal defects may be summed up as:

- Involuntary admissions is often found to be very high and the provisions of Section 19 which permits admission under certain special circumstances by a relative or a friend are being widely abused
- Lack of a proper review mechanism of involuntary admissions.
- Perception of institutional care as the sole arrangement for the care and safeguard of mentally ill persons, which is outdated.
- Abuse of power by the police, medical officer or magistrate.
- No doctor constituting the Licencing authorities, who would surely be the best judge to ascertain the facilities and services of the psychiatric hospitals/psychiatric nursing homes.
- Leaving out General Hospitals and Health Centres rules out the provision of better health care, particularly in the rural areas.
- No specification regarding post discharge care and rehabilitation of patients.
- Act misses on the penalties, if the relatives and officers request unnecessary detention of a person in such hospitals.
- Separate approach for Government and Private Hospitals.⁷⁰
- Lack of privacy of patients.
- Concentrating on the human rights perspective, little preference has been accorded to mental health care and infringement of human rights of mental patients, with only one section dealing with the human rights.

69. Supra note 11 at p. 19

70. Supra note 68 at p. 178

A look at the above drawbacks reveals that there is a want to build up a comprehensive policy for protection of the rights of mentally ill patients. What's more, not merely adopting preventive measures to prevent the occurrence of illness, prominence is to be laid on cure and treatment in community based settings with an increasing participation of family, community and social organizations. Thus it is of utmost necessity that either a separate legislation or suitable amendments to the present Act be brought about to incorporate some human rights essential for the well-being of the mentally challenged.⁷¹

Perhaps the actual crisis lies in the lack of synchronized efforts to appreciate the special needs of the mentally ill. Hence the urgent need is to search for proper methodologies so that psychiatric hospitals truly turn into therapeutic community. Moreover there is a need of delivery of mental health care and consultative and educational services to all those who seek it. But the most important initiative is the need to carry out extensive research that would not only assess the impact of mental healthcare and preventive programmes, but also reaches out to include all citizens. Thus the need is an assurance of a comprehensive health care programme which would aim at improved public education, responsible government, the mitigation of group prejudice, through collaboration among the members of the community, which would turn the world more sane and harmonious.⁷² Suggestions to reach this aim includes,

- ✓ Inclusion of provisions for educating society about mental illness and treating it at par with physical illness;
- ✓ Suitable check on the working of licencing authorities, delimit the powers of the licencing authority and appointment of a doctor preferably a psychiatrist as inspecting officer;

71. Supra note 38 at p. 3

72. Supra note 30 at p. 42

- ✓ Sufficient provisions for long-term treatment and expenses thereof;
- ✓ Provisions for post discharge care and rehabilitation; penalties for those requesting unnecessary detention of mentally ill;
- ✓ Privacy of patients and stress on treatment of illness rather than the ill;
- ✓ Avoiding institutionalization and treatment to be based on socialization;
- ✓ Provisions for foster homes and half-way homes for those patients whose family members are unwilling to take them back or where the patient has no family;
- ✓ Separate arrangements for elderly, destitute, women and psychopaths, along with children and addicts in places of treatment.
- ✓ Uniform approach for all institutions dealing with care and treatment of the mentally ill.
- ✓ Special provision for rural mental health care, if possible through rules for the same.
- ✓ Specific provisions to curb on the power of police, medical officer or magistrate.
- ✓ Check on voluntary admissions.
- ✓ The *Disability Convention, 2006* aims at reinstating the dignity and worth of the disabled person; as a result it is obvious that changes need to be included into this Act to make it more functional to mentally disabled people.

(b) The Rehabilitation Council of India Act, 1992⁷³: An Overview--

(i) Backdrop of the Act:

The rehabilitation of disabled persons in India has been receiving the attention during the last three decades since independence. As early as 1974 the government had launched the scheme of *Integrated*

73. Act No. 34 of 1992, dt. 1-9-1992

Education for Disabled Children (IEDC) but there were only 700 teachers to attend to some 45,000 children. Even with all the schemes, not more than 2 per cent of the children with disability could be covered.⁷⁴ But, there were merely any planned efforts in the field for developing trained manpower, which could help in rehabilitation of the disabled persons in India. The existing training programmes in the country in the field of handicapped were isolated and ad-hoc in nature, with no standard syllabi. There was no uniformity in the teaching curriculum run by various institutions at the undergraduate, graduate and post-graduate levels. It was, therefore, decided by the Government of India to set up a Rehabilitation Council of India in 1986,⁷⁵ primarily as a society under the Societies Registration Act to regulate and standardize training policies and programmes in the field of rehabilitation of 'persons with disabilities'. The imperative call for minimum standards was considered, as the bulk of persons engaged in education; vocational training and counselling of persons with disabilities professionally incompetent. Poor academic and training standards unfavourably influenced the likelihood of disabled succeeding in the employment scenario.⁷⁶ Therefore, in 1992, status of this Council was enhanced to that of statutory body by passing the Rehabilitation Council of India Act. The Act came into force on 22nd June 1993 and contains provisions concerning the constitution of the Rehabilitation council of India, its functions and incidental provisions. Amendment Act No. 38 of 2000 w.e.f 4th September 2000 amended the Act in the year 2000.

(ii) *Objects of the Act:*

Divided into three chapters, thirty sections and a schedule, the Act has the following aims-

74. B.S. Padmanabhan, "Rehabilitation Council of India—Enabling the Disabled". To view full article visit, <http://www.frontline.com>, accessed on 24.3.2008

76. For details on the working of Rehabilitation council of India, visit <http://www.vigyanprasar.gov.in/comcom/feature16.htm-10k> accessed on 27.2.2008

75. Supra note 14 at p. 34

- a) To regulate and monitor the training of rehabilitation professionals;
- b) To bring about standardization of training courses for rehabilitation uniformly throughout the country.
- c) To lay down minimum standards of education and training of various classes of professionals dealing with persons with disabilities;
- d) To regulate these standards in all training institutions uniformly throughout the country;
- e) To promote research in rehabilitation and special education; and
- f) To maintain Central Rehabilitation Register for registration of professionals.

(iii) Meaning of Rehabilitation and Rehabilitation Professionals under the Act:

'Rehabilitation'⁷⁷ in the Act refers to a process aimed at enabling persons with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric or social functional levels. While the use of the word handicapped has been held to be derogatory it is astounding as to why the RCI Act defines the term. 'Handicapped'⁷⁸ has been defined as a person suffering from any disability referred to in clause (i) of Section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (I of 1996). In spite of 'handicapped' being used synonymously with person with disability under the Persons with Disabilities Act, 1995; the use of this term is not acceptable by any means.

77. *The Rehabilitation Council of India Act, 1992, S. 2(ma)*

78. *Ibid S. 2(c)*

*'Rehabilitation Professionals'*⁷⁹ under the Act includes —(i) audiologists and speech therapists; (ii) clinical psychologists; (iii) hearing aid and ear mould technicians; (iv) rehabilitation engineers and technicians; (v) special teachers for educating and training the handicapped; (vi) vocational counsellors, employment officers and placement officers dealing with handicapped; (vii) multi-purpose rehabilitation therapists, technicians; or (viii) speech pathologists; (ix) rehabilitation psychologists; (x) rehabilitation social workers; (xi) rehabilitation practitioners in mental retardation; (xii) orientation and mobility specialist; (xiii) community based rehabilitation professionals; (xiv) rehabilitation counselors/ administrators; (xv) prosthetists and orthotists; (xvi) rehabilitation workshop managers; (xvii) physio therapists; (xix) ophthalmic technicians; and (xx) such other category of professionals as the Central Government may in consultation with the council, notify from time to time. This definition of the Act has been a subject of criticism due to a number of factors and is one of the major drawbacks of this Act.

Experts opine that the most thriving rehabilitation happens where full community participation takes place and where rehabilitation is built-in, holistic and home based. The Rehabilitation Council of India unsatisfactorily perceives rehabilitation work to be at par with the health or the legal professions, with the rehab worker 'practicing' rehabilitation in clinics and offices on 'patients'.⁸⁰ A study of the list would divulge that no deliberation was given to the quality or the responsibility of the work to be done by the above categories. Defining the duties and powers of the rehabilitation professional is to simply make sure that all activities are carried on in the interest of persons with disabilities. It is important that these

79. *Ibid*, S. 2(n)

80. Dr. Madhumita Puri, "Ramifications of the RCI Act". For full article, visit <http://www.disabilityindia.org/mod/cfm-11k> . accessed on 12.3.2008

should be carried out with the knowledge of persons who hold a requisite educational qualification and/or with adequate understanding in the field, that is in deference with the significance of the situation. From the list it is also evident that no thought was given to the fact that the educational qualifications ranged from a 3 month certificate course after the 10th std, to a 5 years (or more) post graduate degree qualification; for the list is neither comprehensive nor reflective of a universal educational level. It does not appear to follow any logic in its inclusions and exclusions. Moreover, if the key desire of registering rehabilitation professionals is to regulate their standards of training, and thereby creating a Central Register of all those who have so qualified, then the RCI Act should remain within its purview and should not seek to be so expansive that it becomes impossible to implement. Attempting to register, recognize or license the Rehabilitation Professional is just and feasible. Even in Western countries with much stronger economies it is accepted that the bulk of the services are received from family, friends, neighbors and experienced volunteers. Therefore, attempting to register all those who provide services for persons with disabilities reflects a basic lack of in-depth understanding of the enormity of the needs of persons with disabilities.⁸¹

(iv) Rights of disabled persons emanating from the Act:

1. To have the right to be served by trained and qualified Rehabilitation professionals whose names are borne on the Register maintained by the Council.
2. To have the guarantee of maintenance of minimum standards of education required for recognition of rehabilitation qualification by Universities or institutions in India.

⁸¹. *Ibid*

3. To have the guarantee of maintenance of standards of professional conduct and etiquette by rehabilitation professionals against the penalty of disciplinary action and removal from the Register of the Council.

4. To have the guarantee of regulation of the profession of rehabilitation professionals by a statutory council under the control of the Central Government and within the bounds prescribed by the statute.⁸²

(v) *Constitution and functions of the Rehabilitation Council of India:*

Chapter II deals with constitution of The Rehabilitation Council of India. *Section 3* provides for the formation of Rehabilitation Council of India as a statutory body, having the features of a body corporate namely, perpetual succession and a common seal with power to acquire, hold and dispose of immovable properties and enter into contracts. It shall sue and be sued in by its name. The Council so constituted shall consist of a Chairperson appointed by the Central Government; a maximum of seven nominees of the Central Government to represent ministries dealing with matters relating to persons with disabilities; a single representative each of the University Grants Commission, Directorate General Of Indian Council of Medical Research to be appointed by the Central Government; two members representing the Social Welfare departments of the States and union Territories; maximum of six members from amongst the rehabilitation professionals working in the voluntary organizations; maximum of four medical practitioners engaged in the rehabilitation of the handicapped; three members of the Parliament and maximum of three social workers who are actively engaged in assisting the disabled. Council functions with the help of

82. Gautam Banerjee, "*Legal Rights of Persons with Disability in India*", Revised Edition (Rehabilitation Council of India, New Delhi, 2001 (Revised in 2004)), p. 53.

committees of eminent experts drawn from different disciplines. For this the council has set up number of Expert Committees which meet regularly to consider total aspects of implementation of any programme, keeping the minimum level of standards to be maintained. These Committees give guidelines for infrastructural facilities, faculty, their qualifications and equipment etc. for various levels of programmes.⁸³ The Council is to also have a Member-Secretary, ex-officio.⁸⁴

Chapter III of the Act concerns itself with the functions of the Rehabilitation Council. Accordingly the various functions may be enumerated as under :

- (i) Recognition of qualifications granted by University, etc., in India for rehabilitation of professionals and recognition of qualifications granted by institutions outside India respectively.⁸⁵
- (ii) Enrolment of persons possessing qualifications included in the Schedule on the Central Rehabilitation Register.⁸⁶
- (iii) The Council can take information as to course of study and examinations from universities or institutions which grant a recognized qualification for rehabilitation professionals.⁸⁷

83. *Rehabilitation Council of India Act, 1992, Section 7*

84. The Act also provides inter alia for the tenure of the Chairperson, filling up of casual vacancy, holding of meetings, presiding meetings during absence of Chairperson, decision by motion of votes (s. 4); Disqualifications of a member of Council (s. 5); circumstances in which a member of the Council would be deemed to vacate his office (s. 6); and appointment of member secretary by the central government (s. 8). To be read with *Regulation 4, Regulation 5, Regulation 6, Regulation 7, Regulation 8, Regulation 9, Regulation 10* of the *Rehabilitation Council of India Regulations, 1997*.

85. *Rehabilitation Council of India Act, 1992, Sections 11 and 12*. The list of recognized qualifications under Section 12 has been provided in the Schedule to the Act.

86. Section 13. Sections 23, 19, 20, 21, and 22 provides for the keeping and maintaining of the Central Rehabilitation Register by the member secretary of the Council; registration of rehabilitation professionals with proper qualifications in the Register; privileges of persons who are registered on the Register; professional conduct and removal of names from Register and appeal against any order of removal from Register respectively.

87. Section 14

- (iv) The Council is to appoint Inspectors at examinations conducted by the recognized universities and institutions.⁸⁸ The Council shall also appoint ‘visitors’ to inspect any university or examination held for the purpose of granting recognized rehabilitation qualification.⁸⁹
- (v) The Council has been authorized to prescribe the minimum standards of education for granting recognized rehabilitation qualification by universities or institutions.⁹⁰ Non-compliance of the requisite standards prescribed by the Council results in the withdrawal of recognition of Universities and institutions by the Council.⁹¹
- (vi) The Council has a duty to furnish Annual Report, copies of its minutes, extract of its accounts and other information to the Central Government as may be required and the publication of such information by the Central Government.⁹²
- (vii) The Council can make rules and regulations to carry out the purposes of this Act, with the previous sanction of the Central Government and must lay down such rules and regulations before the Parliament.⁹³

88. Section 15

89. Section 16. To be read with *Regulation 23 of Rehabilitation Council of India Regulations, 1997.*

90. Section 18. To be read with *Regulation 24 of Rehabilitation Council of India Regulations, 1997.*

91. Section 17

92. Section 24

93. Ss. 28, 29, 30. In exercise of the powers conferred by Section 29 of the *Rehabilitation Council of India Act, 1992*, the Rehabilitation Council of India, with the previous sanction of the Central Government has enacted twenty-five regulations, named the *Rehabilitation Council of India Regulations, 1997* (Noti. F. No. 5-62/93-RCI, dt. 27-3-1997). The Regulations deal with the Constitution of the Council (Regulation 3); powers and duties of the Chairperson of the Council (Regulation 4); powers of the Council (Regulation 5); termination of membership (Regulation 6); *Regulations 7, 8, 9 and 10* deals respectively with the Annual General Meeting; Agenda of the Meeting; Special Meetings and Minutes of the Council/Committee; *Regulations 11, 12, 13 and 17* provide for the Meeting of the Executive Committee; Powers and Functions of the Executive Committee; Constitution of Committees and sub-Committees; and resolution of

A reading of the above lines divulge the main purpose of the RCI Act, which is to regulate and standardize the programmes of training

urgent matters by circulation amongst the Executive Committee members respectively. These Regulations are to be read with Section 7 of the Act. *Regulations 19, 14 and 15*, deals with the situation of the Office of the Rehabilitation Council of India; the time and place of business for meetings of the Council and the constitution of Quorum respectively. These Regulations are to be read along with Sections 3 and 4 of the Act. *Regulations 16 and 18* correspondingly deal with the maintenance of roll of the members along with their addresses and occupations and tenure of office, powers and duties of the Member-Secretary and other employees of the Council. These Regulations are to be read along with Section 8 of the Act. *Regulation 20* is concerned with maintenance of accounts, payment of funds and audit of accounts and includes, preparation and sanction of budget estimates; while *Regulation 21* deals with maintenance of fund and operation of accounts through audit, appropriation/re-appropriation, investments, contracts, disposal of property, drawal of funds, hiring of office accommodation maintenance of register and sale of publications. These Regulations have to be read with Section 3 of the Act. *Regulation 22* provides the manner in which the inspections of examinations have to be carried out by the Inspectors. This Regulation is to be read with Section 15 of the Act. *Regulation 23* deals with the appointment of visitors to inspect any university or institution. *Regulation 24* provides for the norms for starting rehabilitation professional courses with the approval of the Council and the Central Government. *Regulation 25* provides for the maintenance and publication of Central Rehabilitation Register.

In addition to the above Regulations, the *Rehabilitation Council of India (Conditions of Service of the Member-Secretary, Officers and other Employees) Regulations, 1998* (Noti. F. No. 5-62/93-RCI, dt. 22-4-1998), were also made in exercise of the powers conferred by sub-section (3) of Section 8 and Section 29 of the *Rehabilitation Council of India Act, 1992*. The regulations contain provisions relating to Appointment (Regulation 3); Appointing authority (Regulation 4); Salaries and Allowances (Regulation 5); Grant of leave (Regulation 6); Seniority (Regulation 7); Superannuation (Regulation 8); Conduct (Regulation 9); Facilities for medical treatment (Regulation 10); Leave Travel Concession and Travelling allowance (Regulations 11 and 12); Insurance (Regulation 13); Liability to serve throughout India and to undergo training (Regulations 14 and 15); Suppression of facts and information (Regulations 16); Reservation in employment (Regulation 17); and General conditions and records of service (Regulations 18 and 19).

In exercise of the powers conferred by sub-section (1) of Section 21 and Section 29 of the *Rehabilitation Council of India Act, 1992*, regulations have been made called *Rehabilitation Council of India (Standards of Professional Conduct, Etiquette and Code of Ethics for Rehabilitation Professionals) Regulations, 1998*.⁹³ The Regulations contain provisions containing Prohibition of advertisement and publicity (Regulation 3); Declaration by professional to abide by the regulations (Regulation 4); Amendment in registration certificate (Regulation 5); Change in the name and surname of the professional (Regulation 6); Notice of change of place of practice and residence (Regulation 7); Display of qualifications and registration certificate (Regulation 8); Nominal fees for professional service rendered (Regulation 9); Prohibition of exaggeration or forecasting the disease or gravity of the condition of persons with disability (Regulation 10); Non- involvement in infamous conduct (Regulation 11); Submission of information regarding qualifications, practice, place of practice etc. as required by Council or the Central government (Regulation 12); Maintenance of Register regarding daily records of persons examined, consultation fee etc. (Regulation 13); Production of Documents (Regulation 14); and, consequences of contravention of the regulations (Regulation 15).

professionals in the disability sector on the lines of professional bodies such as the Medical Council of India and the Bar Council of India. The RCI, however, did not impound itself to mere policing but went past that, to make certain the socio-economic empowerment of the disabled. But the rehabilitation efforts embarked on for some decades had not thrived to the desired level in facilitating the disabled to protect their rights in spite of no scarcity of dedicated social workers and activists interested in the cause of the rehabilitation of the disabled. In fact, the RCI now has comprehensive objectives. In spite of the controversy surrounding the categorization of rehabilitation professionals, the RCI is claimed to be the first of its kind in the world covering different categories of professionals serving at all levels from the grassroots to the top. When the RCI was set up there were just 20 training institutions in this sector. Now there are 160 institutions recognised by the RCI. Out of them 29, considered the best, have been accorded accredited status. These institutions are training more than 200 batches in programmes at different levels from certificate programmes to master's degree programmes. As many as 21,513 professionals with recognised qualifications in the area of rehabilitation and special education are now registered with the RCI. It has so far developed and approved 87 training programmes to meet the manpower requirements of the 16 categories of professionals allocated to it. Universities and other institutions have adopted these courses to update the knowledge and skills of professionals already working in the field. A landmark in the record of the RCI has been the successful launch and conclusion of a national bridge course to improve the skills of those working in this field even prior to 1993 and register them as rehabilitation personnel. In order to endow with opportunities for higher education in rehabilitation, the RCI kicked off a proposal to set up a national university for rehabilitation sciences. There are 240 universities in the country but not many of them offer courses in rehabilitation sciences. As a first step towards the formation of such a full-

fledged university, the RCI proposed the establishment of a College of Rehabilitation Sciences. This plan has been accepted and the Ministry of Social Justice and Empowerment is in the process of setting up the college in Gwalior. The RCI has also formulated a scheme to provide vocational education to the disabled after consultations with experts in the field through a number of regional workshops. While all these take care of educational aspects, the RCI has ensured that the medical aspects are taken care of. At the grassroots level the disabled go to the Primary Health Centres (PHCs) when they have any problem, and unless the doctors and nurses in the PHCs are properly oriented they will not be able to realize the special needs of the disabled. So the RCI commenced a national programme of orientation of medical officers working in PHCs towards disability management. In keeping with existing inclination of decentralized functioning, the RCI has set up seven zonal advisory committees with select non-governmental organisations (NGOs) as the nodal agencies. This is projected to give an opening to regional institutions to take up more responsibility for some of the activities of the RCI. These committees will also assist the strengthening of the quality of the training programme in their zones by providing technical support where needed.⁹⁴ But these achievements have been marred by the lack of appropriate trained manpower which has been from the very beginning one of the major constraints in the expansion of rehabilitation services in the country. Considering the huge disabled population and the stipulation under the Act which disempowers anybody not registered with it for carrying out any work with/for the disabled.⁹⁵ It forbids any individual from teaching, training, or

94. Supra note 74

95. *Rehabilitation Council of India Act, 1992*, Section 13, Rights of Persons Registered with RCI

No person, other than the rehabilitation professional who possess a recognised rehabilitation qualification and is enrolled on the Register,---

1. Shall hold office as rehabilitation professional or any such office (by whatever designation called) in Government or in any institution maintained by a local or other authority;

providing recreation, leisure etc until and unless the registration proviso is fulfilled. This goes against the very spirit and principle of the UN Convention whose aim is the betterment of the disabled as opposed to the regulation of rehabilitators. It is a situation that seeks to detach the person with a disability, in contravention with the Convention. It means, for instance, that no child with a disability can ask for admission in a regular school as the teachers there would not be registered with the RCI.⁹⁶

(e) Implementation of the Act:

Although the above Act was passed in 1992 and came into effect in 1993, it actually came to the knowledge of the persons associated and working in the disability sector only in 1994. In spite of the fact that everyone wanted standardization of training and recognition of the people working in the disability field, the Act was strongly opposed. This was basically attributed to two reasons. First reason relates to the conceptualization of the Act, which is more elemental in nature. At a time when humanity is moving towards supporting the philosophy of mainstreaming, inclusion, integration, viewed objectively and impersonally, the Rehabilitation Council of India Act is more in the path of segregation. It makes it obligatory for medical and para-medical professionals, teachers, counselors and volunteers etc. to do

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2. shall practice as rehabilitation professional anywhere in India;
 3. shall be entitled to sign or authenticate any certificate required by any law to be signed or authenticated by a rehabilitation professional;
 4. shall be entitled to give any evidence in any court as an expert under section 45 of the Indian Evidence Act, 1872 on any matter relating to the handicapped:

Provided that if a person possesses the recognised rehabilitation professional qualification on the date of commencement of this Act, he shall be deemed to be an enrolled rehabilitation professional for a period of six months from such commencement, and if he has made an application for enrolment on the Register within said period of six months, till such application is disposed off.

Any person who acts in contravention of any provision of above shall be punished with imprisonment for a term, which may extend to one year, or with fine, which may extend to one thousand rupees, or with both.

96. To view details on "Impact of the Disability Convention on Indian domestic law", visit <http://www.indlaw.com/ActionAid/?Guid=F7DCF339-E339-4F83-B9E5-0380E90A0623>, accessed on 12.6.2008.

Rehabilitation Council of India (RCI) permitted training and register themselves with Rehabilitation Council before doing any work with the persons with disabilities. This means that a person with disability to benefit of any of the above services whether medical, education, therapy etc., will foremost have to find such professionals who are registered with the Council. In addition it implies that non-RCI registered professionals would not like to see a person with disability for apprehension of penal action by the RCI. This absolutely alienates people with disabilities and drives them to a situation of complete segregation from the rest of the society.⁹⁷ The second reason relates to the implementation aspect which pertains to –

- a. Arbitrariness in formulation and implementation of the Act because while it was appropriate that the government was concerned about the quality of training of professionals and para-professionals, it was inappropriate not to consult those very people who were involved in providing services long before the Council or Act came into being. This led to a major haziness in the formulation of the clauses and rules;
- b. Delay in implementation of the clauses of the Act;⁹⁸
- c. Inclusion of the clause of disciplinary action against those who failed to comply with the dictates of the Act. The attitude of centralization adopted by the Act is absolutely inappropriate as it seeks to such efforts are mitigated with clauses of punishments and fines for voluntary workers in the disability sector.⁹⁹

From the practical point of view, attempts to cover all levels of service providers in both urban and rural areas, across the length and breadth

97. Vandana Bedi, "Rehabilitation Council of India Act: An Overview and Emerging Issues", in S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002), pp. 172-175 at pp. 172,173

98. *Supra* note 80.

99. Vandana Bedi. *op.cit.* at pp. 174, 175

of this country is not feasible, when such clauses are included in the Act and cannot be implemented then it tends to violate the rights of the persons with disabilities. It is also in contravention with specific clauses of the *Persons with Disabilities Act, 1995*: 'The right of persons with disabilities to rehabilitation as defined under *Section 2 (w)* of the *Persons with Disabilities Act, 1995*; and the tenets of *Sections 26 and 27* of the same Act, that lays down the provision for access to formal education in both urban and rural areas'.¹⁰⁰ At a moment, when the whole world is shifting towards advocating the philosophy of 'mainstreaming', 'inclusion' and 'integration'; the policy makers in India seem to be walking in the opposite direction. When viewed impersonally and neutrally, in principle, whatever is being legislated through the RCI Act - - is more towards segregation. Thus, according to the RCI Act, the new cadre of professionals being introduced - the Rehab Professional, is being given power with an impression of being the only ones who have the aptitude of dealing with this special breed of human beings - i.e. those with disabilities. If we asked ourselves that is this what we would like the next millennium to herald? If an honest answer to this were educed, it would unquestionably be in the negative.¹⁰¹

Ideologically, the RCI Act needs to be meticulously revised. The need is to develop professional standards in service delivery and it shall be adequately met only when Central and State Governments as well as other International agencies strongly stipulate the condition for professional qualifications before funding rehabilitation organizations and also regularly monitor their efficacy.¹⁰² Perhaps stress should be in recognizing the idea that the total perception of educating persons with disabilities lies in the realm of Teacher Training per se and not in Special Teacher Training. All

100. Supra note 80

101. Vandana Bedi, op.cit. at pp. 174, 175

102. Supra note 80

resources, if routed in this direction would result in a meaningful implementation of the protection of human rights as envisaged by ‘*The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995*’. To remove the anomalies it is suggested that:

- The role of RCI should be changed. From a mere training body it should be a networking and liaison body.
- Alternatives to Central Registry should be worked out at the State and District levels.
- Clause 13(3) related to penal actions must be removed.
- A stringent definition of the term ‘Rehabilitation professional’, alongwith an equally strict eye on educational entry level and quantum of relevant disability course content.
- Introduction of a clause dealing with persons working in the disability sector before the RCI Act was formulated. The clause should specify at least graduate-level educational qualifications along with a predetermined number of years of experience in the service sector for the registration/licencing of persons already working with the disabled before the coming into force of the Act.¹⁰³

(c) National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999¹⁰⁴: An Overview--

(i) Backdrop of the Act:

As certain groups amongst the disabled are more susceptible than others, a special enactment for the security of such persons, their property and

103. Vandana Bedi. op.cit. at pp. 174, 175.

104. Act no. 44 of 1999, dt. 30-12-1999.

well-being was felt indispensable. The passing of the *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* intends to accomplish a universal insistence of families seeking reliable arrangement for their severely disabled wards. The Act endeavours to provide for the constitution of a body at the national level for the welfare of persons with Autism Cerebral Palsy, Mental Retardation and Multiple Disabilities and for matters connected therewith or incidental thereto. The body so constituted is known as the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities, commonly referred to as the National Trust. The Trust is promotive, proactive and protectionist in nature. It seeks principally to keep up the rights, encourage the development and defend the interests of persons with Autism¹⁰⁵, Cerebral Palsy¹⁰⁶, Mental Retardation¹⁰⁷ and Multiple Disabilities¹⁰⁸ and their families. To accomplish this aim, the National Trust supports programmes which promote liberty, facilitating guardianship where necessary and address the concerns of those special persons who do not have their family support. The Trust seeks to strengthen families and protect the interest of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities after the death of their parents.¹⁰⁹

105. *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999*, s. 2 (a) ---'Autism' means a condition of uneven skill in development primarily affecting the communication and social abilities of a person, marked by repetitive and ritualistic behaviour.

106. *Ibid*, S. 2 (c) ---'Autism' means a condition of uneven skill in development primarily affecting the communication and social abilities of a person, marked by repetitive and ritualistic behaviour.

107. *Ibid*, Section 2 (g) -- 'Mental Retardation' means a condition of arrested or incomplete development of mind, which is specially characterized by sub-normality of intelligence.

108. *Ibid*, Section 2(h)--- 'Multiple Disabilities' means a combination of two or more disabilities as defined in clause (i) of Section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Since the objects of the Act apply to 'Persons with Disability', the term has been defined as a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from multiple disability.

109. *Supra* note 5 at p. 404.

The National Trust Act was enacted in 1999 after a long gestation period. The Act was projected to address the fear of parents (primarily of persons with intellectual disability) on the future of their wards after them. However by the time the National Trust Act was enacted, the protective motivations of the original proposal were diluted with the inclusion of autonomy and self-advocacy claims.¹¹⁰

(ii) Object of the Act:

Divided into nine chapters and thirty-six sections, the objects of the Act¹¹¹ can be broadly specified as under:

I. Enabling and empowering persons with disability—

- to live independently,
- to live fully as possible,
- to live within and close to the community to which they belong,
and
- to ensure that the persons with disability do not suffer isolation and as such it has been seen that such persons are able to live as independently as possible. They are to be helped to manage themselves gradually so that their dependence on non-disabled persons is reduced.¹¹²

II. Strengthening the facilities required to provide support to persons with disability to live within their own families-- The Trust Act has a very

progressive objective namely, to facilitate persons with disabilities to live as fully as possible within and close to the community to which they belong.

The initiative is not to push people out of the society and keep them in

110. Amita Dhanda, Gabor Gombos, "Harmonizing National Laws with CRPD: Suggested Amendemnts to the National Trust Act, 1999". View full article at, www.nationaltrust.in, accessed on 12.10.2008.

111. *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999*, Section 10.

112. *Supra* note 5 at p. 417

residential institutions, but to encourage them to live within their families. But there are people with severe disabilities who may be unable to move. Thus there could be a possibility of a therapist visiting home and providing rehabilitation services at home.¹¹³ Thus the Trust seeks to improve their situation with the physical and psychological support of the family members so that they may feel that they are part of normal family and thereby the magnitude of their suffering is curtailed.¹¹⁴

III. Extending support to registered organizations— The next object of the Act is to provide support to the registered organizations so as to provide need-based services during the crisis the family of persons with disability. The support to the organizations involves setting up of care centres, relief and respite centres with ample medical facilities and provision for the care, protection and maintenance of persons with disability.

IV. Dealing of problems of persons with disability who do not have family support— This implies that the Trust will unswervingly take actions for persons with disability who have been discarded or who do not have sufficient family support. Tribulations of such persons principally relate to their rehabilitation and care.

V. Promoting care and protection in case of death of parent/guardian— Usually the parent or guardian looks after a person with disability. If a situation arises where parents or guardian dies, the natural question is as to who will look after them and take their responsibility. Thus in such a situation, the Trust has to make provisions for the care and protection of such person. It is often seen that people with mental retardation either end

113. Dr. D.K. Menon, "The National Trust Act, 1999: An Overview", in S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002), pp. 103-105 at pp. 103-104.

114. *Supra* note 6 at p. 417.

up in Juvenile Homes or mental hospitals or jails. None of these are places where they ought to go, but unfortunately this is what the state does.¹¹⁵ Hence the State must take appropriate measures as a means of social commitment.

VI. Procedure for appointment of guardians and trustees-- The issue of appointing a guardian under the tenets of this Act is governed by the constitution of a local level committee, consisting of an officer of the State, a representative of an NGO a (any) person with disability. This object reflects a very progressive attitude and provisions have been made under sections 14, 15, 16 and 17 of the Act for the appointment of guardians.

VII. Facilitating equal opportunities, protection of rights and full participation--- this implies taking initiatives for encouraging occasions for realization of equal opportunities, protection of rights and full participations of persons with disability.

VIII. Residual Power—The Trust has also been empowered to perform all other act that is necessary for the attainment of the aforesaid objects.

Thus the Act has very specific objectives to achieve its goal, which ranges from enabling and empowering persons with disabilities to live as independently and as fully as possible within and as close to the community to which they belong; promoting measures for the care and protection of persons with disabilities in the event of death of their parents or guardian; and extending support to registered organizations to provide need based services during the period of crisis in the family of disabled covered under the Act.¹¹⁶ Another important aspect of the Act is training and counseling as well as programmes for respite care, foster family care and day care services.

¹¹⁵D.K. Menon.op.cit.at pp. 104, 105

¹¹⁶. Supra note 14 at p. 34.

(iii) *Constitution of the Trust:*

Section 3 of The National Trust Act, 1999 deals with the Constitution of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability, etc. The Section not only provides for the constitution of the trust but also mentions that the all actions of the Trust shall be exercised by Board which shall consist of a Chairperson to be appointed by the Central Government from amongst persons having adequate expertise and experience in the field of autism, cerebral palsy, mental retardation and multiple disability; not more than nine members to represent the registered organizations working with the persons suffering from aforesaid disabilities, out of which three persons are appointed from the association of the parents of such persons; eight members to represent the Ministries or Departments of Social Justice and Empowerment, Women and Child Development, Health and Family Welfare, Finance, Labour, education, Urban Affairs and Employment and Rural Employment and Poverty Alleviation; and three persons nominated by the Board representing associations of trade, commerce and industry. There shall be a Chief Executive Officer¹¹⁷ who shall be the ex-officio Member-Secretary.

117. *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000*. Rule 15 provides for the appointment powers and duties of the Chief Executive Officer (CEO). It is seen that the CEO is appointed by the Central Government and is to perform such duties as may be delegated to him by the Chairperson. Whatever powers are exercised and whatever duties are to be performed has to be done under the directions of the Board. His rank shall be that of a Joint Secretary and hold office for a period of three years or up to the age of 60 years, whichever is earlier. Certain powers have been specifically given by Rule 15 and the duties are to be performed in accordance with the rules laid down in Rules 18 to 26. Powers include general power of control and giving directions of the Board, to exercise the powers of the Head of Department, management of the affairs of the Trust, administrative control and management of the office of the Board, maintenance of the accounts of the Trust, entering into contracts as per the regulations and maintenance of the records regarding meetings of the Board and the business arising thereof. Duties include, preparation of budget of the Trust (Rule 18); maintenance of accounts fund, operation of accounts and preparation of annual statements of accounts (Rule 19); maintenance of register of investments made by the Trust (Rule 21); disposal of non-expendable and other articles and to write off all unserviceable and condemned articles (Rule 22); keeping watch over the expenditure and sanctioning payments (Rule 23); hiring of office accommodation as well as hired and purchased accommodation for the staff and such other suitable arrangement for

The National Trust so constituted under sub-section (1) is a body corporate having a name, perpetual succession and a common seal, with power to hold, acquire and dispose both movable and immovable property, to contract as well as to sue and be sued. It is open to the board of Trustees to associate with itself in accordance with the provisions of the Regulations made under the Act any person whose assistance or advise it may require for implementing the objects of the Trust. However such associated persons have a right to take part in the discussions relevant to that purpose but shall not have a right vote at the meeting of the Board. Such persons shall not be considered to be member of the Board for any other purpose. Further, the number for members so associated with the Board shall not exceed eight in number and such person shall necessarily belong to a registered organizations or a professional.¹¹⁸ However in the event of there being any vacancy in the Board or any other

accommodation of Chairperson and staff (Rule 24); maintenance of register (Rule 25) and preparation and submission of annual report to the Central government (Rule 26). *The Board of the Trust Regulations, 2001* (Noti. No. GSR 579 (E), dt. 3-8-2001) were also enacted. *Regulation 3* lays down the conditions of service of Chief Executive Officer, other officers and employees of the Trust

118. Also to be referred: Term of office of the Chairperson and the members, meetings of the Board etc.(s.4); Resignation from office by Chairperson and members (s. 5); Disqualification of Members (ss.6 and 7); appointment of Chief executive Officer (s. 8) of *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999*. *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000* (Noti. No. GSR 639 (E), dt. 26-7-2000) has also been enacted. *Rule 4 to 6* deals with the conditions of service of the Chairperson and Members. The conditions of service of the chairperson who serves the Trust on a full time basis will be regulated by the conditions of service as mentioned in the Rules. *Rule 4* provides for the salary of the Chairperson which shall be equivalent to the basic pay of the Secretary to the Government of India and as admissible dearness allowance and city compensatory allowance. The Rule also makes provision for the salary to be received if the Chairperson is a retired Central or State Government employee. *Rule 5* provides dearness allowance, city compensatory allowance and travelling allowance to the Chairperson; and the non-official Members shall be eligible for receiving sitting fee for attending the Board Meetings. *Rule 6* deals with the powers and duties of the chairperson which include calling and presiding over all meetings of the Board; move the Board to take into consideration his views in regard to any matter which is required to be considered by it, or any matter required by the central government to be considered by the Board; responsible for proper functioning of the Trust including LLCs and ensuring implementation of the policies and programmes of the Trust; and giving directions to the Chief Executive Officer for implementation of the decision of the Board.

defect in the constitution of the Board the same will not vitiate any act or proceedings of the Board.¹¹⁹

The primary defect of the Act relates to the notional absence of involvement of the persons with disability in the Board. Secondly, there are question marks regarding the extent of the applicability of the restrictions imposed under Section 4(5). The section lays down that no member of the Board shall be a beneficiary of the Trust during the period such member holds office. Now the question is whether this impediment shall extend to benefits which were obtained when the person was not a member but continues during the membership period; and what will be the position of programmes approved during a membership period though the benefits of the same ensued to a member subsequently.¹²⁰ Thus the Act has a 'protector' kind of image, distant from person-centred plan.

(iv) Powers and Duties of the Board:

Chapter IV lays down the powers and duties of the Board. Under *Section 11* the powers and duties have been mentioned thus:

- (a) The Board shall receive from the Central Government a one-time contribution of Rs. 100 crores from the Central Government which would constitute the corpus of the Board. The corresponding duty is to invest the corpus and utilize the income derived from such investment for providing adequate standard of living for persons with disability.¹²¹

119. Supra note 111, Section 9

120. Amita Dhanda, "According Reality to Disability Rights: Role of the Judiciary", S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002) pp. 90-102 at pp. 99,100

121. Supra note 111, *Section 21* deals with grant of Rs. 100 crore for a corpus, which shall be a one-time contribution, by the Central Government. *Section 22* provides for the constitution of a Fund called the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Fund in which all moneys to be received from the Central Government will be credited. All moneys received by way of grants, gifts, donation, benefaction, bequest or transfer received by the Trust including moneys received in any other

(b) The second power of the Board is to receive bequest of movable property from any person. The corresponding duty is to use such bequest for the benefit of the person with disability in general and for furtherance of the Objectives of the Trust in particular. It is also the obligation of the Board receiving such bequests of movable property to make arrangements for adequate standard of living for the beneficiary, named in the bequest, if any. It is also the obligation of the Board to utilize the property bequeathed for any additional purpose for which the bequest is made. However the Board is under no obligation to utilize the bequest for the exclusive benefit of the beneficiary as named in the bequest. The provisos to section 11(1) (b) allows bequests to be made to the Trust for the benefit of a particular person with disability. At the same time the provisos lay down that no donor can insist on the exclusive utilization of the bequest for the beneficiary named by him.¹²² This is a very contradictory situation

(c) The Board is also empowered to receive from the central government such sums as may be considered necessary in each financial year. The corresponding duty is to provide financial assistance to registered organizations for carrying out the 'approved programme'. In addition, while allocating funds preference shall be given to women with disability or to persons with severe disability and to senior citizens with disability.

(v) Ancillary Functions of the Board:

Apart from the key function of protection of the rights and property of the persons with autism, cerebral palsy, mental retardation

manner and from any other source has to be credited to this fund.¹²¹ Section 23 lays down the duty of the board to prepare the budget for the next financial year showing the estimated receipt and expenditure of the trust. Section 24 imposes a duty on the Board to maintain proper accounts and relevant records about the financial transactions of the Trust.

¹²². Amita Dhanda . op. cit. at p. 100

and multiple disabilities, as well as to execute a universal demand of families seeking unswerving arrangement for their severely disabled wards, some ancillary functions of the Board may be summed up as under:

- i) Registration of Associations of Persons with Disability; Association of Parents of Persons with Disability and Voluntary Organizations whose principal object is to promote the welfare of persons with disability.¹²³
- ii) Constitution of Local Level Committee (LLC) for such areas as may be specified by it from time to time to perform the functions as assigned by the Board.¹²⁴
- iii) Appointment of guardians on basis of applications received by the LLCs and their removal on valid grounds.¹²⁵

123. Supra note 112, Section 12. The section makes it mandatory for the aforesaid associations to register themselves by submitting an application in the required form and manner, and accompanied by such documents and fees as provided in the regulations. On receipt of the application the Board after making suitable enquiries may either register or reject the application along with reasons recorded for the same. *The Board of the Trust Regulations, 2001* also provides under *Regulation 6*, the manner and form in which application of registration is to be made by the organization. *Regulation 6* lays down the procedure for grant of registration. *Regulation 8* lays down the procedure to be followed by the Board for evaluation of registered organization for participation in the Trust's scheme and programmes. *Regulation 9* says that under what circumstances an association or organization may be de-registered and the consequences of such de-registration.

124. Supra note 111. Section 13 provides that the LLC shall consist of an officer of the civil service of the Union or of the State who is not below the rank of a District Magistrate or a District Commissioner of a District. It must also have a representative of a registered organization and a person with disability as defined in section 2(t) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. A LLC is initially constituted for a period of three years and shall exercise its functions for that period or till such time as the Board reconstitutes it. The frequency of the meetings has been fixed to be at least once in every three months. *Regulation 10* of *The Board of the Trust Regulations, 2001* lays down the form and manner of constitution of the Local Level Committee. *Regulation 14* concerns with the particulars of orders passed by the Local Level Committee.

125. Supra note 112, *Section 14. Section 15* while laying down the duties of such guardians as appointed under Section 14, says that a person who is appointed as the guardian of a person with disability will have to take care of the person or property of the persons with disability. Along with the guardian may also be responsible for maintenance of the person with disability. Section 16 imposes an obligation on the guardian to furnish inventory, within six months of his appointment, to the LLC and annual accounts within a period of three months of the closure of every financial year. *Section 17* provides for the circumstances in which a guardian appointed

- iv) The Trust has to maintain its books and documents in the manner envisaged by the rules.¹²⁶ It also has to evaluate the procedure for assessing the prefunding status of registered organizations, which are seeking assistance from it.¹²⁷
- v) Holding of Annual General Meeting and fulfilling other requirements for such meeting.¹²⁸
- vi) To prepare every year an annual Report about its activities during the previous year.¹²⁹

(vi) Rights to persons with disabilities under the Act:

A look at the Act reveals that the Central Government has the obligation to set up, in accordance with this Act and for the purpose of the benefit of the disabled the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability at New Delhi. The National Trust created by the Central Government has to ensure that the objects for which it has been set up as enshrined in Section 10 of this Act have

by a LLC is liable to be removed. The two major grounds of removal include, abusing or neglecting a person with disability, and misappropriating or neglecting the property of the person with disability. To be read with Rules 15 and 16 of the National Trust Act Rules, 2000. *The Board of the Trust Regulations, 2001* under *Regulations 11, 12 and 13* deals respectively conditions of eligibility for the guardianship of a disabled person; the order of eligible applicants and guidelines for receiving, processing and confirmation of application for appointment of guardian. *Regulations 10, 11, 12, 13 and 14* have been made for the purpose of appointment of guardians and their regulation by the Local Level Committee.

126. Supra note 111, Section 18.

127. Supra note 111, Section 19.

128. Supra note 111, Section 20.

129. Supra note 111, Section 25. *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000* -- *Rule 7* provides for the keeping of a Membership Roll, i.e. a record of names and addresses of the members. *Rule 8* makes provision regarding the Meetings of the Board, the requirements of a valid notice for calling a meeting and the manner of complying with such notice. *Rule 9* says that the Chairperson shall act as the Presiding Officer in every meeting and, in his absence the members shall elect one of the Members as the Presiding Officer. *Rule 10* says that the quorum shall consist of one-third of the total members and also points out the provisions pertaining to adjournment of meeting and the non-necessity of quorum in case of an adjourned meeting. *Regulation 5 of The Board of the Trust Regulations, 2001* fixes the frequency, place, annual general meetings of the Trust.

to be fulfilled. The National Trust shall be bound by the provisions of this Act as to its accountability, monitoring, finance, accounts and audit. Accordingly, the rights may be summed up as ---

- 1) It is the obligation of the Board of Trustees of the National Trust to make arrangements for adequate standard of living of any beneficiary named in any bequest received by it, and to provide financial assistance to registered organisations for carrying out any approved programme for the benefit of the disabled.
- 2) Disabled persons also have the right to be placed under guardian appointed by the Local Level Committees in accordance with the provisions of the Act. The guardians so appointed will have the obligation to be responsible for the person and property of their disabled wards and be accountable for the same.
- 3) A disabled person has the right to have his guardian removed where the guardian is abusing or neglecting him or is misappropriating or neglecting the property of the disabled person.
- 4) Where the Board of Trustees is unable to perform or has persistently made default in the performance of duties imposed on it, a registered organisation for the disabled can complain to the Central Government to have the Board of Trustees superceded and/or reconstituted.¹³⁰

(viii) *Implementation of the Rights:*

But a look at the rights tells that the system put forward by the Act has least involvement of the persons with disabilities. The National Trust

¹³⁰. Supra note 82 at pp. 103, 104

Act regime is based on the presumption that some persons with disabilities, due to the nature of their disability, are incapable of making their own decisions; hence they do not possess legal capacity; and thus special protective arrangements need to be put in place for them. Consequently, the statute makes caretaking arrangements for the named disabilities, proceeding on the presumption that such arrangements are only required for those disabilities.¹³¹ Throughout the Act, as one weaves through the clauses and sub clauses, there appears to be no participation of the person with the disability (even notionally). It also lacks a person centred plan including a planning process of persons with disabilities. The person centred planning process is a process of planning for and supporting an individual that honours the individual's preferences, choices and abilities and it assumes that all people have preferences, regardless of their level of disability. Decision-making by the individual is the key to this effort. Naturally, appointing a guardian to take decisions can defeat this process. Hence the National Trust should address the development of this process. In order to comply with the spirit and the letter of the Disability Convention, a more comprehensively drafted enactment is needed, which takes into consideration the preferences of the disabled person, as opposed to merely the relatives or friends.¹³² It is important to note that whilst the Disability Convention sets up a regime of universal legal capacity by recognizing the legal capacity of all persons with disabilities; the National Trust Act is a law with restricted application because it addresses the capacity deficits of certain named disabilities only.¹³³

Hence the defects inherent in the Act need to be adequately addressed so that the purpose of the legislation is not defeated. Consequently, the suggestions, which may be considered in amending the Act, are:

131. *Supra* note 110

132. Vandana Bedi. *op.cit.* at p. 96

133. *Supra* note 10

- ✓ The National Trust Act should introduce an express provision recognizing universal legal capacity and the provision should state that all persons with disabilities have full legal capacity.
- ✓ The existing restrictive definition of disability must be replaced with a broader one, preferably with the one given in the Disability Convention.
- ✓ Consultation by the National Trust with persons with disabilities will help identify specific areas of action to enable persons with disabilities to exercise their legal capacity and starting programmes accordingly with the active participation of and in consultation with persons with disabilities.¹³⁴
- ✓ Sensitisation of parents about the process for self determination and assisted decision making. All laws, rules, international treatise shall be of no use if the parent does not believe that their child can be a participant in making choices, believes strongly enough to follow their day-to-day lives.¹³⁵

(d) The Children with Cerebral Palsy or Mental Retardation (Care, Educational Facilities and Welfare) Bill, 2005

The present discussion will be incomplete without a reference to the The Children with Cerebral Palsy or Mental Retardation (Care, Educational Facilities and Welfare) Bill, 2005, which aims to provide for the educational facilities at par with the normal children and for the care and welfare measures to be undertaken by the Central and State Governments for the children afflicted with cerebral palsy or with mental retardation. This Bill has been introduced in the Rajya Sabha and is still under deliberations. The Bill seeks to formulate a National Policy for the Children with Cerebral Palsy and Mental Retardation to

^{134.} *Ibid*

^{135.} *Supra* note 113 at *ibid*; *Supra* note 14 at p. 34

secure proper care, education and welfare measures and other rights for the children with cerebral palsy or mental retardation to ensure their proper growth and a secure future for such hapless children.¹³⁶ It also lays that the appropriate Government shall ensure that, as far as practicable, the children with mental retardation are given education in schools, Government as well as private schools, meant for normal children for their proper development. For the children having cerebral palsy the appropriate Government shall open sufficient number of special schools, Technical education institutes and training Centres for imparting education and training to such children. It imposes duty on every parent, guardian or head of the family to send every child with Cerebral Palsy or Mental Retardation to normal School or Special School or Technical education institute, as the case may be, for getting education or technical training as per his caliber.¹³⁷

While the need is to devise a comprehensive disability educational policy for very person with disability, the thrust of the Bill on only cerebral palsy and mental retardation are surely questionable. Particularly in the light of the Disability convention, the Bill needs to be amended to deal with each and every category of disabled. Even if mental retardation is the issue then also, other mental illnesses must also be included.

C. MINOR LAWS DEALING WITH THE RIGHTS OF PERSONS WITH DISABILITIES:

Apart from the above-mentioned laws there are some other laws also which deal with the issue of disability. *The Lepers Act of 1898* and the *Indian Lunacy Act of 1912* are the earliest laws dealing with the interests of the disabled. The two laws dealt respectively with the regulation and control of

136. *The Children with Cerebral Palsy or Mental Retardation (Care, Educational Facilities and Welfare) Bill, 2005*, Section 3.

137. *Ibid*, Section 5.

leprosy patients and those who are suffering from mental diseases respectively. Though the laws do not exclusively deal with the interests of the disabled but they contain some remarkable provisions which tend to secure their position up to a certain extent. For instance the *Workmen's Compensation Act, 1923* and the *State Employees Insurance Act, 1948* are operative only when a misfortune struck an able bodied person and turns him/her into a disabled person and the law is applicable only to those who are engaged in some occupation or industry.¹³⁸ Similarly the *Factory Act, 1948*, *The Plantation Labour Act, 1951* and the *Mines Act* are basically intend to prescribe safe and secure working conditions for workers so as to prevent accidents and thereby prevent disability. In the following lines we shall assess the various laws which contain provisions relating to disability rights, whether expressly or impliedly.

(a) The Workmen's Compensation Act, 1923:

The Workmen's Compensation Act, 1923 was framed with a view to provide for compensation to workmen incapacitated by an injury from accident arising out of and in the course of employment. It is a guarantee against hazards of employment to which a workman is exposed because of his employment. The main object of the Act is to provide compensation to the workman or his dependants. In addition, the Act also efforts to prevent accidents.¹³⁹

The Act does not define 'disability' or 'disablement'. It defines 'partial disablement' and 'total disablement'. Section 2(1)(g) defines partial disablement to mean: "where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in nay employment

138. D.C. Pande, " Law and the Physically Disabled – Agenda of Social Justice", *Aligarh Law Journal*, vol. 9, (1988), pp.13-24 at p. 17

139. Surya Narayan Misra, Sudhir Kumar Misra, "An Introduction to Labour and Industrial Laws", 18th Edition (Central Law Publications, Allahabad, 2000) p. 281

in which he was engaged at the time of the accident resulting in the disablement, and where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time; provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement.”

The Section divides partial disablement into two kinds—

i) Temporary partial disablement and (ii) Permanent partial disablement.

The test of such disablement is the reduction in the earning capacity of the workman. If the earning capacity of a workman is reduced in relation to the employment he had been at the time of the accident resulting in such disablement, it is temporary partial disablement. If the injury caused by the accident results in the reduction of the earning capacity, in respect of employment which the workman was capable of undertaking at the time of accident. To determine whether the injury is permanent or temporary, it has to be examined whether the injury has incapacitated the workman from every employment which he was capable of undertaking at the time of accident or merely from the particular employment in which he was at the time of the accident resulting in disablement. In the former case the disablement is partial but permanent; in the latter case it is temporary.

In *Calcutta Licenced Measures Bengal Chamber of Commerce v. Md. Hossain*¹⁴⁰ the following propositions were laid down to decide the nature of disablement:

Firstly, earning is not the same as earning capacity. There is a difference between earning of a person and his capacity to earn.

Secondly, rise in earning may be because of various factors and rise in wages is not decisive of no loss in earning capacity.

140. AIR 1969 Cal. 378

Thirdly, loss of physical capacity is not co-extensive with loss of earning capacity, and

Lastly, loss of physical incapacity may be relevant in assessing to what extent there is loss of earning capacity for every employment which the workman was capable of undertaking at the time or the employment in which he was engaged at the time of the accident as the case falls for consideration.¹⁴¹

Section 2(1) (l) defines 'total disablement' as follows:

"such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement:

provided that permanent total disablement shall be deemed to result from the permanent total loss of the sight of both eyes or from any combination of injuries specified in Schedule I where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to 100 per cent or more."

The definition of 'total disablement' speaks of 'incapacity for all work' and not 'incapacity to work'. The application of 'for' instead of 'of' makes it sufficiently understandable that it is the inability to get employment which is significant and not the physical incapacity to undertake any work. If because of his apparent physical defects caused by an injury no one will employ a workman, however competent he may be, in fact, he has lost power to earn wages as completely as if he was paralysed in every limb.¹⁴²

141. *Supra* note 139 at p. 290

142. *Ball v. William Hunt and Sons Ltd.* 1962 A.C. 496

In *Pratap Narain Singh Deo v. Srinivasa*¹⁴³, a carpenter suffered injury in the course of his employment which resulted in amputation of left hand above elbow. Since a carpenter cannot work with one hand, disablement was held to be total and not partial.¹⁴⁴

Apart from defining 'partial disablement' and 'total disablement', Chapter II of the Act specifically deals with 'Workman's Compensation'. Section 3 is concerned with employer's liability for compensation. The liability of an employer to pay compensation is limited and is subject to the provisions of the Act. Section 3(1) fixes the liability of the employer to pay compensation only on these four grounds:

- (1) Personal injury must have been caused to a workman;
- (2) Such injury must have been caused by an accident;
- (3) The accident must have arisen out of and in the course of employment;
and
- (4) The injury must have resulted either in death of the workman or in his total or partial disablement for a period exceeding three days.

The employer shall not be liable to pay compensation in the following cases:

- (a) If the injury did not result in total or partial disablement of the workman for a period exceeding three days;
- (b) In respect of any injury not resulting in death or permanent total disablement the employer can implore:
 - I. that the workman was at the time of accident under the influence of drinks or drugs;
 - II. that the workman willfully disobeyed an order expressly given or a rule expressly framed for the purpose of securing safety of workman; and

143. A.I.R. 1976 S.C. 222

144. Supra note 139 at p. 294

III. that the workman having known that certain safety-guards or safety devices are specifically provided for the purpose of securing the safety of workman, willfully disregarded or removed the same.¹⁴⁵

Sub-section (2) provides for the payment of compensation in case of an injury resulting from occupational diseases. Schedule III of the Act contains the list of occupational disease. Sub-section (2-A) deals with the situation where there are more than one employers in case of any employment mentioned in Part C of Schedule III. It says that the Commissioner shall fix up the extent of liability of different employers in respect of the amount of compensation payable to a workman. Sub-section (3) empowers the Central government or the State Government by giving notification in the Official Gazette of not less than three months expressing its intention to add any description of employments to the employments specified in Schedule III. Sub-section (4) makes the employer liable to pay compensation only if the disease can be directly attributed to a specific injury by accident arising out of and in the course of employment. Sub-section (5) puts a limitation on the recovery of compensation by laying down that no claim for compensation shall be maintainable by a workman in respect of any injury if he has already instituted a civil proceeding for damages in respect of the same injury against the employer or any other person.

Section 4 lays down the amount of compensation payable in various types of disablement

(a) Compensation in case of permanent total disablement--- Under section 4 (1)(b) where permanent total disablement results from the

145. *Ibid* at p. 303

injury, the injured workman shall be entitled to an amount equal to sixty per cent of the monthly wages of the injured workman multiplied by the relevant factor or an amount of ninety thousand rupees, whichever is more. Explanation II attached to the Section says that where the monthly wages of a workman exceeds four thousand rupees, his monthly wages for the purpose of clause (a) and clause (b) shall be deemed to be four thousand rupees only.¹⁴⁶

(b) Compensation in case of permanent partial disablement--
Section 4(1)(cc) provides that where permanent partial disablement results from the injury

- i. In the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and
- ii. In the case of an injury not specified in Schedule I, such percentage of the compensation payable in case of permanent total disablement as is proportionate to the loss of earning capacity permanently caused by the injury. Explanation I to section 4 (1)(c) says that where more injuries are caused by the same accident, the amount of compensation payable shall be aggregated but not so as to exceed the amount which would have been payable if permanent total disablement has resulted from the injuries thereto. Explanation II provides that in assessing the loss of earning capacity for the purpose of sub-clause (ii) the qualified medical practitioner shall have

146. S.C. Srivastava, "Rights of Persons Disabled During Employment in Indian Industries", in S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002), pp. 51-67 at p. 56.

due regard to the percentage of loss of earning capacity in relation to different injuries specified in Schedule I.¹⁴⁷

(c) Compensation in case of Temporary Disablement—As per Section 4(1) (d), Where temporary disablement, whether total or partial results from the injury, an injured workman is entitled to a half-monthly payment of the sum equivalent to twenty five per cent of monthly wages of the workman to be paid in accordance with the provisions of sub-section (2). The payment becomes due on the sixteenth day:

- (i) from the date of the disablement where such disablement lasts for a period of twenty-eight days or more, or
- (ii) after the expiry of a waiting period of three days from the date of the disablement where such disablement lasts for a period of less than twenty-eight days; and thereafter half-monthly during the disablement or during a period of five years, whichever period is shorter.

The aforesaid provisions are subject to two conditions: (i) all advance payment or allowance by way of compensation made by the employer to the workman is to be deduced from any lump sum or half-monthly payments (ii) the half-monthly payments shall not exceed half the amount of such wages which the payment or allowance which the workman is earning after the accident; (*Proviso (a) and (b) to Section 4(2)*). The explanation to the Section further adds that any payment or allowance which the workman has received from the employer towards his medical treatment, shall not be deemed to be a payment or allowance received by him by way of

147. *Ibid* at p. 58

compensation within the meaning of clause (a) of the proviso. Section 4(3) provides that on the ceasing of the date on which any half monthly payment falls due, there shall be payable in respect of that month a sum proportionate to the duration of the disablement in that half month.¹⁴⁸

However any compensation is payable only when a notice of the accident has been given in writing, as soon as practicable after the accident.¹⁴⁹The phrase 'as soon as practicable' depends upon the nature and circumstance of each individual case. In *Banshidhar v. Ramchandra*¹⁵⁰ it was observed that a notice given after two months of accident may, if the victim of accident is continuously in the hospital, it shall be considered to be one given as soon as possible.¹⁵¹The object of giving such a notice is to facilitate the employer to verify the fact of the accident having occurred to the workman in the course of employment and also to allow the employer to take such steps as he may consider fit to lessen the outcome of the accident.¹⁵²Further, under *Section 11*, a workman who is so injured and has given a notice thereof under *Section 10*, to the employer shall submit himself for medical examination if offered by the employer. Such offer by the employer must be free of charge and made within three days from the time at which the service of the notice has been affected. Also, where any workman who receives half monthly payment shall submit himself for medical examination if and when required by the employer. Such submission to a medical practitioner shall only be in accordance with the rules made under this Act and at such intervals as prescribed by the rules. If a workman declines to present himself for examination by a qualified medical practitioner as required either by the employer or the Commissioner, his right to compensation shall be suspended

148. *Ibid*

149. *Workman's Compensation Act, 1923*, Section 10.

150. AIR 1960 MP 313

151. *Supra* note 139 at p. 328

152. *Ahmedabad Victoria Iron Works Ltd. v. Maganlal Keshavlal Panchal*. AIR 1941 Bom. 296

for the period of refusal or obstruction. In such cases he shall be permitted to full compensation only if he can establish that he was for some satisfactory cause prevented from submitting himself.¹⁵³

An evaluation of the aforesaid provisions reveals the following drawbacks of the *Workman's Compensation Act*:

- The Act does not make special provisions for particular disease or imposes restrictions on them.
- Secondly, there is also no provision for rehabilitation of workers suffering from occupational disease. In other words, neither health nor rehabilitation aspect are taken into consideration.
- Thirdly, lump sum payment made for permanent disablement under the *Workman's Compensation Act* is unsuitable to provide protection against social contingencies. As a matter of fact the quantum of compensation is in most cases too meagre to set off handicaps.
- Fourthly, the rights available are merely compensatory and temporary relief.
- Fifthly, once a person is disabled it becomes incumbent on the family members to make constant efforts to collect the compensation, which often results in desperation because of prolonged litigation.¹⁵⁴ The more appropriate remedy would be evolution of a scheme for periodical payment to injured persons.

Hence it is suggested that:

153. Supra note 139 at p. 331

154. Mohd. Zafar Mahfooz Nomani, "Human Rights to Development and Persons with Disabilities: Breaking new Grounds For Equality in India", *Aligarh Law Journal*, vol. XIII, (1998), pp.91-104 at pp. 95,96

- ✓ Rehabilitation measures are included in the Act as well as a scheme for periodical payment of the compensation in case of permanent disablement.
- ✓ Also a scheme must be framed and executed for systematic training of persons with disabled injured during employment.¹⁵⁵

(b) Employees' State Insurance Act, 1948

The next important legislation is the *Employees' State Insurance Act, 1948* which also contains certain provisions concerning 'disablement'.

There are three kinds of disablement under the Act:

- i) Section 2(15-A) — Permanent Partial Disablement.
- ii) Section 2(15-B)—Permanent Total Disablement.
- iii) Section 2(21) --- Temporary Disablement.

Permanent Partial Disablement: Section 2(15A) of the Act defines the term as—

“Such disablement of a permanent nature as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of accident resulting in the disablement:

Provided that every injury specified in Part II of the Second Schedule shall be deemed to result in permanent partial disablement.”

Thus the definition contains the following requisite for a disablement to be of a permanent partial nature—

- (1) partial disablement must be of a permanent character;
- (2) the disablement must diminish the earning capability of an employee;

155. Supra note 139 at pp. 61, 67

- (3) reduction in earning capacity must be in each employment which he was competent of undertaking at the time of the accident ensuing in the disablement.

What shall constitute a permanent partial disablement is a question of fact, but every injury provided in Part II of the Second Schedule shall be considered to result in permanent partial disablement. It is the duty of the courts to see that the earning capacity of the workman has been reduced in all employments which he was able of undertaking at the time of the accident and not simply the particular employment in which he was engaged at the time of accident resultant in accident.¹⁵⁶

Permanent Total Disablement---Section 2(15B) defines the term to mean—

“Such disablement of a permanent nature as incapacitates an employee for all work, which he was capable of performing at the time of accident resulting in such disablement:

Provided that the permanent total disablement shall be deemed to result from every injury specified in Part I of the second Schedule or from any combination of injuries specified in Part II thereof where the percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more.”

The requisites of the disablement to be permanent total are:

- (1) the disablement consequential from injury ought to be permanent;
- (2) the disablement must be of such a character as to leave the workman incapable for all work which he was capable of performing at the time of accident resulting in such disablement;
- (3) every injury specified in part I of Schedule II shall be supposed to effect in permanent total disablement; and

¹⁵⁶. *Ibid* at p. 381

(4) it shall also be deemed to result from any combination of injuries specified in Part II of Second Schedule where the cumulative percentage of the loss of earning capacity, as specified against those injuries, amounts to one hundred per cent or more.¹⁵⁷

In *Canara Public Conveyance Co. v. Usman Khan*¹⁵⁸ it was observed that the disablement is said to be permanent and total if it results in such permanent loss of earning capacity of the employee as to make him incompetent for all work which he was capable of doing at the time of accident. But if the disablement results only in the reduction of the earning capacity it is only partial and not total. The use of 'for' makes it amply clear that the incapacity for work as referred thereto is not only physical incapacity to work but incapacity to secure employment. Hence, no matter what may be the physical power of the employee to do a task in any field of activity, if there is no earning power remaining in the workman so as to present him any employment, the incapacity is complete.¹⁵⁹

Temporary Disablement--- Section 2(21) of the act defines the term as follows:

“ a condition resulting from an employment injury which requires medical treatment and renders an employee, as a result of such injury, temporarily incapable of doing the work which he was doing prior to or at the time of injury.”

The constituents of this disablement are:

- (1) It is a state resulting from an employment injury;
- (2) The injury must be such as necessitates medical treatment;

157. *Ibid* at pp. 381,382

158. (1996) 1 LLJ 831 (Mys.)

159. *Supra* note 139 at p. 382

(3) The injury must make the employee temporarily incapable of doing the work; and

(4) The incapacity to work ought to be with regard to such work which the employee was doing either preceding the injury or at the time of injury resulting in such disablement.¹⁶⁰

‘Employment injury’¹⁶¹ has been defined in the Act to mean a personal injury caused to an employee, (i) by accident arising out of and in the course of employment, (ii) by occupational disease existing out of and in the course of employment, (iii) such employment must be insurable, and (iv) it is immaterial whether the accident arising out of and in the course of employment occurs within or outside the territorial limits of India.

Apart from the above definitions the Act under *Section 46* provides benefits in case of disablement along with certain other benefits like sickness benefit, maternity benefit, dependants benefit, medical benefit, etc. According to this Section, any insured person shall be entitled to periodical payments if—

- i) he suffers from disablement;
- ii) the disablement results from an employment injury; and
- iii) the injuries were sustained due to employment as an employee under the conditions mentioned in the Act.

However, the disablement benefit is payable only when the injury is appropriately certified by an Insurance Medical Officer.¹⁶²

Section 51 provides for disablement benefit and lays down that, subject to the provisions of this Act:

160. *Ibid* at p. 384

161. *Employees’ State Insurance Act*, 1948. Section 2(8).

162. *Supra* note 139 at p. 409

- (a) a person who sustains temporary disablement for not less than three days(excluding the day of accident) shall be entitled to periodical payment at such rates and for such period and subject to such conditions as maybe prescribed by the Central Government.
- (b) a person who sustains permanent disablement whether total or partial, shall be entitled to periodical payment at such rated and for such period and subject to such conditions as may be prescribed by Central Government.

Section 51A provides that if it is shown that the accident arose in the course of employment of an insured person, it would be presumed also to have arisen out of employment. But the presumption is rebuttable and applied to the provisions of this act only.¹⁶³ *Section 51 B* explains the expression 'arising out of and in the course of employment'. An accident shall be deemed to arise out of and in the course of an insured person's employment notwithstanding that he was at the time of the accident acting in contravention of the provisions of any law applicable to him or any orders given by or on behalf of his employer or that he is acting without instructions from his employer, if—(a) the accident would have been deemed to have arisen had the act not been one in contravention as aforesaid or without instructions from his employer, as the case may be, and (b) the act is done for the purpose of and in connection with the employer's trade or business.¹⁶⁴ *Section 51 C* of the Act incorporates the principle of notional extension of employer's premises. This section lays down the liability of the employer for the payment of benefit for accident arising while an employee is traveling in any transport provided by the employer while going to or coming from work.¹⁶⁵ *Section 51 D* lays down that an accident occurring to an insured person in or about any premises at

163. *Ibid* at p. 410

164. D.K. Menon. *op.cit.* at p. 62

165. *Supra* note 139 at p. 410

which he is for the time being employed for the purpose of his employer's trade or business shall be deemed to arise out of and in the course of his employment, if it happens while he is taking steps, on an actual or supposed emergency at those premises, to rescue, support or defend persons who are or thought to be possibly injured or imperiled or to avert or minimize serious damage to property.¹⁶⁶ Finally, *Section 54* deals with the issue of determination of question of disablement. The Section lays that the questions relating to disablement shall be determined by the Medical Board constituted in accordance with the regulations, and the disablement question shall concern with:

- (i) whether the relevant accident has resulted in permanent disablement;
- (ii) whether extent of loss of earning capacity can be assessed provisionally or finally;
- (iii) whether the assessment of the proportion of the loss of earning capacity is provisional or final; and
- (iv) in the case of provisional assessment the period for which such assessment shall hold good.¹⁶⁷

The positive aspect of the *Employees' State Insurance Act, 1948* is the periodical payments of disablement benefits. Also a person who sustains temporary disablement for not less than three days (excluding the day of accident) is also entitled to periodical payment at prescribed rates and conditions. In addition, the person who sustains permanent disablement whether total or partial shall be entitled to periodical payments though subject to the conditions prescribed by the Central Government. Unfortunately, the coverage of the Act is very limited.

166. D.K. Menon. op.cit. at p. 63

167. Supra note 139 at p. 413

- There are a large number of workers in the unorganized sectors of employment like power looms, diamond cutting workshops, quarries, etc. who are more prone to accidents, but are outside the scope of the Act. This is one of the major defects of the Act.
- Secondly, there is no periodical review of the adequacy of existing facilities and improvement of facilities has not been keeping pace with the increase in number of workers in the covered area.
- Thirdly, there is no scheme either for the training of persons disabled due to employment injury or any scheme for rehabilitation.¹⁶⁸

Hence the following changes may be considered:

- ✓ There is a need to include the employees of the unorganized sector within the ambit of this Act.
- ✓ Secondly, there is a need to periodically review the growth of industries in the covered area and the adequacy of existing facilities.
- ✓ Thirdly there is a need to shift the emphasis to prevention of accidents leading to disablement as well as prevention of disease. The most effective means of prevention of accidents is safety measures and strict enforcement of the same.
- ✓ Finally, framing of schemes for providing training and alternative employment are a high time need for the actual success of the Act.¹⁶⁹

168. *Ibid* at pp. 63, 66, 67

169. *Ibid*

(c) Other Labour Laws:

Apart from the above principal labour legislations *The Factory Act, 1948*, *The Plantation Labour Act, 1951* and *The Mines Act, 1952* are the legislations which are concerned with the prevention of accidental situations and circumstances to curb the growing incident of disability. However these laws are primarily meant to prescribe such conditions for workers as may ensure their safety and security. They do not directly deal with the issue of disability benefit nor contain any special provision of health or safety with regard to their disabled status. In fact the inadequacies as well as non-enforcement of prescribed rules and laws to prevent occupational hazards have been responsible for increasing the number of disabled persons either by way of suffering from incurable diseases or by way of accidental injuries.¹⁷⁰

(d) Motor Vehicles Act, 1988:

The *Motor Vehicles Act, 1988* seeks to consolidate and amend the law relating to motor vehicles. Sections 8, 16 and 186 are the provisions which concern with 'disability' as one of the grounds of refusal or revocation of licence and when disabled persons may be penalized for being a danger to the public by driving vehicles which they are incompetent to drive. *Section 8* deals with the grant of learner's licence. Every person who applies for a learner's licence has to satisfy the licensing authority about his physical fitness for driving vehicles on the road. For this purpose such person has to submit a medical certificate from a registered medical practitioner. Sub-section (4) provides that if from a medical certificate it appears that the applicant is suffering from any disease or disability which is likely to cause the driving by him of motor vehicle of the class which he would be authorized by the learner's

170. Supra note 138 at p. 21

licence applied for to drive, to be source of danger to the public or passengers. the licencing authority shall refuse to issue the learner's licence. However it is subject to the proviso that a learner's licence limited to driving an invalid carriage may be issued to the applicant, if the licencing authority is satisfied that he is fit to drive such a carriage.

Section 16 deals with the revocation of driving licence on grounds of disease or disability. It says that any licencing authority is at liberty at any time revoke a driving licence or may require as a condition of continuing to hold such driving licence the holder thereof to produce a medical certificate in the same manner as is referred to in Section 8 , if the licencing authority has reasonable grounds to believe that the holder of the driving licence is, by virtue of any disease or disability unfit to drive a motor vehicle and where the authority revoking a driving licence is not the authority which issued the same, it shall intimate the fact of revocation to the authority which issued that licence.

Section 186 imposes a penalty on a person who drives a motor vehicle in any public place when he has knowledge that he is suffering from any disease or disability and such driving shall be a source of danger to the public, punishable for the first offence with fine extending up to two hundred rupees and for a second or subsequent offence with fine which may extend to five hundred rupees.

Apart from the above provisions Chapters VII-A and VIII is of special significance as they respectively deal with liability without fault in certain case and introduced compensation for accident involving death or bodily injury to person arising out of the use of motor vehicles. *Section 92-C* defines permanent disablement to mean a disablement resulting from an accident arising

out of the use of a motor vehicle or motor vehicles and if such a person has suffered by reason of the accident any injury or injures involving—

- (a) permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint; or
- (b) destruction or permanent impairing of the powers of any member or joint; or
- (c) permanent disfiguration of the head or face.

Chapter VIII was initiated with a view to giving effect to a social policy of distribution risks caused by the necessary peril in today's life particularly on the roads. The compensation for injuries and damage can be had on showing that some cause of action against the party responsible lies in terms of Section 110(1) of the Act. The Act requires adjudication upon claims for compensation in respect of accidents involving "the death of or bodily injury to persons arising out of the use of motor vehicles or damages to any property of a third party so arising or both."¹⁷¹

Thus the scheme and the provisions of law relating to motor vehicles envisages that at least a compensatory remedy be available to persons who are prone to be victims by use of motor vehicle in a public place. However, the policy of giving relief to the victims through the approach of ensuring hazards on roads and dispensing the losses suffered by the individuals, would get attenuated, if claims arising out of motor accidents were to be determined exclusively on the basis of preponderant evidence of negligence, for which the burden of proof lies on the victim. Unfortunately it is the victim even if he has been permanently disabled, or his family members who have to collect foolproof evidence of negligence of the driver or to make intense investigatory efforts to establish the defaulter' conduct, as being such that lacked prudence or

¹⁷¹ *Ibid* at p. 22

standard care on his part. The defaulter must in fact be identified by logical interpretation of events. Thus apart from appropriate legislative amendments the courts should also use their judicial skills to assure justice.¹⁷²

(e) Provisions for Disabled in Various Other Legislations:

Together with the Constitutional provisions, particular legislations dealing with disability rights, legislations concerning compensatory remedies in case disablement, it will be worth while to have a look at the various other legislations that contain provisions pertaining to people with mental and physical disability. While in some legislations they have been given some benefits, in others they have been abstained from doing certain acts.

(i) Indian Penal Code: The Code though provides for a general punitive law for India. However persons with insanity have been given the benefit of General Exceptions in case they have been found to have committed a crime within the meaning of this Code.

Section 84 deals with the act of a person of unsound mind and says that nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Section 89 also excepts any act done in good faith for benefit of child or insane person by consent of the guardian or other person having lawful charge of that person.

Section 90 provides that if any consent given by a person who, from unsoundness of mind is unable to understand the nature and consequence of that to which he gives consent will not amount to consent.

172. *Ibid* at pp. 22, 23

However, Section 98 provides for the right of private defence against an act of a person of unsound mind.

Thus the Code provides for these exceptions due to the incapacity of a person with mental disability to understand the nature and consequences of his conducts due to their immaturity of understanding.¹⁷³

(ii) Contract Act, 1872: The Act principally deals with the making of contracts, its essentials, competence of the parties and when contracts may be vitiated. Section 11 provides the competence of the parties to contract. It says that every person who is of age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. Section 12 says that for the purpose of making contracts, a person shall be treated as one of unsound mind when he is so declared by a competent court.

(iii) The Evidence Act, 1872: Chapter IX of the Act deals with the provisions dealing with witnesses in courts. Section 118 of the Act provides as to who may testify as witness. It lays that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving, rational answers to these questions, by tender years, extreme old age, disease, whether of mind or body, or any other cause of the same kind. The Explanation provides that a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. Further Section 119 of the Act provides for the manner in which a dumb witness may tender evidence orally in an open court. It provides that a witness who is unable to speak may give evidence in any other manner in

173. Ratanlal & Dhirajlal, "*The Indian Penal Code*", 28th Edition (Reprint), (Wadhwa and Company, Nagpur, 1999), pp. 96, 101, 102, 118.

which he can make it intelligible, as by writing or by signs, but such writing must be written and the signs made in open court. Evidence so given shall be deemed to be oral evidence. This provision thus takes care of the situation of the dumb witness but there is no provision laid down for blind or deaf witness.¹⁷⁴

(iv) The Government Savings Banks Act, 1873: This Act provides for an independent provision with regard to deposits made in Government Savings Bank belonging to lunatics. Section 12 provides that if any depositor becomes insane or otherwise incapable of managing his affairs, and if such insanity or incapacity is proved to the satisfaction of the Secretary of the Bank in which his deposit may be, such Secretary may, from time to time, make payments out of the deposit to any proper person, and the receipt of such person, for money paid under this section shall be sufficient discharge therefor. Where a committee or manager for the depositor's estate has been duly appointed, nothing in this section authorizes payments to any person other than such committee or manager.

(v) Prisoners Act, 1900: This Act has been enacted to deal with law relating to prisoners confined by order of court. Section 30 of the Act specifically deals with the manner with which lunatic prisoners have to be dealt with. Sub-section (1) says that, where it appears to the State Government that any person detained or imprisoned under any order or sentence of any court is of unsound mind, the State Government may, by a warrant setting forth the grounds of belief that the person is of unsound mind, order his removal to a lunatic asylum or other place of safe custody within the State there to be kept and treated as the State Government directs during the remainder of the term for which he has been ordered or sentenced

174. Supra note 5 at p. 477

to be detained or imprisoned or, if on expiration of that term it is certified by a medical officer that it is necessary for the safety of the prisoner or others that he should be further detained under medical care or treatment, then until he is discharged according to law. As per sub-section (2) where it appears to the State Government that the prisoner has become of sound mind, the State Government shall, by a warrant directed to the person having charge of the prisoner, if still liable to be kept in custody, remand him to the prison from which he was removed, or to another prison within the State or if the prisoner is no longer liable to be kept in custody, order him to be discharged. According to sub-section (3) the provisions of Section 9 of the Lunatic Asylums Act, 1858 shall be applicable to every person confined in a lunatic asylum under the provisions of sub-section (1) after the expiration of the term or which he was ordered or sentenced to be detained or imprisoned and at the time during which a prisoner is confined in a lunatic asylum under that sub-section shall be considered as a part of the term of detention or imprisonment which he may have been ordered or sentenced by the court to undergo. Sub-section (4) provides that in any case in which the State Government is competent under sub-section (1) to order the removal of a prisoner to a lunatic asylum or other place of safe custody within the State, the State Government may order his removal to any such asylum or place within any other State or within any part of India to which this Act does not extend by agreement with the State Government of such other State and the provisions of this section respecting the custody, detention, remand and discharge of a prisoner removed under sub-section (1) shall, so far as they can be made applicable, apply to a prisoner removed under this sub-section.

(vi) Registration Act, 1908: This Act principally seeks to consolidate the enactments concerning the registration of documents. While dealing with Powers of Attorney that are recognizable under the Act, an exception has

been made in Section 33 in respect of persons with physical disability from attending the registration office or court for the purpose of executing any power of attorney.¹⁷⁵

(vii) Code of Civil Procedure, 1908: The Code is a procedural law that relates to the procedure of the Courts in civil matters. Order XXXII deals with suits by or against minors and persons of unsound mind. Rule 15 says that Rules 1 to 14, except rule 2-A shall apply to persons of unsound mind or shall so far as apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who though not be adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.

(viii) Designs Act, 1911: This Act seeks to amend the law relating to the protection of designs. Section 74 of the Act contains a provision on declaration by infant, lunatic etc. According to sub-section (1), if any person, by reason of his infancy, lunacy or other disability, is incapable of making any statement or doing anything required or permitted by or under this Act, the lawful guardian, committee or manager, if any, of the person subject to the disability, or if there be none, any person appointed by any court possessing jurisdiction in respect of his property, may make such statement or a statement as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of the person subject to the disability. Sub-section (2) further lays down that, an appointment may be made by the court for the purposes of this section upon the petition of any person acting on behalf of the person subject to the disability or any other person interested in the making of the statement or the doing of the thing.

¹⁷⁵. *Ibid* at p. 491

(ix) Indian Securities Act, 1920: The Act has been enacted to consolidate and amend the law relating to Government Securities. Section 20 makes a special provision regarding payments in case of securities held by minors and lunatics. According to the Section, where a Government security stands in the name of or is held by a minor or person who is insane and incapable of managing his affairs, the interest accumulating thereon, or the capital sum payable in respect thereof on the maturity or discharge of the loan, shall, where in the case of interest payable, does not exceed five thousand rupees, be paid in such manner as may be prescribed, and on any payment being so made, the government shall notwithstanding any provision of any enactment to the contrary, be discharged from all liability in respect thereof.¹⁷⁶

(x) Indian Succession Act, 1925: The Act seeks to consolidate the law applicable to intestate and testamentary succession. Section 59 deals with the person capable of making wills. It says that every person of sound mind not being a minor may dispose of his property by Will. Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to understand the nature of their acts. A person who is ordinarily insane may make a Will during interval in which he is of sound mind. Sections 223 and 236 disentitle a person of unsound mind to be granted Probate or Letters of Administration. Section 246 deals with the administration for use and benefit of lunatic or minor. If a sole executor or a sole universal or residuary legatee or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestate's estate applicable in the case of the deceased, is a minor or lunatic, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent

¹⁷⁶. *Ibid* at p. 493

authority, or, if there is no such person to such other person as the court may think fit to appoint, for the use and benefit of the minor or lunatic until he attains a majority or becomes of sound mind, as the case may be.

(xi) Hindu Succession Act, 1956: The act intends to amend and codify the law relating to intestate succession among Hindus. Section 28 of this Act says that disease, defect etc. in a person shall not disqualify him or her from inheriting ancestral property. It says that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity or save as provided in this Act, on any other ground whatsoever.

(xii) Children Act, 1960: This Act has been enacted to provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of delinquent children in Union Territories. Section 47 deals with the transfer of children of unsound mind or suffering from leprosy. Sub-section (1) says that, where it appears to the Administrator that any child kept in a special school or children's home in pursuance of this Act is suffering from leprosy or is of unsound mind, the Administrator may order his removal to a leper asylum or mental hospital or other place of safe custody for being kept there for the remainder of the term for which he has to be kept in custody under the orders of the competent authority or for such further period as may be certified by a medical officer to be necessary for the proper treatment of the child. Under sub-section (2) where it appears to the administrator that the child is cured of leprosy or of unsoundness of mind, he may, if the child is still liable to be kept in custody, order the person having charge of the child to send him to the special school or children's home from which he was removed or, if the child is no longer liable to be kept in custody, order him to be discharged.

(xiii) Income Tax Act, 1961: The Income Tax Act, 1961 recognises the plight of the disabled and allows concessions to the blind or those subject to permanent physical disability or to those subject to mental retardation and also allows deductions incurred on the maintenance of the disabled. It also allows deductions and rebate in the case of senior citizens who are more than 65 years of age.¹⁷⁷ Certain sections of this Act have granted concessions to a person with disability, but in a limited way in as much as a disabled person has been taken as a handicapped person suffering from a permanent physical disability or is subject to mental retardation which has the effect of reducing considerably such person's capacity for normal work or engaging in a gainful employment or occupation.¹⁷⁸

Section 80U of the said Act provides that in computing the total income of an individual, being a resident, who at the end of the previous year, is suffering from a permanent physical disability (including blindness) or is subject to mental retardation being a permanent physical disability or mental retardation specified in the rules made in this behalf by the Central Board of Direct Taxes, which is certified by a physician, a Surgeon, an oculist or a psychiatrist, as the case may be, working in a Government hospital, and which has the effect of reducing considerably such individual's capacity for normal work or engaging in a gainful employment or occupation, there shall be allowed a deduction of a sum of Rs. 50,000 with enhanced limit of Rs. 75,000 for the severely disabled. Such individual has to produce the aforesaid certificate before the Assessing Officer in respect of the first assessment year for which he claims deduction under this Section.¹⁷⁹

177. Supra note 82 at p. 16

178. Supra note 5 at pp. 479, 480.

179. Supra note 82 at p. 17

Under *Section 80DD* of the Income Tax Act, 1961 it has been provided that deductions will be available to an assessee resident in India, being an individual or Hindu Undivided Family (HUF) in respect of maintenance including medical treatment of a handicapped dependant. It provides that where the assessee during the previous year has incurred any expenditure for the medical treatment (including nursing) training and rehabilitation of a handicapped dependant, or paid or deposited any amount under a scheme framed in this behalf by the Life Insurance Corporation of India or Unit Trust of India and approved by the Central Board of Direct Taxes in this behalf for the maintenance of a handicapped dependant, in that event the assessee will be allowed deduction of a sum of Rs. 50,000 in respect of the previous year. The deduction shall be allowed only if a scheme of LIC or UTI provides for payment of annuity or lump-sum amount for the benefit of a handicapped dependant in the event of the death of the individual or the member of the HUF in whose name subscription to the scheme has been made. The assessee has to nominate either the handicapped dependant or any other person or a trust to receive the payment on his behalf for the benefit of the handicapped dependant. If the handicapped dependant pre-deceases the individual or member of the HUF the amount so deposited shall be deemed to be the income of the assessee of the previous year in which such amount is received by the assessee and shall be chargeable to tax as income of that previous year.¹⁸⁰

(xiv) *The Limitation Act, 1963*: Section 6 of this Act, described as 'Legal Disability' provides that where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be considered, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time

180. *Ibid* at p. 18.

specified therefor. The above benefit would be available when there is more than one disability and will ensure to the legal representatives if the disability continues till death.¹⁸¹

(xv) Medical Termination of Pregnancy Act, 1971: Section 3 of the Act deals with the situation when pregnancies can be terminated by registered medical practitioners. Sub-section (2) clause (b) (ii) provides that where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith that there is a substantial risk if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped, such pregnancy may be terminated by a registered medical practitioner. Also, Sub-section (4) (a) provides that no pregnancy of a woman, who has not attained the age of eighteen years, or who, having attained the age of eighteen years is a lunatic, shall be terminated except with the written consent of the guardian. Thus the Act on one hand seeks to prevent the birth of abnormal children as well as intends to protect a pregnant lunatic woman.

(xvi) Code of Criminal Procedure, 1973: This code consolidates and amends the law relating to Criminal Procedure. Section 125 of the Act deals with orders that a Magistrate can pass for maintenance of wives, children and parents where they are unable to maintain themselves. Clause (c) of sub-section (1) of Section 125 provides that if a person having sufficient means neglects or refuses to maintain his legitimate or illegitimate child, other than a married daughter, who has attained majority, where such child is, by reason of any physical or mental abnormality or injury is unable to maintain

181. Supra note 82 at p. 483

itself, a Magistrate of first class may order such person to make a monthly allowance for the maintenance of such child.¹⁸²

(xvii) Legal Services Authorities Act, 1987: This Act seeks to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunities. Section 12 of this Act provides for the criteria that entitles a person to receive legal services under the aforesaid Act and includes a mentally ill person as well as a person with disability as defined in Section 2 (i) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.¹⁸³

(xviii) Building and Other Construction Workers (Regulations of Employment and Conditions of Service) Act, 1996: This Act has been enacted with a view to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures and other matters related therewith or supplementary thereto. Section 31 contains a specific provision that prohibits employment of certain persons in certain buildings or other construction work. According to this section, no person about whom the employer knows or has reason to believe that he is a deaf or has defective vision or he has a tendency to giddiness shall be required or allowed to work in any such operation of building or other construction work which is likely

182. Ibid at p. 475

183. Ibid at p. 487

to involve a risk of any accident either to the building worker himself or to any other person.¹⁸⁴

(xix) *The Juvenile Justice (Care and Protection of Children) Act, 2000:*

This Act deals with the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child friendly approach in the adjudication and disposition of matters in the best interests of children and for their ultimate rehabilitation through various institutions established under this Act. Section 58 particularly concerns with the transfer of juvenile or child of unsound mind or suffering from leprosy or addicted to drugs. This section is similar to the provision contained in Section 47 of the Children act, 1960. According to Section 58 of the Juvenile Justice Act, where it appears to the competent authority that any juvenile or the child kept in a special home or a children's home or shelter home or institution in pursuance of this Act, is suffering from leprosy or is of unsound mind or is addicted to any narcotic drug or psychotropic substance, the competent authority may order his removal to a leper asylum or mental hospital or treatment centre for drug addicts or to a place of safety for being kept there for such period not exceeding the period for which he is required to be kept under the order of the competent authority or for such further period as may be certified by the medical officer necessary for the proper treatment of the juvenile or the child.

(xx) *Other minor provisions:*

Apart from the above Acts the *Indian Divorce Act, 1869*, the *Parsi Marriage and Divorce Act, 1936*, the *Hindu Marriage Act, 1955* and the *Special Marriage Act, 1956* also make insanity or unsoundness of mind

184. *Ibid* at p. 473

as a ground of divorce, judicial separation or voidability of marriage. Under the latter two legislations one of the requirements of a valid marriage is soundness of mind.

The above discussion will be incomplete without the mention of two other Acts which do not expressly pronounce disability or disablement, whether physical or mental, but play a very important role in the prevention of disability. They are—The *Prevention of Food Adulteration Act, 1954* and *Narcotic Drugs and Psychotropic Substances Act, 1985*. One of the purposes of the Acts is to reduce the disabled population through induced disability. Firstly, sale of certain food articles, when consumed is a reason for causing disability. The Prevention of Food Adulteration Act seeks to address this issue. For instance, it is known that the crippling of lower limbs known as lathyrism is caused by the use of a grain called 'kesari-dal'. This grain is often used to adulterate pulses as well as preparation of snacks at restaurants and roadside eating places. This 'dal' is easily cultivated, having high drought resistance. It has toxicity due to alkaloids present in the seeds, namely, *Neurotoxin and B-(N) Oxaly amino L. alanine*, which causes crippling effect in the lower limbs for which no effective remedy, has yet been found. Though the sale of this food item is not banned its use is recommended only after detoxifying the seeds by soaking them in large quantities in warm water in masonry tanks which will make them free from the alkaloids. Unfortunately the seeds are sold through illegal trade practices including using it for adulteration.¹⁸⁵ Thus the Food Adulteration Act intends to curb on this practice to prevent disability. But lack of proper administrative measures has been a major hindrance in the attainment of such a noble objective. Hence regular laboratory tests to detect instances of adulteration are a proper way to achieve the desired objects. Secondly, the use of drugs and their overdoses

185. Supra note 136 at p. 21

have been hazardous in many ways including causing mental and physical disabilities. This issue has been dealt with by the *Narcotic Drugs and Psychotropic Substances Act*. Corticosteroids have resulted in a number of physical and mental abnormalities. The psychotropic drugs which have a specific effect on the brain like L.S.D. Resperine are indiscriminately used as tranquilizers. Chlorpromazine is known to cause chromosomal aberrations. Thalidomide hypnotic tranquilizers have produced monster infants. Shockingly, most of these drugs are used and easily available in India. Though these drugs are essentially to be prescribed by a qualified doctor and have to be sold by a registered pharmacist under a prescription, but in reality they are often sold across the counter without any formalities. In reality, self-medication and availability of these drugs is a practice which reigns abundant. Lack of knowledge about the hazards of these drugs is also a reason of contravention of the provisions of this Act. Accordingly, the imperative is to provide abundant medical facilities, educate the masses about the hazards of using these drugs as well as enforce the drug law effectively including disciplining the medical stores from selling drugs like these over the counter without prescription.¹⁸⁶ Regular amendments keeping in view the global advancement in development of better drugs should be incorporated to ensure the better health of the citizens.

In addition to the above laws, *All India Services (Special Disability Leave) Regulations, 1957* have been framed in pursuance of sub-rule (1) of rule 16 of the All India Service (Leave) Rules, 1955. Disability under these regulations means any injury, illness, infirmity or disease. Special disability leave may be granted to a member of the Service who suffers a disability as a result of risk of office or special risk of office.

186. *Ibid* at p. 19

A SUM UP:

The above lines reveal the constitutional mandate, the various legal enactments and their affirmative actions as well as their inherent shortcomings. Although the Constitution of India endeavours for the accomplishment of an egalitarian socio-economic order and hence it directs that the State shall make effective provision for securing the right to public assistance in case of unemployment, old age, sickness and disablement. The State shall also strive to promote the welfare of the people by securing and protecting a social order in which justice social, economic and political shall prevail in the nation's life. It is seen that in spite of the constitutional mandate the state apparatus remains unmoved to accommodate the human constituent of social security.¹⁸⁷ However it is most unfortunate that the Constitution lacks a direct provision dealing with the interests of the disabled persons. There is absolutely no provision considering the plight of disabled women and children, who suffer a double bane because of their vulnerability. Implication of the rights will not suffice if the State sincerely intends to uplift their status. Further in spite of the implied constitutional mandate the state apparatus remains unmoved in gearing up the momentum. The maximum generous attitude of society has been to keep this section of the society on doles and grants without making a conscience effort to inject in them a sense of dignity and self-reliance and fellow feeling.¹⁸⁸ In view of India's ratification to the recent Disability Convention it becomes utmost necessary to amend the Constitutional provisions to adapt with the ratification.

187. *Supra* note 154 at p. 95

188. *Ibid* at pp. 92, 95

Leaving aside the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, the other three major Acts dealing with the disabled whether physical or mental as well as their rehabilitation and support viz. *The Mental Health Act, 1987*; *Rehabilitation Council of India Act, 1992* and *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999*. Each of these Acts suffers from their own sets of drawbacks. The *Mental Health Act* puts grave question marks on the efficacy of the Act for ensuring the protection of the person, property and privacy of communication of the mentally ill. As a matter of fact, the Act leaves enough liberty for the misuse of power by the police, medical officer and magistrate. The primary flaw of the Act relates to the fact that it perceives institutional care as the lone arrangement for the concern and security of the mentally disabled. Institutionalization of care of the mentally sick is an outmoded and defective concept in this generation of human rights. In the entire Act there is only one provision directly concentrating on the human rights of the mentally ill. There is also no privacy and misuse of the power of voluntary admission. Hence the need is to include provisions for educating society about mental illness and treating it at par with physical illness; check on the licencing authorities with respect to their powers and functions, sufficient provisions for long-term treatment and expenses thereof; provision for timely discharge and penalties for unnecessary detention in mental hospitals and nursing homes. Actually, the crisis lies in the lack of harmonized efforts to realize the particular needs of the mentally ill. Hence the urgent need is to search for proper methodologies so that psychiatric hospitals truly turn into therapeutic community as well as delivery of mental health care and counselling and educational services to all those who seek it. Thus the call is for an assurance of an inclusive health care programme which would aspire at improved public education, responsible government, the

lessening of group bigotry, through collaboration among the members of the community, which would turn the world more sane and harmonious.

The Rehabilitation Council of India Act, 1992 is sure set back for the advocates of inclusion and mainstreaming of person with disabilities and disowns all those individuals who may though be working for the benefit of the persons with disabilities, but since they do not appear on the rolls of the Register maintained by the Council of its trained members, their action have been made punishable. Thus it disempowers anybody not registered with it for carrying out any work with or for the disabled, but also forbids any individual from teaching, training or providing recreation, leisure etc. until and unless the registration proviso is fulfilled. Therefore, the role of RCI should be changed. From a mere training body it should be a networking and liaison body. Clause 13(3) relating to penal actions must be removed. The definition of rehabilitation professional is not satisfactory and cannot incorporate the innumerable volunteers who work for the benefit of the disabled, whose work cannot be set in watertight compartments. A stringent definition of the term 'Rehabilitation professional', along with an equally strict eye on educational entry level and quantum of relevant disability course content must be introduced. All together an ideological reevaluation of the Act is desirable.

So far as the *National Trust Act, 1999* is concerned, though the Act principally deals with the constitution of a Board for the welfare of person suffering from autism, cerebral palsy, mental retardation and multiple disabilities, the primary defect of the Act is the notional absence of involvement of the persons with disability. Secondly, there are question marks regarding the extent of the applicability of the restrictions imposed under Section 4(5). Thirdly, the provisos to section 11(1) (b) allows bequests to be made to the Trust for the benefit of a particular person with disability. At the same time the provisos lay down that no donor can insist on the exclusive utilization of the

bequest for the beneficiary named by him. This is a very contradictory situation. Fourthly, the Act has a 'protector' kind of image, distant from person-centred plan. Thus the need is correct these defects by evolving a system that emerges from a person centred plan to a planning process for persons with disabilities. At the same time there is a want of sensitizing parents about the process for self determination and assisted decision making. Besides the defects inherent in the Act also needs to be adequately addressed so that the rationale of the legislation is not defeated.

Further, the principal minor enactments reveal extreme apathy of the government towards the problem of disability as well as disabled. The amount of compensation under the *Workman's Compensation Act, 1923* is too meagre to set off the handicaps caused by the disabilities incurred, nonetheless the law keeps it open for the injured to go to the court to demand damages by way of civil suit. The disabled person who is surrounded by physical and financial handicaps finds it convenient to shun this course of action.¹⁸⁹ Moreover the medical facilities to persons with disabilities should not be preventive rather anticipatory, regulatory and remedial. To prevent disability arising out of side effect of drugs the authorities created under the *Narcotic Drugs and Psychotropic Substances Act, 1985* and the *Prevention of Food Adulteration Act, 1954* should be made more responsive through stringent enforcement and inspectorate. The quantum of compensation provided under the *Workman's Compensation Act, 1923*, *Employees' State Insurance Act, 1948* and *Motor Vehicles Act, 1988* should be based compulsorily based on multiplier theory.¹⁹⁰ Adequate rehabilitation and training facilities also be made under the two former Acts. The reality is that the State is to be made fully active towards its commitment to apply and implement the law which stipulates an obligation

189. Supra note 138 at p. 21

190. Supra note 154 at p. 103

to make environment of safety in the workplace, as well as duty to act cautiously and with care while engaged in hazardous jobs.

Hence the need is to have a multi dimensional approach to deal with the particular demands of the disabled persons, which shall secure a comprehensive system of social security. Legislations, rules and regulations must be framed and amended, where needed; and, to uphold disability rights to their fullest concerted government action to put the laws into practice is the immediate obligation of the State particularly keeping in view the provisions of the Disability Convention.

CHAPTER 4

PROTECTION AND PROMOTION OF HUMAN RIGHTS OF PERSONS WITH DISABILITIES IN INDIA WITH REFERNCE TO PERSONS WITH DISABILTIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995

CHAPTER 4

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PROLOGUE:

“It is not tragic to live in a wheel chair. Disability only becomes a tragedy when society fails to provide the things one needs to lead one’s life the design of our physical environment should reflect our understanding of the real needs of the disabled.... Let us join hands to define disability as a special ability.” --Judy Heumann

A considerable section of the Indian population experiences physical, intellectual or psychological impairment of changeable proportions, temporarily or permanently. It has been observed that their lives have been often handicapped by social, cultural, economic, infrastructural and attitudinal barricades which impede their admittance to opportunities and their ability to benefit from rights on equal terms. To characterize disability as a special ability, in the last decade India has toiled towards providing a comprehensive legal framework for its citizens with disabilities. Four landmark Acts have been espoused namely the *Mental Health Act of India, 1987*, *The Rehabilitation Council of India Act, 1992*, *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* and the *Persons with Disabilities (Equal Opportunities, Protection of Rights*

and Full Participation) Act, 1995. The objectives of these Acts has been to even out opportunities, augment participation, deal with tribulations of discrimination and more importantly, ensure the enjoyment of all basic and fundamental rights by persons with disabilities. The passing of these laws has also marked an alteration in the acuity of disability-connected subjects, the focus changing from one based on charity to one enthused by the concept of rights. Unfortunately review of the three Acts namely the *Mental Health Act of India, 1987*, *The Rehabilitation Council of India Act, 1993* and *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* point out that the slow and uneven implementation of these Acts has resulted in disappointment among the persons with disabilities as well as their families. The implementation of the laws has been particularly weak along with some defective provisions as discussed in the previous chapter.

India being a welfare state has got the obligation to help the downtrodden and the poor. Persons with disability also need some attention and state support. In fact the Constitution through the Directive Principles of State Policy under Article 41 demands the State to protect the disabled, within the limits of its economic capacity. Being a Directive Principle, the provision is an unenforceable one as laid down under Article 37; hence the State can put forward the plea that it does not have the sufficient economic resources.¹ Although the United Nations declared 1981 as the international year of the disabled, India enacted its comprehensive legislation in 1995 as its obligation of being a signatory to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and the Pacific region, which was adopted at the meeting to launch the Asian and Pacific Decade of the Persons with Disabilities (1993-2002) convened by the Economic and Social Commission for

1. P.S. Seema, "Persons With Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995- A Critique". *The Karnataka Law Journal*, vol. (4) (2005), pp. 19 at p.1

Asia and Pacific at Beijing on 1st December, 1992. To implement the Proclamation, the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* was enacted. , the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Bill, 1995* was passed in December 1995 and was published in the Gazette of India on Monday, 1st January 1996 after receiving assent from the President of India Dr. Shankar Dayal Sharma. It became enforceable on Wednesday, 7th February 1996. The title of the Act speaks enough as to its major aims and objectives which are to enable a disabled human to attain his or her full personhood which includes an individual's dignity, creativity and opportunity as are the broader preamble objectives and directives of the Indian Constitution.² The Act treats disability as a civil right rather than a health and welfare issue, and recognizes the need to integrate persons with disabilities with the mainstream of society by some normative action. Among other things the Act intends to provide for the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities; to create a barrier free environment for persons with disabilities; to remove any discrimination against persons with disabilities in the sharing of development benefits vis-à-vis non-disabled person etc.³ Despite the enactment of such a beneficial piece of legislation, various incongruities have crept in the realistic field of its execution. Various shortcomings have surfaced in the functioning as well as its implementation in the past decade. In this chapter a critical analysis of the various provisions of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* will be taken up. Assessment of the Act will be incomplete without a reference to the national

2. Ateeque A Khan, "The Persons With Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995—A Plea for Early Enforcement in India", *Kashmir University Law Review*, Vol. V (1998), pp. 267-279 at p. 267

3. Justice S.B. Sinha, "Disability Law vis-à-vis Human Rights", *Supreme Court Cases*, (2005) 3 SCC, pp. 1-14 at pp. 3, 4

policy of Government of India and the disability estimates. Hence to ascertain the true picture of the major disability law an appraisal of these areas is also desirable and which shall find a place in this paper. Along with *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996* shall be referred to freeze the correct position of the Act.

A. GOVERNMENT POLICY AND NATIONAL PLAN TOWARDS PERSONS WITH DISABILITIES:

(a) Backdrop of current Disability Policy:

India has an extensive experience of policy and practice with respect to disability, together with collection of census information on disability beginning as early as 1872, and special schools and institutions operating since the 19th century. Like many countries, it too had definite provision for people with mental illness and retardation under the *Indian Lunacy Act of 1912*. Welfare of differently-abled persons is under the Concurrent List. In view of that, both the Centre (the Ministry of Social Justice and Empowerment) and the State Governments (Ministries of Women and Child Development) devise and execute welfare programmes such as provision of social education service, employment and training, and rehabilitation and social security schemes. The Constitution of India also acknowledged general state obligations to persons with disabilities in Article 41, and the State List under “Relief of the disabled and unemployable”.

Subsequently, specific measures such as employment concessions were introduced from the 1960s. However, it was not until the 1980s that policy commitment to full participation of PWD in Indian society evolved. The outcomes of this policy shift were realized in several key pieces of

legislation : (i) *the Mental Health Act, 1987*; (ii) *the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* (PWD Act); (iii) *the Rehabilitation Council of India Act, 1992 and amended in 2000* (RCI Act); and (iv) *the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* (National Trust Act).⁴ As a matter of fact important initiatives took place during the Asian and Pacific Decade of Disabled Persons, which included the passage of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* while including a more fundamental shift from a welfare and charity approach to a more human rights approach. Decentralization of services for persons with disabilities was an important aspect of development during this decade.

The Ministry of Social Justice and Empowerment improved outreach considerably through adoption of a camp approach for meeting the rehabilitation needs of the persons with disabilities. The Ministry also put forward the *National Programme for Rehabilitation of Persons with Disabilities* which trains people from the grassroots level upwards in the prevention of disability recognition of its occurrence and rendering advice on appropriate referrals that can range from minor interventions available at primary and state level institutions that are able to provide sophisticated services. The Ministry of Social Justice and Empowerment is accountable to the Parliament for the implementation of the *Persons with Disability Act, the Rehabilitation Council of India Act* and the *National Trust Act*. In 2005, the Ministry of Social Justice and Empowerment developed a draft National Policy for Persons with Disabilities. The national Cabinet approved this in February 2006. Overall, the Policy follows the structure of the PWD Act.

4. People with Disabilities in India: From Commitments To Outcomes, *Human Development Unit, South Asia Region, The World Bank*, May 2007, p. 123

(b) Framework of the Policy:

The National Policy of the Persons with Disabilities, 2006⁵ has pronounced the Constitutional mandate of equality freedom, justice and dignity of all individuals and an inclusive society for all, including persons with disabilities. The National Policy for Persons with Disability, announced in February 2006, endeavours to elucidate the framework under which the state, civil society and private sector must function to facilitate a dignified life for persons with disability and support for their caregivers. The National Policy for Persons with Disability includes:

- (a) Extending rehabilitation services to rural areas
- (b) Increasing trained personnel to meet needs
- (c) Emphasising education and training
- (d) Increasing employment opportunities
- (e) Focusing on gender equality
- (f) Improving access to public services
- (g) Encouraging state governments to develop a comprehensive social security policy
- (h) Ensuring equal opportunities in sports, recreation and cultural activities
- (i) Increasing the role of civil society organisations as service-providers to persons with disability and their families.⁶

Apart from the legal framework, extensive infrastructure has been developed. Consequently seven national Institutes are working for the development of manpower in different areas namely:

Institute of the Physically Handicapped, New Delhi

5. No.3-1/1993-DD-III, Government of India, Ministry of Social Justice and Empowerment

6. Deepanjali Bhas, "National Policy for the Disabled: No clear roadmap for action", *Info Change News & Features* (August 2006), viewed at <http://infochangeindia.org/20060828251/Disabilities/Features/National-Policy-for-the-Disabled-No-clear-roadmap-for-action.html> accessed on 23.6.2008.

National Institute of Visually Handicapped, Dehradun
National Institute for Orthopaedically Handicapped, Kolkata
National Institute for Mentally Handicapped, Secunderabad
National Institute for Hearing Handicappeds, Mumbai
National Institute of Rehabilitation Training and Research, Cuttack
National Institute for Empowerment of Persons with Multiple Disabilities,
Chennai.

There are five Composite Rehabilitation Centres, four Regional rehabilitation Centres and 120 District Disability Rehabilitation Centres (DDRCs) providing various kinds of rehabilitation services to persons with disabilities. There are also several national institutions under the Ministry of Health and family welfare working in the field of rehabilitation , like the National Institute of Mental Health and Neuro sciences, Bangalore; All India Institute of Physical Medicine and Rehabilitation, Mumbai, All India Institute of Speech and hearing, Mysore; Central Institute of Psychiatry, Ranchi, etc. In addition certain State Government institutions also provide rehabilitation services. Besides, 250 private institutions conduct training courses for rehabilitation professionals. National Handicapped and Finance Development Corporation (NHFDC) has been providing loans on concessional terms for undertaking self employment ventures by the persons with disabilities through State Channelizing Agencies. Panchayati Raj institutions at Village level and District Level have been entrusted with the welfare of persons with disabilities.⁷

7. Source: National Policy for the Persons with Disabilities 2006.

(c) Implementation of the Policy:

The policy lays down a roadmap for implementation:

- The Ministry of Social Justice and Empowerment will be the nodal ministry coordinating all matters relating to policy implementation.
- An inter-ministerial body will be set up to coordinate issues concerning to execution of the national policy. All stakeholders, including prominent NGOs, disabled peoples' organisations, advocacy groups and family associations of parents/guardians, experts and professionals will also be embodied. Analogous measures will be encouraged at the state and districts levels. Panchayati Raj institutions and urban local bodies will be related with the running of District Disability Rehabilitation Centres' district-level committees to coordinate matters relating to implementation of the policy. Parenthetically, the role of Panchayati Raj institutions has been highlighted in implementing the policy, to address local-level issues and draw up appropriate programmes.
- The Ministries of Home Affairs, Health and Family Welfare, Rural Development, Urban Development, Youth Affairs and Sports, Railways, Science and Technology, Statistics and programme implementation, Labour, Panchayati Raj, and the departments of elementary education and literacy, secondary and higher education, road transport and highways, public enterprises, revenue, women and child development, information technology and personnel and training will set up required machinery to realize the policy. Each ministry/department will develop its own five-year perspective plan and annual plans setting objects and financial allotments. The annual reports of each ministry/department will specify progress accomplished during the year.

- Apart from their statutory responsibilities, The Chief Commissioner for disabilities at the central level, and State Commissioners at the state level, shall play a key role in implementing the national policy.
- Every five years, a wide-ranging review will be carried out on implementation of the national policy. A document indicating status of implementation and a roadmap for five years will be prepared based on discussions at a national convention. State governments and union territory administrations will be advised to take steps to draw up state policy and develop action plans.⁸

The Policy repeatedly replicates the general obligation of the Persons with Disabilities Act, 1995 while remains more general on concrete strategies for executing them. This major shortcoming is not for want of insight into the shortcomings of current policy and practice. For example, the Policy sets out briefly the reasons why the current disability certification process has not functioned well. However, in terms of the futuristic agenda, it simply insists on State Governments to assume “simple, transparent and client-friendly procedures”. There is no agenda as to how the position might be improved. This is one paradigm, but such lack of concrete strategies is found in many parts of the document. This is not true in all areas (e.g. health strategies are outlined in somewhat more detail). However, overall there is very limited sense in the Policy that even Government of India’s own assessments indicate serious implementation problems. Merely repeating the general assurances made by the Persons with Disabilities Act, 1995 is not likely to be satisfactory to revitalize the disability sector. There also remains limited reference to the role of Persons with Disabilities themselves in policy advancement, execution, supervision and assessment. Disabled Persons Organisations are not mentioned in the Policy, nor are persons with disabilities themselves. Practically, they remain agents who

8. Supra note 6.

act together with the public policy and delivery systems either through public agencies or at best NGOs. While the Policy notes that “PWD are an important resource for the country, and seeks to create an environment that provides them with equal opportunities, protection of their rights and full participation in society”. this significant insight is not mirrored in the main Policy.⁹

The National Policy must come out of the shadow of Persons with Disabilities Act, 1995 and frame an independent approach which shall in fact be a touchstone for the legislations dealing with the benefits of the persons with disabilities. The National Policy discussed above mostly reflects only one legislation i.e. *Persons with Disabilities Act, 1995* but the other three legislations concerning mental health, constitution of National Trust and training for rehabilitation professionals must also be taken into consideration.

(d) State Level Disability Policy:

A supplementary facet of disability policy that has remained rather neglected is development of state-level disability policies. To date, there are merely three States that have draft disability policies. They are Chhattisgarh and Karnataka, though Maharashtra has a state level Action Plan for effectuating its commitments to persons with disabilities. The draft Karnataka policy for the majority part echoes the structure and major provisions of the *Persons with Disabilities Act, 1995*. It is mostly a State-specific endorsement of different initiative for promotion of rights of persons with disabilities. In a number of cases, it replicates the Central Act’s entitlements and obligations, and repeats general directives to frame appropriate schemes (e.g. reservation in poverty alleviation programmes; education). In others, the general assurances of the Act are put in a more State-specific perspective (e.g. health). In still others,

9. Supra note 4 at pp. 129, 130

there is more precise guidance on conditions in which persons with disabilities should avail advantages under the Act (e.g. exemptions on property tax for PWD). However, principally the draft State Policy does not provide much more specific commitments or implementation guidance than the Act itself. Conversely, the Chhattisgarh draft state policy – *the Comprehensive Disability Policy Framework for Chhattisgarh* – can be considered “best practice” within India, and could present a model for potential national and state-level policy development. The Policy provides more methodical context and calculated track for disability policy, allowing for better prioritization in planning along with implementation. Regardless of being a poor and new State, Chhattisgarh has developed an inspiring draft state level policy on disability. By and large, the draft Chhattisgarh Policy provides beneficial assistance for other states in policy development. A few imperative features are:

- it has detailed discussion of different models of disability and has structured its policy consequently;
- it recognizes India’s international commitments in the field of disability policy;
- it has comprehensible account of both overall and sectoral policy objectives, indicating the overall policy stand on every key issue;
- at the next level, it provides guiding principles in endeavouring attain policy objectives;
- it recognizes that “self-representation” of Persons with Disabilities in disability policy and practice is vital;
- it categorizes particular cross-cutting areas in need of special attention, including mental illness, gender issues, and prevention and early detection of disabilities;
- it creates a State Disability Council as an institutional means both of raising the profile of disability issues and improving coordination;

- it sets explicit coverage/performance objective by the disability sector, thus moving towards monitorable indicator of improvement;
- it is clear on policy to mobilize public financing for the sector.¹⁰

In view of the above it can be aptly suggested that:

- ✓ The National Policy must be amended keeping in view the remarkable features set out by the Chattisgarh Draft State Policy. It is one of the most pertinent ways by which the National Policy shall be able to come out of the reflection of the Persons with Disabilities Act, 1995 and set out targets of achieving success in the disability sector by ensuring its equal opportunities in social, economic and cultural life as well as guaranteeing its human rights to the fullest.
- ✓ Further, States should be stalwartly encouraged to build up their own disability policies which draw out a sincere approach for meeting their obligations under the Persons with Disabilities Act, 1995 and other legislations.
- ✓ Lastly, there should be a progression for fundamental benchmarking of practicable policies and programs for people with disabilities in the areas which are presently subject to the economic capacity proviso.

B. HUMAN RIGHTS OF THE PERSONS WITH DISABILITIES UNDER THE PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT: A CRITICAL STUDY:

10. *Ibid* at p. 130, 131

(a) Background:

India being a welfare state has the commitment to shore up the downtrodden and the poor. Persons with disabilities too call for considerable attention and help. Though persons with disabilities do not mean persons with no worth, rather they may be more able than other persons. The concept denotes a person who runs short of something from the normal human beings and this often leads to a situation where they need the care of the society as well as the legal system, at least minimum help at the initial level. This capability of the disabled persons is more aptly their "different ability". Hence now the persons with disabilities are often identified as the "differently able persons".¹¹ Until the recent past, there was no comprehensive legislation concerning the differently able persons. The first attempt was made in July, 1980 when a Working Group was set up. A draft legislation known as "Disabled Persons (Security and Rehabilitation) Bill, 1981 was prepared. As mentioned in Chapter 2, 1981 was the International Year of Disabled Persons. In 1987-88 a Committee was constituted under the Chairmanship of Member of Parliament Shri Bharul Islam who was the former Judge of the Supreme Court. The Committee submitted its report in June 1988 and it made wide-ranging recommendations concerning the various aspects of rehabilitation, e.g., prevention, early intervention, education, training, employment etc. These recommendations unfortunately could not take the shape of a law. Moreover since the welfare of the disabled falls within the State List the parliament lacked jurisdiction to pass a comprehensive national legislation on the issue. Finally the Economic and Social Commission for Asia and Pacific (ESCAP) at its 40th Session held at Beijing in 1992 adopted its resolution 48/3 which proclaimed the period 1993-2002 as the Asia and the Pacific Decade of Disabled Persons with a view to give impetus to the implementation of the World Programme of Action in the ESCAP Region

¹¹ Supra note 1 at p. 1

beyond 1992. The Resolution laid stress on enactment of legislation aimed at equal opportunities for people with disabilities, protection of their rights and prohibition of abuse and neglect of these persons and discrimination against them. Since Article 253 of the Indian Constitution enables the Parliament to enact a law, even in respect of a subject falling within the State List in order to give effect to an international resolution; this finally paved away for the Indian Parliament to enact a comprehensive law for persons with disabilities as India was also a signatory to the ESCAP Resolution.¹²

In September 1993 a National Conference of eminent NGOs, the State Government of India was organized which inter-alia recommended enactment of a comprehensive legislation. As a result of the Government of India's commitment at ESCAP Conference, recommendation of the National Conference, recommendation of the previous Committees and strong NGO movement in that country, the process of discussion and consultation for drafting a comprehensive law was started in right earnest towards the end of 1993. Initially a draft was prepared and it was circulated to all the State Governments, eminent NGOs of the country, professionals and other concerned Ministries of the Government of India. Consequently a comprehensive Act known as *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* (Act 1 of 1996) was passed in 22nd December 1995, which got the assent of the President on 1st January 1996.¹³ The Act has been in effect from 7th February, 1996. The enactment of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, commonly referred to as the PWD Act is a signal achievement of the Indian disability movement. Preamble to this Act clearly delineates its objective

12. Anuradha Mohit, "Initiatives of the Government of India to Advance Asia and Pacific Decade of Disabled Persons". View full article at www.swayam.com/?q=node/392-23k, accessed on 23.3.2008.

13. *Ibid*

of promoting and ensuring equality and full participation of persons with disabilities. The Act aims to protect and promote economic and social rights of persons with disabilities. Broadly, the entitlements and commitments towards PWD under the Act can be divided into two main groups: (i) entitlements which are absolute and thus in nature of legal rights. Some of these existed as rights prior to the Act but were reiterated or strengthened in the Act itself (and have in some cases been refined subsequently); and (ii) commitments that are given either in rather general terms or with the explicit proviso “within the limits of [governments’] economic capacity and development”. These can be described as “contingent entitlements” under the Act and are not unqualified rights. The division is not entirely clear cut, as subsequent jurisprudence has in some cases strengthened general commitments. In a number of cases, follow-up action is also anticipated by states or other relevant authorities. Despite the PWD Act being a ground-breaking piece of legislation, there remain a number of policy shortcomings in its design that are worth highlighting. These include both general issues which apply to several areas of the Act, and others which relate to specific sectoral heads. ¹⁴As Amy Briant puts it—“ Veiled in vagueness the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* gives with one hand what it takes away with the other. After two years of deliberation, the Act was passed hastily on the last day of the winter session of Parliament with very little discussion. Who, after all, needs to discuss a bill which promises the sun, moon and stars, but fails to mention exactly how these can be obtained?”¹⁵ These lines abundantly speak of the empty promises made by the Act. India, by ratifying this Act has simply made good its vow made at the conference, to go by a statute for the disabled persons. The Act defines the expression ‘disability’ and makes provision for introduction of commissions with a view to make certain basic rights and opportunities to

14. Supra note 4 at p. 124

15. Amy Briant. “Limping Along, Persons with Disabilities Act, 1995”. *Lawyers Collective*. Vol. XI (April, 1996), pp. 4- 11 at p. 4

persons with disabilities which consist of equality in employment, housing, access to public places and social security benefits. But disappointingly, the Act is interspersed with a liberal splash of “mays” and “ifs” and “within the limitations of”; the terms of the legislation are extremely ambiguous. In reality the Act appears more as a proposal than a statute on the subject. There are only a handful of areas where the Act stands firm.¹⁶

(c) Salient Features:

Divided into 14 Chapters, the Act as expressed in the Preamble is the result of a Proclamation on Full Participation and Equality of People with Disabilities in the Asia and Pacific region that was held in Beijing in December 1992 at the meeting to launch the Asian and Pacific decade of the disabled. The objects of the Act are to:

- a) spell out the state’s responsibility towards prevention of impairments and protection of disabled people’s rights in health, education, training, employment and rehabilitation;
- b) work to create a barrier-free environment for disabled people;
- c) work to remove discrimination in the sharing of development benefits;
- d) counteract any abuse or exploitation of disabled people;
- e) lay down strategies for a comprehensive development of programmes and services and for equalization of opportunities for disabled people; and
- f) make provision for the integration of disabled people into the social mainstream.¹⁷

The salient features of the Act include *inter alia*:

16. *Ibid*

17. *Supra* note 12.

- (i) *Definition of disability and its prevention:* In view of the fact that the beneficiaries of the Act are the persons with disabilities, the Act defines this term. It also seeks to prevent the occurrence of disability and also seeks to prevent discrimination on grounds of disability in work, education, housing, transport and access to public facilities;
- (ii) *Applicable to Central Government, State Government, and local authorities:* The mandates of the Act are applicable to both the Central and the State Government, Local authorities, and the “establishment”. The definition of the establishment makes it very clear that, any entity, which is controlled or aided or created by the State, only is considered as an establishment. Hence provisions of this Act do not address any private institution.¹⁸
- (iii) *Equalisation aspect:* It lists out the entitlements for equalizing the gaps created by disability and negative attitudes of the society and derogatory practices against persons with disabilities. The Act with a view to equalize tries to assure the following: (a) Prevention and detection of disability, (b) opportunities for education to the persons with disabilities, (c) Opportunities for employment to the persons with disabilities, (d) Making access to public facilities, (e) Provision for aids and appliances, (f) Establishment of institutions for persons with disabilities.
- (iv) *Administrative mechanism for implementation:* It lays down administrative mechanisms for the implementation of its various provisions. It casts obligations on both the Centre and the State

18. Supra note 1 at p. 2

Governments to frame schemes to promote economic, social and cultural status of persons with disabilities. The Act creates a federal type of enforcement with similar constitution, powers and functions in the Central and State level.¹⁹

- (v) *Monitoring Mechanism:* It provides for a monitoring mechanism through the Chief Commissioner and Commissioners for persons with disabilities. It is the first comprehensive law which adopts a rights based approach to person with disability.²⁰

(c) Concept of 'Disability' and 'Persons with Disability':

Since the Act examines the rights of the persons with disabilities, hence it would be worthwhile to assess the definitions of 'disability' and 'person with disability' as given in the Act. In other words the direct beneficiaries of the Act are the persons with disability, hence it becomes important to evaluate the implication of the aforesaid terms.

The concept of Disability has already been discussed in the first Chapter, where it has been seen that disabilities are conventionally defined in medical science on three scale established by World Health Organization in 1980 ranging from Impairments, Disabilities and handicap. The World Health Organization in its International Classification of Impairments, Disabilities and Handicaps makes a clear distinction between the three. The PWD Act defines "disability"²¹ to include -blindness; low vision; leprosy cured; hearing impairment; locomotor disability; mental retardation and mental illness.

19. Supra note 12.

20. *Ibid*

21. Section 2(i)

“*Person with Disability*”²² means a person suffering from not less than forty per cent of any disability as certified by a medical authority. The Act also defines each of the different kinds of incapacities that comprise disability.²³

Thus it appears that the definition of disability is flexible in allowing a number of categories of disability in the definition. But it seems that the definition does not recognize the international classification of disability, impairment and handicap given by the World Health Organization. Also though it apparently the definition may look to be inclusive but a close inspection reveals the term has been used in a very narrow sense. It has simply overlooked

22. Section 2 (t)

23. “*Blindness*” under *Section 2(b)*, refers to a condition where a person suffers from any of the conditions mentioned below:

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

Though low vision has not been specifically defined, but “*person with low vision*” has been defined under *Section 2 (u)* to mean 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 a task with appropriate assistive devices.

Similarly, “*leprosy cured person*” has been defined under *Section 2 (n)* to mean 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.

“*Hearing Impairment*” under *Section 2(l)* means loss of sixty decibels or more in the better ear in the conversational range of frequencies.

Section 2 (o) defines “*locomotor disability*” to mean disability of bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy. “*Mental Retardation*” and “*Mental Illness*” have been separately defined. While the former has been defined under *Section 2 (r)* to mean a condition of arrested or incomplete development of mind of a person which is specially characterized by subnormality of intelligence. The latter expression has been dealt with under *Section 2(q)* to mean any mental disorder other than mental retardation.

some important categories recognized world over, such as speech disability, disability in the internal organs such as heart ailment, learning disability, thalassemia, haemophilia, filariasis, eunuchs and persons suffering from AIDS.

As per the conservative estimation, just about 6 per cent of India's population is disabled. If one goes by what the U.N. officials or various other experts have to say, the number could well be in double digits. The proportion of disabled people is very high in more affluent countries. Australia officially estimates that some form of disability affects 18% of its population. U.K.'s disabled population is estimated at 14.2% and in the U.S. it is 9%. One rationale why the figures are so high for developed countries is because their definition of disability is much wider than ours. In such countries the term disabled is understood to include people with internal or unseen conditions such as kidney disease or a severe heart ailment. In certain countries even diabetics come under the umbrella of disability. Such countries and societies view disability as a social issue and not as a medical one. Regrettably in India, the reliance is still on the bio-medical model, and disability means a person without a leg or without an arm or without eyes or to be twisted or even crooked.²⁴ They are always the butt of ridicule and contempt in the society. As a consequence the following kinds of 'disability' must also be included in the definition:

- a) Speech Impairment: Speech is the primary mode of expressing oneself or communicating. One's expressive capacities come to a halt due to this kind of disability. But it is very unfortunate that this type of incapacity has been left out of the definitional ambit. The Constitution of India guarantees the fundamental right of 'freedom of speech' and difficulty in speaking is also covered under the scope of disability by the World Health Organisation. From this it is clear that how much important is the

24. Javed Abidi, "Disability Law and Status of Disability in India Today". *Alpjan Quarterly: A Chronicle of Minorities*, Vol. 4(4). (2004- Jul- Sep). pp.5-6 at p. 5

ability to speak. But it equally surprising that why the lawmakers left this category out of the definition.

- b) Disability in the internal organs: the term disability is often associated with physical disability or disability of the external organs visible to human eye. But in reality the approach must be include internal organs also like kidneys, lungs, heart, brain or liver. Disability of internal organs refers to the situation where a person may have one kidney or one lung or serious functional disorders of heart or congenital defects as in thalassemia. The persons belonging to this category also lack the physical ability to perform a number of tasks performed by a normal health person. Hence it is desirable that disability of internal organs be included in the definition of disability.
- c) Eunuch: This category of human beings though may be physical and mentally fit, but their stigma, the disability is principally due to the fact of them being not labeled as male or female. For this section of human beings life is without dignity. They are deprived of their right to education, to decent employment, to their family property and even a decent funeral ceremony after death. Consequently, they are totally segregated from the mainstream society and often forced by circumstances to get involved in anti-social activities and crimes; which generate even more hatred for them. The potential of this section can be utilized in real sense if laws relating to their proper categorization are legislated. Some States have already opted for the category of 'third sex' which is definitely a welcome change in a conservative society like ours. Further law to provide them opportunities in different fields should be

legislated. The central point of these laws must aim to provide them a life of dignity.²⁵

- d) AIDS Patients: A person suffering from AIDS carries a social stigma in a similar way as leprosy cured person. AIDS also weakens the immune system that in turn reduces their normal working capacity. They are also prone to health hazards; hence they are in need of special care and protection. Therefore in today's world where this disease has assumed huge proportions, it is desirable that persons with AIDS be also included in the definition.²⁶
- e) Learning Disability: It is a disorder, which affects the basic psychological processes of understanding or using written or spoken language. This disorder affects development of language, speech, and reading and associated communication skills needed for social interaction. Conditions such as brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia are examples of learning disabilities.²⁷

In addition to the above the definition of hearing impairment is dissatisfactory as it covers only loss of sixty decibels or more. Ordinarily loss of forty decibels or more constitutes a hearing impairment. Moreover the definition of 'mental retardation' and 'mental illness' appear to be vague. Though mental illness has been included as one of the seven disabilities, the Act as a whole shows very little understanding of the nature of the disability and current developments in the field. It appears that the recognition is more by default than intent. The very definition of mental illness is more by elimination rather than explanation. For instance, by stating that mental illness is other than mental

25. Saurabh Jain, "Effectiveness of the Indian disability Law to enforce Human Rights of Persons with Disabilities", *AIR (Journal)* Vol. 91 (April, 2004), pp. 118-127 at p. 119at pp. 124,125

26. *Ibid*

27. Leni Chaudhari, *Disability, Health and Human Rights*, (CEHAT, Mumbai, 2006) p. 4

retardation, one is in a fix as to whether one should apply the definitional criteria to all mental disorders including epilepsy and dyslexia. Thus it is essential that each kind of mental illness or mental retardation be specifically laid down in the definition.²⁸ Also learning disability and autism must be specifically included in the definition of disability. Though pointed out in the first chapter of this work that it is very difficult to evolve a precise and comprehensive definition of the term but at the same time efforts must be taken to evolve a comprehensive and universal definition of the term so that maximum number of disabled persons can benefit from the Act. International definitions must be analysed and adopted as far as possible. Since India has ratified the Disability Convention, the definition in Article 1 of the Convention indicates change that needs to be made to the definition. As explained above, the PWD Act has strict specifications as to what counts as disability; however, the Convention includes all long-term physical, mental, intellectual or sensory impairments, which may hinder their full and effective participation in society.

So far as the definition of 'person with disability' is concerned it has been defined as a person suffering from not less than forty per cent of any disability as certified by any medical authority. Disability is a condition of a person's being unable to do something, which others can. There is no relevance to the 'percentage' of disability as mentioned in the definition. A person may have only twenty-five or thirty percent disability, but if he is not in a state to function as a normal human being, it is pointless to deny him the rights available to person with disability of forty per cent. This percentage criterion is even more ambiguous in cases of mental illness because this quantification is a mystification as such a tool is unavailable which can measure the quantum of mental disability. So if the parents/guardians of the affected individuals want to derive benefits under this Act and approaches a psychiatrist for a legally

28. Supra note 15 at pp. 5, 6 and 7.

approved disability certificate, there is none available. By being deprived of access to a certificate of disability, the discrimination to mental illness is inherent in the very definition of disability as envisaged in the Act. Hence the issue must be left to the medical authority to decide as to which per cent of disability will indeed make a person disabled. Hence the definition of the expression 'person with disability' needs to be redefined as "person with disability is a person suffering from any of the disabilities as certified by the medical authority".²⁹

(d) Rights under the Act:

(i) Prevention and Early Detection of Disability:

As the saying goes, prevention is better than cure; hence prevention must be the priority of any government in order to reduce the incidence of disability. Not all disability is from birth. A great number of them are acquired in the course of time. Accidents, illnesses, nutrition related matters, conflict situations and several other factors cause disability. This means that if the aforementioned causes can be proscribed then disability can also be prevented. A large proportion of disability is caused by illness. Because of the disability movement and the international covenants the notion of prevention has now attained an expanded meaning. It not only means control or removal of disabling factors but also commencing actions which authorize disabled people to appreciate their full potential and to lead a productive life.³⁰ In India a large proportion of disabilities are preventable, including disabilities that emerge in the conditions surrounding birth, including maternal conditions, from undernourishment, and from causes such as traffic accidents or workplace injuries. The Persons with Disabilities Act under *Section 25* envisages

29. Supra note 1 at pp. 7, 8

30. Supra note 27 at p. 36

preventive measures which include the undertakings of surveys, investigations and research concerning the cause of occurrence of disabilities and the promotion of various methods of preventing disabilities. Screening of all children at least once in a year for the purpose of identifying the “at- risk” cases; providing facilities for training to the staff at the primary health centres; to sponsor or cause to be sponsored awareness campaigns and to disseminate or cause to be disseminated information for general hygiene, health and sanitation; measures for pre-natal, perinatal and post-natal care of mother and child; educating the public through the pre-schools, schools, primary health centres, village workers and anganwadi workers; and creating awareness amongst the masses through television, radio and other mass media on the causes of disabilities and preventive measures to be adopted.

Undoubtedly prevention and detection of disability are important components of the medical model. However measures taken for these are insufficient. While Pulse Polio drive and immunization against diphtheria, pertussis and tetanus have been successful to a large extent, efforts for the prevention of other conditions such as blindness, deafness and neurological disabilities have been dismal. The incidence of developmental disabilities, for example mental retardation, autism has increased to an alarming level.³¹ In addition, the measures for prevention and early intervention incase of disability is not in sharp focus. They are considered more as health programmes rather than measures for prevention of disability. The health sector is the one where the PWD Act makes the weakest incremental commitments in public policy. This is for two main reasons. Firstly, it focuses mainly on prevention and early detection of disabilities, and raising of public awareness on these issues. It does not make specific additional commitments on treatment and rehabilitation of

31. Rubina Lal, “Disability- Background and Perspective” viewed at. <http://www.infochangeindia.org/Disabilities/lbp.jsp> accessed on 20.12.2007

PWD. Secondly – in contrast to areas such as education and employment – the Act’s provisions on health are in the form of unenforceable commitments due to the rider “within the limits of governments’ economic capacity and development”. As a result, respect to health issues and PWD, the Act remains largely aspirational even in principle with, mainly outlining the type of prevention and early detection initiatives that states should seek to implement.³²

Hence the greatest stumbling block in the Section is the insertion of the phrase “*within the limits of their economic capacity and development*”. The expression suggests that the appropriate Government and the local authority shall not carry on any activity, which will be outside their budgetary and manpower capacity. Hence the appropriate Government or the local authority is not expected to carry on any scheme, programme or activity, which they will not be able to honour due to economic and other constraints.³³ The constricted espousal of this expression has reduced the Act into nothingness. Thus the government’s focus should be towards removing the factors causing disability rather than only providing clinical corrections. Article 4(2) of the UN Disability Convention says that the maximum possible resources should be utilized for the betterment of the disabled. The limitation in the PWD Act that reforms should only be undertaken within the limits of a state’s economic capacity nullifies the Conventional stipulation.

The provision of detection of disability must be read with Chapter II of the *Persons with Disability Rules, 1996* that lays down guidelines for evaluation and assessment of various disabilities. According to *Rule 4*, a person detected with a disability can avail himself/herself of a Disability Certificate to be issued by a Medical Board duly constituted by the Central and

32. Supra note 4 at pp. 42, 43

33. Gautam Banergee, *Disability and the Law*, Commercial Law Publishers (2005), pp. 172,173

the State Government. The State Government may constitute a Medical Board consisting of at least three members out of whom at least one shall be a specialist in the particular field for assessing locomotor/Visual including low vision/hearing and speech disability, mental retardation and leprosy cured, as the case may be. *Rule 5* lays down the formalities to be observed by the Medical Board while granting Disability Certificates. It also requires the Board to mention the period of validity of certificate where the disability is not permanent or where there is a chance of variation in the degree of disability. No refusal of grant of Certificate shall be made without giving a reasonable opportunity of being heard. *Rule 6* enables the person to whom a certificate has been granted eligible to apply for facilities, concessions and benefits admissible under schemes of the Governments or Non-Governmental Organisation, subject to such conditions as the Central or the State Government may impose.

The issue of certification remains a huge bottleneck for the disabled to claim entitlement to their rights and is subject of much concern. The authorities who are empowered to issue certificates are not equipped with the experts and equipment required to certify all disability conditions. Consequently it is found that in the absence of comprehensive testing facilities, persons with multiple disabilities usually run from one doctor to another to have each disability certified. Moreover no standard procedures exist for certifying the mentally retarded and the mentally ill, as hospitals do not have psychiatrists and psychologists. There is an urgent need for a single window for issuing disability certificates and simplification of certification procedures.³⁴ At the same time it is always desirable that the procedure of grant of Disability Certificates be imbibed in the Act itself. Besides the neither the Rules nor the Act specifically

34. Rajiv Raturi, "Disabling, Crippling, Turning Rights Lame". To view full article, visit http://www.combatlaw.org/information.php?article_id=1054&issue_id=38 accessed on 24.8.2008

point out the concessions and facilities to be available on the grant of the Certificate nor give clear guidelines as to what are the areas where concession and benefit ought to be provided and to what extent.

(ii) Education:

Education enables a person to acquire knowledge, makes him interact, communicate and lead a better life and facilitates in availing employment opportunities. Education is crucial for any individual's growth. Same is the case for persons with disability. Article 45 of the Indian Constitution enjoins state to provide free and compulsory education up to the age of fourteen years. Chapter V of the Persons with Disabilities Act, 1995 contains the provisions relating to education.

Section 26 makes provision for free education for all children with disabilities up to the age of 18 years and there is also the requirement of encouraging them to study in normal schools. The Section also directs the appropriate Government and the local authorities to set up special schools in the Government and the private sector for those in need of special education and equip them with vocational training facilities.³⁵ Prior to independence foreign

35. *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act, 1995 (1 of 1996, Section 26. **Appropriate Governments and local authorities t provide children with disabilities free education, etc.***---The appropriate Governments and the local authorities shall -

- a. ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years;
- b. endeavour to promote the integration of students with disabilities in the normal schools;
- c. promote setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools; endeavour to equip the special schools for children with disabilities with vocational training facilities.

missionaries introduced services for the disabled. The first school for the deaf and blind were started in the 19th century in Bombay and Amritsar respectively. In India, at present there are around 3000 special schools. Of them, only 900 are schools for the hearing impaired, 400 for children with visual impairment, 700 for those with loco motor disability and one thousand for the intellectually disabled. More than 50,000 children with disability are enrolled in the Integrated Education for Children, a government-sponsored programme. Only a few schools have special provisions such as resource rooms, special aids and special teachers. This is restricted only to big cities. Since there are no special schools or special education services in rural India, children with special needs either have to make do with the regular schools in the village or go without education. Pre-vocational and vocational training is provided only in specialized institutions and in select cities. Though the provision is for encouraging admission of children with disabilities into normal school, is in order to help them in the processes of life and education of such children in the least restrictive environment. This is also termed as inclusive education. The general education system is to be developed to meet the educational needs of children with disabilities and normal children.³⁶ Regrettably in spite of such an encouraging provision, education for the disabled is not part of conventional learning, but it is imparted through isolated institutions which operate on a service and charity mode.

In spite of the constitutional provision of free and compulsory education to all the children below the age of fourteen, the government has not yet included the clause of education of disabled children explicitly in the 'Education for all' program. Education for non disabled children comes under the Ministry of Education, whereas for the disabled children it comes under the Ministry of Social Justice. This shows that all the discourse around inclusive

36. Supra note 27 at p. 40.

education and mainstreaming the issue is only at a theoretical level, the reality reflects something else. The Act does not define the parameters of segregationist, integrationist, and inclusive education. The lack of ideological commitment of the government towards this issue is reflected in the various forms.³⁷ Educational prospects to children do not make sense when there are not sufficient primary schools admitting disabled children, schools not having enough skilled teachers and reading material not being available in Braille, and there is a lack of sign language interpreters, assistive aids and appliances.

Sections 39 and 49 are required to be read together with Section 26. *Section 39* requires all Government educational institutions and other educational institutions receiving aid from the Government to reserve not less than three per cent seats for persons with disabilities. There has been a judicial debate over the application of the provisions of Section 39. Thus, under Section 39, all government educational institutions and institutions receiving aid from the government shall reserve not less than 3% seats for persons with disabilities. However there is no pressure for compliance with this affirmative action program and much needs to be done. Procedures and technicalities should not be a deterrent to achieving these rights. The participation of the private sector in the affirmative action programs should be encouraged and even enforced, through incentives like tax reliefs, government contracts and moral persuasion. The disabled should be actively involved in planning, lobbying and campaigning.

Three decisions viz. *Binita Senapati v. State of Assam*,³⁸ *Vijay Kumar Agarwal v. State of Rajasthan*³⁹ and *Deputy Secretary (Mart), Dept. of*

37. *Supra* note 21 at p. 32.

38. AIR 2000 Gau. 1.

39. AIR 2001 Raj. 261

*Health and Family Welfare v. Sanchita Biswas & Others*⁴⁰ is worth mentioning here. In these cases petitions were filed for the activation of Section 39 of the Persons with disabilities Act, 1995. Section 39 enjoins that there shall be three per cent reservation of "seats" in government and government aided educational institutions. The Gauhati High Court in the former case turned down the petition on the ground that no mention of reservation of seats is made in the Education Chapter of the statute. Section 39 has been included in the Employment Chapter. This necessarily implies that if any reservation was being contemplated it was being done in relation to the non-teaching posts in such institutions. Further three per cent reservation has been extended to all persons with disability. This would mean that even persons with mental retardation can demand admission in medical colleges. As such a consequence was evidently undesirable; the court held that the appropriate governments had not committed any illegality, unconstitutionality or arbitrariness in not providing the reservation for persons with disability.⁴¹

In the second case, the Rajasthan High Court took a contrary view. It was held that under *Section 39*, persons with disabilities were entitled to reservation of three per cent seats in post-graduate medical courses. The Court agreed that Section 39 ought to have been placed under Chapter V but its effect could not be allowed to be nullified simply because instead of placing it under Chapter VI of the Act.

The Calcutta High Court, in *Sanchita Biswas' Case* has also held that the State is bound to provide 3% reservation of the total seats in an educational institution for the disabled candidates. In this case the High Court was required to pronounce on the reservation policy of the Government of West

40. AIR 2000 Cal.202.

41. *Supra* note 25

Bengal. The absence of reservation for persons with physical handicap in medical colleges was found by the court to be an infringement of both the Persons with Disabilities Act, 1995 and the Constitution. This ruling was first delivered by a single judge and later upheld by a division bench. The Court also provided the modalities to be adopted in selecting candidates from the handicapped category.⁴²

In view of the above three cases it can be strongly submitted that the approach of the Calcutta and Rajasthan high Courts are far more correct and convincing than the one given by Gauhati High Court. The title of a chapter cannot restrict the scope or the legislative intent of the enactment. Since the area of this reservation falls within the heading "Employment" it cannot be construed as applicable to reservation in jobs in educational institutions and not in case of admission therein. It is hoped that an amendment be initiated to rule out this confusion and secure the educational rights of the persons with disabilities.

Section 49 provides for financial incentive to universities and other institutions of higher learning, professional bodies and non-governmental research units or institutions to undertake research in special education, rehabilitation and manpower development.

In view of the ground truth and material and sociological barriers conceivably every child with disability will not be able to benefit from formal schooling. For that reason the Act chalked out an alternative course by institutionalization of non-formal education by imparting functional literacy,

42. 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 t p. 196

orientation, training through open school, university and electronic media.⁴³ *Section 27* mandates the Appropriate Governments and local authorities to make schemes and programmes for non-formal education, etc. It has been witnessed that many adult disabled persons have been unable to benefit from the learning system available for school-going and academically capable children. Therefore there was a realization for need of non-formal education programmes and community based programmes in order to provide educational service to such adults, with a view to enable those to become literate as well as pursue higher education. The Section requires the appropriate Government and the local authorities to make schemes for these purposes:

- (a) conducting part-time classes in respect of children with disabilities who having completed education up to class fifth and could not continue their studies on a whole-time basis;
- (b) conducting special part-time classes for providing functional literacy for children in the age group of sixteen and above;
- (c) imparting non-formal education by utilizing the available manpower in rural areas after giving them appropriate orientation;
- (d) imparting education through open schools or open universities;
- (e) conducting class and discussions through interactive electronic or other media; and
- (f) providing every child with disability free of cost special books and equipments needed for his education.

Such distance learning system has been supported by the Indira Gandhi national Open University which has embarked on special study centres for persons with disabilities. The National Open School/ University has developed instructional material for education of quality in the case of disabled

43. Mohd. Zafar Mahfooz Nomani, "Human Rights to Development and Persons with Disabilities: Breaking new Grounds For Equality in India", *Aligarh Law Journal*, vol. XIII. (1998), pp.91-104 at p. 97

children. It has also started providing recognition to selected institutions in the country imparting education to over-age persons and improve levels of academic and vocational courses for the benefit of disabled children.⁴⁴ But the initiative is negligible compared to the huge demand. More so such steps have been confined only in the urban areas and rural areas continue to reel under oblivion and superstition. Although the Government is to make schemes for imparting non-formal education by utilizing the available manpower in rural areas after giving them appropriate orientation; but the ground reality is that we can hardly witness any such popularized schemes in the lines of Jawahar Rozgar Yojana or the Indira Awas Yojana. Until and unless awareness of the various schemes of the Government is made, their success too is under a question-mark. So far as the issue of conducting classes for literacy, where a huge section of 'normal' citizens remain illiterate in the country which is by far based on a rural economy, expecting literacy movement for the disabled person seems to be a distant dream.⁴⁵

Section 28 obliges the appropriate Government to initiate or cause to be initiated research by official and non-governmental agencies for the purpose of designing and developing new assistive devices, teaching aids, special teaching materials or such other items as are necessary to give child with disability equal opportunities in education. About 6% of the population is disabled; out of whom around 25-30% require assistive devices in their day to day life. Such devices comprise of mobility devices, braces, hearing aids, audio meters, educational aids, Braille Writing appliances and low vision aids. The Government of India under ADIP Scheme provides subsidy for the manufacture and standardization of assistive devices. Artificial Limb Manufacturing Corporation (ALIMCO), which is a Government of India Undertaking,

44. *Supra* note 23 at p. 185

45. *Supra* note 4 at pp. 56, 57, 58, 59

manufactures a large number of assistive devices ranging from modern computer parts and sub systems for orthosis, prosthesis, prosthetics using rubber and polypropylene and other rehabilitative devices such as wheel chairs, tricycles, walking systems, creches and various designs of bracers. Bureau of Indian Standards lays down the standards regarding the quality of manufacture of assistive devices. However, there is a lack of development of advanced and modern assistive devices as in the west. There is also a need to increase production base as well as manufacture of sophisticated assistive devices to make available the best of technology to the persons with disability. The available assistive devices are heavy and cumbersome in most cases. Hence, it is required that light weight prosthetic and orthetic aids and appliance using carbon fibre or composite plastic is manufactured. It is also desirable that suitable electronic or hi-tech system is used to make the assistive devices more easily usable and comfortable. Hand propelled mobility aids must be replaced with motorize one. Advanced hearing aids at reasonable prices must be made readily available for the hearing incapacity.⁴⁶ In India most of advanced equipments are available in the urban areas only and are very expensive making it difficult for such persons to afford it. Nearly each of the sophisticated equipments and parts are imported which adds to their cost. Hence the Government must take initiatives to make available all advanced, sophisticated and hi-tech equipments at reasonable rates to persons with disabilities throughout the country. The Governmental undertaking enterprise should undertake research (not only in paper as laid down in the Act, but in practice) to find substitutes to the expensive devices, which cut down the cost but not the comfort or usage.

Section 29 directs the appropriate Governments to set up adequate number of teachers' training institutions and assist the national

46. *Supra* note 33 at pp. 185, 186

institutes and other voluntary organizations to develop teachers' training programmes specializing in disabilities so that requisite trained manpower is available for special schools and integrated schools for children with disabilities.

Section 30 directs the appropriate Government to prepare a comprehensive education scheme providing for –

- (a) transport facilities to the children with disabilities or in the alternative financial incentives to parents and guardians to enable their children with disabilities to attend schools;
- (b) remove architectural barriers in schools, colleges or other institutions imparting vocational and professional training;
- (c) make free supply of books, uniforms and other materials to children with disabilities attending school;
- (d) grant scholarships;
- (e) setting up of grievance redressal machinery so that parents can seek remedy regarding the placement of their children with disabilities;
- (f) suitably modify the examination system to eliminate purely mathematical question for the benefit of blind students and students with low vision;
- (g) restructure imparting non-formal education by utilizing the available manpower in rural areas after giving them appropriate orientation;
- (h) restructure curriculum to suit the requirements of children with disabilities well as for hearing impaired, so that they are able to take only one language as part of their curriculum.

In pursuance of this provision the Government of India has introduced in the year 2002-2003 a National Scholarship Scheme for persons

with disability under which 250 students either male or female will be given scholarship for pursuing higher and technical education. ⁴⁷But so far as the implementation of this beneficial legislative provision is concerned, the development is inconsequential. Hardly any Schemes can be heard of for providing the various facilities as envisaged. Mostly educational institutions do not have a barrier free environment. Narrow pathways and steep stairs are the usual picture. In fact a visit to the Commissioner's Office in West Bengal reflects the apathy of the Government towards the persons with disability. Though the Office of the Commissioner puts up a Board declaring the area to be disabled friendly and barrier free, but a visit to the place will expose the true situation. The Office can be accessed through a lift or narrow stairs and the lift is by any chance not working how the persons with disabilities will reach there is a big question to be answered. Moreover the place is to be reached through narrow passages which may be quite cumbersome even for a normal individual. If this is the condition of the Commissioner's Office it can be well imagined as to what will be the situation elsewhere. So far as the modification of curriculum is concerned, provisions of teaching science, mathematics and technical skills to disabled students in secondary and high schools must be introduced. As a matter of fact the best remedy here would be to establish a separate educational board which shall chalk out academic, syllabus and training of educational personnel to deal with persons requiring special education. In *M.C. Mehta v. Union of India*⁴⁸, popularly known as the Child Labour Abolition Case, a child labour cum-welfare fund has been instituted. The income of the fund shall be utilized for the education of child labourer to attain the objective of Article 45 of the Constitution. On this line a children with disability – welfare and educational

47. *Ibid* at p. 187

48. AIR 1996 SC 670

fund can also be considered. At least all teachers training courses should have the components of special education for children with special needs.⁴⁹

Section 31 obliges all educational institutions supported by the Government or any local authority to provide or cause to be provided amanuensis to blind students and students with low vision. Amanuensis is an assistive device that enables a blind person or a person with low vision to pursue their education. But this provision of the Act appears to be capricious. This section makes provision for availability to amanuensis only to blind students, but the question naturally arises as to why the facility should not be available to students with cerebral palsy. More so if the issue is of providing assistive devices for pursuing education why the benefit should be restricted only to blind students and not extended to all disabled students. Hence the section must be restructured so as to provide for assistive devices for educational purposes to each and every disabled student.

Justice S.B. Sinha in his article "*Disability vis-à-vis Human Rights*"⁵⁰ has highlighted a very interesting fact. He writes,

"In 1973, an American Children's Advocate Marian Wright Edelman launched the Children Defence Fund in the United States with a survey. One US Census figure haunted her. Some 750,000 American Children between the age of 7 and 13 did not attend school. She assumed they were Negro students, but then dawned an unanticipated reality, "handicapped kids were those seven hundred fifty thousand kids," she said. A similar deplorable condition prevails in India, where it is estimated, less than 1% of disabled students ever manage to receive formal education."

49. Supra note 43 at p. 98

50. Supra note 3 at p. 6

The above lines clearly speak of the education scenario of the disabled children. In spite of such encouraging provisions laid down in the Persons with Disabilities Act, 1995 the lag in their implementation has made the provisions a farce.

Though the National Policy of 1996 pointed out that it will be ensured that every child with disability has access to appropriate pre-school, primary and secondary level education by 2020. In India the education scenario for the disabled children reflects a rather grim picture Education for non disabled children comes under the Ministry of Education, whereas for the disabled children it comes under the Ministry of Social Justice. All the discourse around inclusive education and mainstreaming the issue is only at a theoretical level, the reality reflects something else. The issues which are crucial for the education of disabled children is the availability of special schools, access to schools, trained teachers and availability of special educational material. The Act does not define the parameters of segregationist, integrationist, and inclusive education. The lack of ideological commitment of the government towards this issue is reflected in the various forms.⁵¹

Efforts at integrating children with disabilities into mainstream schools have been even less successful. Under the law, 3% of seats in educational institutions must be reserved for the disabled. A countrywide survey on the enrolment of disabled children in educational institutions released in September 2004 revealed that only a fraction obtained admission. Between them, the 119 universities that responded to the survey conducted by the National Centre for Promotion of Employment for Disabled People (NCPEDP) had enrolled only 1635 disabled students. The 89 schools that responded to the

51. Supra note 27 at p.20

survey had enrolled 382 students with disabilities. About 18 schools cited the existence of 'special schools' as reason enough to refrain from doing so.⁵²

The situation of special schools in India is quite appalling. According to the Sixth All India Educational Survey Report, of the 6461 towns and cities in India, only 334 or 5.1 percent of the towns and cities have the facility of special schools catering to serve disabilities. In these towns, a total of 630 schools are actually functioning of which 97 admit only boys and 33 are for girls and the rest admit both. Some schools are dedicated exclusively to a particular disability, while others cater to the needs of children suffering from different types of disability. Categorization of these schools according to their specialization indicates that 215 are for the visually impaired, 290 for hearing impaired, 190 for those orthopedic problems, 173 for the mentally challenged and 60 for those with other locomotive disabilities. The facility of special education is rather skewed. Data shows that of a total number of 586465 villages in the country only 241 have facilities for special education for the disabled. A further look at the state-wise distribution of these schools shows that 83 percent of these schools are in the States of Andhra Pradesh, Bihar, Gujarat, Haryana, Kerala, Madhya Pradesh, Maharashtra, Orissa and the Union Territory of Andaman and Nicobar Islands. Of the 272 available schools, 55 are for boys, 11 for girls and the rest offer coeducation. Categorization of these schools in terms of their specialization shows that 73 are for the visually challenged, 128 for the speech and hearing impaired, 70 are for the mentally challenged and 25 cater to various other handicaps. In the absence of adequate number of special schools, the other issue that requires discussion is the integration of education of the disabled children with mainstream education.

52. Supra note 24 at pp.5,6

In fact, the Universal Education program envisages universalizing education by educating the disabled children through the mainstream schools. This is possible only if there are adequate numbers of teachers with special training at the primary level. In the primary schools in India, the number of trained teachers is not adequate. The teacher training programs which provide disability training emphasize that specialization should be sought for a single type of disability. But this is a very expensive proposition. So the situation demands that either the training programs should offer multidisability training or the general teachers' training courses should be remodeled in a way to equip all the teachers to address the concerns of disabled children. Another critique of the integrated education system is that it is suitable only for children with moderate disabilities. The system is unable to include children with mental disability. These children are unable to attend the mainstream schools due to stigma and discrimination and also because of their inability to cope with the academic syllabus. Provision of a barrier-free environment also remains a pipe dream, though it, too, has been mandated. It is the odd public building that will have any kind of access for the physically handicapped, or signposting in Braille, even in the biggest cities. Public transport is mostly out of bounds for independent disabled travellers anywhere in India. The government clearly needs to do more than just enact legislation and announce action plans. It must put enforcing and monitoring mechanisms in place. An Action Plan for making education disabled friendly by 2020, announced by the Human Resources Development Ministry in March 2005, sets no interim targets.⁵³

Hence it is suggested that the best remedy would be pass a separate legislation in lines of Special Educational Needs and Disability Act 2001 (SENDA) in the United Kingdom. and Individuals with Disabilities

53. Supra note 27 at pp. 20, 21

Education Act 2004 (IDEA) in the U.S.A. SENDA has been enacted with a view to make provision against discrimination, on grounds of disability, in schools and other educational establishments; and for connected purposes. It specifically provides for education in mainstream schools of children with special educational needs. It also lays down the general duties of local education authorities with regard to advice and information for parents, resolution of disputes and compliance of orders. It also provides for the identification and assessment of educational needs of special children.

The Act defines the term discrimination and prohibits discrimination against disabled pupils and prospective pupils; it prohibits substantial disadvantage to disabled pupils and accessibility strategic plans and procedures. It also lays down the establishment of a Disability Tribunal for the enforcement of the provisions laid in the Act. Apart from looking into the educational needs of the disabled pupils in schools, the Act makes similar provisions for higher education as well. The Individuals with Disabilities Education Act (IDEA) is another important piece of civil rights legislation for children with disabilities ever passed. Prior to its passage in 1975, at least one million children with disabilities in the United States were denied any public education, and at least four million more were segregated from their non-disabled peers. IDEA is the primary federal law that governs Individualized Educational Programs (IEPs) and the special education process. IDEA guarantees children with disabilities a 'Free, Appropriate Public Education' (FAPE) in the 'Least Restrictive Environment' (LRE). IDEA was reauthorized in 2004 and its implementing regulations were released in August 2006.⁵⁴ Thus it has to be accepted that India lags far behind so far as such a special legislation

54. Theresia Degener and Gerard Quinn, "A Survey of International, Comparative and Regional Disability Law Reform", for details visit http://www.dredf.org/international/degener_quinn.html, accessed on 23.12.2007.

is concerned. Thus the appropriate remedy would be to enact legislation on these lines.

Alternatively the existing Act may be amended with a view to:

- ✓ End prejudiced approach towards educating disabled people. The traditions and unfounded myths must be substituted with progressive ideas and practices supported by relevant research findings.
- ✓ Ample financial, technical and human resources as well as adequate infrastructure for providing education to children and adults with disabilities has to be ensured.
- ✓ Sufficient provisions of teaching science, mathematics and technical skills to disabled students in secondary and high schools must be taken up.
- ✓ All teacher training courses must include components of special education and for children with special needs; as well as financial and other incentives must be provided for teachers to acquire special skills and techniques to manage disabled children with special needs.
- ✓ Incentives and transport facilities needs to be made available to parents to send disabled boys and, more importantly, girls to school and to complete their education.
- ✓ Supply of suitable adequate educational materials like Braille text books, audio-visual assistive devices has to be made easily available.⁵⁵

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

- ✓ A Separate Educational Board and a separate curriculum to be provided to meet the needs of special education.

(iv) Employment:

That of employment closely follows the concept of education. In fact among the various rights and opportunities guaranteed to the persons with disability, the most significant is the opportunity to get an employment. Employment is one of the imperative tools, which not only empowers the individual economically but moreover contributes in his/her assimilation into social life. Chapter VI of the Act contains the provisions guaranteeing the employment opportunities.

Section 32 lays down the obligation of the appropriate Government to identify posts in their establishments which can be reserved for persons with disabilities. Once such identification has been done, the Government must review at periodical intervals not exceeding three years, the list of posts so identified as well as up-date the list taking into account the development in technologies. 'Establishment' has been defined under Section 2(k) of the Act to mean a corporation established by or under a Central, Provincial or State Act, or authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in Section 617 of the Companies Act, 1956 and includes Departments of a Government. *Rule 36* of the Disabilities Rules 1996, provides that for the purpose of computation of vacancies for persons with disabilities in Group A, B, C and D posts, the manner of computation of vacancies shall be such as may be determined by the Government by instructions or orders in this regard.

Section 33 is by far the most promising provisions. Though the reservations for person with disabilities were in subsistence since long, these are restricted to limited number of disabilities and many a time not adhered to by the concerned authorities. The Persons with Disabilities Act, 1995 exclusively provides for taking suitable measures together with reservations for persons with disabilities in the area of employment.⁵⁶ Under Section 33 a direction has been given to every appropriate Government to reserve at least three percent vacancies in every establishment in such manner that one percent of such vacancies shall be reserved for persons suffering from blindness or low vision, one percent for persons with hearing impairment and one percent for persons with locomotor disability or cerebral palsy in the posts identified for each disability. However the appropriate Government has been empowered to exempt any establishment from such reservation of posts having regard to the nature of work in any department or establishment by a notification subject to conditions which are to be mentioned in the notification as well. The National Policy for Persons with Disabilities says that the Persons with Disabilities Act, 1995 provides for 3% reservation in employment in the establishments of Government of India and Public Sector Undertakings (PSUs) against identified posts. The status of reservation for Government in various Ministries/ Departments against identified posts in Group A, B, C & D is 3.07%, 4.41%, 3.76% and 3.18% respectively. In PSUs, the reservation status in Group A, B, C & D is 2.78%, 8.54%, 5.04% and 6.75%, respectively. The Policy also obliges the Government to ensure reservation in identified posts in the Government sector including public sector undertakings in accordance with the provisions of the PWD Act, 1995. Unfortunately experience has shown that these provisions are hardly given effect to. This is because of the general misconception among non-disabled that persons with disabilities are incapable of doing any job

56. Sadiq Ahmed Jilani Syed, "Legal Framework for Social integration of Persons with Disabilities in S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002) pp. 154-167 at p. 163

properly. In *LIC of India v. Chief Commissioner for Disabilities*,⁵⁷ the view taken was that a person with 45% disability was incapable of performing his duties as a peon. The Delhi High Court in appeal from the decision the Chief Commissioner found no substance in it and accordingly directed LIC to employ the persons with disabilities. Despite a 3 percent reservation in public employment, as of 2003, only 10 percent of posts in public employment had been identified as “suitable” for PWD. As a result, the share of PWD in all posts thus remains negligible, at 0.44 percent. Shockingly, the jobs identified for the three categories of disabled have effectively excluded disabled persons from more than 95% of jobs available in the Government sector. A second feature of the quota policy is that it applies only to three disability types – locomotor, visual and hearing - which limit many other disabled people from accessing jobs. *Section 39* and *Section 40* must be read with *Section 33*. Though *Section 39* has already been discussed under the head ‘Education’; a brief comment is nevertheless appropriate. The *Section* provides for special reservation in Government educational institutions and other educational institutions receiving Government aid, a reservation of not less than 3% apart from the reservation spelt in *Section 33*. *Section 40* obliges the appropriate Governments and local authorities to reserve a minimum of three per cent vacancies in poverty alleviation schemes for the benefit of persons with disabilities. Though there are a range of public programs to promote PWD employment, but their impact has been negligible and largely confined to urban areas. This is in part due to weaknesses in design and implementation. Broader impacts on employment outcomes for people with disabilities will be dependent firstly on efforts to change perceptions on the productive contribution that disabled people can make, an effort that will require engagement of the public, private and NGO sectors.⁵⁸

53. (2002) 101 DLT 434

58. *Supra* note 4 at p. 95

Section 34 mandates the setting up of Special Employment Exchanges. Under *Section 34*, the appropriate Government is obliged to notify that every employer in an establishment must furnish information or returns about vacancies in their establishment for persons with disabilities that have fallen vacant or are about to fall vacant to the Special Employment Exchanges within whose jurisdiction the establishment will fall.⁵⁹ *Rule 37* of the Persons with Disabilities Rules provides in this respect that the following vacancies shall be notified to the Special Employment Exchanges, namely: -

- (a) Vacancies in posts of a technical and scientific nature carrying a basic pay of Rs. 1400 or more per month occurring in establishments in respect of which the Central Government is the appropriate Government under the Act, and
- (b) Vacancies which an employer may desire to be circulated to the Special Employment Exchanges outside the State or Union territory in which the establishment is situated, shall be notified to such Special Employment Exchanges as may be specified by the Central Government by notification in the Official Gazette, in this behalf. A copy of the notification of vacancies shall be sent to the Vocational Rehabilitation Centre for Handicapped concerned.

59. 'Employer' has been defined under *Section 2(j)* to mean-- in relation to a Government, the authority notified by the Head of the Department in this behalf or where no such authority is notified, the Head of the Department; and in relation to an establishment as defined in *Section 2(k)*, the Chief Executive Officer therein. The form in which and the intervals of time for which information or returns shall be furnished and the particulars contained therein shall be in accordance with the prescribed rules.

The Rule also provides that vacancies other than those specified shall be notified to the local Special Employment Exchange concerned. A copy of the notification of vacancies shall also be sent to the Vocational Rehabilitation Centre for Handicapped concerned. According to *Rule 38*, the vacancies shall be notified in writing to the Special Employment Exchange concerned, and the particulars as mentioned in the Rule shall be furnished in respect of each type of vacancy. *Rule 39* says that, vacancies required to be notified to the local Special Employment Exchange, shall be notified at least thirty days before the date on which applicants will be interviewed or tested where interviews or tests are held, or the date on which vacancies are intended to be filled, if no interviews or tests are held. Vacancies required to be notified to the Special Employment Exchange shall be notified at least three weeks before the date on which applicants will be interviewed or tested where interviews or tests are held, or the date on which vacancies are intended to be filled, if no interviews or tests are held. An employer shall also furnish to the concerned Special Employment Exchange, the results of selection within fifteen days from the date of selection. But a strict adherence to these Rules is hardly found.

A national network of Special Employment Exchanges for disabled people exists, but plays a negligible role in promoting their employment. Employment exchanges exist in state capitals, but overall, the link between employment exchanges and establishments in the private sector is weak. As a result, the job placement ratio is very low for both special and other exchanges, 0.9 percent and 0.7 percent of registered PWD respectively in 2003, and has roughly halved over the past decade. The downward trend reflects shrinking job opportunities in the public sector, and a general failure of exchanges to reach out to private employers.⁶⁰ *Section 35* empowers any person authorized in writing by the Special Employment Exchange to have access to

60. *Supra* note 4 at p. 95

any relevant record or document in the possession of any establishment. Such entry may be at any reasonable time and in any premises where it is suspected that such records or documents are available; as well as inspect or take copy of the relevant records or documents or ask any question necessary for obtaining any information.⁶¹

According to *Section 36*, the reserved vacancies are to be filled up by a carry forward rule on a rotation basis. The Section explicitly lays down that where in any recruitment year any vacancy under Section 33 cannot be filled up due to non-availability of suitable candidates with disability or for any other sufficient reason; such unfilled vacancies are to be carried forward to the succeeding recruitment year. If in the succeeding year also suitable persons with disabilities are not available, it may be filled up by inter change among the three categories mentioned in Section 33. The reserved seats can be filled by persons other than the persons with disabilities only when there are no persons with disabilities available for that vacancy for the successive recruitment year. Where it is found that the nature of vacancy in any establishment is such that a given category of person cannot be employed, the vacancy can be inter-changed among three categories but subject to prior approval of appropriate Government.⁶²

The earmarking of three per cent post in general employment sector especially educational and poverty-alleviated sector is a substantive guarantee to persons with disabilities. But such reservation benefits are confined to the three categories of Person with Disabilities namely, blind, hearing impairment and locomotor disability or cerebral palsy. For person suffering from disability of leprosy-cured, mental retardation and mental illness no

61. *Supra* note 33 at p. 189

62. *Ibid* at pp. 190, 191

employment avenue is being conceived. In addition, though the Act on one hand earmarks three per cent as the benchmark under Section 33 but conversely an employer must employ five per cent of the work force consisting of persons with disabilities, as general rule to be assured of incentives under Section 41.⁶³

While *Section 41* provides for incentives to employers to ensure five per cent of the work force is composed of persons with disabilities. Under this section the appropriate Government and the local authorities shall provide incentives to employers in both public and private sectors to ensure that a minimum of 5% of their work force is composed of persons with disabilities. But again this provision is also bonded with the words “within the limits of economic development” of the concerned Government and authorities, which surely mitigates the effect of this encouraging provision for employers to involve the persons with disabilities. In addition, though the Act makes provision for a private sector incentives policy, with a target of 5 percent of the private sector workforce being people with disabilities. However, neither Government of India nor States have introduced a general incentives policy (though there is a specific new incentive provided for formal sector workers in the 2007/08 budget). In the late 1990s, employment of PWD among large private firms was only 0.3 percent of their workforce. Among multinational companies, the situation was far worse, with only 0.05 percent being PWD. However, there are a number of private and public sector firms, which have far, better performance on PWD hiring, and offer good practice examples of more inclusive workplaces.⁶⁴

Section 37 obliges the employers to prepare a record of the persons with disabilities employed in the establishment in accordance with the

63. Supra note 43 at p. 98

64. Supra note 4 at p. 97

manner prescribed by rules framed under the Act. Such records will relate to applications received in reply to advertisement, comments of the selection committee, appointment letter issued, confirmation, promotion and other records involving medical leave and allied matters. These records shall be open to inspection at all reasonable hours by such persons who are authorized in this behalf by general or special orders of the appropriate Government.⁶⁵

It is to be noted here that while Section 35 provides for inspection by authorized persons of the Special Employment Exchange the present provision provides for inspection by any authorized person from the appropriate Government.⁶⁶ Further the modalities of incentives are not well documented.

Section 38 empowers the appropriate Governments as well as local authorities to formulate schemes for ensuring employment of persons with disabilities, by notification, which may provide for:

- a) training and welfare of persons with disabilities;
- b) relaxation of upper age limit;
- c) regulating employment;
- d) health and safety measures and creation of a non-handicapping environment in places where persons with disabilities are employed;
- e) the manner in which and the persons by whom the cost of operating the schemes is to be defrayed; and

65. *Rules 40 and 41* lay down certain obligations on the employer. Under *Rule 41* an employer shall maintain the record of employees with disabilities in Form DPER III, as may be amended from time to time. *Rule 40* requires an employer shall furnish to the local Special Employment Exchange quarterly returns in Form DPER I and biennial returns in Form DPER II as may be amended from time to time. Quarterly returns shall be furnished within thirty days of the due dates, namely, 31st March, 30th June, 30th September and 31st December, while biennial returns shall be furnished within thirty days of the due date as notified in the Official Gazette.

66. *Supra* note 33 at p. 191

- f) constituting the authority responsible for the administration of the scheme.

The National Handicapped Finance and Development Corporation (NHFDC) was established in 1997 to provide financial assistance to disabled entrepreneurs. However, between 1997 and 2005, the number of NHFDC beneficiaries was negligible - only 19,643. Even among the small client base, there is a strong gender and disability bias. In addition, disbursements have been very low, in part due to long lags between receipt of funds and loan disbursement. If NHFDC is to reach more beneficiaries, the structure of the schemes needs to be revised so as to give channelling agencies and banks better incentives to participate, together with improved accountability for channelling agencies. Equally, awareness of schemes among potential beneficiaries is very limited. Vocational Rehabilitation Centres (VRCs) have been established in state capitals to provide vocational training to disabled people. The main tasks of VRCs are to make vocational assessments of PWD and to provide short term training. Some also provide job placement services. VRCs generally do not seem to make regular efforts to update the skills imparted along with shifts in labor demand. Like other active labor programs for people with disabilities, the size of the VRC program is very small, rehabilitating only about 10,500 persons a year. In addition, there seems to be a lack of focus on placement, with no evidence to date of net positive impacts on labour market outcomes for trainees.⁶⁷ Inopportune Section 38 also creates a problem for disabled in seeking employment. Since under Section 38 the Government is to identify the jobs which could be performed by persons suffering from various kinds of disabilities, as because of disability a person may not be in a position to undertake a particular kind of job. Cases have been filed where questions have arisen that as to whether a person suffering from a

67. *Supra* note 4 at pp. 102, 104

particular disability would in a position to take up a particular job. For instance, the Delhi High Court in *Govt. of NCT of Delhi v. Bharat Lal Meena*⁶⁸ held that persons with disabilities can be appointed as Physical Education Teachers once they have passed the qualifying examination and undergone the requisite training and the Government cannot by a subsequent clarification take away that right which has been already accrued to them. Similarly, in *Perambaduru Murali Krishna v. State of Andhra Pradesh*,⁶⁹ the Andhra Pradesh High Court has ruled that visually challenged persons who were selected for the post of Secondary Grade Teacher/School assistant but were later deprived of their legitimate right owing to their disability, were entitled to a supernumerary post as a school teacher.⁷⁰

Shapiro pointed out that unlike other minorities, disability is one minority, and “anyone can join at any time, as a result of a sudden automobile accident, a fall down from a flight of stairs, cancer, or disease.”⁷¹ Section 47 deals with a very important aspect of disability acquired during employment. It provides for non-discrimination in Government employment. Section 47 in clear terms mandates that no establishment shall dispense with or reduce in rank an employee, who acquires a disability during his service. Thus, the Section specifically secures the tenure of service of an employee without withholding or reducing his rank in case of acquired disability during his service. This part of the section uses two phrases---“dispense with” and “reduce in rank”. While the former includes simple discharge as also termination after following due process; the latter implies placing an employee in a rank which is lower than what he was holding. This is however subject to two provisos:

68. CWP.2461 of 2002

69. 2001 (II) AD (DELHI) 582

70. Supra note 3 at p. 9

71. Joseph P. Shapiro: “No Pity: People with Disabilities Forging a New Civil Rights Movement”. Universal, 1994, cited in *Ibid*

- 1) if an employee after acquiring disability is found unsuitable for the post held by him, he may be shifted to some other post with the same pay scale and service benefits enjoyed by him;
- 2) if it is not possible to adjust such employee against any post, he may be kept on supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. A supernumerary post is one which carries pay scale and benefits as the employee was enjoying but which does not fall under any of the existing categories of the post.

Thus the first sub-section prohibits the demotion of employees who have incurred a disability during employment, unless the person can no longer do any job in which case the employee is entitled to the same remuneration. Sub-section (2) also bars denial of promotion merely on the ground of his disability. Nonetheless the appropriate Government has been empowered, having regard to the type of work carried on any establishment exempt such establishment from the provisions of this section. However such exemption shall be made by a notification and subject to such conditions as specified in the notification.⁷² In *Kunal Singh v. Union of India*⁷³ the Supreme Court of India had the occasion to deal with a case arising out of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*. The Supreme Court held:

“Section 47, which falls in Chapter VIII, deals with an employee, who is already in service. It must be borne in mind that Section 2 of the Act has given distinct and different definitions of “disability” and “persons with disability”. It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that a person does not acquire or suffer disability by choice. An employee, who acquires disability during the service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possible all those who depend on him would also suffer. The very

72. *Supra* note 33 at p. 197

73. 2003(2) Supreme 102, decided on 13-2-2002

frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of section reads “no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service.”⁷⁴

A perusal of the abovementioned provisions reveals that the Act does not specifically state that no person can be denied employment solely on the basis of disability. This omission tacitly implies that all persons being equal, it is still permissible not to hire someone on the basis of a disability.⁷⁵ Without doubts, among the various rights and opportunities guaranteed to the persons with disability, the most important one is the opportunity to get an employment. But, here it becomes essential to assess the difference between assurance of equality and assurance of equal opportunity. While in giving equal opportunity the State is not to act positively, but only to give an opportunity to persons with disabilities who are equally placed, assuring of equality moves many steps backwards. In this case, the State will have to ensure that persons with disabilities are equally placed with others. For instance, where some posts are notified by the Government and 3% is reserved in accordance with section 32, the considering of applications, and allowing the persons with disabilities to attend the interview and the test will be enough for giving them equal opportunity. If nobody applies for the post, the State is under no obligation to see that some person with disability applies. But so far as assurance of equality is concerned, the State will have to see that some persons, with the required qualifications are there, for applying for the post. Thus the State is under an obligation to see that education is imparted to persons with disabilities and post is also created for them and also see that some persons with disability apply for

74. Para 9 of 2003(2) Supreme 102, at 105, 106 cited by Prof. Gurbax Singh Karkara, “Right to Continue in Employment in Acquiring Disability during Service Under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995,” *Journal of Legal Studies*, vol. XXXIII (2002-2003), pp. 1-10 at p. 5

75. *Supra* note 12 p. 8

and also get the job. But disappointingly the Act envisages only an assurance of equal opportunity and not equality.⁷⁶

The National Policy document of 2006 points out that development of appropriate skills in persons with disabilities will be encouraged for their employability in private sector. Vocational rehabilitation and training Centres engaged in developing appropriate skills amongst persons with disabilities keeping in view their potential and abilities will be encouraged to expand their services. Considering rapid growth of employment opportunities in service sector, persons with disabilities will be encouraged to undertake skill training suitable to the market requirement. Also Considering slow pace of growth in employment opportunities in the organized sector, self-employment of persons with disabilities will be promoted. This will be done through vocational education and management training. But again strong reflection of the national policy can hardly be found in the legislation or its implementation.⁷⁷

Thus to assure equality of employment and not merely equality of opportunity the following suggestions may be taken into account:

- ✓ New employment opportunities must be created and identified in public and private sectors taking into account cooperative and self-employment schemes.
- ✓ Self-employment must be encouraged. Accordingly, training must be provided to persons with disabilities to begin as well as manage their own businesses. Low interest loans must also be provided so that they can set up their own businesses.

76. Supra note 1 at p. 4

77. Supra note 4 at p. 126.

- ✓ Specialized attention and training must be provided to persons born with a disability and those who have acquired it.
- ✓ Efforts must be made to prevent forcing suitably qualified candidates accept poorly-paid, low-skilled, low-status and unrewarding jobs in poor working conditions such as job security, opportunities for promotion and advancement.⁷⁸
- ✓ Awareness to be spread amongst the employers that disability, impairment and ill-health are separate concepts and a person with disability can be equally worthwhile to their 'normal' counterparts. Provision for incentives too requires to be well defined.
- ✓ The quantum of reservation of person with disabilities should be according to working population; and the persons with disabilities excluded from the quota reservation should be given priority in availing other benefits such as establishments of industry, research institution and rehabilitation centres.⁷⁹

(iv) Affirmative Action and Non-discrimination:

Equalization of opportunities and participation, only education and employment will not suffice for him/ her to lead a life of total independence. In this backdrop some affirmative actions in the form of providing aids and appliances and schemes for preferential allotment of land in favour of persons with disabilities have been enacted under Sections 42 and 43 respectively. The Disability Act gives a broader definition of access. It provides for access not only physical access, but also to education, media, communication, entertainment and technology etc. Sections 44 to 46 talks about access, to public transport, public buildings and adapted toilets, etc.

78. Supra note 55

79. Supra note 43 at p. 99

Section 42 directs the appropriate Governments to make schemes to provide aids and appliances to persons with disabilities. Accordingly the Central Government has prepared the schemes for purchasing and filling of aids and appliances, commonly known as ADIP. To improve the learning and economic potentials of the persons with disability, durable, standard, up to specification, aids and appliances are made available under this scheme. It is implemented through district and *taluk* offices and are preceded by survey and screening prior to giving assistance. Under the scheme implementing agencies are provided 100% non-recurring financial assistance and only those aids and appliances which cost between Rs. 50 to Rs. 6,000 are covered. The aids and appliances are provided free of cost if the income of the beneficiary or his guardian is up to Rs. 5,000 per month and up to 50% concession of the cost, if the monthly income is between Rs. 5,000 to Rs. 8,000.⁸⁰ This section is similar to Section 28 which deals with encouraging research for designing and developing assistive devices. Access to free aids and appliances is currently within the ambit of a social security system that functions very inadequately, not in small part due the manner in which it is designed. Thus, assistance to buy aids and appliances fall within a range of individual beneficiary schemes that often have serious implementation problems and low coverage. Due to this and other demand and supply side issues, coverage of rehabilitative services and aids is very limited. In addition, systems for support and maintenance of assistive devices remain under-developed.⁸¹

Section 43 instructs the appropriate governments and local authorities to frame schemes, by notification, for the purpose of preferential allotment of land at concessional rates for:

- i) housing;

80. *Supra* note 33 at p. 194

81. *Supra* note 4 at p. 48

- ii) setting up business
- iii) setting up of special recreation centres;
- iv) establishment of special schools;
- v) establishment of research centres; and
- vi) establishment of factories by entrepreneurs with disabilities.

Thus in terms of the above provision persons with disabilities have to be preferred and given priority in the matter of allotment of land by the Development Authorities and Industrial Development Corporations. Particularly for the purpose of self-employment and encouraging the business initiatives of the persons with disabilities this provision has been enacted. The provision also intends to allot land for educational, training and research purposes which would in turn make them self dependent. But The Act fails to include all the facets of residential and independent housing in its purview. Important issues like framing schemes, allotment criteria and other important details are left to the local authorities. Access to residential housing becomes difficult without disabled specific housing loans. Moreover the intricate web of red tapism and disability as well as gender bias has put a question on the effectiveness of this provision. Thus the Act or the Rules must specifically lay out the schemes of allotment with reference to housing purposes as well for acquiring loans for the same. ⁸²

Easy and convenient access to all public places is a very important right which is given to people with disabilities. Accessibility is elementary to the recognition and satisfaction of any right. It is beyond questioning that in order to gain from the various rights guaranteed in the Constitution and the statutory provision of the various enactments pertaining to persons with disabilities, apposite conditions have to be formed to facilitate the

82. Supra note 41 at p. 45

people with disabilities to benefit from those rights. In course of attaining education and employment such persons have to move from one place to another. For this they might have to board train, bus or other vehicles, to use bathrooms and latrines, to cross roads, to get into multistoried buildings amongst others. Though the earlier definition of access included only 'physical access' and took only architectural barriers into consideration, the modern day analysis of access is more holistic in nature. It encompasses within itself accessibility to quality education, information and communication, entertainment and technology. Originating from the Beijing Conference and the Disabilities Act, access comes across at not only as a means to attain personal economic development but furthermore as a prospect to partake in social and political platforms. A close look at access related issues brings to light that in spite of international conventions and domestic legislations, access has remained as an inadequately addressed concern.⁸³ Section 44, 45, 46 and 47 specifically contains non-discriminatory provisions; especially Sections 44, 45 and 46 deals with easy and convenient access i.e. towards creation of a barrier free environment. The greatest critique of this Act is that the entire Act does not have a special chapter on access. It provides for it in the chapters on non-discrimination. The Act fails to address that access and nondiscrimination are two different things and call for two different kinds of action. Without physical access, reservations in educational institutions, government organizations do not have any value any will not give any tangible results. Still, a large section of India's public transport system, public amenities, parks, entertainment centers etc, are disabled unfriendly.⁸⁴ Since Section 47 has already been discussed under the head "Employment", hence only Sections 45, 46 and 47 shall be discussed in this part.

83. *Supra* note 27 at p. 16

84 *Ibid* at p. 34

Section 44 provides that all establishments in the transport sector such as Railways, Airways, Roadways and Waterways have to take special measures to adapt rail compartments, buses, vessels and aircrafts in such a way as to permit easy access to persons with disabilities; and also adapt toilets in rail compartments, vessels, aircrafts and waiting rooms in such a way as to permit wheel chair users to use them conveniently. This is also subject to the economic capacity and development of the State. In India Authorities are yet to take measures to ensure the implementation of the provision for “accessibility”. The authorities are taking undue advantage the term ‘within the limits of their economic capacity and development’. This term has turned out to be complete defence to negate the right granted by the statute. To ensure strict implementation of the provision it is necessary that a deadline must be fixed for the authorities to comply with the provisions of the Act.⁸⁵

Section 45 has been framed to help the persons with disability to cross and use the public road. The act directs the appropriate Governments and the local authorities to take measures “within the limit of their economic capacity and development” to provide for installation of auditory signals at red lights for the benefit of persons with visual handicap, to make curb cuts and slopes in pavements for the easy access of wheel chair users, to make engravings on the surface of the zebra crossing for the blind, make engraving on the edges of railway platforms for the blind or persons with low vision, to provide for appropriate symbols of disability and to install warning signals at appropriate places. Thus, safety measures such as road safety, safety in residential areas, public transport system etc, should be taken up on a priority basis.⁸⁶

Section 46 deals with non-discrimination in the built environment. The Section directs the appropriate Governments and local

85. Supra note 25 at p. 125

86. Supra note 33 at p. 195

authorities to provide for ramps in public buildings, to adapt toilets for wheel chair users, provide for Braille symbols and auditory signals in elevators or lifts and to provide for ramps in hospitals, primary health centres and other medical care and rehabilitation institutions. But again this is subject to economic capacity and development. Thus it can be observed that the general approach is one of accessible design or adaptation of public facilities and to some extent the built environment, rather than universal design. Accessible design refers to buildings that are accessible by PWD, while universal design is buildings or products that are accessible by all, including PWD. The former tends to result in access channels for PWD which are separate, while the latter provides for design solutions that accommodate all people in the same manner. For example, an accessible building might have a separate ramp entrance, while a universal design building would not have steps at all. The draft National Policy for Persons with Disabilities recognizes the distinction, and commits rather ambitiously that “all future infrastructure development will ensure universal access.” In addition the provisions of the Act, and to some extent their subsequent interpretation and implementation, show a relative focus on access for people with disabilities in urban areas. This is to some extent understandable, but as a result lessens the focus on the types of access priorities of rural people with disabilities. These in many cases may be more fundamentally focused on access from the home to buildings or facilities than on access to facilities themselves. The latter clearly remains important, but does not become relevant if the person with a disability can not access the facility in the first place.⁸⁷

Easy access to transportation, public places and communication play a very significant part in availing the facilities leading to the social

87. Supra note 4 at p. 144

integration of the disabled.⁸⁸ Access not only to justice in courts of law, but also to various other facilities such as public buildings, housing, medical and health care, educational institutions, sports facilities, etc. The issue of access therefore encompasses ascertaining means to overcome “environmental barriers”, “institutional barriers” and “attitudinal barriers” (as discussed in Chapter 1). Things like public transport, public hospitals toilets, hospitals, government offices, public spaces like parks, educational institutions, places of worship are still inaccessible to people. So far the interventions which have been made are restricted to the physical access only. Areas like education, teaching aids, books in Braille and interpreters for the hearing and speech impaired are still not available to large sections of the disabled.⁸⁹

The dictionary definition of the word barrier is “any obstacle or circumstance that hinders or obstructs progress, access etc.” (Oxford Advanced Learner’s Dictionary) thereby implying a literal and figurative extension of its meaning. In the context of built environment, the literal barriers are the physical barriers and refer to those problems of disabled people related to access and use of buildings and mobility in the environment. While the figurative barriers are the social barriers and refer to restrictions to full societal participation imposed upon the persons with disabilities through the built environment. Apart from physical and social nature of these barriers, they have also the following characteristics:

- a) Barriers are always external to the disabled persons and their effects are not a concomitant of disability.
- b) They are normally non-transparent to those unaffected i.e. only the persons with disability are directly aware of the existence of barriers.

88. *Supra* note 56 at p. 164

89. *Supra* note 27 at p. 16

“Accessibility” is a fundamental feature of the built environment. It allows people to reach and subsequently use built facilities such as homes, places of work, educational institutions, shops, theatres and parks. Accessibility enables people to participate in the social and economic activities for which the built environment is intended. It should be understood as a fundamental environmental factor and not simply the concern of those who have a permanent or temporary-physical or sensorial disability. Barrier free environment in this context implies unhindered, obstruction free built environment to ensure free passage to and use of facilities therein. Even though barrier free design is commonly associated with the environmental needs of disabled person, it is much more universal concept in its application. As a society, we have become victims of and are controlled by our environment.⁹⁰ While India has standards on promoting access to the built Environment and basic services, it faces major challenges in implementation due to a combination of institutional coordination challenges, poor enforcement mechanisms, and lack of awareness of the needs of people with disabilities.

Although the Persons with Disabilities Act contains provisions for attainment of these objects but their non-implementation make these provisions nothing but a farce. The provisions on access for people with disabilities in the Act are framed as contingent entitlements, i.e. obligations on the authorities are subject to the proviso “within the limits of their economic capacity and development”. As such, the authorities are encouraged to take various interventions to promote access, but the nature of the legal obligations is somewhat vague. Indeed, there are no specific enforcement provisions or

90. Dr. S.C. Handa, “Understanding Barrier Free Environment” in Professor B.K.Sengupta and Basins UmaSahnkar, himangshu Garg, Haimanti Banerji (ed.) “*Proceedings of Seminar on Barrier Free Environment for the Persons with Disabilities and Elderly*”, organized by the Ministry of Social Justice and Empowerment, Government of India, in collaboration with Dept. of Architecture and Regional Planning Indian Institute of Technology, Kharagpur,(2004), pp.17-20 at pp. 17,18,19

sanctions for failure of authorities to be proactive in undertaking their obligations under the Act. Nor is a mechanism spelt out for how authorities should move to implement the Act's provision, e.g. amendment of bye-laws etc. As a result, people with disabilities have relied on a combination of general non-discrimination provisions of the Act and the specific provisions on access.⁹¹ It is unfortunate that none of our transport systems are accessible to a person with any disability. No blind person can cross the road without the help from others. No person in a wheel-chair or with locomotor disability can get into public vehicles or use the public toilets. The road crossings, zebra crossings etc. do not have audio-signals to inform the hearing and visually impaired persons. It is a pity that even most of the government buildings do not tally with requirement of Section 46. The only remedy of such violations of the Persons with Disabilities Act is seeking the solace of the Court. But the irony is even the Courts do not have ramps or other disabled friendly access.

The cases regarding accessible public transport have explicitly tried to balance the need for access with impacts on public finances. For example, the Supreme Court in 1999 ordered Indian Airlines in *Javed Abidi v. Union of India & Others*⁹² to provide ambu-lifts and aisle chairs for people with locomotor disabilities. This was phased in on the basis of Indian Airlines' claims that such installation was economically unviable. In *Disability Rights Group v. Chief Election Commissioner*⁹³ in public interest litigation, a non-governmental organization committed to the welfare of the persons with disabilities had sought the intervention of the Supreme Court to correct the wrong of the Election Commission of India in not providing adequate facilities for persons with disabilities to vote. The matter involved the right of over 45 million citizens of the country who are unable to vote effectively in various

91. Supra note 4 at p. 144

92. 1999 SC 512

93. WP (C) No. 187 of 2004

general and local elections, with their dignity and sense of confidentiality in their vote intact, due to the non-availability of ramps, disability friendly security arrangements in the polling booths and identification of their disabled status in the electoral rolls. Consequently the Supreme Court directed the Chief Secretaries of States to ensure facilities to enable the persons with disability to reach the polling stations to cast their votes in at least the cities and urban areas. But this decision of the Supreme Court is itself discriminatory as it speaks of the availability of disabled friendly polling facilities only in the cities and urban areas. Where the rural sector is anyhow backward, the decision of the apex court has exposed the discriminatory attitude and restrictive development of the persons with disabilities in the urban sector. The judiciary must have been more sensitive in giving such decisions. Thus, it is important to have both more specific policies and a supportive institutional framework if access commitments are to be realized more fully. Interestingly, very few access-related cases have been brought before the Commissioners' offices, with the few that have being *suo moto*.⁹⁴

Even though the Disability Act talks about making all public buildings and places of importance accessible to the disabled the government is far from achieving it. The government should set a dead line and immediately work upon the physical accessibility part. The Disability Act expanded the concept of access from physical access to other things like information, communication, media, entertainment etc. The spirit of the Act has to be translated into action.⁹⁵ The following suggestions can be considered in this respect:

94. Supra note 4 at p. 144,148

95. Supra note 27 at p. 40

- ✓ Complete inclusion of the disabled implies removal of the physical barriers of participation. Hence, Barrier-free designs of public places, buildings, roads, footpaths, transport facilities should be promoted and renovation of old buildings should be done to make them disabled-friendly and barrier-free by providing ramps, wide doors, convenient amenities, safe public places, etc.
- ✓ Conditions and policies that actually build physical barriers must be changed without delay. Barrier-free designs, with the specific needs of people with sensory, intellectual and physical impairments should be made an integral part of the curricula of architects, town planners and engineers, etc.
- ✓ Sign language interpreters should be available in public places for convenience of deaf persons.⁹⁶
- ✓ The Motor Vehicles Act must make wheel chair accessibility an absolute condition for manufacture of public transport.
- ✓ The Standard Rules on the Equalization of Opportunities for persons with Disabilities which were adopted in the 48th session of the United Nations General Assembly, December 1993, should be considered as a guideline and strict implementation of the same has to be done.

(e) Other features of the Act:

(i) Mechanism of implementing the provisions of the Act:

The enforcement or implementation machinery is to be studied under two broad heads:

96. Supra note 55

1) Central and State Coordination Committees and Executive Committees—Their Constitution, Powers and functions

(Chapter II and Chapter III)

2) Chief Commissioner and Commissioners for persons with Disabilities (Chapter XII)

I. Constitution, Powers and Functions of the Central Coordination Committee and Executive Committee:

Constitution of Central Coordination Committee--- *Sections 3 to 8* deal with the Central Coordination Committee. *Section 3* provides for the constitution of the Central Co-ordination Committee by the Central Government, which consists of the Minister in charge of the Department of Welfare as well as the Minister of State in that Department in the Central Government. The Minister (Chairperson) and Minister of State-in-charge (Vice- Chairperson) of Department of Welfare, Secretaries to the Government of India-in-charge of the Departments of Welfare, Education, Woman and Child Development etc., the Chief Commissioner, Chairman, Railway Board, three members of Parliament, four nominated members to represent the State Governments and Union Territories, five persons as far as practicable, being persons with disabilities to represent NGOs etc., are some of the members of the Central Co-ordination Committee. It is to be noted here that at present the Ministry of Social Justice and Empowerment deals with welfare, which was earlier being looked after by the Department of Welfare. The persons who are appointed by virtue of the offices that they are holding as *ex-officio* members will cease once they give up the offices they are holding; consequently their membership of the Central Coordination Committee will also cease. Rules 7, 8 and 9 of the

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996 have to be read with this section.⁹⁷

Section 4 provides for the term of office of those members in the Central Coordination Committee who are nominated by the Central Government.⁹⁸ *Section 5* provides for the disqualifications which prevent a person to become a member of the Central Coordination Committee.⁹⁹ *Section 6* provides that if a member of the Central Coordination

97. *Rule 7* says that the Central Government shall nominate four members – three from the State and one from the Union territories under clause (k) of sub-section (2) of section 3 of the Act, by rotation, in such a manner so as to cover all the four regions of the country, every year. *Rules 8 and 9* lays down the functions of the member Secretary. *Rule 8* says that the Member Secretary shall keep a record of names of Members and their addresses; and *Rule 9* provides that if a Member changes his address, he shall notify his new address to the Member-Secretary, who shall thereupon enter his new address, in the official records (but if he fails to notify his new address, the address in the official records shall for all purposes be treated as his correct address). It is to be noted that under *Rule 19*, no proceeding of the Central Co-ordination Committee shall be invalid by reasons of existence of any vacancy in or any defect in the constitution of the Committee.

98. The appointment of such members shall be for a period of three years. It may be mentioned that a casual vacancy occurs when a member dies, resigns, is removed from his membership or fails to attend three consecutive meetings of the Central Coordination Committee. Any person who is nominated to fill the casual vacancy in the Central Coordination Committee shall hold office only for the remainder of the term for which the member in whose place he was so nominated was to serve. *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996, Rule 10* provides that Non-Official members of the Central Co-ordination Committee, resident in Delhi, shall be paid an allowance of rupees seventy five per day for each day of the actual meetings of the Central Co-ordination Committee. While, non-official members of the Central Co-ordination Committee, not resident in Delhi shall be paid daily and travelling allowances for each day of the actual meetings at the highest rates admissible to a Grade I Officer of the Central Government. However, in case of a Member of Parliament who is also a Member of the Central Co-ordination Committee, the said daily and travelling allowances shall be paid at the rates admissible to him as Member of Parliament, when the Parliament is not in session and on production of a certificate by the Member that he has not drawn any such allowance for the same journey and halts from any other Government source. So far as an official member of the Central Co-ordination Committee is concerned he /she shall be paid daily and travelling allowances, at the rates admissible under the relevant rules of the respective Government under whom he is serving on production of a certificate by him that he has not drawn any such allowance for the same journey and halts from any other Government source.

99. The expression “adjudged insolvent” under Section 5 has to be seen in reference to the provisions of the Presidency Insolvency Act under which a person who fails to pay his creditors is declared insolvent. It is possible for such person to compound with his creditors and clear the debts of his creditors in which circumstance his disqualification will stand removed. The disqualification relating to “unsound mind” has to be seen only if such unsoundness has been

committee becomes disqualified by virtue of any of the provisions of Section 5 the seat shall become vacant. According to *Section 7* the meeting of the Central Co-ordination Committee shall take place at least once in every six months in accordance with the rules or procedures prescribed by the Central Government.¹⁰⁰

declared by a competent court. Under the *Mental Health Act, 1987*, a District Judge is competent to declare a person to be of unsound mind relying on the medical investigation report and similar factors. "Moral turpitude" implies acts of corruption, bribery, commission of fraud involving the integrity of a person.

100. *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996, Rule 11* provides that the meetings of the Central Co-ordination Committee shall ordinarily be held in New Delhi on such dates as may be fixed by the Chairperson. The Chairperson has been empowered to call a special meeting of the Committee upon the written request of not less than ten members of the Central Co-ordination Committee. The rule also lays down the period of notice to be laid before a meeting is held. Fifteen clear days' notice of an ordinary meeting and five clear days' notice of a special meeting specifying the time and the place at which such meeting is to be held and the business to be transacted thereat, shall be given by Member – Secretary to the members. Hence this is another function of the member-Secretary in addition to the ones mentioned in Rules 8 and 9. Notice of a meeting may be given to the members by delivering the same by messenger or sending it by registered post to his last known place of residence or business or in such other manner as the Chairperson may, in the circumstances of the case think fit. However, no member shall be entitled to bring forward for the consideration of the meeting any matter of which he has not given ten clear days' notice to the Member-Secretary, unless the Chairperson in his discretion, permits him to do so. The Central Co-ordination Committee may also adjourn its meetings from day to day or to any particular day. But, where a meeting of the Central Co-ordination Committee is adjourned from day to day, notice of such adjourned meeting shall be given to the members available at the place where the meeting which is adjourned if held by messenger and it shall not be necessary to give notice of the adjourned meeting to other members. Where a meeting of the Central Co-ordination Committee is adjourned not from day to day but from the day on which the meeting is to be held to another date, notice of such meeting shall be given to all the members. *Rule 12* declares the Chairperson as the presiding Officer and in his absence the Vice-Chairperson as the same, but when both the Chairperson and the Vice-Chairperson are absent from any meeting, the members present shall elect one of the members to preside at the meeting. *Rule 13 inter alia* provides that one-third of the total members shall form the quorum for any meeting and no quorum shall be necessary for the adjourned meeting. *Rule 14* deals with the minutes. *Rule 15* declares that the presiding officer shall maintain order at the meeting. However under *Rule 16*, except with the permission of the presiding officer, no business which is not entered in the agenda or of which notice has not been given by a member under *Rule 11*, shall be transacted at any meeting. *Rule 17* deals with the change in the order of business as entered in the agenda. As per *Rule 18* all questions considered at a meeting of the Committee shall be decided by a majority of votes of the members present and voting and in the event of equality of votes, the Chairperson or in the absence of the Chairperson, the Vice-Chairperson or in the absence of both the Chairperson and the Vice-Chairperson, the member presiding at the meeting, as the case may be shall have a second or casting vote.

Powers and functions: *Section 8* provides the functions of the Central Coordination Committee as under:

- a) The Central Coordination Committee is to serve as the national focal point on disability matters and facilitates the continuous evolution of the policies towards solving the problems faced by the persons with disabilities. The policies have been guided by the declarations/resolutions of the United Nations and the International Treaties and Conventions that have been developed from time to time by the United Nations and its various Commissions and Committees. As a matter of fact the provisions of the present Act reflect the national policy on disability.
- b) Review and co-ordination of the activities of departments which deal with matters relating to persons with disabilities.
- c) Develop national policy to address issues faced by persons with disabilities.
- d) Advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to disability.
- e) Take up the cause of persons with disabilities with the concerned authorities and the international organizations with a view to provide for schemes and projects for the disabled in the national plans and other programmes and policies evolved by the international agencies.
- f) Review the funding policies with the donor agencies, from the perspective of their impact of the persons with disabilities.
- g) Take appropriate steps to ensure barrier free environment in public places, work places, public utilities, schools and other institutions.
- h) Monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of persons with disabilities; and such other functions as may be prescribed by the Central Government.

Constitution of Central Executive Committee-- The Central Executive Committee has been constituted under *Section-9* of the Persons with Disabilities Act of 1995. It is the executive body of the central coordination committee and is responsible for carrying out the decisions of the central coordination committee. The Executive Committee is constituted by the Central Government and consists of a Chairperson, eleven ex-officio Members, ten nominated members and a Member-Secretary.¹⁰¹

But practical experience reveals that hardly any officer of the level of a secretary or joint secretary attends these meetings. Most often officials, who are of the level of a director or sometimes section officers of the various ministries, attend these meetings. These junior officials are not empowered enough to voice their ministry's activities and are mute participants. They do not contribute even a bit during the deliberations. It is questionable whether they even communicate to their seniors who matter about the decisions taken in the meetings. Participation continues to be confined to officers below the rank of joint secretaries. It is imperative that senior officers, who are aware of the workings of their respective ministries and are empowered to take decisive action, represent the ministries. In

101. The Chairperson and member-secretary shall be ex-officio. and *inter alia* the Secretary to the Government of India in the Ministry of Welfare (now the Ministry of Social Justice and Empowerment) who shall be the ex-officio Chairperson; the Chief Commissioner; the Director General for Health Services; the Director General of Employment and Training; six persons not below the rank of a Joint Secretary to the Government of India to represent the Ministries or Departments of Rural Development, Education, welfare, Personnel, Public Grievances and Pension and urban affairs and employment, Science and Technology; the Financial Advisor, Ministry of Welfare, Advisor(Tariff) Railway Board ---ex-officio Members; ten nominated members by the Central Government consisting of---four persons representing the States and Union Territories, one person representing the interest , which in the opinion of the Central Government ought to be represented and five persons representing the NGOs. The Joint Secretary to the Government of India in the Ministry of Welfare dealing with the welfare of the handicapped shall be the ex-officio Member Secretary.

addition, none of the NGO representative members are persons with disabilities. Even more disappointingly, not even a non-disabled NGO member represents the people with mental disabilities.¹⁰² As the chairperson of the Central Executive Committee also happens to be the secretary of the Ministry of Social Justice and Empowerment, the pivotal ministry for ensuring implementation of the provisions of the Act, there is a clear duplicity of roles. In this context it will be more productive that the chairperson of Central Executive Committee is clearly de-linked from the Ministry of Social Justice and Empowerment. The role of the Chief Commissioner Disabilities, who is also ex-officio chairperson of the Central Executive Committee, is far from satisfactory. The Chief Commissioner generally plays an extremely passive role in these meetings as bureaucratic protocol positions the Chief Commissioner under the secretary Ministry of Social Justice and Empowerment and one cannot expect the Chief Commissioner to toe a line which is not in conjunction with the Ministry of Social Justice and Empowerment. This conflicting position of the Chief Commissioner also needs to be examined as the chief Commissioner is mandated under the law to be an independent body and under no circumstances should be subordinate to the Ministry of Social Justice and Empowerment.¹⁰³

The Role of the Central Executive Committee is to implement policy decisions taken by the Central Coordination Committee and this is by way of regular meetings. Under *Section 11* the Meetings of the Central Executive Committee shall be held at least once in three months and such rules of procedure shall be observed in regard to the transaction of business as may be prescribe by the Central Government. The phrase “at least

102. Vandana Bedi, “Disability of Will”. View full article at http://www.combatlaw.org/information.php?article_id=1055&issue_id=38, accessed on 2.10.2008.

103. *Ibid.*

once in three months” only means that the Committee shall meet once in three months in the minimum. There is no contravention if more than one meeting is held. Simply speaking there must be at least one meeting quarterly and four meetings annually. In reality though these meetings are convened but not enough time is devoted. The minutes of the meeting of the Central Coordination Committee have never been circulated in any of the Central Executive Committee meetings.¹⁰⁴ *Section 12* deals with the temporary association of persons with the Central Executive Committee for some particular purpose/purposes. The Central Executive Committee is empowered to associate with itself in such manner and for such purposes as may be prescribed by the Central government any person whose assistance or advice it may desire to obtain in performing any of its functions under the Act. The expression “may associate with itself” has to be seen with reference to the assistance or advice that the Committee may require from such associated persons in performing any of its functions as assigned under this Act. The chief object of enacting this provision is to enable the Committee to avail of the contributions of the experts in the field of disability. Such persons though included in the Committee shall have no right to vote in the meeting of the said Committee and shall not be a member for any other purpose. Such persons shall also be enabled to such fees and allowances for attending its meetings and for attending to any other work of the Committee.

Function-- The principal function of the Central Executive Committee as constituted under *Section 9* is act as the executive body of the Central Coordination Committee and is responsible for carrying out the decisions of the latter. It shall also perform such other functions as delegated by the Central Coordination Committee.¹⁰⁵

104. *Ibid*

105. *Supra* note 33 at p. 177

II. Constitution, Powers and Functions of the State Coordination Committee and Executive Committee: -

Constitution of State coordination Committees--- According to *Section 13* the State Coordination Committee is constituted by the state Government and performs functions similar to that of the Central coordination Committee at the State level. The Committee consists of the Minister in-charge of the Department of Social Welfare in the State Government (Chairperson, ex-officio); the minister in-charge of the Department (Vice-Chairperson, ex-officio); Secretaries to the State Government in-charge of the Departments of Welfare, Education, Woman and Child Development, expenditure, Personnel Training and public Grievances, Health, rural Development, Urban Affairs and Employment, science and Technology, Public enterprises; Secretary of any other Department which the State Government considers necessary; Chairman Bureau of public Enterprises (Members, ex-officio); five members, being persons with disabilities to be nominated from the NGOs by the State Government; three members of State Legislature; three persons to be nominated by the State government to represent agriculture, industry or trade or any other interest which the State Government opines to be represented; the Commissioner and Secretary to the State Government dealing with Welfare of Handicapped shall be the Member Secretary. The Section also makes clear that no State Coordination Committee shall be constituted in respect of any Union Territory and the Central Coordination Committee shall perform the function relating thereto. *Section 14* provides for the terms and conditions of service of Members.¹⁰⁶ *Section 15* provides for the disqualifications which are

106. Section 14 provides that the nominated members shall hold office for a period of three years and shall continue to hold office even after the expiry of his term until his successor enters into office, even though a term of three years might have expired. Such nominated members may resign his office by writing to the State Government or may even be removed by the State

akin to the Disqualifications of the Central Coordination Committee Members under Section 5. The only difference being that the order of removal shall be made by the state government instead of the Central Government. If a member becomes subject to any of the disqualifications his seat shall become vacant (*Section 16*).

Section 17 says that the Meetings of the State Coordination committee shall be held at least once in six months and the prescribed rules of procedure shall be observed with regard to the transaction of business.

Functions of State Coordination Committees--- *Section 18* deals with the functions of the State Coordination Committee, which is the same as the Central Coordination Committee. The chief difference is that while the State Coordination Committee works at the State level, the Central Committee works at the national level. Along with the only matter with which the Central coordination Committee has power is to take up cause of persons with disabilities with the international organization to provide for schemes and projects of the disabled. As in the case of Central Coordination Committee, the State Coordination Committee will also have to serve as the focal point on disability matters within the State and evolve a progressive policy towards solving the problems faced by persons with disabilities. However such policy must be in consonance with the provisions of the Act as well as the comprehensive policy developed by the Central Coordination Committee.¹⁰⁷

Government after giving him a reasonable opportunity of showing cause against the same. A nominated member is also eligible for re-nomination and is entitled to such allowances as may be prescribed by the State Government. So far as the ex-officio members are concerned, their term of office shall end as soon as he ceases to hold office by virtue of which he had been appointed/ nominated. In case of any casual vacancy the person nominated shall hold office only for the remainder of the term for which the Member in whose place he had been nominated.

107. *Supra* note 33 at pp. 180-181

Constitution and functions of State Executive Committees--- *Sections 19 to 22* deals with constitution, functions, meeting and temporary association of members of the State Executive Committees respectively. The State Executive Committee is the executive body of the State Coordination Committee. The Committee consists of the Secretary, department of Social Welfare (Chairperson, ex-officio); the Commissioner; nine persons not below the rank of a Joint Secretary to the State Government, to represent the Departments of Health, Finance, Rural Development, Education, Welfare, Personnel Public Grievances, urban Affairs, Labour and Employment, Science and Technology (Members, ex-officio); one nominated member by the State Government representing the interest of those who ought to be represented in the opinion of the State Government; five member to be nominated from amongst the persons with disabilities from NGOs; and Joint Secretary dealing with disability division in the Department of Welfare shall be the Member-Secretary, ex-officio. The functions are similar to that of the Central executive Committee and so is the frequency of meetings. The provisions regarding temporary association of persons with State Executive Committee under *Section 22* is also the same as in case of Central Executive Committee.

Section 23 provides that the Central Coordination Committee shall be bound by the written directions of the Central Government and State Coordination Committee by the Central coordination committee or the State Government. However if any direction of the State government is inconsistent with the directions of the Central Coordination Committee, then the matter shall be referred for decision to the Central Government. The provision of this Section reflects the hierarchical control of the Central as well as State Governemnts over the Committees. *Section 24* provides that no act or proceeding of the Central Coordination Committee, Central Executive Committee. State Coordination Committee and State Executive Committee

shall be questioned by reason of any vacancy or defect in the constitution of such Committees.

To address the concern of inter-sectoral coordination, the PWD Act mandates Central and State-level Coordination and Executive Committees. Together, these Committees are intended as “focal points on disability matters” and to be key institutions in development of comprehensive disability policy development. They should meet every 6 and 3 months for the Coordination and Executive Committees respectively. Unfortunately, the track record of these coordinating institutions in states and at the centre is poor, with few exceptions. Government of India Reports indicate that meetings in most States happen very rarely, with a number of major states (e.g. Gujarat, Bihar, Kerala) having had only one meeting of their Coordination Committees since the passage of the Act, and others such as Rajasthan and Orissa reporting no meetings at all. Similar lack of action seems to apply to State Executive Committees. It was found that the shortfall in meetings of these core committees as of end-2003 was between 43 and 100 percent at state level and 50 percent at the national level. It is unclear if the situation has improved in the meantime. It thus appears that the disability field is characterized by a nodal Ministry with relatively weak convening power, and coordinating institutions which are in many parts of the country barely functional.¹⁰⁸

III. Chief Commissioner and Commissioners for Persons with Disabilities:

Chapter XII of the Persons with Disabilities Act spells out one of the chief aims of the Act. As revealed, the persons with disabilities have suffered through the ages and have been subject of discrimination and injustice. To ensure the enjoyment of their fundamental rights and other

108. Supra note 4 at p. 133

human rights, the office of the Chief Commissioner for persons with disabilities was visualized. The office seeks to deal with discrimination, deprivation and non-implementation of laws and regulations made by the appropriate governments along with the local authority for the wellbeing and protection of the persons with disabilities. In addition it was also perceived that persons with disabilities can be advantageous only if they are made conscious about the privileges, rights and amenities available to them under the Act.¹⁰⁹The Indian disability law envisages the appointment of Chief Commissioner as a watchdog on the rights of the disabled people. He has powers of a Civil Court. A simple application by and aggrieved person with disability will set the law in motion and the Commissioner has the power to investigate it and take necessary safeguard the rights. He has the power to monitor the utilization of funds disbursed by the central government. He/she is required to submit his/her report to the Central government on the implementation of the Act. The report has to be laid before the Parliament, which is the highest law making body. Similar provisions have been made at the State level as well. Now an appraisal of the sections dealing with the appointment, powers and functions of the Chief Commissioner and State Commissioner shall be taken up.

Appointment: *Section 57 and 60* deals with the appointment of Chief Commissioner and Commissioners respectively. While the Chief Commissioner is appointed by the Central Government the Commissioners are appointed by the State Governments. A person to be appointed as the Chief Commissioner or Commissioner must have special knowledge or practical experience in matters relating to rehabilitation of persons with disabilities. It is for the respective Government to prescribe the salary and allowances and conditions of service (including pension, gratuity and other

¹⁰⁹. Supra note 33 at p. 204

retirement benefits) and also determine the nature and category of officers and other employees required to assist the Chief Commissioner or Commissioner in the discharge of its functions. The officers and employees shall discharge their functions under the general superintendence of the Chief Commissioner/Commissioner and their salaries and allowances and other conditions of service shall be prescribed by the Central Government/ State Government.¹¹⁰

Functions: *Sections 58 and 61* deals with the functions of the Chief Commissioner and Commissioner respectively. Section 58 stipulates that the Chief Commissioner shall have the following functions to perform:

- (a) To coordinate the work of the Commissioners for the States;
- (b) To monitor the utilization of funds disbursed by the Central Government;
- (c) To take steps to safeguard the rights and facilities made available to persons with disabilities; and
- (d) To submit reports to the Central Government on the implementation of the Act at such intervals as prescribed by the Central Government.¹¹¹

Similar powers have been conferred on the State Commissioner under *Section 60* except that the area of operation of the State Commissioner or Union territory shall be within their respective States and Union Territories. Also the State Commissioner shall coordinate with the departments of the State Government for the programmes and schemes for the benefit of persons

110. *Rule 43*--- The Chief Commissioner for Persons with Disabilities shall be entitled to salary, allowances and other perquisites as are available to the Secretary to the Government of India.

111. According to *Rule 44* the Chief Commissioner shall submit to the Central Government on the implementation of the Act at the interval of six months in such a manner that at least two reports are sent in one financial year.

with disabilities, which is unlike the Chief Commissioner which coordinates the Commissioners of the States; and the reports on the implementation of the act has to be submitted to the State Government.

Apart from the above functions the Chief Commissioner and Commissioner have to prepare Annual Reports giving full account of his activities during the previous financial year in such form as may be prescribed by the Central/State Government and forward a copy thereof to the respective Government who shall have the same laid before each house of Parliament/State Legislature along with its recommendation made in so far as they relate to Central/State Government, under *Sections 64 and 65* respectively.¹¹² The respective Government must also state the reasons for non-acceptance of any recommendation or part thereof in the said report.

Powers: *Section 59* of the Act confers on the Chief Commissioner the following powers:

“Without prejudice to the provisions of *Section 58* the Chief Commissioner may of his motion or on his application of any aggrieved person or otherwise look into complaints with respect to matters relating to---

- (a) deprivation of rights of persons with disabilities;
- (b) non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate

112. As per *Rule 45*, the Chief Commissioner shall as soon as possible after the end of the financial year but not later than the 30th day of September in the next year ensuing, prepare and submit to the Central Government an annual report giving a complete account of his activities during the said financial year. In particular, the annual report shall contain information in respect of each of the following matters, namely: names of officers, staff of the Board and a chart showing the organizational set-up; the functions which the Chief Commissioner has been empowered under *Section 58 and 59* of the Act and the highlights of the performance in this regard; the main recommendations made by the Chief Commissioner; progress made in the implementations of the Act State wise; and any other matter deemed appropriate for inclusion by the Chief Commissioner or specified by the Central Government from time to time.

Government and the local authorities for the welfare and protection of rights of persons with disabilities, and take up the matter with the appropriate authorities.”

Hence it is seen that under *Section 59*, the Chief Commissioner in addition to the functions that it has to perform under *section 58* of the Act, has the obligation to look into complaints with respect to deprivation of rights of persons with disabilities and take up with the appropriate authorities all matters relating to non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Government and the local authorities for the welfare and protection of rights of persons with disabilities. The Commissioner may take such steps either suo moto on his own knowledge based on any information received or on the basis of any complaint of any aggrieved person bringing to the notice of the Chief Commissioner any matter relating to deprivation of rights of persons with disabilities or non-implementation of laws etc. The Chief Commissioner not only has the task of looking into the complaints about deprivation of rights and non-implementation of laws etc., but also to take up the matters suitably with the appropriate authorities. *Section 62* confers similar power on the State Commissioner whereby he shall look into the complaints with respect to matters relating to deprivation of rights of persons with disabilities in the identical manner as the Chief Commissioner.

For discharging the functions provided under the Act, the Chief Commissioner and State Commissioners have been conferred certain powers of the Civil Court under *Section 63*. Under this Section the Chief Commissioner and State Commissioners have the same powers as are vested in a Civil Court under the Code of Civil procedure, 1908 while trying a suit. However, these powers will be related to

- a) summoning and enforcing attendance of witnesses,

- b) requiring the discovery and production of any document in the custody of any person,
- c) requisitioning any public record or copy thereof from any Court, or office,
- d) receiving evidence on affidavits, and
- e) issuing commissions for the examination of witnesses or documents.

The Section also specifically lays down that the proceedings before the Chief Commissioner and State Commissioners shall be judicial proceedings within the meaning of Sections 193 and 228 of the Indian penal Code and also be regarded to be Civil Court for the purposes of Section 195 of Chapter 26 of the Code of Criminal Procedure, 1973.¹¹³

An Appraisal of the Role of the Disability Commissioners:

Under the Act, the Chief Commissioner and Commissioners for Persons with Disabilities are envisaged to be the watchdog bodies with the powers of a civil court. However very few facilities have been provided to these offices and they thus remain ineffective. It is disheartening to note that the Office of the Chief Commissioner and State Commissioners has failed to live up to its expectations as visualized under the Act. The institution mandated with monitoring compliance with the Act – the Office of the Commissioner – has weak powers. It is also argued that the Chief Commissioner and State Commissioners are not needed. The protection of the rights of the persons with disabilities is essentially a matter of protection of human rights. When there is already a machinery called the National Human Rights Commission which principally aims into looking at complaints concerning human rights violation and non-implementation of laws, rules etc. relating to the protection of human rights. Consequently the creation of the office of the Commissioner for the same

113. *Rule 42 of the Disability Rules, 1996* lays down the procedure to be observed by the Chief Commissioner for entertaining complaints.

purpose appears to be of no use. The creation of the Office has caused multiplicity in the enforcement mechanism on the same subject matter and unnecessary burden on the State Exchequer.¹¹⁴ The Commissioners' office has authority to look into deprivation of Persons with Disabilities rights and on-implementation of various rules, laws etc. which have been developed to promote the welfare and rights of PWD. The fundamental limitation of the office is that its only legal sanction in case of a breach is to "take up the matter with the appropriate authorities". The Office does not itself have enforcement powers of a court or administrative tribunal. It can and does make orders, but can not enforce compliance. As such, its effective powers are either "naming or shaming" or encouraging referral to the court system. While these have been effective remedies in some cases, there are clear limitations.¹¹⁵

The World Bank in its Report states: -

"There is little detailed analysis of the performance of the Commissioner system outside its own reports. However, the most recent Government of India report suggests significant issues of low capacity to perform their mandate effectively. CAG evidence for the period 1999-2003 indicates several concerns related to: (i) poor monitoring of use of funds; (ii) lack of clarity on grievance redressal mechanisms; and (iii) limited advocacy work in a number of states. The analysis points to significant issues with lack of staff and low capacity in Commissioners' offices. These concerns are supported by field work for this report in Rajasthan and Karnataka (two states considered to have better functioning offices), which found skeletal staff in both offices. In Rajasthan, the Commissioners' office consisted of one Additional Commissioner (there has been no Commissioner since end-2003) and his PA, with no support staff. The office had failed to register any grievance cases of persons with disabilities since 2002. The same study also noted that full time Commissioners exist to date only in a

114. Supra note 1 at pp. 8, 9

115. Supra note 4 at p. 125

minority of states. An additional generic concern is the lack of legal expertise in the Commissioners' offices, particularly at state level, despite the importance of their quasi-judicial role in enforcement of the Act."¹¹⁶

In view of these the best remedy would be to abolish the Office of the Chief Commissioner and Disability Commissioner in the States and instead either establish a Commission for Welfare of Persons with Disabilities akin to the Women's Commission or Minorities Commission or a Disability Tribunal to meet the requirements of the Act with regard to the functions performed by the Commissioner in the present Act.

(ii) Research, Manpower Development and Recognition of Institutions for Persons with Disabilities and Severe Disabilities:

Section 48 obliges the appropriate Governments and local authorities to promote and sponsor research for prevention of disability, rehabilitation including community based programmes, development of assistive devices including their psycho social aspects, job identification for persons with disabilities and modifications in offices and factories.

Though the Chief Commissioner and Commissioners are supposed to submit reports to the Central Government and respective State Governments. However research is hardly done and reports never submitted. A strong research agenda is required to study the ways and means of better realizing the rights of the disabled. The reports bring in more accountability.¹¹⁷

Sections 50 to 55 deal with the *recognition of institutions of persons with disabilities*. *Section 50* empowers the State Government to appoint a competent authority as it deems fit for the purposes of this Act. In most of the

116. *Ibid* at p. 134

117. *Supra* note 25 at p. 127

Sections it is noted that both the Central and State Government have been entrusted with a number of powers. But the power to appoint the competent authority regarding the recognition of institutions for persons with disabilities has been given to the State Government only. *Section 51* contains a direction to all persons or bodies who intend to establish or maintain any institution for persons with disabilities.¹¹⁸ *Section 52* deals with the grant of registration certificate on an application made by any person for setting up or for carrying on nay institution for persons with disabilities.¹¹⁹ *Section 53* deals with the factors which lead to the revocation of certificate of registration. The Section provides that the competent authority may revoke the certificate issued under *Section 52* if the competent authority has reasonable ground to believe that such certificate has been obtained by a false statement in the application, whether grant or renewal of grant; or where the holder of the certificate has committed any breach of the rule or any conditions subject to which the certificate was granted. However such revocation may be made after appropriate enquiry as

118. According to *Section 51*, no such institution shall be established or maintained except under and in accordance with a certificate of registration issued by the competent authority in this behalf. However the proviso adds that any such institution set up prior to the commencement of the Persons with Disabilities Act, 1995 may continue such an institution for a period of six months. The application so made may be disposed of by the competent authority after the period of six months and till such disposal, the institution can be maintained by virtue of the provisions of this section.-- See *Supra* note 33 at p. 199.

119. As per *Section 52*, the competent authority appointed by the State Government under section 51 is to make such enquiries as deemed necessary and if on sufficient enquiry the authority is satisfied that the applicant has complied with the requirements of this Act and the rules made there under in so far as setting up such institution, it shall grant a certificate of registration to the applicant. It must to be noted that prior to making any order refusing to grant certificate the competent authority shall give a reasonable opportunity of being heard to the applicant, and every order of refusal shall be communicated to the applicant in the manner prescribed the State Government for the purpose. It is necessary that before issue of the certificate of registration the institution must be in a position to provide such facilities and maintain such standards as may be prescribed by the State Government by rules made in this behalf. So far as the certificate is concerned it shall remain in force for such period as may be prescribed by the State Government unless it revoked under *Section 53*. It may be renewed from time to time for a similar period and shall be in such form and be subject to such conditions as may be prescribed by the state Government. Further, where a certificate so granted is due to expire: an application for its renewal has to be made sixty days before the expiry of the valid period. It is essential that the registration certificate shall be displayed by the institution in a prominent place of its establishment.-- See *Ibid* at pp. 199, 200

deemed fit by the competent authority and no order of revocation can be made unless an opportunity is given to the holder to show cause as to why the certificate should not be revoked. Thus the principles of natural justice must be strictly followed. Once a certificate has been revoked by the competent authority in respect to the institutions for persons with disabilities, such institution shall cease to function from the date of revocation. However a provision of appeal has been provided under Section 54¹²⁰. Thus it has been provided in the Section that where no appeal has been preferred immediately on the expiry of the period prescribed for the filing of such appeal, or where such appeal has been preferred, but the order of revocation has been sustained from the date of the order of appeal. The competent authority also has to give directions that upon revocation of a certificate of registration issued in respect of an institution all inmates of such institutions may be restored to the custody of their parents, spouses or lawful guardians as the case may be or they may be transferred to such other institution as may be specified by the competent authority. It is also the obligation of every institution which holds a certificate of registration that has been revoked under this section to surrender such certificate to the competent authority immediately.¹²¹

Thus the above Sections deal more with formalities of recognition of institutions for persons with disability. According to Section 53, the competent authority appointed by the State Government under Section 51 is

120. *Section 54* says that where there has been a refusal of grant of certificate of registration or revocation that has aggrieved any person who has applied for grant, the appeal has to be made before the State Government within the prescribed period against such refusal or revocation. The order of the State Government in such appeal shall be final and no further appeal before any authority or the Central government will be allowed. *Section 55* firmly says that the provisions of Chapter X of the Act shall not be applicable to institutions for persons with disabilities whether established or maintained by the Central or the State Government. In short any institution set up by a non-Government organization will come under the provisions of this Chapter. However if any such non-Governmental organization has received any aid from the Central Government or State Governments, it shall not be exempted under this Section.

121. *Supra* note 33 at p. 201, 202

to make such enquiries as deemed necessary and if on sufficient enquiry the authority is satisfied that the applicant has complied with the requirements of this Act and the rules made there under in so far as setting up such institution, it shall grant a certificate of registration to the applicant. But neither the Act nor the Rules lay down any general requirement to be complied by the institutions to register themselves as an institution for persons with disability. The sections do not speak of the activities to be taken up therein. Hence it is desirable that while filing the application for certificate of registration the organizations must clearly specify the nature of facilities which they are to provide to the persons with disabilities, whether they intend to rehabilitate them through proper vocational training and special education at least up to the primary level, whether the place identified for setting up the institution is easily accessible and the building barrier free. In addition, apart from revocation, the Sections do not even lay down any penalty if any institution swerves from the conditions under which they were granted the certificate of registration and consequently harm the well being of this vulnerable group of people.

Chapter XI consists of a single section i.e. *Section 49* dealing with institution for persons with severe disabilities. While the terms 'disability' and 'person with disability' have been defined in Section 2(i) and 2(t) respectively, of the Persons with Disabilities Act, 1995. The Act nowhere defines 'person with severe disability'. However *Section 49(4)* says that for the purposes of *Section 49*, 'person with severe disability' denotes a person with eighty per cent or more of one or more disabilities. Whereas Section 2(t) indicates a person with disability as a person suffering from not less than 40% of any disability as certified by the medical authority; *Section 49(4)* deals with one or more disabilities affecting a person with 80% or more of such disability, but it does not speak of any certificate by the medical authority and is applicable for the purposes of *Section 49* only. Again the Act has defined the disability in

terms of percentage which is not acceptable at all, and it has also not been pronounced as to who will declare a person to be affected with severe disability as such. Under *Section 49* the appropriate Government has been empowered to establish or maintain institutions for persons with severe disabilities. If the appropriate Government opines that the institution is fit for rehabilitation of persons with severe disabilities, the Government may also recognize such institution as an institution for the persons with severe disabilities to meet the purposes of this Act. However no such institution shall be recognized if it has failed to comply with requirements of this Act or the rules made there under. As a matter of fact every institution established for the persons with severe disability shall be maintained in such manner and abides by such conditions as may be prescribed by the appropriate Government.

This section too does not lay down any requirement to be complied with by an institution, to be called an institution for persons with severe disabilities. A person with severe disability implies a person with 80% or more disability. Thus such a person requires a lot of care and attention; therefore whether an institution shall be able to undertake this kind of responsibility must be assessed with clear cut precision and not vaguely. In addition it is desirable that a clear definition of “persons with severe disability” must be framed. The institutions must also make provisions of right to avail residential facilities to the spouse and care of the person with severe disability.

(iii) Social Security:

For persons with disability social security measures are extremely important because they provide the opportunity for greater mental and physical well-being. They provide the opportunity for vocational rehabilitation, protection against unemployment, other facilities like insurance,

compensation, loans, maintenance of dependants etc.¹²² Chapter XIII deals with social security for disabled persons. It consists of three sections, namely Sections 66, 67 and 68. *Section 66* states that the appropriate Governments and local authorities shall to the best of their economic ability, undertake programmes for the rehabilitation of disabled persons. This section also grants financial assistance to all non-governmental organizations dealing with persons with disabilities who may also be consulted in the course of formulating rehabilitation schemes and policies by the appropriate Governments and local authorities.¹²³ *Section 67* stipulates the creation of an insurance scheme for disabled government employees to be arranged according to the governmental capabilities. If an insurance scheme cannot be arranged then an alternative social security scheme may be framed instead. But this provision is applicable only to the Government employees.¹²⁴ An important instrument for addressing the risk of disability and smoothing consumption is insurance. As in the majority of countries, most disability insurance provision in India is provided publicly and in the form of a mandated benefit tied to the retirement income scheme. Only formal sector workers are covered by the mandated disability insurance schemes, although some voluntary provision exists. It is suggested that workers from the private sector too are brought within the scope of insurance either through insertion of sections in this Act or a separate Act. *Section 68* makes provision for unemployment benefits to be given to anyone who cannot find employment after getting himself registered in the Special Employment Exchange for more than two years. But the Act does not say what will be the plight of the person who remains unemployed for those two years after getting himself/herself registered with the Special Employment Exchange.

125

122. Supra note 27 at p. 41

123. Supra note 2 at p. 9

124. *Ibid*

125. Supra note 33 at p.210

In India most of the social security measure are available to all those who are employed and that too in the organized sector. Large sections of the disabled are not only unemployed but also in the unorganized sector. These people are any way left out of the chain of social security. The once who really need it are the most vulnerable. The government should take it as a priority that all disabled people are brought within the network of social security. Moreover though Chapter XIII enunciates social security measures, but it does not lay down any blueprint as to how the policy is to be implemented. Granting of financial aid, insurance scheme, alternative security scheme and unemployment allowance are definitely upbeat measures but at the same time the concept of sustainable, cost-effective, community oriented infrastructure support mechanism needs to be evolved.¹²⁶

Section 69 lays down the punishment for fraudulently availing or attempting to avail any benefit meant for persons with disabilities, which shall be punishable with imprisonment for a term of up to two years or with fine up to Rs. 20,000 or with both. The complaint before the Magistrate may be made against such persons and prosecution is sought for under the provisions of this section in addition to other provisions affecting his conduct under the *Indian Penal Code, 1860*. If the fraud is confirmed to the consequence that the person charged is availing or trying to gain any advantage meant for persons with disabilities such person shall be put on trial and punished under this section.¹²⁷

The discussion of social security guaranteed under the Act will remain incomplete without a reference of the case of *Indian Banks' Association*

127. *Supra* note 43 at p. 101

126. *Supra* note 33 at p. 212

v. *Devkala Consultancy Service and Ors.*¹²⁸ where the Apex Court opined for the creation of a fund for the benefit of the disabled people. The Court said that despite the PWD Act came into force in 1996, very little had been done to implement the beneficial provisions. Since India possesses a huge disabled population a lot needs to be done, hence it may not be possible to achieve the legislative target for the Central Government or State Government alone. Since the disabled are victims of discrimination in spite of the beneficial provisions of the Act, therefore in the larger interest it ordered for the creation of a fund to be created with the amount at the hands of the Union of India and the Appellants and other concerned banks to be managed by the Comptroller and Auditor General of India.

C. ISSUES TO BE ADDRESSED:

As of 2006, the Ministry has proposed a number of amendments to the PWD Act which are under consultation. The general areas for proposed revision are:

- *revision of definitions of a number of disabilities, including mental illness, cerebral palsy, low vision, mental retardation and other impairments.*
- *revised provisions on the institutions responsible for various areas of implementation and oversight of the Act.*
- *instructions to states and local authorities to develop strategies and schemes.*
- *other sectors such as employment attempt to spell out more precise obligations of employers and mandates of institutions*
- *strengthened provisions on regular gathering of data on the socio-economic status of PWD.*

126. MANU/SC/0355/2004, JT 2004 (4) SC 587

A perusal of the Act makes it clear that the Act is informed by approaches beyond a pure medical model, in that many aspects of PWD lives are addressed, including societal attitudes. At the same time, the direct linkage in the Act between definitions of disability and entitlements necessitates a definition of disability, which derives from threshold levels of physical and mental impairment which are defined in a largely medical sense. While the philosophy of the Act therefore represents a major step forward in disability policy in India, its underlying philosophy can be considered a hybrid between medical and social models of disability.¹²⁹ Although the aforementioned amendments have been put forward for approval, but it is opined that the best remedy to guarantee the various rights envisaged by the Act and as reiterated by India by its being signatory to the international instruments and more specifically the UN Disability Convention, the revision of the entire Act may be undertaken in the following manner:

Chapter I

- The definitions of disability, person with disability are revised along with the definitions of mental illness, cerebral palsy, low vision and mental retardation.
- Introduction of the definitions of learning disability, dyslexia, autism, person with severe disability, disabled person's organizations and non-governmental organizations.

Chapters II and III

127. Supra note 4 at pp. 124, 131

- Minimize Government representation from the Central and State Coordination Committees and Central and State Executive Committees.
- Increase the representatives of disabled persons organizations and non-governmental organizations.
- Constitution of District Executive Committees along with the State Executive Committee.

Chapter IV

- Instead of a single section five new sections must be introduced which shall explicitly deal with the issues of
 - a. Undertaking surveys, investigation and research concerning the reasons behind the occurrence of disabilities.
 - b. Promoting various methods to prevent disabilities including health issues and public awareness.
 - c. Screening of children at least once a year mentioning specifically the various medical tests to be undertaken to detect at-risk cases.
 - d. Proper training for primary health centre staff to be provided by a specific institution/recognized institutions to be set-up/recognised for the particular purpose of prevention and early detection of disability.
 - e. Devise specific measures for what actions are to be taken for pre-natal, perinatal and post-natal care of mother and child.
- Strike out the expression ‘within the limits of their economic capacity and development’.
- Impose civil and criminal liability on the person responsible for causing disability by either refusing to take a step which would lead to disability or causing something which would result in disability.

- Inclusion of provisions laying down guidelines for evaluation and assessment of various disabilities and grant of Disability Certificates.

Chapter V

- Special educational needs to be specifically defined.
- Appointment of a specific educational authority to look into the educational needs of the persons with disabilities.
- Provisions for education of children with disabilities in mainstream school without any discrimination and punishment for violation of this non-discriminatory provision.
- Section 39 must be removed from the 'Employment Chapter' and placed in this Chapter.
- Reservations for admission to educational institutions, specifically to technical and professional institutions amounting up to 4% and must be distributed evenly amongst all the categories of disability.
- Reservations to exist in government aided as well as private educational institutions.
- Inclusion of provisions for a specific curriculum for the education of the persons with disability.
- Measures to devise specific schemes for introduction of specific programmes in open schools and open universities, for the education and training of the persons with disability.
- Inclusion of disability education as an integral part of teacher's training programmes.
- Insertion of specific learning disabilities to be taken special care of, in imparting education.
- Section 31 to be specifically amended so that aids and appliances are to be provided for educational purposes not only to blind students or those

with low vision. But specific devices to be given free of cost to each and every person with disability to assist him/her to attain the highest levels of education.

- Residential/ non-residential girl's Special School to be set up, at least one in every district.

Chapter VI

- Increasing the percentage of reservation to a minimum of four per cent and not limiting it to only three categories as laid down in Section 33 but also extending to persons with autism, mental retardation and cerebral palsy.
- The quantum of reservation of person with disabilities should be according to working population; and the persons with disabilities barred from the quota reservation should be given priority in availing other benefits such as establishments of industry, research institution and rehabilitation centres.
- Insertion of a section specifically dealing with self-employment. Accordingly, training must be provided to persons with disabilities to begin as well as manage their own businesses. Low interest loans must also be provided so that they can set up their own businesses.
- Provision for incentives for employers for employment of persons with disability requires to be well defined.

Chapter VII

- Amendment of Section 42 to include the repair and maintenance of aids and appliances.
- Criterion for preferential allotment of land must be categorically laid down.

Chapter VII

- Chapter should be renamed as 'Barrier-free Environment.'
- Sections 44, 45 and 46 to be placed under the above-named Chapter.
- Section 47 to be moved in Chapter VI relating to 'Employment'.
- The expression 'within the limits of their economic capacity and development' should be struck out.
- Insertion of freely accessible airports and bus terminus for persons with disabilities.

Chapter IX

- Specific standards to be laid down for research and manpower development.
- District Executive committee to be entrusted the responsibility to look into the application of this provision and the standard to be maintained in relation thereto.

Chapter X

- Insertion of provision laying down general requirement to be complied by the institutions to register themselves as an institution for persons with disability.
- Provision to include the activities to be taken up therein.
- Inclusion of penalty provision if any institution swerves from the conditions under which they were granted the certificate of registration.

Chapter XI

- Specific requisites including medical facilities to be available for person residing in such institutions.
- Inclusion of residential facilities for spouse and person in care of severely disabled person.
- Special concessions to be made available to persons with severe disabilities, particularly in availing treatment.

Chapter XII

- Abolish the Office of the Chief Commissioner and Disability Commissioner in the States and instead either establish a Commission for Welfare of Persons with Disabilities akin to the Women's Commission or Minorities Commission or a Disability Tribunal to meet the requirements of the Act with regard to the functions performed by the Commissioner in the present Act.
- In case of retaining the office of the Commissioner:
 - (a) Define the powers of the Chief Commissioner/ Commissioners in exactitude.
 - (b) Lay down the conditions of eligibility of the Chief Commissioner/ Commissioners.
 - (c) Access audits by Commissioners' offices.
 - (d) Review of human resource and financial capacity of Central and State Commissioners' offices is also needed, and guidelines on minimum staffing levels introduced.

Chapter XIII

- Insurance schemes for employees in the private sector as well.
- Unemployment allowance to be paid to every unemployed person with disabilities who has registered himself/herself with the Special Employment Exchange leaving repealing the provision of two years unemployment.
- Contributory pension scheme.
- Creation of a fund in consonance with the decision in *Indian Banks' Association Case*.

Chapter XIV

- Provision for free legal aid to every person with disability.
- Specific concessions to be available to the persons with disabilities.
- Specific schemes for public awareness to be introduced.

In addition to the above two separate Chapters must be introduced laying down specifically about Non-governmental Organizations and Disabled Persons Organizations---their powers, functions and specific role in effectuating the provisions of the Act and specific welfare provisions for women with disability and child with disability.

A SUM UP:

The world for and of the disabled is shifting at a fast pace and the hopes and desires of people are also changing as fast. Progress in medical and surgical sciences, advancement in technology, better perception of the causes of disability and enhanced techniques of dealing with it, rising awareness of civil

rights and the emergence of people with disabilities flaunting skills and knowledge to develop their own lives, are some of the aspects which have added to the new thinking that the disabled are worthy of a dignified standing in society on the same terms as the non-disabled. Disabled people are a huge minority group which has been subjected to direct and indirect unfairness for centuries in most countries of the world, including India.¹³⁰

Over the years, India has been witness to series of legislations that have endeavoured to tackle the problems faced by the disabled. Some of these actions have been daring, venerable steps; but the fallout is not observable yet. Whatever the provisions on paper, India's approach towards the rehabilitation of the disabled reflects the confused state of mind of a person who wants to be emancipated and modern while preserving age-old traditional values. Government policy, legislative actions, schemes and provisions for the disabled give the impression of a State that is committed to human rights and equal opportunities. But the ground reality is quite different.¹³¹

Of all the legislations aimed for the betterment of the disabled population, the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995* has often been considered to have unique position: that of an overarching legislation, with supporting roles from the others. India has also put forward a national policy. The National Policy of the Persons with Disabilities, 2006 has manifested the Constitutional mandate of equality freedom, justice and dignity of all individuals and an inclusive society for all, including persons with disabilities. The *National Policy Statement* recognizes that Persons with disabilities are important human resource for the country and look to create an environment that endows them with equal opportunities, protection of their rights and full participation in society. But

130. Supra note 55

131. Supra note 27 at p. 2

sadly, The Policy over and over again replicates the general obligation of the Persons with Disabilities Act, 1995 while remains more general on actual strategies for accomplishing them. Overall there is very restricted sense in the Policy, that even Government of India's own evaluation signifies serious implementation problems. Simply reiterating to the general assurances made by the Persons with Disabilities Act, 1995 is not likely to be satisfactory to revitalize the disability sector. There also remains inadequate reference to the role of Persons with Disabilities themselves in policy progression, execution, supervision and assessment. Disabled Persons Organisations are not mentioned in the Policy, nor are persons with disabilities themselves. Practically, they remain agents who act together with the public policy and delivery systems either through public agencies or at best NGOs. The State policies also need to evolve.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is a significant landmark and a noteworthy step in the path of ensuring equal opportunities for people with disabilities and their full participation in the nation building. The Act provides for both preventive and promotional aspects of rehabilitation like education, employment and vocational training, job reservation, research and manpower development, creation of barrier-free environment, rehabilitation of persons with disability, unemployment allowance for the disabled, special insurance scheme for the disabled employees and establishment of homes for persons with severe disability etc. The Act addresses the issues related to the education of the disabled persons and imposes several duties on the Government and the Local Authorities to ensure free and compulsory education of the disabled persons. The Act provides for a quota of 3% seats for persons with disability in Government educational institutions and other educational institutions receiving aid from government. It seems clear that the Act is conversant by approaches

further than a pure medical model; in that many aspects of Persons with Disabilities' lives are addressed, including societal attitudes. Simultaneously, the straight relationship between definitions of disability and entitlements, calls for a definition of disability which originates from threshold levels of physical and mental impairment which are defined in a largely medical sense. Though the thinking of the Act consequently represents a major step forward in disability policy in India, its core philosophy can be considered a hybrid between medical and social models of disability. Notwithstanding the Persons with Disabilities Act being a pioneering piece of legislation, there remain a number of policy shortcomings in its design that are worth highlighting. These include both general issues which apply to several areas of the Act, and others which relate to specific sectoral heads.¹³²

To begin with, little has been done to raise awareness about prevention and detection aspect of disability, across the country. The majority populace continues to consider that disability is either an irretrievable medical condition or an act of destiny. Myths and delusion about disability flourish, causing the disabled to be detested, secluded and marginalized. The definitions view disability strictly from the medical and/or psychometric viewpoint. This results in strengthening a medical model of intrusion rather than the much-needed community-based rehabilitation.¹³³ The definition of a 'person with disability' under the Act has been criticized for its imprecise nature. Section 2 (t) requires that a medical authority needs to certify that a person suffers not less than forty percent disability. Particularly for mental health problems such as cerebral palsy or autism, such a determination becomes difficult in the absence of any guidelines. It has also been criticized as a purely 'medical understanding' of disability. A better understanding would require disability to be seen from

132. *Supra* note 4 p. 124

133. *Supra* note 27 at p. 2

social as well as human rights perspectives. Moreover in view of Article 1 of UNCRPD the definition of disability needs to be changed.

Further, although prevention and early detection are important components of the medical model, measures taken for these are insufficient. Diverse schemes have been presented for the welfare of the disabled population, but due to deficiency of sufficient information about them, the stakeholders -- disabled people, their families and organisations that work for them -- are either ignorant or cannot benefit from the provisions therein. Every so often the process of availing of the benefits of schemes is so cumbersome and prolonged that most people choose to sidestep them. Often, the government department chosen for executing a scheme is not notified of its particulars and their role in it. On the other hand, when the department concerned is notified, the officers assume a patronising outlook towards impending beneficiaries and holdup the process of implementation.¹³⁴

Though education for the disabled has also been adequately provided for under existing legislation. In India, education for the disabled is not part of mainstream learning, but it is imparted through isolated institutions which operate on a service and charity mode. Here again, only a few schools have resource rooms and employ special education teachers to assist retain children with special needs in their system. Despondently, these services are found in very few cities. There are almost no special schools or special educational services in rural India. Efforts at incorporating children with disabilities into mainstream schools have been even less successful.¹³⁵ Very few organisations are penalised for not providing barrier-free environments. In fact, this basic requirement is seen more as a voluntary gesture -- if an organisation provides a ramp it's touted as a praiseworthy achievement. No one considers the

134. *Ibid*

135. *Ibid* at p. 23

fact that, according to the 1995 Persons with Disability Act, the provision is mandatory by law.¹³⁶ Hence the need is to

- ✓ Stop discriminatory approach towards educating disabled people and provide ample financial, technical and human resources as well as adequate infrastructure for education to children and adults with disabilities.
- ✓ Sufficient provisions of teaching science, mathematics and technical skills to disabled students in secondary and high schools must be taken up.
- ✓ Include components of special education and for children with special needs in all teacher training courses.
- ✓ Incentives and transport facilities needs to be made available children with disability to school.
- ✓ Supplying necessary assistive devices and requisite educational materials.
- ✓ Set up a separate educational board and curriculum for persons with disabilities.

So far as the employment scenario is concerned, the Act provides for employment to only those people who come under loco motor, hearing impaired and visually impaired acknowledged categories of disability. The persons with mental illness and mental disability are specifically left out of it irrespective of the degree and severity of their illness. On the one hand, the Act provides for the employment of the disabled persons in government sector on the other hand provides for an “exemption clause”. Even though 3% jobs in the government are reserved for persons with disability, and a Special Employment Exchange has been created for the persons with disability, only 1,00,000 disabled persons have been employed since the first Special Employment

136. Supra note 6

Exchange was set up in Mumbai in 1955. The emphasis on self-employment too is almost an admission of failure in ensuring private and public sector employment, despite a 3% quota in the public sector (according to the PWD Act). The increased emphasis on self-employment poses the threat of further alienating PWD from mainstream society.¹³⁷ Therefore,

- ✓ New employment opportunities must be created and identified in both public and private sectors.
- ✓ Opportunities for proper training and loan facilities must be created to encourage self employment.
- ✓ Preventing disabled persons from taking up low status and unrewarding jobs as a consequence of their disability.
- ✓ Employers to be made aware that disabled persons can be as competent and skilled as their so called normal counterparts.
- ✓ The quantum of reservation must be increased as well as new categories should be introduced.

Along with a shortage of government servants attuned to the peculiar nature of disability is a definite setback for the Office of the Commissioner of Disability. Some State Coordination Committees and State Executive Committees have not yet been set up. Only a few people with disability are represented in the administrative bodies. This shows that the responsibilities of the government under the Act, particularly under Chapter IX, have been ignored, with no obvious results from any initiatives on research and manpower development.¹³⁸

Despite growing universal awareness of the rights of people with disabilities, bold political decisions and practical actions taken in several countries, including India, in the form of the enactment of appropriate laws, the

137. *Ibid*

138. *Supra* note 15 at p.5

plight of most disabled people remains serious. Disabled people are, undeniably, the victims of discrimination, marginalisation and of a vicious cycle of multiple deprivation. Their situation is "the silent emergency" of our times because they are prevented from participating in the mainstream activities of society.¹³⁹ Perhaps the greatest defect of the existing legislation has been its non-implementation. Hence the need is to fortify the disability movement and empower people with disabilities. Both National and State policies on promoting access for people with disabilities should be required to include consultation with disabled people in setting priorities. First, there should be serious consideration given to broadening the categories of disabled people included in the Persons with Disabilities Act. Second, Ministry of Social Justice and Empowerment and Central and State Commissioners' offices should expand programmes in alliance with Disabled Persons Organisations and NGOs for awareness rising of officials, service providers, Panchayati Raj Institutions representatives and communities on programmes for people with disabilities. As a final point, there should be a practice for fundamental benchmarking of practicable policies and programmes for persons with disabilities in the areas which are currently subject to the proviso of economic capacity.¹⁴⁰

So far as the Persons with disabilities Act is concerned, amending the Act on the suggested guidelines is the remedy to address the want of equality of opportunity, full participation and guarantee of human rights. The best therapy is of course revamping the existing coordinating mechanism into a National Commission for Persons with Disabilities which would have the standing and organizing authority, and is currently under-developed in the sector. It is imperative that such a body be a management and supervisory agency, and not be viewed as a separate "silo" for disability. However, such an enterprise would only make sense if the structural problems of coordination

139. Supra note 55

140. Supra note 4 at p. 142, 143

within and between levels of government, and between the public and non-governmental sectors are attended to. It would also necessitate a switch if the current Commissioners' Offices are to be merged into a future Commission, so that there is not simply duplication of responsibilities. The enforcement mechanisms for the Act need to be elucidated and reinforced. One alternative would be a Disability Tribunal with direct enforcement powers. NGOs should also be brought more actively into both policy and implementation, but with strengthened financial accountability and monitoring of program outcomes. Finally, there needs to be more direct engagement between both public and NGO sectors with Persons with Disabilities themselves and their families.¹⁴¹ In a country like India, it is also indispensable that various departments of the government, such as education, health, transport, building works and employment, work in conjunction. It also means that the world's largest democracy must listen to the voice of people who have been on the margins, and bring them into the mainstream. In this Chapter the focus has mainly been on the disability policies and legislative approach to protection of human rights. But the discussion will be incomplete unless judicial role is also taken into account. A little reference as to the role of the judiciary has surely been appended in the discussion, but a revamp of the Act does require weightage of the judicial pronouncements in that connection. Hence in the following Chapter, role of the judiciary in upholding and guaranteeing the rights of the persons with disability shall be taken up.

141. *Ibid*

CHAPTER 5

ROLE OF INDIAN JUDICIARY IN PROTECTING THE CIVIL AND ECONOMIC RIGHTS OF THE PERSONS WITH DISABILITIES.

CHAPTER 5

ROLE OF INDIAN JUDICIARY IN PROTECTING THE CIVIL AND ECONOMIC RIGHTS OF THE PERSONS WITH DISABILITIES.

PROLOGUE:

It is a fundamental right of everyone to realize himself, however imperfectly and contribute to the common good, however little. --Helen Keller

The differently abled have fought for social justice from time immemorial and the battle persists to this day. Despite the fact that, the sensitivity in the 21st Century has changed from “charity to rights”, the acknowledgment of these rights has not been very easy. Persons with disabilities have been blocked out of our everyday reality, touching only those who are caregivers. The Centre's delayed recognition of the rights of person with disabilities is disappointing.¹

The pursuit for access to justice by persons with disabilities has motivated the enactment of a special legislation which came into force in 1996. In the previous Chapter it has been brought to the fore that issues concerning persons with disabilities were covered by the general laws preceding the enactment of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*. It is the sole legislation relating exclusively to the Persons with Disabilities which provides for education,

1. Deepanjali Bhas, “National Policy for the Disabled: No clear roadmap for action”, *Info Change News & Features* (August 2006), viewed at <http://infochangeindia.org/20060828251/Disabilities/Features/National-Policy-for-the-Disabled-No-clear-roadmap-for-action.html> accessed on 23.6.2008.

employment, creation of a barrier-free environment, social security etc. It has been witnessed that in the thirteen years of its enactment, this too has met with very little success even in matters as basic as ensuring a barrier-free environment and generating employment. Unfortunately, the provisions of the *Persons with Disabilities Act, 1995* have not been fully implemented till date. Time and again the Court's intervention has been sought in this area. It is known that other general legislations also consist of provisions that deal with persons with disabilities within the ambit of that law. Nonetheless, these provisions are not basically receptive. Thus, protection against abuse, social security, custody of children, provision of basic needs such as shelter within the family and marital home are issues that still need to be adequately addressed. There have been instances of people with disabilities and/or their care- and service-providers approaching various grievance redressal forums (primarily the Courts) to realize these provisions. But the numbers are few. It is believed that one of the reasons is the inaccessibility of the information.² Even though the Supreme Court through judicial activism has given bigger profundity and dimension to the rights of the citizens of this country and enlarged the horizon of fundamental rights guaranteed under the Constitution; but access to justice in the legal system for segments of population in our country has not been forthcoming.³ In a democratic set-up, the "rule of law" is the heart of democracy. If justice is not easily accessible to every citizen, there can hardly be "rule of law". The traditionally inherited legal system is very expensive, time-consuming and more complex. Consequently, it is said that the poor and vulnerable class has started to look upon such a system as a foe, instead of a friend. In a nation like India, free and proficient legal aid to the deprived and

2. For details visit <http://www.disabilityindia.org/disabilitylawandrights.cfm>. Accessed on 23.5.2008

3. Susan Bhujel, "Including the Excluded?" viewed at http://www.combatlaw.org/information.php?article_id=1072&issue_id=38, accessed on 22.6.2008

indigent in general and the disabled in particular is indispensable and an obligation of the state.⁴

So far as the conventional functional separation between the various organs of the legal system is concerned, the judiciary's role comes to the fore only on the enactment of the statute. In the process of interpretation of various statutes, the judiciary promotes or obstructs the objective of a law—a process which is of special significance in the background of social change.⁵ Law in short is what the judge asserts by his legal interpretation in a judgment. Even when a particular area is covered by a statute, it is the judge who construes the legal provisions. In this process the judge tries to uncover the intent of the legislature and in this milieu it is his ultimate word as to what the legislature deliberated and hence, what the law is. On the whole, legal practice is broadly speaking 'interpretation'. It is for that reason now widely accepted that in this entire process, the judge or the judiciary makes the law as well. In reality, like the interest in Rules during the 1960s and in Legal Principles during the 1970s, much of the legal theorizing in the 1980s had been built around the concept of 'interpretation'. Interpretation has at present happened to be one of the chief rational paradigms of legal scholarship. *Dworkin* in the 1980s propagated interpretative theory of law. Accounting for the concept of law, he asserts that it is inescapably tied up with the considerations about what the law is there to settle. *Cardozo* acknowledges in his classic, *The Nature of Judicial Process*: "I take judge-made law as one of the existing realities of life", and that ".....no system of *jus scriptum* has been able to escape the need of it", and he elaborate further: "It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are

4. Justice Jitendra N. Bhatt, Handicapism—Disabling Images or Images Disabling? *Supreme Court Cases (Journal)*, vol.8, (2003) at p. 2

5. Amita Dhanda, "According Reality to Disability Rights: Role of the Judiciary", S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002) pp. 90-102, at p. 90.

hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however, obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator's mind. The process is indeed, that but, at times, it is often something more. The ascertainment of intention may be at least of a judge's troubles in ascribing meaning to a statute." Gray in his *Lectures on the Nature and Sources of the Law* points out that, "The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have to do is, not to determine what the legislature did mean on a point not present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." The judge as the interpreter of the community of its sense of law and order must apply omissions, correct uncertainties and harmonize results with justice through a method of free decision—"libre recherche scientifique".⁶

The count of judicial pronouncements in the field of disability is relatively less. However, the Apex Court has pronounced progressive judgments in such cases. Even before the enactment of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, the Supreme Court has mulled over issues concerning disabled people and laid precedent. At this juncture it is noteworthy to mention that cases pertaining to mentally challenged were brought to the forefront by activist Sheela Barse and academician Upendra Baxi as early as 1988. But one of the cases that is the cornerstone of disability case-law regime is that of *Daya Ram Tripathi v. State*

6. A.K.Sikri. Human Rights of the Disabled: World in a Slow Motion, *Journal of Constitutional and Parliamentary Studies*: Vol. 38, Number 1-4; January- December 2004. pp. 1-49 at pp.22,23

of UP & Another.⁷ It was held by the Supreme Court that if in an advertisement issued by the U.P. Public Service Commission, one post in the Provincial Civil Service (Executive Branch) was reserved for physically handicapped persons and the appellant, namely, Daya Ram Tripathi, who was such a handicapped person, appeared in the Combined State Services Examination, held in 1982, pursuant to such advertisement and was declared qualified in that Examination, the Government could not deny him a suitable post in the PCS (Executive Branch). In this case, Justice Chinnappa Reddy said,

"Having announced their determination...to rehabilitate physically handicapped persons, by reserving posts for them in all the services of the government, the government cannot now create needless hurdles. The State Civil Service (Executive branch) is a large enough service, which can easily accommodate physically impaired persons in suitable posts."⁸

(emphasis supplied)

In this Chapter the focus shall be on the role of the judiciary in the realization of disability rights in the context of the Indian Constitution, *Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* and other disability laws. The Chapter shall bring to light not only the notable findings of the judiciary but also the apathy of the law makers to imbibe these judicial pronouncements into laws. At the same time the conflict of decisions on various issues following a lack of clear-cut provision of law has also been witnessed in a number of cases under the *Persons with Disability Act, 1995*.

7. (1986) Supp. SCC 497

8. Supra note 2

A. CONSTITUTIONAL GUARANTEES AND JUDICIAL REMEDIES:

In order to achieve the objectives set out in the Preamble through the mechanism of the Constitution, certain very important and relevant provision were incorporated as, for example, Articles 14,15 and 16 guaranteeing equality before law and equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The Constitution also guaranteed “Right to Life” to all its citizens which means that every person including disabled has a right to live with dignity. This also means that the “Disabled” like other citizens or people, possess all the basic human rights particularly because they are “Human Beings”.⁹

As already discussed in Chapter 3 of this work that the Constitution of India does not specifically proscribe discrimination on the ground of disability, but it also does not contain non-discriminatory provisions that guarantee equality and equal opportunities for all citizens as in *Article 14* and *Article 16*. It not only guarantees right to life and personal liberty but also directs the State through Article 41 to make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age sickness and in other cases of undeserved want, in consonance with the complementary principles “non-discrimination” and “reasonable differentiation”.¹⁰ *Article 41*, thus, makes effective provision for securing the right to work to person suffering from disability. Further, in view of the provisions contained in Article 36 and 37, it is apparent that *Article 41* is a mandate both to the Legislature and the Courts. In the landmark case of

9. Sadiq Ahamad Jilani Syed, “Legal Framework for Social Integration of Persons with Disabilities” in S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002), pp. 154- 167, at p. 155

10. Justice S.B. Sinha, “Disability Law vis-à-vis Human Rights”, *Supreme Court Cases*, (2005) 3 SCC, pp. 1-14 at p. 3

Kesavananda Bharati v. State of Kerala,¹¹ the Supreme Court of India observed that primarily the mandate in Article 37 is addressed to the legislature, but, in so far as the Courts of Justice can indulge in some judicial law making within the interstices of the Constitution on any statute before them, the Courts too are bound by this mandate.¹² Though, Article 41 does not confer a justiciable right, the Supreme Court has, by its own interpretation, bearing in mind the goal of socio-economic, held that the Courts should so interpret a statute as will advance the objective underlying Article 41.¹³ At the same time Article 13 of the Indian Constitution makes a State action invalid if it is in contravention of the fundamental rights—a process which has been further whetted with the initiation of public interest litigations. Actions in public interest have been filed when the ground level position of a particular individual or group is in a flouting of the fundamental rights guaranteed under the Constitution. These actions have been filed before the High Courts or Supreme Court under Articles 226 and 32 for issuance of suitable writ order or direction for remedying the deficit and upholding the right.¹⁴ The Supreme Court and the High Courts, in India, by exercising constitutional powers and rights under Articles 32 and 226, respectively, have in their dynamic approach, widened the concept of providing free and competent legal aid to the suppressed and oppressed, the disabled and disadvantaged class of people. While not in large numbers, actions in public interest have been filed to assert the rights of persons with disability. Through innovative interpretations of Articles 19 and 21 in particular, the Apex Court and High Courts, have charted neo-juristic, dynamic and visionary mission and have contributed and added new dedicated multi-dimensional profile to achieve socio-economic goals as per the constitutional commandments and have provided neo-concept and philosophy of “right to life, liberty and freedom” for

11. AIR 1973 SC 1461

12. *Infra* Chapter 1 note 4 at p. 47

13. See *Jacob M. Puthuparambil v. Kerala Water Authority* (1999) 1 SCC 28 =ARI 990 SC 2228; *Supra* note 9

14. *Supra* note 5 at p. 92

the weaker and disabled mass.¹⁵ But a closer look reveals the indication of the judiciary which can be termed as sympathetic but not radical. As a matter of fact before the enactment of the *Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* one gets to see a very feeble response of Indian Judiciary regarding the human rights of the persons with disabilities. However it can be seen that judiciary was influenced by the shift to a right-based perspective on disabilities.¹⁶

So far as the constitutional approach is concerned the judicial concern has been more with guarantee of equality and the use of reservation as a means to achieve equality amongst the unequals. The judiciary has had a number of opportunities to explore not only the legality of such a concept but also its consistency with the right to equality. *Indira Sawhney v. Union of India*¹⁷ has been witnessed to be the most important judgement, where the court has held that,

“... mere formal declaration of the right would not make unequals equal. To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip type disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Articles 14 and 16(1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them.”

(emphasis supplied)

Another important judgment is that of the case of *D.N.Chanchala v. State of Mysore*¹⁸. This case involved the issue of reservation of seats for various categories of persons and classification on universal basis under Articles

15. Supra note 4 at p. 3

16. Saurabh Jain, “Effectiveness of the Indian disability Law to enforce Human Rights of Persons with Disabilities”, *AIR (Journal)* Vol. 91 (April, 2004), pp. 118-127 at p. 122

17. AIR 1993 SC 477

18. AIR 1971 SC 1762 on page 1775

14 and 15(4) of the Constitution of India. But while delivering the judgement Shelat J. observed:

“...But an equally fair and equitable principle would also be that which secures admission in just proportion to those who are handicapped and who, but for the preferential treatment given to them would not stand a chance against those who are not so handicapped and are therefore, in a superior position. The principle underlying Article 15(4) is that a preferential treatment can validly be given because the socially and educationally backward classes need it, so that in course of time they stand in equal position with the more advanced sections of the society. It would not in any way be improper if that principle were also to be applied to those who are handicapped but do not fall under Article 15(4)....”

(emphasis supplied)

The Hon'ble Supreme Court made an effort to extend the equitable principle of preferential treatment under Article 15(4) to the persons with disability in the mainstream by giving them equal opportunity in the field of education.¹⁹ Seven years following the *Daya Ram Tripathi* ruling, the Apex court in a Public Interest Litigation filed by *National Federation of the Blind*²⁰ directed the government and the Union Public Service Commission to permit visually impaired eligible candidates to compete and write the civil services examination in Braille script or with the help of a scribe. The Court held, "If some of the posts in the Indian Administrative Service and other allied services, as identified by the committee can be filled from amongst the visually handicapped persons then we see no reason why they should not be permitted to sit and write the civil services examination." However, the court also emphasised that once recruited to the lowest level of the service the visually impaired person shall have no right to claim promotion to the higher posts if that particular post is not suitable for the visually handicapped person.

19. Supra note 14 at *ibid*

20. *National Federation of the Blind v. Union Public Service Commission*, AIR 1993 SC 1916

*Nandakumar Narayan Rao Ghodmare v. State of Maharashtra and others*²¹ was another significant case where, the Supreme Court recognised colour blindness as a disability and directed the state of Maharashtra to appoint the appellant within two months from the date of the order to the state public service. The appellant in this case was a person with colour-blindness who was not appointed to the state public service on the ground that he is disabled.

Apart from employment rights of persons with disabilities, the Pre-Disability Act era also witnessed other cases. One noteworthy case is that of *Godawari Bai v. DDA & others*.²² This is the first petition in which the court directed the respondent to allot a flat on an out of turn basis within three months of the deposit of the requisite amount to a disabled lady. Further, the court said that preference should be given to the petitioner in respect of the accommodation in the ground floor if possible.

The Apex Court in cases pertaining to granting compensation or disability pension has adjudicated considerably in favour of the aggrieved disabled petitioners. In *Lance Dafadar Joginder Singh v. Union of India and others*²³ setting aside the orders of the High Court, Kuldip Singh and B.P.Jeevan Reddy JJ. directed the government to grant disability pension to ex-army personnel from the date of discharge from the army treating him to have incurred 60 per cent disability. Further, the court also stated the if the arrears of disability pension is not paid to the appellant with the period of six months from the receipt of this order, then the appellant shall be entitled to 12 per cent interest from the date on the amount due.

21. JT 1995 (8) S.C. 156

22. (1990) supp. SCC 124

23. 1995 Supp(3) SCC 232. Civil appeal No. 4257 of 1993

In *Ramchandra Tandi and 30 others v. State of Orissa and others*²⁴ the State of Orissa refused to accord recognition and financial assistance to a school for the deaf and dumb in order to avoid unnecessary financial burden. Pasayat J. along with S.K. Mohanty J. while directing the State to grant recognition and financial assistance to the school within of its order said,

“We are perplexed, pained that the State has taken absolutely untenable stand of its financial instability and need for financial austerity. If austerity measures are to be taken, they are to be taken at elsewhere. It is common knowledge that large sums are spent in festivals, for celebrations... If we cannot provide assistance to 62 helpless deaf and dumb children, these are unnecessary financial extravagances. After half a century of independence, it does not befit the State to take plea of unsound financial condition to deny meager amounts needed for a few deaf and dumb children....Merely making welfare schemes would not be sufficient. Merely observing World Disabled Day or the like would serve no purpose, unless there is real concern for the handicapped, otherwise it would be same as discussing problems of famine ravished in star hotels, or discussing prohibition in a bar with drunkards sizzled with drinks...”

(emphasis supplied)

Apart from the above, a number of public interest litigations have also been filed where the court have asked for investigation of the ground level situation. In some cases guidelines on the living and treatment conditions, education, training and rehabilitation facilities. Particularly in cases of administration and proper direction of the mental asylums of Agra, Ranchi, Gwalior and Shahadra,²⁵ separate petitions were filed and the Court merely gave recommendations which were more or similar in each of the cases. In such cases the Court should have *suo moto* taken suitable actions and issued proper

24. AIR 1994 Ori 228, O.J.C. No. 5442 of 1993

25. *Rakesh Chandra Narayan v. State of Bihar* (AIR 1989 SC 348), *S.R. Kapoor and Others v. Union of India and Others* (AIR 1990 SC 752), *Supreme Court Legal Aid Committee v. State of M.P. and others* (AIR 1995 SC 204), *Aman Hingorani v. Union of India* (AIR 1995 SC 215)

directions to each of the mental hospitals within the country to abide by the court's guidelines and also instruct the respective governments to take necessary steps to initiate changes.

Thus it can be observed that the courts have made some very invaluable comments with respect to the rights of the persons with disabilities, particularly in the *case of Ramchandra Tandi*. But unfortunately all actions of the judiciary in this sphere can be termed as 'fire-fighting' in nature. They in most of the cases provided relief in individual cases but in majority cases did not bring about any revolutionary change. Again this attitude of the judiciary is mainly out of sympathy by doing good deeds instead of vindicating the rights of the persons with disability.²⁶

B. JUDICIARY AND THE RIGHTS OF PERSONS WITH DISABILITIES:

With a view to confer rights on the persons with disabilities with the greatest effect, the need is to *firstly*, equip disabled people with educational opportunities; *secondly*, ensure employment of the disabled people; *thirdly*, ensure easy and convenient access to all public places; and, *fourthly*, increase public awareness on disability issues.²⁷ In the post Persons with Disabilities Act period the Apex court has deliberated mostly on the provisions relating to employment and reservation under the Act. The cases have come up before them for non-compliance with the provision of the Disabilities Act. Here the attempt is to shed some light on the role of the courts, both the Supreme Court as well as the various High Courts, in shaping the rights conferred upon the persons with disabilities as well as the judiciary's contribution in transform and augmenting the concept of human rights of the persons with disabilities. The

26. *Supra* note 5 at p. 93

27. *Supra* note 6 at p. 22

emphasis shall be on the access, education, employment, social security and mandatory notification of schemes amongst others.

(a) Access for persons with disabilities:

Easy and convenient access to all public places is a very important right which is to be given to people with disabilities. It needs no mention that in order to even avail of various rights guaranteed under the constitution and the statutory provisions of the various enactments pertaining to disability rights, the conditions have to be created to enable the persons with disabilities to avail of those rights.²⁸ Broadly, the term ‘barrier free environment’ would mean removing obstacles and providing access to all. Access not only to justice in courts of law, but also to various other facilities such as public buildings, housing, medical and health care, educational institutions, sports facilities etc. In *PGA Tour, Inc. v. Casey Martin*²⁹, the United States Supreme Court held that a golf player suffering from degenerative circulatory disorder in one leg was entitled to relaxation in the rules of the game that required walking as long as there was no “fundamental alteration” in the character of the competition. The issue of access hence encompasses ascertaining means to overcome “environmental barriers”, “institutional barriers” and “attitudinal barriers”. The concept of a barrier-free environment is in fact premised on Article 7 of ICESCR that mandates “providing and modifying devices, services, or facilities, other changing practices or procedures in order to afford participation on equal terms”, including thorough installation of wheelchair ramps, elevators for people of mobility impairments, introduction of part-time work schedules for workers with severe conditions, availability of

28. *Ibid* at p. 45

29. 149 L. Ed 2d 904

readers for visual impairments, and sign transition for people with hearing impairments.³⁰

The strategy adopted in the persons with Disabilities Act, 1995 for the realization of positive rights is to mandate the government to prepare schemes through which it can be done. The PWD Act makes provisions to create a barrier free environment for all persons with disability and to encourage them to be fully participating members of the society. Hence under Section 30 of the Act, appropriate governments have been directed to prepare a comprehensive education scheme which may provide, amongst others, for transport facilities, supply of books, uniforms, grants of scholarships etc. Under Section 38, duty has been cast on appropriate government and local authorities to formulate schemes for ensuring employment and under section 42 schemes have to be made to provide aids and appliances to persons with disabilities. So far as the realization of these vital rights can occur if the proposed schemes are formulated, the absence of a scheme would need to be seen by courts as a ground for intervention. If Courts leave the choice of making schemes at the discretion of appropriate government and local authorities then one of the most potent rights guaranteed by the statute would be rendered nugatory.³¹

A celebrated judicial pronouncement after the enactment of the Disability Act was adjudicated in *Javed Abidi v Union of India*.³² The petitioner filed a writ petition seeking directions to the Union of India to implement the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 alleging, inter alia, that though the Act is intended to grant opportunities to the people with disabilities for their full participation but no effective steps have been taken by the government to implement the provisions. The petitioner prayed that the Indian Airlines be

30. Supra note 10 at p. 5

31. Supra note 6 at p. 45

32. (1999) 1 SCC 467, Writ Petition (C) No. 326 of 1997

directed to immediately provide for aisle chairs in every aircraft and ambulifts on all the airports. The main grievance of the petitioner before the court was that the Indian Airlines was not providing any concession to other categories of disabilities for their movement by air even though such concessions are being given to blind persons, who are also considered disabled persons under the Act. Appointment of the Chief Commissioner, State Disability Commissioners, constitution of co-ordination committees as well as executive committees was some of the other prayers in the petition. When a statement that the Act itself postulates for providing facilities to the disabled persons within the limits of economic capacity of the government was voiced by the then Attorney General, the court held that the economic capacity is a germane consideration while deciding the question as to whether all persons suffering from disability as defined under sec 2(i) of the Act should be granted concession like blind persons for travelling by air. At the same time the court said they cannot ignore the true spirit and objective with which the Act was enacted, thereby, providing concession to locomotor disability to the extent of 80 per cent and above for travelling by air within the country. Consequent to this case, the Indian Airlines announced that ambulifts and aisle chairs would be made available to people with disabilities at the major airports to start with and extend in a phased manner to other airports.

The order given in *Disabled Rights Group v. Chief Election Commission and others*³³ is one case of historic importance where a non-governmental organization filed a public interest litigation seeking the intervention of the Supreme Court to correct the wrong of the Election Commission of India in not providing adequate facilities for Persons with Disabilities to vote. The matter involved the rights of 45 million citizens of the country who were unable to vote effectively in various general and local elections with their dignity and sense of confidentiality in their vote intact, due

33. WP (C) No. 187 of 2004

to the non-availability of ramps, PWD-friendly voting machine (EVMs), PWD friendly security arrangements in the polling booths and identification of their PWD status in the electoral rolls. In this case, the petitioner approached the Chief Justice of India after several failed attempts of securing accessibility for disabled voters from the Chief Election Commissioner. Accordingly, the Chief Secretaries of the respective states were directed to coordinate with the chief election officers to ensure that wooden ramps are provided at the polling stations to enable the disabled persons to easily reach the polling stations to cast their votes at least in the cities and urban areas.

In spite of such judgements the concept of barrier free environment or right to access still remains a distant dream for the disabled. It is even more painful to see that although such directives have been spelt out by the Apex Court very little has been done to provide for aisle chairs or ambulifts in air travel. There have been many newspaper reports carrying the plight of children as well as elderly being ill-treated by the airlines staff and being manhandled at times. The problem again lies in the societal attitude or attitudinal barriers which is the basis of environmental barriers. Hence the need is to sensitise people, and courts here have a very vital role to play by not giving out judgements but along with giving directives for holding workshops regularly so that this concept of barrier free environment does not remain on paper but be a reality. The saddest part is perhaps the apathy of the NGOs working in this field. Most of them are biased and prefer to keep only those PWDs who do not have locomotor disability and hence would not require building ramps, specially designed handles, wider lifts, and specially designed toilets amongst others. The Courts must act *suo moto* and appoint special officers to impartially visit the NGOs and see that access is free for every person with disability. Accordingly the legislature must also make a specific law particularly on this aspect and assure a barrier free accessibility at all public places for the disabled lot.

But with all these hopes and suggestions, a recent judgement meted out by the Delhi High Court in *Javed Abidi v. Union of India and others*³⁴ is also worth mentioning. As a matter of fact this judgement has been a dampener in the movement for barrier free environment. The Court has resorted to the clichéd statement of economic capacity and development of the State to implement the provisions of Section 46 of the Act. The petitioner's grievance was that despite the provisions of Section 46, neither the appropriate Government nor the local authorities had taken any meaningful steps towards providing ramps in public buildings, adaptation of toilets for wheel chair users, braille symbols and auditory signals in elevators or lifts, ramps in hospitals, primary health centres and other medical care and rehabilitation institutions for the benefit of the physically challenged individuals visiting public buildings, hospitals, family health centres, medical care and rehabilitation institutions and other public places. Section 46 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 inter alia enjoins upon the appropriate Government and local authorities to provide for ramps in public buildings, adaptation of toilets for wheel chair users, braille symbols and auditory signals in elevators or lifts, ramps in hospitals, primary health centres and other medical care and rehabilitation institutions. The Court while deciding the writ said that:

“A bare perusal of the above would show that while there is an obligation on the part of the appropriate Government and local authorities to provide for what is stipulated in clauses (a) to (d) above, the obligation is limited to the economic capacity of the Government and the local authorities.....we allow this petition but only in part and to the extent that the respondents shall in keeping with the Section 46

34. WP(C) Nos. 812/2001, Date of order: 20.1.2008. On Request of Petitioners the Present Order in Writ Petition No. 812/2001 was also extended mutatis mutandis to Writ Petition Nos. 13781/2004 *Disabled Rights Group v. UOI and Ors.* and WP(C) No. 24125/2005 *Javed Abidi v. Govt of NCT of Delhi & Ors.* also by the same bench of Delhi High Court on 20.01.2008.

of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 take adequate steps within the limits of their economic capacity and development to provide for ramps in public buildings, adaptation of toilets for wheel chair users, braille symbols and auditory signals in elevators or lifts, ramps in hospitals, primary health centres and other medical care and rehabilitation institutions....”
(emphasis supplied)

The final order seems to have got diluted given the fact that the Court has accentuated its stress on “within the economic capacity of the state” ,as well as the Court did not find this judgement to be important /necessary enough to be reported to media or for inclusion in Digest. With the earlier decisions on disability accessibility this case had raised the hopes of being a progressive one. But the Ld. Court has failed to live up to the expectations.

It is even more interesting to note that in the 1999 ruling in *Javed Abidi's case*, the Supreme Court though did not interpret the import of the phrase “within the limits of their economic capacity and development”, but did seem to accept the defence at least partially. Hypothesising on this partial acceptance, it can be said that the governments shall not be allowed to use financial constraint as a complete justification.³⁵ Almost a decade later it can be logically expected that the court shall be more responsive but the decision is not up to scratch. At a stage where we are looking at the judiciary to remedy the defects of the Act, the judiciary's resort to the much criticized provision is neither acceptable nor welcome. The court's decision has definitely proved to be setback for setting aside the economic capacity and development criterion. Thus the Courts must be more perceptive and instead of highlighting a flawed provision it should take steps to put forward a more remedial approach.

35. *Supra* note 5 at p. 98.

(b) Educational opportunities:

Education is a social right that is intimately connected to the exercise of many other human rights. For example, education is important for the enjoyment of the right to work, right to political participation, and for the exercise of right to culture. Education supports greater autonomy and freedom of participation in all aspects of society. Failure to access education and training prevents the achievement of economic and social independence and increases vulnerability to poverty leading to what can become a self-perpetuating, inter-generational cycle.³⁶ The Constitution of India guarantees right to education to all children till the age of 14 years (Article 21 A). Earlier, the Courts had treated the right to education as a part of the Right to life and liberty guaranteed under other provisions of the Constitution (Article 21). It needs to be remembered that this is a general right, and perhaps could be perceived as an attempt to make the State responsible for the education of all children till they reach a certain age.

36. The right of every child to education is proclaimed in the Universal Declaration of Human Rights and has been forcefully reaffirmed by the World Declaration on Education for All. This right is also recognised in Article 13(1) of the ICESCR, which says, 'The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.' The CEDAW Convention also addresses the gender-based discrimination in relation to education and enjoins State Parties to ensure that the women and girls receive education on the basis of equality with men. Article 10 of the Convention says: 'States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education...' The CRC addresses education in two articles: Article 28, which focuses on access to education and Article 29 about the aims and content of education. In the context of children with disabilities, Article 23 places a clear obligation on the States Parties 'to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.' The Committee on the Rights of the Child in General Comment No. 1, outlines the functions of Article 29(1), in which it 'emphasizes the indispensable interconnected nature of the Convention's provisions.' It establishes that 'Article 29 (1) is much more than an inventory or listing of different objectives which education should seek to achieve.' It makes an encompassing analysis of the right to education, which takes within its sweep the provisions listed in Article 23 for children with disabilities. For details visit <http://nhrc.nic.in>.

In a number of cases, the Supreme Court of India has considered the right to education as an important facet of right to life. In *Mohini Jain v. State of Karnataka*,³⁷ the Supreme Court held, 'the right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education.' Similarly, a five-Judge Constitutional Bench of the Supreme Court in *Unnikrishnan J.P. and Others v. State of Andhra Pradesh and Others, Union of India*³⁸ held, 'the right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the Directive Principles in Part IV of the Constitution.' In this case the Court had the occasion to also examine the extent to which claim to free education can be ascertained. The Court clarified that, '(a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.' The Court added that a number of vulnerable groups are denied this right on facetious reason. It is only if such reasons are not accepted as defences by the judiciary when 'persons with disabilities' assert their rights and the promise made under Section 26 becomes a reality.

In the previous Chapter it has been witnessed that that the provisions relating to education are contained in Chapter V of the Persons with Disabilities Act, 1995. Section 26 enjoins appropriate governments and the local authorities to ensure that every child with disability has access to free education in an appropriate environment till he attains the age of 18 years. It is also endeavour to promote the integration of students with disability in the normal schools. Along side this statutory emphasis is the social fact of normal schools denying admission to 'persons with disabilities' on the reasoning that they lack

37. AIR 1992 SC 1858

38. (1993) 1 SCC 645

the infrastructure and personnel to teach such children. These facilities would not be created in ordinary schools unless they have students with disability. Acceptance of the above reasoning is thus a negation of the statutory mandate and it is here that courts have a crucial role to play. The reality is that one of the largest groups of the total disabled population is that of mentally challenged children falling into various categories such as imbeciles (IQ from 0-25), trainable mentally challenged (IQ from 25-50), educable mentally challenged (IQ from 50-70), the dull (IQ from 75-85), dyslexic children and emotionally challenged children. Despite this fact, schools deny admission to children with disabilities on the reasoning that they lack the infrastructure and personnel to teach such children. Such avoidance of disabled students on one pretext or the other is a flagrant violation of the statutory mandate. The courts possess the power to authoritatively direct schools and government to fulfill the mandate of the Act and ensure that inclusive education happens both in form and substance.³⁹ Often, the provisions of the Persons with Disabilities Act are not put into operation completely which drives the parents of children and young adults with disabilities to come up to the Court for redressal. A huge number of them seek orders for reservation in higher and professional education. In sharp contrast, very few cases are filed for intervention at the primary education levels.

In the case of *National Federation of the Blind v. Government of NCT of Delhi and Others*,⁴⁰ the Delhi High Court has held that ‘...the purposes of the Act would be defeated if free education is provided only up to class 10 and not up to the age of 18 years. Since in the latter age, he/she may be able to complete the school education up to class 12.’ The Court, therefore, struck down a rule laid down by National Capital Territory of Delhi.

39. Supra note 6 at pp. 27-28

40. (CW 6456/ 2002, decided on 06.11.2003)

Appreciating that persons with disabilities must have equal access to all forms of education through a variety of models, Section 27 of the Act is modeled on human rights approach and enables persons with disabilities to all such measures that are required for the effective enjoyment of their right to education. Mainly, the Act recognizes that skilled manpower be made available for special schools and integrated schools for children with disabilities. In this respect Section 29 casts a duty on the appropriate Governments to, set up sufficient number of teachers training institutions and lend a hand the national institutes and other voluntary organisations to build up teachers' training programmes specialising in disabilities so that necessary trained manpower is available for special schools and integrated schools for children with disabilities. Sections 30 and 31 delineate the special measures to create the concept of appropriate educational environment guaranteed in Section 26. Section 30 further mandates that special provisions such as transport facilities, removal of architectural barriers in schools, supply of books, uniform and other materials to children with disabilities to encourage them to go to school and to pursue basic education be made available. Although the Act catalogues a comprehensive range of measures necessary to allow equal participation in all aspects of an educational pursuit, the disabled continue to face numerous obstacles on account of a negative mindset and poor information about the Act itself.⁴¹

41. For example, one Anka Toppo aggrieved on being denied the right to take the examinations for MBBS final year on losing sight by the All India Institute of Medical Sciences (AIIMS), approached the NHRC. The Respondent was of the opinion that 'in view of the severe visual loss suffered by Shri Toppo, it would not be possible for him to work in the medical profession.' After great persuasion by the NHRC and on exposing the Respondent to numerous examples of blind people successfully pursuing medical profession, the Respondent finally agreed to take steps to examine the petitioner for the MBBS course by offering a modified methodology of examination. In the light of the experience of this case the NHRC at its sitting on 28 May 2001 expressed the view that the Medical Council of India should perform a similar exercise so that the same facility and system is available in other medical institutions of the country as well. For details see *Anka Toppo v. AIIMS*, No.1754/30/2000-2001.

*National Association for the Blind & Others v. Central Board of Secondary Education & Others*⁴² is a landmark case in which the Delhi High Court directed to 'grant an extra hour to blind students (appearing for a written examination): meaning thereby that they shall be given 4 hours instead of 3 hours given to normal students.' Respondent No.1 was also directed to permit the school from which a blind candidate is to appear to choose amanuensis, subject to observance of the relevant rules. Due to paucity of time, the Court did not allow the prayer in respect of modification of the mathematics paper and supply of question papers in Braille. However, it directed that 'so far as the future examinations are concerned, proper curriculum and examination system shall be fixed keeping in view the objectives of the Act.' Similarly in *Dhawal S Chotai v. Union of India & others*⁴³ the petitioner was suffering from "cerebral palsy", a disability which affects the normal functioning of bones, muscles and joints and also the communication skills. Despite such handicap the Petitioner had passed B.Com Examination as also passed the Foundation Course for the Chartered Accountants course conducted by the Institute of chartered Accountants of India. He wanted to appear for the Intermediate Examination known as "Professional Education-II". At the time of taking his B.Com Examination, at his request, the University of Mumbai allowed him three extra hours to write his papers in view of his aforesaid disability. However, the Institute of Chartered Accountants of India when requested by him had agreed to give extra time of half-an-hour only for writing his papers. Aggrieved by such communication the petitioner filed the petition. The Institute of Chartered Accountants contended that in a situation like this, at the most one hour could be granted and such decisions are taken on the basis of past resolutions of the Institute. On behalf of the petitioner, the attention of the court was invited to the definition of 'cerebral palsy' as defined in section 1(2) (e) of the PWD Act,

42. CWP No 1015/2001 & CM No. 1712/2001.

43. AIR 2003 Bombay 316

1995 and to the Regulations of the HSC Board which defines spastics as those suffering from cerebral palsy. The court observed that,

“Chapter V of the PWD Act 1995 makes beneficial provision in the matter of education. Section 27 directs the appropriate Government and local authorities to make schemes and programmes for non-formal education of children with cerebral palsy. The overall tenor of Chapter V of the Act is to make all necessary facilities available to the persons suffering from these disabilities even in the matter of education... the Institute of Chartered Accountants of India is a statutory authority and would fall amongst ‘other authorities’ under Article 12 of the Constitution of India and would be bound by Article 21 of the Constitution which provides for right to life which means right to have a decent life. The right to receive education and facilities for it will have to be read in it. ...”

(emphasis supplied)

Accordingly, it was held that the Institute of Chartered Accountants of India ought to give the petitioner similar facility to write the examination for three extra hours as was given to him for the B.Com examination. This flows from the responsibility of that Institute as an authority under Article 12 read with Article 21 of the Constitution. The Court took into account the fact that the petitioner would write with his own hands, had earlier required three hours extra and that his disability is mentioned as 50% in the disability certificate issued by All India Institute of Physical Medicine and Rehabilitation, Mumbai. The High Court further directed that the petitioner be allowed three hours extra to write his examination and all future examinations for the Chartered Accountants course and that the Examination Centre will provide all co-operation to the petitioner in continuing with the examination for three extra hours.

Section 39 of the Persons with Disabilities Act imposes yet another positive obligation on the State by mandating ‘all Government educational institutions and other educational institutions receiving aid from the Government,’ to ‘reserve not less than three per cent seats for persons with

disabilities.’ This Section of Persons with Disabilities Act remained under controversy for sometime by its placement under the Chapter on Employment, instead of Education. The decisions of the Gauhati High Court in *Binita Senapati v. State of Assam*⁴⁴ and the Calcutta High Court in *Deputy Secretary, Department of Health and Family Welfare v. Sanchita Biswas*⁴⁵ have already been discussed in Chapter 5 of this work. In both the cases, persons with disability filed petitions seeking the initiation of *Section 39* of the *Persons with Disabilities Act, 1995*. *Section 39* of the Act enjoins that there be 3% reservation of seats in government and government aided educational institutions. The Gauhati High Court turned down the petition on the ground that no mention of reservation of seats is made in the education chapter of the statute. *Section 39* has been included in the employment chapter. This necessarily implies that if any reservation was being contemplated it was being done in relation to the non-teaching posts in such institutions. Further, the 3% reservation has been extended to all persons with disability. This would mean that even persons with mental retardation can demand admission in medical college. As such a consequence was evidently undesirable; the court held that the appropriate governments had not committed any illegality, unconstitutionality or arbitrariness in not providing the reservation for with disability. The Calcutta High Court, on the other hand took a different view of the matter. The High Court was required to pronounce on the reservation policy of the West Bengal government. The absence of reservations for persons with physical handicap in medical colleges, the Court found to be an infringement of both the *Persons with Disabilities Act* and the Constitution. This ruling of the Court, first delivered by a single judge was later upheld by a division bench. The court also provided the modalities to be adopted in selecting candidates from the PWD category.⁴⁶

44. AIR 2000 Gau 1

45. AIR 2000 Cal. 202

46 *Supra* note 5 at pp. 96, 97. The view of the Calcutta High Court also finds support in the judgement pronounced by the Andhra Pradesh High Court in the case of *National Federation of*

In Delhi High Court this question came up for hearing before a single judge in the case of *Naveen Kumar A. v. University of Delhi*,⁴⁷ wherein an important question relating to admission in B.E. Course on the basis of reservation due to disability under Section 39 of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*. The petitioner in this case appeared in an entrance test and secured 5016 rank out of 25 thousand. The same contention of reservation being meant for employment and not educational institutions again came up for consideration and it was held that in terms of Section 39 of the Act such a reservation had to be made and all government institutions and other institutions receiving aid from the government were directed to make such reservations. The Court observed that a physically challenged person can be admitted to a B.E. Computer Course subject to his being found medically fit to pursue the course.

⁴⁸ Justice S. N. Kapoor while delivering his judgement said that:

“In so far as the question of applicability of Section 39 of the Act is concerned Section 39 undisputed falls in Chapter VI which starts with the heading “Employment’. The learned counsel for the respondent is also right that there is another Chapter V which relates to education.....If it is seen from the point of view of a good draftsman who is to draft a legislation, the counsel for the respondent may be absolutely justified in submitting that it should have been drafted the way he suggested. But we see occasionally examples of bad drafting which simply cause some confusion. But bad

the Blind v. Registrar, Andhra University (WP No. 10234 of 1999); the Madras High Court in *J.Rajkumar (Minor) v. Secy. Educational Deptt., Government of Tamil Nadu* (WP No. 36981, decided on 30-12-2002); The Rajasthan High Court in *Vijai Kumar Agarwal (Dr.) v. State of Rajasthan* (AIR 2001 Raj. 261) held that under Section 47 persons with disabilities were entitled to reservation of three per cent seats in post graduate medical courses. The Court agreed that Section 39 ought to have been placed under Chapter V but its effect could not be allowed to be nullified simply because instead of placing it under Chapter V, Parliament had placed it under Chapter VI of the Act.

47. CWP No. 4657/2000 decided on 24th November 2000

48. The Gujarat High Court in *Palak Kailashchandra Jain v. Union of India* (S.C.A. 7410/2000 dated 29.11.2000), held that a person with disability may be admitted in the MBBS course only after ascertaining that he/she will be in a position to undergo the medical course and will be able to discharge the functions of at least a physician.

drafting cannot and should not debar the clear intention of the legislator and if intention appears to be clear and loud it has to be accepted irrespective of the bad drafting.”

(emphasis supplied)

This observation of the Delhi High Court presents the true facet of poor drafting which has caused harassment to many a disabled person and questioned the efficacy of a law that had intended to be for the benefit of the persons with disabilities rather than being a litigious issue. Unfortunately after such an insightful evaluation, another single judge of the High Court in the case of *Rekha Tyagi v. Vice-Chancellor, University of Delhi and Others*⁴⁹ took a contrary view and referred the matter to a larger bench. The Division Bench in that case which heard the matter agreed that reservation was not permissible as Section 39 would apply only to posts and not to seats in educational institutions.

Finally, the Supreme Court in *All Kerala Parents Association v. State of Kerala*⁵⁰, while settling this issue said that the inclusion of the Section 39 under the chapter on employment is due to an error in drafting and affirmed that reservation of 3% of available seats in government educational institutions for students with disabilities should be applied. On the issue of inclusion of the Section 39 of the PWD Act 1995, under the chapter on employment, the Supreme Court stated,

“We fail to understand as to how and on what principles of construction, the High Court has given a construction to the provision of Sec. 39 not only by doing violence to the language of Sec. 39 but also rewriting the provisions of Sec. 39..... section 39 unequivocally deals with the question of reservation of seats for persons with disabilities in educational institutions of the Government, as well as institutions receiving aid from the Government. The language is clear and unambiguous, which itself indicates the legislative intent. It is well settled that when the language of any statutory provisions is clear and unambiguous, it is not

49. 2001 V AD (DELHI) 746

50. (2002) 7 SCALE 198

necessary to look for any extrinsic aid to find out the meaning of the statute inasmuch as the language used by the Legislature is the indication of the legislative intent. We fail to understand as to how and on what principles of construction the High Court has given a construction to the provisions of section 39 not only by doing violence to language of section 39 but also rewriting the provisions of section 39. If section 39, as has been constructed by the High Court, would be interpreted to mean it relates to employment merely because the provision occurs in the Chapter-VI dealing with employment then the "educational institutions" would have to be interpreted to mean the Government post and the question of receiving aid from the Government would not arise at all. Natural and ordinary meaning of words should not be departed from unless it can be shown that legal context in which the words are used requires a different meaning. We have therefore no hesitation to come to the conclusion that the High Court was wholly in error in construing section 39 of the Act to mean it relates to reservation in Government employment and not in relation to admission of students with disabilities in the Government institutions as well as educational institutions receiving aid from the Government. Further, reservation in Government employment is provided under Section 33 of the Act. We, therefore, set aside the impugned judgment of the Kerala High Court and hold that *section 39 deals with the reservation of seats for persons with disabilities in Government educational institutions as well as educational institutions receiving aid from the Government, and necessarily therefore the provisions thereof must be complied with*".

(Emphasis supplied)

Discarding the error in drafting, the court affirmed the reservation of 3 per cent of available seats in government educational institutions for students with disabilities.⁵¹

In *Dr. Vijay K. Agarwal v. State of Rajasthan & others*⁵² Dr. Vijay K Agarwal, is an orthopaedically handicapped person applied for admission to Post Graduate Medical Course but was refused admission against

51. In *Raman Khanna (Dr.) v. University of Delhi* [(2003) 106 DLT 97] the Delhi High Court also supported the decision of *Sanchita Biswas' Case* (AIR 2000 Cal 202)

52. AIR 2001 Rajasthan 261

the reserved category for the physically handicapped as under the University Ordinances there was no reservation provided for the physically handicapped person. Accordingly, he filed a writ petition before the Rajasthan High Court praying for a direction that he may be admitted against mandatory reservation to be provided by Section 39 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Before the High Court, the University informed the Court that the relevant Ordinances had been amended to provide for reservation for the physically handicapped persons but since such amendment had prospective effect, no benefit could be given of the same to the petitioner. The High Court held that whether reservation of 3% seats for admission to post-graduate medical course is mandatory even if such reservations are not provided in the admission ordinances.

Nevertheless, *Dr. P.D. Benny v. State of Kerala & others*⁵³ is one of the instances where it was held that reservation not applicable to PG courses. Here the appellant who was afflicted with polio causing 60% handicap in his legs graduated in medicine from Calicut University and registered as a medical practitioner with the Medical Council of India after completing his internship in 1995. In April 2001, the State Government published a prospectus for admission to the Post Graduate Degree/Diploma Courses in Medical Sciences. While issuing this prospectus, reservations were made for various categories, like Scheduled Castes, Scheduled Tribes, Ex-servicemen and Service candidates. However, no reservation was made for the physically handicapped persons. The appellant submitted his application form. He did not claim the benefit of any reservation. However, in June, 2001, he filed a petition under Article 226 of the Constitution complaining that the State Government had failed to carry out its statutory obligation under the provisions of the 1995 Act. This action was arbitrary and violative of Article 14 of the Constitution. The single judge before whom the matter came up

53. AIR 2003 Kerala 208

dismissed the Writ Petition. On appeal, the matter was placed before the Full Bench (3 judges) and after hearing the respective contentions of the appellant and the State, the High Court did not consider it appropriate to interfere as it was a matter of policy and held that the decision has to be taken by the competent authority after examining the factual position. However, in the matter of reservations for the physically handicapped the High Court made the following observations:-

“The State cannot be compelled by the issue of a writ or direction to make a reservation of more than 3% seats for handicapped persons. In all educational institutions for admission to graduate course in medical college because number of seats in each speciality at each of the colleges is ... Though the provision requires the Government to reserve not less than 3% seats in all educational institutions except those, which are not receiving any aid from it....Reservation of even one seat would exceed the prescribed percentage. It would lead to reservation of more than 3% to 100%. Still further, even if it is assumed that the pooling of seats is permissible, the reservation of 3% shall not be workable. Still further, the stipulation in S. 33 has also to be kept in view. Both the provisions of S.33 and S. 39 have to be harmonized.... The total number of seats for this subject in all the five colleges is 26. Even if it is assumed that the seats can be put together, reservation on one seat out of 26 would be in excess of the percentage prescribed under the provisions of S. 39. Since such reservation would not be in strict conformity with the provisions of the statute, no mandamus forcing the Govt. to do so can be issued.... Persons with handicaps even if imparted the training may not be in a position to fully carry out all the onerous duties expected of medical officers with postgraduate qualifications.”

(emphasis supplied)

But this observation of the Court that “...*Persons with handicaps even if imparted the training may not be in a position to fully carry out all the onerous duties expected of medical officers with postgraduate qualifications*” is totally unacceptable. Where we believe that the disabled persons are in reality specially abled and a person who could undergo five years of rigorous study to

complete his M.B.B.S. and could also successfully complete his internship before applying for post graduation, how can that person not be able to carry out the duties of medical officers with post graduate qualifications. The explanation put forward by the Court in not allowing reservation is surely a setback to the rights of the disabled. The decision of the Rajasthan High Court in *Dr. Vijai Kumar Agarwal's case* is in the right track. But, in *P.D. Benny's Case* this attitude of looking upon the disabled persons as worthless is a definite setback in securing their rights. While the judicial decisions must be exemplary in securing the rights of the vulnerable sections of the society they must not underestimate their worth as human beings.

There has also been some uncertainty about who would constitute an 'educational institution receiving aid' from the government within the context of reserving 3% seats for persons with disabilities. In *Harsha Shivaram v. National Law School of India*⁵⁴ the Karnataka High Court has held that this reservation would apply only to government institutions or institutions receiving aid from the government and has no bearing on self-financed institutions such as National Law School of India. In *Social Jurist v. Government of National Capital Territory of Delhi & Others*,⁵⁵ the High Court of Delhi has taken a broad view while defining 'aid' and has held that the land received on concessional rate to establish a social institution would constitute aid by the Government. The Court directed the Delhi Development Authority (DDA) to take 'appropriate action' against 265 'recognized, private unaided' schools in the Delhi region, which had been allotted land by the DDA at concessional rates on condition they reserve a 25% freeships quota for disadvantaged children, for breach of that condition.

Undoubtedly, the right to education has been elaborated from a human rights perspective in the Persons with Disabilities Act. There are

54. XC III DLT 813 (2001)

55. CW No. 3156 of 2002

numerous examples of positive jurisprudence as well. One of the difficulties that could be attributed to the full realization of the right to education is the stringent criteria by which access to an entitlement is subject to a disability certificate awarded by a medical board. In that respect, the Persons with Disabilities Act is obsolete and reflects a bio-centric approach.⁵⁶

Similar criteria also disadvantage many other members of the weaker sections. In a PIL *Social Jurist v. Union of India and others*⁵⁷, the petitioner pointed out that admissions were denied on irrelevant grounds like non-availability of birth certificate, non-availability of ration card, non-availability of affidavit of date of birth duly attested by the executive magistrate, non-availability of disability certificate in the case of disabled child, etc. The view taken by the Respondent, i.e. the Government and the Court only reflects the entrenched understanding based on a bio-centric model, which tends to see disability within the confines of the body of an individual. The medical criteria are used for gate keeping and as a means to check corruption.

A perusal of the above case judgements reveals that though in most cases the courts have not as yet begun to evolve a jurisprudence of disability rights. The issues raised are being decided on a case to case basis and sympathy rather than entitlement is determining the decision of the courts. Yet, if courts are to perform an activist role in the realization of disability rights particularly educational rights, the need for jurisprudence of these rights cannot be gainsaid. On a close examination of the statute, the judicial interpretation of the various provisions and formulations in the Person with Disabilities Act is of crucial importance in the realization of the various rights.⁵⁸ Further the courts must take a leap to assure the existence of the opportunities under Section 39 to educational institutions and remove every ambiguity associated with the

56. Supra note 19

57. C.M.6736/2000 in C.W. 3956 of 2000 (Delhi H.C.).

58. Supra note 5 at p. 95

implementation of this particular provision which has caused much harassment to the disabled lot. The various High Courts in this matter seem to opine in a different manner from the other. But the correct view is that a general outlook should be adopted as the matter in issue is concerned with rights of a very vulnerable section of the society and the State's effort to give a lift to their position. It is an all accepted truth that education is the sole way to upliftment and the judiciary's confusing approach could well play havoc with the interests of the persons with disabilities.

(c) Employment Opportunities:

Promotion of equal opportunities and creating a non-discriminating environment for disabled people are the main objectives of the Persons with Disabilities Act that aims to protect the rights of persons with disability. One such important area is employment. Several cases have been filed in the Courts on the issue of employment. A large number of cases are filed by disabled people for non-implementation of the provisions of the Act. For example, one such area is non-creation of disability quota while recruiting new employees. Related issues are applicability of the Act on various bodies, distribution of the posts amongst people with different disabilities and dismissal from service on acquiring disability. Courts have also been called upon to intervene in wide array of cases such as those filed against the transport corporations, colleges, universities, banks, the Armed forces, UPSC, railways etc.⁵⁹

Shapiro points out that, unlike other minorities, disability is one minority, anyone can join at any time as a result of sudden automobile accident, a fall from stairs or a flight, cancer or some other disease. Hence a normal person can become disabled even during the course of his or her employment. And so this head may be discussed as, firstly, rights of the PWD to secure

59. Supra note 2

employment; and, secondly, rights of the persons acquiring disability during employment.⁶⁰

(i) *Rights of the PWD to secure employment:* Employment opportunities whether be in the public or private sector is restricted due to a dearth of jobs and the volume of jobseekers enormous. In such a backdrop persons with disabilities in particular find it extremely difficult to get a suitable job even if they are competent of performing a particular kind of job.⁶¹ In so far as the rights of this kind are concerned, Section 33 of the Persons with Disabilities Act provides for 3% reservation of vacancies for persons with a disability, where 1% each is to be reserved for persons with (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability and cerebral palsy. According to Section 36, where in any recruitment year any vacancy under Section 33 cannot be filled up due to non availability of suitable candidates with disability; such vacancy is to be carried forward to the succeeding recruitment year. The reserved seats can be filled by persons other than the persons with disabilities only when suitable candidates in this category available for that vacancy for the successive recruitment year. Under Section 41, the Act also provides incentives to public and private sector players who ensure that at least 5% of their work force is constituted of PWDs.

So far as reservation in appointment to public offices is concerned, there has been a mixed response. The judiciary has examined not only the legality of concept of the concept but also its consistency with the right of equality. It has been mentioned earlier also, in *Indra Swahney v. Union of India*⁶² that the apex court considered the legality of a reservation in favour of disabled persons, who are not explicitly covered under Article 16 of the Constitution. The legislature as well as the Indian judiciary, has justified the

60. *Supra* note 6 at p. 30

61. *Ibid*

62. *Supra* note 17

introduction of special measures to guarantee *de facto* equality. In *Dr. Jagdish Saran & Ors. v. Union of India*⁶³ Justice Krishna Iyer held that even apart from Article 15(3) and (4), equality is not degraded or neglected where special provisions are geared to the larger goal of disabled persons overcoming their disablement consistently with the general good and individual merit. But unfortunately experience has shown that these provisions are hardly given effect to. This is due to the reason that a general misconception prevails amongst non-disabled that persons with disabilities are incapable of doing any job with precision.⁶⁴ Such kind of perception brings out discriminatory treatment in relation with persons with disabilities when selection is to be made. More often, it would be seen, the employer would conclude that even if the reservation was made, the employer could not find suitable persons under this category for a particular job. It would thus become easy for the employer not to choose anybody even if the advertisement has provided for such reservation. The attitude of the employer is creating difficulties in the implementation of the provision.⁶⁵ In *Life Insurance Corporation of India v. Chief Commissioner of Disabilities, Ministry of Social Justice and Empowerment and Others*⁶⁶, the view taken by LIC was that a person with 45% disability was incapable of performing his duties as a peon. The Delhi high Court in appeal from the decision of the Chief Commissioner found no substance in it and accordingly directed LIC to employ the person with disability.

People on grounds of disability have encountered rampant discrimination due to inadequate safeguards in the law. Hence it is necessary that the law must comprehend that disability is an accepted part of the human experience and it does not in any way fade away the rights of individuals to independently enjoy self-determination, make option, contribute to society,

63. (1980) 2 SCC 768.

64. *Supra* note 6 at p. 8

65. *Supra* note 6 at p. 31

66. 101 (2002) DLT 434

trail meaningful careers and enjoy full inclusion and assimilation in economic, political, social, cultural and educational systems of Indian society. With the advancement of technology and advent of supports, as may be provided through supported employment, the notion of equating 'disability' with inability to work' is erroneous and outmoded. There should be a presumption of ability that a person can achieve employment and other rehabilitation goals regardless of the severity of his or her disability, if appropriate services and supports are to be made available. There should also be presumption that an individual can benefit in terms of 'employment outcome' from vocational rehabilitation services—unless it is demonstrated by clear and convincing evidence that such individual is incapable of benefiting from the vocational rehabilitation services in terms of an 'employment outcome'.⁶⁷

The medical fitness criteria for entry into and retention of government service out rightly discriminates people on grounds of disability.⁶⁸ It must also be stated in all fairness here that discrimination exists not only with respect to State entities—even private organisations fail to recognise the potential of PWDs and, hence reject them as candidates for employment. In this context it is also essential to put forward two other aspects of the problem:

- (a) The definition of disability does not provide for all kinds of disability. There are some types of disabilities that may render persons with disabilities unable to undertake any job. But, there are some other kinds of disabilities that must be brought within the definition, since persons suffering from such disabilities could still perform certain kinds of jobs; and

67. *Supra* note 6 at pp.31-32

68. *Ibid*

- (b) Under section 38 of the Act, the Government is required to identify jobs that could be performed by persons suffering from various kinds of disabilities.⁶⁹

There have been a number of cases where questions have come up before the court as to whether a person suffering from a particular disability, would be in a position to undertake a particular job. The leading case on the point is *Govt. of NCT of Delhi v. Bharat Lal Meena and Anr.*⁷⁰, the High Court of Delhi clarified that in the light of the notification dated 31 May 2001 by the Expert Committee of the Ministry of Social Justice and Empowerment, the post of physical education teachers had not been found unsuitable and hence, was not exempted. In short, this Notification provided that any post that is not suitable for reservation for disabled persons had to be explicitly exempted from reservation under Section 32 and that the identified posts, under whichever nomenclature, will be considered as identified. In short it was held that persons with disabilities can be appointed as Physical Education Teachers once they have passed the qualifying examination and undergone the requisite training and the Government cannot by a subsequent clarification take away that right which has already accrued to them. Similarly, the Andhra Pradesh High Court in *Perambaduru Murali Krishna v. State of A.P.*⁷¹ has ruled that visually challenged persons who were selected for the post of Secondary Grade Teacher/School Assistant but were later deprived of their legitimate right owing to their disability, were entitled to a supernumerary post as Secondary Grade Teachers.⁷² Another case worth mentioning is that of *Ravi Kumar Arora v. Union of India and Union Public Service Commission (UPSC)*,⁷³ the petitioner, Ravi Kumar Arora, who had low vision, cleared Civil Services Examination 2001, under the general category, with a rank of 325 and received intimation for

69. *Ibid* at p. 30

70. (2002) 100 DLT 157

71. WPs Nos. 3997 and 4041 of 2002, decided on 20-12-2002.

72. *Supra* note 6 at p. 9

73. (2004) 111 DLT 126.

joining the foundation course. However, he was declared unfit for all Services on account of "substandard vision". The Committee appointed in terms of order dated 02.07.1999 to identify the posts had identified various posts for even visually impaired persons of Group 'A' and Group 'B', but that was not given effect to. A new Committee was set up in the year 2003. The lawyers argued that as per the rank of the petitioner, he would have been entitled to the Indian Postal Services or possibly a superior Service. The petitioner is therefore entitled to be appointed as per his merit and seniority based on the rank. The petitioner is also liable to be treated as having joined in service along with his batch-mates. The court directed to appoint the petitioner to the post in pursuance to the Examination of Civil Service 2001 with all the consequential benefits within a maximum period of one month from the date of this order. In *Krishan Kumar v. Secretary, Govt. of NCT of Delhi and Ors* ⁷⁴The petitioner claimed that he is a physically handicapped person and is entitled to the benefits of Section 33 of the Persons with Disabilities Act. His qualifications are MA (Physical Education) from Choudhary Charan Singh, Haryana Agriculture University Sports College, Hissar. When Delhi Subordinate Services Selection Board (for short 'DSSSB') advertised posts for inviting applications for the post of various teachers, including four posts of Physical Education Teacher (PET) for physically handicapped persons, the petitioner also applied for the said post in the aforesaid reserved category. He emerged successful in the said selection and was issued appointment letter dated 23.12.1999. The petitioner joined as PET at Government Boys Senior Secondary School, Shakarpur, Delhi on 13.1.2000. On 23.5.2000, he was transferred to GBM School, Sultanpuri, Delhi. While working in this school, the Deputy Director of Education (Admn. Branch), Govt. of NCT of Delhi issued him a show-cause notice dated 21.12.2000 stating therein that the petitioner was not eligible to be appointed to the post of PET as a handicapped person and, therefore, as to why his services should not be terminated as it was detected that he was not possessing the

74. WP (C) No. 4576 of 2005 Pronounced on : December 20, 2007

educational qualifications required for the post. Subsequently, the respondent vide orders dated 26.4.2004 terminated his services on the ground that the petitioner did not possess the essential qualification prescribed for the post in question and the qualification possessed by him, i.e. Bachelors of Sports Humanities, cannot be equated with the qualifications prescribed for the post as per the recruitment rules. The respondents were also of the opinion that the petitioner was disabled to the extent of 65%, thus, rendering him incapacitated to impart training to the students. The Court held that termination of services of the petitioner is clearly unjust, illegal and arbitrary and also ordered for his reinstatement. The decision in *Bharat Lal Meena's Case* was reiterated and the petitioner herein was duly selected against the post. Almost more than 11 months after he joined the services as PET he was issued show-cause notice the matter kept on lingering and the termination order was issued after four years from the first show cause notice. The Court opined:

“The termination of services of a handicapped person, like the petitioner, after his due selection on the aforesaid grounds amounts to adding insult to his injuries. It is not a case where the petitioner had suppressed either his qualifications or the extent of his disablement. With open eyes these aspects were examined by the respondents before consideration of the petitioner's candidature. Not only he was treated to have been eligible for the post with requisite qualifications, but after the selection process he was also considered fit for the said post. Taking a somersault thereafter and grounding him on the premise that he is himself a physically challenged person and, therefore, cannot give physical education to the students is inadmissible. It was too late in the day to deny his eligibility when at the time of considering his candidature the respondents allowed him to participate in the selection treating that he is having requisite qualifications for the post as per the recruitment rules.”

(emphasis supplied)

Thus it can be seen that the *case of Bharat Lal Meena* has proved to be landmark judgement in securing the employment rights of the disabled persons particularly where they could have been deprived of their particular employment rights as a result of their disabilities. In fact while the court appears to be little confused regarding reservations and allowing disabled candidates to pursue higher education, its stand on the right to employment is very firm.

As discussed earlier, the Constitution of India views affirmative action measures as a means to achieve equality and non-discrimination, particularly in the matter of work. This view has determined the policy towards persons with disabilities as well. The Government of India by way of an Executive Order, issued as early as in 1977, had introduced 3% reservation in Group C and D posts for persons with disabilities. The Persons with Disabilities Act has also included affirmative action as a strategy in the area of employment. Section 33 provides for a 3% reservation in favour of persons with disabilities, except persons suffering from mental illness and intellectual disability, in all establishments belonging to the Central and State Governments and Local Authorities. The reservation provided under this section is to be distributed equally to the extent of 1% each among three groups of disabled comprising respectively of the blind or having low-vision, the hearing impaired, and those with loco-motor impairments and cerebral palsy. This is a very important legal provision in the area of ensuring equality of opportunity in public employment.⁷⁵ It is interesting to note here that even before the Disability Act came into force, the government and other state functionaries had provided for such a reservation by issuing necessary administrative instructions. The Disability Act has now given legislative mandate to such administrative instructions. But in spite of such administrative instructions coming into

75. Chapter 8, International and National Law on Selected Economic Rights, in *National Human Rights Commission Disability Manual*, (National Human Rights Commission, New Delhi, 2005), pp.124-155 at p.131.

existence much prior to the passing of the Disability Act in 1996, question marks still arose as to the translation of the provisions of the statute book into reality.⁷⁶

Two meaningful decisions of the Delhi High Court are worth mentioning here where the court had to step in to enforce the provisions of the Act. . One is *Pushkar Singh & Ors. v. University of Delhi*,⁷⁷ and the other is *Smt. Shruti Kalra v. University of Delhi & Ors.*⁷⁸ In the first case, the Executive Council of the University of Delhi had decided that there would be, without relaxation in required qualifications, 3% reservation for blind and orthopaedically handicapped candidates in teaching posts in the University and Colleges. The petitioners contended before the Delhi High Court that in spite of Resolution of the Executive Council of the Delhi University, there was no reservation made for teaching posts, inasmuch as, no appointment of the physically handicapped had been made except in Dr. Ambedkar College. The

76. Supra note 6 at p. 33. Also see *Dr. Raman Khanna v. University of Delhi and Ors.* (106 (2003) DLT 97)

77. 2001 (II) Apex Decisions (Delhi) 749

78. 2001 (II) Apex Decision (Delhi) 582. See *Jaswant Singh v. State of Haryana and Anr.* (Civil Writ Petition No. 15196 of 2001, decided On: 06.05.2002) where implementation of Section 33 by the Punjab Government was questioned. According to the petitioner, in the year 1997-98 applications were invited for direct recruitment against the 18 posts of Quality Inspectors, out of which one post was reserved for physically handicapped person. He applied for the post of Quality Inspector under the physically handicapped quota and appeared in the written test conducted and was also short listed for interview. But prior to the interview the respondent authorities issued a notice in the newspapers scraping all the interviews on the pretext that a ban has been imposed on all the recruitments. The Court opined that it is the mandate of Section 33 of the Act that 3% posts have to be kept reserved for the handicapped such as blind persons or the persons with low vision; the persons who are handicapped on account of hearing impairment and for locomotor disability or cerebral palsy. The statutory compliance is supposed to be done by every department of the Government and the Corporations/Boards. It is no excuse to say that since a ban has been imposed therefore, it is not in a position to fill the posts of backlog vacancies. If there is ban, that will only apply prospectively to those vacancies which are already lying vacant with the respondents. The entire approach on behalf of the respondents to the matter is erroneous. In these circumstances, the writ petition was allowed and directions given to the respondents to start the process of filling up the vacancies of the posts of Quality Inspector falling under 3% quota of the persons with disabilities, reserved as per Section 33 of the Act.

petitioners individually and collectively with other similarly situated candidates made repeated representations even to the Vice-Chancellor. The Vice – Chancellor also gave appropriate directions to adhere to the said resolution. However the colleges continued with their apathy. The petitioners knocked the doors of justice as a last resort by filing the petition on 12 July 1995 in the Delhi High Court. The way the petition progressed in the court clearly demonstrated the lack of will and lackadaisical approach of the Executive council which was provided legislative mandate by the Disability Act as well. This was clearly visible as most of the advertisements issued by the colleges for filling up the teaching posts produced along with the writ petition filed by the petitioners did not even mention about such reservation. In some of the advertisements although it was mentioned that 3% seats are reserved for visually and orthopaedically handicapped candidates, the conduct of the respondent colleges showed it was more to complete the formality with no intention to follow the same. They came up with a host of excuses from time to time in not implementing the Resolution. The High Court while allowing the Writ petition directed the respondents to comply with the Resolution of the Executive Council of the Delhi University with effect from the date of Resolution so that the number of posts which have to be reserved for visually and orthopaedically handicapped persons are calculated subject wise and after ascertaining the number of posts, steps should be taken to fill up those posts from amongst the handicapped persons by adopting the regular selection procedure. It was further provided that if such posts have already been filled up by candidates other than the physically handicapped persons, the University would create superannuity posts so as to give effect to the reservation made in favour of blind and orthopaedically handicapped candidates. The court observed that, to give effect to the theme of Asian and Pacific Decade of Disabled Persons 1993-2002 the Indian Parliament enacted Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Therefore, respondents were bound to give 3% reservations to persons with disabilities in view of their

own resolution as well as the provisions of the Disability Act. The outlook of the respondents forced the court to make the following observation:

“The narration of the aforesaid events shows how callous approach is shown by the respondents and nothing concrete has happened even when the university took the decision for reserving posts for visually and orthopaedically handicapped persons more than six years ago and the Parliament passed law to this effect more than four years ago. When it comes to showing sympathies with disabled persons, we come out with all kinds of slogans and catchwords. We admit that social discrimination is the most significant problem experienced by people with disabilities and we should eradicate it.....We realize the necessity of creating a more accessible and a more caring society for people with disabilities. But when it comes to real action, we forget that people with disabilities have the right to be both equal and different. In fact, this case amply proves that physical and attitudinal barriers are more limiting than limbs that are paralysed and that other people’s attitudes and not one’s own disability, whether it came from birth or later, are the biggest barriers.”

(emphasis supplied)

The case of Shruti Kalra was a case of discrimination meted out to a disabled person by non-disabled. Shruti Karla, even without any vision/proper vision since birth, not only pursued her studies but also passed her Senior Secondary Examination with distinction in Accountancy as well as in Economics. She joined B.A.(Hons.) Degree Course in Instrumental Music and topped the Daulat Ram College of the Delhi University in all the three years. She was also awarded All India Post Graduate Scholarship for Instrumental Music by the University of Delhi. She topped in M.A. (Instrumental Music) and was awarded Lala Jugal Kishore Jagdish Prasad Memroial Prize. She also completed here M.Phil from Delhi University in first division. In 1995, two posts of Lecturer (Instrumental Music) in Shyama Prasad Mukherjee College (for women) of the Delhi University were advertised. Shruti Kalra applied for one of the posts and was interviewed by the Selection Committee but was not

selected. She approached the Delhi High Court with the Writ petition which was allowed on the ground that the selection procedure was not proper as the mandate for reservation policy was ignored. It was further directed that the Shruti Kalra would be considered for the post of Lecturer in Instrumental Music keeping in view the mandate of the Disability Act, 1995 and Delhi University Resolution dated 16th July, 1994 which provided that at least one disabled person would be appointed in each college in the academic year 1994-1995.

Amongst the recent cases, reference ought to be made of *Ms. Anubha Bhargava v. Union of India and Others*⁷⁹. The petitioner herein is one of those 130 employees, working in different offices of the respondent-Airport Authority of India all over India, whose services were terminated, inter alia, on the ground that all these persons were appointed on ad hoc basis without any advertisement or calling candidates from Employment Exchange or following recruitment rules, which are required for any public appointment. There were approximately 200 vacancies and as 50% of these vacancies were reserved for those terminated employees, the Court expressed that it was sufficient to reassure those petitioners to have a fair chance. Advertisements were subsequently inserted for the purpose of appointment which would require the candidates to appear for a written test. The petitioner was a receptionist working with the respondents who was visually impaired and had been appointed on an ad hoc basis and had served the respondents for two years prior to the termination. The respondents, in the advertisement, had not reserved any post for visually handicapped persons. What was pointed out in the said advertisement was that only two posts were reserved for physically handicapped persons, one for Orthopaedically handicapped and one for those disabled suffering from hearing impairment. Therefore, she could not even apply in the quota reserved for such persons under Section 33 of the Disability Act. The respondents wanted her to compete in the general category along with other

79. WP (C) No. 21966/2005. Date of Order 4.12.2007.

persons whose services were terminated as well as outsiders, who are otherwise able persons, physically and mentally. The Petitioner sought exemption from subjecting her to any written test on the basis of the quota reserved for the visually disabled/physically challenged person under Section 33 of the Persons with Disabilities Act, 1995. The grievance raised in the application is that the respondents had violated the provisions of Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. . Therefore the petitioner sought the court's direction that the respondents comply with the provisions of the Disability Act and keep a post vacant for the visually challenged persons till the final disposal of the petition. The Court awarded a very commendable judgement in exempting the petitioner from appearing in the written test due to her visual impairment as well as provided that one vacancy out of the vacancies advertised, thus, shall be earmarked for the petitioner. It would be up to the respondents to take this vacancy from the general quota prescribed and adjust it against the quota reserved for physically handicapped persons after undertaking the exercise as to how many posts under the said quota are still available. Alternatively, it would be open for the respondents to create a supernumerary post for the petitioner immediately, to be adjusted against the disability quota. The petitioner shall not be entitled to any salary for the interim period. The appointment given shall be treated as a fresh appointment without giving any benefit of the past service rendered. But it is unfortunate that such a landmark judgement has been concluded with the remark that "Since the order is passed having regard to the peculiar facts, as emerged above, it be not treated as a precedent." Such remarks of the judiciary surely mitigate the effect of the judgement which was otherwise so progressive and encouraging in the protection of the right to livelihood of the persons with disabilities.

A very sensitive case involving the Constitutional provision concerning special benefits for the backward classes as well as Section 33 of the

Persons with Disabilities Act, 1995 was decided by the Apex Court in *Mahesh Gupta and Others v. Yashwant Kumar Ahirwar and Others*⁸⁰. In this case question arose as to the interpretation of an advertisement in the light of a circular of the State of Madhya Pradesh as regards recruitment of handicapped persons to some posts. The State took recourse to a special drive for filling up the vacant posts in the reserved category candidates, viz., Scheduled Castes, Scheduled Tribes and Backward Classes. In a circular letter issued on 29.03.1993, it was stated: "SUBJECT: SPECIAL DRIVE FOR FILLING UP RESERVED POSTS FOR HANDICAPPED PERSONS." The State Government had reserved 3% posts (1% for blinds and 2% for other physically handicapped persons) for disabled persons. The State Government had also extended certain exemptions to persons with disabilities through various notifications. It was brought to the knowledge of the State Government that this quota for the handicapped persons is not being fulfilled due to absence of knowledge about reservation and procedural complications. Yashwant Kumar Ahirwar, the petitioner was not only a handicapped person but also belonged to the reserved category but was not selected. He approached the Administrative Tribunal. The Administrative Tribunal by a judgment and order dated 27.11.1999 opined that he had no right of appointment on the post of Assistant Teacher (Science) having not been selected by the Selection Committee. On perusal of the advertisement published in the *Rojgar Nirman* dt. 26th May, 1994 (Ann. P.8), it appears that the respondent had advertised 8 posts for the reserved category for scheduled castes and 8 posts for the handicapped persons. The respondents showed the reserved category separately in the body of the advertisement, though the heading of such advertisement is misleading that applications are also invited from the candidates belonging to the category of S.C. & S.T. but the body of the advertisement leaves no room for doubt that 8 posts were got reserved for the candidates belonging to the Scheduled Castes

80. Appeal (Civil) 3984 of 2007, date of judgement 30.8.2007. Civil Appeal No 3984 OF 2007 [Arising out of SLP (Civil) No. 16291 of 2004] With Civil Appeal Nos. 3985 and 3986 OF 2007 [Arising out of SLP (Civil) Nos. 19391 and 20321 of 2004].

and 3 posts for handicapped persons without having any caste wise reservation. The Court not only set aside the judgment of the High Court but also direct that the persons whose services have been terminated Furthermore the court also directed that they should be paid back wages as also other service benefits. It also directed that If all the vacancies meant for Scheduled Castes, Scheduled Tribe had not been filled up, the State may consider appointing the petitioner. If he has already been appointed, the State may consider the desirability of creating a supernumerary post and continue his service therein. The Court observed:

“Disability has drawn the attention of the worldwide community. India is a signatory to various International Treaties and Conventions. The State, therefore, took a policy decision to have horizontal reservation with a view to fulfil its constitutional object as also its commitment to the international community. A disabled is a disabled... They constitute a special class... The advertisement, however, failed to mention in regard to the reservation for handicapped persons at the outset, but, as noticed hereinbefore, the vacant posts were required to be filled up for two categories of candidates; one for Scheduled Castes and Scheduled Tribe candidates and other for handicapped candidates. Handicapped candidates have not been further classified as belonging to Scheduled Castes, Scheduled Tribes and general category candidates. It is a travesty of justice that despite the State clarified its own position in its order dated 1.01.2004 and stated that the posts were vacant under the handicapped quota but it completely turned turtle and took a diagonally opposite stand when a contempt petition was filed. The State completely lost sight of its commitment both under its own policy decision as also the statutory provision.” (emphasis supplied)

Thus the judgment will go a long way in securing reservations for persons with disabilities. But it is disheartening that use of a term like “handicapped” has been repeatedly used in the judgment. While the trend is not to use derogatory words which lowers the dignity of a persons with disability. When we are

repeatedly emphasising the positive and exemplary role of the judiciary, it is expected that the judiciary must put forward a clear mandate to address the persons with disabilities respectfully.

Hence, to secure the rights of the disabled to secure employment, the role of the judiciary has been at some points very encouraging while at some it failed to live up to its expectations. In fact in cases of reservations under Section 33 the court has in almost every case upheld the rights of the disabled persons. The courts have believed that the persons with disabilities constitute a special class whose interest must be protected at every cost. But at the same time the decision of the court to leave some of the judgements unreported surely dilutes the effect of its efforts towards vindicating their rights. Similarly long and ever going litigations regarding employment matters, as witnessed in *Pushkar Singh's Case* is also not desirable. The Court must also be very careful with the language it uses to address the persons with disabilities. Since the disabled persons have always been looked down upon and made a subject of ridicule, the court must take all care to see that their self esteem is never hampered. Hence the judiciary must play an even more pro-active and progressive role to protect the rights of the persons with disabilities as well as leave no stone unturned to see that their judgements are communicated to the masses in every feasible manner.

(ii) *Rights of the persons acquiring disability during the employment:* The right to have just and favourable conditions of work also embraces the right to continue in employment unless terminated or retrenched by due process of law. It has been mentioned earlier also that disability may strike a person at any time. An analysis of the different causes of disability includes accidents, diseases, crimes, wars etc. as some of the factors leading to disability of a person at a later stage in life. So far as the employment prospects of a person who acquires any disability during the employment, Section 47 has been enacted to take care

of such situation. Section 47 mandates in clear terms that no establishment shall dispense with or reduce in rank the employee, who acquires the disability during his service. Even if he is not suitable for the post he was holding, as a result of the disability, he is to be shifted to some other post with the same pay scale and service benefits.⁸¹ The intention of Section 47 is clear and unambiguous namely, not to dispense with the service of the person who acquires disability during his service. The objective of the enactment is to provide proper and adequate opportunities to the disabled in the field of education, employment etc. it is obvious that those who are already in employment should not be uprooted when they incur disability during the course of employment. Therefore, their employment is protected even if the destiny inflicts cruel blow to them affecting their limbs. Even if he is unable to discharge the same duties and there is no other work suitable for him, he is to be retained on the same pay scale and service benefits so that he keeps on earning his livelihood and is not rendered jobless. But notwithstanding this provision, experience shows that proper respect has not been given to this provision particularly due to lacuna in the definition of disability. If an employee becomes incapacitated to perform his job because of the disability, which may be acquired by him, but is not covered by Section 2(i) then provisions of Section 47 may not be strictly applicable in his case. This definitely goes against the spirit of the Act. This is yet another reason for amending the definition of disability.⁸² The role of the judiciary may be assessed through a string of cases. There have been various decisions of the English Courts which have highlighted these rights. In *Collins v. Royal National Theatre Board Ltd.*⁸³ where the court of appeal stated that Sections 4, 5 and 6 which of the English Disability Discrimination Act, 1995 prohibited an employer to discriminate against a PWD by, among other things, dismissing him. The semi-skilled carpenter who had become disabled in the course of

81. Supra note 10 at p. 9

82. Supra note 6 at p. 41, 43

83. (2004) 2 All ER 851. Also see *McAuley Catholic High School v. C* (2004) 2 all ER 436: Cited in *Ibid*

employment in this case was therefore entitled to relief in that the employer was duty-bound to find him a suitable alternate employment within the establishment. In another case, that of *Archibald v. Fife Council*⁸⁴, a street sweeper who became disabled and was consequently sought to be demoted, but because of unavailability of posts at a lower grade, was dismissed, approached the courts for justice. It was held that the Employment Tribunal, that had earlier upheld her dismissal, was to reconsider the case on the ground that the employer was mandated by the English Disability Discrimination Act, 1995 to prevent dismissal by even transferring her “upwards”.⁸⁵

One of the earliest cases on the issue is that of *Anand Bihari & others v. Rajasthan State Road Transport Corporation*⁸⁶. This case reveals how the Supreme Court presented a scheme for relief to drivers disabled during the course of employment by striking down their termination and directing provision of alternative jobs, retirement benefits and additional compensation even though such disability was not covered by *Workmen's Compensation Act, 1923* nor were the drivers entitled to retrenchment compensation under the *Industrial Disputes Act, 1948*. In fact, this case was decided much before the PWD Act, 1995 came into force.

The next important case of the pre Act era is that of *Narendra Kumar Chandla v. State of Haryana and others*⁸⁷. In this case a petition was filed under Article 32 in the Supreme Court of India. Chandla was aggrieved on account of being reduced in rank on acquiring disability during service. The Supreme Court, however, at that stage refuse to entertain the petition under Article 32. The petitioner therefore approached the Punjab and Haryana High Court, who dismissed his petition. Chandla again filed a leave petition in the Supreme Court. Though the Supreme Court, by its order, appointed him as

84. 2004 UKHL 32

85. *Supra* note 80

86. 1991 (1) SCC 731; 1991 (1) SLR 575

87. (1994) (4) SCC 460

L.D.C. (clerk), which was lower in rank but protected his salary in the pay scale of Rs. 1400-2300. However, he was deprived of his right to promotion to the next higher grade forever. No doubt to a great degree the Supreme Court removed the injustice and protected his livelihood but it did not lay down the law prohibiting discrimination in the matter of career enhancement on acquiring disability during service.⁸⁸

In the post Act period a number of cases have come up where the Court has directed that when a person is injured during the course of employment and as a result is struck by some disability, the prime concern should be on the welfare of that person and a suitable employment opportunity must always be given.⁸⁹ But notwithstanding the judicial dictum as well as the mandate of Section 47 of the Persons with Disabilities Act, in *Baljeet Singh v. DTC*⁹⁰ serving regular employees of the Delhi Transport Corporation who had acquired disability during service were discharged from service by way of premature retirement. They challenged the action of the employer on the ground of protection available to them under Section 47 of the PWD Act, 1995. Though separate Writ Petitions were filed, a common judgement was delivered by the High Court. The petitioners challenged the act of the employer by alleging that in some cases the kind of disability suffered did not entitle the employer to impose premature retirement and in cases where the disability incurred incapacitated the employees from doing the same job that they were performing, alternative jobs could be given to them. The nature of disability from which the several petitioners suffered ranged from falling sick and developing chest infection, injury sustained in right eye while repairing bus, injury sustained on right ankle as steering wheel came out while driving heavy vehicle, injury sustained on spinal chord due to fall from roof of house, injury sustained by

88. Supra note 6 at p. 41

89. See *Phool Chand v. DTC* (CWP No. 4100/1995 decided on 28th April 1998, *Rampal v. DTC* (2001 VII AD (DELHI)461, *Inder Das v. DTC* (CWP no. 3700/1997 decided on 31st July 1998

90. 2000 (1) AD (DELHI) 88

conductor while pushing bus alongwith other passengers, multiple fractures sustained on right leg due to impact from opposite vehicle, and injury (fracture) sustained in right leg after bus rammed into a tree. In all of these cases the Medical Officer of the Corporation declared the employees as medically unfit for service and premature retirement orders were issued which was challenged in the Writ Petitions. Allowing the petitions the Court quashed the orders of premature retirement and directed payment of wages to all employees from the time such payment had been stopped. The petitioners were also to be treated as in continuous service and wherever necessary alternative jobs are to be provided. The High Court of Delhi held:

‘when the objective of enactment is to provide proper and adequate opportunities to the disabled in the field of education, employment etc. it is obvious that those who are already in employment should not be uprooted when they incur disability during the course of employment.’

(emphasis supplied)

Likewise, in *Virender Kumar Gupta v. Delhi Transport Corporation*⁹¹ where a conductor of DTC, after he met with an accident which rendered him unfit to perform the duties of a conductor, was prematurely retired. However, after his treatment he was certified to resume duties and fit for the desk job holding that mandate of Section 47 was clear and unambiguous and his services could not be dispensed with even upon acquiring disability. The writ petition was allowed and it was directed that he be taken back to service.⁹²

An additional issue to the access to employment is protection of wages of the persons with disabilities in employment. In *Satyabir Singh v. Delhi*

91. 2002 IV AD (DELHI) 876. Also see *Vijender Singh v. DTC* [(2003) 105 DLT 261], where the Delhi High Court ordered reinstatement in a suitable alternate post for an employee whose services were terminated only on the ground that he became physically challenged while in service.

92. *Supra* note 6 p. 44

*Transport Corporation*⁹³ the court opined that on acquiring disability, such a person is to be retained in the same or equivalent job and in any case be paid salary in the same pay scale as Section 47 of the Act prohibited reduction in rank of such an employee. Such a claim was sustained, in any case, even when compensation was paid to the petitioner under any other Act or scheme. Similarly, Delhi High Court in *Delhi Admn. v. Presiding Officer*⁹⁴ while dismissing the contention that minimum wages were not to be paid to disabled workers in a workshop established for their welfare opined

“if the wages of an employee who incurs disability during employment are protected under Section 47 without taking into account his output, then I see no reason whatsoever why the disabled whose quality and quantity of work are not questioned should be denied dignity of labour by paying them less than the minimum wages merely on ground of their being disabled”.

(Emphasis supplied)

*Kunal Singh v. Union of India*⁹⁵ is a shining example of the Indian jurisprudence where the Supreme Court granted both the benefit of invalidity pension and continuation of the service under Section 47 of the Persons with Disability Act. Applying the doctrine of *generalia specialibus non-derogant*, the court in this case held that a social beneficial enactment dealing with disabled person intended to give them equal opportunities, protection of rights and full participation. In this case, the Appellant joined as a constable in the Special Service Bureau (SSB) and later lost his leg and was discharged from his duties with an invalidity pension under Rule 38 of the Centre Civil Services (CCS) (Pension Rules), 1972. He challenged his discharge, which was upheld by the High Court on the ground that he had been permanently invalidated on the basis of medical opinion and as such there were

93. 2002 IIIAD (DELHI) 1028

94. (2003) 108 DLT 119

95. AIR 2003 SC 1623 .

no posts in the SSB open to him. An appeal was made before the Supreme Court where the appellant took a fresh ground under Section 47 of the Persons with Disability Act, which protects persons who acquire disability while in employment from termination. The language of Section 47 was found to be self-explanatory in as much as it cast a statutory duty on the employer to accommodate its employees who acquire a disability while in their employment in alternate posts or to create a supernumerary posts till a suitable post is available. The Supreme Court held that the Rule 38 of CCS (Pension Rules), 1972 does not override Section 47 of the Persons with Disabilities Act, as the doctrine of *generalia specialibus non derogant* would apply. This doctrine can also be found in the Act itself in Section 72. Consequently, it does not take away the right of the appellant to claim continuation of his services under the Persons with Disabilities Act, while at same time availing the parallel benefit of the 'invalidity pension' under the Pension Rules. Further the court emphasised that Section 47 contained a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires disability during the service. The Apex Court came down heavily on the Union of India by affirming,

"It must be remembered that a person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer."

(emphasis supplied)

It must be elucidated here that Section 47 does not absolutely suggest to an injury sustained during the course of employment. The employee may acquire disability in natural course or by disease or accident, but in all these cases the benefit of Section 47 will be available to him or her. In *Ranbir*

Singh v. DTC ⁹⁶ it was held that benefits of the enactment, and entitlements under Section 47, available irrespective of where the employee contracted the disability.

In yet another case of *Union of India v. Sanjay Kumar Jain* ⁹⁷, where the respondent while working in Group-C post of the Railways applied for promotion to Group-B post. He qualified in the written test and was directed to undergo medical examination as per the rules of the Indian Railway Establishment Manual (in short the 'Establishment Manual'). Passing of the medical test is a requirement before the candidate is called for viva voce test. He was considered unfit as he may become visually handicapped in future. The respondent was therefore not called for viva voce test. He challenged before the CAT the order whereby it was indicated that he was not to be called for viva voce test as he had been declared medically unfit. It was held that while considering the case of the respondent sub-sections (1) and (2) of section 47 were not kept in view. Attracting the interpretation of Section 47 of the Act, the Apex Court held,

"Section 47 only permits the appropriate government to specify by notification any establishment, which may be exempted from the provision of Section 47. It does not give unbridled power to exclude any establishment from the purview of Section 47; the exclusion can be only done under certain specified circumstances. They are (a) Issuance of a notification and (b) Prescription of requisite conditions in the notification."

(emphasis supplied)

In *Shri Dilbagh Singh v. Delhi Transport Corporation* ⁹⁸, the order of the respondent DTC, prematurely retiring the petitioner from its

96. 2002 (97) DLT 19

97. (2005) 1 PDD (CC) 405, Civil appeal no. 5173 of 2004 arising out of SLP © No. 16541/2003

98. WP(C) No 6182/2003 Date of Decision : August 1st, 2005

services, was quashed. The DTC was directed to re-instate the petitioner in its services within a period of six weeks from today, to a suitable post, of equivalent rank, and grant continuity of service, in regard to matters such as pay revisions, allowances, increments, seniority, etc. with arrears for the period.

Questions have also arisen as to whether a person who has become disabled during employment be ineligible for further promotion. In *Shri Suhas Vasant Karnik v. Union of India and Others*,⁹⁹ the Bombay High Court had the occasion to examine whether person suffering from blindness could be declared ineligible for seeking promotion. The High Court held that the respondent is not entitled to discriminate amongst the members of staff merely because some of its members are physically handicapped. It further held that the respondent is under constitutional obligation to encourage participation of the visually handicapped persons in activities of the Bank on par with other members of the staff and consider the cases of visually handicapped for promotion fairly and equitably. Having regard to the judgement of the Supreme Court in *National Federation of the Blind v. Union Public Service Commission and Others*¹⁰⁰, it allowed the petitioner and all other similarly situated persons to appear in the promotional examination and participate in the process of promotion. Similarly, in *Union of India and Ors. v. Suresh Kumar*¹⁰¹ the respondent was denied promotion for his disability. But the Ld. Judges A.K.Sikri and Vipin Sanghi opined that no promotion shall be denied to a person merely on the ground of his disability; provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section. It is, therefore, clear that if the respondent is a disabled person

99. W.P.1368 of 1993 dated 17.8.1995

100. (1993) 2 SCC 411.

101. WP (C) No. 9443/2007

under the Disability Act, his promotion cannot be ignored merely because he has acquired the aforesaid disability.

There is a provision in the Disability Act to accord exemption to establishments from employing disabled. This is possible only after a set procedure given in Section 47(2), which states,

“Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provision of this Section.”

No guidelines have been evolved nor any rules included in the implementing rules for deciding a case for exemption. In such a situation, there is a danger of arbitrary operation of this proviso jeopardising the future prospects of a disabled employee which has also been reiterated in *Suresh Kumar's Case*. The provision added by the Court shall prove to be cumbersome while treating this case as a precedent.

In *Union of India and Anr. v. Jagmohan Singh and Ors.*¹⁰² the question that arose for consideration was as to whether 3% reservation under Section 33 of the Persons with Disabilities Act, 1995, in the public employment provided in favour of the physically handicapped persons would be available to them even for promotions as well. The contention of the petitioners to deny him promotion overlooking the provisions of the Act was not taken very happily by the Court. The Judges said that they fail to understand as to how when a physically handicapped person like the respondent gets promotion in the normal course would be able to discharge the function of that post satisfactorily, but would not be able to do so if he is promoted to this post under the reservation quota. Ironically, this was the argument of learned counsel for the petitioner

102. WP (C) Nos. 11818 and 13627-28/2004 (*Union of India thru G.M. Northern Railways, WP(C) No. 11818/2004 Chairman, Railway Board , WP(C) No. 13627-28/2004 v. Jagmohan Singh, WP(C) No. 11818/2004 Northern Railway Physically Handicapped Employees Welfare Association and Ors. , WP(C) No. 13627-28/2004*)

before the Tribunal that in the normal course, despite being handicap, the respondent herein was eligible to be considered in the selection for. If selection by promotion to such a post under normal channel is available to a person like the respondent and his handicapped-ness, in that eventuality, does not come in way of discharging his duties, the reason for not providing reservation on this ground is contradictory in terms and cannot be sustained. Such a justification for denying reservation was totally irrational and arbitrary and depicts closed and narrow minded approach of the petitioner.

Thus so far matters of promotion are concerned the Court has not shown prejudice to deny promotion, but at the same time reliance on the proviso to Section 47(2) is not acceptable. As emphasized earlier also such decisions prove to be little difficult for the beneficiaries of the Act when it comes to treat them as precedents in future situations. Hence it is always hoped that the judiciary will play a more positive role in setting aside provisos and concentrating on the beneficial aspect of the legislation so that more and more people are benefited

In addition to the above another facet which needs to be highlighted is the application of the Act in the private sector particularly the application of Section 47. Almost all the cases discussed above have been in the public sector undertakings and The Persons with Disabilities Act as well as the Supreme Court directives are applicable in that sector. The objections to the application of the Act in the private sector are twofold. One, that the section sought to be invoked i.e. Section 47 has a title that says that this provision applies to government employment. The other is that the legislation is applicable to establishments which have been defined U/S 2 (k) to mean corporations, established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government, or a local authority or a government company as defined in Section 617 of the Companies

act, 1956 and includes Departments of Government.¹⁰³ The issue came up before the Court in *Shree Satish Prabhakar Padhye v. Union of India and others*¹⁰⁴ where a division bench of the High court decided that the Act applied both to the public and the private sector as is evident from various provisions of the Act. The decision came at a time when the petitioner, who was employed as a trained telephone operator for 23 years, filed a petition against his termination on the ground of acquiring a disability. The petitioner was not provided with a sound proof cabin and was subjected to extremely noisy surroundings in the respondent's factory. The Petitioner contended that due to constant loud manufacturing noises his sense of hearing became gradually impaired and ultimately he had to undergo medical treatment leading to termination of services. The petitioner contended that his right to employment had been violated and also contended that the term "establishment" in the Act applies to the private sector also and thus he was entitled to the provisions under Section 47 and so his services could not be terminated. Consequently the Court ruled that the Act applied to

“...both private as well as public, Governmental as well as local, including Corporations established under an Act of the Centre or the State. It therefore, excludes only the smaller which would be, at best, sole Proprietary Concerns and partnership Firms which are not Corporations established under any Acts.”¹⁰⁵

(emphasis supplied)

Hence it can be seen that the judiciary has been upbeat about restoring the rights of the persons who have encountered disability while being in employment. However it always need to be stressed that in cases of employment, the judiciary must bring the various labour laws like the industrial Disputes Act, The Employees State insurance Act and the Workman's

103. Dr. N. Vasanthi, “Disability and Labour Laws in India”, *Supreme Court Journal*, vol. 7 (2006), pp. 11 -17 at p. 14

104. MANU/MH/1077/2005

105. Supra note 102

Compensation Act into a straight line along with the Persons with Disabilities Act, so that all indistinctness are set aside and greater number of people are actually empowered and not merely compensated for their disabilities. The Court should be careful in interpreting the various legislations and concentrate more on harmonious construction so that disabled are assured of their rights of not being discriminated, as a human rights issue and not out of charity or their being medically unfit.

(d) Mandatory notification of schemes:

The approach taken on in the Act for the recognition of positive rights is to mandate the Government to organize schemes through which it can be realized. Thus, under *Section 30* of the Act, appropriate Governments have been directed to set up an inclusive education scheme which may make available, inter alia, for transport facilities, supply of books, uniforms, grant for scholarships, etc. Under *Section 38*, a function has been cast on the appropriate Government and local authorities to devise schemes for ensuring employment and creating a barrier-free environment and by virtue of *Section 42*, schemes have to be made to provide aids and appliances to persons with disabilities. The comprehension of these imperative rights can only come about if the projected schemes are formulated or alternatively, courts see the absence of a scheme as a ground for intervention. If courts leave the choice of making schemes to the discretion of appropriate government and local authorities then one of the powerful rights guaranteed by the statute would be rendered negatory.¹⁰⁶ Pointless to mention, due to the apathetic functioning of the State machinery, the provisions of the Act were notified with effect from November 4, 2003 only after public interest litigation in the Delhi High Court was filed. The impact that judicial interpretation can have on this formulation has come to the fore in the decision of the Allahabad High Court in *National Federation of Blinds, U.P.*

¹⁰⁶ Supra note 5 at p. 97

*Branch v. State of U.P.*¹⁰⁷ where the petitioner's request for concessional tariffs in allotment of land under Section 43 of the Act was rejected on the ground that in the absence of any scheme for such allotment under the provision, no such benefit could be provided to him. To correct the folly of the administrative machinery, the Court directed the framing of a scheme in three months' time, and also noted that:

“It was the obligation of the State Government and all local bodies including the development authorities, to frame a scheme and notify the same. If they had not done so, they cannot take advantage of their own wrong.”

(emphasis supplied)

The Delhi High Court in *Delhi Development Authority v. Chief Commr. for Disabilities*¹⁰⁸ while directing allotment of a flat in terms of Section 43 of the Act noted with dismay that there was no scheme to provide allotment to persons with disabilities in accordance with the mandate of Section 43. The Court therefore observed that

“The object and intent of the legislature in enacting Section 43 of the Act cannot be defeated by non-framing of the scheme in terms of the mandate of the section”.

In accordance with the ruling of the Court, the Delhi Development Authority has notified schemes for the persons with disabilities that came into effect in October 2004.¹⁰⁹

107. AIR 2000 All 258

108. CW No. 4300 of 2003 decided on 11.7.2003

109. Supra note 10 at pp. 11-12. Also see *Indian Council of Legal Aid and Advice v. Union of India & others* [(2000) 10 SCC 542] where the Apex Court elucidated the following words: “Article 21 and 41 of the Indian Constitution cast a duty on the state to make provisions for treating and preventing disability, within its economic capacity so that a disabled person may be able to lead normal life. The Supreme Court opined that the scheme for periodical check-ups and treatment of visually disabled persons admitted to blind schools run by Delhi administration or voluntary organisations formulated by Union of India should be adopted by all states and the

Similarly, in a recent case of *Sanjay Kumar Jha v. AIIMS and Another*,¹¹⁰ the petitioner herein is a disabled person as he suffers from blindness. All India Institute of Medical Sciences (AIIMS) has a big campus known as Ayurvedigyan Nagar Campus. Having felt the need to have a local telephone booth for the visitors and residents etc., AIIMS has constructed a shop at the said campus from where local telephone booth is operated. On 8.2.1994, AIIMS had allotted the said shop to the petitioner for running a public telephone booth in response to his application for allotment thereof. This allotment was made on licence basis and licence deed was executed. As per the conditions of the said allotment licence deed, the allotment was for a period of 11 months renewable by mutual consent. There are other usual terms contained in the licence deed. Further extensions were given from time to time. During the currency of the said licence agreement, AIIMS inserted tender notice as per which, tenders were invited to run the said STD/ISD local phone booth. The petitioner got alarmed from this tender notice as it was clear from the aforesaid move that the AIIMS wanted to go with open tender and had invited bids from the general public for allotment of the said booth. Aggrieved by this action of the AIIMS, the petitioner filed the instant petition inter alia, on the ground that being a disabled person he was conferred with various rights under the Disability Act one of which was that he was entitled to preferential allotment of land at concessional rates by the Government at all levels and therefore, the respondents could not deprive him of the possession of the said booth, which was already allotted to him and was in his possession. The petitioner has sought preferential treatment for allotment of the said telephone booth to him which is under his occupation for a long period of 14 years primarily because of his disability and the rights which flow in his favour under the Disability Act. Section 43 of the said Act, which deals with preferential allotment of land at concessional rate to such disabled persons. The respondents had claimed that no

Union Territories in the whole country, and issued notice to the health secretaries of the entire states and Union Territories to show cause why the scheme should not be implemented.”

110. WP(C) No.14332/2004. Pronounced on : 14.03.2008

scheme was prepared by the appropriate Government, namely, the Central Government under Section 43 of the Act and in the absence of such a scheme, no right had accrued to the petitioner. Even if a disabled person was to be given preferential allotment, the petitioner could not claim exclusive right, as in such eventuality as well, the booth could have been put to tender by making only disabled persons eligible to submit their bids. Judges A.K. Sikri and Vipin Sanghi, while rejecting the contentions of the respondents clearly held that there is a duty cast on the appropriate Government and local authorities to frame schemes in favour of persons with disabilities for preferential allotment. It is, thus, the bounden duty of the appropriate Governments and the local authorities to frame such schemes and take such an affirmative action so that persons with disabilities are able to reap the benefit of the provisions like Section 43 of the Act. The Court observed:

“It is necessary to point out that the appropriate Government or the local authorities have not framed the requisite schemes in favour of persons with disabilities for preferential allotment etc., though this is the duty cast upon them by the Legislature under Section 43 of the Disability Act. This Act came into force with effect from 7.2.1996, i.e. more than 12 years ago. Therefore, it would be necessary to give direction to these authorities to make appropriate schemes under Section 43 of the Act within a period of six months.”

(emphasis supplied)

Hence the above construal of the courts guarantees as rights all those entitlements on which schemes have to be devised by the appropriate governments. The judiciary’s stand on the fact that the right is already there and the scheme is nothing but a means of its realization. Such elucidation surely strengthens the struggle for affirmative rights by persons with disabilities.¹¹¹

111. Supra note 5 at p. 98

(e) Social Security:

Sections 66, 67 and 68 of the Persons with Disabilities Act, 1995 contain the provisions pertaining to social security. Social security for persons with disabilities largely involves the issue of rehabilitation so that they become independent. In the last few decades the ambit of rehabilitation has expanded throughout the globe. The current state of affairs of persons with disabilities in almost every nation calls not only for improvement of job prospects but also for enlarged public understanding and constructive attitudes in the community. In *National Federation of Blinds UP Branch v. State of Uttar Pradesh*¹¹², while pronouncing the judgement the Court defined rehabilitation as:

“Rehabilitation means the restoration of the disabled to the fullest physical, mental, social, vocational and economic usefulness of which person is capable. In other words rehabilitation is a goal-oriented programme which aims at enabling an impaired person to reach an optimum mental or social functional level, which follows basically three aspects, Physical Rehabilitation, Vocational Rehabilitation and Psychological Rehabilitation of the disabled.”

(emphasis supplied)

So far as cases relating to social security are concerned, the Supreme Court has been quite generous. In *Swatantra Kumar v. Qamar Ali & others*¹¹³, the Supreme Court increased the amount of compensation after considering future economic loss due to the permanent or partial disability as well as for pain, shock and suffering undergone by the applicants. Borrowing from *Anand Bihari & others v. Rajasthan State Road Transport Corporation*¹¹⁴, the Apex Court in *Jaswant Singh v. State of Punjab*¹¹⁵ proposed the same social

112. AIR 2000 Allahabad 258.

113. MANU/SC/1033/1998.

114. Supra note 85.

115. Supra note 77.

security scheme outlined in an earlier case. Accordingly, the respondents were directed to provide alternative appointments for the appellants when vacancies arose or to pay compensation computed on the basis of the number of years the individual had worked. In this case, the appellants were drivers, who became blind as a result of their service.

Even in *Ashwani Kumar Mishra v. P. Muniyam Babu & others*¹¹⁶ where a 23-year-old appellant met with an accident, received severe injuries and became permanently disabled, the Supreme Court granted him some compensation in lieu of future earnings on the basis of his monthly income. The Hon'ble Court stated that even though the appellant was not formally employed, the amount of compensation could be fixed on the basis of "some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused". Hence, it enhanced the amount of compensation.¹¹⁷

But amongst all these the decision given by the Supreme Court in *Indian Bank's Association, Bombay and Ors. v. Devkala Consultancy Service and Ors.*¹¹⁸ the most remarkable. Devkala Consultancy Services had filed a petition in the Karnataka High Court challenging the authority of banks to round up the existing interest rates to 0.25 percent of such rates as were less than 0.25 percent. Such rounding off was found necessary on account of the grossing up involved in calculating the incidence of tax. As the Reserve Bank of India had given its approval to such rounding off in April, 1993, the banks collected an amount of Rs. 723.99 crores, it was alleged. The High Court held that the action of the banks was illegal and accordingly directed that this excess amount be collected by the Union of India from the banks and deposited in Government funds. The Indian Banks Association which was a respondent in the writ court

116. MANU/SC/0248/1999

117. *Supra* note 3

118. MANU/SC/0355/2004, JT 2004 (4) SC 587

appealed to the Supreme Court by way of Special Leave. The Supreme Court upheld the judgement of the High Court and declared that the Reserve Bank of India could not have empowered the banks to charge something more from the borrowers by the process of rounding off of interest in exercise of their contractual powers vis-à-vis the Banking Regulation Act. Considering that there were more than five crores of borrowers of the banks, any directions to refund the amount would take a long time. The Court therefore directed that the amount accrued so far should be put in a corpus for the Welfare of the physically challenged. The Court also directed the Indian Banks Association and other institutions concerned to contribute Rs. 50 lakhs each. The CAG would be the Chairman of the said Trust and the Finance Secretary and the Law Secretary of the Union of India would be the ex-officio members thereof. The corpus so created might be invested in such a manner to enable the trustees to apply the same for the purpose of giving effect to the provisions of persons with Disabilities (Equal Opportunities Protection of Rights and full Participation) Act, 1995. The Bench stated as follows:

“Despite the progressive stance of the Court and the initiatives taken by the Government, the implementation of the Disabilities Act is far from satisfactory. The disabled are victims of discrimination in spite of the beneficial provisions of the Act...We are, therefore, of the opinion that in a larger interest, a fund for the aforementioned purpose should be created with the amount at the hands of the Union of India and the appellants and other concerned banks, which may be managed by the Comptroller and Auditor General of India.... We would request the Comptroller and Auditor General of India to effect recoveries of all the excess amount realized by the Union of India by way of Interest Tax and interest by the banks and other financial institutions and create the corpus of such fund therefrom. The appellant and other concerned banks are also hereby directed to contribute to the extent of Rs. 50 lakhs each in the said fund.... The Comptroller and Auditor General of India would be the Chairman of the said Trust and the Finance Secretary and the Law Secretary of the Union of India

would be the ex-officio members thereof. The corpus so created may be invested in such a manner so as to enable the trustees to apply the same for the purpose of giving effect to the aforementioned provisions of the 1995 Act... The Union of India, the Reserve Bank of India, the Appellant banks, other scheduled banks and financial institutions are directed to render all cooperation and assistance to the trustees... The committee as also the committees set up by the Central Government should act in close cooperation with each other. The Committee may, if it thinks proper, invest any amount in the Trust set up by the Central Government under the 1999 Act or any other scheme framed by the Central Government, as noticed hereinbefore.... The trustees aforementioned with a view to give effect to this order may frame an appropriate scheme. In case of any difficulty, they may approach this court for any other or further order/orders or direction/directions.... The Central Government, however, with a view to implement the aforementioned provisions may be amending the 1995 Act to provide for creation of such a fund and, in such an event, the statutory authority, if any, would be entitled to take over the corpus of the fund; but so long no legislative step is taken in this behalf, this order shall remain in force."

(emphasis supplied)

In fact this decision of the Apex Court is so encouraging and absolutely a perfect example of judicial intervention in matters of upliftment of the persons with disabilities. The Court in addition to the fund allotted for the purpose of National Trusts Act considered it necessary that funds are very important for the fulfillment of the various provisions of the Persons with Disabilities Act. But this broad perspective of the Court to create a fund for the disadvantaged people like the disabled is totally unparallel in a case which was primarily concerned with financial matters. This *suo moto* intervention of the court surely deserves a salute. In fact the directives of the Court to make changes in the actual legislation to accommodate the correct usage of the allotted fund, but it is unfortunate that the legislators have not risen from their deep slumber even after four years of passing of such an outstanding judgement.

a mental asylum in Tamil Nadu were charred to death as they had failed to escape due to the fact that they had been chained to poles or beds, the Supreme Court of India issued notices to the State of Tamil Nadu and the Central Government. The Court appointed a 'friend of the court' to make a prima facie examination and submit a report on the basis of which it issued notices to other States also. It was reported to the court that the Mental Health Act, 1987 had not been implemented by the Central/State Governments. Realizing the urgency about implementation of the said Act it was stated on behalf of the Central Government that the Act would be implemented in right earnest. After examining the provisions of the Act, the Supreme Court issued specific directions to all State Governments and Union territories to take a survey of bodies providing psychiatric mental health care, grant them licenses on fulfillment of minimum prescribed standards, a nodal agency involving the Chief Secretary or Additional Secretary be designated to coordinate implementation of the Act of 1987 as also the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as also of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. It was also directed that awareness campaign with special rural focus on the rights of the mentally challenged persons should be carried out and that chaining of mentally challenged persons is illegal and that mental patients should be sent to doctors and not to temples or darghas.¹²⁷

127. After hearing the Additional Solicitor General of India in the matter the Supreme Court gave further directions on 12.4.2002. See, *In Re: Death of 25 chained inmates in Asylum fire in Tamil Nadu with Saarthak Registered Society and another v. Union of India & Others* (AIR 2002 SC 3693). Also see *Chandan Kumar Banik v. State of West Bengal*, the Supreme Court heard of the inhuman conditions in which mentally ill persons were held in mental hospital at Mankundu in the District of Hooghli. The Court denounced this practice and ordered the cessation of the practice of tying up the patients who were unruly or not physically controllable with iron chains and ordered medical treatment for these patients. However on August 6th 2001 the indifference of state and private authorities resulted in the tragic death of 26 patients in Erawadi as they were tied to their beds when fire engulfed the building. Following this tragedy the National Human Rights Commission of India (NHRC) advised all the Chief Ministers to submit a certificate stating no person with mental illness are kept chained in either government and private institutions.

A perusal of the above referred cases clearly reveal that until recently many mentally ill persons were confined to jails and those living in mental health institutions were no better off, as the conditions both in prisons and in mental institutions were far below the stipulated standards. The NHRC is mandated under section 12 of the protection of Human Rights Act 1993 to visit government run mental hospital to study the living conditions of inmates and make recommendation thereon. In 1997 project quality assurance in Mental Health Institutions was initiated to analyze the conditions generally prevailing in 37 government run mental hospitals and departments. The findings of this study confirm that mental hospitals in India are still being managed and administered on a custodial mode of care. Characters sized by prison like structure with high walls, watch towers, fenced wards and locked cells. Mental Hospitals are like detention centres where persons with mental illness are kept caged in order to protect society from the danger their existence poses. The above discussion has clearly pointed out that each of these cases reached the Supreme Court at different point of times through public litigation. However, in these cases, there was no mention of the rights of the inmates to minimum standards of care and treatment. However, the cases have demonstrated the need for continued judicial monitoring in order to ensure that the state acts in accordance with the statute and the Constitution.¹²⁸

A SUM UP:

The Rights Approach to disability has led to the evolution of impressive legal framework. With sincere regard to the Supreme Court's pronouncements involving disabled people, it is felt that the judiciary has not shown the same zeal, enthusiasm and activism in disability rights cases as

128. Manish Lakhawat, "*Human Rights Of Mentally Ill Persons*", viewed at <http://www.legalserviceindia.com/articles/mentai.htm>, accessed on 23.6.2008

compared to activism shown in environmental cases.¹²⁹ An appraisal of the various case laws concerning the different facets of disability human rights reveals that the courts are yet to start to evolve a jurisprudence of disability rights. The courts have resorted to individual remedies of the problems brought before them primarily based on sympathy rather than entitlements. Yet, if courts are to perform an activist role in the realization of disability rights, the need for a jurisprudence of these rights cannot be refuted.¹³⁰ Although on the whole, the case-laws show that the Supreme Court has been sensitive towards persons with disability and in most of the cases the verdict has been in favour of the disabled; and no doubt the combination of the effects of these cases will definitely give new dimension to disability law in India.

The Courts though have pronounced very remarkable judgements concerning employment and social security; but it seems to be averse towards education and barrier-free environment. In fact there are very few cases concerning barrier free environment or the right to access as it is commonly called. It is even more interesting to note that whereas in *Javed Abidi's Case* decided in 1999 the court gave some very broad guidelines, which proved to be a landmark decision on the area; but in *Javed Abidi Case* decided by the Delhi High Court in 2008 the judiciary seems to have lost trail. Moreover it is even more shocking to see that the Court is apathetic to the publication of the judgements. Even in matters of education, the confused state of mind of the various High Courts cannot be overlooked. When the Calcutta High Court had pronounced a very progressive judgement in *Sanchita Biswas's Case*¹³¹ regarding interpretation of Section 39, saying that Section 39 should be construed under the Chapter 'Education' and not 'Employment'. It is surely amazing that there was a flurry of cases until the matter was finally put at rest by the Kerala High Court in *All Kerala Parent's Association of the Hearing*

129. Supra note 2

130. Supra note 5 at p. 95

131. Supra note 45

*impaired v. State of Kerala*¹³². It is expected that to reduce the burden on the judiciary the Apex Court should suo moto look into such cases and pronounce a favourable decision so that the invaluable time of the judiciary is not wasted in deciding cases of similar nature.

Further, in matters of employment the court has surely proved its mettle. Most of the cases reveal an upbeat attitude of the judiciary. But again the court's apathy in not treating some unusual judgments as precedents is not acceptable, especially where the issue is concerned with the right to livelihood of persons with disability who have been repeatedly emphasized as vulnerable and neglected.

The greatest contribution of the judiciary can be seen in the cases relating to social security. The decision given in *Indian Bank's Association's case* is simply majestic. In fact such actions of the Court are exemplary in nature. But unfortunately non-application of these provisions surely mitigates their effect. The Judiciary's role must not merely be sympathetic but it should reasonably weigh the issues placed before them, so that the decision given by them has a tremendous effect on the society.

Another issue which needs to be mentioned here is that, though the Apex Court and the various High Courts have resorted to foreign judgments while expressing and explaining their judgements, but it is very unfortunate that to this day we have very few cases that could match up with the activism of the judiciary in the western world. We hardly have any case assessing upon the need of access to healthcare of the persons with disabilities. Though, similar access to healthcare for the persons with disabilities in India can be provided under Article 21—the fundamental right to life—of the Constitution. In *M.C. Mehta v. Union of India*¹³³ the Supreme Court observed that the right to life

132. *Supra* note 53

133. (1999) 6 SCC 9

under Article 21 also encompassed the "right to good health". But the role of the judiciary has not moved further. Persons suffering from HIV/AIDS also suffer from a disability not included in the definition under the Act. In South Africa, the Constitutional Court in *Minister of Health v. Treatment Action Campaign*¹³⁴ invoking the right of access to public health care services embodied in the South African Constitution held that the State was constitutionally obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of such a right. People were therefore entitled to use of Nevirapine—a potentially life-saving drug that reduced the risk of mother to-child transmission of HIV. In *Bragdon v. Abbott*¹³⁵ the United States Supreme Court construed asymptomatic HIV infection as a disability if it affected the major life activity of reproduction.¹³⁶ Again, though the definition of disability has been criticised again and again for being too restrictive, but the Court in none of the cases has made any efforts to clarify the same or to make it more inclusive, or make suggestions for its amendment.

So far as the other laws are concerned it is only the Mental Health Act which has some cases to its credit. But in spite of their shortcomings the National Trust Act and Rehabilitation Council of India Act have hardly attracted any judicial intervention either suo moto or on individual prodding. Even PILs can hardly be found concerning these two areas. The point which resurfaces again is that the judiciary is not ready to show its activism in this area unless made to ponder.

To sum up it can be said that in spite of admirable constitutional and statutory authority given to the judiciary, there have been very few cases where the court has taken any drastic action to provide any exemplary relief. In most of the cases the courts have stuck to provide remedy only on case to case

134. 13 BHRC 1

135. 141 L Ed 2d 524

136. Supra note 10 at pp. 10-11

basis. *Suo moto* action is also negligible. The judiciary in spite of some landmark judgement seems to be in a dormant stage where it requires constant prodding to rise from its slumber. Further, in case of protection and protection of human rights and particularly of people of the weaker sections and the disabled, the general judicial response except constitutional courts is believed to be not very encouraging and satisfactory mainly due to docket explosion, slow motion justice system and high and heavy quantum of expenses in litigation, complexity of processual justice system, the heart of the judicial anatomy---the common litigants are frustrated. It is also felt by them that the administration of justice is woefully out of tune with the unprecedented crisis and new challenges of modern India. The need is therefore to innovate and evolve effective, efficient systematic and scientific strategies to meet the new challenges of the present century.¹³⁷ As a final point it is hoped that the judiciary will be more pro-active in taking suo moto actions in cases of violation of the rights of persons with disabilities making the most of the powers granted to them. The need is of continuous judicial pondering and most imperative of all, the disability fraternity must also step ahead and assert their rights.

137. *Supra* note 4 at pp. 7-8

CHAPTER 6

CONDITIONS OF PERSONS WITH DISABILITES IN NORTH BENGAL

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PROLOGUE:

In the previous chapters a picture of the disability human rights has been painted. Considering the concept of disability from the historical perspective to the development of the disability human rights; from the development of the international declarations to the coming into being of the first Convention for protection of disability rights; from the study and review of the various laws across the globe dealing with protection of human rights of the persons with disabilities to the various laws and legal provisions under the Indian legal system which aim at securing the human rights of the disabled populace. A review on the role of the judiciary has also been made. It has been witnessed that all the major legislations in India suffer from the inherent weakness of poor implementation and lack of awareness on the part of the disabled populace, the common people, the government officials and the workers of the various NGOs who have been attached with the disability movement and who are in fact the principal trustees of the well being of this segment of the population. Here it becomes necessary to test the effectiveness of the various laws, which aim at guaranteeing their human rights.

There are various objective criterions for testing the effectiveness of legislation. The functionality of all those entire objective criterion can be tested either through the test of efficiency or through the test of social attitude. In both these cases response of the people to the particular legal process provides as indicators. Considering this aspect, an opinion

survey was undertaken by this researcher for examining the legal awareness of disability human rights, in particular the Persons with Disabilities Act, 1995, in the six northern districts of West Bengal, popularly known as North Bengal. The entire area consists of Malda, Uttar Dinajpur, Dakshin Dinajpur, Darjeeling, Jalpaiguri and Coochbehar.

Prior to analyzing the opinion survey, it needs to be mentioned that the survey suffers from some inherent limitations due to some practical reasons. The most important was the unavailability of willing persons with disabilities as well as the reluctance of the NGOs to let their workers interact with the researcher. The second reason was paucity of funds due to which it was practically impossible to reach each and every corner of the districts and consequently forced the researcher to fix the universe at a limited number. A kind of inference has tried to be drawn from this survey which is presumed to be the general reflection of the legal awareness of the human rights of the persons with disabilities in North Bengal.

A. SAMPLING UNIVERSE:

The proposed sampling universe had been fixed at 500, but since the condition of any segment of population can be studied in isolation, as well as, with a view to give equal weightage to each of the categories, the survey was made by distribution of a total of 504 questionnaires to persons with disabilities, NGO workers, common people and Government employees in the six district of North Bengal. Three different sets of questionnaires were framed. One each for the persons with disabilities and NGO workers; and a common questionnaire for common people and Government employees. The questionnaires meant for persons with disabilities and NGO workers consisted of ten questions each, containing both positive and negative reply to be

selected by putting a tick mark by the respondents. Another common questionnaire meant for the common people and government employees was framed which contained five questions, and the respondents in this case too had to put a tick mark to the positive or negative reply. The total number of respondents for each of the categories was 126. The questionnaires of each of the categories were evenly distributed in the six districts of North Bengal. Consequently, 21 questionnaires in each of the categories were distributed in each of the districts. The opinion survey for each of the districts and each of the categories is presented in Tables 6.1 to 6.24 and that of the scenario in North Bengal in Tables 6.25 to 6.28. It is to be noted here that among the categories mentioned above, only literate people are sample population for distribution of questionnaire.

C. SAMPLE DESIGN:

As mentioned above, the universe has been divided into four categories. We shall in the following lines take each of the categories separately and assess the conditions in all the six districts.

(i) *Persons with Disabilities:*

The first question contained two parts. The first part was —‘*Do you know that there are specific laws to protect the interests of the persons with disabilities?*’ The positive answer received in each of the districts is as follows: Malda---38.10%; Uttar Dinajpur---80.95 %; Dakshin Dinajpur---71.43%; Darjeeling---52.38%; Jalpaiguri---52.38%; Coochbehar---38.10%. The average for North Bengal comes to 55.55%. The second part of this question was-‘*Can you name any one?*’ To this none gave a positive answer in Malda and Coochbehar. In Uttar Dinajpur the response is 33.33%; Dakshin Dinajpur-

--38.10%; Darjeeling---9.52 %; Jalpaiguri---42.86%; .The overall response from North Bengal is 20.63%.

Hence it can be seen that though a large number of people know about the existence of specific laws for the disabled but majority cannot name a single Act. While the majority of the PWDs in Uttar Dinajpur know about the existence of laws, only 33.33% of that district knows about the name of any particular law. Thus the trend is the lack of knowledge about specific laws enacted for the purpose of upholding the rights of the PWDs. Upon inquiry the researcher came to know that majority of the disabled populace though have heard about certain legal rights but they exactly don't know about any particular Act/ Acts enacted for protecting their interests.

The second question too consisted of two parts. The first part was '*Do you know about the Persons with Disabilities Act, 1995?*' To this the positive response received are: Malda--- 23.81%; Uttar Dinajpur---57.14%; Dakshin Dinajpur---38.10%; Darjeeling---19.05%; Jalpaiguri---42.86%. In Coochbehar none gave a positive response to this question. The average for North Bengal comes to 30.15% which is less than fifty percent. The second part of this question was '*Do you know about the various rights provided by this Act?*' The positive response was miserable. Malda--- 38.10%; Uttar Dinajpur---42.86%; Dakshin Dinajpur---38.10%; Darjeeling---4.76%; Jalpaiguri---33.33%; Coochbehar---4.76%. The average for North Bengal comes to 26.98%. It is surely disappointing that majority of the disabled persons do not know about the law or the rights guaranteed by the Act which has been principally enacted to uphold the human rights of the persons with disabilities.

The third question is in three parts. The questions mainly deal with reservation in employment. The first part was ‘*Do you know that 3% seats are reserved for persons with disabilities in educational institutions and employment (in the public sector)?*’ The positive response was a little low. The figures are: Malda--- 52.38%; Uttar Dinajpur---57.14%; Dakshin Dinajpur---19.05%; Darjeeling---42.86%; Jalpaiguri---38.10%; Coochbehar---14.29%.The average for North Bengal comes to 37.30% The second part of the question was ‘*Do you think that the percentage should be increased?*’ There was a unanimous answer where almost everybody felt that the percentage should be increased. The figures are: Malda, Dakshin Dinajpur, Darjeeling and Coochbehar gave an absolutely 100% positive response. In Uttar Dinajpur the figure is 95.24% and Jalpaiguri--- 71.43%. The average for North Bengal comes to a whopping 94.44%. The third part of the question was, ‘*Should reservation be introduced in the private sector as well?*’ To this also there was an overwhelming positive response. Uttar Dinajpur, Dakshin Dinajpur and Darjeeling gave a perfect 100% positive response.The figures of the other three districts are: Malda--- 42.86%; Jalpaiguri---76.19% and Coochbehar---85.71%.The average for North Bengal comes to 84.13%.Hence it can be seen that the majority of the disabled people want that the percentage of reservation must be increased and reservation be introduced in the private sector as well.

The fourth question was ‘*Do you know about Special Employment Exchange?*’ The positive response was very disappointing. The figures are: Malda--- 42.86%.; Uttar Dinajpur---52.38%; Dakshin Dinajpur---23.81%; Darjeeling---19.05%; Jalpaiguri---38.10%. None gave a positive answer to this question in Coochbehar. The average for North Bengal comes to a low of 28.57%.The researcher’s prodding revealed that although majority of the persons with disabilities know about Employment Exchanges, very few

know about the existence of Special Employment exchanges. Though the special cell dealing with employment of PWDs is in Kolkata, but most of them did not know that the local Employment Exchange serves the purpose in the districts. It makes a separate list of persons with disabilities, who have registered themselves with the Exchange.

The fifth question was '*Do you receive any allowance from the Government?*' To this question also the negative response prevailed. None gave a positive response to this in Malda, Darjeeling and Jalpaiguri. The percentage of positive response in other four districts are: Uttar Dinajpur---38.10%; Dakshin Dinajpur---19.05% and Coochbehar---23.81%. The average for North Bengal comes to 13.49 which is miserable. The researcher's inquiry revealed that most of the disabled people did not know whom to approach for receiving the allowance. Some even said that they had approached the responsible office but had failed to meet the procedural formalities.

The sixth question was '*Have you ever been discriminated because of your disability?*' To this question the positive response was enormous. Almost every district came up with a similar response. The percentage of positive response in the districts is: Malda---66.67%; Uttar Dinajpur---95.24%; Dakshin Dinajpur---95.24%; Darjeeling---85.71%; Jalpaiguri---90.48%; Coochbehar---90.48%. The average for North Bengal comes to 87.30%. Inquiry by the researcher revealed that in every sphere of life they are being discriminated. Right from addressing them to making fun of them, to discrimination in educational fields to employment---discrimination is everywhere.

The seventh question was in two parts. The first part was '*Have you obtained a Disability Certificate?*' To this the positive response is:

Malda--- 95.24%; Uttar Dinajpur---61.90%; Dakshin Dinajpur---66.67%; Darjeeling---80.95%; Jalpaiguri---85.71%. Coochbehar gave a 100% positive response. The average for North Bengal comes to 81.74%. The second part was *'Was it an easy process to obtain the certificate?'* To this almost everybody gave negative response. The percentage of positive response is : Malda--- 33.33%; Uttar Dinajpur---4.76%; Darjeeling: 19.05%; Jalpaiguri--- 14.29%. None in Dakshin Dinajpur and Coochbehar gave a positive response. The average for North Bengal comes to 11.90%. Inquiry by the researcher brought to the fore that majority of them had obtained their disability certificates with the help of their parents, guardians or NGOs. Some of them also said that without their assistance it would be impossible for them to obtain the certificate all by themselves. The second question received an almost full house of negative answers. Their allegation was that there was too much of formalities to be fulfilled for obtaining the certificate. They strongly felt that the authorities should take into concern their physical as well as mental health before entangling them in procedural formalities. Even the percentage of negative answer givers to the first part reflected the thoughts of the answers given in the second part.

The eighth question too had two parts. The first part was *'Do you know that there is a 'Disability Commissioner' to listen to your woes?'* The positive response received is -- Malda--- 66.67%.; Uttar Dinajpur--- 38.10%; Dakshin Dinajpur---42.86%; Darjeeling---9.52%%; Jalpaiguri--- 42.86%; Coochbehar---76.19%. The average for North Bengal comes to 46.03%. The second part was *'Have you ever seeked his help?'* To this also the positive response is very meagre. Malda--- 47.62%; Uttar Dinajpur--- 38.10%; Dakshin Dinajpur---33.33%; Jalpaiguri---9.52%. None in Darjeeling and Coochbehar gave a positive response. The average for North Bengal comes to a low of 21.43%. Inquiry by the researcher revealed that most of

them did not know who a disability commissioner is, where he sits, what he does. They did not even know that the District Magistrate of all the districts has been declared as the Additional Commissioner for PWDs. The ones who gave a positive response to the first part added that the Commissioner was totally inaccessible and some also said that his presence in Kolkata always does not let them approach him. It also came out that the District Magistrate with his enormous responsibilities was unable to discharge this function sensitively.

The ninth question was '*What is the biggest injustice you have faced on account of your disability?*

- (a) *Negative societal attitude*
- (b) *Limited educational opportunities*
- (c) *Limited employment prospects*
- (d) *Non-friendly transport facilities*
- (e) *Non-accessible buildings*
- (f) *Apathy of Government*'.

The response received is as follows:

- (a) *Negative societal attitude*: Malda--- 47.62%; Uttar Dinajpur---33.33%; Dakshin Dinajpur---66.67%; Darjeeling---57.14%; Jalpaiguri---42.86%, and Coochbehar---52.38%. The average for North Bengal comes to 50%. This figure clearly indicates that of the six grounds enumerated this ground claims fifty per cent of the reasons of discrimination.
- (b) *Limited educational opportunities*: Malda--- 38.10%; Uttar Dinajpur---19.05%; Dakshin Dinajpur---9.52%; Darjeeling---14.29%; Jalpaiguri---4.76%, and Coochbehar---9.52%. The average for North Bengal comes to 15.87%. This ground ranks second.

- (c) *Limited employment prospects*: Malda and Uttar Dinajpur--- 14.29%; Dakshin Dinajpur---9.52%; Darjeeling and Jalpaiguri each 4.76% and Coochbehar---9.52%.The average for North Bengal comes to 9.52%.
- (d) *Non-friendly transport facilities*: Malda---0%; Uttar Dinajpur and Jalpaiguri ---14.29%; Dakshin Dinajpur and Darjeeling---4.76%; and Coochbehar---9.52%.The average for North Bengal comes to 7.94%.
- (e) *Non-accessible buildings*: Malda--- 0%; Uttar Dinajpur---9.52%; Dakshin Dinajpur and Darjeeling ---4.76%; Jalpaiguri---14.29% and Coochbehar---9.52%. The average for North Bengal comes to 7.14%.
- (f) *Apathy of Government*: Malda--- 0%; Uttar Dinajpur and Coochbehar ---9.52%; Dakshin Dinajpur---4.76%; Darjeeling---14.29%; Jalpaiguri---19.05%. The average for North Bengal comes to 9.52%.

Thus the response reveals that negative societal attitude scores the highest when it comes to injustice faced due to disability. This is followed by limited educational opportunities, apathy of the government and limited employment opportunities, non-accessible buildings and finally non-friendly transport facilities.

The tenth question related to the kind of education favourable with persons with disabilities. The question was *'Is mainstream education or special education more desirable for persons with disabilities?'*

- (a) *Mainstream Education*
 (b) *Special education*
 (c) *Both*'.

The positive response received in each of the Districts is as follows:

- (a) *Mainstream Education*: Malda--- 47.62%; Darjeeling---57.14%; Jalpaiguri--- 33.33%; Coochbehar---4.76%. Uttar Dinajpur and Dakshin

Dinajpur did not favour this scheme of education at all. The average for North Bengal comes to 23.81%.

- (b) *Special Education*: Malda--- 38.10%; Uttar Dinajpur---76.19%; Dakshin Dinajpur---71.43%; Darjeeling--- 33.33%; Jalpaiguri---14.29% and Coochbehar---4.76%.The average for North Bengal comes to 53.17%.
- (c) *Both* : Malda--- 14.29%; Uttar Dinajpur---23.81%; Dakshin Dinajpur--- 28.5%; Darjeeling--- 9.52%; Jalpaiguri--- 52.38% and Coochbehar--- 9.52%.The average for North Bengal comes to 23.02%.

Though the majority vouch for special education and mainstream as well as special education. But it is disheartening that very few vote for mainstream education. It also came to the fore that though the Government has initiated education for all, *Sarva Shiksha Abhiyan*, mainstream education has also received negative vibes because of the discrimination faced by disabled students from their so called normal counterparts.

(ii) **NGO workers:**

Ten questions were also put before the NGO workers. The first question contained two parts. The first part was –‘*Do you know that there are specific laws to protect the interests of the persons with disabilities?*’ A 100% positive answer came from all the six districts. The second part of this question was-‘*Can you name any one?*’ To this the positive answers received are: Uttar Dinajpur, Dakshin Dinajpur and Jalpaiguri gave a perfect 100% positive response. In Darjeeling it is 90.48%; Malda---76.19%; and Coochbehar---42.86%. The overall response from North Bengal is 84.92%. The researchers inquiry revealed that most of the NGO workers knew about the Persons with Disabilities Act, 1995 followed by the National Trust Act,

1999. But nobody seemed to know about the Rehabilitation Council of India Act, 1992 or the Mental Health Act, 1987. Thus it can be seen that a very positive trend prevails in almost all the districts when it comes to knowing about the laws. But at the same time the researcher, disclosing the pathetic knowledge of the PWDs had inquired that, if they know about the law/laws why they didn't ever take the initiative to spread a similar awareness amongst the persons with disabilities. To this they answered that they never felt that it was necessary in any way. This reflects that PWDs are treated as objects of pity and charity and not as human beings.

The second question was '*Have you heard about the Persons with Disabilities Act, 1995?*' To this question too the response is very positive in all the districts. The figures are: Malda, Uttar Dinajpur, Dakshin Dinajpur and Jalpaiguri gave a 100% positive response. In Darjeeling it was 90.48% and Coochbehar 71.43%. The average for North Bengal comes to an impressive 94.44%. Although the response may be overwhelming, but again when we compare it with the response given by the PWDs the same question again crops up and brings forth the callousness of the NGO workers to adhere to the charity model instead of moving towards the human rights model.

The third question was again in two parts. The first part was '*Do you know about the various disabilities as incorporated in the Persons with Disabilities Act, 1995?*' to this most of the answers received were positive. The figures are: Malda, Dakshin Dinajpur and Jalpaiguri gave a 100% positive response. The trends of Uttar Dinajpur, Darjeeling and Coochbehar are 95.24%, 90.48% and 71.43% respectively. The average for North Bengal comes to 92.86%. The second part was '*Do you think that the classification made in the Act is satisfactory?*' Some extreme reactions can be seen here. In Malda the positive response is 0%.; Uttar Dinajpur--52.38%;

Dakshin Dinajpur---85.71%; Darjeeling 14.29%; Jalpaiguri---61.90%; and Coochbehar---9.52%. The average for North Bengal comes to 37.30%. Though the wave is of negative reaction, some agreed to the existing definition, majority said it was obsolete and new disabilities must be added. The two extremes are Malda totally disagreeing with the existing definition while Dakshin Dinajpur showing its satisfaction of over eighty five percent. The researcher's investigation revealed that almost all the workers felt that cerebral palsy should be independently dealt with apart from locomotor disability; autism, dyslexia, AIDS should also be added to the existing definition of disability.

The fourth question was '*Do you know whether your institution receives sufficient funds from the Government?*' The answers received were mostly negative and the trend prevailed in almost all the districts. Malda---0%; Uttar Dinajpur---47.62%; Dakshin Dinajpur---61.90%; Darjeeling---4.76%; Jalpaiguri---90.48% and Coochbehar---9.52%. The average for North Bengal comes to 35.71%. Thus the average is not satisfactory at all. The researcher's interaction with the NGO workers and authorities brought out the dismal picture of non-cooperation of the Government agencies in majority cases. It is also learnt that though a number of them receive funds, but the amount is inadequate to run the huge expenses particularly where there are inmates. In most of the cases they have to rely on donations by non-governmental agencies and in some cases corporate sponsors or foreign aids. But that is only a fraction of total lot working in this area. Majority of them said that they have to shell out money from their own pockets to run the institutions.

The fifth question was '*Do you know whether your institution organization has received any benefit from the Government for working for*

the persons with disabilities ? To this also the positive response was dismal. Malda--- 19.05%; Uttar Dinajpur---9.52%; Dakshin Dinajpur---76.19%.; Darjeeling---66.67%; Jalpaiguri---52.38% and Coochbehar---9.52%. Thus three districts have given a positive response of over 50% but the other three are equally dismal. The average for North Bengal comes to 38.89%. Thus taking the entire figures the positive response is not even fifty percent.

The sixth question was *'Has the Disability Commissioner extended the necessary help to your institution?'* To this majority nodded in negative. The positive response is Malda--- 19.05%.; Uttar Dinajpur--- 47.62%; Dakshin Dinajpur---57.14%; Darjeeling---57.14%; Jalpaiguri--- 66.67% and Coochbehar---76.19%. The average for North Bengal comes to 45.24%, which is less than fifty percent. The researcher's prodding revealed that the Disability Commissioner was a distant story, even the DM, the DLROs and the Social Welfare Department Officials were also the least cooperative.

The seventh question was in four parts. The first part was *'Do you know about special education?'* The positive response ruled in all the districts. The figures are: Malda, Darjeeling and Jalpaiguri --- 100%; Uttar Dinajpur---85.71%; Dakshin Dinajpur---85.71% and Coochbehar---52.38%. The average for North Bengal comes to 87.30%. The second part was *'Does your institution have specially trained teachers?'* To this also there was a very positive response. The positive response in Malda, Dakshin Dinajpur and Coochbehar is a stunning 100%. The figures of the remaining districts are: Uttar Dinajpur---66.67%; Darjeeling---80.95% and Jalpaiguri--- 80.95%. The average for North Bengal comes to 88.10. The third part was *'Does the institution have RCI trained professionals?'* Again the response was 100% in Uttar Dinajpur, Dakshin Dinajpur, Darjeeling and Jalpaiguri. In Malda it was

as low as 28.57% and Coochbehar 33.33%. The average for North Bengal comes to 76.98%. Though the overall percentage is above seventy per cent, most of them accepted that their number was far less than those actually required. The researcher's investigations revealed that the ratio in majority cases was 1:35, which is far above the desirable limits. The fourth part was '*Is mainstream education or special education more desirable for persons with disabilities?*'

(a) *Mainstream Education*

(b) *Special education*

(d) *Both*'.

To this there was a mixed reaction.

(a) *Mainstream Education*: Malda--- 85.71%; Uttar Dinajpur---9.52%; Dakshin Dinajpur---19.05%; Darjeeling---80.95%. None in Jalpaiguri and Coochbehar voted for mainstream education. The average for North Bengal comes to a disappointing 32.54%.

(b) *Special education*: Malda--- 14.29%; Uttar Dinajpur---76.19%; Dakshin Dinajpur---57.14%; Darjeeling--- 9.52%; Jalpaiguri---33.33% and Coochbehar---42.86%. The average for North Bengal comes to 38.89%.

(c) *Both*: Malda--- 0%; Uttar Dinajpur---14.29%; Dakshin Dinajpur---23.81%; Darjeeling---9.52%; Jalpaiguri---66.67% and Coochbehar---57.14%. The average for North Bengal comes to 28.57%

The above figures reveal that the NGO workers favour mostly for special education followed by mainstream education. There are only a few who think that a combination of mainstream and special education will be worth while. This figure again reveals the failure of the Sarva Shiksha Mission in its efforts to amalgamate special children with their so called normal counterparts.

My eighth question was '*Have you made any efforts on your part to enroll the eligible inmates with the Special Employment Exchange and*

receive unemployment allowance?' The positive response is: Malda and Coochbehar---14.29; Uttar Dinajpur---100%; Dakshin Dinajpur---90.48%; Darjeeling---0% and Jalpaiguri---33.33% The average for North Bengal comes to 42.06%. There is again a very mixed response. While Uttar Dinajpur has given a total effort, followed by Dakshin Dinajpur, but the other Districts are lagging way behind. The researcher learnt that majority of the NGO workers too did not know that the local Employment Exchanges act as Special Employment Exchanges in the districts. In fact in most of the cases they have hardly made any efforts on their part to assure the employment prospects or obtaining allowances.

The ninth question was '*Do you think self-employment is the best method of assuring self dependence of the persons with disabilities?*' The positive response is: Malda, Uttar Dinajpur and Darjeeling --- 100%; Dakshin Dinajpur---76.19%; Jalpaiguri---71.43% and Coochbehar---52.38%.The average for North Bengal comes to 83.33%. Thus majority of the respondents opine that self employment is the best way of assuring self dependence of the PWDs.

The tenth question was '*Is your institution barrier free?*' The reaction was mixed. The positive response was: Malda--- 42.86%; Uttar Dinajpur---61.90%; Dakshin Dinajpur---42.86%; Darjeeling---66.67%; Jalpaiguri---38.10% and Coochbehar---33.33%. The average for North Bengal comes to 47.62%. The researcher's query brought to the fore that the institutions/ organizations that receive some amount of Government allowance or some benefit under the Act have been able to assure barrier free environment to a certain extent, but the rest are in a total mess. In fact even those buildings which claim they are barrier free cater to only a few classes of disabilities and not all. Ramps were the most invisible things all over. Stairs ruled everywhere. Only the entrance points had a ramp, but the interiors had

staircases which were totally inaccessible by wheel chair users. Handrails were also found missing and so were specially built toilets.

(iii) Common People:

Five questions were put before the common people in all the districts. Since the failure of the disability laws is mainly attributed to the ignorance of the masses, hence the opinion survey conducted amongst these people will certainly serve the purpose of assessing the awareness of the laws. The first question was '*Do you know that there are specific laws to protect the interests of the persons with disabilities?*' The positive response was: Malda-- 71.43%; Uttar Dinajpur---90.48%; Dakshin Dinajpur---52.38%; Darjeeling-- 71.43%; Jalpaiguri---80.95% and Coochbehar---52.38%. The average for North Bengal comes to 69.84%. Hence it can be seen that most of the people know about the existence of specific law meant for the persons with disabilities, but very few could name a single Act.

The second question was '*Do you know about the Persons with Disabilities Act, 1995?*' The positive response is as follows: Malda--- 23.81%; Uttar Dinajpur---19.05%; Dakshin Dinajpur---28.57%; Darjeeling---14.29%; Jalpaiguri---47.62% and Coochbehar---47.62%.The average for North Bengal comes to 30.16%. Thus the awareness about the Act is very low.

The third question was '*Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?*' The positive response was comparatively better with Malda scoring 47.62%, Uttar Dinajpur---85.71%; Dakshin Dinajpur---47.62%; Darjeeling---52.38%; Jalpaiguri---80.95% and Coochbehar---76.19%.The average for North Bengal comes to 65.08%. It is

interesting to note that though a majority of them have answered positively, but the researcher learnt that although bulk of the sample population knew about the reservation but most of them did not know about the exact percentage reserved.

The fourth question was '*Have you heard about Special Employment Exchange?*' The positive response is as follows: Malda and Darjeeling-- 0%; Uttar Dinajpur---9.52%; Dakshin Dinajpur---33.33%; Jalpaiguri--- 38.10%; Coochbehar---19.05%.The average for North Bengal comes to 16.67%.

The last question was '*Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?*' To this the negative trend prevailed, the positive response being, Malda--- 9.52%; Uttar Dinajpur---19.05%; Dakshin Dinajpur---28.57%; Darjeeling---38.10%; Jalpaiguri--- 33.33% and Coochbehar---23.81%.The average for North Bengal comes to 25.50%.

In the five questions asked in order to assess the awareness of the common people on disability laws and rights, majority questions have invited negative response from almost all the districts. Thus the need of awareness and sensitization of the people attracts a lot of attention.

(iv) **Government employees:**

The first question was '*Do you know that there are specific laws to protect the interests of the persons with disabilities?*' The positive response was: Malda and Uttar Dinajpur---100%; Dakshin Dinajpur--- 95.24%; Darjeeling---76.19%; Jalpaiguri---71.43% and Coochbehar---

85.71%. The average for North Bengal comes to 88.10%. Though the trend is highly positive, but the researchers prodding brought forth that most of the Government Employees do not know the name of a single Act.

The second question was '*Do you know about the Persons with Disabilities Act, 1995?*' The positive response is as follows: Malda--- 57.14%; Uttar Dinajpur---14.29%; Dakshin Dinajpur---47.62%; Darjeeling---33.33%; Jalpaiguri---23.81% and Coochbehar---14.29%. The average for North Bengal comes to 31.75%.

The third question was '*Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?*' The positive response was comparatively better with Malda scoring 80.95%. Uttar Dinajpur---90.48%; Dakshin Dinajpur---71.43%; Darjeeling---80.95%; Jalpaiguri---85.71% and Coochbehar---95.24%. The average for North Bengal comes to 84.13%.

The fourth question was '*Have you heard about Special Employment Exchange?*' The positive response is as follows: Malda--- 28.57%; Uttar Dinajpur---23.81%; Dakshin Dinajpur---19.05%; Darjeeling--- 14.29%; Jalpaiguri---28.57% and Coochbehar---38.10%. The average for North Bengal comes to a miserable 25.40%.

The last question was '*Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?*' To this the negative trend prevailed, the positive response being, Malda--- 19.05%; Uttar Dinajpur---19.05%; Dakshin Dinajpur---0%; Darjeeling---33.55%; Jalpaiguri---42.86% and Coochbehar---23.81%. The average for North Bengal comes to 23.02%.

Table 6.1: Opinion Survey among the Persons with Disabilities in Malda District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities? (ii) Can you name any one?	38.10	61.90
		0	100
2.	(i) Do you know about the Persons with Disabilities Act, 1995? (ii) Do you know about the various rights provided by this Act?	23.81	76.19
		0	100
3.	(i) Do you know that 3% seats are reserved for persons with disabilities in educational institutions and employment (in the public sector)? (ii) Do you think that the percentage should be increased? (iii) Should reservation be introduced in the private sector as well?	52.38	47.62
		100	0
		42.86	57.14
4.	Do you know about Special Employment Exchange?	42.86	57.14
5.	Do you receive any allowance from the Government?	0	100
6.	Have you ever been discriminated because of your disability?	66.67	33.33
7.	(i) Have you obtained a Disability Certificate? (ii) Was it an easy process to obtain the certificate?	95.24	4.76
		33.33	66.67
8.	(i) Do you know that there is a 'Disability Commissioner' to listen to your woes? (ii) Have you ever seeked his help?	66.67	33.33
		47.62	52.38
9.	What is the biggest injustice you have faced on account of your disability? (a) Negative societal attitude (b) Limited educational opportunities (c) Limited employment prospects (d) Non-friendly transport facilities (e) Non-accessible buildings (f) Apathy of Government	(a) 47.62 (b) 38.10 (c) 14.29 (d) 0 (e) 0 (f) 0	
10.	Is mainstream education or special education more desirable for persons with disabilities? (a) Mainstream Education (b) Special education (c) Both	(a) 47.62 (b) 38.19 (c) 14.29	

Table 6.2: Opinion Survey among the NGO workers in Malda District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities? (ii) Can you name any one?	100	0
		76.19	23.81
2.	Have you heard about the Persons with Disabilities Act, 1995?	100	0
3.	(i) Do you know about the various disabilities as incorporated in the Persons with Disabilities Act, 1995? (ii) Do you think that the classification made in the Act is satisfactory?	100	0
		100	0
4.	Do you know whether your institution receives sufficient funds from the Government?	0	100
5.	Do you know whether your institution/ organization has received any benefit from the Government for working for the persons with disabilities?	19.05	80.95
6.	Has the Disability Commissioner extended the necessary help to your institution?	19.05	80.95
7.	(i) Does your institution impart special education?	100	0
	(ii) Does your institution have specially trained teachers?	100	0
	(iii) Does the institution have RCI trained professionals?	28.57	71.43
	(iv) Is mainstream education or special education more desirable for persons with disabilities? (d) Mainstream Education (e) Special education (f) Both	(a) 85.71 (b) 14.29 (c) 0	
8.	Have you made any efforts on your part to enroll the eligible inmates with the Special Employment Exchange and receive unemployment allowance?	14.29	85.71
9.	Do you think self-employment is the best method of assuring self dependence of the persons with disabilities?	100	0
10.	Is your institution barrier free?	42.86	57.14

Table 6.3: Opinion Survey among the Common People in Malda District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	71.43	28.57
2.	Do you know about the Persons with Disabilities Act, 1995?	23.81	76.19
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	47.62	52.38
4.	Have you heard about Special Employment Exchange?	0	100
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	9.52	90.48

Table 6.4: Opinion Survey among the Government Employees in Malda District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	100	0
2.	Do you know about the Persons with Disabilities Act, 1995?	57.14	42.86
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	80.95	19.05
4.	Have you heard about Special Employment Exchange?	28.57	71.43
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	19.05	80.95

**Table 6.5: Opinion Survey among the Persons with Disabilities in Uttar
Dinajpur District.**

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities? (ii) Can you name any one?	80.95	19.05
		33.33	66.67
2.	(i) Do you know about the Persons with Disabilities Act, 1995? (ii) Do you know about the various rights provided by this Act?	57.14	42.86
		42.86	57.14
3.	(i) Do you know that 3% seats are reserved for persons with disabilities in educational institutions and employment (in the public sector)? (ii) Do you think that the percentage should be increased? (iii) Should reservation be introduced in the private sector as well?	57.14	42.86
		95.24	4.76
		100	0
4.	Do you know about Special Employment Exchange?	42.86	57.14
5.	Do you receive any allowance from the Government?	38.10	61.90
6.	Have you ever been discriminated because of your disability?	95.24	4.76
7.	(i) Have you obtained a Disability Certificate? (ii) Was it an easy process to obtain the certificate?	61.90	38.10
		4.76	95.24
8.	(i) Do you know that there is a 'Disability Commissioner' to listen to your woes? (ii) Have you ever sought his help?	38.10	61.90
		38.10	61.90
9.	What is the biggest injustice you have faced on account of your disability? (a) Negative societal attitude (b) Limited educational opportunities (c) Limited employment prospects (d) Non-friendly transport facilities (e) Non-accessible buildings (f) Apathy of Government	(a) 33.33 (b) 19.05 (c) 14.29 (d) 14.29 (e) 9.52 (f) 9.52	
10.	Is mainstream education or special education more desirable for persons with disabilities? (a) Mainstream Education (b) Special education (c) Both	(a) 0 (b) 76.19 (c) 23.81	

Table 6.6: Opinion Survey among the NGO workers in Uttar Dinajpur

District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities?	100	0
	(ii) Can you name any one?	100	0
2.	Have you heard about the Persons with Disabilities Act, 1995?	100	0
3.	(i) Do you know about the various disabilities as incorporated in the Persons with Disabilities Act, 1995?	95.24	4.76
	(ii) Do you think that the classification made in the Act is satisfactory?	85.71	14.29
4.	Do you know whether your institution receives sufficient funds from the Government?	47.62	52.38
5.	Do you know whether your institution/ organization has received any benefit from the Government for working for the persons with disabilities?	9.52	90.48
6.	Has the Disability Commissioner extended the necessary help to your institution?	47.62	52.38
7.	(i) Does your institution impart special education?	85.71	14.29
	(ii) Does your institution have specially trained teachers?	66.67	33.33
	(iii) Does the institution have RCI trained professionals?	100	0
	(iv) Is mainstream education or special education more desirable for persons with disabilities? (a) Mainstream Education (b) Special education (c) Both	(a) 9.52 (b) 76.19 (c) 14.29	
8.	Have you made any efforts on your part to enroll the eligible inmates with the Special Employment Exchange and receive unemployment allowance?	100	0
9.	Do you think self-employment is the best method of assuring self dependence of the persons with disabilities?	100	0
10.	Is your institution barrier free?	61.90	38.10

Table 6.7: Opinion Survey among the Common People in Uttar Dinajpur District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	90.48	9.52
2.	Do you know about the Persons with Disabilities Act, 1995?	19.05	80.95
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	85.71	14.29
4.	Have you heard about Special Employment Exchange?	9.52	90.48
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	19.05	80.95

Table 6.8: Opinion Survey among the Government Employees in Uttar Dinajpur District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	100	0
2.	Do you know about the Persons with Disabilities Act, 1995?	14.29	85.71
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	90.48	9.52
4.	Have you heard about Special Employment Exchange?	23.81	76.19
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	19.05	80.95

Table 6.9: Opinion Survey among the Persons with Disabilities in Dakshin Dinajpur District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities?	71.43	28.57
	(ii) Can you name any one?	38.10	61.90
2.	(i) Do you know about the Persons with Disabilities Act, 1995?	38.10	61.90
	(ii) Do you know about the various rights provided by this Act?	38.10	61.90
3.	(i) Do you know that 3% seats are reserved for persons with disabilities in educational institutions and employment (in the public sector)?	19.05	80.95
	(ii) Do you think that the percentage should be increased?	100	0
	(iii) Should reservation be introduced in the private sector as well?	100	0
4.	Do you know about Special Employment Exchange?	19.05	80.95
5.	Do you receive any allowance from the Government?	19.05	80.95
6.	Have you ever been discriminated because of your disability?	95.24	4.76
7.	(i) Have you obtained a Disability Certificate?	66.67	33.33
	(ii) Was it an easy process to obtain the certificate?	0	100
8.	(i) Do you know that there is a 'Disability Commissioner' to listen to your woes?	42.86	57.14
	(ii) Have you ever seeked his help?	33.33	66.67
9.	What is the biggest injustice you have faced on account of your disability?	(a) 66.67	
	(a) Negative societal attitude	(b) 9.52	
	(b) Limited educational opportunities	(c) 9.52	
	(c) Limited employment prospects	(d) 4.76	
	(d) Non-friendly transport facilities	(e) 4.76	
	(e) Non-accessible buildings	(f) 4.76	
	(f) Apathy of Government		
10.	Is mainstream education or special education more desirable for persons with disabilities? (a) Mainstream Education (b) Special education (c) Both	(a) 0 (b) 71.43 (c) 28.57	

Table 6.10: Opinion Survey among the NGO workers in Dakshin Dinaipur District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities?	100	0
	(ii) Can you name any one?	100	0
2.	Have you heard about the Persons with Disabilities Act, 1995?	100	0
3.	(i) Do you know about the various disabilities as incorporated in the Persons with Disabilities Act, 1995?	100	0
	(ii) Do you think that the classification made in the Act is satisfactory?	85.71	14.29
4.	Do you know whether your institution receives sufficient funds from the Government?	61.90	52.38
5.	Do you know whether your institution/ organization has received any benefit from the Government for working for the persons with disabilities?	76.19	23.81
6.	Has the Disability Commissioner extended the necessary help to your institution?	57.14	42.86
7.	(i) Does your institution impart special education?	85.71	14.29
	(ii) Does your institution have specially trained teachers?	100	0
	(iii) Does the institution have RCI trained professionals?	100	0
	(iv) Is mainstream education or special education more desirable for persons with disabilities? (a) Mainstream Education (b) Special education (c) Both	(a) 19.05 (b) 57.14 (c) 23.81	
8.	Have you made any efforts on your part to enroll the eligible inmates with the Special Employment Exchange and receive unemployment allowance?	90.48	9.52
9.	Do you think self-employment is the best method of assuring self dependence of the persons with disabilities?	76.19	23.81
10.	Is your institution barrier free?	42.86	57.14

Table 6.11: Opinion Survey among the Common People in Dakshin Dinajpur District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	52.38	47.62
2.	Do you know about the Persons with Disabilities Act, 1995?	28.57	71.43
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	47.62	52.38
4.	Have you heard about Special Employment Exchange?	33.33	66.67
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	28.57	71.43

Table 6.12: Opinion Survey among the Government Employees in Dakshin Dinajpur District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	95.24	4.76
2.	Do you know about the Persons with Disabilities Act, 1995?	52.38	47.62
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	71.43	28.57
4.	Have you heard about Special Employment Exchange?	19.05	80.95
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	0	100

Table 6.13: Opinion Survey among the Persons with Disabilities in

Darjeeling District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities?	52.38	47.62
	(ii) Can you name any one?	9.52	90.48
2.	(i) Do you know about the Persons with Disabilities Act, 1995?	19.05	80.95
	(ii) Do you know about the various rights provided by this Act?	4.76	95.24
3.	(i) Do you know that 3% seats are reserved for persons with disabilities in educational institutions and employment (in the public sector)?	42.86	57.14
	(ii) Do you think that the percentage should be increased?	100	0
	(iii) Should reservation be introduced in the private sector as well?	100	0
4.	Do you know about Special Employment Exchange?	19.05	80.95
5.	Do you receive any allowance from the Government?	0	100
6.	Have you ever been discriminated because of your disability?	85.71	14.29
7.	(i) Have you obtained a Disability Certificate?	80.95	19.05
	(ii) Was it an easy process to obtain the certificate?	19.05	80.95
8.	(i) Do you know that there is a 'Disability Commissioner' to listen to your woes?	9.52	90.48
	(ii) Have you ever sought his help?	0	100
9.	What is the biggest injustice you have faced on account of your disability? (a) Negative societal attitude (b) Limited educational opportunities (c) Limited employment prospects (d) Non-friendly transport facilities (e) Non-accessible buildings (f) Apathy of Government	(a) 57.14 (b) 14.29 (c) 4.76 (d) 4.76 (e) 4.76 (f) 14.29	
10.	Is mainstream education or special education more desirable for persons with disabilities? (d) Mainstream Education (e) Special education (f) Both	(a) 57.14 (b) 33.33 (c) 9.52	

Table 6.14: Opinion Survey among the NGO workers in Darjeeling

District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities?	100	0
	(ii) Can you name any one?	90.48	9.52
2.	Have you heard about the Persons with Disabilities Act, 1995?	90.48	9.52
3.	(i) Do you know about the various disabilities as incorporated in the Persons with Disabilities Act, 1995?	90.48	9.52
	(ii) Do you think that the classification made in the Act is satisfactory?	14.29	85.71
4.	Do you know whether your institution receives sufficient funds from the Government?	4.76	95.24
5.	Do you know whether your institution/ organization has received any benefit from the Government for working for the persons with disabilities?	66.67	33.33
6.	Has the Disability Commissioner extended the necessary help to your institution?	57.14	42.86
7.	(i) Does your institution impart special education?	100	0
	(ii) Does your institution have specially trained teachers?	80.95	19.05
	(iii) Does the institution have RCI trained professionals?	100	0
	(iv) Is mainstream education or special education more desirable for persons with disabilities? (a) Mainstream Education (b) Special education (c) Both	(a) 80.95 (b) 9.52 (c) 9.52	
8.	Have you made any efforts on your part to enroll the eligible inmates with the Special Employment Exchange and receive unemployment allowance?	0	100
9.	Do you think self-employment is the best method of assuring self dependence of the persons with disabilities?	100	0
10.	Is your institution barrier free?	66.67	33.33

Table 6.15: Opinion Survey among the Common People in Darjeeling District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	71.43	28.57
2.	Do you know about the Persons with Disabilities Act, 1995?	14.29	85.71
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	52.38	47.62
4.	Have you heard about Special Employment Exchange?	0	100
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	38.10	61.90

Table 6.16: Opinion Survey among the Government Employees in Jalpaiguri District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	76.19	23.81
2.	Do you know about the Persons with Disabilities Act, 1995?	33.33	66.67
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	80.95	19.05
4.	Have you heard about Special Employment Exchange?	14.29	85.71
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	33.33	66.67

Table 6.17: Opinion Survey among the Persons with Disabilities in Jalpaiguri District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities?	52.38	47.62
	(ii) Can you name any one?	42.86	57.14
2.	(i) Do you know about the Persons with Disabilities Act, 1995?	42.86	57.14
	(ii) Do you know about the various rights provided by this Act?	33.33	66.67
3.	(i) Do you know that 3% seats are reserved for persons with disabilities in educational institutions and employment (in the public sector)?	38.10	61.90
	(ii) Do you think that the percentage should be increased?	71.43	28.57
	(iii) Should reservation be introduced in the private sector as well?	76.19	23.81
4.	Do you know about Special Employment Exchange?	38.10	61.90
5.	Do you receive any allowance from the Government?	0	100
6.	Have you ever been discriminated because of your disability?	90.48	9.52
7.	(i) Have you obtained a Disability Certificate?	85.71	14.29
	(ii) Was it an easy process to obtain the certificate?	14.29	85.71
8.	(i) Do you know that there is a 'Disability Commissioner' to listen to your woes?	42.86	57.14
	(ii) Have you ever sought his help?	9.52	90.48
9.	What is the biggest injustice you have faced on account of your disability?	(a) 42.86	
	(a) Negative societal attitude	(b) 4.76	
	(b) Limited educational opportunities	(c) 4.76	
	(c) Limited employment prospects	(d) 14.29	
	(d) Non-friendly transport facilities	(e) 14.29	
	(e) Non-accessible buildings	(f) 19.05	
	(f) Apathy of Government		
10.	Is mainstream education or special education more desirable for persons with disabilities?	(a) 33.33	
	(g) Mainstream Education	(b) 14.29	
	(h) Special education	(c) 52.38	
	(i) Both		

Table 6.18: Opinion Survey among the NGO workers in Jalpaiguri District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities?	100	0
	(ii) Can you name any one?	100	0
2.	(i) Have you heard about the Persons with Disabilities Act, 1995?	100	0
3.	(i) Do you know about the various disabilities as incorporated in the Persons with Disabilities Act, 1995?	100	0
	(ii) Do you think that the classification made in the Act is satisfactory?	61.90	38.10
4.	Do you know whether your institution receives sufficient funds from the Government?	9.52	90.48
5.	Do you know whether your institution/ organization has received any benefit from the Government for working for the persons with disabilities?	52.38	47.62
6.	Has the Disability Commissioner extended the necessary help to your institution?	66.67	33.33
7.	(i) Does your institution impart special education?	100	0
	(ii) Does your institution have specially trained teachers?	80.95	19.05
	(iii) Does the institution have RCI trained professionals?	100	0
	(iv) Is mainstream education or special education more desirable for persons with disabilities? (a) Mainstream Education (b) Special education (c) Both	(a) 0 (b) 33.33 (c) 66.67	
8.	Have you made any efforts on your part to enroll the eligible inmates with the Special Employment Exchange and receive unemployment allowance?	33.33	66.67
9.	Do you think self-employment is the best method of assuring self dependence of the persons with disabilities?	71.43	28.57
10.	Is your institution barrier free?	38.10	61.90

Table 6.19: Opinion Survey among the Common People in Jalpaiguri District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	80.95	19.05
2.	Do you know about the Persons with Disabilities Act, 1995?	47.62	52.38
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	80.95	19.05
4.	Have you heard about Special Employment Exchange?	38.10	61.90
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	33.33	66.67

Table 6.20: Opinion Survey among the Government Employees in Jalpaiguri District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	71.43	28.57
2.	Do you know about the Persons with Disabilities Act, 1995?	23.81	76.19
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	85.71	14.29
4.	Have you heard about Special Employment Exchange?	28.57	71.43
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	42.86	57.14

Table 6.21: Opinion Survey among the Persons with Disabilities in Coochbehar District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities? (ii) Can you name any one?	38.10	61.90
		0	21
2.	(i) Do you know about the Persons with Disabilities Act, 1995? (ii) Do you know about the various rights provided by this Act?	0	21
		4.76	95.24
3.	(i) Do you know that 3% seats are reserved for persons with disabilities in educational institutions and employment (in the public sector)? (ii) Do you think that the percentage should be increased? (iii) Should reservation be introduced in the private sector as well?	14.29	85.71
		100	0
		85.71	14.29
4.	Do you know about Special Employment Exchange?	0	100
5.	Do you receive any allowance from the Government?	23.81	76.19
6.	Have you ever been discriminated because of your disability?	90.48	9.52
7.	(i) Have you obtained a Disability Certificate? (ii) Was it an easy process to obtain the certificate?	100	0
		0	100
8.	(i) Do you know that there is a 'Disability Commissioner' to listen to your woes? (ii) Have you ever seeked his help?	76.19	23.81
		0	100
9.	What is the biggest injustice you have faced on account of your disability? (a) Negative societal attitude (b) Limited educational opportunities (c) Limited employment prospects (d) Non-friendly transport facilities (e) Non-accessible buildings (f) Apathy of Government	(a) 52.38 (b) 9.52 (c) 9.52 (d) 9.52 (e) 9.52 (f) 9.52	
10.	Is mainstream education or special education more desirable for persons with disabilities? (j) Mainstream Education (k) Special education (l) Both	(a) 4.76 (b) 85.71 (c) 9.52	

Table 6.22: Opinion Survey among the NGO workers in Coochbehar

District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities?	100	0
	(ii) Can you name any one?	42.86	57.14
2.	(i) Have you heard about the Persons with Disabilities Act, 1995?	76.19	23.81
3.	(i) Do you know about the various disabilities as incorporated in the Persons with Disabilities Act, 1995?	71.43	28.57
	(ii) Do you think that the classification made in the Act is satisfactory?	9.52	90.48
4.	Do you know whether your institution receives sufficient funds from the Government?	9.52	90.48
5.	Do you know whether your institution/ organization has received any benefit from the Government for working for the persons with disabilities?	9.52	90.48
6.	Has the Disability Commissioner extended the necessary help to your institution?	23.81	76.19
7.	(i) Do you know about the concept of special education?	52.38	47.62
	(ii) Does your institution have specially trained teachers?	100	0
	(iii) Does the institution have RCI trained professionals?	33.33	66.67
	(iv) Is mainstream education or special education more desirable for persons with disabilities? (a) Mainstream Education (b) Special education (c) Both	(a) 0 (b) 42.86 (c) 57.14	
8.	Have you made any efforts on your part to enroll the eligible inmates with the Special Employment Exchange and receive unemployment allowance?	14.29	85.71
9.	Do you think self-employment is the best method of assuring self dependence of the persons with disabilities?	52.38	47.62
10.	Is your institution barrier free?	33.33	66.67

Table 6.23: Opinion Survey among the Common People in Coochbehar District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	52.38	47.62
2.	Do you know about the Persons with Disabilities Act, 1995?	14.29	85.71
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	76.19	23.81
4.	Have you heard about Special Employment Exchange?	19.05	80.95
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	23.81	76.19

Table 6.24: Opinion Survey among the Government Employees in Coochbehar District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?	85.71	14.29
2.	Do you know about the Persons with Disabilities Act, 1995?	14.29	85.71
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	95.24	4.76
4.	Have you heard about Special Employment Exchange?	38.10	61.90
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	23.81	76.19

Table 6.25: Overall response of persons with disabilities in North Bengal

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities? (ii) Can you name any one?	55.55	44.44
		20.63	79.37
2.	(i) Do you know about the Persons with Disabilities Act, 1995? (ii) Do you know about the various rights provided by this Act?	30.15	69.85
		26.98	73.02
3.	(i) Do you know that 3% seats are reserved for persons with disabilities in educational institutions and employment (in the public sector)? (ii) Do you think that the percentage should be increased? (iii) Should reservation be introduced in the private sector as well?	37.30	62.70
		94.44	5.56
		84.13	15.87
4.	Do you know about Special Employment Exchange?	28.57	71.43
5.	Do you receive any allowance from the Government?	13.49	86.51
6.	Have you ever been discriminated because of your disability?	87.30	12.70
7.	(i) Have you obtained a Disability Certificate? (ii) Was it an easy process to obtain the certificate?	81.74	18.26
		11.90	88.10
8.	(i) Do you know that there is a 'Disability Commissioner' to listen to your woes? (ii) Have you ever sought his help?	46.03	53.17
		21.43	78.57
9.	What is the biggest injustice you have faced on account of your disability? (a) Negative societal attitude (b) Limited educational opportunities (c) Limited employment prospects (d) Non-friendly transport facilities (e) Non-accessible buildings (f) Apathy of Government	(a) 50 (b) 15.87 (c) 9.52 (d) 7.94 (e) 7.14 (f) 9.52	
10.	Is mainstream education or special education more desirable for persons with disabilities? (m) Mainstream Education (n) Special education (o) Both	(a) 23.81 (b) 53.17 (c) 23.02	

Table 6.26: Overall response of the NGO workers in North Bengal.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	(i) Do you know that there are specific laws to protect the interests of the persons with disabilities?	100	0
	(ii) Can you name any one?	84.92	15.08
2.	(i) Have you heard about the Persons with Disabilities Act, 1995?	94.44	5.56
3.	(i) Do you know about the various disabilities as incorporated in the Persons with Disabilities Act, 1995?	92.86	7.14
	(ii) Do you think that the classification made in the Act is satisfactory?	37.30	62.70
4.	Do you know whether your institution receives sufficient funds from the Government?	35.71	64.29
5.	Do you know whether your institution/ organization has received any benefit from the Government for working for the persons with disabilities?	38.89	61.11
6.	Has the Disability Commissioner extended the necessary help to your institution?	45.24	54.76
7.	(i) Does your institution impart special education?	87.30	12.70
	(ii) Does your institution have specially trained teachers?	88.10	11.90
	(iii) Does the institution have RCI trained professionals?	76.98	23.02
	(iv) Is mainstream education or special education more desirable for persons with disabilities? (d) Mainstream Education (e) Special education (f) Both	(a) 32.54 (b) 38.89 (c) 28.57	
8.	Have you made any efforts on your part to enroll the eligible inmates with the Special Employment Exchange and receive unemployment allowance?	42.06	57.94
9.	Do you think self-employment is the best method of assuring self dependence of the persons with disabilities?	83.33	16.67
10.	Is your institution barrier free?	47.62	52.38

Table 6.27: Overall response among the Common People in North Bengal.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?		
		69.84	30.16
2.	Do you know about the Persons with Disabilities Act, 1995?	30.16	69.84
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	65.08	42.86
4.	Have you heard about Special Employment Exchange?	16.67	83.33
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	25.40	74.60

Table 6.28: Opinion Survey among the Government Employees in Jalpaiguri District.

Question Number	Question put to the Respondents	Response in %	
		YES	NO
1.	Do you know that there are specific laws to protect the interests of the persons with disabilities?		
		88.10	11.90
2.	Do you know about the Persons with Disabilities Act, 1995?	31.75	68.25
3.	Do you know that 3% seats are reserved for persons with disabilities in educational institutions and for employment (in the public sector)?	84.13	15.87
4.	Have you heard about Special Employment Exchange?	25.40	74.60
5.	Do you know that there are 'State Disability Commissioners' and 'Chief Commissioner' to look into the well-being of the persons with disabilities?	23.02	76.98

C. DATA ANALYSIS:

On a perusal of the overall response of the questionnaires, the scenario in North Bengal may be summed up by way of the following observations:

- (i) Though all the categories seem to know about the existence of specific laws meant for the protection of the persons with disabilities, it is disappointing that a comparatively lesser response has come from the PWDs themselves. While the other three categories, i.e of NGO workers, common people and government employees have given a very high percentage of positive reply, the PWDs have been able to move slightly above fifty percent.
- (ii) Though the respondents mostly knew about the existence of laws only the NGO workers knew about specific Acts and the PWD Act. The response from the PWDs in this field was also very less, not even forty percent.
- (iii) The majority of the PWDs also did not know about the availability of reservations in employment compared to common people and government employees. But once informed, majority of them voted that the quantum of reservation must be increased and so must be the introduction of reservation in the private sector.
- (iv) Majority of the PWDs do not about the existence of Special Employment Exchange and even fewer receive any kind of allowance from the Government. In fact very few common people and Government employees also knew about the existence of Special Employment Exchanges *et al.*
- (v) Majority of the PWDs are highly discriminated, the highest reason accountable is the negative societal attitude of looking down upon them, followed by restricted employment opportunities, apathy of the government, limited employment prospects, inaccessible buildings and non-friendly transport facilities.

(vi) The only silver lining in all this seems to be obtaining the Disability Certificate, but that too at the cost of much harassment and procedural formalities. While 81.74% have obtained the certificates, 88.10% pointed out that getting the Certificate was very cumbersome for which many had dropped the idea of obtaining one.

(vii) The role of the Commissioner has been very disappointing in all the categories. Less than fifty percent of the PWDs know about the existence of the Disability Commissioner and only a meagre 21.43% has ever gone forward to seek his help. Less than thirty per cent of the common people and government employees also know about the Disability Commissioner/Commissioners. Majority of the NGO workers have also pointed out that they have not received satisfactory cooperation from the Commissioner. Neither have the NGOs received any special benefit for working for the disabled nor have they received sufficient funds. Majority of the institutions do not have a barrier free environment also.

(viii) Majority of the NGO workers have also expressed their dissatisfaction on the existing definition of disability and have vouched for a change in the definition by including some more specific categories.

(ix) For over a century, the prevalent model for offering education to children with special needs has been the special school. This system had major shortcomings – it is expensive and has only limited reach. In addition, isolating children based on disability was prejudiced and breach of the human rights. This led to the coming out of the new concept called Inclusive Education or mainstream education which argues that all children irrespective of the nature and degree of the disability should be educated in general schools with normal children. Inclusive education is all about making classrooms responsive to the needs of the learner. But majority of the NGOs impart special education and have professionals for the purpose, but where the current movement is towards inclusive education it is surprising that both the

NGO workers and PWDs have voted in favour of special education. The thrust of the NGOs, in the opinion of the researcher ought to be towards mainstream education, and the PWDs must also be motivated by them towards this goal, which will certainly assure their equality in the true sense of the term.

(x) The role of the NGO workers so far as spreading awareness amongst the disabled is not satisfactory at all. While they themselves know about the laws and their provisions they have hardly made any effort on their part to convey the same to the PWDs. Even very few, 42.06% have made efforts to enroll the eligible candidates to the Special employment Exchanges or helped them to receive unemployment allowance.

(xi) However it heartening to note that the major chunk of the NGO workers opine that self employment is the best method of assuring the self dependence of the PWDs which is definitely a step towards recognizing the human rights approach to disability rights.

Hence from the above it can be said that the Persons with Disabilities Act, 1995 has not been able to make a satisfactory mark in this part of the country. There are various aspects where the Act needs to be reconsidered. In addition the awareness and sensitizing of the populace is absolutely necessary. Of all the four categories examined the conditions of the Persons with disabilities is not pleasing. Majority of them do not know about their rights and the NGO workers have made no efforts to educate them in this regard. The common people and Government Employees too do not know much about the rights of this section of the population. The role of the Commissioner in all its aspects is highly dissatisfactory. Majority of the population hardly knows about his existence. It appears that the Commissioner does his duties by merely publishing a booklet on the World Disabled Day. The Ministry of women and Child Development and Social

Welfare Department, of the State has also failed to spread the idea of inclusive education. Thus in short it may be pointed out that a lot remains to be done to uplift the condition of the persons with disabilities in North Bengal form awareness of the legal rights, to their employment prospects, to education, to receiving allowances, to accessibility both physical and psychological and above all making them a true human being with special abilities.

A SUM UP:

The efficacy of any legislation depends upon its applicability. This work revolves around the human rights of the persons with disabilities with particular reference to the Persons with Disabilities Act, 1995. In order to test the effectiveness of the governmental initiatives towards the persons with disabilities an opinion survey was taken up by the researcher in the northern six districts of West Bengal comprising of Malda, Uttar Dinajpur, Dakshin Dinajpur, Darjeeling, Jalpaiguri and Coochbehar. This area is commonly designated as North Bengal.

Since the condition of any section of population cannot be studied in isolation, therefore the sample was divided into four categories each consisting of 126 people. They comprised of the Persons with Disabilities, the NGO workers, the common people and Government employees. 21 questionnaires were given to each of the categories in each of the districts. Efforts were made by the researcher to present a hundred per cent response from the respondents. Consequently the figures that came were staggering. While response to some questions evoked a hundred per cent positive response, in some it was totally negative. But evaluation of the data reveals the bitter truth---the legislative efforts of the State have failed to make a mark in this part of the country.

Majority of the persons with disabilities have not heard of this Act or the benefits following from it. They neither know about the existence of Special employment exchanges or the Disability Commissioner nor receive allowances. The common people and the government employees to did not give a very positive response. The NGO workers seem to make no effort to spread any awareness or sensitize the world around them. Where the NGO workers are themselves averse, that societal attitude is the biggest discrimination faced by the persons with disabilities is very obvious. At the same time, the role of the Disability Commissioner has been under the axe. A very dismal performance when it comes to extending cooperation or extending its helping hand to the persons with disabilities as well as the NGOs working for them. But what is most shocking is the favorability of special education instead of inclusive education, both by the persons with disabilities as well by the NGO workers. This reflects the failure of the Government machinery to spread this wonderful idea of inclusion and not segregation. The survey also brings to the fore that the reservation in employment should be increased. Similarly the definition should not be rigid and include some more categories.

Hence the need is to spread awareness about the existence of specific laws guaranteeing the human rights of the persons with disabilities through regular workshops and mass sensitization programmes. The government should take up a proactive role in spreading the message of equality and non-discrimination. In short all efforts should be made in every area—employment, education, housing, accessibility, social security-- to make the lives of the specially able truly special by assuring them of their human rights.

CHAPTER 7

CONCLUSION AND SUGGESTIONS

CHAPTER 7

CONCLUSION AND SUGGESTIONS

*If you have a mind and shall not reason, you are
disabled.*

*If you have the opportunities and do not use them, you
are disabled.*

To be disinterested is to be disabled.

But if you are disabled and can think;

If you are disabled and are dedicated;

If you have talent and have skills;

If you have the will, then where do you go?

Only ahead. May even reach zenith.

*That is the direction of joy, empowerment, achievement
and adventure.*

So come with us.

---Justice Jitendra N. Bhatt

The study of any law, its principles and provision is incomplete unless we assess its background and gradual course of development. The researcher's field of study revolves around the human rights of the persons with disabilities in the legal system prevailing in India. In this work also an attempt has been made to frame the historical and conceptual development of disability rights; because unless we mark out the early phases of development we cannot monitor the present situation or develop laws for the future. With this endeavour, the origin of the concept of disability has been traced.

Disability in the early periods has been mainly connected with religious beliefs and the words pronounced in the religious scriptures. Also the key reason behind disability was considered to be punishment for sins committed in the past life. Whether it be Ramayana or Mahabharata the disabled have been basically been looked down upon. The dominant social attitude towards persons with disability has been one of pity, from which springs insidious forms of discrimination - the eventual source of their exclusion and extreme isolation. The reasons behind disability have also been assessed and principally relate 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. The various definitions of disability in national and international arena have also been considered which has brought forth the necessity of a new definition incorporating the human rights approach to disability and giving it the utmost importance while considering the definition of disability. So far as the definition of disability is concerned there appears to be no concurrence. By and large, disability may be denoted as 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 dominion of human existence. It is very inopportune that even to this day a suitable, undisputed and ubiquitous definition of the term has not developed, even when human rights and disability movement has gained impetus throughout the world. There is lack of sensitivity on the issue of disability throughout the globe predominantly due to its diverse approaches and definitions. However, current international view is of the vision 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 which is reflected in the definition given in Article 1 of the UN Disability Convention.. A distinction between handicap, disability and

impairment is also an area of study which has been adequately addressed. 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 a handicap is a difficulty experienced by a person because of the nature of the environment in which a person finds himself.

There are various models of disability beginning from moral model, charity model, social model, welfare model, economic model and finally human rights model. A look at the various models of disability has revealed the present transition from charity to human rights. In human rights law, equality is founded upon two complementary principles: non-discrimination and reasonable differentiation. The doctrine of differentiation is of particular importance to persons with disabilities, some of whom may require specialised services or support in order to be materially equal to others. Differences of treatment between individuals are not discriminatory if their aim is to protect the rights of the disadvantaged groups. A rights based society gives individuals or groups their due within society as a whole. Exclusion and abuse of people with disabilities are violations of their human rights. People with disabilities are entitled to enjoy the same rights as all others. A human rights approach to disability acknowledges that people with disabilities are rights holders and that social structures and policies restricting or ignoring the rights of people with disabilities often lead to discrimination and exclusion. A human rights perspective requires society, particularly governments, to actively promote the necessary conditions for all individuals to fully realize their rights. Hence the need of the hour is to encourage the promotion of disability human rights and give utmost priority to human rights perspective to disability rights.

Due to difference in the definitional approach, the disability estimates in the country also reflect different pictures. The disability population according to the Census 2001 and that of the NSSO 2002 are different

principally due to the different definitions. These differences surely have a negative impact in assessing the true percentage of disabled population in the country. In fact the figures are not satisfactory when compared with even countries like Nepal or Pakistan. Hence the need is to shed off the medical model and take a more human rights approach; and above everything else evolve a satisfactory and complete definition of the term disability so that the true picture comes to the fore.

So far as the international legal regime is concerned, the role of the United Nations and the legislations of Europe including the European Union, U.K. and Germany; North America including U.S.A. and Canada; Costa Rica in South America; Australia including New Zealand; South Africa and Zimbabwe in Africa and Asia including China and India has been assessed. So far as the United Nations is concerned, it has taken some very positive steps to assure rights of this section of the population. Apart from the Universal Declaration of Human Rights, there are a number of binding and non-binding instruments. The core United Nations Human Rights Conventions that are binding on States that have ratified them are:

- International Covenant on Civil and Political Rights, 1966;
- International Covenant on Economic, Social and Cultural Rights, 1966;
- Convention on the Elimination of All Forms of Racial Discrimination, 1965;
- Convention on the Elimination of all Forms of Discrimination against Women , 1979;
- Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment , 1984;
- Convention on the Rights of the Child, 1989;

- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990.

There are also some international and regional human rights conventions that protect the rights of persons with disabilities specifically, or have provisions concerning persons with disabilities. These include: ILO Convention concerning Vocational Rehabilitation and Employment (Disabled Persons); Convention on the Rights of the Child (Article 23) amongst others. Besides international conventions, there are a number of declarations, guidelines and Acts emanating from the UN, which deal specifically with a range of issues relating to disability. It is to be noted that international instruments, such as declarations, resolutions, principles, guidelines and rules, are not technically legally binding. They express generally accepted principles and represent a moral and political commitment by States. They also can be used as guidelines for States in enacting legislation and formulating policies concerning persons with disabilities. Several disability-specific non-binding international instruments have been adopted at the international level. The instruments include:

- Declaration of the Rights of Mentally Retarded Persons, 1971
- Declaration on the Rights of Disabled Persons, 1975;
- World Programme of Action concerning Disabled Persons, 1982;
- Principles for the Protection of Persons with Mental illness and the Improvement of Mental Health Care, 1991
- Standard rules on the Equalization of Opportunities for Persons with Disabilities, 1993;
- ILO Recommendation concerning Vocational Rehabilitation and Employment (Disabled persons), 1983 amongst others.

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and its Optional Protocol was adopted on 13 December

2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007. It is the first comprehensive human rights treaty of the 21st century and is the first human rights convention to be open for signature by regional integration organizations. It marks an exemplary change in attitudes and approaches to persons with disabilities. The Convention is projected as a human rights instrument with an explicit, social development dimension. It espouses an extensive classification of persons with disabilities and reaffirms that all persons with all forms of disabilities ought to enjoy all human rights and fundamental freedoms. It elucidates and qualifies how all types of rights concern to persons with disabilities and classifies areas where adaptations have to be made for persons with disabilities to successfully implement their rights and areas where their rights have been desecrated, and where protection of rights must be toughened. Its impact on disabled peoples' lives holds a great deal of promise. Given the fact that other treaties that solely protect the disabled persons like—the World Programme of Action, Standard Rules, Beijing Declaration on the Rights of Disabled Persons, Declaration on the Rights of Mentally Retarded Persons and Principles for the Protection of Persons with Mental Illnesses—one may well wonder why there is need for a new Convention. It is important because of two reasons. Firstly, none of the treaties that deal specifically with the rights of the disabled are legally binding. Secondly, the very existence of specific groups that are especially vulnerable, calls for a single set of binding norms whose enforcement can be monitored. The rights guaranteed under the UNCRPD are comprehensive and deal with all aspects of the life of persons with disability. If implemented in its right spirit, there will, indeed, be far reaching changes in the lives of persons with disabilities. India's nod to UN Convention on the Rights of Persons with Disabilities means that the State has to spare sizeable resources for the disabled people whose share has so far been conditional to funds' availability. Though the process for this is yet to begin, India stands to gain by setting aside decent

allocations for the disabled for their mainstreaming means enhancing productivity through harnessing thus far untapped potential.

Taking clue from the United Nations Declarations and other documents as well as the Conventions and Recommendations adopted by the International Labour Organisation, various countries all over the world have set up legal framework for protecting the welfare of persons with disabilities. International norms concerning disability are useful for setting common standards for disability legislation. Those standards also need to be appropriately reflected in policies and programmes that reach persons with disabilities and can effect positive changes in their lives. An overview of the laws prevailing in U.K., Germany, U.S.A., Canada, Costa Rica, Guatemala, Australia, New Zealand, South Africa, Zimbabwe, China and India brings to the light that the most comprehensive legal approach to preventing and protecting against disability based discrimination seems to be the enactment of civil rights legislation. However it can be concluded that modern disability discrimination laws in most cases resort to the principles of desegregation, de-institutionalisation and reasonable accommodation which collectively aim at abolishing structural as well as open discrimination. Today there is no universal definition of disability discrimination and no general concept of what equalisation of opportunities for disabled persons actually necessitates. Although all the anti discrimination laws intend to institute equal opportunities for disabled persons, they do not recognize and forbid accessibility, segregation or the denial of independent living as forms of discrimination. It is to be kept in mind that anti discrimination law is not the only way to equality for persons with disabilities, but the right based approach is one of the most outstanding legal methods being used by many states around the world.

Coming to India, though the principal anti-discrimination legislation is the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, the constitutional provisions and the other three major Acts dealing with the disabled whether physical or mental as well as their rehabilitation and support viz. *The Mental Health Act, 1987*; *Rehabilitation Council of India Act, 1992* and *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* has also been considered. The Constitution of India is premised on the principle of social justice and human rights. The Preamble, the Directive Principles of State Policy and the Fundamental Rights enshrined in the Constitution stand testimony to the commitment of the State to its people. These provisions envisage a very positive role for the State in the upliftment of the status of disadvantaged groups. For example, Article 41 enjoins that, "The State shall, within the limits of its economic capacity and development make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement." Further, in view of the provisions contained in Article 36 and 37, it is apparent that Article 41 is a mandate both to the Legislature and the Courts. Though, Article 41 does not confer a justiciable right, the Supreme Court has, by its own interpretation, bearing in mind the socio-economic goal, held that the Courts should so interpret a statute as will advance the objective underlying Article 41.

Among the major laws is the *Mental Health Act, 1987*. The emphasis of this legislation is on the appointments or qualifications of authorities, admission and discharge of mentally ill from specialized institutions, removal and role of medical officers, magistrates or police officers, liability to meet the cost of maintenance of mentally ill persons, and penalties and punishments, etc. However, there are serious doubts as to the effectiveness of this legislation for ensuring the protection of the person, property and privacy

of communication of mentally ill. It leaves sufficient space for the misuse of power by the police, medical officer or magistrate. The percentage of involuntary admissions is often found to be very high and the provisions of Section 19 which permits admission under certain special circumstances by a relative or a friend are being widely abused. The fundamental weakness of the Act is that it perceives institutional care as the only arrangement for the care and protection of persons with mental illness. So far as the *Rehabilitation Council of India Act, 1992* is concerned The Rehabilitation Council of India was set up by the Government of India in 1986, initially as a society to regulate and standardise training policies and programmes in the field of rehabilitation of persons with disabilities. The urgent need for minimum standards was felt as the majority of persons engaged in education, vocational training and counselling of persons with disabilities were not professionally qualified. Poor academic and training standards adversely affect the chances of disabled succeeding in the world of work. Therefore, an Act of Parliament in 1992 enhanced the status of the Council to a statutory body. In essence, the Council and its Act, aims to regulate the quality of training of Rehabilitation Professionals and to maintain a Central Rehabilitation Registration Register of the professionals so trained. However, both the Council and the Act didn't find favour with the voluntary sector, due to arbitrariness in formulation and implementation, delay in implementation of the clauses of the Act, inclusion of the clause of disciplinary action against those who failed to comply with the dictates of the Act and inadequate definition of the term Rehabilitation professional. *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* was enacted for the protection of certain groups among the disabled who are more vulnerable than others, and hence a specific enactment for their property and well-being was felt necessary. The enactment of the National Trust Act was meant to fulfill a common demand of

families that seek State provision for their severely disabled wards. The specific objectives of the Act are:

- To enable and empower persons with disabilities to live as independently and as fully as possible within and as close to the community to which they belong;
- To promote measures for the care and protection of persons with disabilities in the event of death of their parent or guardian; and
- To extend support to registered organisations to provide need based services during the period of crisis in the family of disabled covered under this Act.

The issue of appointing a guardian under the tenets of this law is governed by the constitution of a local level committee (LLC), consisting of an officer of the State, a representative of an NGO and a (any) person with a disability. The LLC is vested with the authority to decide upon applications for legal guardianship. The Act provides for the manner in which legal guardians are to be appointed. The Act also lays down duties of the legal guardian who has to furnish periodic returns to the LLC about the assets of the ward and their disposal in his hands. Similarly, the Committee too is required to maintain inventory and annual accounts of the property and assets, claims and liabilities submitted by the legal guardians to it. The overall supervision of this Act is vested with a National Trust Board appointed through a democratic process by the registered organisations of the parents and others providing services to this segment of the disabled population. The government has contributed Rupees one billion to the trust fund. The interest earned is used in supporting mandated activities. Throughout the Act, as one weaves through the clauses and sub clauses, there appears to be no involvement of the person with the disability, even notionally.

Apart from the above mentioned laws there are a host of minor laws which contain some provisions relating to disability. These Acts have also been reviewed and include *inter alia Workmen's Compensation Act, 1923* and the *State Employees Insurance Act, 1948* amongst the labour welfare

legislations, *Motor Vehicles Act, 1988*, and a host of laws which mention provisions concerning disablement or disability like the *Indian Penal Code, The Contract Act, 1872, The Evidence Act, 1872, The Government Savings Banks Act, 1873, Prisoners Act, 1900, etc.*

Coming to the principal legislation i.e. *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, India enacted this comprehensive legislation in 1995 as its commitment of being a signatory to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and the Pacific region, which was espoused at the meeting to launch the Asian and Pacific Decade of the Persons with Disabilities (1993-2002) convened by the Economic and Social Commission for Asia and Pacific at Beijing on 1st December, 1992. The Act considers disability as a civil right rather than a health and welfare topic, and identifies the requirement to incorporate persons with disabilities with the mainstream of society by some normative action. The main purpose of this Act is to define the responsibilities of the Government at National as well as at State level with regard to the services for disabled persons. The Act ensures full life to disabled individuals so as to make full contribution in accordance with disability conditions. Amid other things the Act proposes to provide for the liability of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities; to create a barrier free environment for persons with disabilities; to remove any discrimination against persons with disabilities in the sharing of development benefits with reference to non-disabled person etc. However, it has been criticized for it suffering from indistinct terminology and lacks teeth for its full implementation with lack of adequate and proper monitoring mechanism. Since its initiation this has met with very little success even in matters as basic as ensuring a barrier-free environment and generating employment. As a matter of

fact, particularly viewed with respect to the UNCRPD, the very first change that needs to be made to the definition. The caveat in the PWD Act that reforms should only be undertaken within the limits of a state's economic capacity nullifies the Act's potential for change; the Act does not provide for special provisions for women and children in consonance with the Convention. Further, the provisions of access to justice, liberty and security etc. do not find much mention in the PWD Act, which deals more with the procedural aspects of disability legislation- with rather elaborate details of the committees to be set up. Hence there are a lot of areas where the Act needs to be revamped. Not only have the inherent defects of the Act but also the Act's incompatibility with the Disability Convention mitigated its effects.

The National Policy for Persons with Disability, pronounced in February 2006, attempts to elucidate the framework under which the state, civil society and private sector must function in order to make sure a dignified life for persons with disability and support for their caregivers. The policy makes out the need to restore the earlier emphasis on medical rehabilitation with an emphasis on social rehabilitation. Community Based Rehabilitation (CBR) is seen as an effectual means of rehabilitation, and the policy states that CBR will be encouraged. Like any policy statement, this one too delineates the track that intervention for persons with disability must take. But there is no clear roadmap, or even list of priorities, on how this is to be executed. A closer look reveals that the Policy is in nothing but the imitation of the Persons with Disabilities Act, 1995 and hence requires a complete revamp.

As mentioned above the provisions of the Persons with Disabilities Act, 1995 have not been fully executed till date. Repeatedly the Court's intrusion has been wanted in this field. There have been incidents of people with disabilities and/or their care- and service-providers approaching

various Courts to comprehend these specifications. The conventionally inherited legal system is very pricey, time-consuming and more complex. Therefore, it is said that the underprivileged and vulnerable class has started to look upon such a system as an enemy, instead of a friend. A perusal of the various case laws show that the courts have resorted to individual remedies of the problems brought before them, basically rooted on sympathy rather than entitlements. *Suo moto* action is also negligible. The Courts though have enunciated very notable judgements concerning employment and social security; but it seems to be disinclined towards education and barrier-free environment. The decision given in *Indian Bank's Association's case* is simply magnificent. Simply speaking the judiciary in spite of some landmark judgement seems to be in a slow-moving stage where it requires steady nudging to rise from its sleep.

Finally coming to the scenario of the human rights of the persons with disabilities in North Bengal, the situation is very disappointing. Only 30.15% of the disabled population surveyed knows about the Persons with Disabilities Act. 79.37% of the respondents do not know about the rights guaranteed by this principal anti discrimination law of the nation. 62.70% do not know about the reservations available. Majority of them do not receive any allowance, have been discriminated in their day to day lives and do not know about the Disability Commissioner or have sought his help in any way. The Non-Governmental organizations working in this area have received very little funds which are at most times inadequate and neither the majority of them have received any other special benefit under the Act. 54.76% of the Ngo workers questioned have revealed that their institution has not received the necessary cooperation from the Disability Commissioner. Alongside majority of the common people and government employees too do not know about the Persons with Disabilities Act, the Special employment exchange or the Disability

Commissioner. It thus becomes amply clear that a lot needs to be done to improve the conditions of the disabled in this part of the country.

A glance of the above lines brings into view that individuals with disabilities are the most disadvantaged groups in society and still encounter daily discriminations in every facet of life; and disability must be considered as a natural part of life which does not in any way diminish the right of individuals to live independently, make choices, contribute to society, and pursue meaningful careers. In view of the present study and findings derived from this work, it may thus be safely concluded that:

- I. There is no unanimous definition of Disability that focuses on the social model rather than the charity model and hence there is lack of sensitivity on the issue of disability throughout the world principally due to its different approaches and definitions.
- II. India as such has not laid any specifications regarding collection of disability population data nor has it differentiated between disability, handicap and impairment.
- III. Laws of almost all the countries reviewed brings to light that none of the countries have included provisions for social awakening and most of them vouch for a system of segregation of people with disabilities in institutions.
- IV. The Constitution of India does not specifically lay down any beneficial provision for the persons with disabilities as for women and children.

- V. The *Mental Health Act* puts grave question marks on the efficacy of the Act for ensuring the protection of the person, property and privacy of communication of the mentally ill. As a matter of fact, the Act leaves enough liberty for the misuse of power by the police, medical officer and magistrate. The percentage of involuntary admissions is often found to be very high and the provisions of Section 19 which permits admission under certain special circumstances by a relative or a friend are being widely abused. The primary flaw of the Act relates to the fact that it perceives institutional care as the lone arrangement for the concern and security of the mentally disabled.
- VI. *The Rehabilitation Council of India Act* too suffers from serious drawbacks, chiefly that it not only disempowers anybody not registered with it for carrying out any work with or for the disabled, but also forbids any individual from teaching, training or providing recreation, leisure etc. until and unless the registration proviso is fulfilled. As mentioned earlier also the Act's defects revolve around uncertainty in formulation and execution; delay in execution of the clauses of the Act; addition of the clause of disciplinary action against those who were unsuccessful in complying with the dictates of the Act; and unsatisfactory definition of the expression Rehabilitation professional.
- VII. *The National Trust Act* suffers from the primary defect of absence of participation of the persons with disability. Secondly, there are question marks regarding the extent of the applicability of the restrictions imposed under Section 4(5). Thirdly, the provisos to section 11(1) (b) permits bequests to be made to the Trust for the advantage of a particular person with disability. Simultaneously the provisos lay down that no donor can persist on the exclusive utilization of the bequest for the

beneficiary named by him. This is a very conflicting condition. Fourthly, the Act has a 'protector' kind of image, distant from person-centred plan.

VIII. The National Policy for the Disabled framed in 2006 echoes the provisions of the Persons with Disabilities Act, 1995 instead of making efforts to remedy the defects of the Act which surfaced in ten years of its implementation since 1996.

IX. The main criticisms effected against the *Persons with Disabilities Act, 1995* is its suffering from indistinct terminology and lacks teeth for its full implementation with lack of adequate and proper monitoring mechanism. The key defects can be summed up as:

- a) The definitions view disability strictly from the medical and/or psychometric viewpoint. This results in strengthening a medical model of intrusion rather than the much-needed community-based rehabilitation. Though Mental Illness has been included as one of the seven disabilities, the Act as a whole shows very little understanding of the nature of the disability and current developments in the field. It appears that the recognition is more by default rather than intent. The very definition of Mental Illness (MI) is more by elimination rather than explanation. For example, by stating that mental illness is other than mental retardation, one wonders whether one should apply the definitional criteria to all mental disorders including epilepsy and disabilities such as dyslexia.
- b) The definition of a 'person with disability' under the Act has been criticized for its imprecise nature. Section 2 (t) requires that a medical authority needs to certify that a person suffers not less

than forty percent disability. Particularly for mental health problems such as cerebral palsy or autism, such a determination becomes difficult in the absence of any guidelines. Moreover the assessment of disability in terms of percentage is also not a very hailing process, as it is very difficult to know how to rate a person as a 'person with disability' or 'a person with severe disabilities'.

- c) Although prevention and early detection are important components of the medical model, measures taken for these are insufficient.
- d) In India, education for the disabled is not part of mainstream learning, but it is imparted through isolated institutions which operate on a service and charity mode. Here again, only a few schools have resource rooms and employ special education teachers to assist retain children with special needs in their system. Despondently, these services are found in very few cities. There are almost no special schools or special educational services in rural India. Efforts at incorporating children with disabilities into mainstream schools have been even less successful. There is also a contradiction of the provisions of Section 39 which deals with reservations in educational institutions, being put under the head employment.
- e) **The** Act provides for employment to only those people who come under loco motor, hearing impaired and visually impaired acknowledged categories of disability. The persons with mental illness and mental disability are specifically left out of it irrespective of the degree and severity of their illness. This classification of assigning one pr cent of reservation to each of

these categories is not desirable and the categories have also limited the scope of the application of this section.

- f) Though the Act recognises seven disabilities, the representation allowed in the coordinating committee and executive committee at the central and state levels are restricted to only five members. So unless each disability is represented individually, the chances of MI being dropped by the wayside cannot be ruled out in the absence of representation granted to it in the Committees.
- g) It has very weak anti-discrimination provisions calling for quotas in most cases.
- h) Another significant defect of the Act is that majority of the provisions are subject to the expression “only within the limits of economic capacity and development” of the State and thus are rather easy to evade.
- i) Total lack of efforts on the part of the Government to spread awareness on the provisions of the Act. Most of the disability rights movement has remained confined to the urban sector and failed to mobilize the masses who are neglected.
- j) The role of the Commissioner/ Commissioners has been far from satisfactory.

XI. The dormant nature of the judiciary has also added to the existing woes of this vulnerable section. The Court are reluctant to take *suo moto* actions and in most cases act only when prodded on a particular issue. The judiciary is the least proactive when it comes to dealing with disability issues. Further litigation is expensive and a case usually drags on for years making it difficult for a disabled person to enforce his rights even more.

Thus from the above lines it is amply clear that the persons with disabilities are not objects of charity or pity, but they are very much ‘normal’

like any other human being. It is absolutely that it is the environment around the disabled person that plays a vital role to facilitate his or her mainstreaming and integration into the society. Removing physical, psychological and social barriers and obsolete ethos are gradual steps towards their normalization. A disabled person may be surrounded by invisible glass walls and ceilings which often prevent his or her access to the various societal positions. This process of including the disabled with the non-disabled is incomplete without the necessary laws and their respective rights and obligations. In fact in the present century any law existing without including the human rights perspective is incomplete and invalid. But unfortunately, the existing laws fail to meet the demands of this 'invisible minority' and hence great challenges lies before the State to frame laws in accordance with these changing needs and requirements of the Persons with disabilities. Thus the need is to let the disabled suffering from any kind of disability whether mental or physical get full justice and understand their human rights of the disabled and nourish, flourish and enrich them so as to obey and implement normalization, equalisation, inclusion and rehabilitation in normal social life.

Further, given that a law is a mechanism of social change, the device to protect life, its hands are long and sure enough to protect the exploited from the exploiters. Its hands work according to public policy. Legislation however perfect is pointless without enforcement. Laws are a means to an end in them. Hence their success depends upon both people's respect for them and implementation. Persons with disabilities on their part must come forward to protect their interests and assert their rights individually or through various action groups and welfare organizations; so that the laws far from remaining a dead letter in a statute book are transformed into a living organism. Following suggestions are humbly placed for consideration in this regard:

- i) An all pervasive definition of 'disability' has to be framed based on the social model and in conformity with the provision of the United Nations Convention on the Rights of the Persons with Disabilities, 2006.
- ii) The State must make an effort at the earliest to abandon its outlook of morality and charity and deliberate on the human rights model. The legislative policies and schemes must move from the medical to the human rights model. All together the different nuances of the human rights model must be assume in every viable mode.
- iii) The human rights approach to disability policy must be adopted across the world irrespective of political or cultural precincts.
- iv) Public consciousness must be augmented so that their outlook towards this sector alters. The enterprise here should be together of the society and the state as well as all voluntary organisations operational in this area.
- v) Adoption of the first UN Convention on the Rights of the Persons with Disabilities must not be put at rest on papers but be put into practice as soon as possible.
- vi) The Constitution must be amended by bringing forth specific fundamental rights securing disability entitlements.
- vii) *The Mental Health Act, 1987* must be amended incorporating the following suggestions:

- Inclusion of provisions for educating society about mental illness and treating it at par with physical illness;
- Suitable check on the working of licensing authorities, delimit the powers of the licencing authority and appointment of a doctor preferably a psychiatrist as inspecting officer;
- Sufficient provisions for long-term treatment and expenses thereof;
- Provisions for post discharge care and rehabilitation; penalties for those requesting unnecessary detention of mentally ill;
- Privacy of patients and stress on treatment of illness rather than the ill;
- Avoiding institutionalization and treatment to be based on socialization;
- Provisions for foster homes and half-way homes for those patients whose family members are unwilling to take them back or where the patient has no family; and
- Separate arrangements for elderly, destitute, women and psychopaths, along with children and addicts in places of treatment.

viii) *The Rehabilitation Council of India Act, 1992* must be also amended with these provisions:

- The role of RCI should be changed. From a mere training body it should be a networking and liaison body.
- Alternatives to Central Registry should be worked out at the state and District levels.
- Clause 13(3) related to penal actions must be removed.

- A stringent definition of the term 'Rehabilitation professional', alongwith an equally strict eye on educational entry level and quantum of relevant disability course content.
- Introduction of a clause dealing with persons working in the disability sector before the RCI Act was formulated. The clause should specify at least graduate-level educational qualifications along with a predetermined number of years of experience in the service sector for the registration/licencing of persons already working with the disabled before the coming into force of the Act.

ix) So far as *the National Trust Act, 1999* is concerned the need is to evolve a system that emerges from a person centred plan to a planning process for persons with disabilities. The person centred planning process is a process of planning for and supporting an individual that honours the individual's preferences, choices and abilities and it assumes that all people have preferences, regardless of their level of disability. Decision-making by the individual is the key to this effort. Naturally, appointing a guardian to take decisions can defeat this process. Hence the National Trust should address the development of this process. At the same time there is a need to sensitize parents about the process for self determination and assisted decision making. Also universal legal capacity of a person with disability needs to be recognized. Along with the defects inherent in the Act also needs to be adequately addressed so that the purpose of the legislation is not defeated.

x) Each of the Chapters of the Persons with Disabilities Act need some change. In fact it is strongly suggested that the changes suggested

by the Amendment Committee of 2006 must be taken up as early as possible. Along with the following suggestions with respect to the Persons with Disabilities Act, 1995 may be considered:

- The definitions of disability, person with disability are revised along with the definitions of mental illness, cerebral palsy, low vision and mental retardation as well as introduction of the definitions of learning disability, dyslexia, person with severe disability, disabled person's organizations and non-governmental organizations.
- Minimize Government representation from the Central and State Coordination Committees and Central and State Executive Committees and increase the representatives of disabled persons organizations and non-governmental organizations. Constitute District Executive Committees along with the State Executive Committee.
- Instead of a single section five new sections must be introduced which shall explicitly deal with the issues of--- Undertaking surveys, investigation and research concerning the reasons behind the occurrence of disabilities; promoting various methods to prevent disabilities including health issues and public awareness; screening of children at least once a year mentioning specifically the various medical tests to be undertaken to detect at-risk cases; proper training for primary health centre staff to be provided by a specific institution/recognized institutions to be set-up/recognised for the particular purpose of prevention and early detection of disability and devise specific measures for what actions are to be taken for pre-natal, perinatal and post-natal care of mother and child.

- Strike out the expression 'within the limits of their economic capacity and development'.
- Impose civil and criminal liability on the person responsible for causing disability by either refusing to take a step which would lead to disability or causing something which would result in disability.
- Inclusion of provisions laying down guidelines for evaluation and assessment of various disabilities and grant of Disability Certificates.
- Special educational needs to be specifically defined.
- Appointment of a specific educational authority to look into the educational needs of the persons with disabilities.
- Provisions for education of children with disabilities in mainstream school without any discrimination and punishment for violation of this non-discriminatory provision.
- Section 39 must be removed from the 'Employment Chapter' and placed under the Education Chapter.
- Reservations for admission to educational institutions, specifically to technical and professional institutions amounting up to 4% and must be distributed evenly amongst all the categories of disability and such reservations must exist in government aided as well as private educational institutions.
- Inclusion of provisions for a specific curriculum for the education of the persons with disability.
- Measures to devise specific schemes for introduction of specific programmes in open schools and open universities, for the education and training of the persons with disability.
- Inclusion of disability education as an integral part of teacher's training programmes.

- Insertion of specific learning disabilities to be taken special care of, in imparting education.
- Section 31 to be specifically amended so that aids and appliances are to be provided for educational purposes not only to blind students or those with low vision. But specific devices to be given free of cost to each and every person with disability to assist him/her to attain the highest levels of education.
- Residential/ non-residential girl's Special School to be set up, at least one in every district.
- Increasing the percentage of reservation to a minimum of four per cent and not limiting it to only three categories as laid down in Section 33 but also extending to persons with autism, mental retardation and cerebral palsy.
- The quantum of reservation of person with disabilities should be according to working population; and the persons with disabilities barred from the quota reservation should be given priority in availing other benefits such as establishments of industry, research institution and rehabilitation centres.
- Insertion of a section specifically dealing with self-employment. Accordingly, training must be provided to persons with disabilities to begin as well as manage their own businesses. Low interest loans must also be provided so that they can set up their own businesses.
- Provision for incentives for employers for employment of persons with disability requires to be well defined.
- Amendment of Section 42 to include the repair and maintenance of aids and appliances.
- Criterion for preferential allotment of land must be categorically laid down.

- Chapter should be renamed as 'Barrier-free Environment.'
- Sections 44, 45 and 46 to be placed under the above-named Chapter.
- Section 47 to be moved in Chapter VI relating to 'Employment'.
- Insertion of freely accessible airports and bus terminus for persons with disabilities.
- Specific standards to be laid down for research and manpower development.
- District Executive Committee to be entrusted the responsibility to look into the application of this provision and the standard to be maintained in relation thereto.
- Insertion of provision laying down general requirement to be complied by the institutions to register themselves as an institution for persons with disability.
- Provision to include the activities to be taken up therein.
- Inclusion of penalty provision if any institution swerves from the conditions under which they were granted the certificate of registration.
- Specific requisites including medical facilities to be available for person residing in such institutions.
- Inclusion of residential facilities for spouse and person in care of severely disabled person.
- Special concessions to be made available to persons with severe disabilities, particularly in availing treatment.
- Abolish the Office of the Chief Commissioner and Disability Commissioner in the States and instead either establish a Commission for Welfare of Persons with Disabilities akin to the Women's Commission or Minorities Commission or a Disability

Tribunal to meet the requirements of the Act with regard to the functions performed by the Commissioner in the present Act.

- In case of retaining the office of the Commissioner:
 - Define the powers of the Chief Commissioner/ Commissioners in exactitude.
 - Lay down the conditions of eligibility of the Chief Commissioner/ Commissioners.
 - Access audits by Commissioners' offices.
 - Review of human resource and financial capacity of Central and State Commissioners' offices is also needed, and guidelines on minimum staffing levels introduced.
 - Insurance schemes for employees in the private sector as well.
 - Unemployment allowance to be paid to every unemployed person with disabilities who has registered himself/herself with the Special Employment Exchange leaving repealing the provision of two years unemployment.
 - Contributory pension scheme.
 - Provision for free legal aid to every person with disability.
 - Specific concessions to be available to the persons with disabilities.
 - Specific schemes for public awareness to be introduced.
- x i) Take appropriate measures to incorporate necessary changes through amendments in each of the Acts dealing with Disability Rights in consonance with the UNCRPD.
- x ii) The judiciary must also take a more proactive part in protecting and interpreting the rights of the persons with disabilities and take steps for *suo moto* actions.

- xiii) Make specific provisions for enhancing the human rights approach to disability rights in the rural areas.

In view of the findings of this study, the suggestions that are made by the researcher if accepted and implemented by the appropriate authorities, it is hoped that, these shall bring forward the durable solution of the maximum problems regarding the protection of human rights of the persons with disabilities in India. If accepted the suggestions will assist in making disability laws successful in every part of the country including the people of North Bengal as well as assist it in making them 'model law' for others to follow.

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