

# **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.<sup>1</sup> 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 “).<sup>2</sup> 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

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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.

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27.10.2008

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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.<sup>3</sup> '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.

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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.<sup>4</sup>

*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 49<sup>th</sup> 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 50<sup>th</sup> 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.)

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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.<sup>5</sup> 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

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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.<sup>6</sup>

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6. Justice R.K. Abichandani, “THE RIGHTS HANDICAPPED”, viewed at [cestat.gov.in/Articles%20by%20President/THE%20RIGHTS%20HANDICAPPED.DOC](http://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."*<sup>7</sup> 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

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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?<sup>8</sup> 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.<sup>9</sup>

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

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8. *Ibid*

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

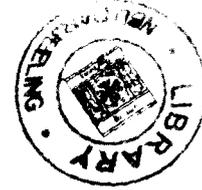
#### **OBJECTIVE OF STUDY:**

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.<sup>10</sup> 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;

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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.<sup>11</sup>

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*

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<sup>11</sup>. Visit [www.un.org](http://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*<sup>12</sup> 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*<sup>13</sup> 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*.<sup>14</sup> In spite of the legislative activities, further steps were not taken to implement the scheme of the Persons with Disabilities Act. Since

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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*<sup>15</sup> 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

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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."*