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Human Rights Violations against Persons with Disabilities even in the Midst of Pandemic: A Critical Legal Analysis

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ABSTRACT

Till very recently the persons with disabilities were largely excluded from the purview of anti-discrimination and human rights laws. The legal recognition for them was confined to the spheres of welfare and charity law. Though this was only a partial recognition which undermined them as equal citizens at par with their able-bodied counterparts, the situation underwent a radical change, especially in the aftermath of global disability rights movement since the 1970s. This movement culminated in the adoption of the United Nations Convention on the Rights of Persons with Disability and also its Optional Protocol on 2006 (UNCRPD). Despite the fact that they are positive steps-forward, there were still huge problems underlying these rights of persons with disabilities. Although, the existing human rights laws seem to provide equal rights for the disabled, in reality these instruments have failed to protect the human rights and fundamental freedoms guaranteed to disabled people. In the national scenario in spite of four major legislation relating to disability and the comprehensive disability legislation of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation Act, 1995(PWD Act), the lacuna and defects in the legislation was realised very late which ultimately resulted in the Rights of Persons with Disabilities Act, 2016 (RPWD). In spite of all these developments in the disability legislation the human rights violations against these persons are still prevalent and in fact more rampant in the midst of COVID pandemic. Their condition was likely to be worsened if the government proceeded with the amendment to the RPWD Act, 2016, to decriminalize “minor offences for improving business sentiment and unclogging court processes.” All these call for a need to look into the evolution of the law, its development both in the international and national scenario and the recent move of the government to amend the legislation opening up once again the imminent question as to whether the rights of the persons with disabilities are truly protected.

Keywords: *Persons with Disabilities, United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), The Rights of Persons with Disabilities (RPWD), COVID Pandemic, Amendment, Human Rights Violations.*

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I. INTRODUCTION

Equality and non discrimination are the fundamental principles of International Human Rights Law and these principles apply equally to every-one prohibiting discrimination in all spheres of life. However, they are seen shattered many a times when it comes to protection of the rights of persons with disabilities. Inclusion and participation essential to human dignity and to the enjoyment and exercise of human rights are also seen violated for persons with disabilities. This has become more visible and evident in recent times of COVID pandemic. Among the world population of 7 billion the persons with disabilities form the world's largest minority in the world. This reveals the most shocking revelation that one billion people, or approximately 15 per cent of the world's population lives with some form of disability. 80 per cent of them live in developing countries wherein, they are excluded and denied their basic human rights. They have poorer health, lower education achievements, fewer economic opportunities, higher rates of poverty and many more hurdles and obstacles in their path when compared to persons without disabilities. The other major and related issues faced by them include (i) education (ii) skill development and employment (iii) social security, health, rehabilitation and recreation (iv) environmental barriers (v) accessibility etc., These problems faced by them are only a glimpse of many and varied that is yet to be unraveled. Many persons with disabilities because of their pre-existing health conditions are even more susceptible to any infection including coronavirus and many a times death rates are at elevated levels. Within two months span, more than 22,000 persons with disabilities died from corona pandemic accounting to one-third of all deaths.² Above all, they are not legally conscious of their available rights. Till very recently they were largely excluded from the purview of anti-discrimination and human rights laws. The legal recognition for them was confined to the spheres of welfare and charity law. Though this was only a partial recognition which undermined them as equal citizens at par with their able-bodied counterparts, the situation underwent a radical change, especially in the aftermath of global disability rights movement since the 1970s. This movement culminated in the adoption of the United Nations Convention on the Rights of Persons with Disability and also its Optional Protocol on 2006 (UNCRPD).³ In the national scenario, in spite of four major legislation relating to disability, the comprehensive disability legislation was the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation Act, 1995 (PWD Act). However, the lacuna and defects in the legislation was realised very late which ultimately

² That is from 2 March to 15 May, 2020. See Lucy Webster, *Coronavirus: Why disabled people are calling for a COVID-19 inquiry*, BBC News, July 4, 2020.

³ The Convention on the Rights of Persons with Disabilities: Resolution adopted by the General Assembly, January 24, 2007, A/RES/61/106.

resulted in the enactment of the Rights of Persons with Disabilities Act, 2016 (RPWD) which once again arose hopes among the millions of persons with disabilities in India. However, their conditions were likely to be worsened if the government had proceeded with the amendment to the RPWD Act, 2016, to decriminalize “minor offences for improving business sentiment and unclogging court processes.”⁴ The imminent question here is whether the rights of these persons with disabilities are still protected. An attempt is therefore made to look into the evolution of the International Convention on the Rights of Persons with Disabilities and the legislation in the national scenario and other related issues.

II. EVOLUTION OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The United Nations for the last 70 years has been working on the three pillars namely, (i) human rights (ii) peace and security and (iii) development. Although, expected to promote higher standards of living, full employment and conditions of economic and social progress it won't be wrong to say that United Nations was oblivious to the situations of the disabled for quite a long time.⁵ The Committee on Economic, Social and Cultural Rights publicly acknowledged that governments devoted very little attention to the disabled. Moreover, the Committee explicitly concluded that:

it is now widely accepted that the human rights of persons with disabilities must be protected and promoted through general as well as specifically designed laws, policies and programmes.⁶

This paved the way for a widespread international agreement that a legally binding disability Convention was necessary in realising human rights of the disabled persons.

The negotiations on the Convention originated in an initiative taken by Mexico during the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, from 31 August to 7 September 2001. At that conference, Mexico invited the UN General Assembly to adopt an International Convention to protect the rights of

⁴ The Ministry of Social Justice and Empowerment tried to take advantage of the COVID-19 situation by making amendments to RPWD Act by trying to insert Sec. 95(a) which allowed the State and Chief Commissioner for Persons with Disabilities to ‘compound offences’. See Shameer Rishad, *People with disabilities can't be too joyful over rollback of amendments to the RPWD Act*, The Wire, July 09, 2020.

⁵ The clauses concerning human rights in the Charter of United Nations provide a foundation for, and an impetus to further improvement in, the protection of human rights. Article 55 states that “the United Nations shall promote; (a) higher standards of living, full employment, and conditions of economic and social progress and development... (c) universal respect for, and observance of, human rights and fundamental freedoms for all...” See Ian Brownlie, *Principles of Public International Law*, 569 (4th ed. 1990).

⁶ Robyn Hunt, *Why we need a disability Convention*, Speech delivered in Australian University, (June 11, 2022, 3:31 P.M), <http://www.hreoc.gov.au/disabilityrights/convention/nz.htm>.

persons with disabilities. At the 56th session of the General Assembly in 2001, Mexican President Vicente Fox Quesada⁷ reiterated the need for a comprehensive and integral Convention and presented a proposal for the same. The Mexican draft called for the international community to combat poverty and social exclusion of persons with disabilities.⁸

In response to this, the General Assembly by its Resolution 56/168 of 19 December 2001 decided to establish an Ad Hoc Committee to consider the proposal for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities based on a holistic approach. The first meeting of the Ad Hoc Committee was held at United Nations Headquarters from 29 July to 9 August 2002.⁹ The Mexican draft containing elements of the convention was submitted at the first session of the Ad Hoc Committee. The Ad Hoc Committee considered the Mexican draft and position papers for the convention submitted by China and the European Union. The outcome of the first session of the committee was another resolution adopted by the 57th session of the General Assembly in 2002 which provided guidance for further elaboration of a comprehensive convention at all levels. The Convention is therefore, the result of the final set of negotiations initiated by the Ad Hoc Committee by Resolution of 56/168 of December 2001. The Ad Hoc Committee started its negotiations¹⁰ on the draft convention at its third session from 24 May to 4 June 2004 (A/AC/265/2004/5) based on the draft text prepared by the working group in accordance with General Assembly Resolution 58/246 and went through eight sessions. The eighth session (14 to 25 August 2006) (A/AC.265/2006/2)¹¹ finalized the negotiations and resulted in the adoption

⁷ He reaffirmed the interest of Mexico to lead the process and as a result the Government of Mexico hosted an International Expert Group Meeting at Mexico City in 2002. This International Conference on Financing for Development (Monterrey, N.L.16 to 22 March 2002) was to enable the international community to identify a renewed impetus and to develop an effective means to fulfil the commitments of the Millennium Declaration. See General Assembly Resolution 55/2 of 8 September 2000, (May 19, 2022 9: 30 P.M), <http://www.refworld.org/docid/3b00f4ea3.html>

⁸ Kozue Kay Nagata, *Key issues at global and regional levels in the process towards the International convention on the rights of persons with disabilities*, 15 Asia Pacific Disability Rehabilitation Journal 1, 36-44 (2004).

⁹ The modalities of the participation of accredited NGOs were discussed in the first session. It also focused on some preliminary issues as (i) nature and scope of the proposed convention (ii) the type of legal instrument to be adopted (iii) its inter relation with the Standard Rules on the Equalization of opportunities for persons with disabilities and the other existing human rights instruments. For a detailed discussion of the different stages of the convention See Aaron A Dhir, *Human Rights treaty drafting through the lens of mental disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 Stanford Journal of International Law 2, 180-216 (2005).

¹⁰ One of the unique characteristics within the process of drafting and negotiating the convention has been the active involvement of civil society. Disabled Peoples Organizations (DPOs) and NGOs have established the International Disability Caucus (IDC). This is a consortium of approximately fifty organizations that provided critical input into the convention process, including detailed comments on the draft articles, and making comments on key issues. During the Second Ad Hoc Committee meeting it was agreed that UN accredited NGOs and DPOs could attend any public meetings of the committee and make statements within the plenary sessions, when required. See Lang, Raymond (2006), *Human Rights and Disability-New and Dynamic Perspective with the United Nations Convention on Disability*, 17 Asian and Pacific Disability Rehabilitation Journal 1, 3-11 (2006).

¹¹ See (A/AC.256/2006/4 And Add.1).

of the International Convention on the Rights of Persons with Disabilities and Optional Protocol as a whole without vote. Furthermore, the Committee decided to establish an open-ended drafting group in order to ensure the uniformity throughout the draft convention and draft optional protocol, harmonizing the versions in the six official languages of the United Nations. The finalized version was presented to the 61st session of the General Assembly and was finally adopted on 13 December 2006.

III. ADOPTION OF THE RIGHTS OF PERSONS WITH DISABILITIES IN THE NATIONAL SCENARIO

In the midst of these developments, the irony is that discrimination was rampant in spite of the International Conventions adopted to protect the human rights and fundamental freedoms guaranteed to persons with disabilities. India has four major legislation relating to disability:

- Mental Health Care Act, 2017; (Mental Health Act, 1987 is replaced by the Act of 2017);¹²
- Rehabilitation Council of India Act, 1992;¹³
- The Rights of Persons with Disabilities Act, 2016; (Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation Act, 1995 (PWD Act) is replaced by the Act of 2016);¹⁴
- National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.¹⁵

The PWD Act was a comprehensive legislation which aroused a lot of hope and expectations among the persons with disabilities.¹⁶ Apart from an assurance of equal opportunities in all walks of life including education and employment, non-discrimination and removal of barriers (both physical and psychological) it sought to ensure certain affirmative action for their full inclusion.¹⁷ However, the reality was that it lacked teeth and binding force for its

¹² Mental Health Care Act, No.10 (2017).

¹³ Rehabilitation Council of India Act, No.34 (1992).

¹⁴ The Rights of Persons with Disabilities Act, No. 49 (2016).

¹⁵ National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, No.44 (1999).

¹⁶ Although government of India recognized the need for legislation as early as 1980s, it was enacted only in 1995. The delay could be attributed to the fact that Indian Constitution while distributing legislative powers between the Centre and States kept the disability issues in the State List at Entry 9 of Schedule 7. Parliament gained the competence to legislate on disability issues with the signing of the Proclamation of Equality and Full Participation and Article 249 empowers the Parliament to legislate on any subject falling in any list in order to fulfil its international obligations. See D.D. Basu, *Constitutional Law of India*, (1998).

¹⁷ It is disheartening to note that the PWD Act did not have a separate section for women and children.

implementation and the caveat that reforms should only be undertaken within the limits of State's economic capacity also nullified the potential of the Act for change.

The very aspect highlighted to be achieved through the legislation was that persons with disabilities enjoy the same opportunities in society that everybody already enjoys. This was realised to a great extent by the ratification of the UNCRPD in India. However, things did not go through a smooth phase because of the lack of initiative by policy makers and the existing administrative mechanisms of the country. The pillar of the disability legislation, PWD Act, itself suffered from unreal definitions and lacked teeth for its full implementation with inadequate monitoring mechanism. The policy makers were on doubt and confused and not ready to accept the fact that the pillar itself had shattered long back and failed to fulfil the needs of persons with disabilities and also the reality that the proposed 101 amendments recommended by the Ministry of Social Justice and Empowerment if implemented would again might have proved to be a disaster. The ratification of the UNCRPD by India imposed an obligation and a need to review the existing legislative framework in India to examine whether it adequately promoted the rights contained in the Convention and there is a strong demand for a new law. Initially Ministry of Social Justice and Empowerment proposed amendments to the PWD Act and around 108 amendments were suggested. But the disability rights Group opposed the amendments and demanded a new law on disability. A committee was therefore appointed by the Ministry of Social Justice and Empowerment to draft a new legislation to replace the PWD Act, 1995.¹⁸ The committee submitted their report on 30 June 2011.¹⁹ However, Ministry released it with 2012 Bill which was not comprehensive and inclusive as 2011 Bill and there were serious issues raised before the Ministry on the notification of the 2012 Bill.²⁰ The Cabinet scrutinised and approved it on Dec. 2013. The government completely watered it down in its version of the 2014 Bill. When presented in Parliament serious objections were raised which again led to the 2014 Bill being referred to a Standing Committee. The Standing Committee failed to address the controversial issues and finally on December, 2016 the Rights of Persons with Disabilities Act, 2016 was passed by the Parliament with some modifications. Thus, after 21 years the Parliament passed the Rights of Persons with Disabilities Act, 2016 in order to harmonise all disability-related legislation with the guiding spirits and ethos of the Convention.

¹⁸ Ministry of Social Justice and Empowerment (2010), Office Memorandum, Constitution of a Committee to draft a new legislation to replace the Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, (1995).

¹⁹ Committee appointed by Ministry of Social Justice and Empowerment, the Rights of Persons with Disabilities Bill 2011-Final Report, Centre for Disability Studies, NALSAR University, (2011).

²⁰ The Ministry of Social Justice and Empowerment produced a draft Bill in 2012 based on the Committee's proposal but did not incorporate all of the Committee's suggestions. See Ministry of Social Justice and Empowerment (2012), Draft Rights of Persons with Disabilities Bill, (2012).

To achieve this objective, the government replaced the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act of 1995 with the RPWD Act.

IV. NEED FOR EFFECTIVE IMPLEMENTATION OF THE RIGHTS OF PERSONS WITH DISABILITIES

The principles stated to be implemented for empowerment of persons with disabilities through the Rights of Persons with Disabilities Act, 2016 are respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons. The Act lays stress on non-discrimination, full and effective participation and inclusion in society, respect for difference and acceptance of disabilities as part of human diversity and humanity, equality of opportunity, accessibility, equality between men and women, respect for the evolving capacities of children with disabilities, and respect for the right of children with disabilities to preserve their identities. The principle reflects a paradigm shift in thinking about disability from a social welfare concern to a human rights issue. The Act provides broad based Central and State Advisory Boards on Disability²¹ which are set up to serve as apex policy making bodies at the Central and State level for the effective implementation. Office of Chief Commissioner of Persons with Disabilities²² has been strengthened who will now be assisted by 2 Commissioners and an Advisory Committee comprising of not more than 11 members drawn from experts in various disabilities. Similarly, the office of State Commissioners of Disabilities has been strengthened who will be assisted by an Advisory Committee comprising of not more than 5 members drawn from experts in various disabilities.²³ The Chief Commissioner for Persons with Disabilities and the State Commissioners will act as regulatory bodies and Grievance Redressal Agencies and also monitor implementation of the Act. District

²¹ Chapter XI of the RPWD Act provides for setting up of the Central and State Advisory Boards on Disability and District Level Committee.

²² Sec. 75 (1) deals with the functions of the chief commissioner which are as follows:

- identify, *suo motu* or otherwise, the provisions of any law or policy, programme and procedures, which are inconsistent with this Act and recommend necessary corrective steps
- inquire, *suo motu* or otherwise, deprivation of rights of persons with disabilities and safeguards available to them in respect of matters for which the Central Government is the appropriate Government and take up the matter with appropriate authorities for corrective action
- review the safeguards provided by or under this Act or any other law for the time being in force for the protection of rights of persons with disabilities and recommend measures for their effective implementation
- review the factors that inhibit the enjoyment of rights of persons with disabilities and recommend appropriate remedial measures
- undertake and promote research in the field of the rights of persons with disabilities
- promote awareness of the rights of persons with disabilities and the safeguards available for their protection
- monitor implementation of the provisions of this Act and schemes, programmes meant for persons with disabilities

²³ State Commissioners are appointed as per Sec. 79 (1) of the Act and performs the functions which are similar to that of the Chief Commissioner.

level committees will be constituted by the State Governments to address local concerns of Persons with disabilities. Details of their constitution and the functions of such committees would be prescribed by the State Governments in the rules. The Act enables the appropriate government to designate persons having requisite qualifications and experience as certifying authorities who shall be competent to issue the certificate of disability.²⁴ National and State Fund is created to provide financial support to the persons with disabilities. The existing National Fund for Persons with Disabilities and the Trust Fund for Empowerment of Persons with Disabilities will be subsumed with the National Fund. The Act also provides for penalties for offences committed against persons with disabilities and also violation of the provisions of the new law.²⁵ However, in the midst of the pandemic the Union Ministry of Social Justice and Empowerment issued a notification proposing amendment to the Right of Persons with Disabilities Act, 2016, to decriminalize “minor offences for improving business sentiment and unclogging court processes.”²⁶ Similar attempts were made by the government to decriminalize Companies Act, 2013 and also minor offences with a view to cultivate confidence in investors and encourage ease of doing business.²⁷ Although government’s initiatives seemed to be appropriate in the field of business and commerce but there was no justification in the case of persons with disabilities. Moreover when the Confederation of Indian Industry listed 37 laws that should be amended in India for ease of business the Disabilities Act was not in that list. Thus these initiatives of the government are itself posing questions which are to be solely answered by the government who has the onus of duty to protect the rights of persons with disabilities in all times and more in case of pandemic.

V. CONCLUSION

COVID pandemic has resulted in the increase of discrimination and other barriers in accessing livelihood. The pandemic have made them more secluded and many are falling victims of depression. It is disheartening to know that these gross violations are rampant in the midst of legal frame work in the international and national scenario. To add to this, the recent initiatives taken by government to amend the various provisions of the RPWD Act in the midst of pandemic when the disabled are amongst the most vulnerable to the deadly virus spurred more opposition and protest by the community of persons with disabilities, disability rights activists

²⁴ As per Section 57(1) of the 2016 Act.

²⁵ Chapter XVI of RPWD Act deals with offences and penalties wherein, detailed provisions are provided under sections 89 to 93 for punishment including imprisonment.

²⁶ Shampa Sen Gupta, *The proposed amendment to the Disabilities Act shows the apathy of the State*, (July 8, 2022, 7:50 P.M), <http://feminisminindia.com>

²⁷ Dr. Satendra Singh, *Why the Government’s Amendments to the Disabilities Act must be opposed*, (July 7, 2022, 9:45 P.M), <http://feminisminindia.com>

and organizations. In this regard it is to be noted that in addition to the above, there are many issues that come in the way of effective implementation of the rights of persons with disabilities which are listed as follows:

- The violators of the provisions of the Disabilities Act are normally charged under the provisions of generic laws not invoking the punishment clauses under the specific law for persons with disabilities
- There is lack of exact statistics for persons with disabilities. Although recently, the government has announced a survey covering persons with 21 disabilities²⁸ and has also earmarked 5 Crore Rupees for it which is indeed a welcome note. But what is required is that the survey should be a proper socio-economic one to be done scientifically.²⁹
- For disability certificates, the certifying authority under the Act is to give disability certificates³⁰ and accordingly every district government hospital and medical colleges if any, are designated to be the certifying authorities in respective States. However, the disability certificate issued by the authorities will be valid only in the respective States and the requirement as of now is the universal validity for disability certificates.
- There is no clarity as to the implementation of education, social security, free health care etc.,
- Many lost their jobs and there are no financial assistance or free and universal health coverage for the disabled.³¹
- The percentage of financial allocation is also still doubtful. Although the government has passed the law unless there is support for budgetary allocation, it cannot be implemented.³² The 2016 Act has various provisions which require huge allocation of money. In the Union budget 2018 and 2019 statement and speech, there was no mention for budgetary allocation for

²⁸ The RPWD Act has identified 21 disabilities as compared to 7 types of disabilities under the PWD Act.

²⁹ K.C. Deepika, *Karnataka Budget: Survey of Persons with Disabilities announced*, *The Hindu*, July, 6, 2018. 2019 budget also failed to acknowledge the existence of the Rights of Persons with Disabilities Act, 2016 and continued to make provisions under the repealed law. *See Union Budget 2019: Disabled Totally Neglected*, (July 5, 2022, 11: 50 P.M), <http://enabled.in>

³⁰ The disability certificate is issued to persons with disabilities as per the PWD Act, 1995. In order to get a disability certificate a person requires a birth certificate and a proof of residence. However, Medical Boards in many hospitals set up for this purpose are not working. These certificates are issued as per the temporary (reversible) impairedness and permanent (non-reversible) impairedness. The information is gathered based on interview from Mr. Sunil Gokhale, Lecturer in community Medicine, Karnataka Institute of Medical Sciences (KIMS).

³¹ Did Budget 2022 Ignore The Disabled? Activists Think it's too little too late, *Outlook*, 02 February, 2022.

³² The budget in its "miserly outlay" allocated Rs 300 crore towards the Schemes for the Implementation of the Persons with Disabilities Act (SIPDA) which provides financial assistance for implementation.

implementation of Three-Year Action plan for the disabled people.³³ However, in the Union Budget 2022 there was an allocation of Rs. 1212 crores in the financial year 2022-23 but the same has been criticized that even with this increase from the previous years there is a shortfall of 112.97 crores compared to 2020-21 estimates. Many more issues are still to be resolved in the implementation of the Act which casts an onerous duty on respective State governments.

- While the Act itself is not effectively implemented the government was still trying to dilute the provisions of the Act in the name of “improving business sentiment” and “promoting investments from both domestic and foreign investors. The proposed amendments aimed to debilitate the penalty clauses under Sections 89, 92 (a) and 93 of the RPWD Act by making certain offences compoundable.

Although the timely intervention of the disability rights movement could prevent such an adverse step on the part of the government the incident once again is reflecting the idea that human right violations are still persistent against these vulnerable groups and their fight for the protection of their own rights are continuing.

³³ *Disability Rights Activists say Jaitley's budget a 'big disappointment*, Indian Express, September 28, 2018.