

SOCIAL JUSTICE FOR DISABLED GROUPS IN INDIA: ENSURING CONSTITUTIONAL PROTECTION THROUGH AFFIRMATIVE ACTION

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Abstract: In India individuals with disabilities have a constitutional right to be treated equally with equal opportunities, access to resources, equal societal participation and so on. To ensure equality to disabled persons, Government of India has undertaken several steps. There has been a paradigm shift in the conceptual understanding from a charity-based approach to a right-based approach. 'The Rights of Persons with Disability Act, 2016 (RPwD Act, 2016)' imparts rights and entitlements to disabled persons in India. This ensures rights, equality, participation, non-discrimination and accountability. However, reality starkly deviates from this ideal society. There exists partial implementation of laws and policies at ground level which becomes the subject matter of investigation here.

This article shall examine the factors that make the disabled population vulnerable in their existence in society and would establish the denial of their rights, privileges and opportunities due to this vulnerability. It shall examine the guarantees and protections which Indian Constitution has assured to disabled groups and its current status. The article argues for affirmative action for these groups by highlighting how because of vulnerable status and denials, disabled groups constitute a distinct and separate class in themselves and hence must be made the subjects of affirmative action.

Keywords: *Disability, Rights, Inequalities, Implementation, Affirmative Actions, Inclusion, Opportunities.*

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Introduction

"Every person with disability is an individual" - Itzhak Perlman

Disability is a part of being human. Every person may experience disability in one form or another during their lifetime which can either be temporary or permanent. Disability can be a physical or mental limitation which poses difficulty in performing any activity in the same manner as able or normal people would do. According to the World Health Organization, disability is any condition of impairment of body or mind which makes it difficult to perform certain activities or to interact with society. The people with disabilities can be considered as one common group but they can be affected differently. The World Health Organization gave three aspects of disability which are (1) Impairment in a person's body or mind to perform its functions, (2) Activity Limitation which causes restrictions, such as difficulty in seeing or walking and, (3) Participation restrictions in normal daily life functions.¹

The term disability has evolved over the years, and it may include a wide range of conditions. Disability is not a static condition, and it varies in its intensity, degree and functional adaptability of the individual.

Disability is not just a health problem but a social and legal problem. There are various legal issues and challenges faced by disabled groups. They face discrimination in society as well as denial of equal protection of law by the State. The Constitution of India guarantees the right to equality to every citizen of India. This ensures equality before the law and equal protection of the law to all persons.² Disabled persons face the denial of equal protection of

<https://www.cdc.gov/ncbddd/disabilityandhealth/disability.html#:~:text=According%20to%20the%20World%20Health%20Organization%2C%20disability%20has,as%20difficulty%20seeing%2C%20hearing%2C%20walking%2C%20or%20problem%20solving>

² INDIA CONST. art. 14

¹ Centre for disease control and prevention (2024) *Disability and Health Overview*

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the law because of the lack of implementation of special laws made for them.

This paper is dedicated to the inequalities faced by disabled people, how are they more vulnerable to the offences against human body, and the current legal position in India. There has been a positive change in the condition of disabled people with the enactment of the Right of Persons with Disabilities Act, of 2016 but the challenges persist. There are several barriers faced by them while accessing the justice system. The problems faced by them start from the initial process of filing a FIR to the trial. There are several theories of victimization which focus on how an accused selects a particular victim and why a certain kind of person is more vulnerable to the offences against them. The concept of affirmative action is imbedded in Indian history and the impact of affirmative actions can be analyzed by the several measures taken by the government such as reservation for SC/ST. The government must take some affirmative actions for disabled people also as they form a distinct class in themselves and are subjected to inequality. The paper will also focus on the comparative analysis of the condition of disabled people in India with the condition of disabled people in the most disabled-friendly nations in the world.

Social Vulnerability and Difficulties in the Criminal Justice System

The purpose of the criminal justice system is to ensure justice is done and to be accessible to all. The criminal justice system must ensure the reduction in crimes against the more vulnerable people. A 'person with disability' is defined under the 'Rights of Persons with Disability Act, 2016' as a person with physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others.³ This definition allows us to interpret that persons with disability lack effective participation and these impairments lead them to being more vulnerable to offences. According to several studies, it is established that children and adults with disabilities are more vulnerable to offences against the human body such as sexual harassment, human trafficking, kidnapping, abduction, and hurt. People with disabilities are at increased risk of victimization as victimization theories establish how an accused selects his victim. It studies victims and how people are more prone to being victims.⁴ People with disabilities have limited access to preventive education making them incapable of recognizing and avoiding abuse and exploitation. The lack of mobility makes it difficult for them to escape from sexual offences and violence. People with disabilities are at a higher risk of experiencing interpersonal violence than abled people. Still, they face a lack of assistance from the criminal justice system to seek justice despite being entitled to the same criminal protections as all Indians. Victimology has failed to recognize people with disabilities as a unique category of victims. The crime data collected by the National Crime Record Bureau in India fails to specify the atrocities faced by them. Several rights organizations, activist, and academicians raised their voices to the

Ministry of Home Affairs to order NCRB to maintain separate data on disabled people and recognize them as a unique class⁵.

The victims face barriers to disclosing victimization due to societal or personal barriers such as shame, fear, or confusion. However, the challenges faced by disabled people include additional barriers such as mobility restrictions, communication restrictions, feelings of shame and self-blame, fear of retribution, and social and physical isolation⁶. There exists a high number of unreported cases in India as the authorities are not well-equipped to understand the needs and struggles of disabled people. The failure of the police to intervene and protect may not be necessarily due to disregard for people with disabilities but rather a lack of awareness on how to facilitate the legal protection sought by them. There are cases when the police officers do not even entertain their complaints as they believe that disabled people are asexual, or they are incapable of understanding the crime committed against them. Every police station must be associated with a sign language expert and a person expert in braille to facilitate police in recording the statement of the disabled victim. The police are the foremost agency of the criminal justice system, and it becomes the duty of the police to do accurate recording of the statement and to communicate the same effectively to the victim. Section 119 of the Indian Evidence Act mandates a video graph of the testimony of such witnesses who are unable to give verbal statements after the 2013 amendment based upon the recommendations from Justice J.S. Verma committee.⁷ The evidentiary value of their statements remains a question, but the Supreme Court has recognized it and states that the statement of a deaf and dumb person has an evidentiary value if he is capable of understanding the nature of an oath. There is a need for specialists in the courtrooms along with the police stations. The code for Criminal Procedure does not empower the Magistrate to operate on the ground level to facilitate the disabled people.⁸ In 2019, the Committee on Persons with Disabilities reviewed India's initial report and concluded that the violence including all forms of physical and sexual violence, against people with disability in institutions especially women and girls, is a normalized practice.⁹

The central and state governments of India must carry out effective legislation for the protection of disabled people from such offences. It is necessary to have a friendly and accessible justice system for them. To foster a safe and smooth process, it is necessary to provide training to police, judges, experts, forensics,

⁵ Damini Nath, *Crimes against persons with disabilities I Rights organizations want NCRB to maintain data*, TH, Jan. 22, 2021.

⁶ Bhanu et al, *Improving Criminal Justice System Responses to Crime Victims with Disabilities in India*, 1(2), Law and Humanities Q. Reviews, 67, 69-70 (2022).

⁷ Indian Evidence Act, 1872, § 119, No. 1, Acts of Parliament, 1872 (India).

⁸ Meghna Nagpal, *Minimizing Vulnerability of Persons with Disabilities through Legislative Responses in Criminal Procedure in India*, 6 NIRMA U.L.J. 51, 59-61 (2017). <https://heinonline.org/HOL/Page>

⁹ United Nations, <https://www.ohchr.org/en/press-releases/2019/09/committee-persons-disabilities-reviews-indias-initial-report-asks-about#:~:text=The%20Committee%20on%20the%20Rights%20of%20Persons%20with,children%20with%20disabilities%20in%20inclusive%20and%20mainstream%20education>, (Last visited Apr.17,2024)

³ The Rights of Persons with Disabilities Act, 2016, § 2(s), No. 49, Acts of Parliament, 2016 (India).

⁴ Bhanu et al, *Improving Criminal Justice System Responses to Crime Victims with Disabilities in India*, 1(2), Law and Humanities Q. Reviews, 67, 69-70 (2022).

medical officers, etc. on how to deal with the victims of sexual offences or violence who are disabled. The presence of special educators must be ensured for the help of disabled people to know their legal rights and to guide them with the procedure established by law.¹⁰ The heterogeneity of women as a community is recognized by the Criminal Amendment Act, of 2013 and the Prevention of Children from Sexual Offences Act, of 2012. These legislations aim to make the laws more women-inclusive, but the reality is different from the papers. The National Crime Record Bureau does not categorize the women victims and hence no separate data on disabled victims. This calls for action and the need to maintain the record of offences committed against disabled people as a separate class. This practice may help in rendering justice to those who are unheard, unrepresented, or face difficulties in accessing the justice system.

Constitutional Guarantees and Protections

The Constitution of India guarantees fundamental rights to every citizen of India. These fundamental rights are written under Part- III of the Constitution. Article 14 of the Constitution guaranteed equality to each and every citizen of India. Article 14 comprises equality before law and equal protection of law.¹¹ Equality before law means that every citizen of India is equal in the eye of the law and that no law can discriminate among the citizens. It ensures equal treatment of law in the context of rights, obligations, duties, functions, entitlement, privileges, etc. The concept of equal protection of law has been taken from the 14th Amendment of the USA.¹² It means the applicability of law will be in the same manner for all. All eligible people must have equal implementation. Hence, equality before the law is the legislation which cannot discriminate among people and equal protection of law means equal implementation or enforcement of the legislation.

Article 14 only deals with equality among equals and those who require special treatment should be provided with it. Uniform equal treatment to all citizens is not guaranteed under Article 14 as it would eventually lead to inequality but if the unequal would be given special treatment would eventually make them be on par with others. Equality among equals differs from the subject matter to law. Disabled people are not equal to the abled people. They cannot function in the same manner as abled people and their vulnerability leads to the denial of their rights, opportunities, entitlements, privileges, etc. They do not receive equal opportunities as others. They lack political representation, employment and education. The government of India has a legal duty to ensure free education as per Article 45 of the Constitution.¹³ Also, it is a fundamental right to have free

education under Article 21A guaranteed by the Constitution¹⁴. However, there are several factors which prevent disabled persons from having access to the schools or educational institutions such as their lack of mobility, lack of mental development, or any kind of impairment. The government has taken some affirmative actions to ensure that educational institutions are accessible to the disabled group. But the implementation of such actions is questionable and hence, the government can be held liable for the violation of the right to education along with the equal protection of law¹⁵.

Non-fulfillment of the right to be treated equally or to have equal access to opportunities leads to the denial of equal protection of law. The disabled group of people is not equal to others and hence they require special treatment to be at par with others. They form a separate class from others due to their disability. The government should ensure that they take affirmative action for disabled people in order to make them equal. One such step is the 'Right of Persons with Disability Act, 2016', which is in confirmation to the test of reasonable classification under Article 14. This Act has formed a separate class of disabled people, this is an intelligible differentia as above proved that a class of disabled people is not equal to the abled people. The objective of law is to ensure that disabled people come at par with others, this ensures the nexus between the objective and the intelligible differentia created by the Act. Hence, equality before the law is ensured and promoted but the implementation of the said Act lacks, which results in the denial of equal protection of law. This ultimately results in the denial of equality as guaranteed under Article 14.

Article 15 of the Constitution prohibits discrimination on the grounds of religion, race, caste, sex, and place of birth of a citizen. It is not a mere extension of Article 14; it serves a specific purpose. It aims to free the historically discriminated people and reinvent the social order. The courts of India and the government have made significant progress in establishing the social order by eliminating the hierarchies and stereotypes pertaining to women in Indian society. This is why Article 15 recognizes horizontal discrimination based on certain grounds. However, it does not recognize disability as a ground eligible for horizontal discrimination¹⁶. It is important to recognize disability as a ground based on the marginalization faced by them.

The court had shown reluctance to consider disability as a ground under Article 15. In the case of "*Vikas Kumar v. UPSC*", the court declared that the denial of scribe to a person with dysgraphia in a civil service examination is discrimination against an individual. The court limited its reasoning to the denial of the equality guaranteed under Article 14 only. Recognition of disability as a ground under Article 15 extends to the benefit of including unidentified disabilities within its scope. The RPwD Act recognizes only 21 types of disabilities. The recognition will also provide the benefit of horizontal reservation and will make it

¹⁰ Anuj et al, *Neglected & Forgotten?: Women with Disabilities in Indian Criminal Justice System*, 12 ECB 4434, 4439-4440 (2023).
https://r.search.yahoo.com/_ylt=AwrlQWKfsB9mqR4SY3C7HAX.;_ylu=Y29sbwNzZzMEcG9zAzEEdnRpZAMec2VjA3Ny/RV=2/RE=1713381663/RO=10/RU=https%3a%2f%2fwww.eurchembull.com%2fuploads%2fpaper%2f43ca5974e5e7063fa3d29d8cc192ad1f.pdf/RK=2/RS=recpRIs_9pP.uQ1ijCUSTSkNVdw-

¹¹ INDIA CONST. art. 14

¹² U.S. Const. Amend. XIV, § 1.

¹³ INDIA CONST. art. 45.

¹⁴ INDIA CONST. art. 21A, amended by The Constitution (Eighty Sixth Amendment) Act, 2002.

¹⁵ Boruah, Jayanta, *Right to Education for Persons with Disabilities in India: An Analysis of the Contemporary Legal Developments*, Vol- I Sarkari School E- Newsletter 1, 6-8 (2020).
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821873

¹⁶ INDIA CONST. art. 15.

mandatory for the State not to discriminate against disabled people by the interpretation of the word 'Shall'.¹⁷

The Preamble of the Constitution aims to ensure social equality and economic justice for all the citizens of India. Due to the denial of equal opportunities, disabled people suffer from economic injustice and social inequality. The social status of an individual depends on factors such as education, reputation, individual identity, status, etc. Disabled people are discriminated against from access to equal opportunities in education and employment. If an individual is not able to receive education due to his disability, then that individual will also experience a struggle for employment. The lack of education and employment will lead to a lack of income and no reputation. This results in social inequality and economic injustice. Ultimately the aim and objective of the preamble to create an ideal society fails, failing the whole idea of constitutionalism¹⁸.

Disabled people also experience the violation of Article 21. Article 21 of the Constitution guarantees the right to life and personal liberty which can only be ceased by the procedure established by law. The scope of Article 21 extends to the principles of natural justice. As discussed above, disabled people face problems while accessing the criminal justice system which leads to the violation of the right to fair trial¹⁹. The incapacity of the investigating bodies to not provide aid, the failure of the investigating bodies to file a complaint, or the failure of the justice system to not be accessible to them, all lead to the violation of their right to fair hearing. There has been no separate dedicated commission or committee to ensure the implementation of laws made for the upliftment of the disabled group of people. The state's intervention is required because they cannot help themselves. They are dependent on the state to help them and ensure that they exercise their rights.

The problems faced by disabled people are a prolonged issue. It is evident from the number of petitions filed in the courts. They are experiencing the denial of their fundamental rights guaranteed by the Constitution in their daily life. Still, the State fails to ensure the effective implementation of their rights and special provisions made for them.

Arguing Affirmative Action for Disabled Groups

India has a history of discriminating people majorly based on caste and as a consequence of it, people of lower caste are not treated as equal to the people of upper caste. To eradicate such challenges, the government of India adopted the concept of affirmative action. The concept of affirmative action allows the government to provide preferential treatment for the disadvantaged group of people. It is the remedy to the Indian history of discrimination against certain groups based on caste, class, gender,

etc.²⁰ Affirmative action questions the widely accepted notion of equality by allowing the government to make special provisions for the groups facing discrimination. However, this understanding of the relationship between affirmative action and the equal protection of the law is problematic as the right to equality permits logical discrimination. The Constitution of India guarantees the Right to Equality to all the citizens of India, ensuring equality before law and equal protection of law. The purpose of the right is to ensure equality among equals and to assist marginalized people in achieving parity with others. Hence, the concept of affirmative action is in conformity with the equal protection of the law.

The government of India has brought several special provisions in favour of people who are marginalized based on caste or gender. Some of those special provisions are the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 which aims to prevent any kind of atrocities against SC/ST persons and to punish the perpetrator, and the Prevention of sexual harassment at Workplace Act, 2013 to protect women from sexual harassment at the workplaces and to punish the offender. There exists a category of people who are marginalized on the basis of their disabilities. The disabled group of people face discrimination, exploitation and underrepresentation as they have not been explicitly identified as a separate category of people under the Constitution. Despite the existence of these Acts, the government of India has failed in the implementation of special laws enacted for the benefit of disabled people.

The disability rights movement has been developing in India since the 1970s. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, of 1995 addressed the issues of disabled people and attempted to make substantial advancement by providing reservation in employment. Later, India signed and ratified the first ever international human rights law treaty which deals with the rights of disabled people, the United Nations Convention on the Rights of Persons with Disabilities in 2007. UNCRPD aims to ensure that disabled people enjoy all human rights and fundamental freedom on an equal basis with others. Therefore, it recognizes that discrimination on grounds of disability is a violation of human rights. For the process of ratification, the Indian government brought the 'Mental Healthcare Act, 2017' and the 'Rights of Persons with Disabilities Act, 2016' and repealed the PwD Act, 1995. The RPwD Act, 2016 was made in conformity with the provisions of the UNCRPD.

This act classifies people with disabilities into three groups: "persons with disability" refers to those who have a physical, mental, intellectual, or sensory impairment that has persisted for a long time and that, when combined with other obstacles, may prevent them from fully and effectively participating in society on an equal basis with others; "persons with benchmark disability" refers to those who have at least 40% of a specific disability, as certified by a competent authority; and "persons with disability having high support needs" refers to those who are confined to their homes or institutions, or who may be hidden, neglected, or segregated, or who are homeless or destitute²¹.

¹⁷ Vikash Kumar v. Union Public Service Commission, (2021) 5 SCC 370

Manu Gupta, Right of Disabled People in India - The Need of the Hour, 2 INDIAN J.L. & LEGAL RSCH. 1, 9-11 (2021).

<https://heinonline.org/HOL/Page?collection=journals&handl e=hein.journals/injllw2&id=5510&men tab=srchresults>

¹⁸ Ayushi Bhojwani, Disability Laws in India: Conceptual Study, 11 SUPREMO AMICUS 111, 113-114 (2019)

<https://heinonline.org/HOL/Page?collection=journals&handl e=hein.journals/supami11&id=122&men tab=srchresults>

¹⁹ INDIAN CONST. art. 21.

²⁰ ASHWINI DESHPANDE, AFFIRMATIVE ACTION IN INDIA 9, (Oxford University Press 2013).

²¹ The Rights of Persons with Disabilities Act, 2016, § 2(r), No. 49, Acts of Parliament, 2016 (India).

The aim of the RPwD Act was to rectify all the limitations and failures of the PwD Act. The act ensures equality of opportunity and status, dignity, individual autonomy to make one's own decisions, independence of persons, full and effective participation, inclusion in society, accessibility, and respect for difference and acceptance in society. This act has shown a gradual shift from a charity-based to a right-based strategy making it an example of affirmative action taken by the government of India for disabled persons.²²

Reasonable accommodation goes far beyond the simple equal treatment to uplift the disadvantaged people. It is legally enforceable to provide reasonable accommodation. This is a which ensure the correspondence with the rights of disabled people by implementing positive actions to remove the obstructions faced by them. The government of India launched an initiative to make India an 'Accessible India' for disabled persons, which is an example of reasonable accommodation.²³ But the reality is far from what is on the papers. The implementation of laws has failed to render justice to disabled people as they are devoid of equality of opportunity. Persons with disabilities face challenges in their career development. They are not just underrepresented in the organizations but also less successful in their career. They manage and pursue their careers differently than abled people and the market provisions are inadequate to understand their needs.

There is an existing link between disability and poverty in India. Disabled people are poorer than those who are non-disabled. This is because they face exclusion from the workforce, lack of education, social marginalization, and the cost of healthcare. The initiative of Accessible India has failed to provide accessibility to disabled people such as the lack of ramps in educational institutes or workplaces, even if the ramps exist, they are not very disabled-friendly. This leads to a low enrollment rate of disabled students or an increase in dropout rates after attaining secondary education²⁴. Disabled people are less likely to be involved in the labour market and this is a global issue.

The societal marginalization as disabled women are excluded from performing their social role of childbearing, lack of autonomy over their sexual and reproductive health, vulnerability to sexual violence, or their autonomy to make decisions for themselves. There exists persisting discrimination and stigmatization of people with mental health disability. The government has taken positive steps to address the issue of mental

health by making a legislature. This has evolved the condition of people suffering from mental disabilities to have a platform where they can get assistance.

The Constitution of India imposes a duty on the government of the centre and state under Article 41 and the state list under the seventh schedule to provide special measures and relief for disabled people.²⁵ The Indian judiciary also fulfilled its role by doing justice to disabled people. In the case of '*Deaf Employees Welfare Association v. Union of India*' the Supreme Court allowed the petition seeking writ of mandamus to direct Central and State governments to grant equal transport allowances to its employees suffering from hearing impairment as what was being given to blind and other disabled people. As the allowances given to employees suffering from hearing impairment were much lower. The court directed the government to ensure the equal protection of law and equality of law to all, and that same benefits must be given to all²⁶. This case is a classic example of how the Indian government failed to accomplish the objective of the Acts as well as all the affirmative actions formulated by the government itself.

Conclusion

The disabled group of people are a vulnerable group and requires the State to intervene as they cannot help themselves. The implementation of affirmative action by the State becomes important to mitigate the difficulties faced by them. The meaning and scope of affirmative action are more than just a particular kind of treatment. There has been no specific commission or committee for disabled groups of people. There is a need to ensure the efficient implementation of the laws made by the legislature for the upliftment of disabled groups. Everyone must be treated equally before the law and those who are unequal must be given special treatment to ensure that they stand at par with others. Disabled people face discrimination during education, employment or job opportunities, reporting of an offence, claiming justice, etc. The school enrollment ratio of disabled children is very low violating their fundamental rights enriched under Article 21A. The implementation of government guidelines on how to make an accessible India has failed miserably. If in case disabled people enroll in primary education, then they drop out before admission to secondary education. The public places need to be accessible for disabled people, but it remains a failure. The job opportunities are very limited for them. The employers do not wish to hire a disabled employee. Even if he does, the treatment provided to disabled persons will be very different. The disabled group of people do not sympathy from others but demand the justice they deserve. They should be considered as a separate class and the government must provide special treatment for them just as it did for the upliftment of the women. Their backwardness can be determined from the RPwD Act, and the needs of the differently abled person are distinct from another disabled person. Some states have recognized disabled groups as victims and provided compensation for them within their respective states 'victim compensation schemes'. The

²² Dr. Sanjit Kumar Chakraborty, *Disability Rights in India: A Paradigm Shift from 'Object' to 'Subject'*, Vol III Calcutta Law Times 1, 6-8 (2009). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1732128

²³ Parmananda Singh, *Disability, discrimination and equality of opportunities: a comparative analysis of the legal framework*, Vol. 45 No. 2 Journal of the Indian Law Institute 173, 180 (2003). <https://www.jstor.org/stable/43953410?seq=9>

²⁴ Rajesh M. Sosa, *Relationship between disability and poverty: a sociological study in the context of Indian society*, Vol- XI SELP Journal of Social Science 41, 46-47 (2020). <https://iaraindia.com/wp-content/uploads/2020/04/Dr.-RAJESH-M.-SOSA.pdf>

²⁵ INDIAN CONST. art. 41.

²⁶ *Deaf Employees Welfare Association. v. Union of India*, (2014) 3 SCC 173
The centre for internet and society, <https://cis-india.org/accessibility/blog/summary-of-judgments-on-disability-rights> (last visited Apr. 28, 2024)

government has taken affirmative action for disabled people, but the need of an hour is the effective implementation of such laws.

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