CHAPTER IV
The Law of the Disabled is vital to promote and protect the rights of the disabled. Statutory provisions and constitutional mandates are basics for securing justice to the disabled. A study of the disability laws and judgements in the country is necessary for which an understanding of the constitutional framework is germane. “Disability Statutes” have come to be provided, only from 1995, till then, the Constitution held forth and provided remedy and relief to persons with disabilities, when their rights were violated or denied. Statutes derive their roots from the Constitution. Hence the philosophy of the constitution must get extended into the provisions of the statutes, which must always be tested against the constitutional touch stone to reveal their true importance. Even as of now, in cases where these statutes fell short and can not deliver due to limitations of their provisions which they do on several counts, not with-standing their tremendous import – the constitution can still be invoked against any act or omissions amounting to violations of fundamental right to life and equality which in turn entail several other rights – which the persons with disabilities can rely upon.¹ International Law of Disability set the trend towards reckoning of the rights of persons with disability and global efforts to secure national disability statues, have gone a long way in securing awareness among the world community, the urgent need to halt discrimination and denial of rights of the disabled.

In order to realise this goal, the United Nations and its specialised organs have developed a good number of legal norms through various human rights declarations covenants and conventions infavour of Persons

with Disabilities. These may be termed as hard and soft laws on the ill fated developing law of disabled. Apart from these guiding instruments the United Nations has since adopted an independent comprehensive, integral, rights leased convention on persons with disabilities to address the rights of the disabled directly under one umbrella. Such a step is not only the need of the hour but also will go a long way in focussing core aspects of the disabled such as definition, inclusiveness, rehabilitation, mainstreaming in a universal fashion than the existing different dimensional methodology adopted by various nations and regions. As there exists a difference between international and national perspectives an attempt is made in this chapter to bring out the subtle differences among the two systems of law and to find out the commonality between the two systems in order to find out to what extent they have helped the disabled in the promotion of their rights.

(a) The seven binding International Hard Law Instruments include: International Covenant on Civil and Political Rights (ICCPR) (1966); International Covenant on Economic, Social and Cultural Rights (ICESCR) (1996); Convention on Elimination of all forms of Racial Discrimination (CERD) 1965; Convention on Elimination of all forms of Discrimination Against Women (CEDAW) (1999) and its protocols; Convention Against Torture and other forms of Cruel, in human or Degrading Treatment or Punishment (CAT) (1984); International Convention on the Right of the Child (ICRC) 1989 and it’s the protocol; Convention on Protection of any Migrant Worker and members of their families (CMW) 1990.

Soft laws include Declarations, Resolutions, Rules, Codes, Guidelines on which are contained in non binding instruments and these may become part of customary international law or be used to interpret binding treaty obligations. They are for instance Universal Declaration of Human Rights (UDHR), World Programme of Action etc.

(b) Soft Law Instruments adopted with in the frame work of UN, which focus specifically on disability include: World Programme of Action 1982; Standard Rules and Equalization of Opportunities (1993); Declaration on the Rights of Disabled (1975); Declaration on the rights of Mentally Retarded (1971); Principles for the protection of persons with mental illness and for the improvement of Mental Health Care (1991); Tallinn Guidelines for Action on Human Resources Development in the development of Disabilities.

The UNs Convention on Persons with Disabilities was adopted with 50 Articles and Protocol to the Convention with 18 Articles on December 16, 2006, by its General Assembly. Web site www.UN.org on 10.3.2007.
1.0 Human Rights and the Disabled

The causes and consequences of disability vary throughout the world due to the socio-economic, cultural, political and other perspectives.

In order to wipe out the inequalities that exist across the world, among disability masses, the United Nations since its inception has been doing its best to protect the human rights of all especially that of the disabled. From the inception of the UDHR in 1948, till the adoption of the World Programme of Action concerning the Disabled Persons, the human rights law is trying its best to provide a linkage to augment the rights of the disabled across the globe.

The most important outcome of the International Year of the Disabled was the World Programme of Action Concerning Disabled Persons. The Global Meeting of Experts to review the implementation of the World Programme of Action concerning Disabled Persons at the mid point of Nations Decade of Disabled Persons, held at Stockholm in 1987 suggested that a guiding philosophy should be developed to indicate the priorities for action in the years ahead. It was envisaged that the basis of that philosophy should be the recognition of the rights of persons with disabilities.

The meeting recommended that the General Assembly convene a special conference to draft an international convention on the elimination of all forms of discrimination against persons with disability, to be ratified by states by the end of the Decade.

At the forty-second session of the General Assembly, a draft outline of the Convention was prepared and presented by Italy followed by presentations concerning a draft convention made by Sweden at the forty fourth session of the General Assembly. But on both the occasions no consensus could be reached on the suitability of such convention. Many

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4 Adapted by UNGA by its resolution 37/52 of 3 December 1982.
representatives opined that existing human rights documents seemed to guarantee persons with disabilities the same rights as of other persons.\footnote{Ibid.}

However the International Human Rights Law as Hard law, is applicable to all in general including persons with disabilities. These are in the form of customary international law, arising from the consistent practice of states, and binds states by virtue of consent or acquiescence. Besides this, treaty conventions and covenants, which bind states because of their express agreements to be bound.

There are major treaties each of which has an independent monitoring committee. Human rights are universal and civil and political, economic, social and cultural rights belong to all human beings, including differently abled persons. Differently abled persons are entitled to the realization of all human rights and fundamental freedoms on equal terms with others in society, with out discrimination of any kind.

They also enjoy certain human rights specifically linked to their status. The Human Rights of differently abled persons are indivisible, interdependent and inter-related human rights.\footnote{The Human Rights to freedom from any distinction, exclusion, restriction or preference based on the status of differently abled, which has purpose or effect of impairing the enjoyment of human rights and fundamental freedoms; the human rights to freedom from discrimination in access to housing, education, social services, health care or employment; The human rights to active participation in all aspects of social, economic, political and cultural lifes of society, and in shaping decisions and policies affecting him or herself and community at the local, national and international levels. Concerning to the human rights to equality of opportunity include the human right to full equality before the law and equal protection of the law, the human rights to the highest attainable standard of health, to medical, psychological and functional treatment, including prosthetic and orthetic appliances, to medical and social rehabilitation and other services necessary for the maximum development of capabilities, skills and self reliance, the human rights to work, according to capabilities, to receive wages that contribute to an adequate standard of living and to receive equal remuneration for equal work; The human rights to economic and social security, and to an adequate standard of living and the human rights to be treated with dignity and respect.}

“All human beings are born free and equal in dignity and rights. Every one is entitled to all rights and freedoms with out distinction of any kind. All are equal before the law and are entitled with out any discrimination to equal
protection of the law. All are entitled to equal protection against any
discrimination and against any incitement to discrimination. Every one has
the right to standard of living adequate for health and well-being including the
right to security in the event of disability”.

The various provisions of the different Conventions, Covenants,
Treaties and Declarations guarantee the basic human rights for all sections
of the people all over the world including that of physically challenged people
too. A quick pro approach of the documents clearly impose a duty on nation-
states clearly spells out that all the civil, political, socio, economic and cultural
rights incorporated in the UDHR and the Covenant on Civil and Political
Rights; Covenant on Socio, Economic and Cultural Rights are the basic
rights with out which no individual can develop freely to attain the minimum
standards that are necessary to lead a life with dignity.

In addition to these general conventions and covenants many other
multilateral treaties, covenants and conventions have been adopted specially
to protect the rights of women, children and labour, special groups such as
refugees. Administration of justice and protection persons subjected to
detention or imprisonment too clearly impose obligations on nation states in
extending protection to individuals to develop their personality in a more
focussed manner also endorse that the rights of the disabled need to be
augmented.

Apart from the above, majority of the states conjoining with the
universalistic philosophy of human rights, adopted a good number of regional
countries in which they have explicitly endorsed once again to redress the
maladies, if any, in a more specific manner common to their regional
situations. In all most all the documents both at the international and regional
levels undertook self imposed regulations to augment the human rights of the
disabled too without any discrimination to sex, religion and race.

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9 From the UDHR, ICESCR, ICCPR, and ILO Convention No.159; Universal Declaration of Human Rights, Articles 1, 2, 7 and 25.

10 UDHR - Articles 1, 2, 7 and 25; ICCPR – Articles – 2, 7, 14, 16, 17, 23 and 26; ICESCR – Articles 2, 6, 7, 11, 12, 13 and 15; ICRC – Articles 2, 19 and 23.
These positive strides taken by the nation states led the UN to focus more specifically to address and redress the grievances of the disabled all over the world wherein the rights of these people relegated to a secondary position.

At this juncture, it is necessary to highlight the United Nation’s serious concerns towards securing appropriate commitments from the member states in favour of persons with disabilities.

The Vienna Declaration envisaged that special attention should be paid to ensure non-discrimination and the equal enjoyment of all human rights and fundamental freedoms by disabled persons, including their active participation in all aspects of society. It reaffirmed that all human rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities. Any direct discrimination or other negative discriminatory treatment of a disabled person is therefore a violation of his or her rights. The place of disabled person is every where, persons with disabilities should be guaranteed equal opportunity through the elimination of all society determined barriers, physical, financial, social or psychological, which exclude or restrict full participation, in society.\(^\text{11}\)

The Cairo Programme of Action has in its objectives of realisation of the rights of all persons with disabilities, and their participation in all aspects of social, economic and cultural life; to creates, improve and develop necessary conditions that will ensure equal opportunities for persons with disabilities and the valuing of their capabilities in the process of economic and social development; to ensure the dignity and promote the self-reliance of persons with disabilities. It was envisaged that governments at all levels should promote mechanisms ensuring the realisation of the rights of persons with disabilities and reinforce their capabilities of integration.\(^\text{12}\)

\(^\text{11}\) Part 1, Para 22 and Part II, Paras 63 and 64, of the Vienna Declaration adopted on 25 June 1993 in the World Conference on Human Rights held in Vienna.

The Copenhagen Declaration committed itself to ensure that disadvantaged and vulnerable persons and groups are included in social development and that society acknowledges and responds to the consequences of disability by securing the legal rights of the individual and by making the physical and social environment accessible. It was also declared to ensure equal education opportunities at all levels for children, youth and adults with disabilities. It was resolved to strive to ensure that persons with disabilities have access to rehabilitation and other independent living services and assistive technology to enable them to maximise their well-being, independence and full participation in society.\textsuperscript{13}

Copenhagen Programme of Action envisages broadening the ranges of employment opportunities for persons with disabilities and to ensure that laws and regulations do not discriminate against persons with disabilities. It was also envisaged making appropriate adjustments in the workplace to accommodate persons with disabilities besides developing alternate forms of employment, such as supported employment for persons with disabilities who need these services. Governments in collaboration with organizations of people with disabilities and the private sector, should work towards the equalization of opportunities so that people with disabilities can contribute to and benefit from full participation in society. Policies concerning people with disabilities should focus on their abilities rather than their disabilities and should ensure their dignity as citizens.\textsuperscript{14}

The Beijing Platform for Action called up on actions to be taken to design and implement gender-sensitive health programmes that address the needs of women throughout their lives and take into account the special

\textsuperscript{13} Para 26(1) and Commitments 2(d), 6(8) of Copenhagen Declaration adopted in March 1995 (www.UN.org/esa/soc_dev/wssd/agreements/index)

\textsuperscript{14} Para 62(a), (c), (d) and 75(k) of Copenhagen Programme of Action adopted in March 1995.
needs of women with disabilities and to ensure that girls and women of all ages with any form of disability receive supportive services.\textsuperscript{15}

Istanbul declaration highlighted that all human beings are, at the centre of concern for sustainable development, and they are the basis for actions in implementing the Habitat Agenda. The declaration included intensification of efforts to eradicate discrimination to promote and protect all human rights and fundamental freedoms for all, and to provide for basic needs. Promotion of full accessibility for people with disabilities, in policies, programmes and projects for shelter and sustainable human settlements development.\textsuperscript{16}

Habitat Agenda reaffirms that persons with disabilities have not always had the opportunity to participate fully and equally in human settlement development and management, including decision making, often owing to social, economic, attitudinal and physical barriers and discrimination. Such barriers should be removed and the needs and covers of persons with disabilities should be fully integrated into shelter and sustainable human settlement plans and policies to create access for all. It was committed to promoting shelter and supporting basic services and facilities for education and health for persons with disabilities and people belonging to vulnerable and disadvantaged groups. It was also committed for promoting equal access and full participation of persons with disabilities in all spheres of human settlements and providing adequate policies and legal protection against discrimination on grounds of disabilities.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{15} Para 10(c) and (O) – Beijing Platform of Action adopted on 15, September 1995 (www.UN.org women watch dev/Beijing/platform)
\item \textsuperscript{16} Para 7–Istanbul Declaration, adopted on 14.06.1996. (www.unhabitat.org/declaration Istanbul.asp).
\item \textsuperscript{17} Para 16, 40(1), and 43(V)–Habitat Agenda adopted in 1996 (www.unescap.org/huset/habitat):
\end{itemize}
2.00 INTERNATIONAL LAW OF DISABLED

a. Soft Law

Disability specific instruments are in the form of ‘soft law’ – instruments such as declarations, guide lines etc. However there has been no disability specific supervision or enforcement mechanism developed yet either with in the UNs system or its specialised agencies.\(^{18}\) Even none of the human rights laws provided for such mechanism. Taking into consideration of the lackadaiasical attitude of the nation-states and the UN, the disabled all over the world with the aid and assistance of the Non-Governmental Organisations employed pressure that specific legal instruments need to be adopted in order to address their concerns apart from the general human rights instruments. The disability specific movement finally brought in attitudinal changes in the member states, which finally led to the UN to focus on the area. Even then, till December 2006 no single convention or covenant has been adopted to augment the right of the disabled compared to that of general human rights law. It is only on December 13, 2006 a Convention on Rights of Persons With Disability was adopted by UNs General Assembly. Declarations which have no legal binding force upon the Nation-States earlier only was adopted. Hence they may be referred to as instruments of soft nature compared to that of the traditional conventional law which is considered as hard law of nation states bringing upon them in their mutual intercourse with each other.

The ‘Soft Law’ instruments were adopted within the frame work of the UN which focuses specifically on disability.\(^{19}\)

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\(^{18}\) The Commission on Social Development has established the special Rapporteur on disability of the commission to monitor and promote the implementation of the Standard Rules on Equalisation of Opportunities for Persons With Disabilities. However the special Rapporteurs mandate does not direct her to forward allegations of violations of the standard rules or of human rights of persons with disabilities to Government as beings alone by various special Rapporteurs of Commission on Human Rights.

\(^{19}\) (i) World Programme of Action concerning Disabled Persons (1982); (ii) The Standard Rules for equalization of opportunities for persons with disabilities (1993); (iii) Declaration on the Rights of Disabled Persons (1975); (iv) Declaration on the rights of Mentally Retarded Persons (1971); (v) Principles for the protection of persons with
Though these declarations can be said to be non-justiciable in the eyes of law the standards set out in these instruments to a certain extent generally be accepted by nation states which may form part of customary international law and become binding on them, for example the Universal Declaration of Human Rights, though a non-justiciable document, but has obtained hand of law both internationally and nationally and became a cornerstone in the promotion of human rights all through the world with out exception.

At times these standards may even be incorporated as part of the national law and even may receive the sanctions of the national courts, which may in the longer run receive wider sanctions of nation states automatically and form part of the jurisprudence of international human rights law.

b. Hard Law

There have been a number of international human rights standards over the past fifty years, some in the form of binding treaties others in the form of non-binding instruments. Among the many treaties adopted by the UN, seven human rights treaties\(^{20}\) are of particular importance because they contain not only normative standards but also to oversee state’s records in the implementation of their obligations under these treaties.

The General Assembly of the United Nations adopted the convention with 50 Articles on the Rights of Persons With Disabilities and optional

protocol to the Convention on 18 Articles December 13, 2006. The historic and memorable convention for the promotion and protection of the rights of the Persons With Disabilities is the culmination of three years of sustained efforts of member states in the accomplishment of the International Law specifics to Persons With Disabilities.

The State parties to the Convention took note of salient features of the Charter of the UN, UDHR, ICCPR and ICESCR, CERD, CEDAW, CAT, CRC, CPRMW and reaffirmed sensual principles and recognised various aspects concerning to rights of PWDs among other things.21 It needs to be stated

21 The UNs Convention on the Rights of PWDs (2006), was adopted, after the state parties to the convention: (a) recalled the principles proclaimed in the charter of the UN which recognize the inherent dignity and worth of and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the World; (b) recognized that the United Nations, in the Universal Declaration of Human Rights and the International Covenants on Human Rights, has proclaimed and agreed that every one is entitled to all the rights and freedoms set forth there in, with out distinction of any kind; (c) Reaffirmed the Universality, indivisibility, interdependence and inter relatedness of all human rights and fundamental freedoms and the need for Persons With Disabilities to be guaranteed their full enjoyment without discrimination, (d) recalled the International covenant on an economic, social and cultural rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention against Torture and other forms of, Inhuman or Degrading Treatment or Punishment; the Convention the Rights of the Child; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their families, (e) recognized that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others, (f) Recognised the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for PWDs in influencing the formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for PWDs; (g) Emphasized the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development; (h) recognized also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person; (i) Recognized further the diversity of PWDs; (j) recognized the need to promote and protect the human rights of all PWDs including those who require more intensive support; (k) concerned that, despite these various instruments and undertakings, PWDs continue to face barriers in their participation as equal members of society and violations of their human rights in all parties of the World; (l) recognised the importance of International Cooperation for improving the living standard of PWDs in every country, particularly in developing countries; (m) recognized the valued existing and potential contributions made by PWDs to the over all well-being and diversity of their communities, and that the promotion of the full enjoyment by PWDs of their human rights and fundamental freedoms and of full participation by PWDs will result in their enhanced sense of belonging and insignificant advances in the human social and economic development of society and the eradication of poverty; (n) recognized the
that though the Asia Pacific countries made suggestion to the UN that on the
definition of disability should cover a wide range of aspects for a
comprehensive definition. But the UNs Convention has no definition on
disability, though the draft Convention carried a definition on the disability.
However the UN Convention Article 1 on the ‘purpose’ and not under Article
on definition, says: persons with disabilities include those who have long-
term physical, mental, intellectual or sensory impairments which in interaction
with various barriers may hinder their full and effective participation in society
on an equal basis with others.

It needs to be noted that there are two exclusive Articles 6 and 7 on
women with disabilities and children with disabilities, respective pertinently

importance for PWDs of their individual autonomy and independence, including the
freedom to make their own choices; (o) considered that PWDs should have the
opportunity to be activity involved in decision-making processes about policies and
programmes, including those directly concerning them; (p) concerned about the
difficult conditions faced by PWDs who are subjected to multiple or aggravated forms
of discrimination on the basis of race, colour, sex, language, religion, political or other
opinion, national, ethnic, indigenous or social origin, property, birth, age or other
status, (q) recognized that women and girls with disabilities are often at greater risk,
both with in and outside the home of violence, injury or abuse neglect or negligent
treatment, maltreatment or exploitation; (r) recognized that children with disabilities
should have full enjoyment of all human rights and fundamental freedoms on an equal
basis with other children, and recalled obligations to that end undertaken by states
parties to the Convention on the Rights of the Child; (s) emphasized the need to
incorporate a gender perspective in all efforts to promote the full enjoyment of human
rights and fundamental freedoms by PWDs; (t) highlighted the fact that the majority of
PWDs live in conditions of poverty, and in this regard recognized the critical need to
address the negative impact of poverty on PWDs; (u) It was borne in mind that
conditions of peace and security based on full respect for the purposes and principles
contained in the Charter of the UNs and observance of applicable human rights
instruments are indispensable for the full protection of PWDs, in particular during
armed conflicts and foreign occupation; (v) Recognized the importance of accessibility
to the physical, social, economic and cultural environment to health and education and
to information and the communication, in enabling PWDs to fully enjoy all human
rights and fundamental freedoms; (w) realized that the individual, having duties to
other individuals and to the community to which be or she belongs, is under a
responsibility to strive for the promotion and observance of the rights recognized in the
International Bill of Human Rights; (x) convinced that the family is the natural and
fundamental group unit of society and is entitled to protection by society and the State,
and that PWDs and their family members should receive the necessary protection and
assistance to enable families to contribute towards the full and equal enjoyment of the
rights of PWDs; (y) convinced that a comprehensive and integral international
convention to promote and protect the rights and dignity of PWDs will make a
significant contribution to redressing the profound social disadvantage of PWDs and
promote their participation in the civil, political, economic, social and cultural spheres
with equal opportunities, in both developing and developed countries.
owing to the peculiarity of multiple discrimination women with disability and children with disability are confronted with. The Convention covers a wide spectrum of serious concerns of PWDs, and the Articles on these concerns adequately addressed as could be observed from the assertions and claims of human rights activists and disability movement activists in the recent past decades. The disability studies conducted so far not only in India but also elsewhere in the world, have been clinching the rights and issues of PWDs, particularly concerning to inclusive education, mainstreaming of PWDs as also inclusive growth with due participation by PWDs.

It is timely that the Convention of UN has come to be adopted at a time when the PWD Act 1995 and RCI Act 1992 are slated for amendments.

3.00 NATIONAL LAW OF DISABLED

The assertions and averments in the UN charter, the Universal Declaration of Human Rights, and the Human Rights Conventions which include International Convention on Civil and Political Rights, International Convention on Economic Social and Cultural Rights, Convention for Elimination of Racial Discrimination, Convention on Elimination of All Forms of Discrimination against women, International Convention on the Rights of the Child, Convention Against Torture, provided adequate impetus for the formulation of the national constitutions and national law. The International Laws particularly concerning promotion and protection of rights of the citizens are reflected in Indian Constitution by way of provisions of Articles on fundamental rights as also through assertions and resolves in the Articles on Directive Principles of State Policy. However in so far as provisions specifics to rights of Persons With Disabilities, no where in the constitution, articles have been provided similar to the provisions through Articles rightly in favour of the Schedule Caste / Scheduled Tribes. However, it may be stated that there is an entry number 9 – Relief of the disabled and unemployable – in Seventh Schedule – State list.

The constitutional provision by way of fundamental rights, directive principles of state policy etc., besides disability specific laws as also the
general laws are applicable to all citizens. Many labour laws have also the coverage of the interests of Persons With Disabilities. The sustained struggle of the disability movement activists as well as those pursuing disability advocacy has borne fruits in India by the enactments in favour of PWDs. The most reckonable one being the PWD Act 1995. This Act is a shift of policy focus from institutionalisation to mainstreaming and from exclusion to inclusion. The Act generates various rights in different spheres of life but does not guarantee or provide for proper mechanism to enforce those rights.

Under the changed circumstances, the National Laws needed to be given a fresh look in terms of International Law as also the objectives of the Indian Constitution, the National Laws will have to be reviewed in the near future particularly after the passing of the UNs International Convention on Rights of Persons With Disabilities, by General Assembly as an exclusive International Convention on Disability.

a. Indian Constitution

The Indian constitution framers, the erudite intellectuals aimed and accomplished provisions in Indian Constitution all aspects of rights of Citizens, who Constitute different socio, economic, cultural segments in the country. The International Human Right Law provisions have been provided in more than one approach to grant basic rights in the nature of political and Civil Rights through justiciable fundamental rights and economic, social and cultural non justiciable rights through the directive principles of state policies. The Indian constitution guarantees to the people certain basic human rights and freedoms, such as *inter alia* equal protection of law, freedom of speech and expression to move freely and to reside and settle anywhere in India,


23 The Persons with Disabilities Equal Opportunities, Protection of Rights and Full Participation Act, was enacted by the Parliament on 31 December, 1995 and received the assent of the President of India on January 1996, notified by the Government on 7 February, 1996.
freedom to follow any occupation trade or business, freedom of person, freedom against double jeopardy and against *expostfacto* laws. Untouchability, the age old scourge afflicting the Hindu Societies, has been formally abolished.

A person can claim fundamental right against state, subject to the state imposing some permissible restrictions on fundamental rights expressly mentioned in the constitution itself and therefore these rights can be adjudged only to the extent laid down. These rights, in substance constitute inhibitions on the legislative and executive organizations of the State. No law or executive action infringing a fundamental right can be regarded valid. In this way, the constitution demarcates an area of individual freedom and liberty where in government can not interfere.

The constitution provides an effective mechanism in Article 32 and 226 for the enforcement of these rights. With out due enforcement, these rights will be of not much use. The judiciary assumes and effective and speedy enforcement of these rights.24

(I). Fundamental Rights

Article 14 of the constitution – equality before law – says, “The state shall not deny to any person equality before the law or the equal protection of the law with in the territory of India”. The Supreme Court and High Courts in India by their judicial pronouncements have left no doubt that the Constitution does not merely guarantee ‘formal’ equality. But the ‘substantial’ equality concept as opposed to ‘formal’ equality has been espoused under Indian Constitution under Article 14. This implies that only equals must be treated as equals and unequal may not be treated as equals which makes it the constitutional responsibility of the state to ensure that the systematic and historical conditions of disadvantaged classes of persons are taken into account in providing equal status and equal opportunities. Simply put, this

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notion of equality means that the laws may not have universal application for all persons who are not by nature, attainment, historical reasons or any other circumstance, in the same position and hence, the varying needs of different classes of persons may require separate treatment – the only condition being that the classification for separate treatment should be rational and must further the objective of that law and be linked with it.25

In effect, this substantive equality has two implications: Firstly, this paradigm rules out any denial or discrimination against any individual or class, on any arbitrary or unreasonable basis. Secondly, and more importantly, the substantive equality paradigm permits “affirmative action” by way of special laws creating special rights and “positive discrimination” by way of reservations in favour of the weaker classes of society. The right of the person with disabilities, against any discrimination, which is on the basis of disability of the persons, is therefore, within this mandate of Right to Equality under Article 14 of the constitution of India.26

In a writ petition, in National Federation of Blind v. Union Public Service Commission and Others (1993), the Supreme Court held and directed the Government of India and the Union Public Service Commission to permit the visually handicapped (blind and partially blind) eligible candidates to compete and write the Civil Services Examination which is ordinarily held yearly by the Union Public Service Commission. The Court further directed that they shall be permitted to write the examination in Braille script or with the help of a scribe.27

The Supreme Court responded to writ petitions filed under Article 32 of the Constitution of India, during the pre-disability status period, against treatment meted out to persons with mental disabilities in institutions for their

25 Supra, n.1, p.2.

26 Ibid.

care and treatment and laid guide lines on the living conditions, education, training and rehabilitation facilities in such institutions.

In a Public Interest Litigation in *Rakesh Chandravarain v. State of Bihar (1986)* through a letter addressed to the learned Chief Justice of Supreme Court by two citizens of Patna in regard to the mental hospital at Kanke near Patna, the Supreme Court, while holding that it is difficult for the court to monitor the management of hospital, constituted a committee of management for Mental Hospital in a manner indicated and directing the committee to meet every month in first six months with a view of removing the defects and deficiencies with in a time frame say of six months at the most and for reviewing the improvements in the conditions of the hospital. On the repeated allegations that the lady patients who have already been cured are not being released from the mental hospital as the relatives, even though notified are not taking them back, the court directed the committee to take steps to have a rehabilitation centre at a convenient place near Ranchi, where appropriate rehabilitation schemes may be operated and the patients after being cured, irrespective of being male or female, if they are not being taken back by members of their families, could be rehabilitated.28

The Supreme Court in yet another case at *Veena v State of Bihar & Others* gone into horrifying circumstances in which persons of unsound mind kept in Bihar jail for no reason for 30 to 40 years, in number of cases and were kept in jail for years even after they were declared sane. The Supreme Court, besides passing severe strictchers ordered to release some who were sane since long against whom criminal cases need not be proceeded further.

The apex court further said, the cases of these prisoners disclosed a shocking state of affairs involving total disregard of basic human rights. They constitute an affront to the dignity of man and it is surprising, indeed shocking to the conscience of mankind, that such a situation should prevail in any civilised society. What meaning has the rule of law, if the poor are allowed to

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languish in jail with out the slightest justification as if they are castaways of the society? The rule of law does not exist merely for those who have the means to fight for their rights and very often for perpetuation of the status quo which protects and preserves their dominance and permits them to exploit large sections of the community but it exists also for the poor and the down trodden, the ignorant and the illiterate who constitute the large bulk of humanity in this country. It is the duty of this court to protect and uphold the basic human rights of the weaker sections of the society, and it is this duty we are trying to discharge in entertaining this public interest litigation”.

The philosophy of Article 14 of the constitution is taken forward by Art 15 and 16 of the constitution of India.

Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth and citizens shall not be subjected to any disability, liability, restriction or conditions with regard to access to facilities and usage of public places.

It is necessary to understand their interpretation by Supreme Court. These articles, particularly the meaning of the phrase “back ward class(es) of citizens” and whether they include persons with disabilities, came up for interpretation in *Indra Swhney and others V. Union of India and Others* 1992 popularly known as the Mandal case. This case had the background

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30 Article 15 of Constitution of India says, “Prohibition of discrimination on grounds of religion race, caste, sex or place or birth (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them; (2) No citizen shall, on the grounds of only religious, race, caste, sex, place of birth or any of them, be subject to any disability, liability restriction or condition with regard to – (a) access top shops, with public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public.

31 Article 16 of Constitution of India says – 1. There shall be equality of opportunity for all citizens in matters relating to employment to appointment to any office under the state. 2. No citizen shall, on the grounds of religion, race caste, sex, desent, place of birth, residence or any of them, be ineligible for, or discriminate against in respect of any employment or offices under the State.

in that it was the finale of a fierce public controversy which had rocked the socio-political scenario in India, during 1990-1991, in the aftermath of two Office Memoranda (OM) issued by the Central Government purporting to extend reservation in Government services for “socially and educationally backward classes” (27% quota) and “other economically backward sections” (10% quota), which had not been covered by the existing reservation schemes. The issue of constitutionality of such reservation and “affirmative action” generally was referred to a nine-Judges Constitutional Bench of the Supreme Court in India, with a view to finally settle the legal position regarding reservations, in view of several earlier judgements of the Supreme Court, which had failed to lay it at rest. The mammoth judgement, delivered by the Bench on a range of emerging issues, was fraught with sharp differences of opinion among the Judges. In effect, the constitutionality, validity and enforceability of the first OM for reservation for socially and educationally between classes, was ultimately upheld by a 6:3 decision subject to certain conditions and prerequisites, while the second OM for reservation for other economically backward sections was struck down.33

The Mandal Judgement is important from the point of view of disability rights because, on an intervention application filed by the National Federation of Blind and argued by Lawyer S.K. Rungta (who is also visually impaired) on behalf of all persons with disabilities, on the specific issue whether “backward class(es) of citizens” could also include persons with disabilities, was also examined as a sub-issue with in the large issue. It was held by a majority judgement that even though back ward class(es) of citizens as used in clause 4 of Article 15 and 16 did not cover persons with disabilities, the constitutional scheme and spirit of Article 14, and clause (1) of Article 15 and 16 allowed for reservation and other kinds of affirmative action in favour of persons with disabilities. This constitutional Bench thus upheld the opinion rendered earlier by a five judges constitution Bench in KC Vasanth Kumar V. State of Karnataka (1985 Supp. SCC 714) as articulated by Venkataramaiah J. that “Several factors such as physical disability, poverty,
place of habitation ... might each become a sole factor, for purpose of Art 15(4) or Article 16(4) ... While relief may be given in such cases under Article 14, Article 15(1) and Article 16(1) by adopting a rational principle of classification, Article 15(4) and Article 16(4) cannot be applied to them”.

Another important aspect was also clarified by the judges that the reservation in favour of persons with disabilities is “horizontal reservation”, cutting across all the categories in recruitment including the general/open category and hence if 3% seats are reserved for persons with disabilities, 3% seats would be reserved in each category like SCs/STs and general or “open competition” (OC) category candidates.

It is pertinent to highlight a noteworthy aspect that despite divisions on other issues raised in the Mandal Case even the dissenting judges agreed on this proposition and upheld the right of persons with disabilities to be entitled to affirmative action and positive discrimination under Article 14, 15 and 16 of the constitution of India.

Article 21 on protection of life and Personal Liberty says, “No Person shall be deprived of his life or personal liberty except according to procedure established by Law”.

Through several judgements of Supreme Court of India, it is well settled, that fundamental right to life guaranteed under Article 21 of the constitution is an over arching right under which several rights are subsumed as necessary components of life. The Supreme Court held that the right to life includes the right to live with human dignity and all that goes along with it namely, the bare necessities of life such as adequate nutrition, clothing and shelter, facilities for reading, writing and expressing one self in adverse form, free movement and community, with fellow human beings.\(^\text{34}\) It was in the same view that Supreme Court interpreted right to life, as “Right to life guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights or

under the constitution of India can not be exercised without these basic human rights.\textsuperscript{35}

The jurisprudence of the expanding definition of right to life by which various new fundamental rights have been recognised by the Indian courts by reading them into right to life. It is necessary to state that this is so even when the judgements do not pertain specifically to persons with disabilities, for they recognise those rights vis-à-vis all persons, which obviously include those with disabilities. Therefore these pronouncements of the courts are entitled to be used to demand the same basic rights for disabled persons as well.

There have been some important rights which have thus been reckoned as a part of right to life,\textsuperscript{36} which are essential to persons with disabilities. These rights include right to housing, right to education, right to health, right to food and right to clean water.

\textbf{(ii) Directive Principles}

The rights extended in the constitution of India, which are not justiciable, through the Directive Principles of State Policy, can not be claimed as a matter of justiciable right to have them enforced in any court of

\textsuperscript{35} Chameli Singh V. State of UP (1966) 2 SCC 549.


(3). Right to Health in C.E.S.C. Ltd. V. Subhash Chandra Bose [(1992) 1 SCC 441], Consumer Education and Research Centre & Ors V. Union of India & Ors [(1995) 3 SCC 42].

(4). Right to food in Peoples Union for Civil Liberties V. Union of India & Ors. (Civil Writ Petition No.196 of 2001.

(5) Right to clean water in Attakoya Thangal V. Union of India [1990 (1) KLT 580] and so on.
law. The Persons With Disabilities are also extended with support by the Directive Principles of State Policy. In the matter of adjustments and expansion of the ambit of fundamental rights Directive Principles have often been used by the courts. Besides this they also interpret other constitutional provisions. It is necessary to highlight that the government and various administrative authorities have been directed recently, to take positive action to remove grievances caused by non-implementation of the directive principles. It would go a long way that directive principles specifically mention rights of persons with disabilities, Art 41 specifically provides for effective provision to be made by the state for securing the right to work, to education and to public assistance in cases of “disablement”. Art.39A envisages equal justice and free legal aid to all citizens and that opportunities for securing justice are not denied to any citizen by reason of economic or “other disabilities”. Article 46 and 47 also have the potential for raising the standards of living education and development of persons with disabilities. Article 41, 45 and 47 have been relied upon by the Delhi High Court in an interim order in a pending public interest litigation.

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37 Supra, n.5, p.5.

38 Article 41, says, “Right to Work, to education and to ‘public assistance in certain cases – the state shall, with in the limits of its economic capacity and development make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want.

39 Article 45 says, “Provision for free and compulsory education for children – The State shall endeavour to provide, with in a period of ten years from the commencement of this constitution for free and compulsory education for all children until they complete the age of fourteen years”.

40 Article 47 says, “duty of the State to raise the level of nutrition and the standard of living and to improve public health. The shall have regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as amongst its primary duties and, in particular, the state shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drinks which are injurious to health.

Despite some additions, for instance, in the 7th schedule of the constitution, in List II (state subjects), entry 9 worded as “Relief of the disabled and unemployable”, and List III (Concurrent Subjects), Entry 16. “Lunacy and Mental deficiency, including places for the reception or treatment of lunatics and mental deficient”, which may betray lack of a right orientation and or a totally insensitive understanding of disability, the Indian constitution is undoubtedly the single, strongest legal ally of a person with disability in India.42

Though the Directive Principles of the State Policy are non justiciable, the Judiciary, especially the Supreme Court has taken the lead in reading them as part and parcel of the justiciable rights i.e., the fundamental rights and gave impetus to them insisting the duty that has been cast upon the States by the Constitution and as was visualized by Dr.Ambedkar, the Chairman of the Constituent Assembly.43

In the matter of enforceability of economic, socio-cultural rights, theoretically speaking, social and cultural rights have not been perceived enforceable both in the Constitution of India (Part III) and under the international human rights law. The Covenant on Economic, Social and Cultural rights requires the realization of these rights progressively by States in accordance with their level of development and economic capacity. This concept has assumed greater significance in the era of globalization and liberalization especially, with the advent of the concept of good governance which is aimed at synchronizing cultures and politics of all sections of the society.44

42 Supra, n.5, p.6.
43 Commenting on the importance of Directive Principles of State Policy Dr. Ambedkar noted: ‘Surely it is not the intention to introduce in this part these principles as mere pious declarations .It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip service to these principles but that they should be made the basis of all legislative and executive action that they may be taking there after in the matter of governance of the country.’
Accordingly, it is imperative that the rights enumerated in the Directive Principles of States Policy are vital in realizing the fundamental rights of the citizens. Hence, the State has an onerous obligation to facilitate that the norm justiciable rights be enforced at any cost in order to meet the requirements of the preamble of the Constitution.

(b) Laws Relating to Disabled

It may be seen that in India there has been awakening to the rights of persons with disability and in that traditional largesse approach has come to be given up since 1990. The Indian disability legislation include:

(i) The Indian Lunacy Act 1912,
(ii) The Lepers Act, 1899.
(iii) Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995
(iv) National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999.
(v) Rehabilitation Council of India Act 1992 and

The long and tenacious struggle for rights culminated in the formulation of the disability Acts. As such it marked a hard earned victory for the disabled sector. It is necessary to highlight that the disability movement activists and human rights activists realise the struggle for the realization of the basic rights to disabled is a continuing struggle and the achievement to secure the disability legislation in India deserve to be celebrated. The realization of rights to the disabled through these Acts, is far from over. Surfacing of the gaps in the disability laws, insensitivity, ignorance and resistance against the disabled population have come to be realised. In consistency on the part of the judiciary itself as also non delivery of justice is seen to be disheartening. Disability rights jurisprudence is also seen to be unfolding in India, the impact of which is experienced with each passing year.

i. **The Indian Lunacy Act 1912:** This Act deals with the mentally disabled in India. The police are empowered, under this Act to
arrest wandering lunatics. The Act does not spell out the needs of mentally retarded as distinct from those of the mentally ill or mentally not sound. This law is obsolete and against the interest of the mentally retarded persons, in the changed scenario human rights jurisprudence advocated even by the Government of India.

ii. **The Lepers Act 1899**, deals with the problems of lepers, Section VI of the Act empowers the State Governments to arrest proper Lepers without Warrant. The Act imposes disabilities on lepers without any provision for alternative care. As a result even completely cured lepers and their families and children are prevented from full participation in community life. The law also prohibits lepers from taking up certain trades, admission in schools, and entrance in public institutions.

iii. **The Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995**, here in after called as PWD Act, 1995 here in after called as PWD Act, addressed the basic rights of Persons With Disabilities. These include: education, Employment, Access, Housing, Mental Health and touches upon general principles.

### a. Education

Chapter V coupled together with Chapter VI deals with respect to education of Persons With Disabilities. Under the Act, provision is made for

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46 Ibid.

47 Sections 26 to 30 of Chapter V and Sections 39 to 41 of Chapter VI which specifies: Chapter V Sec.26. The appropriate Government and the local authorities shall – (a) ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years; (b) Endeavour to promote the integration of students with disabilities in the normal schools; (c) promote setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools; (d) Endeavour to equip the special schools for children with disabilities with vocational training facilities.
social security measures for disabled which include education, reservation in
government educational institutions and Government aided institutions to
encourage children with disabilities to attend mainstream school. The Act
also provides for making education free and compulsory upto the age of 18
years, though the constitution guarantees it only upto 14 years for others. It
further provides for setting up special educational institutions for children with
disabilities and teaching, training centres.

Section 27: The appropriate Government and the local authorities shall by notification
make schemes - (a) conducting part time classes in respect of children with disabilities
who having completed education up to class fifth and could not continue their studies
on a whole time basis; (b) conducting special part-time classes for providing
functioning literacy for children in the age group of sixteen and above, (c) Imparting
non formal education by utilizing the available manpower in rural areas after giving
them appropriate orientation; (d) Imparting education through open schools or open
universities; (e) Conducting electronic or other media; (f) Providing ever child with
disability free of cost special books and equipments needed for his education.

Section 28: The appropriate Governments shall set up adequate number of teachers’
training institutions and assist the national institutes and other voluntary organisations
to develop teacher’s training programmes specializing in disabilities so that requisite
trained man power is available for special schools and integrated schools for children
with disabilities.

Section 30: With out prejudice to the fore-going provisions, (be appropriate
Governments shall by notification prepare comprehensive education scheme which
shall make provision for – (a) Transport facilities to the children with disabilities or in
the alternative financial incentives to parents or guardians to enable their children with
disabilities to attend schools. (b) The removal of architectural barriers from schools,
colleges or other institutions imparting vocational and professional training; (c) The
supply of books, uniforms and other materials to children with disabilities attending
schools; (d) The grant of scholarship to students with disabilities. (e) Setting up of
appropriate for the redressal of grievances of parent, regarding the placement of their
children with disabilities; (f) Suitable modification in the examination system to
eliminate purely mathematical questions for the benefit of blind students and students
with low vision; (g) restructuring of curriculum for the benefit of children with
disabilities; (h) restructuring the curriculum for benefit of students with hearing
impairment to facilitate them to take only one language as part of their curriculum.

Chapter VI Section 39: All Government educational institutions and other educational
institutions receiving aid from the Government shall reserve not less than three
percent seat for persons with disabilities. Section 40. The appropriate Government
and local authorities shall reserve and local authorities shall reserve not less than
three percent, in all poverty alleviation schemes for the benefit of persons with
disabilities. Section 41: The appropriate Government and the local authorities shall,
with in the limits of their economic capacity and development, provide incentives to
employers both in public and private sectors to ensure that at least five percent of their
work force is composed of Persons With Disabilities.
Though several decades have elapsed since the constitution of India was adopted, welfare policies about the disabled children, the actual facilities made available for them so far, however, are not sufficient.\textsuperscript{48}

It needs to be stressed that being a sizable faction of the Indian Society, they demand further attention and more investment in term.\textsuperscript{49}

\textbf{b. Employment}

Chapter VI–Section 32 to 41 (except Sec.39) has been provided for employment. These provisions comprise the most empowering aspects of Disabilities Act, as they yield most tangible and substantial rights to persons with disabilities. It does not mean to secure an unqualified endorsement of the provisions.

In Section 41 of the Act disabled persons’ employment in the private sector has been provided and self-employment opportunities for persons with disabilities have been bolstered through certain affirmative action in Section 43.

\begin{itemize}
\item \textsuperscript{49} Ibid.
\end{itemize}

The present position of existing educational facilities: (a) for visually challenged – only 200 schools and other establishments, all over the country capable to control only a small percentage of visually challenged children to impart primary education coupled with training in few simple handicrafts. The Central Government has set up a comprehensive National Centre for the Visually Challenged at Dehradun, which includes a Central Braille Press which publishes text books and other reading materials in Braille. There are some centres for the training of teachers of the visually challenged, sponsored by the Government of India and each can train between 30 to 40 teachers. (b) For hearing impaired – The schools for hearing impaired children are less than hundred. Most of these provide primary education, coupled with some pre vocational training in engineering and non engineering occupations. The majority of them are privately managed but are aided by the state Governments. About a dozen centres for the training of teachers of the hearing handicapped are functioning at present and can train 50 to 60 teachers annually. For orthopaedically handicapped – The major problem of this category of children is locomotory in character. These children go to ordinary schools. Not more than 40 institutions in the country with an enrolment capacity of 3000 are presently available for their exclusive enrolment. There is no need for special training teachers associated with the teaching of such children. (d) For mentally retarded – This aspect of special education has received very little attentions on account of its complexity. There are about 35 schools for mentally retarded children with a total enrolment not exceeding 3,0000. One of these schools is men by Government of India two centres for the training of teachers of mentally retarded children are functioning at present and they can train about 20 teachers annually.
The Act also directs the State to extend promotional opportunities in a quick span of time or through reservation mode in all the avocations of the state which includes sponsored research program to be conducted.\textsuperscript{50} It further directs the state to provide for disabled unemployment allowance to people who could not secure a job event after their registration in an employment exchange specially established for the disabled.\textsuperscript{51}

The “aspect of non-discrimination” envisaged in the right against discrimination in government employment is covered in Section 47 under Chapter VIII.

While the frame work for employment of disabled persons in “Government establishments is set out in section 32 to 38.\textsuperscript{52} Section 47

\textsuperscript{50} Section 48: The appropriate Governments and local authorities shall promote and sponsor research, inter alia, in the following areas — (a) Promotion of disability; (b) Rehabilitation including community based rehabilitation; (c) Development of assistive devices including their psychological aspects; (d) job identification; (e) on site modifications in offices and factors.

Section 49: The appropriate Governments shall provide financial assistance to universities, other institutions of higher learning, professional bodies and non government research units or institutions, for undertaking research for special education, rehabilitation and man power development.

\textsuperscript{51} Section 68: The appropriate Governments shall with in the limits of their economic capacity and development shall by notification frame a scheme for payment of an unemployment allowance to persons with disability registered with the Special Employment Exchange for more than two years and who could not be placed in any gainful occupation.

\textsuperscript{52} (i) The Governments (both Central and State at their respective levels) must identify posts in their establishments which can be reserved for employment of persons with disability and the list of the identified posts must be reviewed and updated at least once in the three years.

(ii) The Governments must reserve, in every Government establishment, 3% vacancies on identified posts: 1% each for the following three classes respectively — (1) persons with blindness or low vision; (2) persons with hearing impairment; and (3) persons with locomotor disability or cerebral palsy.

(iii) In any recruitment year, if any vacancy reserved for persons with one of the three mentioned disabilities can not be filled up due to non availability of a suitable person with that disability or for any other reason, that vacancy will be carried forward to the next recruitment year. If in the next recruitment year a suitable person with that disability is not still available, it may first be filled by interchange among the three categories. Only when there is no person with disability at all available for the post in that year, the vacancy will be filled up by appointing a non disabled person. Further the nature of vacancies in an establishment is such that a person with given category
partly endorses the 'principle of reasonable accommodation', and the Section provides for various measures to prevent discrimination against a disabled person employed in a Government establishment.\(^{53}\) Less assertively, other employment options like private sector jobs and even self employment have also been provided for in the Act.

It is envisaged in Section 41, encouraging the private sector to create job opportunities for persons with disabilities through incentives to be provided by the Government for those that employ disabled persons, comprising at least 5% of their total work force.

of disability can not be employed, the vacancy may be inter changed among the three categories of disabilities with a prior approval of the Government.

(iv) The Government may also set up special employment exchanges, and require employers in every Government establishment to furnish to such exchanges, information on vacancies identified for persons with disability that have occurred or about to occur in that establishment and the establishment will then have to comply with such requisition. The records of the Government establishments will also be accessible to public for inspection or to copies or ask any question necessary for obtaining any information furnished by the Government establishment, which is relevant to appointment to vacancies for persons with disability. Employers of Government establishments must also maintain records of persons with disabilities employed in their establishments and these records shall be open to inspection by the Government.

(v) The Governments and local authorities must also issue notifications to formulate schemes on certain matters towards insuring employment of persons with disabilities, including their training and welfare, relaxation of upper age limit, regulation of employment, health and safety measures and certain of a non handicapping environment in places where persons with disabilities are employed.

(vi) 3% vacancies must be reserved by the Government in all poverty alleviation schemes for the benefit of persons with disabilities.

\(^{53}\) (i) No Government establishment can terminate or reduce in rank an employee who acquires a disability during his service.

(ii) If a Government employee, after acquiring a disability, is suitable for the post he was holding, he should be shifted to some other post with the same pay scale and service benefits.

(iii) If it is not possible to adjust such an employee against any comparable post, he may be kept on a super numery post until a suitable post is available or till he retires, which ever is earlier.

(iv) A disabled person can not be denied promotion in any Government establishment merely on the ground of his disability.

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In Section 43, under the provisions for “affirmative action”, it is provided that the Government must frame schemes for the preferential allotment of land at concessional rates to entrepreneurs with disabilities interested in setting up their business and factories.

It may be seen that the PWD Act does not envisage giving the right to employment to every disabled person despite limited definition of persons with disabilities. Mentally ill and mentally retarded persons are excluded expressly from the purview of the employment provisions, irrespective of the nature and extent of their disability and also irrespective of the nature of employment being sought, even though these persons are otherwise covered under the Act. This is despite the fact that even for those covered under the three categories of disabilities, there is a provision for ‘identification’ of jobs in Government establishments, which can be reserved for them: yet the scope for identifying jobs for persons with mental retardation and illness also within the identification process for jobs for others has been either ignored or rejected.\(^5^4\)

The reservation of vacancies is mandated only in Government establishments – a sector which is shrinking fast in the country. Even with in the government sector, there is an exemption clause, which allows the Government to exclude organizations from the purview of the provisions for reservation and non discrimination at the workplace. As far as the private sector is concerned, the incentive provision has been made conditional to the Governments ‘economic capacity and development’. In any case, the incentive policy has not been formulated till today, and thus Section 41 remains a totally dead letter though some civil society organization have drafted an incentive policy and are in the process of lobbying with the Government to adopt it. Similarly, the provision for self employment through preferential and concessional allotment of land, which is also dependent on

\(^5^4\) Supra, n.1, p.103.
schemes being framed by Governments, has been observed in breach in most states, due to the Government’s inaction.\textsuperscript{55}

In another area, it may be seen that principles and methods of identification of posts have been found to be flawed and inadequate. Functional approach to disability, has been relied upon in the process of job identification from the view point of non disabled persons. The process is carried out with out due consultation with individuals experiencing disability. Many covered posts and services continue to be excluded from ‘identification under Section 32 and this problem has been blamed at the grass root – level for in adequate translation of the law into tangible employment opportunities.

c. Accessibility

For the Persons With Disability, accessibility is a right envisaged as the foundation of all rights of the disabled hither to accessibility in the context of rights of the disabled has been defined only towards architectural barriers and physical approach. On the rights of the disabled for equal opportunities and full participation, right to access has assumed a paradigm shift. Now accessibility of disabled encompasses to quality of education, media, information, communication, entertainment and technology taken in totality, these factors enable access to equal opportunities and full participation for persons with disabilities as envisioned by the Beijing Convention and Disability Act of 1995.\textsuperscript{56}

The absence of a specific international instrument spelling out the various facets of the right to access with definite clarify and its indepth modalities, reflect in the ambiguous language used in the disability statutes, consequently the Standard Rules on the Equalisation of Opportunities for Persons With Disabilities\textsuperscript{57} have become an important body of guidelines, although they are non binding in nature.

\textsuperscript{55} Ibid.

\textsuperscript{56} Ibid, p.220.

\textsuperscript{57} Ibid.
Resulting from the Disability Decade, the PWD Act 1995 does not have an exclusive chapter on Access – which is perhaps, its biggest shortcoming. Though the chapter on Non-discrimination\textsuperscript{58} seeks to address the issue of access through the non-discriminatory perspective,\textsuperscript{59} it results in a half baked policy rather than a definitive law. Access and non-discrimination are two distinct and extensive areas of specific needs and demands and justice can hardly be meted out to the two together. Non-discrimination is an element of natural justice enshrined in the constitution and while legislation for groups that have historically been neglected or sidelined. It must form the very foundation of the law. The law on access for persons with disabilities, on the other hand, ought to have been wider in its ambit while addressing the needs various groups of persons with disabilities and the orientation of non-discrimination.\textsuperscript{60}

It is necessary to highlight that in the first Public Interest Litigation (PIL) under PWD Act 1995, the Supreme Court directed that the persons with locomotor disability to the extent of 80% and above would be entitled to the same concession from Indian Airlines as is given to those with blindness. The court also directed the respondent – States to provide ambulifts and aisle chairs for persons with locomotor disability.\textsuperscript{61}

In the matter of adult franchise by secret ballot, with dignity for disabled persons, the Disabled Rights Group (DRG)s letter to the Chief Justice of India was notified as a public Interest litigation. In the said letter it was pleaded that disabled voters should have accessibility to polling booths. The Supreme Court was pleased to direct the Chief Secretaries of respective

\begin{itemize}
  \item \textsuperscript{58} Ibid.
  \item \textsuperscript{59} Chapter VIII. Sections 44 to 46 envisages that with in the limits of their economic capacity, and development for the benefit of PWDs take measures for easy access to services in rail compartments, busses vessels aircrafts and for PWDs, besides provision of ramps in public places, Braille symbols and auditory signals in elevators or lifts.
  \item \textsuperscript{60} Supra, n.1, p.221.
  \item \textsuperscript{61} \textit{Javed Abidi V. Union of India} (1999) 1 SCC 467; AIR 1999 SC 512.
\end{itemize}
states to ensure that wooden ramps were made available for elections in April 2004 as far as possible.62

d. Mental Health

The Persons With Disabilities Act 1995 rolled out a charter of rights to ostensibly empower and mainstream disabled persons as defined in Section 2(i) read with Section 2(t).63 Serious doubts have been raised, since the PWD Act 1995, whether the inclusion of mental retardation and mental illness in the definition of disability is by accident or by intent, because, the definition of mental illness in “Section 2(q) of the Act, as “any mental disorder other than mental retardation” bear ample evidence to this addressing the rights based issues on the mentally ill was has been a greater task than was thought to be initially, looked at from the verdicts of the courts. It is pertinent to highlight that the legal understanding of issues concerning mentally ill persons is both limited and misguided. It may be stated that the Supreme Court recently gave a verdict in favour of a petitioner seeking admission to a seat reserved for persons with disabilities in the Delhi University. In this case Dyslexia was included under the category of mental retardation, which is a specifically excluded inters of provisions in section 33 of the PWD Act 1995. This is not to justify exclusion of a PWD for government employment but only to highlight the ground realities, it may be seen that the employment clause of the Disabilities Act has failed the very purpose or vocational rehabilitation and equal opportunities for which these schemes have been instituted.

As a group, the persons with mental disabilities are exercised over the PWD Act in its entirety. ‘Unsoundness of mind’ and ‘lunacy’ were the words used in the age old definitions of mental disabilities. It is felt that not only PWD Act meted out step motherly treatment to mentally ill persons but also it

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63 Section 2(i) – “Disability” means (i) Blindness (ii) Low vision; (iii) Leprosy-cured; (iv) Hearing Impaired (v) Locomotor disability; (vi) Mental Retardation; (vii) Mental illness. Section 2(t) “Persons With Disability” means a person suffering from not less than forty percent of any disability as certified by a medical authority.
fails to break free from the age old definitions. The absence of a category for learning disabilities has enforced a situation where persons with such disabilities are being added to the category of mental disabilities.

e. Housing

The Law acknowledges the right to housing for disabled persons, whether independent or familial and need to provide for it. PWD Act 1995 in its statement of objects and reasons of the Act aims to make a special provision for the integration of Persons With Disabilities in to the social main stream.

The PWD Act provides for the purposes of housing etc. Section 43 signifies a considerable leap forward in understanding the right to housing it falls short by failing to include the need for residential and societal support system, both of which are critical for the housing rights of disabled persons. In fact, it leads the modalities of framing schemes, allotment criteria and other important details entirely in the hands of local authorities and government bodies. To frame schemes for disabled, it is critical that the authority drafting it clearly understands the diverse requirements of each disability so that it can provide specifically for it. Unfortunately, the experience shows that this is not always the case. Today it has become the primary stumbling block of this extremely significant task, since any housing scheme for the disabled should be developed in consultation with disabled individuals and/or organisations working with them.65

In the first case in Supreme Court, under PWD Act, on the right to housing, of PWDs, the petitioner was a blind lady wanting preferential allocation under an existing policy of the Delhi Development Authority. The

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64 Sec. 43 of PWD Act, says, “the appropriate governments and local authorities shall by notification, frame schemes in favour of persons with disabilities for the preferential allotment of land at concessional rates for the purposes of housing; setting up of business and special recreation centres etc.

65 Supra n.1, p.301.

66 Godawari Bai V. Delhi Development Authority & Ors 1990 (Supp.) SCC p.4.
court directed the respondent Authority to make an out of turn allotment to the petitioner, who was blind.

f. General Principles

Courts have exhibited a fine balance between the letter and the spirit of the Law and have been proactive in effectively interpreting technical aspects of the laws in a flexible and beneficial manner. The Courts have evolved brilliant principles on issues like implementation of the Disabilities Act: In one case even setting up a large fund for its implementation, enlarging the definition of ‘disabilities’ under the Act by reading non-specified disabilities in to it, condonation of delay, recognizing rights of persons with less than 40% disabilities (the statutory cut-off for benefits under the Disabilities Act), lenience in court proceedings and sentencing in cases involving persons with an un sound mind.67

In the PWD Act 1995 the definition of disability is not in consonance with the 1975 Declaration on Disability, for the reason that the PWD Act defines it broadly. The Act specifies under section 2 as to who are disabled persons. But this definition has also not been found satisfactory and the committee set up by the Government of India to review the 1995 Act has suggested for making amendments to bring in various other categories of persons under its fold.68

In the matter of protection and early detection of disabilities, Section 25 of the PWD Act 1995 the appropriate Governments and local authority are required to take steps69 for the prevention of occurrence of disabilities. The

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67 Supra, n.1, p.464.
69 (a) Undertake or cause to be undertaken surveys, investigations and research concerning the cause of occurrence of disabilities; (b) promote various methods of preventing disabilities; (c) screen all the children at least once in a year for the purpose of identifying ‘at risk’ cases; (d) provide facilities for training to the staff at the primary health centres; (e) Sponsor or cause to be sponsored awareness campaigns and disseminate or cause to be disseminated information for general hygiene, health and sanitation; Take measures for premetal, prenatal and post natal care of mother
statute, this provides safeguards and protects the disabled persons. There is
need to strictly enforce the protective laws.

It is felt that PWD Act 1995 is a good combination of the rights based
legislation and enabling legislation as, if one looks at the American
Disabilities Act or Australian Act, those are only rights based legislation and
they do not provide for enabling provisions, which is an extreme step of
thinking that persons with disabilities, if their rights are protected they would
have equality, no. definitely there are provisions which are needed for
enabling them to enjoy equality. Therefore PWD Act 1995 is a good
combination of the enabling provisions and right-based provisions.

iv National Trust Act, 1999

The National Trust for Welfare of Persons With Autism, Cerebral
Palsy, Mental Rehabilitation and Multiple Disability Act 1999 is an Act to
provide for the constitution of a body at the national level for the Welfare of
Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple
Disabilities and for matters connected there with or incidental there to. The
terms autism, cerebral palsy, mental retardation, multiple disabilities and
persons with disability are defined in Section 2(a), 2(c), 2(g) 2(h) and 2(j)
respectively of the Act.70

and child; (g) Educate the public through the pre schools, schools, primary health
centres, village level workers and Anganwadi workers; (h) create awareness amongst
the masses through television, radio and other mass media on the causes of
disabilities and the preventive measures to be adopted.

70 Section 2(a) "autism" means a condition of uneven skill development primarily
affecting the communication and social abilities of a person, marked by repetitive and
ritualistic behaviour; Section (c) "cerebral palsy" means a group of non progressive
condition of a person characterised by abnormal motor control posture resulting from
brain insult or injuries occurring in the prenatal or infant period of development;
Section (g) "mental retardation" means a condition of arrested or incomplete
development of mind of person, which is specially characterised by sub-normality of
intelligence; Section (h) "multiple disabilities" means a combination of two or more
disabilities as defined in clause (i) of section 2 of the persons with disabilities (Equal
Opportunities, Protection of Rights and Full Participation) Act, 1995; Section (j) –
"Person With Disability" means a person suffering from any of the conditions relating
to autism, cerebral palsy, mental retardation or a combinations of any two or more of
such conditions and includes a person suffering from severe multiple disability.
The objects of the Trust shall be to enable and empower persons with
disability to live as independently and as fully as possible with in and as close
to the community to which they belong, to strengthen facilities to provide
support to persons with disability to live with in their own families to extend
support to registered organisations to provide need based services during
the period of crises in the family of persons with disability, to deal with
problems of persons, who do not have family support, to promote measures
for the care and protection of persons with disability in the event of death of
their parent or guardian, to evolve procedure for the appointment of
guardians and trustees for persons with disability requiring such protection, to
facilitate the realization of equal opportunities, protection of rights and full
participation of persons with disability and to do any other act which is
incidental to the aforesaid object.

The National Trust Act mandates the creation of Local Level
Committee (LLC) comprising District Magistrate along with one
representative from a registered organisation and one person with disability.
The LLC is vested with the authority to decide upon application for legal
guardianship. The Act lays down duties of legal guardian.

The Trust has a very progressive objective. The idea is not to push
people out of the society and keep them in residential institutions such as
what has happened in the west but to encourage them to live with in their
family. They have the right to live with in their family and one has to
recognise the diverse needs of the families to retain a person with disability
with in the family system. It is stressed that there is need to have a person to
take care and give protection to persons with disability in the event of death
of parents or guardians. As of today people with mental retardation either
end up in juvenile homes in mental hospitals or in jails. These are the places
where they go and this is what the state does. None of these places are
appropriate where people with disability should go.71

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In effect the functioning of the trust will go a long way in securing social justice to the genuinely needing help in an organised legalised manager. Since the Trust Act has come to be brought into fore recently, it is too early for making a rational assessment as to its efficacy. There is scope to widen its perspective after gaining some experience in actuality at a later date. The disability movement activists could utilise the services of the Trust by playing a catalyst role to sensitise the society towards this end.

The overall supervision of the Act is vested with a National Trust Board appointed through a democratic process by the registered organisations of the parents and others providing services to this segment of the disabled. The Government of India has contributed rupees one billion to the Trust Fund. The interest earned is used in supporting mandated activities.

v. Rehabilitation Council of India Act 1992

The Rehabilitation Council of India Act, 1992 provides for the Constitution of Rehabilitation Council of India for regulating the training of rehabilitation professionals and the maintenance of a Central Rehabilitation Register and for matters connected there with or incidental there to.

The terms “handicapped”, “learning handicapped”, ‘locomotor disability”, ‘mental retardation’, “visually handicapped”, are defined in sessions, 2.1(c), 2.1(d), 2.1(e), 2.1(h), 2.1(o).72

72 2.1(c) ‘handicapped’ means a person – (i) visually handicapped; (ii) hearing handicapped (iii) Suffering from locomotor disability; or (iv) Suffering from mental retardation.

2.1(d) ‘hearing handicapped’ means with hearing impairment of 70 decible and above, in better ear or total loss of hearing in both ears;

2.1(e) 'locomotor disability' mean a person's inability to execute distinctive activities associated with moving, both himself and objects from place to place and such inability resulting from affliction of either bone joints or nerves.

2.1(h) “mentat retardation” means a condition of arrested or incomplete development of mind of person which is specially characterised by sub normality of intelligence.

2.1(o) “visually handicapped” means a person who suffers from any of the following conditions: (i) total absence of sight; (ii) visual activity not exceeding also or 20/200
Section 11 and 12 explains, among other things, the functions of the council. The Act which was passed by Parliament in 1992 came into force in 1993. The objects of the Act is: 1 Regulation of training of rehabilitation professionals and 2. Maintenance of a Central Rehabilitation Register. The Act came to be acknowledged by the disability sector as also by NGOs only in 1994. So the experience with the Act, in 12 years only needs to be reviewed. The Act came to be opposed by NGOs for two main reasons. The first reason relates to the conceptualization of the Act and is more fundamental in nature. At a time when the entire world is moving towards advocating the philosophy of mainstreaming/inclusion/integration, viewed objectively and impersonally the RCI Act is more in the direction of segregation. It makes it mandatory for medical and paramedical, professionals, teachers, councillors, and volunteers etc., to do RCI approved training and register themselves with the RCI before doing any work with the people with disabilities. This means a person with disabilities to avail of any of the above services (medical, education, therapy etc.) will first have to find

(swellen) in the better eye with the connecting in the better eye with the connecting levels, or (iii) limitation of the field of vision subtending and angle of degree or worse.

73 Section 11 – Recognition of qualifications granted by University etc., in India for Rehabilitation professions –

(1) The qualification granted by any University or other institution in India which are included in the schedule shall be recognised qualification for rehabilitation professionals.

(2) Any University or other institution in India, which grants qualification for the rehabilitation professional not included in the schedule may apply to the central government to have any such qualification recognised and the Central Government after consulting the Council, by notification, amend the schedule so as to include such qualification there in and any such notification may also direct that an entry shall be made in the last column of the schedule against such qualifications only when granted after a specified date.

Section 12: Recognition of qualifications by institutions outside India – The Council may enter into negotiation with the authority in any country outside India for settling of a scheme or reciprocity for the recognition of qualifications, and in pursuance of any such scheme, the Central Government may, by notification amend the schedule so as to include there in any qualification which the Council has deviated should be recognised and by such notification may also direct that an entry shall be made in the last column of the schedule declaring that it shall be recognised qualification only when granted after a specified date.
such professionals who are registered with RCI. It also implies that non-RCI registered professionals would not like to see a person with disability for fear of punitive action by the RCI. This totally alienates people with disabilities and pushes them into a scenario of complete segregation from the rest of the society.\textsuperscript{74}

As this Act attempts to cover all levels of service providers in both urban and rural areas, across the length and breadth of the country, which is not practicable. It tends to violate the rights of persons with disabilities by being in contravention with specific clauses of the Persons With the Disabilities Act 1995.

The Right of Persons With Disabilities to rehabilitation is defined under Section 2(w) of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The tenets of Section 26 and 27 of the same Act, lays down the provision for access to formal as well as non formal education in both urban and rural areas.

The second reason pertains to the implementation of the RCI Act. Some of the basic problems are with respect to (i) Arbitrariness in formulation and implementation, (ii) Inclusion of the clause of disciplinary action against those who failed to comply with the dictates of the Act, (iii) inadequate definition of the term rehabilitation professional as the educational qualifications to the registered range from a three month certificate course after the X standard to a five year or more to post graduate degree qualification in various areas of rehabilitation.\textsuperscript{75}

The special educators, under the RCI Act are required to be registered with the Act whereas the teachers in the normal schools were required to be registered under the National Council for Teachers Education (NCTE) Act. It would thus mean that children with disability for inclusive education in normal schools could not be taught by regular teachers for the reason that these


\textsuperscript{75} Ibid, p.173.
teachers are not registered with NCTE. This is grossly detrimental to the interest of the concept of 'inclusive education'.

It is seen RCI's duplicating its services is undesirable and RCI does not have net working with the existing educational infrastructure in Indian context. It may be seen that AICTE Act, NCTE Act, conducts for other paramedical courses with the help of the Universities could do the same work related to standardization of training and registration of professionals. This aspects needs to be considered seriously.

It would be judicious on the part of the Government to review the situation created by the RCI and its role needs to be redefined. It could be a catalyst body for coordination to secure standardization with appropriate stake holders in disability sector and academicians. It needs to be pondered over as to the necessity for its continuing to be a training body.

It would be appropriate if the special educators register with the Department of Education, with the Ministry of Human Resources Department besides other professionals with their respective parent bodies.

vi. Mental Health Act 1987

The Disability Rights Movement in India has achieved laudable goals on various fronts, but its greatest pitfall has been the neglect of the right of persons with mental disabilities. Though this is a direct outcome of the lack of a strong leading organization, it is also due to the absence of a collective voice of the several service focused organizations. This trend in the movement has created the lacunae in the law, both in letter and spirit. The gist of this prime criticism is that the law currently in force has not done, and cannot do, justice to the mentally disabled.76

All persons with disabilities are largely thought of as having similar issues and facing similar violations, which assumes they need similar remedies. But persons with mental disabilities have distinct and unique requirements which can be classified into two lines of thought. Firstly, the

76 Supra, n.1, p.373.
Law has to provide the option of institutional care, subject to the need and informed consent of a mental health service user. This necessitates a complex analysis of the nature and extent to which institutional care and protection is required. It is critical to study the element of consent involved in supervisory care and medication for which an independent legislation is required which specifically and directly addresses the legal complexities of the issue. The second requisite is to address the vulnerability of the mentally ill and disabled who are constantly exposed to abuse and exploitation in their daily life. While addressing these needs it is important that the various aspects of human rights are kept in focus.\(^7\) The Mental Health Act 1987 is far from acceptable since it is interventionalist and pro-institutionalization.\(^8\) The Indian Constitution itself has a negative attitude to the mentally ill. The Mental Health Act also does not consolidate the laws governing persons with mental disabilities, such as Medical Termination of Pregnancy Act, Prison Act and Indian Lunacy Act 1912.

The Mental Health Act 1987, predates human rights emphasis in the nineties. It can be described as civil rights legislation as it aims to regulate standards in mental health institutions and to make provisions with respect to their property and affairs. From a human rights perspective Section 81 is of particular importance.\(^9\)

Section 94 deals with respecting privacy of communication or persons with mental illness, “for the purpose of preventing vexatious or deformatory circumstances, or communications prejudicial to the treatment of mental ill persons. According to it no letter or other communications sent by or to a

\(^7\) Ibid.

\(^8\) Ibid.

\(^9\) Section 81 of Mental Health Act 1987 says, (a) No mentally ill person shall be subjected during treatment to any indignity (whether physical or mental) or cruelty; (b) No mentally ill person under treatment shall be used for purposes of research, unless (i) such research is of direct benefit to him for purposes of diagnosis or treatment, or (ii) Such persons, being a voluntary patient has given his consent in writing or where such personal (whether or not a voluntary patient) is incompetent by reason minority or otherwise, to give a valid consent, the guardian or other person competent to give consent on his behalf, has given his consent in writing for such research.
mentally ill person under treatment shall be intercepted, detained or destroyed.

The emphasis of this Act is on the appointments or qualifications of authorities, admission and discharge of mentally ill from specialised institutions, removal and role of medical officers, magistrates or police officers, liability to meet the cost of maintenance of mentally ill persons, and penalties and punishments etc. However, there are serious question marks on the effectiveness of this legislation for ensuring the protection of the person, property and privacy of communication of mentally ill.80

In fact, the Act, leaves sufficient space for the misuse of power by the police, medical officer or magistrate. The project report Quality Assurance in Mental Health Institutions of the NHRC confirms, 'percentage of involuntary admissions is found to be very high and the provisions of section 19 permitting admission under certain special circumstance by a relative or a friend are being widely abused.81

A suggestion was made to the amendment committee appointed by the Government that mental illness should not be included in the Persons With Disability Act and the amendment committee should suggest its exclusion from the statute and that persons with mental illness are taken care of in the Mental Health Act, 1987. The Mental Health Act, only provides for the admission and discharge of persons from psychiatric institutions in hospitals as they are now called by the statute. The other kind of provision that the statute makes is that if you have a person with mental illness who is unable to manage property and person, then you have a provision for appointment of guardian or person to manage the property. The Mental Health Act does not provide for rehabilitations and it is nowhere on the

81 Ibid.
agenda of the Act and it is for the reason that inclusion of mental illness with in the Disability Act was a major watershed.82

C. Laws having bearing on disability: There are general laws which have bearing on disability. These include laws applicable to general population – Hindu Marriage Act, which prohibits, where one of the parties is a lunatic at the time of marriage; Hindu Succession Act 1956 which stipulates that in order to inherit property the unsoundness of mind is not a bar; The Indian Contract Act says that a contract entered into by an unsound mind is void even if a person has attained the age of majority, according to Section 12 of the Act, Representation of Peoples Act 1950 provides in Section 60 that a citizen ought to be mentally sound in order to be an eligible voter. The Apprentices Act 1961 under which in Annexure I to the Act, it is stated that a physically handicapped person, if declared fit, may be engaged as an apprentice in the particular trade for which he is fit, Indian Penal Code in Section 84 it is stipulated that nothing is an offence which is done by a person, who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the Act or that he is doing what is either wrong or contrary to law.

The Cr.PC goes as far as to permit the acquittal of a person on those grounds, not withstanding whether the person was found guilty or not – a finding which has to be stated in writing. Cr.PC provides for this considering that the accused may not have been in a position to know the nature of the Act., committed and may not be able to make out a proper case in his defense. Magistrate are vested with discretionary powers to release the mentally disabled accused into proper care and protection, pending trial even in the absence of a bail application.

The labour laws – Industrial Dispute Act, 1947, Payment of Wages Act 1965, Payment of Bonus Act 1965, Minimum Wages Act 1948 do not discriminate, apparently between normal person and disabled persons. The Factors Act 1948 has provisions for fencing machines, use of hoists and

cranes etc. aimed at promotion of safety health and welfare of workman. Compensation under *Workmen’s Compensation Act, 1923* and Employees State Insurance are paid to the victims of accidents. The labour laws do not address the problem of rehabilitation, in a comprehensive manner. Workmen’s Compensation Act defines only “partial disablement and total disablement unlike the PWD Act 1995. *The Employees State Insurance Act 1948* makes three distinctions – Permanent Partial Disablement, Permanent Total Disablement and Temporary Disablement.

It is necessary to point out here pertinently that as the United Nations disability specific convention in the nature of comprehensive, integral, rights based, is adopted, the review of not only the National disability specific laws as also general laws and labour laws will come to be reviewed obviously for the reason that the core factors like, promotion and protection of rights of persons with disability are redefined under the changed circumstances.

4.0 Rights of the Disabled – Human Rights

The rights of the disabled as are entitled to them are human rights based. Persons with disabilities are entitled to all the rights as citizens as are entitled to any other citizen. There are International Human Rights Standards concerning to persons with disabilities. The human rights standards are adopted under the auspices of the United Nations System or other intergovernmental bodies and organisations. The international and regional normative standards to promote the rights of persons with disabilities in the society with in a broad human rights framework, encompassing the full range of human rights from civil and political to economic, social and cultural rights and the different mechanisms by which these norms and standards have been adopted in local laws.\(^{83}\)

The Charter of the United Nations requires member-states to respect human rights for all without any distinction as to race, sex, language, or religion and forms the nucleus for the protection of rights of persons with

disabilities. Specific articles of the UNs Chapter provide the foundation on which disability rights can be built.\textsuperscript{84}

The Universal Declaration of Human Rights forms the fundamental normative basis on which national norms and standards concerning persons with disabilities have evolved. The UDHR contains a number of provisions which constitute the foundation for resolutions regarding disabilities based on the principle of equal rights.\textsuperscript{85} Apart from the UDHR there are six core human rights conventions that relate to the rights of persons with disabilities.\textsuperscript{86}

\textsuperscript{84} Art.1. (3) states that the purpose of the United Nations is, "... to achieve international Cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all with out distinction".

Article 13(1)(b) states that the General Assembly, "... shall initiate studies and make recommendations for the purpose of promoting international cooperation in the economic, social, cultural, educational and health field, and assisting in the realization of human rights and fundamental freedoms for all".

Article 55(a) states that the "... United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development".

Further more Article 55(c) provides that the, "... United Nations shall promote universal respect for and observance of human rights and fundamental freedoms for all.

\textsuperscript{85} Article 1 of the UDHR states, "... all human beings are born free and equal in dignity and rights.

Article 2 provides that, "every one is entitled to all the rights and freedoms set forth in this Declaration with out distinction of any kind, such as race, colour, sex or other status".

Article 3 and 6 together state, "Every one has the right to," Life with out any provisions or limitations...

Article 7 states that, "... all are equal before the law and are entitled with out any discrimination to equal protection of the Law. All are entitled to protection against any discrimination and against any incitement to such discrimination".

Furthermore Article 25 of the Declaration recognizes that every one has, "the right to security in the event of unemployment, sickness, disability... or other lack of livelihood in circumstances beyond his control".

\textsuperscript{86} The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) ratified in 1966 are the two basic human rights treaties and together with UDHR constitute the International Bill of Rights.

The other four core human rights Conventions are (i) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1949), the
The provisions on anti-discrimination in the ICCPR have special relevance to rights of persons with disabilities.  

The provisions of the ICESCR pertaining to anti-discrimination too relate to rights of persons with disabilities.  

General Comment No. 5 is a definitive analysis of the states parties obligations under the ICESCR in the context of Disability. The Convention Against Torture and other cruel, Inhuman or Degrading Treatment or Punishment is special importance in preventing disability as a result of torture in furtherance of its obligations under the convention, states parties are to take necessary steps under Art. 2 of the convention.  


The right to life (article 6) and the right to freedom from torture and other cruel, inhuman or degrading treatment and punishment (Article 7) have special relevance to disability. The right to be recognized as a person before the law (article 16) too has special significance to persons with disabilities. Both articles 14 and 15 recognise the right to access to justice, including the right to the free assistance of an interpreter in court one of the most important rights in relation to persons with disabilities is enunciated in article 25, which establishes that citizens are entitled to "access on general terms of equality, to public service in his country".  

Article 2 of ICESCR, encourages states parties to, "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status.

The General Comment No. 5 of the Committee on ICESCR, Economic, Social and Cultural Rights recognizes that through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, destruction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effect of disability based discrimination have been particularly severe in the field of education, employment, housing, transport, cultural life and access to public places and services (para 5).

Article 2 of the Convention reads as: 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. 2. No exceptional circumstances, whatever so ever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.
disabilities face discrimination both because of their gender and disability. Besides this, certain gender specific cultural or traditional practices can cause disability among women as well as cause further harm to disabled women.

The Convention on the Rights of the Child unlike other human rights conventions, in Article 23 focuses directly on children with disabilities. No direct obligations have been cast on states parties to take measures to ensure that children with disabilities enjoy a life of dignity, self reliance and integration with the community. But article 23, paragraph 1-4 recognises the importance of participation in the community, education, training, health care, rehabilitation, employment and recreation of opportunities for children with disabilities. It is pertinent to highlight that the Committee on the Rights of the Child has however established the fact that article 23 dedicated to children with disabilities should not mean that the rights of children with disabilities are confined to that article.

The International Convention on the Elimination of All Forms of Racial Discrimination, like CEDAW is aimed at preventing double discrimination. Persons with Disabilities of particular racial or minority groups are more vulnerable to discrimination on account of both race and disability.

Human Rights based integral comprehensive convention on the rights of Persons With Disability (2006) is of great significance which touches upon the Human Rights Conventions as to the provisions in favour of disabled.

In Article 1 of the U.Ns Convention on the Rights of Persons With Disabilities, the purpose of the convention is declared to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Besides this the Article 6 and 7 are specifically provides for protection of human rights of women with disabilities and children with disabilities and respectively.

Louise Arbour, United Nations High Commissioner for Human Rights called on member states to protect and respect the rights of the disabled, who comprise 10 percent of the World’s population, by implementing the land
mark Convention on the Rights of Persons With Disabilities after it is opened for signature. She said:

I strongly believe that this new instrument comes at a time when there are broad shifts in attitude within societies towards the rights of persons with disabilities. The Convention provides a catalyst to hasten this urgently needed change, which could potentially impact 650 million people living with disabilities. I hope to elevate the profile of the issue of the rights of people with disabilities and my office will take lead in establishing partnership with non governmental organizations (NGOs) and State.91

According to Sheikha Hessa al-Thani, the special Reporteur on Disability, 'complementary relationship' between the two areas – social developmental and human rights – to which the issue of people with disabilities belongs “had now found expression in the brilliant document”, the convention.

Don Macky, the Ambassador of New Zealand who is also Chair of the adhoc committee on the Convention asserts that the treaty radically alters the conception of disabilities, transforming the issue from being solely a social welfare matter to being a human rights one given existing social barriers and prejudices.92

According to Thomas Schindlmayr of the UN Department of Economic and Social Affairs who uses a wheelchair, the Convention marks a major shift away from the way societies look at persons with disabilities, and no longer are persons with disabilities to be seen as objects of charity and pity. The New Convention on the rights of Persons With Disabilities treats PWDs as fulfilled citizens, and stresses that their full integration will require a change of attitude in society. He stresses that it is not asking for PWDs to have any new rights, it is not asking for anything else that the other people don't enjoy already. It is asking that PWDs enjoy the same opportunities in

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91 Web Site www.un-news @ un.org visited on 25.04.2007.

92 Ibid.
society that every body already enjoys. He highlighted that the convention on rights of Persons With Disabilities is the fastest – negotiated treaty every.93

SUMMARY

The problems as are confronted with by Persons With Disabilities are concerning to human rights. Promotion and Protection of human rights is a core aspect of the population, which is a continuing struggle. With the establishment of the United Nations in 1945, systematic and concerted efforts for the promotion and protection of the rights of the disabled started paying dividends in the matter of seriously reckoning the human efforts of the disabled not only for development of this section of the society but also for the participation of differently abled in the socio-economic development. They contribute to the social and economic upliftment of the society. No single entity could have helped the disabled and the society to secure genuine promotion and protection of their rights. No law can be thought of in favour of the marginalised and neglected population unless, there is concerted efforts through continued struggle at macro level, at national and international scenario but as also at micro level of the society. An insensitive society and the governments with indifferent public authorities need to be decried with all the contempt they deserve. In the fast changing global scenario international human rights law have been paving the way for the review of existing laws and formulation of municipal laws in favour of disabled. The assimilation of conditions of the disabled sector in various economies and varying multifaceted approaches by states have brought about considerable unquantifiable measures being taken recourse to by the world community of nations on disability front. Paradigm shift towards, right based approach for protection and promotion of the disabled has been taken seriously in most societies.

The International Human Rights Law as also National Human Rights Laws have been found wanting in the matter of support and solidarity, for near uniform legal, socio-economic approaches to secure genuine rights to

93 Ibid.
the disabled. Observance of the facts like Municipal laws contradicting with each other as also, not keeping in consonance with international laws has provided continuing research on removing built in barriers to secure justice to persons with disability.

The welcoming aspect of formulation of the first disability specific international hard law will for sure come to be placed in its position for a thorough revamping of the definitions, perceptions, paradigm as also appropriate mainstreaming of the disabled. The advancements in science and technology has provided and will continue to provide appropriate impetus not only for help mitigating the hardship of the disabled but also to help realization of the mainstreaming of person with disabilities in society in the global scenario. Since in most municipal laws in various countries, the basic rights have not reached the disabled as these rights have not been made a justiciable for the reason of the economic capacity of the state, the supplementing and complimenting efforts of the states and the UN and its specialised agencies will go a long way to provide conditions, conducive for the status to extend the basic right to the disabled at par with any other citizen. This could be possible by internal and external networking of Human Rights entities and by sensitization of stake holders including the three wings of the government.