CHAPTER-VII

DISCUSSION AND VALIDATION OF HYPOTHESIS
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Positive Changes in societal attitude and public perception is reflected in the accepted terms used to describe people with disabilities in the recent years. Since disability is a social issue the term ‘disability’, ‘handicap’ or, to start with, the more neutral term ‘impairment’, has always demanded a response from society. The ways in which societies have reacted to impairment have differed over time and between one society and another. Until recently, it was socially acceptable to address a person with a disability as lame, retarded or handicapped or disabled person. But now instead of using the term “disabled person” “person with a disability” is in use. Earlier, the first term places the emphasis on the disability, whereas in later term places the emphasis on “the person”, it means “person-first” terminology. The use of person-first terminology linguistically reinforces that the person is more important than the disability. The general shift towards using more humane terms to describe the condition of having a disability reflects the change in the societal attitude and in public perception. Changes in commonly used terms may not seem revolutionary, but they reflect and reinforce slowly evolving social attitudes toward persons with disabilities.

Impairment is both constant as well as culturally and socially shaped. This means that social and cultural dimensions shape how impairment is perceived and how it is responded to. The ways in which members of a society classify and react to disability have a profound impact on the lives of persons with disabilities. The ways in which a society chooses to legally define disability have also a tremendous impact on the social standing and civil rights of persons with disabilities. These social classifications, social reactions, and legal classifications are interrelated and serve to reinforce the definitions for and social roles of disability.

625 BOWMAN, P. UNDERSTANDING DISABILITY; INCLUSION, ACCESS, DIVERSITY AND CIVIL RIGHTS. USA: PRAEGER. (2008).
626 Ibid, p.3-7
628 BOWMAN, P. UNDERSTANDING DISABILITY; INCLUSION, ACCESS, DIVERSITY AND CIVIL RIGHTS. USA: PRAEGER. (2008).
In the last decade, as a result of changes in the law, in the attitudes of people with disabilities, and in society, individuals with disabilities have experienced a change in the way they are treated and the ways in which they are able to participate in society.\footnote{Bowman, P. T. Understanding Disability; Inclusion, Access, Diversity and Civil Rights. USA: Praeger (2008).} With the rise of the disability rights movement in the late twentieth century individuals with disabilities has become a more mainstream presence in society. This increase in social presence has been directly linked to the painfully slow march toward legal rights for individuals with disabilities. Despite gaining a greater role in society and rights under the law, persons with disabilities are still separated in many ways not only from mainstream society but from other minority groups.\footnote{Ibid}

The political and ideological influences which grew and crystallized in the post world war western world resulted in the emergence of civil rights movements, women’s movement, and anti-racist protest, has also accelerated the disability rights movements across the world. These movements not only reshape public perception but also formulated new theory and methodologies for understanding the changing dynamics of social reality in the context of disability. During 1960s and 70s the emerging political ideologies such as dignity, autonomy, freedom of thought and expression, the issue of power hierarchies cutting across gender and race laid down the foundation of disability rights movement. In South Asian context, during 1970s and 1980s with the emergence of large number of non-governmental organizations (NGOs) being involved in women movements for gender equality, environmental movements and social movements like dalit movements have laid down the structural basis for disability rights movement. Post modern and post-structural influences in the 1990s however, brought the question of difference to the center and fuelled identity politics in the era of globalization.\footnote{Molhotra, N. (2011, February 5). Disability Rights Movements in India, pp. 65-72.} In India during this period the voice of persons with disabilities were muted or unheard due to the stereotyped negative societal attitude.

The Disability rights activism emerged in 1990s began to find collective expression through the active participation of NGOs. In western countries based on the social model which provides for an understanding of societal conditions that causes
disability, the disability rights movements were engaged in struggling for creating conditions for “independent living” for persons with disabilities. 632

In India, disability based on medical model, is the outcome of socio-cultural impediments such as belief and stereotyped social stigmas as well as structural impediments such as poverty, illiteracy, unemployment, lack of accessibility, lack of education, the disability rights movements still struggling for getting recognition and protection of their basic human rights, focusing more on prevention and rehabilitation models.

According to the medical model, disability lies in the individuals, as it is equated with those restrictions of activity. Faced with the line of thinking, individuals would feel pressured to work on ‘their’ restrictions, bearing the burden of adjusting to their environment through cures, treatment or rehabilitation. In the medical model, individuals with certain physical, intellectual, psychological and mental conditions (impairments) are regarded as pathologic or abnormal; it is simply the abnormality conditions themselves that are the cause of all restrictions of activities. 633 In contrast, the social model shifts the focus to the society; undue restrictions on behavior of persons with impairment are seen to be imposed by: a) dominant social, political, and economics ideologies; b) cultural and religious perceptions regarding persons with disabilities; c) paternalism in social welfare systems; d) discriminations by society; e) the inaccessibility of the environment and information; and f) the lack of appropriate institutional and social arrangements. Impairment is considered as the functional limitation within the individual caused by physical, mental or sensory impairment and disability is the loss or limitation of opportunities to take part in the normal life of community on an equal level with others due to physical and social barriers. Hence, the international disability rights movements have brought a change in the way of understanding and defining disabilities. The disability rights movements believe the ‘cure’ to the problem of disability lies in the restructuring of society, unlike medically based ‘cures’, that focus on individuals and their impairment only.

In this regard the United Nations Convention on Rights of Persons with Disabilities is a milestone in terms of recognizing and protecting the basic human rights of PWDs through international agreements based on international human rights standards. Unlike the earlier International human rights laws the CRPD has brought a paradigm shift in the way disability is understood. CRPD instead of focusing more on the medical impairments or inability focuses on capability and inclusion; lifting of the attitudinal and environmental barriers to ensure inclusion and full participation of persons with disabilities in the mainstream. The Convention on Rights of Persons with Disabilities incorporates highly disability-specific interpretations of existing human rights, which transform formerly essential non-interference based rights or negative rights into positive state obligation. For example the right of non-interference with personal opinion and expression is transformed into a positive state obligation to provide public information in accessible formats and recognizes sign languages, Braille and augmentative and alternative communication.

The CRPD is the first international human rights treaty that has mixed positive obligations with most of the civil and political rights such as provisions guaranteeing the right to equality, the right to life, the right to non-discrimination in employment, education and access. Prior to the drafting of the Disabilities Convention, there was no international treaty dealing specifically with human rights issues of persons with disabilities. The equality clauses in the earlier three UN human rights instruments such as Universal Declaration of Human Rights (1948), the International Covenant for Civil and Political Rights (1964), and the International Covenant for Economic, Social and Cultural Rights (1966) do not mention disability as a protected category. If disability is addressed as a human rights issue then only in the context of social security and preventive health policy. This led disability activists across the world to view that a
binding international legal instrument that set out the human rights framework for the promotion and protection of the basic human rights of persons with disabilities is essential.

The Convention on Rights of Persons with Disabilities spells out clearly and unconditionally that persons with disabilities have equal access and right to full effective enjoyment of all human rights and the removal of barriers explicitly termed as a condition for access and the enjoyment of equality. Due to lack of overt legal protection for a long time, persons with disabilities were perceived as objects, object of charity or pity rather than subjects as right-holders. The objectification of the disabled resulted in exclusion, inaccessibility and invisibility of persons with disabilities from the mainstream society. Seeing people with disabilities as subjects rather than objects entails them access to the full benefits of basic freedoms, recognition of the value of human dignity as they have a stake in and a claim on society that must be honored quite apart from any considerations of social or economic utility. The paradigm shift instituted by CRPD lies in rejecting the presumption of incapacity that occurs upon the existence of a disability and the consequent disqualifying regime.

CRPD is historic and path-breaking as this is the first human rights treaty for persons with disabilities which combines civil and political rights provided by anti-discrimination legislation (negative rights) with the full spectrum of social, cultural and economic measures (positive rights) bestowed through equality measures. Hence, CRPD focuses more on social and human rights perspectives of disability, giving more importance to capability and inclusion.

The Oxford English Dictionary defines capability as the power to do something. Capability is a contested concept as it is often colored by stereotypical notions about the disabled as unproductive and dysfunctional. Capability theorist like Martha Nussbaum is of the opinion that there cannot be a different set of capacities or a different threshold.

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of capabilities for persons with disabilities. This raises the critical issue of creating a level playing field whereby all citizens to have equality of fair opportunities to enable them to realize their full potential and experience well-being. The human rights model includes disability within the paradigm of rights. A right based model of disability perceive variation in human characteristics associated with disability, whether cognitive, sensory, or motor ability, as inherent to the human condition. Such variations do not limit the potential contribution to the society but rather diversify the range of potential contribution and the range of mechanisms to ensure individual potential is realized. Thus a right-based approach presumes that society is obliged to provide whatever mechanisms are necessary for individual to realize their rights. A right based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and process of development. The right based approach to development identifies claim-holders and corresponding duty-holders. This approach makes the duty-holders accountable to the claim-holders, both in terms of protecting, promoting and advancing the basic human rights as well as preventing the violation of those rights. This approach focuses more on the inherent dignity of the human being and provides that disability is the result of lack of responsiveness by the State and civil society to the difference that disability represents. It follows that the State has the responsibility to tackle socially created obstacles in order to ensure full respect for dignity and equal rights of all persons.

Concerns with regards to the rights of the disabled became visible in public domain in India during 1990s when a cluster of legislations were enacted by the Parliament such as Rehabilitation Council of India Act 1992, National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act

645 Ibid
647 Ibid
649 Ibid

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1999. Earlier the Indian Lunacy Act, 1929 was replaced by the Mental Health Act 1987 this came into force in 1993.\textsuperscript{650} The passing of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full participation) Act, 1995 is the most remarkable achievement in the history of disability rights movement in India, after India’s participation in the Asian Pacific of Disabled Persons 1993-2002.\textsuperscript{651} With the influence of International legal commitments a paradigm shift has been seen in the way of looking at disability related issues and problems in India, from charity to welfare based, to rights based approach where persons with disabilities are no more treated as object of charity, protection and treatment rather treated as subjects having equal access and a right to full and effective enjoyment of all human rights.

The PWD Act provides for both preventive and promotional aspects of rehabilitation -such as, education, employment and vocational training, reservation, research and manpower development, creation or barrier-free environment, rehabilitation for persons with disabilities, unemployment allowance for the disabled, special insurance scheme for the disabled employees and establishment of homes for persons with severe disabilities. Despite all these measures and a plethora of Legislative measures, the social status of the disabled still leaves much to be desired. Rehabilitation services are inadequate for the persons with disabilities to ensure them a life of autonomy and dignity. The disparity between requirements and the availability of services is primarily caused by appalling poverty, and deeply ingrained by social stigma. Most of the policies and programs on disability have remained in paper due to inadequate infrastructure and ill functioning of government mechanisms.\textsuperscript{652} Lack of political will power and patriarchal social system is the core reason of slow progress in the process of implementation of legal measures and accelerating socio-economic development of persons with disabilities in India.

In the last decade, with the impact of international legal commitments, individuals with disabilities have experienced a change in the way they are treated and the ways in which they are able to participate in society. Though persons with disabilities still face

\textsuperscript{651} KOTHARI, J. THE FUTURE OF DISABILITY LAW IN INDIA. Oxford University Press, (2012). p. 179.
\textsuperscript{652} KOTHARI, J. THE FUTURE OF DISABILITY LAW IN INDIA. Oxford University Press, (2012). p. 179.
enormous problems of misunderstanding and discrimination, real progress has been made and continues to occur. Law as a tool of social change has been played a very significant role in breaking the barriers, mainstreaming and bringing about participation of persons with disabilities in India. Today whatever progress has been achieved in social and economic development of PWDs is the outcome of enactment of the PWD Act. However, the PWD Act and the other allied disability legislations in India, is lacking with a strong anti-discrimination and human rights approach. The disability laws in India including the PWD Act are welfare based and lacking in many respects. Medicalisation of disability is the keynote of disability law in Indian context, even when it is challenged in the course of adjudication.653

Validation of hypothesis: On the basis of the above discussion the researcher finds the following hypothesis highly validated.

"The National Legal instruments are yet to match with the International Standardizations to ensure effective protection and promotion of basic rights of persons with disabilities”.

The PWD Act enacted in 1995 was a legislative attempt to protect the rights of persons with disabilities. This was not done on the platform of the right to equality.654 One of the major lacunas is the narrow definition of disability and lack of effective measures to identify persons with disabilities. Identification is important to find out the exact number of population constitute people with disabilities in the country upon which budgetary allocation, planning and policies depends to ensure a sustainable inclusive development. The process of identification is based on the legal parameters upon which disability has been defined. The PWD Act gives a narrow definition of disability based on Medical Model.655 For interpreting the definition with regard to application of

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655 Section.2 (i) PWD Act defines “Person with disability” means a person suffering from not less than forty percent of any disability as certified by a medical authority (any hospital or institution, specified for the purposes of this Act by notification by the appropriate Government). As per the Act “Disability” means (i) Blindness, (ii) Low vision, (iii) Leprosy-cured, (iv) Hearing impairment, (v) Loco motor disability, (vi)Mental retardation; (vii) Mental illness.
principle of non-discrimination, the definition found to be extremely narrow by specifying only seven categories of disabilities.656

The difference between the Census and NSSO report657 is due to lack of a comprehensive legal definition of disability. The United Nations Disability Statistic's Compendium (DISTAT) noted that disability rates are not comparable across the world because of differences in survey design, definitions, concepts, and methods of survey.658 In this regard India is not an exception. With regard to definitions adopted by PWD Act, Census of India stated “the concepts and definitions of disabilities coupled with measuring its extent and its types contained in the PWD Act, 1995 were found to be extremely difficult to canvass even in normal circumstances. Thus, Due to lack of universal standard of legal parameters and with a very narrow definition of disability provided under the PWD Act, there is huge gap seen between these two survey reports. The NSS and the CENSUS are two essential data source used in India to understand the lives of persons with disabilities. But unfortunately these are not comparable because of lack of uniform legal parameters and a comprehensive definition based on in the line of CRPD.659

The Disability Convention defines disability on the basis of social and human rights perspectives, “includes 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”.660 The Convention enshrines the important shift that has taken place over recent years in understanding

660 International Convention of the Rights of Persons with Disabilities and Its Option Protocol, UN GAOR, 61st Sess, Item 67(b), UN Doc A/61/611 (6 December 2006), Article 1
disability, moving away from purely medical concepts towards notion that consider the role of factors in societies the so called “social-model” in understanding disability.661

Rather than resigning persons with disabilities to institutionalized living arrangements, segregated education, sheltered employment and qualified income support, the Convention refocuses the lens of domestic social policy on the societal barriers that prevent persons with disabilities from full and effective participation and inclusion in all aspects of community life, including employment, education, housing, health, political participation, access to justice, cultural expression, entertainment and leisure.662 Social Model of disability is the principle contribution of the Disability Convention. The convention shifts away from a medical or a welfare model of disability that focuses on inability, it focuses more on capability, inclusion, individual dignity and personal autonomy of the person.663 Hence, according to the social model disability is the outcomes of interaction between individual and society and social factors cause disability. Social factors which impose undue restrictions on behavior of persons with impairment are seen to be: a) dominant social, political, and economics ideologies; b) cultural and religious perceptions regarding persons with disabilities; c) paternalism in social welfare systems; d) discriminations by society; e) the inaccessibility of the environment and information; and f) the lack of appropriate institutional and social arrangements, causes disability. Based on medical model the PWD Act fails to take into account that the term “persons with disabilities” encompasses a wide range of differing life experiences, physical and mental state.664

Far from providing a supportive environment, care settings are often where human rights abuses occur. This is particularly true in segregated services including residential psychiatric institutions and psychiatric wings of prisons. Persons with mental disabilities are often inappropriately institutionalized on a long-term basis in psychiatric hospitals and other institutions. While institutionalized, they may be vulnerable too being chained to soiled beds for long periods of time, violence and torture, the administration of

664 KOTHARI, J. THE UN CONVENTION ON RIGHTS OF PERSONS WITH DISABILITIES: AN ENGINE FOR LAW REFORM IN INDIA, pp. 65-72
treatment without informed consent, unmodified use of electro-convulsive therapy (ECT), grossly inadequate sanitation, and inadequate nutrition.665

One of the most difficult aspects of the PWD Act is the way the definition of disability operates in relation to people with mental retardation and mental illness. The Act shows very little understanding of the nature of mental disability and the current developments in this field.666 The Indian situation with regard to treatment of mental illness is combination of two problems. One is the lack of awareness and stigma attached to mental illness and two, inadequate mental health care facility. The data available on mental health care facility shows that India has 0.25 mental health beds per 10,000 populations.667 Depression, anxiety and alcohol and drug abuse are the most common mental disorders. Psychotic disorders such as schizophrenia and bipolar disorder, although less common are profoundly disabling. Many people with mental illness do not seek help. Both the family and the health system are not equipped enough to cater to the needs of the mentally ill. For those who seek formal medical help are often provided with a cocktail of treatments for example, sleeping pill for sleep problems, vitamins for tiredness etc. Specialized treatment and particularly those required for psychological aspects are rarely provided.668

The definition of ‘mental illness’ is more by default rather than by intent. The very definition of mental illness in the PWD Act is by elimination rather than explanation since mental illness is defined as any mental disorder other than mental retardation.669 Mental Retardation is now increasingly referred to as ‘intellectual disability’ but there is no reference to this term anywhere in the PWD Act. There is no mention about dyslexia, dysgraphia or other learning disabilities in the PWD Act.670 In this regard the judiciary played a significant role in recognizing and protecting the rights of mentally challenged and learning disorder in the recent years. In Vincy D’Silva v. St. Mary’s School and

665See Mental Disability Rights International (MDRI) & Association Pro Derechos Humanos, Human Rights and Mental Health in Peru 12-14 (2004); Mental Disability Advocacy Centre, Cage Beds: Inhuman and Degrading Treatment in Four EU Accession Countries (2003); Amnesty International, Romania: Memorandum to the Government Concerning Inpatient Psychiatric Treatment (2004).
666 Ibid
668 Ibid
670 Ibid
Other\textsuperscript{671} the Bombay High Court has recognized learning disabilities under the PWD Act. Based on the direction of the Bombay HC, the State government has formulated a scheme to provide facilities to students with learning disabilities of dyslexia, dysgraphia. Not only the definitions of Mental illness and mental retardation in the Act are not clear but also there is no protection of rights provided under the Act. Their inclusion in the definition of disability is, thus, meaningless. In \textit{Suchitra Srivastava v. Chandigarh Administration}\textsuperscript{672} case, the Supreme Court of India, allowed a girl with intellectual disabilities to continue her pregnancy after she was raped while staying in Nari Niketan in Chandigarh. The Court made the distinction under the Medical Termination of Pregnancy Act. 1971, between “Mentally retardation” and “Mental Illness”. The Act allows non-consensual termination of pregnancy if woman is “mentally ill”, which in post-CRPD is discriminatory. The Court in this regard played a vital role and held that as she was “mentally retarded” and not “mentally ill”, she could still exercise legal capacity regarding her reproductive choices. The Court held that State authorities had no right to take decisions for the petitioner for the termination of her pregnancy and as she had expressed her desire to have the child, respecting her right to privacy and personal autonomy, she was permitted to carry the child to full term. No law or policy has a clearcut statement that prohibits discrimination against persons with disabilities on matters relating to marriage, family, parenthood and relationships on an equal basis with others. Especially with regard to persons with psychiatric or mental disabilities, the plethora of cases applying for divorce gets firm support from individual personal laws all which support that insanity can be a ground for divorce. The prejudice against the persons with mentally illness and mental retardation is so deep rooted that it is evident even fin some of the high court judgments. In the case of \textit{Smt. Binitha Senapathi v. State of Assam and Others}\textsuperscript{673} where the Guahati High Court had to decide on the admissions to medical colleges, it held as follows:

Section 2(t) says persons with at least 40% disability are a person with disability. Section 2(i) (v) provides that mental retardation is disability and under Section 2 (r) defines mental retardation, which means a condition of arrested or incomplete development of mind of a person, which is specially characterized by sub-normality of

\textsuperscript{671} W.P.No. 1744/2005 (Bombay High Court), Order dated 20 July 2006.

\textsuperscript{672} 9 SCC 1 (2009)

\textsuperscript{673} AIR 2000 Guw 1.
intelligence. Read with Section 2 (r), Section (t) includes a person with 100% mental retardation as a person with disability entitling him the benefits under the Act. Now, if Section 39 goes to the extent of providing for reservation in admission to Medical College that means three percent of seats of the Government Medical College have to be filled by 100% mentally retarded people. This is absurd proposition. This shows that such interpretation of Section 39 of the Act may not be permissible. Thus, it appears that the appropriate Government has not done any illegality, unconstitutionality or arbitrariness in providing for reservation for persons with disabilities in matter of Medical Colleges.

People with mental illness are considered as “non-persons”, lacking recognition before the law, on any life dimension. The macro-environment within which the mental healthcare system works is that of custodial law. We do not have a national policy for mental health. The mental hospitals, an over determined mode of mental healthcare provision in the Country, have been instituted and regulated by the Mental Health Act (MHA), 1987 regarded as an Act to protect the “rights” of People with mental illness.\(^\text{674}\)

While the CRPD does not explicitly prohibit institutionalized care such as respite homes, it also does not say anything specifically on having a “special” law for a certain disabled constituency. But Article 14 of the CRPD is clear that a person should not be detained in an institution on grounds of disability. By inference, it is anti-CRPD for a state to continue to create custodial institutions “specially” for some people with disabilities. Article 17 on Right to Integrity, including the protection of physical and mental integrity, is a challenge to the regime of force extant in the mental health sector. Through various other provisions of the CRPD it can infer that states are obligated to begin a deinstitutionalization process through a review of laws, policies, programs and practices, and set up alternative practices that will facilitate inclusion. Article 15 gives further cover on protections from torture, cruel, inhuman and degrading treatments, or punishments. It is the responsibility of the state to ensure full compliance with Articles 14 and 15. The CRPD directs the state on respecting, protecting and fulfilling the right of living independently in the community, and on full inclusion (Article 19). In the wake of CRPD, other developed countries are considering another round “beyond de-

institutionalization"⁶⁷⁵, and applying social innovations to mainstream people found in institutions, compliant with Article 19 (living independently and being included in the community).

The right to liberty is affected by institutionalization, also in the case of civil commitment of the mentally ill. There have been many changes for the better in “due process” requirements in cases of mental disability and in the development of a substantive right to treatment. But much still needs to be done. The fact that the norms applied to civil commitment in the past contrasted sharply with the strictures of “due process” used in “normal” criminal trials shows the extent to which people with mental disabilities were viewed as “different” and how this difference was used to justify radically different levels of legal protection for their rights and interests. When a legally incapacitated person goes before a court on an “insanity” petition, this is like an accusation of crime, which must be proved before the court. The police often have a role to play in mental hospital commitments, which is another peculiarity. Through the punitive legal devices enshrined in the Act, psychiatric patients become high risk for state coercion, particularly involuntary incarceration and treatment, and inhuman, degrading and torturous treatments⁶⁷⁶. This has been a huge concern among human rights activists for many decades. All the stakeholders are unsatisfied with the present Mental Health Act, 1987. Doctors have claimed that it makes hospital admission cumbersome, because it requires court procedures. Parents’ Organizations have made similar claims. Human rights advocates have decried blatant human rights violations in custodial care, the deprivation of liberty and the legal incapacitation of people with disabilities.

With ratification of CRPD which has shifted the policy approach from medical model to social model, which includes long-term impairment - physical, mental, sensory or intellectual combined with social barriers constitute the definition of disability, the Ministry of Health and Family Welfare has proposed a draft, called the Mental Healthcare Bill, 2010. The object of the proposed legislation is “to provide access to mental healthcare for persons with mental illness and to protect and promote the rights of persons with mental illness during the delivery of mental healthcare”. On the face of it,

this preamble to the legislative proposal has all the promising ingredients needed for CRPD compliance. The MHC also proposes to “protect and promote the rights of persons with mental illness during the delivery of healthcare in institutions and in the community”, giving a wider scope than the MHA, which did not talk about “community”. The MHC preamble provides that “community-based solutions, preferably in the vicinity of the person’s usual place of residence, are preferred to institutional solutions”. This is further emphasized by the provision that intervention will have the purpose of improving “the capacity of the person to develop his or her full potential and to facilitate his or her integration into community life”.677 The World Report on Disability (World Health Organization 2011) further gives a step-wise process of moving from a regime of custody to a regime of care in the community.

Wider definition required to determine who should be entitled to get the benefits and to eliminate unnecessary confusion which limits the effective implementation of the legislative measures. Due to this specific categorization of disabilities various other categories of people suffering from any other form of disabilities have been excluded from the definition such as learning disabilities, slow learner, dyslexia, dygraphia under the categories of Mental Illness of PWD Act. Other than this the PWD Act excludes several other kinds of disabilities such as people with HIV/AIDS, cancer and multiple sclerosis.678 Again medical assessment determines who are entitled to get benefit and protection under the Act. For a person to avail the rights and protection under the Act, he/she must be certified by a medical authority that she/he is having at least 40% of disability. Thus, the construction of disabled without capability reflects the highly medicalisation of disability law in India.679 Such medically-inspired schema of the Act has been criticized by activists, for all those disabled persons who do not fall within the strict parameters of the seven categories are not entitled to the protections of the Act.680

In the absence of a wider legal definition of disability and with a medically-inspired schema of the Act, judiciary is playing a significant role in interpreting the term

680RENU ADDLAKHA, S. M. DISABILITY LAW IN INDIA: PARADIGM SHIFT OR EVOLVING DISCOURSE, (2009)
disability in the line of the CRPD in order to bring more people into the purview of disability so as to fulfill the ideal objective of the Act laid down in its preamble.

Even in the context of education and employment the PWD Act is not sufficient unless reasonable accommodation measures are provided to ensure their access. Despite the Government of India declaration that ‘It should, and will be our objective, to make mainstream education not just available but accessible, affordable and appropriate for students with disabilities,’ accessing education is one of the greatest necessity and also one of the greatest challenges for PWD. About 70% of children with disabilities have still not been identified after more than 10 years of implementation of the Education for All programs or Sarva Siksha Abhiyan (SSA) based on Zero Rejection Policy. About 95.5% drop out after primary school (98.5% of children with severe disability, 95% of children with a moderate disability and 93% of children with a mild disability). There have been no measures taken to make physical infrastructure accessible or to bring about any systemic changes in terms of providing appropriate and flexible curriculum or changes in the examination system to fairly evaluate persons with disabilities. Though colleges and universities follow the 3% reservation policy regarding the admission of PWD, none of them have any policy concerning the infrastructure and other facilities required by PWD in the college premises.

Inclusive education is a constitutional mandates guaranteed by right to free primary education, right to equality and right to life. In spite of the constitutional provision of free and compulsory education to all the children below the age of fourteen, the government has not yet included the clause of education of disabled children.
explicitly in the ‘Education for all’ program. An educational setting that does not address the needs of disabled students cannot satisfy constitutional dictates of equality. Though the concept of reasonable accommodation has not been specifically used in the PWD Act, however the concept is indeed present in Section 30 and Section 31 of the PWD Act, which direct the state to prepare schemes in relation to various aspects to ensure access to education.

The idea of integrated schooling for the disabled children advocated under the SSA and the practice of integrated and inclusive education has not yet been internalized in all government primary schools in India. In Private Schools the inclusion of children with disabilities is almost absent. The question of segregated schools and right to equality has not been raised before the court in India. In keeping with the spirit of the Article 21A of the Constitution guaranteeing education as a fundamental right and Section 26 of the Persons with Disabilities Act, 1995, government is committed to providing free and compulsory education to all children with disabilities up to the minimum age of 18 years. The National Policy on Education (NPE), 1986 and the Program of Action (1992) gives the basic policy framework for education, emphasizing the correcting of existing inequalities. It stresses on reducing dropout rates, improving learning achievements and expanding access to students who have not had an easy opportunity to be a part of the mainstream system. Students with Special Needs are not provided with assistive devices other than the very traditional ones like wheelchairs, tape recorders, etc. and even those have limited reach and are of extremely poor quality. The majority of children with high support needs, particularly children with intellectual impairment, multiple impairments and autism are not getting education of any kind. There are hardly any books available for visually impaired students in accessible formats.

690 R. Colker, “The Disability Integration Presumption: Thirty Years Later”, Ohio State University Moritz College of law Working Paper Series No.9, p.8. (2005),
692 ibid
693 ibid
and the few that are available are not provided on time, due to unavailability of adequate resources.  

A report on the Education of Disabled Children and Youth enumerates the failures of SSA to deliver these educational opportunities to children with special needs, and criticizes the "lack of clear vision at the policy level to meet the education needs of children with different impairments." It notes that the Annual Report of Ministry of Human Resource Development (2003-2004) neglected to mention disabled children under Sarva Shikhsha Abhiyan (SSA), and did not provide details on the numbers of children with disabilities enrolled in primary schools. An examination of the process of implementation and general school education for children with disabilities clearly shows that proper implementation and monitoring mechanisms are required to ensure the rights of all persons with disabilities to education.

Another significant contribution of CRP D is the principle of "reasonable accommodation" to protect and promote the basic rights of persons with disabilities. Recognition of rights without recognition of difference is a myth. For example women's right to work maternity benefits and the linguistic rights of deaf persons are respected when there is news bulletin on television in sign language. The current objective of disability laws across the world is to achieve equality and nondiscrimination for persons with disabilities. In order to guarantee equal treatment for persons with disabilities reasonable accommodations ought to be provided, where needed, to enable such persons to have access to and to participate in, or advance in employment and other aspects of social life. Discrimination on the basis of disability is strongly linked to the concept of reasonable accommodation. The legal situation of persons with disabilities around the world calls for "comprehensive anti-discrimination legislation". Such legislation should not be limited to judicial remedies, but also provide for "social policy programs which enable persons with disabilities to live an integrated, self-determined and independent

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695 Universal Periodic Review - India KEY ISSUES OF 120 MILLION PERSONS WITH DISABILITIES IN INDIA. New Delhi: Secretariat: National Centre for Promotion of Employment for Disabled People, National Disability Network.
The disability-based discrimination includes any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights. This is also reiterated in Article 27 of CRPD relating to work and employment. In order to guarantee equal treatment for persons with disabilities, reasonable accommodation ought to be provided, where needed, to enable such persons to have access to, participate in, or advance in employment and other aspects of social life. Measures which are reasonable and appropriate may include adaptations to the "premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources".

Providing reasonable accommodations means accommodating the difference, understanding the diversity of differences, to achieve full participation of persons with disabilities. Equality, nondiscrimination, and dignity which are also constitutional mandates cannot be achieved without providing measures of reasonable accommodations for persons with disabilities. While the PWD Act mentions certain specific provisions to be made available for people with disability such as removal of architectural barriers in schools, restructuring of curriculum for children with disabilities or relaxation of the age-limit in respect of government employment, it does not address discrimination and the need to remove it by providing for reasonable accommodation. The PWD Act provides reasonable accommodations in education and employment in the public sector; even then these provisions would not be sufficient unless reasonable accommodation measures are provided to ensure their access in private places.

A recent judgment of the Bombay High Court, however, has taken the principle of reasonable accommodation enshrined in the Disabilities Convention and has applied it in

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699 E/C.12/1991/1, guidelines on article 2, para 16.
700 Article 5 (3) of CRPD states that "in order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided."
701 Ibid., para 15.
702 KOTHARI, J. THE UN C ONVENTION ON RIGHTS OF PERSONS WITH DISABILITIES: AN ENGINE FOR LAW REFORM IN INDIA (2010)
704 Art. 14 Constitution of India
705 Art. 15 Constitution of India
706 Art.21 Constitution of India
707 Section 30 (b) PWD Act, 1995.
708 Section 30 (g) PWD Act, 1995.
709 Section 38 (b) PWD Act, 1995
468
the domestic context in the case of Ranjit Kumar Rajah vs State Bank of India. In this
case, the petitioner was declared medically unfit for employment as an officer in the State
Bank of India, as he had previously undergone a renal transplant, but was fully capable of
carrying out the duties of the job he had applied for. The respondent bank refused to
select him on the ground that his monthly medical expenses, which would be borne by
the bank, would be substantially high as he had undergone a renal transplant. The
Bombay High Court rejected the bank’s contention and directed them to appoint the
petitioner for the job by providing reasonable accommodation in the form of medical
expenses. The court held that “reasonable accommodation if read into Article 21 of the
Indian Constitution guaranteeing the right to life, based on the Disabilities Convention,
would not be in conflict with municipal law and on the contrary it would give added life
and dimension to the ever expanding concept of life and its true enjoyment”. Article 24 of
the CRPD, for example, requires States Parties to develop an inclusive education system
at all levels, to provide for reasonable accommodation of the individual’s requirements
and ensure that persons with disabilities are provided with “effective individualized
support measures” to maximize their academic and social development. Under the PWD
Act there is no specific reference made to the term reasonable accommodation.

The courts have in most cases upheld the right to education for persons with
disabilities. In Dhawal S. Chotai v. Union of India and Others the petitioner who had
cerebral palsy, wanted three hours extra time to write the Chartered Accountant’s
examinations on account of his ability, this was refused by the authority. The Division
Bench of the Bombay High Court interpreted Chapter-V of the PWD Act to make a
beneficial provision in the matter of education and held that the overall tenor of Chapter
V of the Act is to make necessary facilities available to persons suffering from the
disabilities in the matter of education. Bombay High Court held that since the examining
institution was a statutory authority, it would fall amongst other authorities under Article
12 of the Constitution and would also be bound by Article 21 which provides the right to
Life which includes right to receive education and the facilities for education. Thus the
court directed the authorities to grant three hours extra for writing all his examinations.

710 W.P.No.576/2008,(Bombay High Court), judgment dated 8 May 2009, available at
711 KOTHARI, J. THE FUTURE OF DISABILITY LAW IN INDIA. Oxford University Press. (2012);
712 AIR 2003 Bombay 316

469
For the first time thus, right to life has been interpreted to require the state to give facilities for higher education.\textsuperscript{713} Giving extra time in writing examination is the application of principle of reasonable accommodation by providing suitable modification in the examination system for the benefit of Children with Special Needs (CWN). With this providing transport facilities, removal of architectural barriers at school, provides aids and appliances, and restructure of curricula and examination contains in Section.30 are nothing but forms of reasonable accommodation even though the term as such is not used anywhere in the PWD Act.\textsuperscript{714}

The National Policy for Persons with Disabilities, 2006, addresses the concern of reasonable accommodation especially with reference to the progressive elimination of architectural barriers, and provision of transport under the ‘Integrated Education for Children with Disabilities scheme’ and with reference to the modification of machinery and equipment to suit the needs of persons with disabilities at the workplace.\textsuperscript{715} For the first time the requirement of ensuring diversity for promoting equality and social justice has been mandated by the Right to Education in 2009, which requires all schools including private unaided schools to admit 25 percent of children belong to weaker section and disadvantage groups. This has been done to promote diversity and inclusiveness. But unfortunately children with disabilities are not included within the definition of children from a disadvantaged group and an amendment is proposed to include children with disabilities as well as.\textsuperscript{716}

**Validation of Hypothesis:** On the basis of the above discussion the researcher finds the following hypothesis **highly validated.**

- "The National Legal instruments are yet to match with the International Standardizations to ensure effective protection and promotion of basic rights of persons with disabilities".
- "Principle of Reasonable Accommodation needs to be incorporated with the legislative measures to ensure equality of opportunities in education, employment and accessibility for persons with disabilities".

\textsuperscript{713} KOTHARI, J. THE FUTURE OF DISABILITY LAW IN INDIA. Oxford University Press, (2012). p.78.
\textsuperscript{714} Ibid
\textsuperscript{716} Rights of Children to Free and Compulsory Education (Amendment) Bill, 2010, Section 2 (a).
In *All Kerala Parents' Association of the Hearing Impaired v. State of Kerala*\(^\text{717}\), this appeal to the Supreme Court out of the decision of Kerala High Court where it was held that section 39 of the Disabilities Act dealt with reservation for posts in medical institutions and not with reservation for admissions to academic courses because it came under the chapter on 'Employment' and hence 'seat' ought to be read as 'post'. Supreme Court overruled the decision of High Court on the ground that the language of section 39 clearly indicates that it refers to reservation for admissions as where the language of any statutory provision is clear and unambiguous, it is not necessary to look for extrinsic aids. Thus the fact that section 39 falls under chapter on 'Employment' is of no consequence. Words should be given their ordinary and popular meaning, and 'seat' cannot be interpreted as 'post' when the intent and meaning is clear.

In *National Federation of the Blind v. Govt. of NCT of Delhi & Others*\(^\text{718}\), the petitioner was opposing the rules followed by a particular Government school for blind boys, by the name of Rajkiya Bal Andhvidyalaya Government Boys Senior Secondary School, as being contrary to the provisions of section 26 of the Disabilities Act. The Rules in question stated that free education should be available only to residents of Delhi, till class 10 and be subject to the financial capacity of the parents. All these Rules were struck down by the High Court as being in contravention with the Act. The Court said that section 26 does not lay down a ceiling figure or area of domicile as preconditions to avail the benefits contained therein. The Provision, in fact, states that it is the duty of the state to provide free education to children with disabilities, till the age of 18 years. Further, the court stated in clear and unambiguous terms that financial constraints cannot be the reason to suffocate statutory provisions and that the Union Government ought to make the necessary provisions.

In *Vincy D'silva v. St. Mary's School and Others*\(^\text{719}\) a judgment was passed in two public interest petitions filed in Bombay HC by parents of Vincy D'silva and Robin Machado against St. Mary's School, Byculla and Atomic Energy Central School, Anushakti Nagar respectively, after their children suffering from dyslexia were detained in their class without notice. In this landmark judgment the Bombay HC not only recognized learning disabilities as disability under the PWD Act but also directed the

\(^{718}\) CW 6456 of 2002, Delhi High Court, 06.11.2003.
\(^{719}\) W.P.No. 1744/2005, (Bombay High Court), Order dated 20 July 2006
State Government of Maharashtra to formulate a scheme to provide additional facilities to the students with learning disabilities of dyslexia, dysgraphia such as a modified curriculum and examination system. Likewise reservation in educational institutions is also a form of 'reasonable accommodation' and an affirmative provided under Section 39 of the PWD Act with an objective to entitle persons with disabilities to live life with dignity at par with others on equal basis. But after examining various judgments of HC's and Supreme Court relating to education and disability it has been found that reservation requirements in institutions of higher education are enforced with reluctance in spite of imposing a positive obligation on the state and the attitude of the courts towards persons with disabilities is still of charity. Section 39 which states reservation of 3 per cent seats in government institutions and government-aided institutions, is mentioned under the employment chapter and not under that of education. In order to deny seats to the disabled, the convenient excuse taken by educational institutions is that the act talks about reservation of jobs and not admissions in educational institutions. Education for non disabled children comes under the Ministry of Education whereas for the disabled children it comes under the Ministry of Social Justice. This shows that all the discourse around inclusive education and mainstreaming the issue is only at a theoretical level, the reality reflects something else.

Validation of hypothesis: Hence, the following hypothesis taken by the researcher relating to the role of Judiciary towards PWDs in the context of promoting right to education of children with disabilities is highly validated.

"The Judicial Responses towards the protection of basic rights of persons with disabilities has significantly positive in the domain of education, employment and accessibility than other rights".

Till date there has not been any development made on the enforcement of the right to inclusive education for children with disabilities in the country. The Act doesn't define parameters of segregationist, integrationist, and inclusive education. The lack of ideological commitments of the government towards this issue is reflected in the various
forms. Legislative changes are needed to make laws and policies relating to education in line with Article 24 of CRPD. More resources have to be allocated for inclusive education. All children, including those with high support needs, should enjoy their right to attend school on equal basis with others. Review and remove all laws, regulations and circulars that bar, restrict or hamper students with disabilities from pursuing their choice of subjects.\(^{723}\)

Similarly with regard to employment of persons with disabilities, the Act contains affirmative action and non-discrimination provisions which provides obligation on the State for ensuring equal opportunities in employment for persons with disabilities. Equal opportunities in employment whether through rehabilitation provisions, quotas, anti-discrimination provisions more employment equity legislation, is central not only in terms of the economic rights of disabled persons, but also their broader social and political rights which are closely and strategically linked to economic empowerment.\(^{724}\) These provisions are also based on principle of reasonable accommodation. Since economic independence is crucial for the full and effective enjoyment of all other rights the application of principle of equal opportunities and reasonable accommodation in the context of employment is very important to ensure full participation and sustainable inclusive development. Article 16 of the Constitution, which is on equality of opportunity in employment, does not mention disability as a protected group. The right to work is not only guaranteed in Article 41 of the Constitution of India, but has also been declared by the Supreme Court to be included in the “right to life” provided by Article 21. In addition, the Persons with Disabilities Act outlines specific measures to be taken by the Government to better incorporate persons with disabilities in the workforce. These include the development of schemes providing for the training of persons with disabilities, the reservation of posts in Government establishments for members of community of persons with disabilities and the policy that employers must offer individuals who have acquired a disability a different job with equal benefits and pay. Currently, there has been identification of certain jobs done in the Government and

\(^{723}\) Universal Periodic Review - India KEY ISSUES OF 120 MILLION PERSONS WITH DISABILITIES IN INDIA. New Delhi: Secretariat: National Centre for Promotion of Employment for Disabled People, National Disability Network.

Public Sector as suitable for persons with disabilities, which is discriminatory and violation of Article 3 of CRPD, which emphasizes freedom of choice. CRPD mandates States Parties to recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labor market and work environment that is open, inclusive and accessible to persons with disabilities. It also calls for prohibition discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions. But under PWD Act reservation of three percent in jobs is provided to only people with orthopedic, hearing and vision impairment in certain jobs identified by the appropriate government.

Though the PWD Act is making some difference and the public employment provisions of Chapter-VI are definitely increasing the employment of persons with disabilities and protecting those who have disabled during their employment, yet the narrow definition of disability, exemption of private sector and lack of strong enforcement mechanisms are causing barriers to employment for persons with disabilities. It is evident from the “People with Disabilities in India: From Commitments to Outcomes” report that there has been a 5% drop in the employment rate of people with disabilities in the decade leading up to 2002. The fall in the employment has been from 42% in 1991 to 37% in 2002. For enhancing livelihood security for people in the rural areas, the Government enacted the Mahatma Gandhi National Rural Employment Guarantee Act (NREGA) 2005, which guarantees 100 days of waged employment in a financial year to a rural household. The Scheme specifically mentions disability. While each person was supposed to be given work for 100 days in a year, the average person days for persons with disability, as per this data, is only 7 person days in a year. Most people with disabilities who have applied under this program have not been given work.

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725 Universal Periodic Review - India KEY ISSUES OF 120 MILLION PERSONS WITH DISABILITIES IN INDIA. New Delhi: Secretariat: National Centre for Promotion of Employment for Disabled People, National Disability Network.

726 Article27 CRPD

727 Section 33 PWD Act, 1995

728 Section32 PWD Act, 1995

which is a direct violation of the Act. Thus, legislative amendments to make Employment laws and policies in line with Article 27 of CRPD and amendment of Article 16 of Constitution to include disability is needed to ensure full participation of persons with disabilities in the country.

The PWD Act puts in place affirmative action programs for public employment and education, but there is no declaration of the basic rights to equality and non-discrimination and to the protection of the right to life and dignity for all persons with disabilities. Most crucially, the PWD Act does not have any clear equality guarantee for persons with disabilities. The nondiscrimination ideal in the Disabilities Convention can be seen as a carrier for a vision of an inclusive society. Since, the PWD Act in India does not have a clear articulation of equality and by not having a clear articulation of equality, even the courts, while adjudicating claims under the PWD Act, are not really informed by a rights perspective. While most disability statutes such as the Americans with Disabilities Act 1990 and the Disability Discrimination Act 1995 of the UK have been primarily anti-discrimination laws protecting equality through civil and political rights, the PWD Act is an example of a statute based on redistributive social policy, giving rise to positive measures on the part of the State, but without the backing of human rights.

Validation of hypothesis: On the basis of the above discussion and findings of the study the researcher finds the following hypothesis is highly validated.

"Lack of stringent anti-discrimination provisions and right-based approach of the PWD Act, 1995 leads to de jure and de facto discrimination against persons with disabilities in India".

The Judiciary has played a significant role in throwing human rights approach while interpreting the provisions of the PWD Act especially with regard to ensure

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730 Universal Periodic Review - India KEY ISSUES OF 120 MILLION PERSONS WITH DISABILITIES IN INDIA. New Delhi: Secretariat: National Centre for Promotion of Employment for Disabled People, National Disability Network.
731 KOTHARI, J. THE UN CONVENTION ON RIGHTS OF PERSONS WITH DISABILITIES: AN ENGINE FOR LAW REFORM IN INDIA, (2010)
732 KOTHARI, J. THE UN CONVENTION ON RIGHTS OF PERSONS WITH DISABILITIES: AN ENGINE FOR LAW REFORM IN INDIA, (2010)
733 Ibid
protection of basic rights such as education, employment and social security of persons with disabilities.

People with other disabilities such as intellectual impairment, psychosocial impairments, autism, learning disabilities, deaf-blindness and multiple disabilities are totally excluded from the job market. There is rampant discrimination in the Private Sector. Most companies do not employ people with disabilities. There is neither a reservation system nor an anti-discrimination law in the country that prevents discrimination in the private sector. The provisions relating to reservation has not been effectively implemented as stated in a report that less than 1 percent of the employable disabled are engaged in any income generating work in the country. Reservation in higher posts is very often not made and people are forced to approach the courts for proper identification and reservation. Such identification of jobs has proved stigmatized and discriminatory too.

In the case of Pushkar Singh v. University of Delhi, the issues at hand were reserving teaching posts in Delhi University where reservations at the rate of 3% was to be accorded to disabled persons. The Petitioner had challenged the advertisements issued by the respondents on the ground that either these advertisements do not mention about reservation for the visually and orthopedically handicapped persons and no step were taken to give such reservation. The main difficulty which was pointed out by the respondents was the posts advertised are not identified. The Court held that once reservation is provided, it is for the respondents to ensure as to how it is to be implemented and for that purpose, if necessary changes in the 200-point roster are to be carried out, that should be done by the respondents. It cannot be an excuse for not adhering to the provisions of law. The high court held that in those advertisements where no provisions for reservation for handicapped persons were made such advertisements were not legal and proper.

734 Universal Periodic Review - India KEY ISSUES OF 120 MILLION PERSONS WITH DISABILITIES IN INDIA. New Delhi: Secretariat: National Centre for Promotion of Employment for Disabled People, National Disability Network.
735 National Center for Promotion of Employment for Disabled People, ‘Disabled People in India: The Other Side of the Story’, available at http://www.ncpedp.org/policy
737 90 (2001) DLT 36.
In the case of National Federation of the Blind v. Union of India and Others, Justice A. P. Shah while interpreting Section of the PWD Act held that "plain meaning of Section 33 is that while 3% reservation has to be computed on the basis of the total strength in an establishment, such appointment has to be made in the posts identified for each disability. The fact that persons belonging to disabled categories are to be appointed in the posts identified for such disabilities does not mean that 3% reservation is to be computed only on the basis of identified posts. The computation has to be with reference to the cadre strength". In Indra Sawhney v. Union of India and Others, the Supreme Court held that reservation for SC/ST/OBC made under Article 16(4) of the Constitution, may be called vertical reservation and the reservation made under Article 16(1) such reservation such as reservation for physically handicapped persons as horizontal reservation. Another significant provision of the PWD Act is non-discrimination in matter of promotion in the area of employment on the ground of disability. There has been several decided cases all over the country on the issue of Section 47 of the PWD Act which are clearly stated that it is mandatory and no person who acquires disability during service can be removed from his/her job.

In Kunal Singh v. Union of India, the Supreme Court held that Section 47 must be interpreted liberally so that the object and purport of the Act for equal opportunities to persons with disabilities, protection of their rights and full participation is advanced. The Kunal Singh judgment which is a decisive ruling on Section 47 has been followed in several judgments of the high courts.

In Government of NCT of Delhi vs Bharat Lai Meena, the respondent Bharat Lai Meena had been appointed to the post of physical education teacher (PET) against the positions reserved for the disabled. After issuing appointment and posting orders to Meena, the government detected that there had been a mistake in appointing a "physically handicapped" person to the post of PET and issued show cause notice to the latter.

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741 Section 47 (ii), PWD Act.
742 AIR 2003 SC 1623
743 Ibid., at para7.
744 K. Janardhanan v. Managing Director, Metropolitan Transport Corporation Limited and Others, 2008 INDLAW Mad 691.
demanding why his services should not be terminated. Meena challenged the government order and the show cause notice before the Administrative Tribunal, which ruled in his favor and quashed the government order. The government approached the Delhi High Court against the tribunal’s decision. The government argued that the “physically handicapped” cannot perform the duties of a PET, which include training students in several sporting activities requiring the candidate to be physically fit with all four limbs in proper condition. Additionally, since Meena was appointed only on the basis of a written examination and the appointing board had not had an opportunity to ascertain the candidates’ physical ability through interviews or physical tests, their appointments were marred by procedural mistakes. The respondents, on the other hand, argued that if they were considered incapable of performing the duties of a PET, they would not have been awarded the degree of Bachelor of Physical Education in the first place, which was the minimum requisite for the post in question. The very fact that they were selected for the said course, which they were able to complete, proved that they were suitable for the post of a PET. After reviewing the objectives and the legislative history of the PWD Act and after summarizing the provisions relating to employment in the act, the judges noted:

...experience has shown that the government hardly gave effect to this provision of reservation. It is because, notwithstanding such provision, there is a general conception among non-disabled that persons with disability are not capable of doing any job. Such kind of perception brings out discriminatory treatment qua persons with disability when selection is to be made. More often, it would be seen, the employee would conclude that even if the reservation was made, the employer could not find suitable persons under this category for a particular job. It would thus become easy for the employer not to select anybody even if the advertisement provided for such a reservation. This mindset of the employer is creating difficulties in the implementation of the provision.

On the question of the capability of the respondents to carry out the duties of a PET, the judges accepted their argument and held that after acquiring the requisite degree, a person could not be told that he was not suitable for the job for which he had been trained and certified. Once such persons had completed the course, it is to be presumed that they are physically fit and competent to perform their duties.
In *DTC v. Balaram Sharma*\(^746\), the Delhi High Court had to consider the definition of low vision. In this case, the respondent who was working as a conductor in Delhi Transport Corporation (DTC), had suffered an injury during the course of employment and lost one eye. He was then permanently terminated from service by the DTC due to his visual impairment. It was contended by the counsel for the DTC that the injury sustained by the respondent does not come within the definition of low vision. The Division bench of Delhi High Court, however, upon a joint reading of Section 2(i) and Section 2(u) of the PWD Act, held that it leaves no room for doubt that the disability suffered by the respondent falls within the purview of Section 2(i) of the PWD Act. The Court held that:

The Respondent, as a result of the injury to one of the eye, acquired low vision. Low vision is covered by the definition of disability as given in Section 2(i) of the Act. According to Section 2(u) of the Act, a person with low vision means with impairment of visual functioning even after treatment or standard refractive correction. It is not the case of the appellant that after use of glasses, the low vision of the respondent herein could not be corrected. It goes without saying that a conductor with one eye will not be in a position to excuse the task assigned to him even with appropriate assistive devices. This being the position, the case of the respondent, who suffered disability during his services, was totally covered by the provisions of Section 47 of the Act and his services could not be terminated permanently.\(^747\)

In *Naveen Kumar vs University of Delhi*, Kumar, a physically challenged person, using a wheelchair, was denied admission to the Bachelor of Engineering (BE) Computer Science course, on account of his impairment. The petitioner had secured a rank of 5,016 out of 25,000 in the entrance test and hence was eligible for admission. In the court, the respondent, the University of Delhi argued that Kumar was so “badly handicapped” that he would not be able to undertake the requirements of the course successfully, and that as a result, it would amount to unnecessarily blocking a seat, which could have otherwise benefited another “deserving” candidate. While the court stressed the statutory obligation of the Delhi University to pursue affirmative action and granted that the petitioner was entitled to be considered for the seats reserved for the disabled, it refrain from

\(^746\) 101 (2002) DLT 499 (Division Bench)

commenting directly on the question of Kumar’s ability to pursue the course in the light of his impairment. Instead, it directed the medical officer (MO) of the university to examine him and find out whether his impairment would prevent him from pursuing the course. The MO was specifically directed to take the petitioner to the workshops and laboratory and observe, “That while working on machines, he would neither be endangering his own life and limbs nor in ordinary course his presence to pursue studies would cause damage to the instruments and other apparatus in the laboratory and workshop”. The judge disposed of the case, by directing the university to decide the question of admission on the basis of the medical examination within a stipulated period of time. This case illustrates one of the central criticisms against medicalization of disability. The judge proceeded on the assumption that the “problem” rested in the impairment of the petitioner and then set to depute a medical authority to assess whether Kumar would be able to meet the demands of the course. An alternative judicial course of action in this case would have been to direct the university to implement the provisions of the PWD Act, which provides for changes in the curriculum and adaptations in the built environment to facilitate the exercise of rights by the disabled.\footnote{RENU ADDLAKHA, S. M.). DISABILITY LAW IN INDIA: PARADIGM SHIFT OR EVOLVING DISCOURSE, (2009).}

In an another case Virender Kumar Gupta vs Delhi Transport Corporation\footnote{126 2002 (61) DRJ 355.} is a paradigmatic case since a majority of the cases that have come up for adjudication before the courts have similar fact situations, raise similar questions and the litigants make similar claims and counterclaims. Virender Gupta had been working with the DTC as a bus conductor. As a result of an accident, he sustained injuries and was admitted to the All India Institute of Medical Sciences (AIIMS), in Delhi. On being discharged from the hospital, he was given a medical certificate stating that he had recovered from his injuries, but was fit to undertake only a desk job. He rejoined work and sought to be assigned an appropriate desk job at the bus depot where he had been working. He was asked to appear before the medical board of the DTC and undergo another medical check-up. Subsequently, he was retired prematurely based on the assessment of the board which found him medically unfit. The DTC argued before the court, that the MO of the DTC is a “competent authority” as per the regulations binding upon the DTC, and hence the order of premature retirement based on the report of the MO was valid. The
petitioner, on the other hand, contended that he had been certified as medically fit by a premier medical institute of the country, and it was the DTC which was disregarding its statutory duty under Section 47 of the PWD Act. The court decided the case in favor of the petitioner by applying the abovementioned provision of law, which mandates the employer to provide alternative tasks to an employee who acquires disability during the employment and maintain the same pay scale and service benefits that she was receiving before the occurrence of the disability. The reasoning behind this judgment not only highlights the manner in which medical opinion is used to disentitle the disabled, but also raises questions about the relevance of medical opinion as evidence in the first place. For instance, to what extent, is the statutory provision able to serve its objective independent of "medical proof." Thus, locating and understanding the process of medicalisation in judicial discourse is crucial to unravel what conditions are recognized as disabilities and who is the subject of disability.

Hence, judiciary has played a significant role in transforming and broadening the concept of human rights while interpreting Article 14, 15 and 16 of the Constitution of India as well as some provisions of Directive principles of State Policy, especially in the absence of specific provisions for the protection of fundamental rights of persons with disabilities. Thus, the role of judiciary in interpreting and implementing the statutory provisions in the context of promoting employment of persons with disabilities is significant. In the absence of specific provision on reasonable accommodation the judiciary has implemented the principle of reasonable accommodation in the context of education and employment through liberal interpretation of provisions of the Act in the light of CRPD. The PWD Act has a number of ambiguities that might have had an adverse effect on the minimal entitlements and protections that the Act gives to the persons with disabilities. However, time and again, the judiciary, through creative and purposeful interpretation of the provisions, has salvaged the Act and made it operational. For instance, in one of the early cases under the PWD Act, the Supreme Court refused the argument of the State that it did not have sufficient economic means to implement the provisions of the Act, relating to accessibility. The Court observed that while economic

750 Renu Addlakha, S. M. Disability Law in India: Paradigm Shift or Evolving Discourse, (2009)
751 Ibid, p.64
capacity was a germane consideration, it could not be used to thwart the spirit and object
of the Act.\textsuperscript{752}

To make a critical analysis of the role of judiciary and the attitude and response of
judiciary towards issues of the persons with disabilities in India, the researcher has taken
the following hypothesis:

"The Judicial Responses towards the protection of basic rights of persons with
disabilities has significantly positive in the domain of education, employment and
accessibility than other rights ".

\textbf{Validation of the hypothesis:} The researcher on the basis of the above
discussion and findings of the study finds the hypothesis is \textbf{highly validated}.

The principle of equality of opportunity for persons with disabilities particularly
in education and public employment is fairly well enunciated in Indian policy and
judicial decision-making. But still, there is a long way to achieve equality and non-
discrimination in true sense. Equality of opportunities means far more than an absence of
direct and indirect discrimination, even if all forms of discrimination were completely
eliminated, gross inequalities of opport unities might persist, both as a result of the
accumulation of due to past discrimination and as a result of continuing differences in
patterns of education, training and in aspirations among relevant sections of the
community.\textsuperscript{753} The equality paradigm sees both stereotypes and structural barriers as
obstacles to inclusion of persons with disabilities in India. Equality of opportunity also
includes tackling structural exclusion in such areas as transport, social amenities, public
services and communications, still need to achieve. No meaningful change conceivable
unless the social and economic processes of civil society are structured more inclusively
and opened up to persons with disabilities on a genuinely equal basis.\textsuperscript{754}

Freedom of movement ensures accessibility in all sphere of life, which is a tool to
ensure full and effective enjoyment of all basic human rights. This is the way to secure an
inclusive sustainable development in the society. Instead obligation it should be the duty

\textsuperscript{752} Javed Abidi vs. Union of India, (1999) 1 SCC 467

179.; Sanding Advisory Commission on Human Rights, 'Religious and Political Discrimination and

\textsuperscript{754} DEGENER, G. Q. HUMAN RIGHTS AND DISABILITY; THE CURRENT USE AND FUTURE
POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF
of the State to provide “reasonable accommodations” which should be legally enforceable and there should be corresponding rights of persons with disabilities against the State to require positive action to remove the barriers and improve accessibility of all kinds. The obligation of “reasonable accommodation” is different from “positive action measures” because positive action measures are general and not individualized. However the notion of reasonable accommodation is individualized in India. The right to Freedom of thought and opinion, and assembly and right to take part in public affairs are classical political rights also enshrined under part III of the Constitution of India as fundamental rights could be realized through the application of principle of reasonable accommodation. Freedom doesn’t exist in the vacuum, it must be made tangible and it could be achieved by substantive social and economic supports.

The civil and political rights are important to exercise citizenship rights through democratize control over State power and public policy. These civil and political rights not only protect people against the abuse of power, they are also gives people access to power, equal access to rights and resources that are generally available to all as citizens, which confirms citizenship rights. Citizenship is about relationship between individuals, groups, rights, duties and state institutions. In short it means active involvement and full participation in the democratic process of policy making. Policies being formed without active involvement of people with disabilities lead to alienation of PwDs from democratic processes and take away the possibility of achieving justice through law. As a result, people with disabilities are being deprived from contributing to and benefiting from full participation in society. As the principle of equality implies that the needs of each and every individual are of equal importance, thus those needs must be made the basis for planning of development and the available resources must be equitably distributed in such a way to ensure that every individual has equal opportunities for participation. Some persons with disabilities people with “unsoundness of mind” are not allowed to vote stand for elections or hold public office, as per Article 326 of Constitution of India and Representation of People’s Act. Some State laws bar people with leprosy and deafness to participate in elections and hold public offices. Right to vote or to stand in the election

755 Article 18 ICCPR
756 Article 19 ICCPR
757 Article 21 ICCPR
758 Article 25 ICCPR
constitutes the political right which is important to ensure Citizenship right in the country. Since the election related materials, like the manifestos of various political parties, pamphlets are not accessible for people with disabilities, election booths are not accessible for a wheel-chaired person, there are no Sign Language interpreters in public speeches and rallies, there is violation of privacy of visually impaired persons because they vote with the assistance of another person, we find there is gross violation of political rights of persons with disabilities and the Government as well as the Community at large least are paying no attention to ensure political rights of persons with disabilities. In order to comply with the CRPD provision to ensure Right to Political Participation the Rights of Persons with Disabilities Bill, 2012 contains provisions with an aim to ensure political inclusion of PWDs.

To make a critical analysis of the need to incorporate the principle of reasonable accommodation endorsed by CRPD in the legislative and policy frameworks on protection of basic rights of persons with disabilities in India, the researcher has taken the following hypothesis:

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759 Article 29 of the CRPD states that States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to: (a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by: (i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; (ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate; (iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice; (b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including: (i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties; (ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

760 Section 19 of the Rights of Persons with Disabilities Bill, 2012 provides (i) The Election Commission of India and the State Election Commissions shall ensure that all polling stations are accessible to persons with disabilities and that all materials related to the electoral process are easily understandable by and accessible to persons with disabilities. (2) The Election Commission shall take measures to ensure; (a) the construction and availability of ramps at all polling booths; (b) separate queues for persons with disabilities at all polling booths with clear pictorial signs; (c) the availability of ballot papers and/or electronic voting machines with candidates’ information available in Braille and other accessible formats; (d) the fitting of audio devices to electronic voting machines; (e) training programs to sensitize polling officers about the special requirements of persons with disabilities.
"Principle of Reasonable Accommodation needs to be incorporated with the legislative measures to ensure equality of opportunities in education, employment and accessibility for persons with disabilities."

**Validation of hypothesis:** The Researcher on the basis of findings of the study and the above discussion finds this hypothesis is highly validated.

Disabled women are the most vulnerable in Indian society. This vulnerability exists across class and caste. They suffer because of the triple jeopardy. They suffer because they are women, on the account of being disabled and most of the times because of poverty. A disabled boy is more acceptable than a disabled girl in our society. If a family has a disabled boy they will do their best to give him a decent living, where as in case of a girl, family hardly does anything to give her an independent and decent living. In India disabled women constitute around 42.46 per cent percent of the total disabled population. They are most marginalized in terms of their social, economic, political and health status.

Disabled girls have multiple difficulties in availing education. Firstly, since the number of special schools is inadequate, disabled girls are the least likely to attend general schools. In extreme situations even if parents are prepared to send their disabled male child to the general school, girls are not allowed. Secondly, most of the special schools are residential. Usually Indian families are reluctant to allow their girl child to be away from home. At times these special schools are isolated from the rest of the community and there are major security concerns for students. Thirdly, the few special schools that exist in India are concentrated around big cities, which are inaccessible to large number of disabled girls who are from the rural areas.

Education and Employment are closely linked to each other particularly in the context of disabled women, for whom vocational training is a pre requisite for employment. India large sections of disabled women are either unemployed or engaged in very low paid jobs. Though the overall employment scenario for the disabled persons is bad it is more unfavorable in case of disabled women. No specific provision

761 Census 2001
763 According to the Census, 2002 data the usual work activity status for the disabled persons depicts that 62 per cent and 89 per cent males and females respectively in rural areas and 63.5 per cent and 90.5 per cent males and females respectively in urban areas were out of labour force.
contain in the PWD Act to protect the basic rights of women/girls with disabilities like protection of reproductive right, protection against sexual and domestic violence, discrimination, or to promote opportunities of education and employment for women/girls with disabilities.

Disabled women are the worst victims of social exclusion. Stigma and discrimination attached to disability deprives these women from enjoying their social and cultural rights. India where marriages are universal, they are also considered as means of social acceptability and provide social status to the women. Marriages for disabled persons are a difficult proposition particularly for disabled women. Here again stigma and discrimination prevents families from making marital relations with disabled persons. According to the census 2000, 43 per cent disabled have never married, while 39 per cent are currently married and a significant 15 per cent are widowed and around 1 per cent are divorced or separated.764

Sexual Violence and abuse are serious problems for persons with disabilities, especially for women with disabilities, who are at greater risk than non-disabled persons.765 World Health Organization in its World Report on Violence and Health 2002 defines sexual violence as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.” Violence against women” has been defined in Article 1 of the UN Declaration on the Elimination of Violence against Women, 1993 to mean “any act of gender-based violence that results in or is likely to

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result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.\textsuperscript{767} Article 6 of the CRPD provides for protection of rights of women with disabilities. The States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard State shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

The National Policy on Persons with Disabilities 2006 endorsed the need for special attention to doubly disadvantaged groups by creating a separate section on women with disabilities. The National Policy sought the development of special programs for education, vocational training, employment and other rehabilitation services to women with disabilities. It advocates that rehabilitation women and girls with disabilities be encouraged by ensuring that they are 25\% of the beneficiaries in all rehabilitation projects. The policy also seeks the establishment of short duration stay homes for women with disabilities, hostels for working women with disabilities, and homes for aged women with disabilities.\textsuperscript{768}

So far as India is concerned, the draft Bill 2012 provides that the appropriate government and local authorities shall take measures:\textsuperscript{769} (1) to ensure the full and equal enjoyment of all rights by women and girls with disabilities. (2) to ensure the full development, advancement and empowerment of women and girls with disabilities, for the purpose of guaranteeing them the exercise and enjoyment of the human rights on an equal basis with others.

The XI Plan of India for the period 2007-2012 observes that "Women with disabilities are considered a financial burden and social liability by their families; they are denied opportunities, movement outside the home and access to education; they are viewed as asexual, helpless and dependent. Hence they are isolated and neglected with no hope of a normal life." For the first time, the XI Plan considered the situation of women with disabilities in all its complexity, focusing on the need for an intersectional understanding of discrimination for policy to be effective and addressing the vulnerability

\textsuperscript{769} Sec.5 of the Rights of Persons with Disabilities Bill, 2012.
of poor women to triple discrimination - poverty, gender and disability in significant ways. The XI Plan explored ways in which the gender-based division of labour places women with disabilities at an added disadvantage both at the family and community level. It has given more emphasis on the proactive interventions by the state and its policies have allowed voluntary agencies to come up with practical and workable suggestions. Some of these issues can be dealt with through capacity building of women with disabilities to combat lack of education, poverty, abuse, violence and negative attitude of the society and to bring about effective participation in all aspects of living, which includes education, skill development, rehabilitation services as suggested by the XI Plan.

The sexual and reproductive health of the disabled is an area, which is majorly ignored. They have very little access to reproductive and sexual health and maternal health services. This is primarily because of physical inaccessibility to such services; lack of information about the health facilities and health professional’s lack of knowledge about disability. The disabled persons are considered non sexual. Thus, the mainstream sexual and reproductive health programs have no special component for the disabled. Neither can the disabled avail of any services from these programs. The State and the society fail to realize that the disabled people do have sexual relations and have the right to full fill healthy sexual relations. On the other hand because of their multiple vulnerabilities they are more susceptible to sexual assault and exploitation. According to a study conducted by Swabhiman, a Disabled People’s Organization in Orissa, 25 percent of the intellectually disabled women had been raped. The PWD Act has no provision with regard to protection of sexual and reproductive rights of persons with disabilities. Hence, in this regard the proposed the Bill, 2012 contains provisions for the protection of sexual and reproductive rights. The number of instances of torture and abuse, resulting in deaths of people with mental impairment is increasing day by day in the various State-run institutions due the vulnerability of persons especially women and girls with disabilities in the country. Abuse and violence against women are especially high in these

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770 Section 17 of RPD Bill, 2012 provides that the State shall take measures (1) to ensure that persons with disabilities have access to information regarding family and reproductive planning on an equal basis with others. (2) No person with disability shall be subject to any medical procedure which leads to or could lead to infertility without their free and informed consent.

771 On October 20, 2010, Headlines Today published a report, “Families chain mentally-ill members”, in which they featured many people with mental illness who have been chained in their home for many years.
institutions. There are cases of wrongful or fraudulent confinement, overuse of shock treatment, solitary confinement, sexual exploitation, forced sterilization, hysterectomies, abortions and denial of treatment. Neglect and violence is high in the society and also found at home against persons with disabilities. There is a lack of protection of people with disabilities from neglect, abuse, and harassment in families and communities. There are several instances where people have been chained, locked up, beaten, harassed, abused by family members, neighbors and people in the community. It mostly happens due to the absence of required support services for the families having members with severe disabilities.

The context and nature of the violence and abuse experienced by persons with disabilities within their homes often makes it difficult for the government to obtain conclusive records of the same. In an effort to bridge this gap, however, the government has entered into on-going consultations with civil society on the proposed new legislation on the Rights of Persons with Disabilities.

To combat the brutal face of insensitivity towards the persons with disabilities the Indian Supreme Court in injunction with the various state High Courts have repeatedly safeguarded the rights of affected persons, especially women. The Supreme Court in *Tulshidas Kanolkar v State of Goa* unequivocally and vehemently condemned the repeated rape of a mentally challenged woman. The Court's treatment of this case was notable in that it had observed that with persons with disabilities, apart from the mere factum of physical violence, there is also an element of a blatant —exploitation of her helplessness. Arijit Pasayat, J. also suggested that Section 376(2) (f) of the Indian Penal

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Family members who were interviewed said, they did not know how to take care of them. They believed that they were "possessed by demon". They had not been given any psychiatric or other treatment/support. Some of them had epilepsy, and they had not been given treatment for even that. [http://indiatoday.in/video/families-chain-menatllyill-members/1/11758.html](http://indiatoday.in/video/families-chain-menatllyill-members/1/11758.html)

A study launched by researchers in 20 districts of rural Orissa state have shown appalling results as far as violence within the family are concerned. In the context of physical (i.e. non-sexual) abuse, it was found that almost 70% of disabled persons reported being beaten for no reason at all, while mentally challenged persons tended to get abused more for minor and major mistakes. Statistics related to sexual abuse revealed that 25% of the mentally challenging respondents had reported being raped. The mentally challenged are on the whole at a much higher risk of being sexual abused, possibly because they did not understand the nature of the act being performed on them and only comprehended the situation much later.


AIR 2004 SC 978.
Code, which prescribes a higher penalty for rape of a woman below 12 years of age, should also prescribe a higher penalty for the rape of a mentally challenged woman.

Working on this and its own recommendations, the National Commission for Women in its draft version of the Criminal Law Amendment Bill, 2006 included specially a provision criminalizing the sexual assault of women with disabilities. Section 376(2)(i) of the proposed Bill imposes a minimum term of ten years imprisonment that may extend to life, and a fine for the commission of sexual assault on a —person suffering from mental and physical disability. Also under Section 114A of the Indian Evidence Act, 1872 would involve a presumption of the absence of consent, shifting the burden of proof on the accused rather than on the victim, as is the usual practice in criminal matters.

The PWD Act did not have an explicit equality and non-discrimination provision however the right to equality greatly formed the jurisprudence of the statute. In a series of decisions, Courts in furtherance of substantive equality required the compulsory implementation of the various schemes envisaged in the statute. Through judiciary the principles of equality were not just advanced between the non-disabled and persons with disabilities but also between disabilities. The PWDA has an exclusive chapter entitled Non-Discrimination. Sections 45, 46 and 47 of this chapter prohibit discrimination on the basis of disability in the matter of public employment and in access to public facilities.

There have been a number of judicial decisions that have enunciated and evolved the principle of non-discrimination inherent in PWD Act. These decisions have sought the discontinuance of discriminatory practices against persons with disabilities on grounds of equality under Article 14 of the Constitution and the right to life under Article 21 of the Constitution.

With respect to discrimination faced by persons with disabilities in government employment and the scope of such employment, the Supreme Court in the case of Dalco

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775 Section 47 of the PWDA provides for the principles of nondiscrimination in public employment wherein it states that -No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service. In order to stress that disability cannot be a ground for removal it further provides that if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits and provides further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.
Engineering Private Ltd. v. Shree Satish Prabhakar Padhye and Ors\textsuperscript{776} held that the definition of establishment under Section 47 included within its ambit government companies set up under the Companies Act, 1956. Hence, Section 47 is applicable to any person who acquires a disability during service in a Government company. However the section would not apply to private companies.

While considering the question of discrimination in the promotion of persons with disabilities in government employment, the Hon’ble Supreme Court held in the case of Union of India (UOI) v. Devendra Kumar Pant and Ors that under Section 47 of the PWDA, promotion of a disabled employee with disability shall not be denied to a person on the ground of his disability if the disability does not affect his capacity to discharge the higher functions of a promotional post.\textsuperscript{777}

In National Federation of Blind v. Union Public Service Commission\textsuperscript{778} a writ petition was filed before the Supreme Court against discrimination of visually impaired persons in competing for the coveted civil services of the country, and for the government to be directed to permit otherwise qualified blind candidates to appear in the selection examination. The Supreme Court not only allowed the petition, but also directed the government to allow them to write the examination in Braille or with the help of a scribe. The Supreme Court also responded to direct the government to allow them to write the examination in Braille or with the help of a scribe. The Supreme Court also responded to the Writ Petitions filed under Article 32 of the Constitution of India, against the treatment meted out to persons with mental disabilities in institutions for their care and treatment and laid down guidelines on their living conditions, education, training and rehabilitation facilities in such institutions.

The PWD Act need to incorporate non-discrimination provisions in the Act to protect the basic human rights of persons with disabilities and to ensure equality in true sense because through judiciary or judicial order and guidelines equality and nondiscrimination can’t be achieved in true sense. The equality argument is based on dignity of persons with disability. Equality and nondiscrimination is the means to achieve recognition of the difference, valuing and accommodating the differences and human

\textsuperscript{776} AIR 2010 SC 1576
\textsuperscript{777} AIR 1991 SC 1003
\textsuperscript{778} (1993) IILLJ 452 SC
dignity which serves as a powerful reminder that people with disabilities have a stake in and a claim on society that must be honored quite apart from any considerations of social or economic utility. They are ends in themselves and not means to the ends of others.  

In *Naz Foundation v. Government of NCT of Delhi and Others*, the constitutionality of Section 377 of Indian Penal Code (IPC) which criminalized homosexual sex between consenting adults, was challenged on grounds of equality. The Delhi High Court held Section 377 as unconstitutional. In doing so, it held that discrimination is the anti-thesis of equality and that is the recognition of equality which fosters the dignity of every individual. Application of the principle of formal equality e.g. likes be treated alike and impartial enforcement of legal and social rights to vote by in the context of disability can lead to situations that are discriminatory and unjust. For example special or segregated educational facilities for disabled children are based on the formal approach of equality, since there is an objective difference between disabled and non-disabled children. Different treatment is required in many respects to enable the persons with disabilities to work and other opportunities. Hence, the notion of formal equality ignores social inequalities and disadvantages which fail to address the concerns of persons with disabilities as they need different treatment that accommodate their disabilities with the application of principle of reasonable accommodation and substantive equality. In disability context as Lawson suggests, “it requires that differences resulting from factors such as disability, be acknowledged and to elicit different treatment levels where identical treatment would cause disability.”  

**Validation of Hypothesis:** On the basis of above discussion the researcher finds the following hypothesis is *highly validated.*

- The Judicial Responses towards the protection of basic rights of persons with disabilities has significantly positive in the domain of education, employment and accessibility than other rights.

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780 160 DLT 277.
781 Article 14, Constitution of India
783 ANNA LAWSON, DISABILITY AND EQUALITY LAW IN BRITAIN; THE ROLE OF REASONABLE ADJUSTMENT, Oxford: Hart Publishing. (2008),
• Lack of stringent anti-discrimination provisions and right-based approach of the PWD Act, 1995 leads to dejure and de facto discrimination against persons with disabilities in India.

• Principle of Reasonable Accommodation needs to be incorporated with the legislative measures to ensure equality of opportunities in education, employment and accessibility for persons with disabilities.

The substantive equality theory incorporates both the ideal of equality of opportunities and structural equality.\textsuperscript{784} For example in order to make the school inclusive for children with disabilities schools need to provide special measure for blind children for imparting education in normal a class through talking books and library facilities, instead of issuing identical question papers to all student the schools need to ensure alternative format of writing the exam, the school building needs to be barrier-free, all these special measures based termed as “reasonable accommodation” based on the principle of substantive equality in the context of disability. This would not amount to violation of right to equality\textsuperscript{785} and non-discrimination\textsuperscript{786} enshrined in the Constitution of India. As Lawson notes “a commitment to respect for human dignity requires a focus not on sameness or identical treatment but on individual flourishing.”\textsuperscript{787} Hence, respect for dignity of person with disabilities requires treatment which is different rather than treatment which is identical. Thus, social inclusion and full participation of persons with disabilities in the mainstream can be achieved through substantive equality. The way “the difference” is appreciated, conceived and accommodated in law determines equality between the disabled and the non-disabled.\textsuperscript{788}

According to Article 14 of the Indian Constitution the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. This obligation of equality has been interpreted to require that similarly situated persons should be similarly treated. Consequently whilst reasonable classification is permitted there is a prohibition of class legislation. Reasonable classification means that a group of

\textsuperscript{784} KOTHARI, THE FUTURE OF DISABILITY LAW IN INDIA. Oxford University Press.(2012)
\textsuperscript{785} Article.14, Constitution of India.
\textsuperscript{786} Article.15, Constitution of India.
\textsuperscript{787} Anna Lawson, (2008), Disability and Equality Law in Britain: The Role of Reasonable Adjustment, Oxford: Hart Publishing.
\textsuperscript{788} Renu Addlakha, S. M. (2009, October 10). Disability Law in India: Paradigm Shift or Evolving Discourse, p. 62-68
people may be treated differently provided the criteria that are selected are rationally related to the object that is being achieved by such legislation. This permission of reasonable classification has not come into play whilst determining the legal personhood of persons with disabilities. Thus Indian law recognizes persons with disabilities as subjects of rights and persons before the law. The option of reasonable classification has been employed in order to determine the legal capacity of persons with disabilities. Legislative Classification on the basis of disability was not perceived as discriminatory by the Indian Constitution. It was believed that the legal capacity of persons with disabilities especially persons with intellectual and psychosocial disabilities needed to be addressed in a manner distinct from other persons and provision to that effect has been made in a number of pre-CRPD laws. After ratifying the CRPD the PWD Act need to incorporate specific provision to ensure legal recognition to PWDs across the various categories of disability. In implementing the mandate of Article 12, India has acknowledged that the CRPD makes a paradigm shift on the question of legal capacity of persons with disabilities. This shift is primarily made by recognizing the full legal capacity of all persons with disabilities. In order to enable all persons with disabilities to exercise this capacity, it would be necessary to make provision for support. Insofar as the denial of legal capacity for persons with intellectual, developmental and psychosocial disabilities has been sanctioned by the law, it would be necessary to repeal such disqualifying provisions and replace them with enactments which recognize legal capacity. The law would also need to facilitate the provision of support and most importantly provide that the accessing of support in no way negates the presence of legal capacity. In pursuance with Article 12 of CRPD the Rights of Persons with Disabilities

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789 Article 12 CRPD states that; (1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity (4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests (5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.
Bill, 2012 contains comprehensive provisions to recognize the legal capacity of PWDs.\textsuperscript{790} The appropriate governments shall establish or designate one or more authorities to mobilize the community and create social networks to support persons with disabilities in the exercise of their legal capacity.\textsuperscript{791}

Further Plenary Guardianship is a system whereby subsequent to a finding of incapacity a guardian substitutes for the person with disability as the person before the law and takes all legally binding decisions for him or her. The decisions of the person with disability have no binding force in law during the subsistence of the guardianship. The guardian is under no legal obligation to consult with the person with disabilities or determine his will or preference whilst taking decisions for him or her. Subsequent to the enforcement of this Act all plenary guardians shall operate as limited guardians. All limited guardians shall act in close consultation with the person with disability to arrive at legally binding decisions.\textsuperscript{792}

**Validation of Hypothesis:** On the basis of above discussion the researcher finds the following hypothesis is highly validated.

- *The National Legal instruments are yet to match with the International Standardizations to ensure effective protection and promotion of basic rights of persons with disabilities.*

\textsuperscript{790} Section 7 of the Rights of Persons with Disabilities Bill, 2012 provides (l) Notwithstanding anything contained in any other law to the contrary, persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and have the right to equal recognition everywhere as persons before the law. (2) Any express or implied disqualification on the grounds of disability prescribed in any legislation, rule, notification, order, bye-law, regulation, custom or practice which has the effect of depriving any person with disability of legal capacity shall not be legally enforceable from the date of enforcement of this Act. (3) All persons with disabilities have right, on an equal basis with others, to own or inherit property; control their financial affairs; obtain access to bank loans, mortgages and other forms of financial credit, and not to be arbitrarily deprived of their property. (4) All persons with disabilities have the right to access all arrangements and support necessary for exercising legal capacity in accordance with their will and preferences. The legal capacity of a person with disability shall not be questioned or denied, irrespective of the degree and extent of support, by reason of accessing support to exercise legal capacity. (5) When a conflict of interest arises between a person providing support and a person with disability in a particular financial, property or other economic transaction, then such supporting person shall abstain from providing support to the person with disability in that transaction. (6) No person providing support either individually or as part of a network shall exercise undue influence on a person with disability. Such support when provided by an individual or a network shall be so provided that it respects the autonomy, dignity and privacy of persons with disabilities. (7) Person providing support either individually or as part of a network shall not exercise undue influence on a person with disability. Such support when provided by an individual or a network shall be so provided that it respects the autonomy, dignity and privacy of persons with disabilities. (8) A person with disability may alter, modify or dismantle any support arrangement and substitute it with another.

\textsuperscript{791} Section 9 of the Rights of Persons with Disabilities Bill, 2012.

\textsuperscript{792} Section 8 of the Rights of Persons with Disabilities Bill, 2012.
• Principle of Reasonable Accommodation needs to be incorporated with the legislative measures to ensure equality of opportunities in education, employment and accessibility for persons with disabilities.

Accessibility in the context of disability means societal or attitudinal accessibility, intellectual accessibility, architectural accessibility, communication accessibility, and economic accessibility. The classical political rights such as right to freedom of thought, opinion, peaceful assembly, to take part in the conduct of public affairs and equality rights raises the issue of right to accessibility. Right to accessibility depends upon Right to Freedom of movement, opinion, expression of thought and to take part in public affairs. Then, the essential factor of accessibility is affordability. For instance freedom of movement can be accessed only if architectural barrier free environment is provided to a wheel- chaired person. This raises the need to implement the principle of "reasonable accommodation". Hence, the issue of ‘access’ is wide and would include overcoming environmental barriers such as inaccessible private and public buildings, schools, colleges, offices, institutional barriers such as segregation, exclusion, expulsion from key social institutions including health and employment and attitudinal barriers such as prejudices, pity, disregard for persons with disabilities. The CRPD requires the States parties to take appropriate measures to ensure to persons with disabilities access on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems. It would be achieved through all appropriate and reasonable measures, including the guarantee of reasonable accommodation, procedural safeguards, accessibility and universal design standards, and effective public awareness campaigns.

Internationally, the concept of a barrier-free environment is premised on Article 7 of International Covenant for Economic, Social and Cultural Rights (ICESCR) that mandates providing and modifying devices, services or facilities, or changing practices or
procedures in order to afford participation on equal terms, including installation of wheelchair ramps, elevators for people with mobility impairments, introduction of part-time work schedule for workers with severe conditions, availability of readers for visual impairments, and the essential sign translation for people with hearing impairments.800

Accessibility is fundamental to realization and enjoyment of basic human rights. Lack of accessibility is a major barrier for the full participation of persons with disabilities. The majority of people with disabilities are confined to their homes because they are unable to access any of the public places, transportation or services. People with mobility and communication challenges find it extremely difficult to exercise not only their socio-economic rights but also their civil and political rights, as the existing infrastructure for redress - Courts, police stations, etc. are inaccessible for persons with disabilities.801 A limited number of efforts have been made across the country to ensure ease and liberty of movement for persons with disabilities. By and large, there are hardly any regulations with respect to accessibility in the country. There are a few regulations, such as Building Bylaws, which mandate accessibility in public places. However, their implementation and enforcement remain very poor. Footpaths, roads, common public transport, etc. are not only inaccessible but can also be unsafe for people with disabilities. The infrastructure development programs do not include disability. For instance, the Jawaharlal Nehru National Urban Renewal Mission (JNNURM), a flagship program for modernizing cities, does not have a specific mention of disability.802

In Javed Abidi vs. Union of India803, petition was filed seeking certain general and specific reliefs. The general relief referred to constitution of authorities specified in the Disability Act 1995 and implementation of its relevant provisions. The specific relief was sought for introducing modifications and additions in Indian Airlines for the convenience of those having locomotor disability and travel concessions on the same lines as those provided for visually impaired persons.

800 P. Singh, (2003), 'Disability Discrimination and Equality of Opportunities: A Comparative Analysis of Legal Frameworks', (n 5)
801 Universal Periodic Review India KEY ISSUES OF 120 MILLION PERSONS WITH DISABILITIES IN INDIA. New Delhi: Secretariat: National Centre for Promotion of Employment for Disabled People, National Disability Network.
802 Ibid
Since the Central & several State Governments formed the Central & State Coordination Committees during the pendency of the petition, the Supreme Court dealt only with the specific relief. Supreme Court observed that persons with locomotor disability faced similar hardships as the visually impaired, hence, there was no reason to deny the former the concession provided to the latter, even if it would cause financial hardship to the Airline. Keeping in view the broad objectives of the Disability Act, the Supreme Court directed that 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 ambu-lifts and aisle chairs for persons with locomotor disability.

In Disabled Rights Group vs. Chief Election Commissioner & Anr.,\(^{804}\) the petitioner approached the Chief Justice of India after several failed attempts of securing accessibility for disabled voters from the Chief Election Commissioner. A letter outlining the government’s action, along with a copy of the Government Order, was sent only a day before polling was scheduled to begin. On notifying the letter of the petitioner as a Public Interest Litigation, Harish N. Salve was appointed as Amicus Curiae to assist the Court in the proceedings. The Court was pleased to direct the Chief Secretaries of respective States to ensure that wooden ramps were made available for elections in April 2004, as far as possible. However, as regards the elections to be held in May 2004, wooden ramps should be provided at polling stations - at least in the cities and urban areas - to enable disabled persons to reach the polling stations and cast their votes. A similar order was obtained by the same group in the Bombay High Court for their state elections.

In Sayed Bashir-ud-din Qadri v. Nazir Ahmed Shah and Others,\(^{805}\) the Supreme Court for the first time recognized the concept of reasonable accommodation in disability rights case and found that the doctrine of reasonable accommodation would require the provision of aids and appliances to enable a disabled person in employment to carry out his duties effectively. To assist disabled persons in having access to aids and appliances, the Central and the State Governments have framed schemes for provision of aids and

\(^{804}\) CWP No. 182/2004, Supreme Court, Interim order 19.04.04.
appliances under Section 42 of the PWD Act, called ADIP\textsuperscript{806} Schemes, which are essential for their social, economic and vocational rehabilitation.\textsuperscript{807} Aids and appliances which do not cost more than 6000/- are covered under this scheme. For visually, mentally, speech and hearing or multiple disabled, the limit has been raised to 8000/-.\textsuperscript{808}

Access to information is also a major concern for people with disabilities. There are no voice announcements, audio descriptions, information in Braille and accessible formats, tactile clues, etc. for people with visual impairments to access public places and services. Most websites cannot be accessed by people with disabilities, particularly by people with visual impairment.

In addition to access to public transport the Act provides for affirmative action in allotment of land at concessional rates to persons with disabilities for setting up business, housing, and business.\textsuperscript{809} In Sh. Slil Chaturvedi and Prajwala v. Union of India and Other\textsuperscript{810} the Supreme Court observed that many of the state governments or local authorities in various states have not fully implemented section 43 of the Act. Under these circumstances, the Supreme Court directed that whenever the state governments or the local authorities allot land for various purposes indicated in Section 43 of the PWD Act, preferential treatment needs to be given to disabled persons and the land shall be given at concessional rate. The percentage of reservation may be left to the state government/ local authorities. The provisions on access for people with disabilities in the PWD Act are framed as contingent entitlements, i.e. obligations on the authorities are subject to the proviso “within the limits of their economic capacity and development”. As such, the authorities are encouraged to take various interventions to promote access, but the nature of the legal obligations is somewhat vague.\textsuperscript{811} This is the reason why the PWD Act dealing with access to public transport and roads has received very little attention. This limitation led to almost none of these requirements of access to transport being complied with. Transport law and policy for people with disabilities are one of the most significant access issues. Without inexpensive, efficient transportation the disabled will

\begin{footnotes}
\item[806] Assistance to Disabled Persons for Purchase/Fitting of Aids and Appliances Schemes.
\item[808] Ibid
\item[809] Section 43 of PWD Act.
\end{footnotes}
remain homebound or institutionalized and unemployed or under employed. Access to education or employment is meaningless if a disabled person cannot get to the school or workplace because accessible transportation is unavailable. Based on the intention of the PWD Act to integrate people with disabilities into the mainstream of society, it would have been mandatorily required public transport system to provide access to disabled people. Indeed, there are no specific enforcement provisions or sanctions for failure of authorities to be proactive in undertaking their obligations under the Act. Nor is a mechanism spelt out for how authorities should move to implement the Act's provision.

In Disabled Rights' Group v. Union of India and Others the Delhi High Court with regard to issue of access under Article 44, 45 and 46 was raised, and the railways and various airlines were asked to respond as to what steps they had taken for ensuring full access to persons with disabilities. The Railway Ministry submitted to the Court that an accessible coach for trains has been made available with wider aisles and lavatory doors and width of berths, but that only around 1200 coaches with this design were made available. They also submitted they will take around six to eight years to provide such accessible coaches at both ends of every train. The High court noted that this time period was too long and directed the Railways to make efforts to have all their express trains with such coaches within a period of two years. The ministry of Railways was directed to conduct a detailed survey and prepare a report on accessibility and submit it to the court.

The access provisions of the PWD Act are subject to economic capacity proviso have no provisions or process outlined for either determining appropriate minimum standards of access at different level of development or for sanctions on authorities that fail to make any efforts to improve accessibility. The UN Convention on rights of persons with disabilities has entered into force, which requires states to “develop, promulgate and monitor implementation of minimum national standards and guidelines for the

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814 W.P (C) No.13781/2004, (unreported)
816 Ibid
accessibility of public facilities and services". The provisions of the Act to some extent their subsequent interpretation and implementation, show a relative focus on access for people with disabilities in urban areas. As a result lessens the focus on the types of access priorities of rural people with disabilities. Another criticism of Section 46 is that it reveals the general approach of the PWD Act is one of accessible design or adaptation of the built environment rather than universal design. Further the Act doesn’t contain the term accessibility e.g. removal of barriers and access. Provisions relating to public transport, roads and public buildings have been covered under the Act, thus the private entities have no obligation in this regard.

Barrier free environment and lack of accessibility restricts the enjoyment of social, economic and cultural rights of people with disabilities. The persons with disabilities have the right to equal participation in cultural life, leisure, and sports and should enjoy access to places for cultural performance or services such as cinema, libraries, museum, and tourism services, among others. These are all fall under the domain of right to cultural expression. It enables them to transcend the commonplace to share in a collective vision of the world and to tackle the ways in which they are portrayed and perceived by others. Moreover it allows for the development of a sense of separate identity and community. Regarding access to voting rights, this is a classic democratic political right which is very important to the realization of freedom and expression. If the polling stations are inaccessible to wheelchair persons or if the election materials are available in printing version only, then how can an election considered to be held by universal and equal suffrage. In 2004, based on a letter written by the Disabled Rights Group to the Supreme Court complaining of non-access to voting for disabled persons, the Court registered it and as writ petition in public interest. On April 2004, the Supreme Court directed the Chief Secretaries of all states, in coordination with the Chief Electoral Officers of those state to make available wooden ramp facilities at polling

818 Ibid
819 Ibid
821 Article 30 of United Nation Convention on Rights of Persons with Disabilities
823 Ibid
824 W.P.(C) No. 187/2004
stations situated in cities and in rural areas. The opportunity to participate in the democratic process is a constitutional right and denial of exercising their voting rights as citizen is violation of constitutional rights. Representation of disabled persons in political parties, parliaments and other bodies is another form of political participation, but it is still the exception.

The PWD Act is also lacking in incorporating the principle of “reasonable accommodation” to ensure accessibility in true sense. While there has been a limited progress in increased opportunities in education and employment for disabled people achieved, with regard to transport and communication, and access to justice very negligible step taken for providing barrier free environment for persons with disabilities in the country.

Validation of Hypothesis: On the basis of above discussion the researcher finds the following hypothesis is highly validated.

“The Judicial Responses towards the protection of basic rights of persons with disabilities has significantly positive in the domain of education, employment and accessibility than other rights”.

Freedom of expression also includes freedom to seek, receive, and impart information. The PWD Act does not address the issue of access to communication and with the development of communication and technology and the increasing dependency of daily life on their use; it has become necessary to ensure equal access to such latest developments for persons with disabilities.

Though Section 42 provides a general obligation of the government to make schemes to provide aids and appliances but does not cover communication and information technology as supportive device. The PWD Act does not recognize right to access information and communication as right, hence does not obligate the government or private parties, to provide for such access. Though the earlier definition of access included only ‘physical access’ and took only architectural barrier into consideration, the modern day analysis of access is more holistic in nature. It encompasses within itself accessibility to quality education, information and communication, entertainment and technology.

\[^{825}\text{Ibid.}\]
\[^{826}\text{Kothari, J. (2012). The Future of Disability Law in India. Oxford University Press.}\]
\[^{828}\text{Ibid.}\]
Access to information has been expressly mandate under CRPD.\textsuperscript{829} Thus, recognition of right to information and communications and Web Content accessibility needs to be incorporated in the PWD Act. The National Informatics Center recognizes the term "universal accessibility" refers to making website accessible to ALL irrespective of technologies, platforms, devices or disabilities of any kind.\textsuperscript{830} It is important that public funds for the welfare of disabled persons should be used to support research on their access priorities, development of assistive devices for improving mobility of disables people.\textsuperscript{831}

The right to liberty and freedom of movement is part of the fundamental rights that are available to all citizens under article 21 and article 19 of the Indian Constitution. Article 14 of the Constitution provides equality before the law and equal protection of the laws to all persons. With respect to persons with disabilities however, the right movement and liberty must be examined in conjunction with the provision of special measures that enable persons with disabilities to exercise the right to the freedom of movement. The right to liberty of movement includes the right to move around freely with in the State and freedom to choose one's residence. To implement this human right for the disabled citizens, the State needs to consider their public transportation and housing policies.\textsuperscript{832} In this regard the PWD Act aims in ensuring non-discrimination and access for persons with disabilities in transport\textsuperscript{833}, the built environment, and for allotment of land in chapter- VII and VIII of the PWD Act.\textsuperscript{834} The positive duty to frame scheme for aids and appliances\textsuperscript{835}, allotment of land at concessional rates\textsuperscript{836}, provide access to public transport, public buildings\textsuperscript{837}, and the roads falls within the frameworks of reasonable accommodation.

Persons with disabilities are members of the society and have the right to remain in the community. They should receive the support they need within the ordinary

\textsuperscript{829} Article 9, CRPD
\textsuperscript{830} National Informatics Center, Department of Information Technology, ‘Government of India, Guidelines for Indian Government Websites’
\textsuperscript{832} WI Article 12 of ICCPR
\textsuperscript{833} Section 45 of the PWD Act, 1995
\textsuperscript{835} Section 42 of the PWD Act, 1995.
\textsuperscript{836} Section 43 of the PWD Act, 1995.
\textsuperscript{837} Section 46 of the PWD Act, 1995
structure of education, health, employment and social services. Aids and appliances, supportive services are basic necessities for persons with disabilities to live a normal life and to have independent living. In India most of the people with disabilities are from low-income groups, since these aids and appliances and assistive devices are relatively expensive, unavailability of these appliances restrict their opportunities for leading an independent and productive life. There are hardly any support services such as affordable and accessible health facilities, rehabilitation, food security, counseling, self help groups, etc. in the community for persons with disabilities. There have been instances where families have sent petitions to the President of India and the Chief Ministers, seeking permission for so-called “mercy killing” of their disabled children. Most people with disability in the country do not even have the disability certificate that is required for them to get benefits from the Government. Disability is not taken properly into account while counting people Below Poverty Line (BPL). As a result, most people with disabilities are excluded from poverty alleviation measures or schemes. Disaster Preparedness measures for persons with disabilities are highly inadequate in the country. The Disaster Management Act does not mention needs of persons with disabilities in the event of any disaster. Access to emergency services, such as ambulance, fire engine, police, etc. for persons with disabilities have not been given due priority. Most of these services have to be accessed telephonically by dialing 100, 101, 102, etc. and there are no alternative methods for persons with speech, hearing and communication disabilities to contact these. These numbers are not known to majority of people and sometimes, these numbers vary from State to State. Even if one wants to access these services in person, there are many barriers - physical, communication and attitudinal.

Adequate protection against power, access for people to power, especially over their own lives, life of political community, and an elaborative social support designed to

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839 A couple in Uttar Pradesh had written a letter to the President of India, seeking “mercy killing” of their four physically-challenged sons. (11th August 2009; One India News:http://news.oneindia.in/2009/08/11/up-parents-look-mercy-killing-of-4-disabled-sons.html); In another case, a poor farmer in a village in Bihar asked the State Government to grant permission for “mercy killing” of two sons with muscular dystrophy. 9th March 2011; NDTV(http://www.ndtv.com/article/india/bihar-parents-look-mercy-killing-for-two-sons-90358)
840 Universal Periodic Review - India KEY ISSUES OF 120 MILLION PERSONS WITH DISABILITIES IN INDIA. New Delhi: Secretariat: National Centre for Promotion of Employment for Disabled People, National Disability Network.
841 Ibid.
liberate people in their own lives, is required to be provided to persons with disabilities. The economic, social and cultural rights need to be protected not just because they enable people to lead active and productive lives but also because of obligation of solidarity that exists within the society. The right to health is of great importance to the people with disabilities, who often receive fewer or poorer quality health services.

The PWD Act focuses exclusively on securing the socio-economic rights of the persons with disabilities, without any reference to the civil-political rights. This is in direct conflict with the fundamental proposition of the CRPD, which is enjoyment of all the rights on an equal basis with the non-disabled.

The right to legal representation has little meaning for a number of persons without financial support and persons belong to socially and economically backward classes. Article 39A of the Constitution of India mandates that the State shall secure the operation of the legal system promotes justice on the basis of equal opportunity and shall in particular provide free legal aid by suitable legislation or schemes or in any other way to ensure the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. In Suk Das v. Union Territory of Arunachal Pradesh stated that it is settled law that free legal assistance at State is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. In M.H. Hoskot v. State of Maharashtra the Supreme Court declared that if a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to appeal (to the Supreme Court) for want of legal assistance, there is implicit in the Court

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843 Ibid
845 Section 20 of the RPD Bill, 2012.
846 In furtherance of constitutional commitment under Article 21, the Legal Services Authority Act of 1986 was enacted. Section 12 (d) of this Act provides entitlements free legal aid to persons with disabilities and persons with mental illness. Section 91 of the Mental Health Act of 1987 makes provision for a right to legal representation and legal aid for persons with mental illness in proceedings under the Act. Section 91 of the Mental Health Act of 1987 makes provision for a right to legal representation and legal aid for persons with mental illness in proceedings under the Act.
847 (1986) 2 SCC 401
the power to assign counsel for such imprisoned individual for doing complete justice. In
2010 the National Legal Services Authority through the National Legal Services
Authority (Legal Services to the Mentally ill Persons and Persons with Mental
Disabilities) Scheme, 2010, has put into place a mechanism to provide legal aid to
persons with psychosocial and intellectual disability. In pursuance of Access to justice for
PWDs in the line with CRPD\textsuperscript{848} the Rights of Persons with Disabilities Bill, 2012
provides comprehensive provision to make justice accessible and affordable for PWDs.\textsuperscript{849}

Access to Justice requires courts, police stations and prisons to be accessible. At
present, the Supreme Court of India is accessible and the High Courts of Bombay,
Bangalore and Delhi are partially accessible. Regarding to ensure Procedural Access as
persons with disabilities require distinct modes means and methods of communication, it
is important that such modes, means and methods are both recognized and facilitated by
policing and justicing institutions. At present, sections 340 and 341 of the Code of
Criminal Procedure 1973 are the only provisions which refer to situations where an
accused is not of unsound mind but is unable to communicate or understand the
proceedings against him or her. The Courts are under an obligation to enquire as to how
the family of the person with disability communicates with him or her, and then attempt
to understand whether the individual can be made to understand the proceedings.\textsuperscript{850} In
order to aid such an understanding the courts are under an obligation to provide for
appropriate interpretation facilities.\textsuperscript{851} The communication, physical access, legal

\textsuperscript{848} Article 13 of the CRPD states; (1) States Parties shall ensure effective access to justice for persons with
disabilities on an equal basis with others, including through the provision of procedural and age-appropriate
accommodations, in order to facilitate their effective role as direct and indirect participants, including as
witnesses, in all legal proceedings, including at investigative and other preliminary stages. (2) In order to
help to ensure effective access to justice for persons with disabilities, States Parties shall promote
appropriate training for those working in the field of administration of justice, including police and prison
staff.

\textsuperscript{849} Section 20, RPD Bill 2012 provides that all persons with disabilities and Disabled Persons’
Organizations shall, in their individual or representative capacity, as the case may be, have the right to
move any court; tribunal; authority; commission; or any other body having judicial or quasi judicial or
investigative powers on an equal basis with others. Further National and State Legal Services Authorities
shall make provisions including reasonable accommodations to ensure that persons with disabilities have
access to any scheme, program, facility or service offered by them on an equal basis with others. The
Government mechanism shall make proper measure to: (a) ensure that all their public documents are in
accessible formats; (b) ensure that filing departments, registry or any other office of records are supplied
with necessary equipment to enable filing, storing and referring to the documents and evidence in accessible
formats; and (c) make available all necessary facilities and equipment to facilitate recording of testimonies,
arguments or opinion given by persons with disabilities in their preferred language and means of
communication;

\textsuperscript{850} AIR 1957 Ker 7.

\textsuperscript{851} AIR1957MAD24.
representation and aid entitlements of persons with disabilities to be explicitly recognized as in the RPDB.

The Supreme Court of India has held that the right to shelter or adequate housing is a fundamental human right emanating from this provision, as well as following from Article 21 of the Constitution which guarantees to all the right to life. This has been established in numerous Supreme Court decisions, including *U.P. Avas Evam Vikas Parishad v. Friends Cooperative Housing Society Ltd.*\(^{852}\) where the Court held that, "the right to shelter is a fundamental right, which springs from the right to residence under Article 19(1)(e) and the right to life under Article 21". In *Chameli Singh v. State of UP*\(^{853}\) the Supreme Court clearly read in the right to adequate shelter in a place of one’s choice into the right to life under Article 21. Adequate shelter was widely interpreted to include "not just a roof over one’s head but right to all the infrastructure necessary to enable them to live and develop and develop as a human being". Article 19(1) (e) of the Constitution of India guarantees to Indian citizens the right to reside and settle in any part of India. However, according to Article 19(5), reasonable restrictions on the same may be imposed by the State by law, in order to protect the interests of the general public or of persons belonging to any Scheduled Tribes. The mandate of Article 19 CRPD is reinforced by Article 19 (1) (e) of the Constitution of India as it recognizes the individual’s right to live at a place of his or choice. The PWD Act does not differentiate between residential and commercial property as it seeks to promote both social and vocational rehabilitation; for the first time it perceives the right to housing in relation to the financial capacity of the beneficiary the right to ‘suitable’ accommodation is directly linked to its affordability and purchasing power of the buyer.\(^{854}\) This is especially so in the case of persons with disabilities, where the income generation cycle is obstructed at several points. Disabled consumers face several impediments in operating independent accounts and other related services in most banks as they are asked to open joint accounts which also mean they can have privacy in their financial matters, this problem is

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852 AIR 1996 SC 114
853 (1996) 2 SSC 549
854 Section 43 of the Disabilities Act “the appropriate governments and local authorities shall by notification, frame schemes in favor of persons with disabilities for the preferential allotment of land at concessional rates, for the purposes of housing; setting up business and special recreation centers establishing special schools and research centers; and the establishment of factories by entrepreneurs with disabilities”. Thereby, it mandates the scheme to provide put-of-turn allotment to disabled applicants at discounted rates, though it does not specify the percentage of the subsidy to be extended.
magnified more for those with mental disabilities due to the controversy over their capacity to take these decisions. While issues of access to the education system and to places of employment have considerable achieved, the multi-layered debate on accessing financial institutions has only just commenced. Similarly the National Trust Act also contains provision to strengthen existing facilities for the housing of persons with disabilities.855 For the first time in India, the Trust envisages that disabled persons can live independently, in close contact with the community they belong to. While families of persons with disabilities are to be extended training and assistance to ensure full participation of the disabled members, those who do not have families must also be supported according to the Trust Act. However, the situation on the ground shows that many of these goals have yet to be achieved, and indicates the need for policies containing more specific strategies aimed at ensuring that those with disabilities can live within their communities.

The requirement of living in the community primarily arises from the history of institutional living that is experienced by persons with disabilities. One of the main prerequisites for Independence for persons with disabilities is an effective housing policy that entails non discriminatory public works programmes, non-discriminatory housing subsidies and nondiscriminatory building codes. Non-discriminatory housing subsidies mean that programmes for public or social housing in the form of incentives in the form of subsidy and tax rebate to builders with the sole condition that the buildings conform to accessibility housing standards.856 Where law and policy have opted for a mixed residential policy for persons with disabilities, non-governmental initiatives have put in place some innovative community living options. Thus basic needs have attempted to assist community living by establishing cross disability protected communities.

Persons with disabilities do not have accessible, affordable and good quality health care in India. Most medical professionals are ill informed about disability and do not provide correct information, diagnosis and treatment. Misleading persons with disabilities and their families is quite rampant. Hospitals, clinics, primary health centers are often inaccessible for persons with disabilities. Only about 6% people with disabilities have access to rehabilitation programs in the country. The flagship health

855 Section 10 of National Trust Act, 1999.
programme, 'National Rural Health Mission' does not include access to health for persons with disabilities. Most persons with disabilities are denied health insurance. Many persons with disabilities have been denied medical treatment in hospitals citing reasons like inaccessibility, not having adequate human resources or suitable equipments, inability to communicate.

India's health policy has been based on the traditional medical model of disability prevalent across the world. Section 25 of PWD Act was influenced by this medical model. This section provides that within the limits of their economic capacity and development, the appropriate Governments and the local authorities, with a view to preventing the occurrence of disabilities, shall

Persons with disabilities do not have accessible, affordable and good quality health care in India. Most medical professionals are ill informed about disability and do not provide correct information, diagnosis and treatment. Misleading persons with disabilities and their families is quite rampant. Hospitals, clinics, primary health centre are often inaccessible for persons with disabilities. Only about 6% people with disabilities have access to rehabilitation programs in the country.\(^{857}\) The 'National Rural Health Mission' does not include access to health for persons with disabilities. Most persons with disabilities are denied health insurance. Many persons with disabilities have been denied medical treatment in hospitals citing reasons like inaccessibility, not having adequate human resources or suitable equipments, inability to communicate.

The provisions in the PWD Act referring to prevention and early detection of disabilities are based on the presumption that the quality of life in case of the persons with disabilities is inherently poor and difficult and hence there should be eradication of all impairments. The CRPD on the other hand makes the point that the quality of life need not be difficult if the social environment is barrier free and facilitating equal opportunities of care and protection. This reduces the exclusive focus on medical intervention to address the effects of impairment.\(^{858}\)

The enforcement mechanisms under the PWD Act need to be clarified and strengthened. The enforcement mechanism that has not been effectively used is the office

\(^{857}\) Rehabilitation Professionals in Public Health Systems - An Initiative to Reduce Vulnerabilities for Disadvantaged Communities by Satish Mishra, Handicap International

\(^{858}\) Ibid
of Chief Commissioner and the commissioner for persons with disabilities. Under Chapter-XII of the PWD Act the Central Government has appointed the CCD and the Commissioners at the state level for the protection of rights of PWDs. They are the watch dog bodies with the power of civil court. The CCD and CD at the state level have the power to safeguard the rights and the facilities made available to PWDs, coordinate with the government for implementation of programs and schemes for disabled persons, monitor the utilization of funds and submit reports to the state on the implementation of the PWD Act. There is need to set up Disability Tribunals having direct enforcement powers. Because justice is far cry in India for PWDs. None of the Courts have ramps, Braille transcripts or audio books, or sign language interpreters. An alternative is obviously strengthening of both central and state Commissioners’ offices to play their grievance redressal function more effectively. Most importantly, the Commissioners also have the power to take up complaints relating to deprivation of rights of PWDs and to look into any non-implementation of the PWD Act. These wide range of powers, but often not effectively used to give relief to PWDs. There has not been a single instance where either the CCD or the CD at the state level have taken any petition to the high court or the Supreme Court for effective implementation of the PWD Act. The CCD and the CD required to submit report on the implementation of the Act to the Central Government and the respective state governments but research shows that hardly any regular and adequate reports has been submitted in this regard. As CRPD mandates States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages, there is need to incorporate stringent provisions to ensure access to justice to PWDs. A review of human resource and financial capacity of central and state Commissioners’ offices is also needed, and guidelines on

859 Section. 57 of the PWD Act.
860 Section. 60 of the PWD Act.
862 Section. 58 of the PWD Act.
863 KOTHARI, J. THE FUTURE OF DISABILITY LAW IN INDIA. Oxford University Press.(2012)
864 Ibid
865 Chief Commissioner of disability
866 Commissioner of disability
867 Article 13 of CRPD

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minimum staffing levels introduced. NGOs should also be brought more actively into both policy and implementation, but with strengthened financial accountability and monitoring of program outcomes.

Summary:

Disabled are also not a homogenous group. There are different types of disabilities, with different requirements. Each once problems, needs and help required are different from the other. In spite of several international and national pronouncements the rights of the disabled has remained on paper. There is need to bring policy level changes backed by adequate budgetary allocation. There are both policy and institutional reform needs in the disability sector. Policy reforms such as broadening the definition of disabilities in the line with CRPD, incorporating principle of reasonable accommodation, defining accessibility in wider sense, defining the parameter of inclusion in the context of providing inclusive education, de-linking of definitional inclusion with specific entitlements under the Act. Policy measures should ensure involvement of persons with disabilities themselves at all stages of policy formulation, implementation and monitoring. MHRD, MSJE and central and state Commissioners’ offices should develop programs in collaboration with NGOs for awareness of officials, service providers, and community based rehabilitation programs for people with disabilities. A periodic monitoring of awareness, with particular focus on lagging states and remote regions, should be put in place to assess impact. With regard to bring in institutional frameworks to strengthened direct involvement of persons with disabilities in formulating policies, programs and developing strategies how to implement these policies effectively. Instead of keeping the all matters relating to persons with disabilities under one Ministry e, g Ministry of Social Justice and Empowerment, responsibility and accountability for specific program or policy for PWDs should be direct brought under the relevant Ministry for example regarding all educational policies for PWDs should be brought under the Ministry of MHRD.

The definition of disability is one of the most regressive aspects of the PWD Act and is highly problematic as it is extremely narrow and medical oriented. As because the definition determines who are persons with disabilities, and who are eligible for the government entitlements, due to the narrow definition of disability many people have been excluded from getting the benefits. Thus, the disability sector has been demanding
the expansion of the definition of disability for a long time, because impairments not finding inclusion in the exhaustive definition could not obtain the granted benefits by the State to persons with disabilities. To promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, the definition of persons with disabilities needs to be inclusive one based on social model to include those who have physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in the society on an equal basis with others.

The principle of reasonable accommodation that the CRPD refers to is missing from the PWD Act. Though it could be argued that the principle is present in the PWD Act in the form of provisions relating to non-discrimination at workplace, reservation in educational schools Colleges and institutions but it is limited only to the employers in the public sector and government schools or government funded institutions. The judiciary has played an active role in making the PWD Act effective. While judicial interpretation is being influenced by changing perceptions of disability emanating from the disability rights movement, wider civil society and international legal instruments, the impact of age-old stereotypes of persons with disabilities emphasizing incapacity, helplessness and stigma is equally pervasive. The PWD Act puts in place affirmative action programs for public employment and education, but there is no declaration of the basic rights to equality and non-discrimination and to the protection of the right to life and dignity for all persons with disabilities. Most crucially, the PWD Act does not have any clear equality guarantee for persons with disabilities. Again protecting persons with disabilities from torture, exploitation, violence or abuse, the PWD Act does not address this aspect of discrimination at all.

Hence, on the basis of above discussion and findings of the empirical research the researcher finds all the following hypotheses are highly validated or corroborative:

- The National Legal instruments are yet to match with the International Standardizations to ensure protection and promotion of basic rights of persons with disabilities.

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• The Judicial Responses towards the protection of basic rights of persons with disabilities has significantly positive in the domain of education, employment and accessibility than other rights.

• Lack of stringent anti-discrimination provisions and right-based approach of the PWD Act, 1995 leads to *de jure* and *de facto* discrimination against persons with disabilities in India.

• Principle of Reasonable Accommodation needs to be incorporated with the legislative measures to ensure equality of opportunities in education, employment and accessibility for persons with disabilities.

• The Legislative Programme of Evaluation of PWD Act 1995 would show moderate affirmations from the respondents with respect to the effective implementation of the Act in the State.