



Critical evaluation of laws and legislations for persons with disabilities, especially intellectual disability

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Abstract

Legislations related to disability provide a legal framework for inculcating Persons with Disability in the mainstream and enable them to transcend stigma, discrimination and exclusion. The present paper deliberates upon framework with reference to persons with disability and comprises Domestic laws related to disability in India, Policies and schemes and critical evaluation. India is one of the first few signatories of the United Nations Convention on the Rights of Persons with Disabilities. It has sound legislation, and policies, but the implementation is not done appropriately which results in minor effects. The legislation related to disabilities is being modified as per the recommendations of the UNCRPD but we need to think globally and act locally by making these legislations relevant to the actual needs of the persons with disabilities with special reference to their geographic locale. Our country strives to achieve inclusion in the true sense, giving its citizens to enjoy and live their life in a meaningful manner.

Keywords: children with disability, legislations, policies, rights, inclusion

Introduction

Legislations and policies are essential for protecting the rights and dignity of the people in every country. In India, persons with disabilities (PWDs) constitute one of the significant segments of our population. Therefore, legislations related to disability provide a legal framework for inculcating PWDs in the mainstream and enable them to transcend stigma, discrimination and exclusion. India has evolved from the medical model of disability to the social model along with the provisions for the empowerment of PWDs and right based approach emphasizing the fact that society has to change to conventionalize PWDs and provide them equal rights and opportunities in all spheres. In essence, this concept takes us to the idea of viewing PWDs as subjects rather than mere objects and locating problems in the environment surrounding them rather than in the individual.

There has been an increase in recognition of the abilities of persons with disabilities and the need of the hour is -including them in society depending on their capabilities. For the holistic understanding of varied legislations, policies, programs and rights of persons with disabilities, especially intellectual disability, it becomes imperative to gain insights of the nuances of intellectual disability. The Intellectual Disability (ID), as recognized under the horizon of disability floated in the Charity model, Functional model and Human Rights model. In keeping with the changing perspective on treating persons with ID, the global bodies at the national and international levels have taken various initiatives to provide equal opportunities to persons with ID by enacting several legislations and implementing various policies and schemes for the empowerment of persons with disabilities.

India is one of the first few signatories of the United Nations Convention on the Rights of Persons with Disabilities (2007) ^[1]. It is a landmark international treaty signifying a conceptual

paradigm shift in thinking about the rights of Persons with Disabilities (PwD). It takes disability to a new height that is from viewing persons with disabilities as “objects” of charity, medical treatment and social protection to viewing persons with disabilities as “subjects” with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society. India signed the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and subsequently ratified the same on 1st October 2007. Being a signatory to the Convention, India has an international obligation to comply with the provisions of the Convention. The UNCRPD does not define disability, but article 1 states that "persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

The present paper deliberates upon the framework regarding persons with disability and comprises the following sections:

- Domestic laws related to disability in India
- Policies and schemes
- Critical evaluation
- Conclusion

Domestic laws related to disability in India

After the takeover of the administration of India by the British crown in 1858, a large number of laws were enacted in quick succession for controlling the care and treatment of mentally disabled persons in British India. These laws were The Lunacy (Supreme Courts) Act, 1858, The Lunacy (District Courts) Act, 1858, The Indian Lunatic Asylum Act, 1858 (with amendments passed in 1886 and 1889) and The Lunacy Act, 1912. These Laws gave guidelines for the establishment of mental asylums

and established procedures to admit patients with a mental disorder.

Later, the Lunacy Act was replaced by the Mental Health Act 1987, this being the first legislation on disability in independent India to consolidate and amend laws relating to the treatment and care of mentally ill persons, and to make better provisions concerning their property and affairs. This Act focuses on mental illness, not on intellectual disability. The act does not include persons with ID/MR in its domain. Now, the said Act has been repealed by the Mental Health Act 2016, discussed in later paragraphs.

a) Rehabilitation Council of India (RCI) act 1992

The Act is in response to the need to have uniformity and ensure minimum standards, quality of education and training in the disability field. The RCI is entrusted with the responsibility to develop standardized syllabi for various rehabilitation courses and to regulate and monitoring services given to persons with disability. It defined MR as a condition of arrested or incomplete development of the mind of a person which is especially characterized by sub-normality of intelligence. The Act was amended in 2000 and incorporated changes in terminologies, like- education to special education, handicap to PwD and certain other categories of professionals like vocational counsellors, multipurpose rehabilitation therapists and more were included.

b) The Persons with Disabilities (equal opportunities, protection of rights and full participation) act 1995

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PwD Act) is the most important piece of legislation enacted by the Parliament in the history of the disability movement in India. The PwD Act recognizes the following seven disabilities in its domain: 1. Blindness, 2. Low Vision, 3. Leprosy – cured, 4. Hearing impairment, 5. Locomotor Disability, 6. Mental retardation and 7. Mental Illness With the implementation of this Act, mental retardation has been recognized as a disability with an identity of its own. The Act defined MR as "Mental Retardation means a condition of arrested or incomplete development of the mind which is specifically characterized by impairment of adaptive behaviour manifested during the developmental period, which contributes to the overall level of intelligence, i.e. cognitive, language, motor and Social abilities."

c) The National Trust Act (for the welfare of persons with autism, cerebral palsy, mental retardation and multiple disabilities) 1999

The Act enables persons with disability to live as independently and as fully as possible within and close to the community to which they belong. The idea is not to push people out of society and keep them in residential institutions such as what has happened in the west, but to encourage them to live within their families. The main objective is to provide need-based services during the period of crisis in the family of a person with a disability.

d) The right of children to free and compulsory education (RTE) act, 2009 ^[9]

The Act mandates free and compulsory education of all children of 6-14 years of age until they complete elementary

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education in a neighbourhood school. There is also a reference of children with disabilities in the Act, who are to be given an elementary education in the age range of 6-18 years. The Act attempts to provide an enabling environment for disabled children entering school, attend and complete elementary education. It refers to the disabilities stated in the Persons with Disabilities Act, of 1995. It also has a provision for every child, who is above six years of age and has not yet been admitted to any school or could not complete his/ her elementary education due to any reason, to be admitted in a class appropriate to his or her age. The child admitted under an age-appropriate admission has a right to receive special training or additional instruction to be at par with other children in the class. Some important provisions in the Act are: • Completion of elementary education for children, even after fourteen years of age • Right of child to seek transfer to any other school. • No child is denied admission because of lack of proof of age • Maintaining the pupil-teacher ratio as specified • Laying down the curriculum and evaluation procedures • Monitoring child's right to education.

e) The Rights of Persons with Disability act 2016 ^[7]

After India signed and ratified the UNCRPD in 2007, the process of enacting new legislation began in 2010 to make it compliant with the UNCRPD. After a series of consultation meetings and a drafting process, the Rights of PwD Act, 2016 (RPWD Act, 2016) ^[7] was passed replacing PwD Act 1995 ^[6]. The Act lays stress on non-discrimination, full and effective participation and inclusion in society, respect for difference and acceptance of disabilities as part of human diversity and humanity, equality of opportunity, accessibility, equality between men and women, respect for the evolving capacities of children with disabilities, and respect for the right of children with disabilities to preserve their identities. RPWD Act 2016 ^[7], encompasses 21 disabilities- • Blindness • Low-vision • Leprosy Cured persons • Hearing Impairment (deaf and hard of hearing) • Locomotor Disability • Dwarfism • Intellectual Disability • Mental Illness • Autism Spectrum Disorder • Cerebral Palsy • Muscular Dystrophy • Chronic Neurological conditions • Specific Learning Disabilities • Multiple Sclerosis • Speech and Language disability • Thalassemia • Haemophilia • Sickle Cell disease • Multiple Disabilities including deaf-blindness • Acid Attack victim • Parkinson's disease.

The nomenclature, mental retardation is replaced by intellectual disability which is defined as "a condition characterized by significant limitation both in intellectual functioning (reasoning, learning, problem-solving) and in adaptive behaviour which covers a range of everyday social and practical skills. The Act highlights the importance of strong family and social bond that exists in our country which are of great help to persons with ID.

f) Mental health act, 2017 ^[4]

On 28 March 2017, Parliament passed the Mental Health care Bill, 2016 which repealed the existing Mental Health Act, of 1987. On the 7th of April, 2017, the Mental Health care Act, 2017 has come into existence. It aims to provide mental health care and services for persons with mental illness and protect, promote and fulfil the rights of such persons during the delivery of mental health care and service. The Act has been formulated in line with the Convention on the Rights of Persons with

Disabilities. It defines “mental illness” however, it does not include the term intellectual disability which is a condition of arrested or incomplete development of mind of a person, especially characterized by sub-normality of intelligence and does not provide for the advance directive to minors, as per Section 5. The special feature of the Act is that it guarantees every person the right to access mental healthcare and treatment from mental health services run or funded by the Government. It aims at providing mental health services of good quality at an affordable cost. It also ensures that mental health services are geographically accessible and are provided without discrimination.

Policies and schemes

Along with the legislation, several policies and programs have been initiated by the Government of India for children and adolescents with ID.

- **Sarva Shiksha Abhiyan** - Education for All was implemented by the Ministry of Human Resource Development. Government of India in 2001 all over the country children in the age group of 6 to 14 years; initiated the policy of education for all in an included set up. The special educators were appointed as resource teachers for children with special needs.
- The National Policy for Persons with Disabilities released in February 2006 includes persons with visual, hearing, speech, locomotor and mental disabilities. This policy was formulated by the Government to deal with the Physical, Educational & Economic Rehabilitation of persons with disabilities protecting them to access care, protection and security.
- The Ministry of Social Justice and Empowerment launched a scheme Assistance to Disabled Persons for Purchase/Fitting of Aids and Appliances (ADIP), which is one of the major initiatives by the Government of India. This scheme was implemented to assist the PWDs in procuring durable, sophisticated and scientifically manufactured, modern, standard aids and appliances to promote physical, social, and psychological rehabilitation.
- **National Health Policy 2017** ^[5]- The main objective of the Policy is to achieve the highest possible level of good health and well-being, through a preventive and promotive health care orientation in all developmental policies, and to achieve universal access to good quality health care services as well as stringent monitoring mechanisms for both private and public health institutes.

Several concessions and benefits have been granted by the Central government for children and adolescents with ID and their caregivers.

- 75% concession in the basic train fare in first and second class is allowed to a person with ID accompanied by an escort.
- Public telephone with or without STD facilities are allotted by the Department of Telephones to enable the public to make telephone calls at prescribed charges. ID persons are being given preference in allotment of telephone booths as a means of sustenance, vocational rehabilitation and income generation.
- The scholarships are awarded to ID students subject to their being certified by a clinical psychologist/psychiatrist.

- A government servant is eligible to draw Children's Educational Allowance when he/she is compelled to send a child with ID to a school away from the station of his/her posting.
- The Government has made provision for a choice in the place of posting of parents in government service having a child with ID.
- For setting up special schools, voluntary organizations receive grants up to 90%. Preference is given for opening schools in new districts and upgradation of existing schools.

Critical evaluation

There is a need to differentiate between PWDs (like physical, hearing, visual and others) and PWID (Persons with Intellectual Disabilities). The term disabled constitutes all of disabilities, but people with ID are different, they are characterized by below-average intelligence, and a lack of ability to learn, reason, make decisions, and solve problems. They fail to adapt or adjust to new situations and have difficulty in understanding and following social rules. Separate laws and policies are required for PwID. Other PWDs (physical, visual, hearing) are well aware of their rights and privileges and can display skills and knowledge to achieve them. Society and the attitude of the people are the real cause of problems for people with intellectual disabilities since it continues to put numerous barriers which are visible in the spheres of education, architecture, transport, health and other activities.

The major lacunae in the above Acts and Programs have been summarized below:

- The meaning of disability varies, and gradual changes in policies and Acts are made, as all the Acts of the 1990s e.g. PWD Act, NTA Act, RCI Act, the term ‘Handicap’ was used to refer to people with disability. Later, with the increasing sensitization, ‘People First’ terminology was adopted. For example, the term ‘Handicapped’ as referred to in PWD Act 1995 ^[6]; was later replaced by ‘Persons with Disabilities. Afterwards, all the Acts of the late 1990s tried to pay attention to ‘People First’ terminology and called ‘People with disabilities. National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act (1999), the definitions of terms such as ‘mental retardation’ and ‘Persons with disabilities’ etc. were clarified. The definition of ‘mental retardation’ was the same as RCI Act 1992 and the definition of ‘Multiple Disabilities’ was taken from PWD Act 1995 ^[6]. All the acts from the 1980s seem to lean towards inclusion. But in real terms, these were not impeccably inclusive. Most of them have discriminating elements against people with severe or intellectual disabilities, regarding regular vs. special schooling. The ten schemes initiated by NTA in 2015 for the welfare and development of people with ID is an applauding task, but out of 10 schemes, only 4 are practically functioning in Delhi namely- Niramay, Sahayogi, Disha and Sambhav.
- All the laws and schemes for differently able can be accessed only after one possesses the disability certificate. Thus, it is an important and empowering tool for availing of the concessions and benefits, concerning examination allowances, reduced fares on public transport, or financial

assistance. To obtain a disability certificate, a person should have 40% of a minimum degree of disability that is IQ below 69 for a person with ID. The Government of Delhi has authorised ten hospitals to issue a disability certificate to persons with ID. However, on average, all the hospitals give three months of waiting time to test the IQ of the child to grant the disability certificate. Moreover, among these ten authorized hospitals, four do not have a clinical psychologist to test the IQ of the patient. The hospitals send patients to other agencies for IQ testing. This whole process of accessing the disability certificate is daunting and exhausting for parents and the child too.

- After Independence, the first disability act which was the Mental Health Act, of 1987 did not constitute mental retardation in its realm. Though the act excludes mental retardation but defines both the terms MI and MR as "Mental illness" meaning any mental disorder other than mental retardation; it also defines "Mental retardation" as a condition of arrested or incomplete development of the mind of a person which is especially characterized by the sub normality of intelligence;" and does not consider this population to take benefits under it. The Act is concerned mainly with the legal procedure of licensing, regulating admissions and guardianship matters. Human rights issues and mental health care delivery are not properly addressed in this Act. Due to a large number of very complicated procedures, defects and absurdities in the Act, it was never been implemented properly. The constitutional validity of the MHA, 1987 has been questioned several times by human rights activists because it adheres to curtailment of personal liberty without the provision of proper review by any judicial body. The new Mental Health Act came into existence in 2017 and replaced the Mental Health Act, of 1987. It also did not include ID in its domain, but comprehensively defines both Mental Illness and Intellectual Disability. The Act does not provide advance directives to minors, as per Section 5 of the Act. It is the duty of the Central and State governments, to ensure all the services but the expenditure estimated will not meet the obligations under the Act. The Centre and State, both have responsibilities as per the Act, however, it does not provide sharing of funds between them.
- Present disability laws are just like boasting without reviewing the real picture. The rules and regulations are shallow; they are displayed attractively to create a favourable impression. A lot has been mentioned in the legislation and the papers, but how much these provisions are implemented is a true challenge. Rather than just presenting challenges on paper they are to be implemented in practice. Disabilities are conventionally defined in medical science on a three-point scale established by the World Health Organization in 1980 ranging from impairments, disabilities and handicaps. However, it seems that the PWD Act 1995 ^[6] does not recognize the international classification given by the World Health Organization. The Act has tried to cover every kind of disability. In the current scenario, rather than seeing disability as a medical issue, developed societies are now looking at it as a social issue, but in India, disabilities are still considered stigmatizing. People with Visual Impairment, Hearing Impairment and Physical Impairment

are comparatively in better condition than persons with ID. This section is deprived of very many human rights and fundamental rights. Their disability prevents them from performing day-to-day functions. Because of the social taboo attached to them, they are deprived of their family property, right to pursue a profession, right to education and even the right to get a dignified funeral ceremony after death. As a result, they are segregated from the mainstream. In 1995, PWD was the first Indian Act after the Independence that included ID in its nomenclature. Thus, nearly after 47 years of independence, intellectual disability was acknowledged. Another major drawback of the PWD Act was that in every clause, it was written: "within the economic capability of state...". Therefore, due to the lack of finance, the State did not immediately translate their promises into action, though it acted as the impetus for several other development projects. Now, the PWD Act 1995 ^[6] has been replaced by the Rights of Persons with Disability Act 2016 ^[7].

- The new Act, Rights of Persons with Disability 2016 ^[7] presumes a lack of legal capacity concerning ID. Sections 62(1) and 68(1) say "a person of unsound mind and stand so declared by a competent court" from becoming a member of the Central and State Advisory Boards respectively. Chapters of education, vocational, and self-employment are silent on the specific measures that need to be taken to ensure the realization of their rights. By, considering the attitudinal and environmental barriers faced by PWID, it requires special emphasis and social welfare measures to bring them into the mainstream. The Law is in a flummoxed state as sometimes it gives benefits to the person with ID (like section 84 of the IPC absolving them from criminal responsibility), and sometimes it is detrimental for them (like disqualification clauses in holding various public offices including holding the offices of members of advisory boards as above). The Act fails to see the importance of the family, PWID requires special and different types of attention and care due to the nature of their disability. They are not aware of their disability because of the lack of insight. In these circumstances, their families are a great asset in providing them care and support. In our country, family is a very important asset in the management of ID as personnel employed in mental health care are extremely scarce. Family members need to be involved to a greater extent in mental health care and family support should be encouraged as it provides moral, emotional, and physical support to the PWID. Often, because of the provisions made in section 7(2) of the Act may result in a situation, in which the family members and other caregivers may be scared to provide the required help in which the family members' caregivers are less proactive. Moreover, it denies the possibility that a person living with an intellectual disability may not be able to seek support at all or may not be able to take a decision even when all the supports are made available. While ignoring the role and importance of family in the care, the Act is silent on how the best support system would be built for such a large country with millions of persons suffering from severe IDs.
- Children with disabilities are among the most disadvantaged in terms of access to schooling and completion of elementary education. RTE 2009 ^[9] could not

cover all the differently able students as more than one-third of all out-of-school children are disabled (UNICEF, 2011). Not only do these children suffer from mental deformities, but they are also the victims of societal prejudice, including the schools. Some schools explicitly refuse admission or actively dissuade them from joining. The design of schools, and facilities such as toilets, do not keep their needs in view. Additional support by way of special teachers and learning materials is not provided. The school environment is indifferent to their learning and psychological needs, and consequently many discontinue schooling or do not even enter school. After the enactment of the above laws and legislations, their aims and purposes have not been served. The reasons are some lacunas as well as lack of implementation, due to which India is lagging in the international arena from the country like US, which enacted the Americans with Disabilities Act, 1990 (hereafter referred to as the US Act). It is worthwhile to mention here that, the salient features of the statutes of both countries are similar and seek to provide for education, employment, affirmative action, full participation, non-discrimination, and research and manpower development. Despite all the efforts taken at various levels of the learning process, several factors still hamper the progress on the part of beneficiaries. First, the attitude of the non-disabled is proving to be a major barrier to the social integration of persons with disabilities. The more severe and visible the deformity is, the greater the fear of contagion, hence the attitude of aversion and segregation towards the crippled. Such attitudes reinforced by religious institutions may militate against any attempts to include students with disabilities in regular schools (Kauts & Bhardwaj, 2012) ^[3]. For example, Hindus (who constitute 85 per cent of the total population in India) believe that disability is a consequence of misdeeds performed in their previous life (often referred to as the doctrine of Karma). Any attempts to improve the life of a person with a disability may be considered a “defiance of the wills of Allah or as interference with a person’s karma”. Secondly, a large number of school personnel are also not aware of funding available to include students with ID in regular schools. Unless people, especially parents of children with disabilities and school personnel, are made aware of the various provisions enshrined in the Acts and policies, the Central and State government's commitment to providing integrated education will be a fruitless exercise. The majority of school personnel in India are not trained to design and implement educational programs for students with disabilities in regular schools. Most teacher training programs do not have a unit on Disability Studies. The universities, which do cover some aspects of special education in their teacher training programs, fail to train teachers adequately to work in integrated settings.

Conclusion

India has sound legislations, policies and schemes in place, but the implementation is not done properly which results in lesser impact. The legislation related to disabilities is being modified as per the recommendations of the UNCRPD but we need to think globally and act locally by making these legislations relevant to the actual needs of the persons with disabilities with

special reference to their geographic locale. The various schemes launched by the government must be flexible to accommodate all types of disabilities including children with ID. Although some schemes are available, at the time of actual implementation problems are faced. We should strive for extending our support and cooperation to create an India without discrimination, prejudice and stigma. A country which aims to achieve inclusion in the true sense, meaning giving a fair chance to all its citizens to enjoy and live their life in a meaningful manner and enable them to participate and contribute to their full capacity.

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