Disability Manual

National Human Rights Commission
India

Contributors

Marcia Rioux
- Approaches to Disability
- International Standards with reference to Social Cultural Rights

Collin Gonzalves
- Domestic Standards with reference to Social Rights

Andrew Byrnes
- Overview of International Law
- International Procedures
- International Standards with reference to Economic Rights

S K Rungta
- Domestic Standards with reference to Economic Rights

Amita Dhanda
- Domestic Standards with reference to Civil and Political Rights

Kieren Fritzpatrick
- International Standards with reference to Civil and Political Rights

Anuradha Mohit
- Definition, Causes and Approaches to Disability
- Domestic Standards with reference to Civil and Political Rights
- Domestic Standards with reference to Social Rights, Social Security and Right to Own and Manage Property

Disability Manual

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National Human Rights Commission
Faridkot House
Copernicus Marg
New Delhi-110 001
India
Telephone: 23382263
Fax: 23384863
Website: www.nhrc.nic.in

Printed by Global Print & Pack
Email : printservice1@gmail.com

FOREWORD

There is no dearth of rules, regulations and constitutional provisions aiming at safeguarding the rights of persons with disabilities. Inspite of all this, the country is stuck in a time warp when it comes to even acknowledging the existence of disabled people, leave aside the redressal of their issues.

However, today, there is definitely a growing awareness of the existence of disability. In order to combat any injustice or inequality, education always comes in more than handy. The education in turn is equally important for both the privileged and the marginalized. The aim of an all inclusive education system should be to create a conducive environment for the marginalized or the minority to exercise their potential to the fullest. The emphasis should also be on enabling those in power develop an astute sense of rationality and judgment so that they can make optimum use of their education to address various inequalities afflicting the society.

The NHRC has expressly been mandated to promote human rights literacy and awareness under section 12(h) of the Protection of Human Rights Act, 1993. We have been serving this goal to the best of our potential. Through our various activities and programmes, we are trying to create ethos where something 'out of the normal' is not dismissed as deviant. The aim of the commission, is to promote and protect the human rights of all, particularly the marginalized and the disadvantaged.

Notwithstanding the growing awareness on the topic of disability rights, it still remains a relatively new and unexplored dimension in the pre-existing repertoire of human rights. Therefore, concrete steps need to be taken in order to develop various institutions and individuals exclusively devoted to the cause of disability rights. The NHRC India through a CHRC-NHRC-IGNOU Linkage Project has developed a manual on disability to help creating a disability sensitive generation of legal practitioners. The manual offers a balanced overview of the existing discourse on disability and highlights both the pros and cons of the system vis-a-vis disability rights.

The NHRC sincerely hope that the manual would not remain just yet another theoretical document but would become a practical tool for safeguarding disability rights by way of sensitizing various sections of the civil society. The organization hopes that the manual would reach various stakeholders including the legal decision makers, human rights activists, academia and the general public. If the manual succeeds in bringing the discourse of the rights of disabled persons to the mainstream of social and political agenda, then their rights would find the required attention in actual decision making.

The manual is by no means an exhaustive document on the discourse of disability rights. The production of knowledge is an ongoing momentum that never has a definitive end. This manual has been updated by incorporating the latest developments including the UN Convention on the Rights of Persons with Disability and recent work done by NHRC. I sincerely hope that the manual would enable in creating an attitudinal shift vis-a-vis persons with disabilities.

(K.G. Balakrishnan)

Acknowledgements

This manual on 'Human Rights, Disability and Law' could not be possible without the critical inputs and support of a number of persons and institutions. It is always difficult to sufficiently acknowledge the valued and unique contributions of each one. The NHRC certainly is indebted to all the institutions that have been associated with the NHRC-CHRC-IGNOU Linkage Project. This manual is a major outcome of this collaborative initiative.

The assistance of Prof. Andrew Byrnes of National University of Australia and Ms. Anuradha Mohit, Special Rapporteur, Disability, NHRC is highly appreciated in developing the framework of the manual. The structure of this manual fits well with the designed curriculum, which may be helpful in initiating a stand-alone certificate course or an optional paper focusing on disability and human rights.

We have been very fortunate to receive rich and comprehensive inputs from eminent academics and activists who posses a rare combination of expertise, without which the analysis of international and domestic law presented in this manual from a disability perspective would have been impossible. The Commission undertook an extensive talent search to generate a team of authors, each of whom possess extensive knowledge in human rights and disability issues. The team comprises Prof. Marcia Rioux, Professor & Chair, School of Health Policy and Management, Director, York University Centre for Health Studies, Prof. Andrew Byrnes, National University of Australia, Prof. Amita Dhanda, NALSAR, Hyderabad, Mr. SK Rungta, Secretary General, National Federation of the Blind, India and a leading human rights advocate, Mr. Kieren Fitzpatrick, Director, Asia Pacific Forum of National Human Rights Institutions, Mr. Colin Gonsalves, Executive Director, Human Rights Law Network (India) and a Senior Advocate. However, the most crucial of all contributions was provided by Ms. Anuradha Mohit, who has been deeply involved over the last two years in the design and management of this project.

A word of special gratitude is necessary to acknowledge the crucial support that we received from various young lawyers, particularly Ms. Ritu Kumar, Ms. Anne Carbert, and Ms. Priyanka Chirimar. The range of their support include visits to libraries, net searches, data entries, proof readings and most importantly, the preparation of brief summaries of cases that have been used in various parts of the manual.

We also acknowledge, with gratitude, the financial contribution made by CHRC and the financial management provided by the Indira Gandhi National Open University.

To ensure quality, as well as efficient management of the vast body of knowledge, an editorial team was comprised from India and Canada, headed by Ms. Anuradha Mohit, as the chief editor, and Prof. Marcia Rioux and Dr. Sanjay Kumar (Faculty, St. Stephens College, New Delhi) as co-editors. While Prof. Rioux undertook the initial and critical editorial task of ensuring the organization of material in line with the structure of the manual, Ms. Anuradha Mohit not only set the tone but also often added content, particularly to the catalogue of rights for the manual identified by the activists and academics. Dr. Sanjay Kumar's inputs are greatly appreciated in bringing diverse writing styles as close as possible, fundamental for giving the Manual its cohesive appearance. The committed and tireless efforts of the editorial team are placed on

record with appreciation as they were responsible for coordinating with a team of incredibly learned but extremely busy persons.

Behind any successful team there is an army of quiet and dedicated individuals whose efforts must be acknowledged. First and foremost, I would like to thank the Secretary Generals of both NHRC and CHRC and of course Ms. S. Jalaja, former Joint Secretary, NHRC and Ms. Aruna Sharma, present Joint Secretary, NHRC for their committed support and close supervision of this project. The logistics and field management of the Project have been handled in a most business like fashion by Mr. YSR Murthy, Deputy Secretary (Research), NHRC, and his team members C. Sasidharan and Nishith, Mr. Sebastien Sigouin, Program Manager International CHRC, Chris Gilbreth, Project Manager and Prof. Prabha Chawla, IGNOU for which I thank them also.

The Project has also greatly benefited from a number of young and energetic interns especially, Ms. Mayuri Mehta, Ms. Gauri Gopal, Ms. Tanya Julka and Ms. Misha Rai.

The National Human Rights Commission of India would also like to thank everyone who may have helped in the Project and have not been named here.

I have found the impressive range of information, the depth of analysis and the brilliant commentary on law and jurisprudence extremely useful in understanding disability in the framework of human rights. It is my sincere hope that the academics, practitioners and activists will make optimum use of this Manual. NHRC will feel really rewarded when the manual serves the purpose and reaches large number of people to serve the cause of humanity so that "all Human Rights for all" become the spirit of living and do not remain merely as declaration on paper.

Any shortcomings or omissions on the part of the NHRC team in producing this manual as and when noticed shall be taken into consideration for further improvement in future.

Dr. Justice Shivaraj V. Patil
Member
National Human Rights Commission, India.

GLOSSARY

• AAA	Antyodaya Anna Yojana
• ADA	Americans with Disabilities Act
• AIIMS	All India Institute of Medical Sciences
• AIR	All India Reporter
• APF	Asia Pacific Forum
• CAT	Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment
• CEDAW	Convention on the Elimination of all forms of Discrimination against Women
• CERD	Commission on Elimination of Racial Discrimination
• CESCR	Committee on Economic, Social and Cultural Rights
• CHRC	Canadian Human Rights Commission
• CrLJ	Criminal Law Journal
• CMW	Convention on the Rights of All Migrant Workers and Members of their Families
• CRC	Convention on the Rights of Child
• CSW	Commission on the Status of Women
• CWP	Civil Writ Petition
• DALY	Disability Adjusted Life Years
• DDA	Delhi Development Authority
• DRDO	Defence Research and Development Organization
• ECOSOC	Economic and Social Council
• ECT	Electro-Convulsive Therapy
• FAD	Finnish Association of the Deaf
• FAO	Food and Agricultural Organization
• HF	Human Factors
• HRC	Human Rights Committee
• IAS	Indian Administrative Service
• ICC	International Coordinating Committee
• ICCPR	International Covenant on Civil and Political Rights
• ICDS	Integrated Child Development Scheme
• ICESCR	International Covenant on Economic, Social and Cultural Rights

• IEDC	Integrated Education of Disabled Children
• IGNOU	Indira Gandhi National Open University
• ILO	International Labour Organizations
• ITU	International Telecommunications Union
• LIC	Life Insurance Corporation
• LLC	Local Level Committee
• NABARD	National Bank of Agricultural and Rural Development
• NHFDC	National Handicapped Finance Development Corporation
• NHRC	National Human Rights Commission
• NHRIs	National Human Rights Institutions
• NGOs	Non-Government Organizations
• NZLR	New Zealand Law Reporter
• OHCHR	Office of High Commissioner of Human Rights
• PIL	Public Interest Litigation
• RCI	Rehabilitation Council of India
• SAP	Structural Adjustment Programmes
• SC	Supreme Court
• SCC	Supreme Court Cases
• SIDBI	Small Industries Development Bank of India
• SJSRY	Swarna Jayanti Shahari Rojgar Yojana
• UDHR	Universal Declaration of Human Rights
• UN	United Nations
• UNESCAP	United Nations Economic and Social Commission for Asia and Pacific
• UNESCO	United Nations Educational, Scientific and Cultural Organization
• UNHCHR	United Nations High Commissioners for Human Rights
• UPSC	Union Public Service Commission
• VCLT	Vienna Convention on the Law of Treaties
• W3C	World Wide Web Consortium
• WHO	World Health Organization
• WPA	World Programme of Action
• WSIS	World Summit of Information Society

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INTRODUCTION

By all accounts, India is home to the largest number of persons with disability in the world. The 2001 census of the country estimated their number at 22 million. However, according to many observers the actual number of Indians with temporary and permanent disability could be as high as 50 million. Although the Constitution of India guarantees persons with disabilities the full range of civil, political, economic, cultural and social rights, the arrangements necessary to translate the constitutional guarantees into reality have been conspicuously absent till recently.

The dominant social attitude towards persons with disability has been one of pity, from which springs insidious forms of discrimination - the eventual source of their exclusion and extreme isolation. While many marginalized social groups have been able to project their specific social experiences of discrimination and their aspirations onto the wider social plane for discussion and debate, interventions from the disabled have been minimal as they lead dispersed social lives that make their discrimination appear as individual problems. This is exemplified in the Constitution of India that prohibits discrimination on grounds of religion, race, caste, sex or place of birth (Article 15) but does not explicitly mention persons with disability as a group to be protected against discrimination.

Notwithstanding this disappointing scenario, the past decade has also witnessed an unprecedented process of change that has positioned disability in the centre of a debate that focuses on the idea of 'society for all'. Essentially, this is a part of the broader understanding of what a democratic society and state should be, both in terms of the ideals they espouse and the practical institutional steps they take towards realizing those ideals. This new conception of democracy asks for redefining the notion of the social 'main-stream' that is appreciative and accommodative of the difference, instead of expecting various inherently different minorities to fit into the so called mainstream culture.

From it follows that a democratic State must concern itself with issues of equity and justice implying that the defense of human rights is indistinguishable from the defense of democracy that is inclusive in character and respectful of difference. The widespread exclusion and extreme isolation of persons with disabilities from social institutions, on the one hand points to the imposition of physical and social barriers; on the other it exemplifies how poor has been the treatment of society to difference based on disability.

Despite many obstacles that need to be overcome, the human rights approach to disability has led to the evolution of an impressive legal framework and positive jurisprudence that has clarified the content of rights in the context of disability. It goes without saying that when the new laws and procedures are adopted the need for special inputs is created, especially for those who are vested with the duty to implement and provide remedies.

Towards this end, in the year 2003 the NHRC launched a project in partnership with the Canadian Human Rights Commission (CHRC), which possesses vast experience in the protection and promotion of the rights of persons with disabilities in Canada, and the Indira Gandhi National Open University (IGNOU), the leading distance education provider in India.

The overarching aim of the NHRC-CHRC-IGNOU Linkage Project is to increase the capabilities and strengths of both the Commissions and their associated partners to cooperatively address major human rights issues in relation to persons with disabilities. To realize this encompassing objective, a programme to improve technical capabilities and awareness of the NHRC staff, legal practitioners, and disability and human rights advocates has been prioritized.

A key component of the Project was the '*Training of Trainers Programme*', which has prepared a small cadre of human rights trainers in disability who are capable of serving formal and non-formal programmes of legal studies. The Programme was offered in four phases during 2004-2005. Phase I included face-to-face training in a participatory mode. In Phase II the participants undertook individual studies using desk research and field investigations. Phase III included a seminar in which participants shared findings of their studies. In Phase IV, the participants facilitated five training workshops for a group of law faculties, and disability rights and human rights advocates.

This manual on **'Human Rights, Disability and Law'** can serve as reference material for universities and law schools to design curricula for undergraduate and graduate studies programmes on Disability Law, and to incorporate disability issues into courses on the Family, Criminal, Corporate and Labour Laws. It is also hoped that it will prove to be an effective advocacy tool for organizations of disabled persons and NGOs working in the area of disability and human rights. It is also intended to be a practical guide for legal practitioners and general administrators.

The materials compiled in the manual have been field tested during the '*Training of Trainers Programme*'. Needless to say, the inputs gained during the Programme helped immensely in systematically incorporating the education, knowledge and awareness about international and domestic human rights standards and procedures aimed at persons with disabilities.

Structure of the Manual

The basic framework of this manual consists of six parts –

Part A- *Conceptual Foundations*, covering Definitions and Causes of Disability, Approaches to Disability, and the Indian Scenario

Part B– *International Human Rights Law and Its Relation to National Law*, providing an overview of all Human Rights Instruments and Procedures established under them including a section on International Law in Relation to Domestic Law

Part C- *Application of Social and Cultural Rights to the Disability Context*, covering International and Domestic Standards, examples of jurisprudence including detailed discussion on specific rights

Part D- *Application of Economic Rights to the Disability Context*, covering International and Domestic Standards, examples of jurisprudence including detailed discussion on specific rights

Part E– *Application of Civil and Political Rights to the Disability Context*, covering International and Domestic Standards, examples of jurisprudence including detailed discussion on specific rights

Part F- *Using International Human Rights Procedures to Advance the Human Rights of Persons with Disabilities*, covering reporting procedures, complaints procedures, inquiry procedures, thematic procedures, charter based procedures, regional procedures, and monitoring and enforcement mechanisms under domestic disability laws and redressal procedures.

At the end of Part F, seven national and international legal instruments directly related to disability have been annexed for ease of reference.

Arrangement of Materials

This manual explores a variety of general and disability specific instruments, such as core international human rights treaties, soft law instruments - declarations, proclamations and rules - in order to establish their relevance for persons with disabilities. The Constitution of India and relevant statutes have also been analyzed. A conscious effort has also been made to document examples of positive jurisprudence, disability specific as well as general, to encourage their wide utilization by legal practitioners and activists.

Disability is an emerging area and has gained unparallel attention with the effort of the United Nations to adopt a binding instrument in the international human rights law. In response to a continued advocacy for a disability convention, in December 2001 the UN General Assembly passed a resolution establishing an Ad Hoc Committee:

> [T]o consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the field of social development, human rights and non-discrimination, taking into account the recommendations of the Commission of Human Rights and the Commission for Social Development.[1]

The effort to harmonize experience from the fields of social development and human rights into a single, comprehensive and integral treaty is in itself a unique opportunity to underpin the cultural shift. This treaty elaboration effort by the UN has also enlarged the conventional role of National Human Rights Institutions, who normally seek to translate the international human rights norms and standards into practical action at the ground level, where it matters most. The practical knowledge that NHRIs possess about the functioning of laws and their vigilant inquiry into human rights violations equip them with unique capabilities that have been found useful by the United Nations in tailoring rights to the circumstances of persons with disability.

Encouraging the active participation by National Human Rights Institutions, the United Nations High Commissioner for Human Rights mentioned 'it will be of utmost importance that not only States but also National Human Rights Institutions are able to contribute their experience to the elaboration of the new Convention on the rights of persons with disabilities.'[2]

Responding positively to this call, the National Human Rights Commission of India undertook a series of

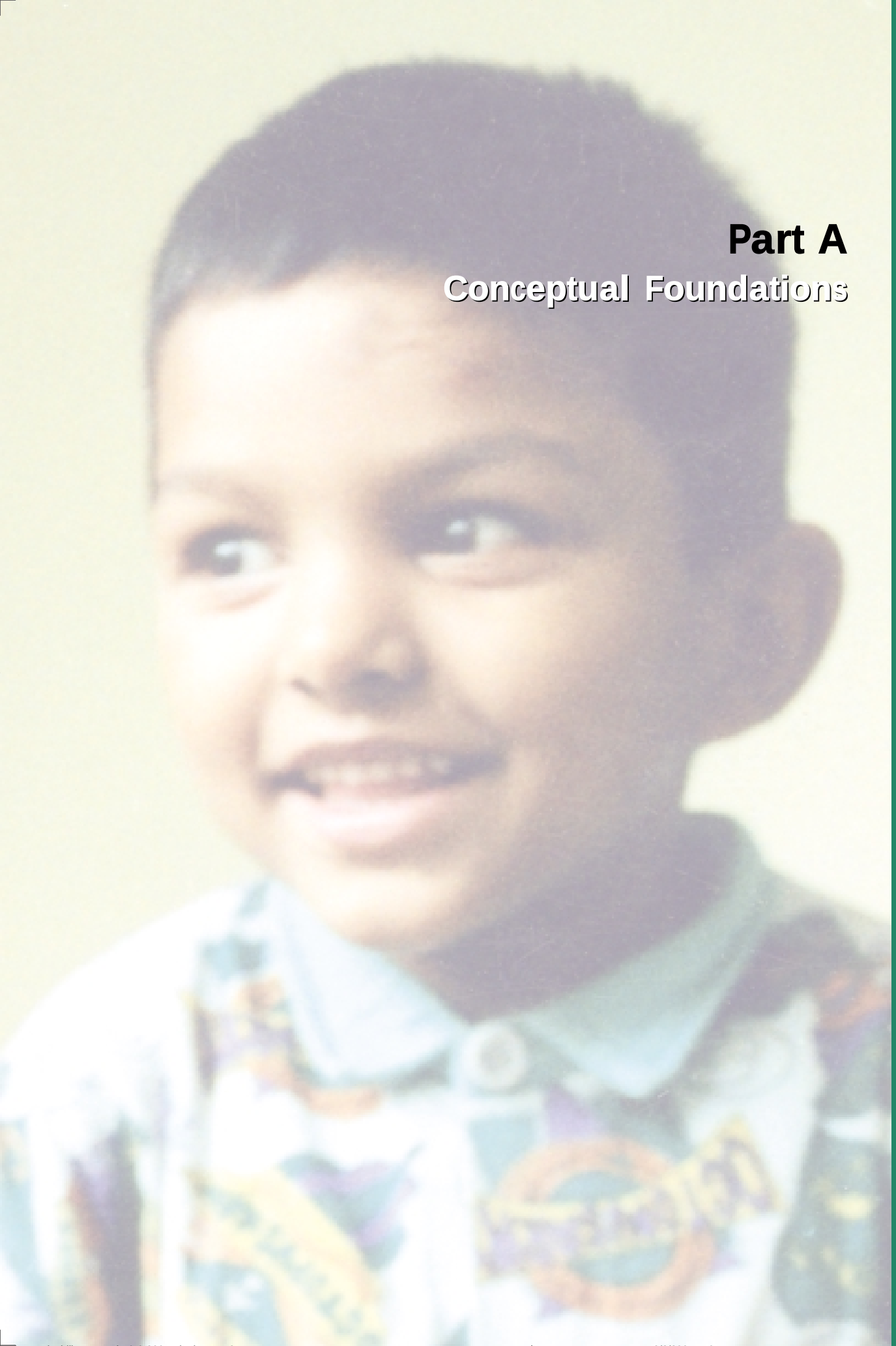
[1] United Nations General Assembly Resolution 56/168 adopted 19 December 2001

[2] PROMOTING THE RIGHTS OF PEOPLE WITH DISABILITIES: TOWARDS A NEW UNITED NATIONS CONVENTION: An International Workshop for National Human Rights Institutions from the Commonwealth and Asia Pacific Region, 26 – 29 May 2003, New Delhi, India

activities to mobilize support for a binding convention and to raise awareness about it.

Today the Commission has the honour of representing the Asia Pacific Forum and the International Coordinating Committee of the National Human Rights Institutions in the UN ad hoc Committee established by the General Assembly to elaborate the Disability Convention. The Office of the High Commissioner for human rights has appointed Indian Commission's Special Rapporteur, Disability to discharge this responsibility on behalf of ICC. In this manual several references to the Draft Disability Convention would feature to illustrate the current thinking on human rights for persons with disabilities.

The legal practitioners, disability and human rights activists, academic institutions and National Human Rights Institutions of India and Canada, who are the beneficiaries of this project, are likely to play an important role in consolidating the gains of the new standard setting exercise in the field of disability and human rights. In this respect, this project is a timely step towards improving the capacity of those who could have a far more important role in spreading education and awareness and to oversee the enforcement of the new Disability Convention. It is hoped that the project would inspire the legal academia to undertake curriculum revision to ensure adequate reflection of disability experience in their courses. It is further hoped that this manual would prove to be a helpful tool in this process.



Part A

Conceptual Foundations

NHRC

CHAPTER 1

Disability: Definitions, Estimates and Causes

1.1 Definitions of Disability

Far from being a mere physical fact, disability is also a normative, cultural, and legal construct. What a society at a particular time in its history considers to be a disabling conditioning reflects its conception of a normal and socially functional human being; and hence in a way it reflects society's self image. For instance, being a female, poor and homeless is considered disabling in several South East and Central Asian societies. The recognition of a physical and mental condition as disabling by a society is also a tacit acceptance by it of its responsibility towards people considered disabled. A society with a deep ethos of social responsibility is likely to be more open in its definition of disability. A very recent and a radical new development is the intervention of disabled people themselves in the social construction of disability. This perhaps is occurring for the first time in human history. It has contributed to a process away from negative definitions of disability as indicating abnormality and impairment to a positive definition that first and foremost asserts essential humanness, understood around notions of human rights and community life, of the disabled that they share with all others, and then within this shared framework identifies special features that make disabled people different from others.

Social values, norms and attitudes are not static and are liable to change depending on a wide range of factors and forces that operate at macro and micro level. Consequently, the formal notion of disability has undergone revisions to accommodate changes in social norms and attitudes. In this section we shall briefly discuss three prevalent definitions of disability that have informed the legal and policy framework. Any one of these definitions can not be subsumed under others as they result from very different perspectives on disability. Subsequent to the discussion of definitions of disability we discuss its estimates and causes in later sections.

1.1.1 Medical Definition of Disability

A number of definitions in use consider disability as individual pathology: - a condition grounded in the physiological, biological and intellectual impairment of an individual.

The World Health Organization (WHO)[1] in 1976, provided a three-fold definition of **impairment**, **disability** and **handicap** explaining that 'an **impairment** is any loss or abnormality of psychological, physiological or anatomical structure or function; a **disability** is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being; a **handicap** is a disadvantage for a given individual, resulting from an **impairment** or a **disability**, that prevents the fulfilment of a role that is considered normal (depending on age, sex, social and cultural factors) for that individual.' Such a description frames disability within a medical model, identifying people with disabilities as ill, different from their non-disabled peers and unable to take charge of their own lives. Moreover, the diagnostic parameters of a medical definition do not take note of the imperfections and deficiencies in the basic social structures and processes that fail to accommodate the difference on account of disabilities.

The disability sector around the world found the WHO's 1976 description of impairment, disability and handicap confusing, particularly for policy-making and political action, and problematic from a rights perspective. Responding to the growing concern, the WHO redefined the relationship between impairment, disability and handicap establishing that **'impairment'** refers to organ level functions or structures, **'disability'** refers to person-level limitations in physical and psycho-cognitive activities, and **'handicap'** to social abilities or relation between the individual and society. The *WHO International Classification of Impairments, Disabilities and Handicaps, 1996* is relatively realistic as it makes a clear distinction between impairment, disability and handicap, though concerns have been expressed that in its definition of the term handicap, the classification is still too medical and centred on individual, and does not adequately clarify the interaction between societal conditions or expectations and unique circumstances of a disabled individual.

1.1.2 Social Definition of Disability

The change in understanding of disability from an individual pathology to a social construct is best reflected in the way *UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993* define disability. According to these rules 'people may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness.' Such impairments, conditions or illnesses may be permanent or transitory in nature. A distinction has been made between disability and handicap. A handicap is considered a loss or limitation of opportunities to take part in community life on an equal level with others. The purpose of this distinction is to emphasise the focus on the shortcomings in the environment and in many organised activities in society that handicap a disabled person.

Thus, it can be concluded that *Standard Rules* have defined disability from a perspective that emphasises social conditions which disable a group of individuals by ignoring their needs of accessing opportunities in a manner conducive to their circumstances.

1.1.3 Human Rights Definition of Disability

The definition of disability adopted by the British Council also takes into account the social conditions which disable a group of individuals by ignoring their needs of accessing opportunities in a manner different from others. However, it also views these social conditions as infringing upon human rights of disabled

[1] http://www.who.org

and as instances of discrimination against them. According to this definition, 'disability is the disadvantage or restriction of activity caused by a society which takes little or no account of people who have impairments and thus excludes them from mainstream activities.' Therefore, like racism or sexism, disability is described as a consequence of discrimination and disregard to the unique circumstances of people with disabilities.

1.2 Disability Estimates

It is estimated that there are about 600 million people in the world who have disability of one form or another. Over two thirds of them live in developing countries with high density of their population in Sub-Saharan Africa and in South and South-East Asia.

There is wide variation in the estimated disability rates reported by developed and developing countries. The variation depends, to a large extent, on the definitions of disability used, which either expand or limit the disability groups covered in a survey. For instance, using an overly restrictive definition of disability, the Census of India (2001)[2] yielded an average of 2.13% of people with disabilities as compared to 19.1% in New Zealand and 18% in Australia[3].

1.3 Causes of Disability

It is an inherent limitation of a welfare model to treat only the manifested symptoms of a problem rather than treating the problem itself. Analysis of the causes of disability from a medical or bio-centric standpoint tends to emphasise disease, hereditary and birth defects over systemic and environmental factors. Thus the focus of preventive programmes has been more on eradicating diseases such as measles, leprosy, polio, goitre, rubella, etc. There are powerful reasons to prevent the occurrence of disability so that people can live healthier lives free from disease and its life-long implications. However, recognition of more fundamental causes that perpetuate and exacerbate disability is critical in planning any strategies to overcome the consequences of disability.

Article 40 of the *World Programme of Action (WPA)* concerning disabled persons lists out a comprehensive range of causes of disability which take into consideration factors like wars, civil conflicts, poverty, overcrowding and unhygienic living conditions; constraints of resources, geographical distance and physical and social barriers, industrial, agricultural, and transportation-related accidents, natural disasters, stress and psycho-social problems. Certainly, the diagnostic parameters in *WPA* go beyond the medical aspects of disability and locate its causes outside the confines of the body of an individual.

1.3.1 Poverty and Disability

There is a high correlation between disability and poverty but very few studies have investigated how poverty and disability influence each other and with their combination create new forms of barriers. In general, people with disabilities are estimated to make up to 15 to 20% of the poor in developing countries[4].

[2] http://www.censusindia.net/results/disabled_main.html

[3] United Nations Statistics Division, 1996

[4] Regional trends impacting on the situation of persons with disabilities: United Nations Economic and Social Commission for Asia and the Pacific, 2002

Inequitable economic and social policies have contributed to large numbers of people living in extreme poverty. Poor families often do not have sufficient income to meet their basic needs. Inadequate shelter, unhygienic living conditions, lack of sanitation and clean drinking water combined with poor access to health facilities lead to disability.

People with disabilities are also very vulnerable to poverty, if they are not already poor, since disability often results in loss of income and demands additional expenditure. The extra costs directly related to disability include expenses on medical treatment, purchase and maintenance of special devices, and travelling to access rehabilitation and medical facilities. A survey of people with disabilities in India found that the direct cost of treatment and equipment varied from three days to two years income, with a mean of two months[5] .

1.3.2 Malnutrition and Disability

While malnutrition indicates poverty, lack of nutritional security is also a sign of inequity and political apathy. For instance it is well known that in many families in India, boys and men comparatively get better and more food and nutrition than female children and women. According to the Human Development in South Asia report (2001), incidence of anaemia among expectant and nursing mothers between the age group of 15 to 19 years is highest in India in the SAARC region.

Malnutrition in its various forms is a cause of disability as well as a contributory factor in other ailments that increase susceptibility to disabling conditions. It is estimated that currently 515 million Asians are chronically undernourished, accounting for about two thirds of the world's hungry people[6] . Common micro-nutrient deficiencies that affect disability include:

- Vitamin A deficiency – blindness
- Vitamin B complex deficiency – beri-beri (inflammation or degeneration of the nerves, digestive system and heart), pellagra (central nervous system and gastro-intestinal disorders, skin inflammation) and anaemia
- Vitamin D deficiency – rickets (soft and deformed bones)
- Iodine deficiency – slow growth, learning difficulties, intellectual disabilities and goitre
- Iron deficiency – anaemia, which impedes learning and activity, and is a significant cause of maternal mortality
- Calcium deficiency – osteoporosis (fragile bones)[7]

At the present rate, by the year 2010 there could still be some 680 million chronically undernourished people whose disabilities are likely to have roots in micro-nutrient deficiencies. Most vulnerable to inadequate diet will be girl children, women and older persons[8]. Due to the lack of food and nutrition security for the

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[5] Susan Erb & Barbara Harriss-White, *Outcast from Social Welfare: adult disability, incapacity and development in rural south India. Books for Change, A Unit of Action Aid Karnataka Projects* (2002).

[6] Current Trends Impacting the Situation of People with Disabilities,: Summary Paper, UNESCAP, (2002). www.**world**enable.net/bmf2004/doc_summarytrends.htm - 16k.

[7] Ibid.

[8] World Food Summit, 13- 17 November 1996, Rome, Italy, www.fao.org/wfs/main_en.htm

poor, about 30% of all infants born in India are born weighing less than 2,500 grams, which is the WHO cut-off level to determine low birth weight with a lower chance of survival and high risk of disability[9].

Recent scientific advances in the field of immunology and cell biology show that the role of nutrition as a major determinant of health is much wider and more pervasive than was believed earlier. Thus, it is now known that a sufficient and nutritious diet is essential not only for the achievement of optimal physical growth and development, but also to ensure 'mental well being, the ability to withstand the inevitable process of ageing with minimal disability and functional impairment.'[10]

1.3.3 Occupational Hazards

Around 90% of the workforce in India is in the unorganised sector, which is characterised by low levels of technology, low standards of safety and hazardous working conditions. In order to maximise profits, production is often located wherever costs are lowest, regulations loose and workers least likely to organise for better working conditions and fair wages. This often results in high rates of accidents, poisoning from toxins, loss of hearing and vision, and health deterioration, all of which contribute to short term and long term disability.

Occupation-related health problems of workers employed in stone quarrying, leather industry, glasswork, weaving, diamond cutting, hand embroidery, and children employed in carpet, cracker and match industry have been recognised but have not received appropriate and sustained attention by those responsible for regulating work standards. Even in developed countries, permanent disablements as a result of industrial and highway accidents outnumber war causalities. For example, 44,000 people lost their limbs in industrial accidents during the period of Vietnam War in which 17,000 American soldiers became disabled.[11]

Like industrial workers in the unorganised sector, poor farmers and peasants too are very vulnerable to disability as they work for long hours exposed to sunlight, dust and smoke. Wheat harvesting and amputations, paddy sowing and muscular diseases, coconut picking and spinal cord injuries are some common hazards associated with typical agricultural activities. Efforts to improve design of agricultural implements have been quite successful in preventing disabilities. However, parallel improvements in the primary health system have not been achieved as it lacks the capacity to deal with agricultural accidents, which occur at the village level.

Occupational casualties and disabilities can be brought down to a great extent if the industrial and occupational standards are in conformity with *Article 7* of the *International Covenant on Economic, Social and Cultural Rights* which calls for the creation of just and fair conditions of work

1.3.4 Wars and Disability

Human civilisation right from its inception has engaged itself in wars to advance various particular interests.

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[9] Independent Commission on Health in India, 1997.

[10] Gopalan, C., *Diet-related chronic diseases in India: changing trends*. NFI Bulletin, 17(3):1-5), (1996).

www.nutritionfoundationofindia.org/ archives.asp

[11] Murickan and Kutty, *Persons with Disability in Society* (1995).

Whatever may be the reason for an armed conflict and the benefit it gives to particular interests, the disaster it creates for the majority of human beings is immeasurable. War has been the single largest factor responsible for causing permanent disablement not only to combatants in the battlefield but also to civilians who are forced to bear the hazards of lethal, chemical and nuclear weapons. It is believed that at present about twenty five percent of the world's population is suffering from the consequences of war and civil conflicts. In the nineties alone, violent conflicts caused death of more than four million people and forced about thirty five million people to become refugees or suffer internal displacement and live in conditions that contribute to disease, malnutrition and early death[12].

Based on figures from a study carried out in 206 communities, including Afghanistan and Cambodia, landmine triggered disability rate among survivors is about 0.9%. About 6% of households in Afghanistan are affected by landmine accidents alone. Surveys of four countries in 1995 found that between 12% and 60% of landmine victims had to sell assets to meet their medical bills[13]. Physical and psychiatric disabilities in war torn countries occur not just due to war injuries but are caused more by diminishing resources and growing demand on already scarce resources available to communities.

1.3.5 Crime and Disability

Violent crimes underline shortcomings in the social, political and economic arrangements of a society. Such crimes not only leave people with a sense of insecurity and fear but they also deprive them of life and liberty. During 1999, the percentage share of violent crimes reported in India was 13.5% of the total 2,38,081 cases reported under the IPC[14]. Many children and women are abducted to be used in prostitution, slavery and beggary. In such cases, the risk of emotional, mental and physical disabilities increases manifold. In the mid-nineties, the government of Saudi Arabia repatriated more than five hundred maimed Indian children who were used for begging. The case of female domestic workers with amputated fingertips, nose and earlobes also surfaced during the same time. They too were smuggled into Arab countries by powerful mafia gangs operating in various parts of India, Philippines and other developing countries.

There are hardly any studies that have analysed the nexus between disability and crime. Unfortunately, even law enforcement agencies themselves are known to commit acts of torture and inhuman treatment particularly to persons in detention. Custodial crimes, which include death, rape and disability, have drawn attention of public, media, legislature and human rights organisations. The Bhagalpur blinding case[15] in India is a well known and documented illustration of this menace.

Freedom from torture and inhuman or degrading treatment provides a shield of immunity. Rights guaranteeing this freedom protect both the physical and mental integrity of the person. It is no accident that the very highest level of due process protection is reserved in most legal systems for the loss of right

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[12] Jonathan M. Mann, *Health and Human Rights: A Reader* (1999).

[13] Anderson, *"Social Cost of Landmines in Four Countries: Afghanistan, Bosnia, Cambodia and Mozambique"*, British Medical Journal, Vol. 311, (16 Sept, 1995).

[14] *Crime in India* (1999).

[15] *Khatri (II) vs State of Bihar* [(1981) 1 SCC 627].

to liberty. More generally, access to a court in order to ensure rights is an important safeguard in any society[16].

1.3.6 Traffic Hazards

Unplanned cities with narrow roads, rapid growth in number of vehicles and disregard of traffic regulations have been responsible for increasing the number of road accidents in India. If current trends continue, road accidents may become the leading cause of death and disability in the country. As per the Central Bureau of Health Intelligence Report of 1997-98, 69,800 people died in road accidents that year. The number of dead in rail accidents was approximately fifteen thousand. An expert in the field, Dr. Leslie G. Norman[17], estimates that for every road accident death there are 30-40 light injuries and 10-15 serious injuries, which may lead to disability.

Improvements in vehicle design and medical facilities, as well as stronger enforcement of traffic regulations concerning compulsory use of seat belts (car use) and helmets (motorcycle use), and restrictions on alcohol consumption and other intoxicants need to be treated more seriously than it has been. It is estimated that by 2020, road traffic accidents will be ranked as the third leading cause of disability in the Asian and Pacific region. Quadriplegia, paraplegia, brain damage and behavioural disorders are some common disabilities among survivors of traffic accidents.[18]

1.4 Economic Policy and Disability: Effects of Structural Adjustment Programmes (SAP) on Disability

The WHO Declaration of Alma-Ata (1978) advocated a comprehensive and strong participatory approach to the global strategy for 'Health for all by the Year 2000.' However, since the 1990s, the World Bank has assumed a leading role in formulating health care policies and programmes of developing countries. One of the most significant impacts of this has been a sharp cutback in public expenditure on health, which, for instance in India, has resulted in a steep fall in central government grants to the disease control programmes in the early nineties. In this entire period, outlays for curative services stagnated and in some states even declined. Some of these cutbacks had to be restored due to the outbreak of several epidemics resulting in a large number of deaths. The plague outbreak in Surat and malaria in western Rajasthan in 1994 indirectly led to the restoration of about 34 % of the budget in communicable disease control programmes.

The negative experiences of SAP on health policies opened up a major debate regarding its impact on public health and nutrition. Subsequently, the World Bank revised its earlier philosophy of blanket privatisation of the health sector to promoting State's capacity to protect social welfare. This has occurred within a utilitarian approach which uses calculation of consequences in terms of additional costs and comparison of policies to determine which reform will achieve the best result for the least input. Tools like Disability Adjusted Life Years (DALY) developed by the WHO also reflect the same utilitarian approach as it is used to gauge cost-effectiveness of interventions. This approach carries the risk of neglecting needs of

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[16] Quinn, Gerard and Theresia Degener, *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (UN 2002).

[17] Murickan and Kutty, *Persons with Disability in Society* (1995).

[18] Asia and Pacific in 21st Century, 2002 www.unescap.org/esid/psis/ publications/theme1998/part2_6.asp - 189k

certain sections of people on grounds of not being cost effective. Therefore, any criterion, which undervalues investment in securing right to life and health, is inadequate and undesirable.

The *Committee on Economic, Social and Cultural Rights* in *General Comment No 5*, makes an analysis of disability as a human rights issue. What is striking about the Committees' approach to the right to health in the context of disability is the direct link it establishes between the achievement of health and other rights and its emphasis on non-discrimination, which can be highly relevant in the context of selective treatment for people with disabilities. The Committee's approach thus signifies a view point on economic polity that is very different the World Bank.

The purpose of analysing a few selected causes of disability is to bring in focus factors beyond the biological and intellectual make up of an individual. It is a fact that disability would always remain one of the characteristics of human society, but the causes may undergo change.

In conclusion, the treatment of disability does not lie in the prevention of medical factors. It calls for reorientation of diagnostic parameters and interventions beyond the narrow medical concerns, which can be achieved through a social order in which social, economic and political justice is achieved by minimising inequalities in income, status, facilities and opportunities.[19]

[19] Constitution of India, Article 38.

CHAPTER 2

Approaches to Disability

This chapter presents an overview of four models of disability; three of them are discussed briefly while the fourth one 'the Human Rights Model' is discussed in detail because it represents a paradigm shift in understanding disability. The discussion on models of disability is followed by a description of recent changes in law and policy on disability, in the light of evolving understanding of disability.

2.1 Models of Disability

The diverse approaches to disability can be traced in various definitions of disability. Law, policy, programmes and rights instruments also reflect these different approaches and associated discourses that treat disability either as an individual pathology or as a social pathology.[1]

Within these two overriding paradigms - (a) individual pathology and (b) social pathology - the four major identifiable formulations of disability are: the charity model, the bio-centric model, the functional model, and the human rights model. The first two of these, the charity model and the bio-centric model are chronologically prior and reflect the ways disability has been framed historically in many cultures around the world. Both of these models follow the individual pathology approach to disability. The latter two, the functional model of disability and the human rights model, which view disability as a social pathology, have emerged in recent decades through interventions by disability and human rights activists and theorists.[2] While the appearance of the social pathology models is chronologically more recent, all four approaches are currently at play in contemporary law, policy and programmes.

2.1.1 The Charity Model

Driven largely by emotive appeals of charity, this model treats people with disabilities as helpless victims

[1] Barnes, C., G. Mercer and T. Shakespeare. *Exploring Disability: A Sociological Analysis.* (Cambridge, Polity Press, 1999).

[2] Rioux, M.H. *Disability: The Place of Judgement in a World of Fact* in *Journal of Intellectual Disability Research*, vol. 41, part 2, pp. 102-111, (April 1997); Rioux, M.*On Second Thought: Constructing Knowledge, Law, Disability and Inequality* (2003*)*; Kerr, S.S., H.H. Kohl & L.O. Gostin*, Different but Equal: The Rights of Persons with Intellectual Disabilities.* (London, Oxford University Press).

needing 'care' and 'protection'. As the term 'handicap' implies, derived as it is from the image of a beggar with a 'cap in hand', this model relies largely on the goodwill of benevolent humanitarians for 'custodial care' of the disabled.[3]

The charity model shares many common features with the bio-centric model. There is a similar imperative of social responsibility that is derived from charity and benevolence, rather than justice and equality. The notion of charitable privilege has its roots in the English Poor Laws, which primarily protected drain on social resources and created criteria to limit claims to rights. In other words, the charity model was based on an assumption that claim to rights is valid on certain grounds and invalid on certain others. Disability was perceived as a disqualification and perhaps for this very reason the expression 'invalid' became synonymous with persons with disabilities.

The charity model engineered stringent criteria for groups declared invalid ensuring their exclusion from social arrangements and services in the public domain. It justified their exclusion from mainstream education and employment, and other rights and privileges enjoyed by citizens who fitted into the criteria of valid holders of rights.

The charity model driven interventions, which are intended to be beneficial can actually compromise their beneficiaries' rights. Since entitlement to rights is often substituted by relief measures, over which the groups declared invalid have little control or power to bargain, the charity model creates an army of powerless individuals dependent on either State sponsored charities or arrangements maintained by benevolent individuals outside mainstream development and mechanisms of social support. Special schools, sheltered workshops and protection homes for persons with disabilities were established throughout the world by religious and other philanthropic agencies. Many governments continue to rely upon such arrangements by providing them financial grants, instead of bringing education, vocational training and right to safe and secure shelter for persons with disabilities under the direct purview of their development agenda.

2.1.2 The Bio-Centric Model

The bio-centric approach to disability emphasises the biological origin of a disabling condition, and focuses on a disease, disorder, physical or mental characteristic that is viewed as aberrant or abnormal, but which may be prevented or ameliorated through medical intervention. The aims of intervention in this model are two fold, one to prevent disability, and second to bring the individual's embodied experience in line with conventional standards of normalcy.

The bio-centric model of disability is linked ideologically to a trend in Western thought that can be traced to the biological sciences and to a period referred to as the *'Enlightenment'* era in Europe. In their struggle to grapple with apparent differences between groups of people, like disabled and non-disabled, the rich and the poor, men and women, western people and non-western people, the Europeans of this period tended to reduce social phenomena to their supposed natural biological roots. Similar construction based on biological and intellectual characteristics have also been deployed by lawmakers of ancient India who classified people into various caste categories. These scientists and philosophers were inclined to find

[3] Tomlinson, S. *A Sociology of Special Education.* (London: Routledge & Kegan Paul, 1982).

scientific justifications for social inequality that fit into a mechanical world-view based on natural laws and natural causes at the level of biology.

On this basis, under the bio-centric model, persons with disabilities are positioned as 'abnormal' in comparison to the established norms of a normal human being. In its harshest forms, the bio-centric model treats disabled persons as undeserving and dangerous[4]. This association of disability with pathology and danger formed the rationale for custodial model of care, which unfortunately, continues to dominate the current law, policy and practice.

The findings of an investigative project undertaken by the National Human Rights Commission of India between 1997-99 affirm that 'a large number of mental health institutions even today are being managed and administered on the custodial model of care characterised by prison-like structures with high walls, watchtowers, fenced wards and locked cells'. These institutions function like detention centres where persons with mental illness are kept chained. The tragic incident at Erawadi in Tamil Nadu, where twenty six persons chained to their beds were burnt alive in a fire accident in August 2001, is a painful reminder of the entrenched and widespread practice of isolating people with certain disabilities in asylum-like institutions, which Foucault describes as 'The Great Confinement'.[5]

The bio-centric model has been a powerful influence in establishing disability as a disqualification under law. As a result, a comprehensive legal regime has emerged that deprives people with disabilities their rights and freedoms. Moreover, laws motivated by this approach give legitimate control over the lives of people with disabilities to professionals, State authorities and private entities. Such a legal construction also has serious implications for the exercise of rights to enter contracts, give evidence, enjoy family life and own property. The limitations of the bio-centric model are evident as it aspires to address problems of inequality by preventing or minimising the existence of difference by imposing the majority norm of behaviour on inherently different minorities.

Although biology is no longer the only lens through which disability is viewed in law and policy, it continues to play a prominent role in determining programme eligibility, and entitlement to benefits, and it also influences access to rights and full social participation. Medical science established the mechanism for gate-keeping, for identifying those who are to be legitimately considered disabled. Assessments and evaluations are used to determine an individual's range of disability with reference to employment, education, economic assistance and other support services[6]. On its own, this model fails to address the need for a change in social structure by prioritising interventions directed at individuals.

2.1.3 The Functional Model

In the functional approach to disability the difficulties experienced by a person are seen as arising from a mismatch between the individual's biological condition and functional capacities on the one hand and environmental and situational factors on the other.

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[4] Cohen, S. *Visions of Social Control: Crime, Punishment and Classification*, (Cambridge: Polity Press, 1985); Cohen, S. (Ed.) *Social Control and the State* (Oxford: Martin Robertson, 1983); Sutherland, N. *Children in English -Canadian Society*. (Toronto: University of Toronto Press, 1976).

[5] Foucault, M., *Mental Illness and Psychology*; translated by Alan Sheridan. (1st Edn. New York: Harper & Row, 1976).

[6] Rioux, M. 'Bending Towards Justice,' in L. Barton (Ed). *Disability, Politics and the Struggle for Change.* (London: David Fulton, 2001).

In comparison to the bio-centric model, which tries to prevent or cure the impairment, the functional model tends to treat the perceived incapacity of the disabled individual through services and supports, which are aimed at making the individual as functional as possible. This involves compensation rather than cure, in order for people to live lives that are as 'normal' as possible.[7]

Such an understanding has been instrumental in establishing rehabilitation services for persons with disabilities throughout the world. Services such as physiotherapy and occupational therapy including training in daily living skills, pre-vocational skills, functional assessments, counselling and job training are some important elements of prevalent rehabilitation programmes.

In the functional model, entitlements to rights are differentiated according to judgements of individual incapacity and the extent to which a person is perceived to be independent enough to exercise her/his rights. The positive contribution of this model can be seen in the development of assistive technologies and specialised services. Its failure, however, lies in linking the entitlement to rights with the ability of the disabled person to negotiate diverse environments, with the use of compensatory skills and assistive technologies. Thus in this model the onus is on the individual to fit within the system, not on the system to include the individual.[8] For example, a child's right to education is considered dependent on whether or not the child can access the school and participate in the classroom, rather than an obligation of the school system to be accessible to children with disabilities.

Another example of the influence of this model can be seen in *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* of India, which in *Section 32* mandates the appropriate authorities to identify posts to be held by persons with disabilities in government establishments. The criteria adopted by the Government in the identification of posts faithfully take into account the job requirements, essential physical functions and the peculiarities of the environment in which a particular job has to be performed before declaring it suitable for one or the other category of persons with disabilities.

Thus in the functional model, the onus is on the individual to fit within the system, not on the system to include the individual[9]. The similar treatment of dissimilar people in the functional model points to the failure of the principle of justice, which implies that people with different needs be treated differently. Moreover in the functional model the professionals remain in the centre of defining and addressing needs by virtue of their position. In many instances, the key problem with professionals' decisions taken in the 'best interests' of the disabled person is that they may actually be in contradiction with that person's own goals and life choices.[10] Hence, the functional model fails to address the shortcomings in the environment and social arrangements, and encourages continuous control over the lives of people with disabilities by various State machinaries and professionals. The proponents of human rights model aim to overcome these shortcomings by positioning disability in the paradigm of rights so that entitlements to rights are not limited by individual differences.

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[7] Meyer, L.H., C. A. Peck, et. al. *Critical Issues in the Lives of People with Severe Disabilities.* (Baltimore: Paul H. Brookes, 1990); Wolfensberger, W. *Normalization: The Principle of Normalization in Human Services.* (Toronto: National Institute on Mental Retardation, 1972).

[8] Rioux, M. (2001) supra note 6 at 34-48

[9] Ibid.

[10] Ibid.

2.1.4 The Human Rights Model

The human rights model positions disability as an important dimension of human culture, and it affirms that all human beings irrespective of their disabilities have certain rights which are inalienable. By emphasising that the disabled are equally entitled to rights as others, this model builds upon the spirit of the Universal Declaration of Human Rights, 1948, according to which, 'all human beings are born free and equal in rights and dignity.'

2.1.4.1 *Diversity*

At the heart of human rights mission lies respect for variation in human cultures and the recognition that people are different on several considerations such as gender, race, language, religion and other aspects. Respect for human diversity underlines two crucial ideas. One, despite their apparent differences all people are same concerning their rights and dignity. And two, the equality of rights and dignity does not imply that all people should be treated in the same or similar way. The two ideas may appear contradictory, but in reality they are complimentary to each other. Together they constitute a guide to build an equitable and just society without forcing inherently diverse human beings to a single mould. They follow the sound practical maxim of great Aristotle, the ancient Greek philosopher, who said 'things that are alike should be treated alike, whereas things that are unalike should be treated unalike in proportion to their unalikeness'.

The principle of diversity provides the foundation to accept disability as part of human variation. However, it is a sad reality that in practice our treatment of difference has been rather poor, especially in the context of disability[11]. Legislation and social policies do not generally reflect the full range of diversity of abilities that exist in the society. The 'problem' of disability mainly stems from a lack of responsiveness of the State and civil society to the difference that disability represents[12].

Describing disability as a dimension of human diversity, Justice Albie Sachs[13] writes, 'It then occurred to me that the right to be the same …and the right to be different …were not opposed to each other. On the contrary, **the right to be the same in terms of fundamental civil, political, economic and social rights provided the foundation for the expression of difference through choice in the sphere of culture, lifestyle and personal priorities**.'

By focusing on the inherent dignity of the human being, the human rights model places the individual at the centre stage of all decisions affecting him/her.[14] Thus, the human rights model ensures that criteria for support programmes are prioritised by people themselves respecting their autonomy and freedom of choice.

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[11] Inaugural address by Justice A.S. Anand, Chairman, National Human Rights Commission, NALSAR, Hyderabad (29.10.2004)

[12] Ibid.

[13] Sachs, Albie *Human Rights in the Twenty First century: Real Dichotomies, False Antagonisms.*

[14] Quinn, Gerard and Theresia Degener, *The Current use and future potential of United Nations Human Rights Instruments in the context of Disability*. (UN 2002).

2.1.4.2 Equality and Non Discrimination

Recognition of the inherent equality of all human beings as well as equal entitlement of each individual to all human rights forms the core of the human rights doctrine. The notion of equality is manifested in two distinct ways: *de jure* and *de facto*. The concept of material equality is rather new and encompasses various notions of equality, as it ensures equality of result, vis-à-vis merely equalising opportunities, giving more of same to groups which are inherently different.

Policy research demonstrates that the mechanism of affirmative schemes, positive measures and special temporary measures including targeted funding commitments are useful mechanisms to create preconditions for equal participation by those who have been on the wrong side of the social divide.[15]

In international human rights law, equality is founded upon two complementary principles: **non-discrimination** and **reasonable differentiation**. The doctrine of differentiation is of particular importance to persons with disabilities, some of whom may require specialised services or support in order to be materially equal to others. Differences of treatment between individuals are not discriminatory if they are based on 'reasonable and objective justification'. In *General Comment No.18*, the *Human Rights Committee* clarifies 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the convention.'

Moreover, equality not only implies preventing discrimination (for example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws) but goes much beyond in remedying discrimination. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.[16]

2.1.4.3 Reasonable Accommodation

An important element of the principle of non-discrimination in the disability context is the concept of 'Reasonable Accommodation'. A duty to provide reasonable accommodation is imposed in a range of national laws in respect of physical and social environments, which if unchanged would constitute a discriminatory barrier preventing persons with disability from full participation.[17]

Reasonable accommodation is an evolving concept and has been widely interpreted by various courts expanding its scope and relevance across sectors. While defining discrimination on the basis of disability, the *Committee on Economic, Social and Cultural Rights* in *General Comment No. 5* observes: 'any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability would constitute discrimination.'

It is important to note that reasonable accommodation is a means by which conditions for equal participation

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[15] Rioux, M. 'Bending Towards Justice,' in L. Barton (Ed). *Disability, Politics and the Struggle for Change*. (London: David Fulton, 2001).

[16] Third Submission by Asia-Pacific Forum of National Human Rights Institutions to the *UN Ad hoc Committee.*

[17] Asia Pacific Forum of NHRIs submission to the 4th Ad hoc Committee, Aug-Sep, 2004.

can be achieved and it requires the burden of accommodation to be in proportion to the capacity of the responsible entity. Given the flexibility to allow proportionate burden, the international human rights community has warmly embraced this concept. In the draft text, currently under elaboration, of the disability convention, '**reasonable accommodation**' has been defined as '**introduction of necessary and appropriate measures to enable a person with a disability to fully enjoy fundamental rights and freedoms and to have access without prejudice to all structures, processes, public services, goods, information, and other systems**.'[18]

2.1.4.4 Accessibility

Accessibility has been the overriding concern in the disability rights debate throughout the world. If access is guaranteed, persons with disabilities can use, interact and participate in social institutions and environments to the same extent as others. UNESCAP has defined '**accessibility'** as '**the measure or condition of things and services that can readily be reached or used (at the physical, visual, auditory and/or cognitive levels) by people including those with disabilities**…'[19]

Traditionally the issue of access has been addressed in international human rights law from two distinct perspectives: one that relates to affordability or cost of access, and second, in opposition to culturally constructed norms that cause barriers to accessing public goods and services. The discourse on disability rights has brought to fore another dimension of accessibility namely the prevalent practice of discounting the difference due to disability while regulating terms of access and participation. This dimension is noted in a study commissioned by the office of the UN High Commissioner for Human Rights according to which 'all points of access to the structures of everyday life – the world of education, of work, of family or of social interaction – are set largely by reference to the dominant norm of the able-bodied.'[20]

An elaboration of *Rule 5* of the *UN Standard Rules, 1993* under the title 'accessibility' explicitly states that 'States should recognize the overall importance of accessibility in the process of the equalization of opportunities in all spheres of society for persons with disabilities.'

In essence, equal and effective enjoyment of all human rights and fundamental freedoms by the disabled is ensured by their access to full participation, which in turn can be achieved by applying principles of non-discrimination and reasonable accommodation.

2.1.4.5 Breaking Down Barriers

Policies that are based ideologically on the human rights model start by identifying barriers in society that restrict disabled persons' participation. This has shifted the focus to the way environments are arranged. In education, for example, where individuals were formerly labelled as uneducable, the human rights model examines the accessibility of schools in terms of both physical access (eg. ramps) and pedagogical strategies.

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[18] Mohit, Anuradha *Approach to Disability* (2003).

[19] Statement of recommendations www.unescap.org

[20] www.unhchr.ch

Thus, the human rights approach to disability seeks to break down barriers by addressing environmental shortcomings with reference to limiting entitlements due to individual characteristics and functional capacity[21]. This can be achieved through a continuous process of reform to ensure equal access by all including those with disabilities.

2.1.4.6 Equal Participation and Inclusion

The international and regional human rights instruments incorporate a notion of an inclusive society in which equality and respect for the inherent dignity of all human beings is realised. A world-view inspired by this understanding envisages an active membership that participates in all aspects of community life, regardless of their differences. 'Thus full inclusion is not merely about formal acceptance by the majority but incorporates the concept of participation that is directed both towards the majority who should allow for participation and the minority wanting to participate actively.'[22] In other words, the human rights perspective requires that people with disabilities and all the fundamental institutions of democracy and their functionaries are helped in gaining capacity for equal access and full participation vital to the concept of an inclusive society.

The world community observed 1981 as the International Year of the Disabled Persons. Its central theme was – '**Full participation and equality**'. It set the trend of human rights in the disability arena, as the State was held responsible to guarantee the enjoyment of full citizenship and fundamental rights by persons with disabilities. Subsequently, the UN General Assembly adopted the World Programme of Action, 1982, the most comprehensive global strategy, which placed **'equalization of opportunities'** as a central theme and as its guiding principle for the achievement of full participation of persons with disabilities in all aspects of social and economic life. The observance of the International Decade of Disabled Persons by the United Nations from 1983–1992 intensified the debate on equal opportunities for full participation.

These initiatives including the recent effort of the United Nations Member States towards elaborating a '*Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities'* can be seen as a majority response to the aspirations of a minority (persons with disabilities) whose members are eager to participate in all aspects of society on equal terms.

2.1.4.7 Private and Public Freedom

The human rights approach while on the one hand requires the State to play an active role in enhancing the level of access to public freedoms, on the other it also requires that the enjoyment of rights is not hampered by third-party actors in the private sphere. In international human rights law, the *Convention on the Elimination of All Forms of Discrimination against Women* provides for a mechanism to deal with violence against women both in the public and private domains. A similar approach is also followed in the drafting of the new Disability Convention, particularly in affording protection to people with disabilities against acts of violence, abuse or neglect. It is not only government agencies which are obliged to observe rights under the Disability Convention, private

[21] National Human Rights Commission of India, *Annual Report 2004*.

[22] Asia Pacific Forum (APF) of NHRIs: Submission to the 4th Session of the Ad hoc Committee, Aug-Sep, 2004.

bodies acting as government agents or to whom public functions are delegated, are also proposed to be held accountable.

In many countries disability services are delivered and managed by non-governmental private agencies. These organisations also develop and distribute equipment and services necessary to improve access and therefore they need to be held accountable in so far as compliance to non-discrimination and equality norms are concerned. The vulnerability of groups such as the disabled increases in an era of fiercely competitive market economies. Therefore, holding private entities accountable to human rights norms becomes an imperative to ensure effective enjoyment of these rights by all. The *Committee on Economic, Social and Cultural Rights (CESCR)*[23] in *General Comment No. 5* notes,

> Given the increasing commitment of Governments around the world to market-based policies, it is appropriate in that context to emphasize certain aspects of States parties' obligations. One is the need to ensure that not only the public sphere, but also the private sphere, is, within appropriate limits, subject to regulation to ensure the equitable treatment of persons with disabilities. **In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities.**

The Committee further observes[24],

> In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces.

In a nutshell, human rights law over the last twenty years has evolved to afford greater protection to the rights and freedoms of disadvantaged groups in both public and private domain by enlarging the obligations of the States in relation to actions of private entities.

2.2 Changing Law and Policy on Disability at the National Level

At the national level, there has been a wave of changes in policy and law. Some countries guarantee disability rights and equality in national constitutions. These include Austria, Brazil, Canada, Finland, Fiji, Gambia, Germany, Malawi, New Zealand, South Africa, Switzerland and Uganda[25]. Other countries have anti-discrimination legislation which prohibits discrimination on the basis of disability. These include Australia, Canada, Chile, Costa Rica, Ethiopia, Germany, Ghana, Guatemala, Hong Kong, Hungary, India, Ireland,

[23] CESCR, General Comment No. 5, (para 11), www.unhchr.ch

[24] Ibid. (para 12), www.unhchr.ch.

[25] Degener, T. 'Disability as a Subject of International Rights: Law and Comparative_Discrimination Law,' *pages 154-184 in* S.S. Herr, Gostin, L.O. and Koh, H.H. (Eds.) *The Human Rights of Persons with Intellectual Disabilities: Different but Equal.* (Oxford: Oxford University Press, 2003).

Israel, Korea, Madagascar, Mauritius, Namibia, Nigeria, Philippines, South Africa, Spain, Sri Lanka, Sweden, the United Kingdom, the United States, Zambia and Zimbabwe. In some cases these laws are very broad and cover all aspects of life, in others they are specific to, for example, employment, education, housing, etc. Similarly, in some countries the anti-discrimination laws are general, while in others they are disability-specific.

2.3 Conclusion

The understanding of disability has and continues to change in response to increasing appreciation and assertion of rights of the disabled. It is moving away from being a matter of charity to one of human rights and equal opportunities for all. Universal access, education for all, equal opportunities and anti-discrimination laws are all examples of the new approaches to disability. However, the pace of transformation is extremely slow and the dominance of bio-centric and functional models is clearly evident in the way law and policy have been framed and applied in most parts of the world. On the brighter side, the human rights approach has been embraced very warmly by the disability movement and human rights institutions. The move towards a binding International Convention on the theme of disability holds the promise to place disability within the purview of human rights, by respecting disability as an integral dimension of the diversity of human culture. By enlarging the notion of rights to cover people with disabilities the convention would provide valuable guidance to States for translating their treaty obligations into reality. The disability sector would also be then able to use this authoritative instrument in its effort to translate human rights approach to disability into law and policy.

CHAPTER 3

The Indian Scenario

This chapter gives an overview of the legal and policy framework on disability in India. It begins with a discussion of the relevant guiding principles, articles and sections of the Constitution of India and judicial interventions that clarify them further. Disability specific Acts passed by Parliament are discussed next. The chapter concludes with a historical perspective on disability related norms and policies in India and some comments on disability oriented non-government organisations (NGOs) currently active in the country.

3.1 Constitution of India

Equality, dignity, autonomy and liberty are the founding principles on which international human rights law is premised. These values have sufficiently influenced the fundamental law of democratic polity and are reflected in Constitutions of most democratic States including India.. The *Preamble* to the *Constitution of India* while giving a structure and philosophy of governance clearly proclaims to,

> ...secure to all its citizens; Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation.

3.1.1 Equality

Under right to equality the Constitution of India guarantees to all citizens equality before law and equal protection of law (*Article 14*); and it prohibits discrimination on grounds of 'religion, race, caste, sex, place of birth or any of them' (*Articles 15 and 16*). Further, to ensure equality in the outcome, it encourages the State, under *Articles 16(3) and 16(4)*, to frame any law or make provision for the reservation of appointments or posts in favour of any backward class of citizens, which, in the opinion of the State, is not adequately represented in its services.

There has been a mixed response to the use of reservation as a means to achieve equality amongst unequals. The judiciary has had many occasions to examine not only the legality of such a concept but also its consistency with the right to equality. The most important judgement, which has set at rest

all controversy, is the case of *Indra Sawhney vs Union of India*[1] . This case is of particular importance for persons with disability since the apex court also examined the legality of reservation in favour of the disabled who are not explicitly covered under *Article 16* of the Constitution. The Court held:

> …mere formal declaration of the right would not make unequals equal. To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Articles 14 and Article 16(1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them.

The legislature and judiciary in India have unequivocally promoted special positive measures as a means to achieve substantial equality. In *Dr. Jagadish Saran & Ors. vs Union of India*[2] , Justice Krishna Iyer held that even apart from *Articles 15(3)* and *15(4)*, equality is not degraded or neglected where special provisions are geared to the larger goal of the disabled getting over their disablement consistent with the general good and individual merit.

3.1.2 Non-Discrimination

The formal recognition of discrimination on grounds of disability is a recent phenomenon and laws enacted even twenty years ago generally did not include disability in the list of prohibited discriminations. For instance, the Constitution in *Articles 15* and *16* prohibits discrimination in the matter of employment and access to public facilities on grounds of religion, race, caste, sex and place of birth, but is silent on disability. In fact, the service rules until 1995 prevented entry of persons with disabilities in higher grades of service. These rules gave the employer the authority to force premature retirement in public interest and often employees who acquired disability during service were either forced out of job or got their rank reduced. In most cases their opportunity for career enhancement was suspended forever.

The case of *Narendra Kumar Chandla*[3] is one such example where an employee was reduced in rank on acquiring disability during service. Aggrieved by this arbitrary treatment he approached the Supreme Court, which at that stage refused to entertain his petition. He then approached the Punjab & Haryana High Court, which too dismissed his petition. Chandla again filed a Special Leave Petition in the Supreme Court. The Supreme Court justified his appointment in the lower rank as an L.D.C. (clerk), but ordered that his salary be retained at the higher scale which he was initially drawing. No doubt, to some degree the Supreme Court removed the injustice and protected his livelihood, but it did not outlaw discrimination in the matter of career enhancement against persons who acquire disability during service.

With increasing awareness of disability-based discrimination, explicit legal safeguards have now been put in place. For example, the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* 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.

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[1] Indra Sawhney vs Union of India [(1992) Supp 3 SCC]

[2] Dr. Jagadish Saran & Ors. vs Union of India [(1980) 2 SCC 768]

[3] Narendra Kumar Chandla vs State of Haryana & Ors. [(1995) AIR(SC) 519]

It is another thing that corresponding reforms in service rules, building codes and motor vehicle standards have been extremely slow. Consequently, disability litigation is on the rise but the redeeming feature of the current scenario is efficient disposal of disability discrimination cases both by courts and quasi-judicial bodies.

3.1.3 Directive Principles of State Policy and the Fundamental Rights

The *Preamble*, the *Directive Principles of State Policy* and the *Fundamental Rights* enshrined in the Constitution, envisage a very positive role for the State towards its disadvantaged citizens.

Article 41 declares that, '(T)he State shall, within the limits of its economic capacity and development make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement.'

Article 46 lays down an obligation on the State '(T)o promote with special care the educational and economic interests of the weaker sections of the people, … and … protect them from social injustice and all forms of exploitation.'

Theoretically, the *Directive Principles* are non-justiciable but courts in India, especially the Supreme Court have played a very important role in giving a wide and comprehensive interpretation of these principles in relation to the *Fundamental Rights*. Commenting on the importance of the *Directive Principles of the State Policy*, Dr. Ambedkar noted[4],

> Surely it is not the intention to introduce in this Part these principles as mere pious declarations. It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip service to these principles but that they should be made the basis of all legislative and executive action that they may be taking hereafter in the matter of the governance of the country.

Over the last twenty-five years the Apex court has interpreted Ambedkar's intention very broadly giving itself the opportunity to entertain matters otherwise seen as non-justiciable. In *Kesavananda Bharati vs State of Kerala*[5], the Supreme Court observed that primarily the mandate in *Article 37* is addressed to the legislature, but, in so far as the Courts of justice can indulge in some judicial law making within the interstices of the Constitution on any statute before them, the Courts too are bound by this mandate.

There appears to be a complete unanimity of judicial opinion that the Directive Principles and the Fundamental Rights should be construed in harmony with each other. 'The directive principles contained in Part IV constitute the stairs to climb the high edifice of a socialistic State and the fundamental rights are the means through which one can reach the top of the edifice.'[6]

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[4] Mohini Jain (Miss) vs State of Karnataka and Others [(1992) 3 SCC 666]; [(1992) 3 SCR 658]; [1992 Indlaw SC 527], Cases can be accessed from the website http://www.indlaw.com (subscription required)

[5] Keshavananda Bharati vs State of Kerala [(1973) 4 SCC 225]; [(1973) AIR(SC) 1461]

[6] State of Kerala vs N. M. Thomas [(1976) 2 SCC 310]; [(1976) SCC (L&S) 227]; [(1976) 1 SCR 906]

Highlighting the relevance of the Directive Principles, the Supreme Court stated in the *Kesavananda Bharati* case that the Fundamental Rights themselves have no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. It is relevant in this context to remember that in building up a just social order it is sometimes imperative that the Fundamental Rights should be subordinated to the Directive Principles.

3.1.4 Enforceability of Socio-Cultural rights

Theoretically, social and cultural rights have not been perceived enforceable both in the Constitution of India (Part III) and under the international human rights law. The *Covenant on Economic, Social and Cultural Rights* requires the realisation of these rights progressively by States in accordance with their level of development and economic capacity. Such a concept has assumed greater acceptance since the enforcement of these rights requires financial investment and thus the pace of implementation is linked to the implementing states' economic capacity. Under the Directive Principles of State Policy (Part IV) too, the rights enunciated are to be realised in accordance with the level of economic capacity. State and its agencies tend to take refuge under this arrangement for justifying non-action. The Supreme Court of India setting aside such a trend in *Municipal Council, Ratlam vs Shri Vardhichand and Others*[7] said,

> The human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision. Likewise, s. 123 of the Act has no saving clause when the municipal council is penniless. Otherwise, a profligate statutory body or pachydermic governmental agency may legally defy duties under the law by urging in self-defence a self-created bankruptcy or perverted expenditure budget. That cannot be.

Moreover, by harmonising the Directive Principles with the Fundamental Rights the Supreme Court has put the argument of economic capacity to defence and has rather paved the way for the protection of all life related rights without distinction of immediate or progressive nature of realisation.

3.2 Protection of Human Rights Act, 1993

After ratification of International Covenant on Economic, Social and Cultural Rights *(ICESCR)* and International Covenant on Civil and Political Rights (*ICCPR)*, India brought into force the *Protection of Human Rights Act, 1993*. This Act provides for the establishment of National Human Rights Commission and States Human Rights Commissions for better protection of human rights. *Section 2(d)* of this Act defines 'human rights' as: 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable by courts in India.'. Thus, the Act provides a mechanism to monitor the implementation of various constitutional provisions and obligations under international covenants on different rights, including economic, social and cultural rights. This also indicates India's readiness to implement non-justiciable rights.

3.3 Disability Laws

During the 1970s a distinct self-advocacy movement of people with disabilities started a sustained campaign

[7] Municipal Council, Ratlam vs Shri Vardhichand and Others [(1980) AIR(SC) 1622]; [(1980) CrLR(SC) 543]; [(1980) 4 SCC 162]; [(1980) SCC(Cr) 933]; [(1981) 1 SCR 97]; [(1980) 86 CRLJ 1075]; [1980 Indlaw SC 164];

demanding protection and recognition of their human rights. Towards this end, it sought enactment of a comprehensive legislation having a rights based approach with special emphasis on social and economic rights. Though the government recognised the need for such a legislation as early as 1980, it was enacted only in 1995. The delay could be attributed to the fact that the Indian Constitution while distributing legislative powers between the Centre and States kept the disability issue in the State list at Entry 9 of Schedule 7. The Parliament of India gained competence to legislate on disability issues with the signing of the *Proclamation of Equality and Full Participation of People with Disabilities in Asian and Pacific Region*. *Article 249* of the Constitution empowers the Parliament to legislate on any subject falling in any list in order to fulfil its international obligations.

3.3.1 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995

The enactment of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (* referred to as *Persons with Disabilities Act)* is a signal achievement of the Indian disability movement. Preamble to this Act clearly delineates its objective of promoting and ensuring equality and full participation of persons with disabilities. The Act aims to protect and promote economic and social rights of people with disabilities. The Act covers seven disabilities.

The criteria for classification of each disability are embodied in a biomedical model. In *Section 2(t)*, a person with disability means 'a person suffering from not less than forty percent of any disability as certified by a medical authority.' The disabilities that have been listed in *Section 2* include blindness, low vision, hearing impairment, locomotor disability or cerebral palsy, mental retardation, mental illness and persons cured of leprosy. In addition, autism and multiple disabilities have been covered under the *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999*.

The Act spells out responsibilities of the Government at all levels including establishments under its control. It lays down specific measures for the development of services and programmes for equalising opportunities for the enjoyment of right to education, work, housing, mobility and public assistance in case of severe disability and unemployment. To execute the mandated responsibilities, a Central Co-ordination Committee and State Co-ordination Committees representing major development ministries, Members of Parliament and disability NGOs and having a woman with disability as a member have been envisaged in a multi-sectoral model. Furthermore, the institution of Chief Commissioner in the Centre and Commissioner for Persons with Disabilities in States has been proposed. Their mandate is to redress individual grievances, provide safeguards to the rights of persons with disabilities, monitor implementation of disability related laws, rules and regulations, and oversee utilisation of budget allocated on disability. These quasi-judicial bodies are vested with the powers of a civil court.

This historic legislation is a corner stone of evolution of jurisprudence on the rights of persons with disabilities in India. As a result, disability concerns have come into sharp focus. However, within a period of ten years of enforcement of this Act its weaknesses have also surfaced in the absence of a powerful implementing instrumentality. Unlike usual indifference the government soon realised these weaknesses and acceded to the demand of the disability movement for overall review of the Act. Towards this end a committee was constituted which harmonised views of the disability sector and relevant bodies in its comprehensive report. Unfortunately, no concrete proposal has been moved to the Parliament so far for

carrying out amendments that have been felt necessary to plug loopholes in the present Act.

3.3.2 National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999

As certain groups among the disabled are more vulnerable than others, a special enactment for the protection of such persons, their property and well-being was felt necessary. The enactment of the *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* (referred to as the *National Trust Act*) aims to fulfil a common demand of families seeking reliable arrangement for their severely disabled wards. The specific objectives of the Act are:

- To enable and empower persons with disabilities to live as independently and as fully as possible within and as close to the community to which they belong;
- To promote measures for the care and protection of persons with disabilities in the event of death of their parent or guardian; and
- To extend support to registered organisations to provide need based services during the period of crisis in the family of disabled covered under this Act.

The *National Trust Act* mandates the creation of a Local Level Committee (LLC) comprising District Magistrate along with one representative from a registered organisation and one person with a disability. The LLC is vested with the authority to decide upon applications for legal guardianship. The Act provides for the manner in which legal guardians are to be appointed. The conditions of eligibility, the order of eligible applicants, and the disqualification of applicants are contained in *Regulations 11* to *14*.

The Act also lays down duties of the legal guardian who has to furnish periodic returns to the LLC about the assets of the ward and their disposal in his hands. Similarly, the Committee too is required to maintain inventory and annual accounts of the property and assets, claims and liabilities submitted by the legal guardians to it.

The overall supervision of this Act is vested with a national trust board appointed through a democratic process by the registered organisations of the parents and others providing services to this segment of the disabled population. The Government has contributed Rupees one billion to the trust fund. The interest earned is used in supporting mandated activities.

3.3.3 Mental Health Act, 1987

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

a. No mentally ill person shall be subjected during treatment to any indignity (whether physical or mental) or cruelty.
b. No mentally ill person under treatment shall be used for purposes of research, unless-
   i) Such research is of direct benefit to him for purposes of diagnosis or treatment, or
   ii) Such persons, being a voluntary patient has given his consent in writing or where such

> person (whether or not a voluntary patient) is incompetent by reason minority or otherwise, to give valid consent, the guardian or other person competent to give consent on his behalf, has given his consent in writing for such research.

Section 94 deals with respecting privacy of communication of persons with mental illness, 'for the purpose of preventing vexatious or defamatory circumstances, or communications prejudicial to the treatment of mentally ill persons.' According to it no letter or other communications sent by or to a mentally ill person under treatment shall be intercepted, detained or destroyed.

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

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

The NHRC is mandated under *Section 12* of the *Protection of Human Rights Act, 1993* to visit Government run mental health institutions to 'study the living conditions of inmates and make recommendations thereon.' Besides discharging this specific responsibility, the Commission has been, right from its inception, giving special attention to the human rights of mentally ill persons because of their vulnerability and need for special protection. Through regular visits the Commission was astonished to find that old and even primitive ways of diagnosis and treatment were being practised at most places. Because of the absence of psychological and psycho-social facilities, control of aggressive patients is achieved by combination of drug therapy, physical restraint and seclusion.

The fundamental weakness of the Act is that it perceives institutional care as the only arrangement for the care and protection of persons with mental illness. Particularly, in the absence of a formal review mechanism of involuntary admissions, the possibility of human rights violations increases manifold. As of now all decisions concerning admission, type of treatment, and release are either decided by professionals or family members.

It is heartening to know that now there exists a World Network of Users and Survivors of Psychiatry (WNUSP) that extends to more than fifty countries, including India. The network represents the voice of the people themselves and is gaining recognition within the disability movement, government sector and UN bodies. The network has helped develop a new understanding of the full implications of legal mechanisms in place, and put on the defensive the whole legal construction around insanity that extends to substantive and procedural laws in India and most legal systems of the world.

3.3.4 Rehabilitation Council of India Act, 1992

The Rehabilitation Council of India was set up by the Government of India in 1986 initially as a society to

regulate and standardise training policies and programmes in the field of rehabilitation of persons with disabilities. The urgent need for minimum standards was felt as the majority of persons engaged in education, vocational training and counselling of persons with disabilities were not professionally qualified. Poor academic and training standards adversely affect the chances of disabled succeeding in the world of work. Therefore, an Act of Parliament in 1992 enhanced the status of the Council to a statutory body with following aims:

1) To standardise training courses for professionals dealing with people with disabilities;
2) To prescribe minimum standards of education and training of various categories of professionals dealing with people with disabilities;
3) To regulate these standards in all training institutions uniformly throughout the country;
4) To promote research in rehabilitation and special education; and
5) To maintain Central Rehabilitation Register for registration of professionals.

The Rehabilitation Council of India (RCI) regulates training standards for sixteen categories of rehabilitation workers. The Council is proactively promoting training and research initiatives utilising experience of specialised as well as mainstream academic institutions.

3.4 Historical Perspective

Despite having a progressive Constitution, an enlightened and alert judiciary, and a fast evolving legal regime with a clear disability focus, the ground level situation in the country leaves much to be desired. There is little impact of recent changes in law and policy, and that too is limited to small pockets of urban India. The slow pace of process of change can be attributed to the social construction of disability in a society that views it as an individual issue and considers family as the primary institution responsible for dealing with it.

Though there is a long tradition in India of caring for the weak and vulnerable by family members at a great personal sacrifice, yet the role of the family as a sole support for the disabled grew out of the failure of colonial rulers in maintaining social safeguards that were available throughout ancient and medieval India. In fact, the concept of charity got introduced in India during British rule to basically contain problems of destitution, beggary, crime, and delinquency, which grew out of proportion with the diminishing of social safeguards that existed earlier.

For instance, Kautilya, the renowned political economist of the Maurya period and author of *Arthashastra* enjoined the king to 'provide the orphans, the aged, the infirm, the afflicted and the helpless with maintenance.' For their self reliance and economic independence, he suggested awarding work on priority to women who were widowed, single, crippled and abandoned. He also recommended earmarking certain jobs exclusively, such as spinning, weaving and cutting of wool, cotton, hemp and flax, for the disadvantaged and vulnerable from a social and economic standpoint[8] .

Emperor Ashoka had developed an elaborate public health system. His edicts record that 'the king erected hospitals along all the highways and deputed physicians and made arrangements for medicines, food and

[8] Murickan and Kutty *Persons with Disability in Society* (1995).

drinking water. *Gopas* were instituted at the village level to maintain record of birth, death, caste and also to provide for the ill, infirm and those in need of help[9].

The reign of Chandra Gupta Maurya stands out unique in its arrangement of workshops for the vocational rehabilitation of the physically disabled as well as other socially and economically disadvantaged members. Even during the Mughal period, institutions established for welfare continued to thrive under *Zakat*, a system by which part of the income was set apart for the central fund for maintaining social institutions. In fact, the Mughals instituted a special department with a head called *Sadr* to supervise and manage *Zakat*.[10]

3.5 Independent India

As a legacy of colonial rule, the Government of Independent India too relied heavily on charitable institutions to deliver basic services for persons with disabilities. For instance, in the first three Five Year Plans (1951-66) the sole support to the disabled comprised grants-in-aid to NGOs and the establishment of national institutions to prepare qualified personnel, mainly to serve in charitable institutions. The Government also established the Central Social Welfare Board to assist voluntary agencies in organising welfare programmes for certain vulnerable groups including persons with disabilities. This approach continues to mark the policy approach as the Steering Committee on Social Welfare for the Tenth Five Year Plan recorded its deep concern over diminishing response of traditional voluntary organisations, and the accompanying support, to the welfare of people with disabilities. In its report the Committee notes there is an urgent need to 'again activate both the community and voluntary sector, and the corporate sector to contribute to the well being of the deprived classes.'

This approach goes against the spirit of the Constitution and the International Human Rights Law which hold the State duty bound to ensure equal enjoyment of rights by all. Commenting on State obligations, the *Committee on Economic, Social and Cultural Rights* in *General Comment No. 5*[11] states, 'while it is appropriate for Governments to rely on private, voluntary groups to assist persons with disabilities in various ways, such arrangements can never absolve Governments from their duty to ensure full compliance with their obligations under the Covenant.'

3.6 Characteristics of Disability NGOs

Distinction needs to be made here between charitable voluntary organisations and the self help organisations of the disabled. Majority of the voluntary organisations working in the area of disability in India are dominated by able-bodied, philanthropic individuals and professionals. They view people with disabilities as unfit to carry out day-to-day affairs of their lives. Such an approach is characteristic of the biocentric model, which presupposes the inability of people with disability to take charge of their own situation. There are over 3,000 service-delivery Non-Government Organisations (NGOs) in India of this kind.

In contrast, the self-help organisations, though relatively small in number, are motivated by a rights-based

[9] Ibid.

[10] Ibid.

[11] CESCR, General Comment No. 5, (para 12)
www.unhchr.ch/tbs/doc.nsf/0/4b0c449a9ab4ff72c12**5**63ed00**5**4f17d?Opendocument - 44k

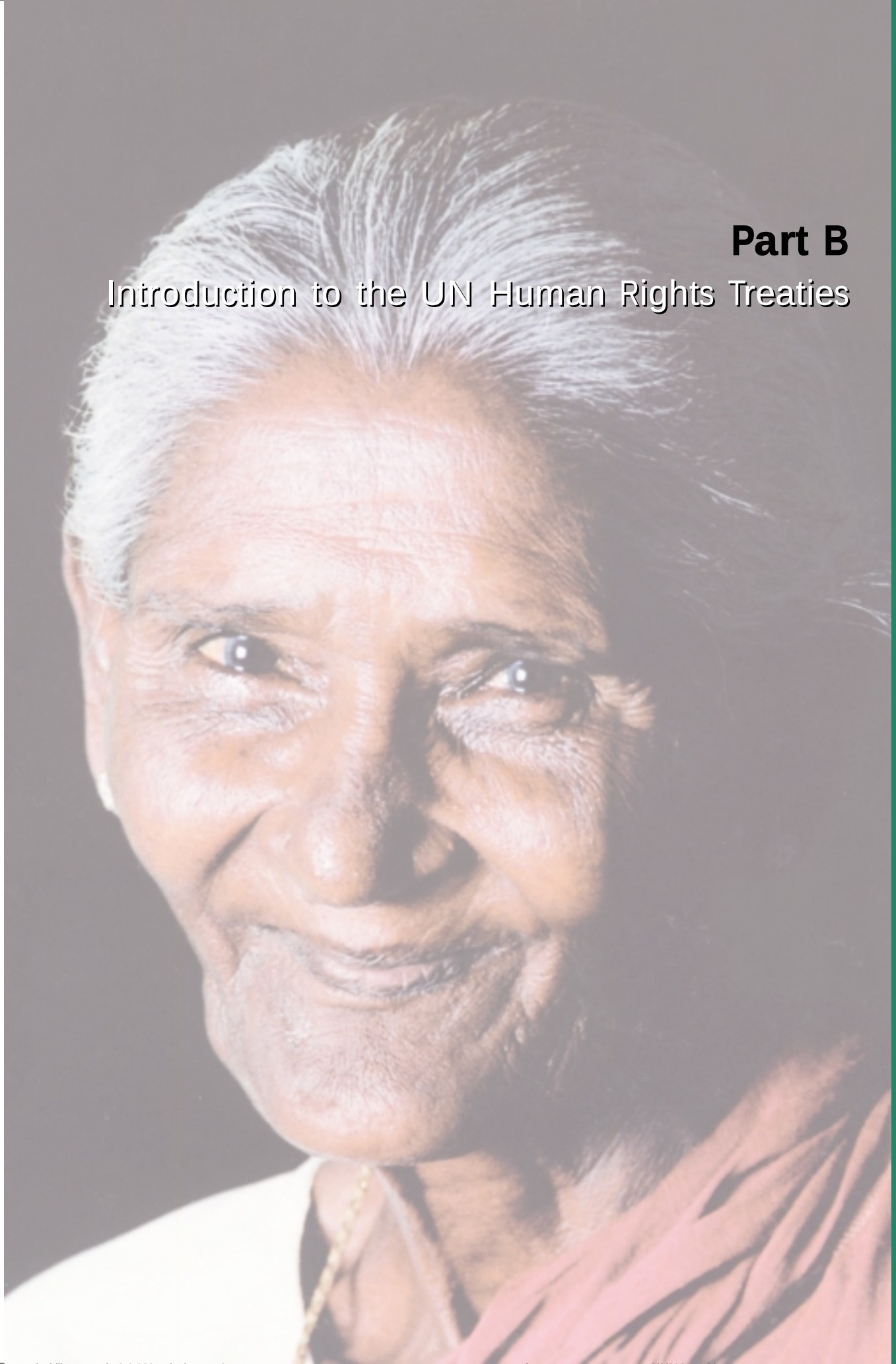
development orientation. Obviously, the self-help movement is spearheaded by persons with disabilities themselves. The disability movement is an emerging agent of social transformation as it has challenged the society to be more tolerant to diversity and differences. Self-help organisations have played a significant role in reshaping public opinion and their contributions in law and policy discourse have been noteworthy.

Any endeavour that seeks to promote the concept of development and human rights necessarily needs to take into account the perceptions of people themselves, as their real participation in the process of development alone can propel the process of change. This is not to suggest the involvement of concerned people in the design and delivery of policies as an end in itself. In fact, it is a means to greater participation in economic, social, cultural and political life.

The support to self-help organisations of the disabled and their parents for advocacy campaigns and for people-to-people empowerment does not come so easily since Indian society accords greater importance to welfare-oriented services. In fact, as seen above, these are the types of voluntary organisations whose involvement has been emphasised by the Steering Committee of the Planning Commission for the *Tenth Five Year Plan*. This approach is not only out of date but conflicts directly with the concept of development and human rights.

3.7 Conclusion

In conclusion, although legislative initiatives in India promote equality of people with disabilities by granting them basic social, economic and cultural rights and by taking various affirmative and special measures to achieve real equality, corresponding improvements in the lives of people with disabilities are not yet noticeable. Perhaps, the continued faith in charities and a welfarist mindset are the major stumbling blocks in the process of mainstreaming disability in the development agenda. The momentum for a paradigm shift from welfare to human rights holds the promise to overcome obstacles of mind, culture, apathy, and sympathy that remain blind to the unique abilities of the disabled.



Part B

Introduction to the UN Human Rights Treaties

NHRC

CHAPTER 4

International Human Rights Law and Its Relation to National Law

This chapter begins with a brief sketch of some of the major international human rights instruments, institutions and source materials. It examines the relevance of these sources to domestic litigation and describes a number of ways courts in different countries have drawn on international standards to inform their deliberations when deciding cases at the national level.

4.1 Overview of Major UN Human Rights Treaties and Mechanisms

This section briefly describes a number of the more prominent international instruments on human rights that have been adopted by the United Nations (UN). It also describes the system of monitoring the implementation of these instruments by the UN – in particular the system of human rights treaty bodies that has operated since the 1970s and which has produced a considerable body of State practice and jurisprudence relating to the interpretation and application of these instruments.[1]

The instruments and bodies described below are only a part of the enormous body of human rights standards that have been produced by the UN and regional bodies over the past fifty years. In addition, the human rights treaty bodies are just some of the bodies that have been established internationally and regionally to monitor the enjoyment of human rights guarantees. Yet these instruments and bodies are of particular importance from a legal perspective for two reasons: (a) most of the instruments described below are binding as a matter of international law on States that ratify them and (b) the independent expert nature of the human rights treaty bodies means that their output – decisions, general comments, concluding observations – is frequently given more weight by national courts and decision-makers than the resolutions or declarations of the overtly political bodies with responsibility for dealing with human rights matters (such as the UN Commission on Human Rights).

International human rights law that formally binds States as a part of international law derives from two major sources: (a) customary international law (the consistent and uniform practice of States accompanied by a sense of obligation) and (b) conventional law or treaty law (explicit written

[1] See generally Degener, Theresia and Yolan Koster-Dreese *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (Martinus Nijhoff, 1995).

agreements setting out obligations which States formally accept). In many cases there is considerable overlap between the customary international law obligations of a State in relation to human rights and its obligations under a treaty, which it has accepted. (The international prohibition on genocide, for example, is both a rule of customary international law binding on all States, as well as a rule of treaty law contained in the *Genocide Convention* binding those States, which are parties to that Convention.) Thus, a State may be obliged under customary international law to respect certain human rights, even if it has not ratified the treaty, which explicitly guarantees those rights. The major difference in such cases will be that the State may have accepted procedural obligations under the treaty – such as the obligation to submit regular reports or the acceptance of the jurisdiction of an international body to entertain complaints against the State – that will not be binding on it under customary international law.

In addition to these binding customary and treaty obligations, there are many human rights standards set out in instruments which are not themselves binding treaties and which therefore do not as such formally bind States (sometimes referred to as 'soft' law). However, some of the standards set out in these instruments may be so generally accepted by States that they pass into customary international law and become binding in that form (for example, the *Universal Declaration of Human Rights*).Courts in many countries have drawn on both customary and treaty standards, as well as 'soft' law to inform their decision-making in domestic cases. Sometimes these standards have been incorporated as part of the national law by constitutional or legislative provisions. In other cases, they do not as such form part of the domestic law, but have been drawn on by courts to supplement or develop existing rules of law.

In the present context – focusing in particular on the human rights of persons with disabilities – a further breakdown of international instruments is relevant. Human rights instruments can also be classified as **mainstream** instruments (applying generally to all humans) or **group-specific**, in the present context, **disability-specific** (providing particular protections to persons with disabilities).

The 'soft law' instruments adopted within the framework of the UN which focus specifically on disability include:

1. World Programme of Action concerning Disabled Persons (1982)
2. The Standard Rules for the Equalization of Opportunities for Persons with Disabilities (1993)
3. Declaration on the Rights of Disabled Persons (1975)
4. Declaration on the Rights of Mentally Retarded Persons (1971)
5. Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991)
6. Proclamation of the Economic and Social Commission for Asia and the Pacific on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region (1993)
7. Tallinn Guidelines for Action on Human Resources Development in the Field of Disability.

4.2 The Treaties and The Treaty Body System

The United Nations has adopted a number of international human rights standards over the past fifty years, some in the form of binding treaties, others in the form of non-binding instruments. Among the many treaties that have been adopted by the UN, seven human rights treaties are of particular importance

because they contain not only normative standards, but also mechanisms to oversee States' records in the implementation of their obligations under these treaties. The seven treaties are:

- International Covenant on Civil and Political Rights (1966) *(ICCPR),* together with the two Optional Protocols to the Covenant
- International Covenant on Economic, Social and Cultural Rights (1966) *(ICESR)*
- International Convention on the Elimination of All Forms of Racial Discrimination (1965) *(CERD)*
- Convention on the Elimination of All Forms of Discrimination against Women (1979) *(CEDAW Convention)* and the Optional Protocol to the Convention (1999)
- Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (1984) *(CAT)*
- Convention on the Rights of the Child (1989)*(CRC)*, and its two Optional Protocols (on the involvement of children in armed conflict, and on the sale of children, child prostitution and child pornography)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) *(CMW)* (entered into force on 1 July 2003).

The General Assembly is presently drafting a new convention on the rights of persons with disabilities, the *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*.[2] Another important disability-specific treaty is the *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities*.[3]

India is a State party to the *ICCPR,* the *ICESCR,* the *CERD Convention,* the *CEDAW Convention* and the *Convention on the Rights of the Child*. It has signed but not ratified the *Torture Convention*. It has not ratified any of the *Optional Protocols* to these instruments, or accepted any of the individual complaints procedures under those conventions it has ratified. It has entered substantive reservations to the *ICCPR, ICESCR,* and the *CEDAW Convention*. A general description of these treaties and treaty bodies and India's response to some of them are set out in Table 1 and Table 2.

Under each of the seven major treaties, there now exists a body of independent experts which monitors their implementation.[4] These experts are nominated by States parties to the treaties and are elected to them by the meeting of the States parties. With the exception of the *Committee on Economic, Social and Cultural Rights* (which was established by a resolution of the United Nations Economic and Social Council), these treaty bodies are all established pursuant to provisions of the respective treaty (see Table 1).

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[2] www.un.org/esa/socdev/enable/**rights**/ahcwgreportax1.htm.

[3] http://www.oas.org/EN/PROG/Juridico/english/treaties/a-65.htm.

[4] On the work of the treaty bodies in relation to disability issues, see Quinn, Gerard and Theresia Degener *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (United Nations, 2002).

TABLE 1: THE UN HUMAN RIGHTS TREATY BODIES

Treaty	Supervisory committee (number of members)	Reporting procedure*	Individual complaints procedure*	Inquiry procedure*	Power to adopt (general) comments or recommendations
International Covenant on Civil and Political Rights (1966) [ICCPR] • [First] Optional Protocol to the ICCPR 1966 • Second Optional Protocol to the ICCPR 1989	Human Rights Committee (18)	Yes	Yes	No	Yes
International Covenant on Economic, Social and Cultural Rights (1966) [ICESCR]	Committee on Economic, Social and Cultural Rights (18)	Yes	No	No	Yes
International Convention on the Elimination of All Forms of Racial Discrimination (1965) [CERD]	Committee on the Elimination of Racial Discrimination (18)	Yes	Yes	No	Yes
Convention on the Elimination of All Forms of Discrimination against Women (1979) [CEDAW] • Optional Protocol to the CEDAW Convention (1999)	Committee on the Elimination of Discrimination against Women (23)	Yes	Yes	Yes	Yes
Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (1984) [CAT] • Optional Protocol to the Torture Convention 2002 (not yet in force)	Committee against Torture (10)	Yes	Yes	Yes	Yes

* These procedures are described in the text following the tables.

Convention on the Rights of the Child (1989) [CRC] • Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (2000) • Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000)	Committee on the Rights of the Child (18 — from 2003, previously 10)	Yes	No	No	Yes
Convention on the Rights of All Migrant Workers and Members of their Families 1990 [CMW]	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (initially 10, to rise to 14 when 41 ratifications)	Yes	Yes	No	Yes

TABLE 2: INDIA AND UN HUMAN RIGHTS TREATIES

Treaty	Ratified/acceded to by India?	Declarations/reservations
ICCPR	EIF 10 July 1979	Reservations to arts. 1, 9, 13; declarations on arts. 12, 19(3), 21, 22 Declarations: "I. With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words `the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation—which is the essence of national integrity.* "II. With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State. "III. With respect to article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners. "IV. With reference to articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said [article] shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India. "V. With reference to article 7 (c) of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said article shall be so applied as to be in conformity with the provisions of article 16(4) of the Constitution of India."
ICCPR 1OP	No action	
ICCPR 2OP	No action	

* A number of States (France, Germany) objected to this particular reservation by India.

CERD	EIF 4 January 1969	The Government of India declares that for reference of any dispute to the International Court of Justice for decision in terms of Article 22 of the International Convention on the Elimination of all Forms of Racial Discrimination, the consent of all parties to the dispute is necessary in each individual case.
ICESCR	EIF 10 July 1979	I. With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights, ... the Government of the Republic of India declares that the words "the right of self-determination" appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people, or nation - which is the essence of national integrity. II. With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further, under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State. III. With respect to article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners. IV. With reference to articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said [article] shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India. V. With reference to article 7 (c) of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said article shall be so applied as to be in conformity with the provisions of article 16 (4) of the Constitution of India.
CEDAW	EIF 8 August 1993	i) With regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent. ii) With regard to article 16 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy. With regard to article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 of this article.

CEDAW OP	No action	
CAT	Signature only 14 Oct 1997	
CAT OP	No action	
CRC	EIF 11 January 1993	While fully subscribing to the objectives and purposes of the Convention, realising that certain of the rights of child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation; recognising that the child has to be protected from exploitation of all forms including economic exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India - the Government of India undertakes to take measures to progressively implement the provisions of article 32, particularly paragraph 2 (a), in accordance with its national legislation and relevant international instruments to which it is a State Party.
CRC AP	No action	
CRC SP	No action	
CMW	No action	

4.2.1 Composition, Role and Functions of the Treaty Bodies

The committees were originally established for monitoring the implementation of treaties by States parties through a number of different procedures. These include reporting procedures, individual complaint procedures and inquiry procedures. (A number of the treaties provide for an inter-State complaint procedure. However, as these procedures have never been used before any of the treaty bodies, they are of little practical relevance.)

Reporting Procedures

All of the treaties include a reporting procedure, under which States parties accept a legally binding obligation to submit regular reports to the Committee describing the steps they have taken to implement the treaty in question and any difficulties they may face in that task.

Individual Complaint Procedures

Individual complaint or communications procedures now exist under four of the treaties. Under these procedures, an individual may bring a complaint to the committee concerned claiming that he or she is a victim of a violation of the rights guaranteed under the convention. All of these procedures are *optional*, and complaints may only be brought against a State party to the treaty body that has accepted the competence of the committee to hear such complaints. The individual must also have exhausted available domestic remedies before the committees can entertain a complaint.

The treaties for which there is an individual complaints procedure are:

- International Convention on the Elimination of All Forms of Racial Discrimination: under *Article 14* of the Convention
- International Covenant on Civil and Political Rights: under the (First) Optional Protocol to the Covenant
- Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment: under *Article 22* of the Convention
- Convention on the Elimination of All Forms of Discrimination against Women: under the Optional Protocol to the Convention (entered into force in December 2000).

While there has been considerable discussion of an individual complaints procedure for the *International Covenant on Economic, Social and Cultural Rights*, the adoption of such a procedure appears unlikely in the near future.

Inquiry Procedures

Two of the conventions have an inquiry procedure which can be initiated by the committee concerned if it receives reliable evidence that there are systematic violations of the convention taking place in the State party concerned. These are *Article 20* of the *Convention against Torture* (if torture is being systematically practised in a State party) and under the *Optional Protocol* to the *CEDAW Convention* ('grave or systematic violations' of the Convention).

Output of the Treaty Bodies

Each of the treaty bodies produces a range of outputs of which advocates need to be aware if they wish to make effective use of treaty standards and evolving jurisprudence of the committees in their domestic advocacy, whether in courts, other legal fora or in political lobbying.

In addition to the texts of the treaties themselves, judges and lawyers need to be aware of the following types of output:[5]

- the general comments or general recommendations adopted by the committees
- the *views* or *decisions* of a committee adopted in a case submitted under an individual complaints procedure, or the *results of an inquiry* (in the case of the *Committee against Torture* or the *CEDAW Committee*)
- the *concluding observations* (or *concluding comments* in the case of the CEDAW Committee) on the reports of individual countries, and
- the reports of individual countries to the Committee (and the record of the discussion of those reports between the Committee and government).

While the treaties themselves are often reasonably well-known, the other outputs of the committees and of States parties to the conventions are not. Yet it is these documents that provide detailed content to the generally-worded provisions of the treaties, show the relevance of Convention provisions to the situation in a particular country (the *Concluding comments* or observations adopted following a country's report), and provide a source of comparative information about how other States parties (and one's own) have gone about implementing the Convention. The views adopted in individual cases are not only of importance to the person and country involved in the case, but contribute to an important body of developing jurisprudence relevant to other countries.[6]

4.2.2 Utility of the Treaties and the International Procedures under Them

There are manifold ways in which the treaties and the practice of the supervisory committees can, and have been used to contribute to changes at the national level. They include:

- use of reporting procedure to promote public discussion of issues and to bring to bear political pressure on government to change laws or policies
- direct invocation of treaty provisions and international jurisprudence before courts and tribunals in litigation
- reliance on international standards and jurisprudence in non-judicial fora, such as law reform commissions, human rights commissions, parliamentary committees and inquiries
- bringing individual cases before the committees under the individual communications procedures
- challenging inconsistent laws and policies under the inquiry procedures

Each of these can have significant effects on domestic law and practice, though they are by no means *guaranteed* to do so. The most effective use of international standards and procedures tends to be as an integral part of a national strategy.

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[5] These documents (and the texts of the treaties) can be found at the website of the UN High Commissioner for Human Rights: www.unhchr.ch

[6] For detailed discussion of the uses made of treaty body output by domestic courts and tribunals, see Committee on International Law and Practice of the International Law Association, *Final report on the impact of the United Nations treaty bodies on the work of national courts and tribunals*, June 2004, principal author as co-rapporteur of the 71st Annual Conference of the ILA in 2004 (available through ILA website: www.ila-hq.org (go to Committees, then to International Human Rights Law and Practice, then to Download 2004 Pre-conference report), and *Interim report on the impact of the United Nations treaty bodies on the work of national courts and tribunals*, 70th Annual Conference of the ILA in 2002 (available through ILA website). See also the international and comparative case law databases maintained by Interights at www.interights.org

4.3 Approaches to Interpretation of Treaty Provisions

4.3.1 Principles and Approach as a Matter of International Law – the Vienna Convention on the Law of Treaties

International law has developed a body of principles and rules in relation to the interpretation of treaties. While these may overlap with approaches under domestic law to statutory interpretation, there are a number of differences (especially in relation to traditional common law approaches to interpretation) that may lead to differing interpretations of the same provision.

Many national courts have accepted that in approaching the interpretation of a treaty provision – whether as part of national law or as a relevant source for national law – the court should strive to give the treaty the meaning that it would bear under international law approaches to interpretation. This means that the provisions on interpretation of the *Vienna Convention on the Law of Treaties (VCLT)* should be applied to the treaty. The critical provisions are *Articles 31* and *32* of the Convention.

Article 31 (1) of the *VCLT* provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

While the primary focus of the interpretation of a treaty is the text of the treaty in the light of its context, object and purpose, the *travaux préparatoires* (preparatory works or drafting history) of the treaty may also be important in resolving a provision that is unclear or ambiguous. This is provided in the *Article 32* of the *VCLT*:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

Although recourse to the preparatory work is explicitly stated to be permissible only when the meaning of a treaty provisions is ambiguous, in practice international bodies regularly look at the *travaux*, either because the 'context' and 'object and purpose' of the treaty (relevant under *Article 31(1)*) can often not be determined without reference to the preparatory materials or because treaty provisions are often capable of bearing more than one meaning.

Many provisions of international human rights treaties are so vaguely worded that it could legitimately be said in many cases that the meaning of the provision in a particular context is ambiguous, thus permitting consultation of the *travaux*. In fact, for example, the Human Rights Committee has regularly made use of the *travaux* in reaching its decisions under the *Optional Protocol* to the *ICCPR*. However, some care may need to be taken in being unduly limited by the *travaux*, especially where the drafters did not advert to a particular issue. Human rights treaties are expressed in general terms and were presumably intended by the drafters to adapt to changing times and circumstances. Accordingly, the use of the *travaux* can pose difficulties, as

very often the drafters did not specifically consider the point in issue.

There are various guides to the drafting history of the *ICCPR*, which comprises the consideration of the draft Covenants in the Commission on Human Rights and the Third Committee of the General Assembly. These include Henkin's 1980 commentary on the Covenant,[7] Bossuyt's *Guide* to the *travaux*,[8] and Manfred Nowak's *CCPR Commentary*. Other commentaries on the Covenant also contain references to the drafting history.

4.3.2 The Practice of the Treaty Bodies – General Comments, Case Law and Concluding Observations

The practice of the human rights treaty bodies also provides useful guidance for interpreting the provisions of the treaties, and is relied on extensively by the committees themselves. There are two sources of particular importance: general comments or general recommendations (described above) and the 'jurisprudence' of the committees that have individual complaint procedures. While neither of these sources is a formally binding interpretation of the treaties, in practice they are important guides, because they reflect the treaty bodies' own understanding and in most cases have been acquiesced in by the States Parties, some of whom have explicitly relied on them in their subsequent reports to treaty bodies or in individual complaints brought against them under complaints procedures. The Concluding observations of the committees on the reports of States Parties also provide guidance in the interpretation of the treaties in both individual cases and more generally.

4.4 Reasons for Using International Human Rights Norms in Litigation at the Domestic Level

Why is knowledge of international law standards in the field of human rights of any relevance to the work of national judges and advocates? Their work is primarily the application of national legislation and other rules such as common law or customary law rules that form part of the national legal system. However, there are a number of reasons why knowledge of international human rights law is important, even in countries in which treaties ratified by the State have not been incorporated into domestic law.

Firstly, international law requires domestic legal protections: under many international treaties (whether dealing with human rights or other subjects) States assume the obligation to ensure that their domestic law and practice are in conformity with the standards set out in the treaty. Exactly how that is done may vary from country to country and may depend on the nature of the specific treaty obligation, but in the case of human rights treaties there is generally a requirement that there be effective legal protection of the rights guaranteed, whether that be brought about through the constitution, legislation, court or administrative procedures. A failure of the State to ensure this protection involves a breach of its international obligations and incurs the responsibility of the State under international law. Such a breach may result from acts of various State organs, including courts. Where a court acts in a manner which results in the breach of an internationally guaranteed human right, then the action of the court as a State

[7] Henkin, L. (Ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981). This collection of essays on the Covenant includes in each chapter a discussion of the relevant travaux.

[8] Bossuyt, M.J. *Guide to the Travaux Préparatoires of the ICCPR* (1987).

organ may give rise to international legal liability on the part of the State. In some cases, the decisions of a court may be subject to review under an international complaint procedure in which an international body may reach a conclusion on whether the State has complied with its international legal obligations. While ultimately the courts must normally apply national law, it is important for them to know when this may lead to a violation of international law, especially if they have a leeway in the result they reach such that they can reach a result consistent with international law in accordance with accepted judicial techniques of interpreting and applying the law.

Secondly, in some countries these international law standards may have been incorporated into domestic law, whether by constitutional provisions, the legislative incorporation of international treaties or other standards, or by the adoption of rules of customary international law as part of or a source of national law.

Finally, it should be mentioned that courts frequently have to grapple with issues of international law, most frequently where the provisions of an international treaty have been directly incorporated by legislation or a statute transforms a treaty into domestic law. Courts in the Asia-Pacific region frequently deal with issues of treaty interpretation and application in their domestic decision-making in areas such as carriage of goods by air, shipping, extradition, conservation matters – and there are a significant number of cases in which human rights materials have also been referred to by courts of the region. Other ways in which courts have made use of international standards for guidance appear below.

4.5 The Relationship between International Law and National Law

One of the important factors that influences the extent to which courts are required (or feel able) to take into account international standards is the relationship between international law and national law. In many civil law jurisdictions treaties ratified by the State become part of the national law, frequently with the status of national legislation. In common law jurisdictions the more common situation is that treaties must first be incorporated into domestic law before they may be invoked directly before the courts to found a cause of action or to ground a legal defence. However, Nepal is an exception in this respect, since under the Treaties Act, treaties ratified by Nepal form part of national law.

In many jurisdictions – both civil law and common law – customary international law forms part of or is a source of national law, so customary international law norms may be properly considered by this route. However, courts in many countries have shown that it may be legitimate or helpful to draw on unincorporated treaties (or other non-binding international instruments) to inform their decision-making, even when those have not been directly incorporated into domestic law. The following sub-sections refer mainly to common law jurisdictions, but many similar issues arise also in civil law jurisdictions.

4.5.1 Where Treaties Do Not Form Part of National Law

The position in nearly all Commonwealth and common law countries (as well as many other countries) is in formal terms fairly similar: unincorporated treaties may not generally be relied on before domestic courts directly to found a cause of action, but they may nevertheless have an indirect impact on the interpretation and application of law. The presumption that the legislature does not intend to legislate in a manner that is inconsistent with international law is well-accepted in most common law and civil law

jurisdictions, and has as its corollary a principle of statutory interpretation that statutes should be interpreted in a manner which is consistent with international law.

Examples of how unincorporated treaties have been used by courts include:

a. *as an aid to constitutional or statutory interpretation, either generally or in order to resolve an 'ambiguity'.*
Examples: in *Madhu Kishwar vs State of Bihar*[9], the case involved a challenge to sex discriminatory inheritance rights under customary law. The court cited extensively from the Convention and noted that 'article 2(e) of *CEDAW* enjoins this Court to breathe life into the dry bones of the Constitution … to prevent gender discrimination and to effectuate right to life including empowerment of economic, social and cultural rights.' In *Gaurav Jain vs Union of India*[10], the Supreme Court of India cited among other international instruments, the *CEDAW* and *CRC* Conventions. In *Attorney-General of Botswana vs Unity Dow*[11], Court of Appeal of Botswana gave consideration to various international instruments in deciding whether constitutional guarantee of equality included discrimination based on sex.

For resolving an ambiguity: The Supreme Court of India in *Vishaka vs State of Rajasthan*[12], addressed the relevance of international sources to the interpretation of the constitutional guarantees as follows: 'In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safe guards against sexual harassment implicit therein.'

b. *as a relevant consideration to be taken into account in the exercise of an administrative discretion by a decision-maker (and thus subject to judicial review).*
Examples: in *R vs Director of Immigration, ex parte Simon Yin Xiang-jiang*[13], the Hong Kong Court of Appeal noted that the existence of treaty obligation in not expelling a stateless person except on grounds of national security or public morals should be taken into account by decision-makers considering whether to expel such a person on other grounds.

Where a local authority under the jurisdiction of the State of U.P. in India, denied allotment of house on concessional rate to a person with disability on the ground that no scheme has been formulated to give effect to such a right, the High Court of Allahabad in *National Federation of Blind, U.P. Branch and Another vs State of U.P. and Others*[14], stated, 'there is no law in India which prohibits allotment of land and houses to handicapped persons on concessional rate, but on

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[9] *Madhu Kishwar vs State of Bihar* [1996 AIR(SC) 1864].

[10] *Gaurav Jain vs Union of India* [1997 AIR(SC) 3021].

[11] *Attorney-General of Botswana vs Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana).

[12] *Vishaka vs State of Rajasthan* [AIR 1997 SC 3011, at 3015, (1998) 3 BHRC 261].

[13] *R v Director of Immigration, ex parte Simon Yin Xiang-jiang* (1994) 4 HKPLR 264 (Hong Kong Court of Appeal), citing *Tavita v Minister of Immigration* [1994] NZAR 116 (New Zealand Court of Appeal).

[14] *National Federation of Blind, U.P. Branch and Another vs State of U.P. and Others* [2000 (2) AWC 1234].

the contrary the Parliament has framed t*he Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, which provides for preferential allotment of land on concessional rate, of houses, setting up business, setting up of special recreation centres, establishment of special Schools, establishment of research centres, and establishment of factories by entrepreneurs with disabilities. Hence, international covenants, declarations, proclamations and treaties to which India is a signatory, are bound to be followed by every State'

c. *as giving rise to a legitimate expectation that the provisions of the treaty will be applied by a decision-maker unless a hearing is given to the person affected.*

Examples: In *Teoh vs Minister for Immigration and Ethnic Affairs*[15] the High Court of Australia gave relevance to guarantees in the Children's Convention in taking the decision of staying the deportation order of a parent as a relevant factor in the exercise of a discretion conferred by legislation on judges[16]. While examining the specific issue, whether the provisions of the Convention are relevant to the exercise of the statutory discretion and, if so, whether Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention, the Court concluded that the status of the Convention in Australian law reveals no intrinsic reason for excluding its provisions from consideration by the decision-maker simply because it has not been incorporated into our municipal law.[17]

d. *as a factor that may be taken into consideration in the development of the common law, where the common law is unclear.*

Examples: The Supreme Court of India in *Vishaka vs State of Rajasthan*[18] clarified that 'it is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.'

In *Rantzen vs Mirror Newspapers*[19] the English Court of Appeal gave the guarantee of freedom of expression and its relation to applicable standard for review of jury awards in defamation

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[15] *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 128 ALR 353 (High Court of Australia)

[16] See the discussion in *R v Togias* [2001] NSW CCA 5222 (NSW Court of Criminal Appeal), available through www.austlii.edu.au

[17] For an endorsement by Commonwealth judges of this position and the possibilities of drawing on international treaties (including the CEDAW Convention), see *Victoria Falls Declaration of Principles for Promoting the Human Rights of Women* (1994) and *Conclusions of the Asia/South Pacific Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human* Rights, in Andrew Byrnes, Jane Connors and Lum Bik (eds), *Advancing the Human Rights of Women: Using International Instruments in Domestic Litigation: Papers and statements from the Asia/South Pacific Regional Judicial Colloquium, Hong Kong 20-22 May 1996* (London: Commonwealth Secretariat, 1997) [hereinafter *Hong Kong Colloquium*], at 3-8. These statements built on the declarations of previous Commonwealth judicial colloquia relating to the use of international human rights norms generally at the national level: see P N Bhagwati, 'Creating a Judicial Culture to Promote the Enforcement of Women's Human Rights' in *ibid* at 20-21. See also Cartwright J in *Northern Regional Health Authority vs Human Rights Commission* [(1997) 4 HRNZ 37, at 57-58 (NZ High Court)].

[18] AIR 1997 SC 3011, (1998) 3 BHRC 261.

[19] (1986) Ltd. [1994] QB 670.

cases as a factor that may be taken into account when identifying the demands of public policy. In *Canada Trust Co vs Ontario Human Rights Commission*[20] the Ontario Court of Appeal took into account international treaties on non-discriminatio, including the *CEDAW* Convention to determine whether a sexist, racist and classist charitable trust was against public policy.

4.5.2 Challenges and Difficulties in Drawing on International Norms and Jurisprudence

The extent of utilisation of unincorporated treaties depends largely on the approach adopted by the judiciary: a judiciary which is prepared to be open to international influences and to draw on international jurisprudence for doing so in most common law systems. The task is probably easier where the judge is interpreting a constitutional or statutory Bill of Rights (in which there may be similar or identical guarantees to those contained in treaties by which the State is bound or which form part of customary international law). This is the case for the vast majority of Commonwealth countries, which became independent after the Second World War. Many of these countries have constitutions, which trace their parentage to the *European Convention on Human Rights*,[21] making reference to international jurisprudence under the *European Convention* (and the *ICCPR*) particularly easy to justify in formal terms, if any justification is needed. For those countries that have accepted the competence of the Human Rights Committee to consider individual complaints (under the *First Optional Protocol* to the *ICCPR*), the relevance of international case law is even more immediate. In the views of the High Court of Australia in *Mabo vs Queensland*[22] *(No 2),* 'The opening up of the international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imposes.'

In recent years a number of Commonwealth courts (especially those in Southern Africa) have energetically embraced international jurisprudence in the interpretation of national constitutional guarantees, including treaties to which the State concerned is not a party as well as those by which it is bound. In Attorney-*General of Botswana vs Unity Dow*[23] the plaintiff was a citizen of Botswana, married to a non-citizen, whose children had been denied citizenship under a provision of the Citizenship Act 1984 that conferred citizenship on a child born in Botswana only if 'a) his father was a citizen of Botswana; or b) in the case of a person born out-of-wedlock, his mother was a citizen of Botswana.' The plaintiff claimed that this provision violated guarantees of the Botswana Constitution. The High Court agreed, holding that the provision infringed the right to liberty, the right not to be expelled from Botswana, the right not to be subjected to degrading treatment, and the right not to be discriminated against on the basis of sex. It concluded that the right to liberty had been infringed because the provision hampered a woman's free choice to marry a non-citizen and, in fact, undermined marriage; that the right not to be expelled from Botswana was infringed because, if the plaintiff's resident permit was not renewed she would be forced to leave Botswana if she desired to stay with her family; and that the right not to be subjected to degrading treatment was infringed because any law discriminating against women constitutes an offence against human dignity.

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[20] *Canada Trust Co vs Ontario Human Rights Commission* [(1990) 69 DLR (4th) 321]

[21] See the classic statement of Lord Wilberforce in *Minister of Home Affairs and Another vs Fisher* [(1980) AC 319, at 328-330 (Privy Council)].

[22] Cp the views of Brennan J of the High Court of Australia in *Mabo v Queensland* [*(No 2)* (1995) 175 CLR 1, at 42].

[23] See, e.g. *Attorney-General of Botswana v Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana); *State v Ncube*, 1990 (4) SA 151 (Supreme Court of Zimbabwe); *In re Corporal Punishment*, 1991 (3) SA 76 (Namibian Supreme Court); *Rattigan v Chief Immigration Officer of Zimbabwe* (1994) 103 ILR 224, [1994] 1 LRC 343, 1995(2) SA 182 (Supreme Court of Zimbabwe).

More generally, there has been increasing reference to the output of the UN human rights treaty bodies in national courts and tribunals.[24] A number of factors have influenced the extent to which national courts have used the output of the treaty bodies. These factors include the knowledge of those materials by national courts and advocates, the ability of the materials to be applied in the resolution of a specific case before a tribunal, the normative standard being interpreted by the national court and the relationship of the international standard to the domestic one, the quality of the reasoning underlying the international source, the availability of international review of the national decision, the accessibility of the international materials to national courts and advocates, and the general attitude of the national courts to international law[25].

For example, national courts have described the *General comments* and *Views* of the Human Rights Committee as a 'major source for interpretation of the ICCPR',[26] and its decisions as being 'persuasive',[27] or 'of considerable persuasive authority'[28], or of direct relevance' to issues of discrimination.[29] The *General comments* and recommendations of the *Committee on Economic, Social and Cultural Rights* have been described as 'of importance for the interpretation and jurisprudential development [of the Covenant] though they are not directly binding.'[30] The *General comments* and similar outputs have been described as 'essential points of reference for the interpretation of national constitutions and legislation and the development of the common law.'[31]

One important case in which the Supreme Court of India relied on *CEDAW Convention* and the output of the treaty body established under it and gave effect to it in a most direct manner is *Vishaka vs State of Rajasthan.*[32] The case arose out of an alleged gang rape of a woman employee of the state government and the failure of officials to investigate complaints of rape. A writ was lodged with the Supreme Court requesting it to direct the State to form a Committee to frame guidelines for the prevention of sexual harassment and abuse of women at place of work.

While the decision of the court was based on a number of guarantees of fundamental rights under the Constitution of India[33] and the court's jurisdiction under *Article 32* of the Constitution to enforce fundamental rights, the court referred to *Article 11* of the Convention and to *General recommendation 19,* used particularly in framing guidelines for the prevention of sexual harassment and abuse of women.

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[24] See *ILA Report*, *supra* note 6.
[25] See *ILA Report*, *para 19*.
[26] *Maria v McElroy*, 68 F Supp 2d 206, 232 (EDNY 1999) ('The Human Rights Committee's General Comments and decisions in individual cases are recognised as a major source for interpretation of the ICCPR.' (referring to *Aumeerudy-Cziffra v Mauritius*)).
[27] *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, at 461 (New Zealand Court of Appeal, Smellie J) ('I agree also that the United Nations Human Rights Committee cases are persuasive').
[28] *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, at 405 (New Zealand Court of Appeal, Eichelbaum CJ) ('a decision of the *HRC* must be of considerable persuasive authority').
[29] *Quilter v Attorney General* [1998] 1 NZLR 523, at 577 (New Zealand Court of Appeal, Tipping J) 'Thus, while in no way binding, the committee's approach to the concept of discrimination is of direct relevance to New Zealand jurisprudence on the subject.')
[30] *A and B v Regierungsrat des Kantons Zürich*, Judgment of 22 September 2000, § 2(g), Swiss Federal Supreme Court (*Bundesgerichtf*) ('Diese Stellungnahmen sind zwar für die Auslegung und Rechtsentwicklung von Bedeutung, können aber keine direkte Verbindlichkeit beanspruchen').
[31] *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218, at 235 (High Court of New Zealand, Cartwright J)(quoting the *Bloemfontein Statement* 1993, para 8).
[32] *Vishaka vs State of Rajasthan* ,AIR 1997 SC 3011, (1998) 3 BHRC 261
[33] The court placed primary emphasis on the guarantees of the right to equality, the right to life and the right to liberty; however, it also noted the relevance of the right to practice any profession or to carry on an occupation, and the right to just and humane conditions of work.

The Supreme Court of India has also referred to General Comments of the Human Rights Committee in *TMA Pai Foundation and others vs State of Karnataka*[34]. Drawing on the General Comment adopted on 6th April, 1994 by the Human Rights Committee functioning under the Optional Protocol of the *ICCPR*, the Court observed, 'from the aforesaid report it is clear that in certain circumstances rights conferred to minority groups are distinct from and additional to, all the other rights which individuals are entitled to enjoy under the covenant.

However, some courts have not been so enthusiastic in their endorsement of an elevated status for international sources. The Kyoto District Court, 45 SHOMU GEPPO 1259 in a judgement stated that "views' and the like [*General comments*] of the *HRC* do not legally bind Japanese courts . . . [they] are at most only taken into account as opinions on the level of facts'[35].

There are, of course, a number of reasons why judges may wish to be cautious in drawing too enthusiastically on treaties, which have not been incorporated as part of domestic law, even though they are binding on the State as a matter of international law. Justice Michael Kirby (now of the High Court of Australia) has identified a number of matters that may influence judges to take a less expansive approach to the use of treaty norms.[36] They include the fact that the ratification of a treaty is generally an executive act, which may or may not reflect the views of the populace or the Parliament; or, in federal states, concern that the federal government may use the power to ratify treaties (and associated legislative power to implement them) to expand federal power at the expense of the power of the States.[37] Other concerns are that the process of judicial development of the law may divert attention from the more open and democratic adoption of such norms by way of statutory or constitutional Bills of Rights, suspicion about the composition and competence of international bodies, and a concern that the drive towards international conformity not lead to a neglect of the relevant national and local social and historical context.[38]

The Supreme Court of India has held on various occasions that although treaties do not automatically become part of domestic law under the Indian Constitution upon ratification, international conventions ratified by the State are relevant to constitutional interpretation.[39] In the context of the rights of persons with disabilities we may need to rely more frequently on the international human rights instruments as well as treaty body output as the domestic law and the jurisprudence on disability rights is not very well developed at this stage.

In the following sections of this manual, a brief analysis of international norms and standards is outlined with examples of treaty body output through the mechanism of *General Comments* and *General Recommendations* followed by domestic law examples and jurisprudence. The effort is to encourage better protection and promotion of the rights of persons with disabilities using both international and national law particularly taking advantage of a positive trend shown through various examples in this chapter of the courts' increasing use of international instruments including treaty body recommendations, comments and concluding remarks.

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[34] (2002) 8 SCC 481 at 655-56.

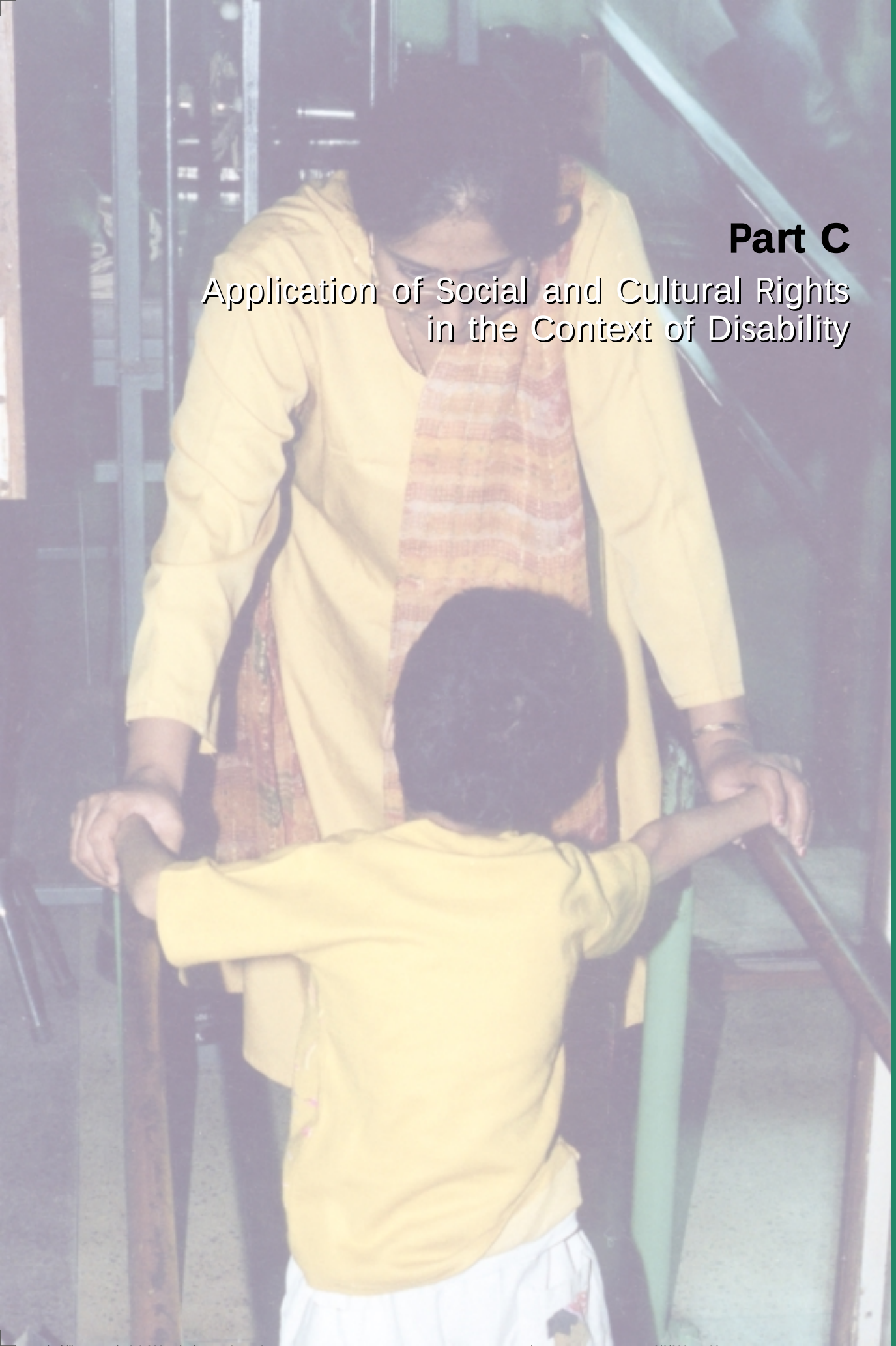
[35] Judgment of 27 March 1998, Kyoto District Court, 45 SHOMU GEPPO 1259Judgment of 15 October 1999, Osaka High Court, 1718 HANREI JIHO 30 (stating that '[general] comments of the Human Rights Committee do not legally bind the interpretation of the ICCPR and the ICESCR by Japanese courts').

[36] See Michael Kirby, *The Role of International Standards in Australian Courts' in Philip Alston* and Madelaine Chiam (eds), *Treaty-Making and Australia* (Sydney: Federation Press, 1995) 81.

[37] Ibid. at 86-87.

[38] Ibid. at 87-88.

[39] *Vishaka vs State of Rajasthan* [AIR 1997 SC 3011, at 3015, (1998) 3 BHRC 261].



Part C

Application of Social and Cultural Rights in the Context of Disability

NHRC

CHAPTER 5

Evolution and Nature of Social and Cultural Rights

This chapter discusses the evolution and nature of social and cultural rights. It also gives a brief outline of a number of international instruments on social and cultural rights that have a bearing on ensuring these rights for the disabled.

5.1 Evolution of Social and Cultural Rights and Disability

In general, social rights are related to enhancing the well-being and standard of living of all members of the society. They include access to education, enjoyment of the highest attainable standard of physical and mental health, and the right to adequate housing and food. While culture has a variety of meanings, cultural rights generally refer to rights to take part in cultural life and to freely exercise cultural customs and beliefs. Cultural rights include rights to participate in arts and recreation, and rights to the expression and practice of one's cultural identity and customs. Cultural rights also include the right to benefit from scientific progress and to be free to engage in scientific and creative activities.

The *Universal Declaration of Human Rights, 1948* includes a broad range of rights: social, cultural, economic, civil, and political. The Declaration articulates the human rights necessary to promote well-being and human dignity. When the Declaration was drafted after the Second World War, the international community agreed that it must equally emphasise 'freedom of speech and belief and freedom from fear and want.' Social well-being and participation in cultural life were understood as essential to life with dignity and as part of the spectrum of human rights that was necessary to promote world peace.

Although the focus of international bodies has generally been on developing the content and interpretation of civil and political rights, in recent years attention to economic, social and cultural rights has increased. The international community has emphasised the interconnection of all human rights, including a clear statement in the *Vienna Declaration and Platform for Action* at the 1993 World Conference on Human Rights reiterating that, 'all human rights are universal, indivisible and interdependent and interrelated.'[1]

Since human rights are indivisible and interdependent, the protection and promotion of social and cultural

[1] *Vienna Declaration and Platform for Action,* , para. 5

rights contributes to greater enjoyment of all rights. For instance, the right to education promotes freedom of thought and expression, as well as individual political participation. In turn, political participation and free expression can influence State action to implement social and cultural rights. An understanding of this interdependence between social and cultural rights and civil and political rights is central to the promotion of equal and effective enjoyment of human rights for persons with disabilities.

Awareness of the indivisibility and interdependence of rights is also important for an understanding of cultural rights. Cultural rights are inextricably linked with other rights. For example, cultural rights are promoted and protected through civil and political rights such as the freedom of expression and the rights of minorities. Social rights also have important cultural dimensions. The right to food, for example, has many cultural elements, such as the choice of food, agricultural practices, preparation methods, and how the food is eaten. Similarly, the right to education has a close connection to culture since education plays a significant role in nurturing a culture and in teaching cultural values. The notion of adequate housing can involve cultural elements related to appropriate location, types of housing structures, adequacy for traditional living arrangements, etc. Traditional health practices are also part of cultural identity. Similarly, language is a key component of cultural identity and linguistic rights have an overriding implication on the enjoyment of all other rights including civil and political rights.

The current understanding of social and cultural rights also includes sensitivity to the historical impact of industrialisation, colonisation, and globalisation. Colonial powers supplanted traditional cultures with imposed social structures and behaviours. Struggles for cultural rights are often connected to historical grievances. Industrialisation, colonisation and globalisation have had a significant impact on living conditions, especially of the world's poor. These changes are an important part of the context for social and cultural rights.

Part of the international discussion of culture and human rights has been the issue of 'cultural relativism' or 'cultural specificity'. Cultural relativists assert that human rights must be applied and interpreted according to different cultural values. This argument arises when individual rights appear to conflict with rights to culture. An awareness of this possible tension is particularly important in addressing the rights of those who have historically experienced discrimination, such as persons with disabilities. Cultural values may be used in an attempt to continue practices that prevent persons with disabilities from fully participating in society.

It is important to note that **declarations at the international level have repeatedly emphasised the universality of human rights: rights are the same everywhere regardless of culture, religion, customs or ideology.** For instance, the *Vienna Declaration* states:

> While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The National Human Rights Commission of India (NHRC)[2] too has found it difficult to 'accept the plea that because certain forms of human rights abuses or violations had long persisted in the country — whether for societal, behavioural or any other reason — these should continue to be acquiesced in or tolerated in the future as a 'wrong' does not become a 'right' if it has continued for long in the past.'

[2] NHRC Annual Report, *Disability - a Paradigm Shift: from Welfare to Human Rights*, 2003-04.

5.1.1 Disability and Social and Cultural Rights

All human rights belong equally to all persons – including persons with disabilities. In the area of social and cultural rights, discrimination against persons with disabilities is all too common. Persons with disabilities frequently have limited or no access to education, live in severely inadequate housing, are denied adequate necessities such as food and health care, and are often excluded from participation in recreation, cultural activities, and the social life of their communities.

Serious efforts to implement social and cultural rights involve a commitment to social integration and equality. This commitment is central to the full realisation of the equal human rights of persons with disabilities. Persons with disabilities are entitled to participate fully in the social and cultural life of their communities and to enjoy equal rights. They are entitled to the full protection of international and national laws.

As the nature of the modern nation state changes and non-state actors such as private enterprises, financial institutions, and development organisations take a greater role in the delivery of services and programmes, it is important that social and cultural rights be recognised as legal entitlements. Under international human rights law, governments are ultimately responsible for ensuring that all persons, including persons with disabilities, enjoy their rights without discrimination, irrespective of whether the concerned service provider is a state or a non-state entity.

It is clear that to guarantee disabled persons equal access to social and cultural rights they must be interpreted to respond to the specific experiences and living conditions of the disabled. Only a more contextual and meaningful interpretation of social and cultural rights will lead to greater awareness of the rights of persons with disabilities to ensure effective enjoyment of their human rights.

5.2 International Instruments for the Protection and Promotion of Social and Cultural Rights

Seven international instruments form the core of the international human rights law[3]. Out of these the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*) is most significant. In addition, the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention)*, and the *Convention on the Rights of the Child (CRC)* also have a bearing on the social and cultural rights of women and children. The meaning and provisions of *ICESCR* are elaborated in *General Comments* of *Committee on Economic Social and Cultural Rights (CESCR);* of these the *General Comment No. 5*[4] has special relevance for the rights of the disabled. *Standard Rules for the Equalization of Opportunities for Persons with Disabilities*[5] are also useful in interpreting *ICESCR* in this context. The rights of disabled women are dealt with in *General Recommendation No. 18* and *No. 24* by the *Committee on the Elimination of Discrimination Against Women* (*CEDAW)*[6] .

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[3] See Chapter 4 for a discussion on these instruments.

[4] www.unhchr.ch/tbs/doc.nsf/ (symbol)/E.C.12.1999.10.En?OpenDocument

[5] www.un.org/esa/socdev/enable/dissre00.htm

[6] www.unhchr.ch/tbs/doc.nsf/(symbol)/ CEDAW+General+recom.+**24**.En?OpenDocument

5.2.1 The Coverage of the International Covenant on Economic, Social and Cultural Rights

The *ICESCR* was adopted in 1966 and came into force in January 1976. As a State Party to this treaty, the government of India is obliged to protect and promote the rights mentioned in the Covenant and to comply with its monitoring procedures.

Parts I to III of the *ICESCR* set out a number of economic, social and cultural rights that States Parties must respect, protect and fulfil. The social and cultural rights of the *ICESCR* include, amongst others:

- the right to an adequate standard of living *(Article 11)*;
- right to the enjoyment of the highest attainable standard of physical and mental health *(Article 12);*
- the right to education *(Article 13);* and
- the right to take part in cultural life *(Article 15)*.

Although the *ICESCR* does not explicitly refer to the rights of persons with disabilities, the *Committee on Economic Social and Cultural Rights (CESCR)* has indicated that all the rights of the Covenant apply to all people. In its 1995 General Comment on persons with disabilities, the Committee expressly relates the rights of the *ICESCR* to the context of disability. ***General Comment No. 5*** states that **'since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant**.'[7] The General Comment includes an explicit requirement that States Parties ensure the full participation of persons with disabilities. Governments have a positive obligation to take measures to assist persons with disabilities in overcoming disadvantages that flow from their disabilities. The Committee stated that:

> The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.[8]

The non-discrimination provision of the *ICESCR* is a key provision when advocating for the equal rights of persons with disabilities. As Quinn and Degener write, 'The relevant non-discrimination norm is a lynchpin of the *ICESCR*. It plays an overarching role in ensuring the equal and effective enjoyment of all *ICESCR* rights. Its importance in the context of disability cannot be overemphasized.'[9]

5.2.2 Women's and Children's Rights Conventions

Two international human rights treaties supplement the *ICESCR* by providing human rights guarantees specific to the protection and promotion of the rights of women and children. *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention)* entered into force in September 1981.

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[7] CESCR, *General Comment No. 5*, para. 5

[8] Ibid., para. 9.

[9] Quinn, Gerard and Theresia Degener, *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (United Nations, 2002) 88.

The *Convention on the Rights of the Child (CRC)* entered into force in September 1990. While the rights enunciated in the *ICESCR* apply equally without discrimination on the basis of sex and age, *CEDAW* and *CRC* highlight particular vulnerability of women and children to rights abuses. The *CEDAW Convenrtion* includes the full range of human rights and specifically addresses social and cultural rights such as: education *(Article 10)*; access to health care *(Article 12)*; participation in recreational activities, cultural and artistic life *(Article 13)*; and an adequate standard of living including nutrition, clothing and housing *(Article 14)* . Like *CEDAW*, the *CRC* too covers the full range of human rights. The relevant social and cultural rights are: education *(Article 28)*; access to health care *(Article 24)*; adequate standard of living including nutrition, clothing and housing *(Article 27)*; rights of minorities to enjoy their own culture, religion and language *(Article 30)*; and participation in recreational activities, cultural and artistic life *(Article 31)*.

The intersection of disability with gender in many cases aggravates vulnerability. *General Comment No. 5* of the *Committee on Economic, Social and Cultural Rights* calls for special attention to the dual discrimination faced by women with disabilities and urges governments to give high priority to the implementation of economic, social and cultural rights for women with disabilities.[10] While the *CEDAW Convention* does not explicitly mention women with disabilities, the treaty is intended to apply to all women, implicitly including women with disabilities. In 1991, **the *Committee on the Elimination of Discrimination Against Women*** issued a **general comment on 'disabled women', *General Recommendation No. 18*.** This brief document calls attention to 'the situation of disabled women, who suffer from a double discrimination linked to their special living conditions' and calls on States Parties to:

> Provide information on disabled women in their periodic reports, and on measures taken to deal with their particular situation, including special measures to ensure that they have equal access to education and employment, health services and social security, and to ensure that they can participate in all areas of social and cultural life.[11]

CEDAW General Recommendation No. 24 on 'women and health' specifically mentions women with disabilities. The Committee notes that 'special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups such as … women with physical or mental disabilities. The *General Recommendation* also addresses cultural or traditional practices that may lead to disabilities, such as female genital mutilation.[12] The Committee expressed concern for older women who 'often live longer than men and are more likely than men to suffer from disabling and degenerative chronic diseases.'[13]

With respect to the double discrimination experienced by children with disabilities, the *CRC* explicitly refers to children with disabilities in *Article 23* of the treaty, but the provisions are relatively weak.[14] A more comprehensive rights advocacy strategy for children with disabilities might focus on the equal application of all the provisions of the treaty to children with disabilities. The equal application of all *CRC* rights without discrimination is guaranteed in *Article 2* and includes an explicit prohibition of discrimination on the basis of disability. Access to education, health care, and the basic necessities of food, clothing and housing, covered as rights in the *CRC*, is particularly important for children with disabilities. These rights

[10] CESRC, *General Comment 5*, para. 19.

[11] Note to CEDAW *General Recommendation 18*.

[12] CEDAW *General Recommendation 24*, para. 12(b).

[13] Ibid., para. 24.

[14] See Quinn & Degener, supra note 9, p. 192 for an analysis.

are essential to the exercise of other human rights and to full participation in society. Children with disabilities are frequently denied these rights outright or are denied access in practice due to physical barriers and lack of necessary supports.

5.2.3 Social and Cultural Rights and the Standard Rules

The *Standard Rules for the Equalization of Opportunities for Persons with Disabilities* are an important document to use in interpreting *ICESCR* rights in the context of disability, especially since the *CESCR* explicitly acknowledged the interpretative value of the *Standard Rules* in *General Comment No. 5*. The Rules provide useful guidelines and examples of how social and cultural rights can be applied in the context of disability. Several rules specifically refer to social and cultural rights. These Rules explicitly state many of the elements necessary to make social and cultural rights meaningful for persons with disabilities. The Rules on medical care, rehabilitation, education, participation in cultural life, and participation in sports and recreation spell out actions governments should take to promote equal opportunities for persons with disabilities and their full participation in society. *Standard Rules* repeatedly address issues of access to physical environments, to information and communication, to integration in mixed settings, to equal quality in services, and to consultation with organisations of persons with disabilities when developing accessible policies, programmes and services.[15]

[15] The Rules relevant to social and cultural rights are: *Rules 2, 3, 5, 6, 10* and *11*.

CHAPTER 6

Specific Social and Cultural Rights and their Relevance to Persons with Disabilities

This chapter provides a detailed description of legal instruments regarding a selected set of social and cultural rights. It discusses international and domestic standards for these rights and considers relevant examples of jurisprudence that have breathed life into them. The rights analysed are:

a. Right to Food and Clean Water
b. Right to Adequate Housing and Shelter
c. Right to Health
d. Right to Education
e. Linguistic Rights
f. Access to Places of Entertainment, Sports and Culture
g. Access to Media and Information Communication Technologies (ICTs)

Tables 6.1, 6.2, 6.3 and 6.4 at the end of the chapter give a synoptic view of the current state of the international and national law and policy on these rights from the perspective of the rights of the disabled.

6.1 Right to Food and Clean Water

6.1.1 International Standards for the Right to Food

The right to food is guaranteed in the International Covenant on Economic, Social and Cultural Rights (*ICESCR),* Convention on the Elimination of All Forms of Discrimination against Women *(CEDAW Convention),* and the Convention on the Rights of the Child (*CRC).* *Article 11(1)* of the *ICESCR* includes adequate food as a component of an adequate standard of living and *Article 11(2)* refers to 'the fundamental right of everyone to be free from hunger.' The *CEDAW Convention* includes adequate nutrition as part of an adequate standard of living in *Article 14*. *Article 24(2)(c)* of the *CRC* specifically mentions rights to both food and water, requiring States Parties to:

> combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious food and clean drinking water, taking into consideration the dangers and risks of environmental pollution.

In *General Comment No. 12*, the *CESCR* confirms that the right to adequate food applies to everyone without discrimination and 'is of crucial importance for the enjoyment of all rights.'[1] The General Comment also identifies principal issues related to the right to food. According to the *CESCR* the 'core content of the right to adequate food implies:

- the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; and
- the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.'[2]

The meaning of these statements is further elaborated in the General Comment. The 'physical access' is explained as implying that 'adequate food must be accessible to everyone including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill.'[3]

The *CESCR* indicates that taking steps to implement the right to adequate food will require the adoption of a national strategy 'to ensure food and nutrition security for all.'[4] The national strategy must address the need to prevent discrimination in access to food or resources to food.[5] When States Parties submit their periodic reports on the implementation of *ICESCR* rights, the revised reporting guidelines stipulate that reports must include detailed information on the right to food for especially vulnerable or disadvantaged groups.[6]

6.1. 2 International Standards for the Right to Clean Water

In addition to adequate food, adequate water is essential to life. While the right to water is not explicitly included in the *ICESCR*, it falls within the right to an adequate standard of living and is inextricably linked to the right to the highest attainable standard of health, rights to adequate food and adequate housing, and the right to life and human dignity. The *CEDAW Convention* explicitly recognises right to water by women. According to *Article 14(2)* the States Parties must 'ensure to women the right to enjoy adequate living conditions, particularly in relation to … water supply.' As noted above, the *CRC* includes the right to water along with the right to food in *Article 24(2)(c)*.

In *General Comment No. 15*, the *CESCR* confirms that '[t]he human right to water is indispensable for leading a life with human dignity.'[7] *Paragraph 2* of the *General Comment* states:

> The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

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[1] www.unhchr.ch/tbs/doc.nsf

[2] CESCR, *General Comment No. 12*, para. 8.

[3] Ibid. para. 13.

[4] Ibid. para. 21.

[5] Ibid. para. 26.

[6] www.ohchr.org/english/bodies/cescr/cescrs35.htm - 26k - 1 Jun 2005.

[7] CESCR, *General Comment No. 15*, para. 1.

The *General Comment* outlines the essential elements of the right to water: availability, quality, and accessibility.[8] Accessibility includes the concept of non-discrimination and equal access for 'the most vulnerable or marginalised sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.'[9] *Paragraph 13* also refers to non-discrimination and equality including the prohibition of discrimination on the grounds of 'physical or mental disability' and 'health status (including HIV/AIDS).' The *CESCR* calls on States to give special attention to individuals and groups who have traditionally had difficulties exercising the right to water including '[g]roups facing difficulties with physical access to water, such as older persons, persons with disabilities….'[10] Further, the core obligations of the right to water include ensuring 'the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalised groups' and 'equitable distribution of all available water facilities and services.'[11] National strategies for the implementation of the right to water must respect 'the principles of non-discrimination and people's participation.'[12]

6.1.3 Domestic Standards for the Right to Food

Constitutional Position

The *Directive Principles of State Policies* under *Articles 47, 39(a) and 39(b)* of the Constitution of India expand on the nature of the obligations of the State to ensure the effective realisation of the right to food. *Article 47* spells out the duty of the State to raise the level of nutrition and standard of living of its people as a primary responsibility. *Article 39(a)* requires the State to direct its policies towards securing the right to an adequate means to livelihood - equally for men and women. *Article 39(b)* further requires that the ownership and control of the material resources of the community are so distributed as to best serve the common good.

A number of judicial pronouncements in recent times have concluded that the right to food is inherent in the right to life under *Article 21* of the constitution and is enforceable. The earlier commentaries on justiciability were perhaps correct because the framers of the Constitution believed that the nation needed some time to prepare for the financial burden that could result if the Directive Principles were made enforceable. However, in the last two decades the Supreme Court of India on a number of occasions has interpreted these principles in harmony with fundamental rights. This is also indicative of a perception that India has acquired the needed level of economic capacity.

The Supreme Court in *M.C. Mehta vs Union of India* [13] and the *Consumer Education and Research vs Union of India.*[14] has declared the right to a healthy and sustainable environment a fundamental right under *Article 21*, and the right to housing has been considered a fundamental right in *Chameli Singh vs State of U.P.* [15].

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[8] Ibid. para. 12.

[9] Ibid., para. 12(c)(iii).

[10] Ibid., para. 16(h).

[11] Ibid., para. 37.

[12] Ibid., para. 48.

[13] *M.C. Mehta vs Union of India* [(1987) 1 SCC 395].

[14] *Consumer Education and Research vs Union of India* [(1995) 3 SCC 42].

[15] *Chameli Singh vs State of U.P* [(1996) 2 SCC 549].

Now the apex court in *People's Union for Civil Liberties vs Union of India and others*[16] has also considered the right to food enforceable under *Article 21*. In the case of *State of Maharashtra vs Manubhai Pragaji Vashi and Others*[17], the Supreme Court has said that where a Directive Principle remains unimplemented for a long time, the apex court could consider declaring it a Fundamental Right.

In its report, dated 7 February 1998, the National Human Rights Commission of India (NHRC) reiterated the positions taken by the Supreme Court. According to it, 'the expression 'life' in this Article has been judicially interpreted to mean a life with human dignity and not mere survival or animal existence. In the view of the Commission, the right to food is inherent to a life with dignity, and *Article 21* should be read with *Articles 39(a)* and *47* to understand the nature of the obligations of the State in order to ensure the effective realization of this right.'

Advancing the same principle, the Supreme Court of India in *People's Union for Civil Liberties vs Union of India and Others*[18] states, 'The citizen's right to be free from hunger enshrined in *Article 21* is to be ensured by the fulfillment of the obligations of the State set out in *Articles 39(a)* and *47*.' To further support this argument, the Court establishes the accord between the Constitution and International Human Rights Law in the following terms, 'The provisions of the Covenant (*ICESCR*) which elucidate and go to effectuate the fundamental rights guaranteed by our constitution can certainly be relied upon by the courts as facets of those fundamental rights and hence enforceable as such.'

Article 51 of the Constitution indicates the spirit in which India approaches her international relations and obligations. It lays down that the State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with one another. Numerous examples of the Supreme Court citing international instruments in support of its decisions are given in Part B (Section 4.5) of this manual under the title 'The Relationship between International Law and National Law.'

Right to Food for persons with disabilities

Traditionally, the issue of nutrition in the disability law and policy is raised from the perspective of disability prevention since malnutrition in its various forms is a cause of disability as well as a contributory factor in other ailments that increase risk to disabling conditions. According to the Human Development in South Asia Report (2001), the incidence of anaemia among the expectant and nursing mothers between the age group of 15 to 19 years is highest in India in the SAARC region. As a consequence, about 30% of all infants born in India weigh less than 2,500 grams, which is the WHO cut-off level to determine low birth weight with a lower chance of survival and high risk of disability.[19]

Section 25(f) of the *Persons with Disabilities (Equal Opportunities, Protection Of Rights And Full Participation) Act, 1995*, makes it incumbent upon the appropriate Governments and local authorities to 'take measure for pre-natal, peri-natal and post-natal care of mother and child.'

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[16] *People's Union for Civil Liberties vs Union of India and others* [(1997) 3 SCC 433].

[17] *State of Maharashtra vs Manubhai Pragaji Vashi and Others* [(1995) 5 SCC 730]

[18] Op. Cit.

[19] Report of *'Independent Commission on Health in India',* (1997).

The NHRC has considered the problem of nutritional anaemia affecting the mental development of the foetus and the infant child to be an important human rights issue. The Commission in the year 2000 recommended that Central and State Governments undertake systematic measures to tackle this problem effectively.[20]

In the history of rights of persons with disabilities in India, the right to food features for the first time in *People's Union for Civil Liberties vs Union of India and Others*[21] case. In its interim order[22] dated 23rd July 2001 the Court asked the Governments to include persons with disabilities in all the schemes targeted at poorer sections of the society. In specific terms, the Court directed:

> Antyodaya Anna Yojana (AAA) Cards be issued to the following groups of persons, which would entitle them to buy grains at highly subsidised rates:
>
> (i) Aged, infirm, disabled, destitute men and women, pregnant and lactating women
> (ii) Widows and other single women with no regular support
> (iii) Old persons (aged 60 or above) with no regular support and no assured means of subsistence
> (iv) Households with disabled adults and without assured means of subsistence
> (v) Households where due to old age, lack of physical or mental fitness, social customs, need to care for a disabled, or other reasons, no adult member is available to engage in gainful employment outside the house
> (vi) Primitive tribes.

Though the right of the disabled to food is clearly enunciated in the order of the apex court, the self criticism of an activist who was a party to the petition is worth considering as it shows that the juridical autonomy for the rights of the disabled aimed by disability activists is still not reached. 'It must be pointed out that disability comes in by a side wind, casually, almost accidentally, in this case as well. Reference to the disability sector and the special concessions sought by them for highly subsidized grains, is found in that part of the order where the disability sector is enjoined with the aged, the infirm and the sick. Once again, casualty was the disability rights, since the right to food was again viewed as a dole or charity. This is a harsh self-criticism because despite being part of the Disability Rights movement, one could not mainstream right to food for persons with disabilities in all issues that are addressed in *People's Union for Civil Liberties* case.' [23]

While malnutrition for sure is a sign of poverty, lack of nutritional security is also indicative of inequity, political apathy and poor governance. Expressing concern over starvation deaths and mismanagement, the NHRC in its order[24] dated 17 January, 2003 observed that 'starvation deaths reported from some pockets of the country are now invariably the consequence of mis-governance resulting from acts of omission and commission on the part of public servants, they are of direct concern to the Commission under the provisions of the *Protection of Human Rights Act, 1993*.' In *People's Union for Civil Liberties*[25] case the Supreme Court notes, 'Plenty of food is available, but

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[20] NHRC Annual Reprot 2000-2001, Annexure 4 (page 228).

[21] *People's Union for Civil Liberties vs Union of India and others* Civil Writ Petition No. 196 of 2001.

[22] Ibid. Order dated 23 July 2001.

[23] Gonsalves, Colin 2005, unpublished paper, *Right to Food*.

[24] NHRC order dated 17 January, 2003 in case no. 37/3/97-LD, complaint of Shri Chaturanan Mishra

[25] *Supra* note 21.

distribution of the same amongst the very poor and the destitute is scarce and non-existent leading to malnutrition, starvation and other related problems.'

6.1.4 Domestic Standards for the Right to Clean Water

In domestic jurisprudence the right to clean water is increasingly being seen as part of the right to life. In the case of *Attakoya Thangal vs Union of India*,[26] the Supreme Court of India stated :

> [T]he right to life is much more than animal existence and its attributes are manifold, as life itself. A prioritization of human needs and a new value system has been recognized in these areas. The right to sweet water, and the right to free air, are attributes of the right to life, for, these are the basic elements which sustain life itself.

It is evident from the manner in which right to food and clean water has evolved that a disability perspective is gradually being recognised and right to food is now not only seen important from the perspective of preventing disabilities, but it has also been recognised as an important right for those who have to live their lives with disability and in poverty. Availability and accessibility to clean water for persons with disabilities in rural areas, urban slums and difficult terrains have direct implications for the right to life, but the law has yet to sufficiently develop in this context.

6.2 Right to Adequate Housing and Shelter

Having a secure place to live is central to life with dignity. A safe and adequate living environment is essential to quality of life and it fosters physical and mental health as it enables participation in the community and the exercise of many social and cultural rights. Adequate housing not only meets the need for shelter from the elements, but also for physical security and personal privacy. Housing contributes to community life as a place for social events and for nurturing family and community relationships. Housing may also be essential to a family's income as income-generation activities are sometimes based in the home. **Emphasis on housing as an element of life related rights is particularly powerful when advocating for the rights of persons with disabilities.**

6.2.1 International Standards

The *Universal Declaration on Human Rights* under *Article 25(1)* has emphasized that housing is essential to everyone as it forms part of living. It states that,

> Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The most comprehensive provision in respect of the enforceable right to adequate housing is found in *Article 11(1)* of the *ICESCR*, which states: 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, to the continuous improvement of living conditions.'

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[26] *Attakoya Thangal vs Union of India* [1990 (1) KLT 580].

Adequate Housing

The *CESCR*, which monitors the implementation of the *ICESCR*, in its *General Comment No. 4* entitled 'the right to adequate housing' sets out the minimum core obligations contained in *Article 11(1)* of the *ICESCR* that must be immediately fulfilled. These minimum core obligations define the concept of adequacy with respect to the right to housing. The Committee notes that '[a]dequate shelter means … adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost.'[27] The *CESCR* highlights several particular housing issues that determine adequacy:[28] These are :

- *legal security of tenure* including legal protection against forced eviction, harassment and other threats;
- *availability of services, materials, facilities and infrastructure* including facilities and resources essential for health, security, comfort and nutrition;
- *affordability* including State housing subsidies and financing, as well as protection against unreasonable rent increases;
- *habitability* in terms of adequate space, protection from elements and threats to health, and physical safety of the occupants;
- *accessibility* to ensure that housing is available to those entitled to it, including 'such disadvantaged groups as the elderly, children**,** the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill …' who 'should be ensured some degree of priority consideration in the housing sphere' and who should be taken into account in law and policy on housing;
- *location* which allows access to 'employment options, health-care services, schools, child-care centres and other social facilities'; and
- *cultural adequacy* with attention to the way housing is constructed, building materials used, and housing policies that 'enable the expression of cultural identity and diversity of housing.'

The Comment also states clearly that the right to adequate housing 'applies to everyone.' The enjoyment of the right to adequate housing must not be subject to any form of discrimination. The *CESCR* also highlights further the principle that the right to housing 'cannot be viewed in isolation from other human rights.' The full enjoyment of rights such as the right to freedom of expression, the right to freedom of association, the right to freedom of residence and the right to participate in public decision-making are indispensable to the realisation of the right to housing. The *CESCR* also states that 'the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.'[29]

The *CESCR's* emphasis on the inter-relatedness of the right to housing with other rights is particularly important for persons with disabilities, since adequate housing is a necessary condition to equal participation in the political, social, economic and cultural spheres of society. In cases where institutionalisation or full

[27] CESCR, *General Comment No. 4*, para. 7.

[28] Ibid. para. 8.

[29] Ibid., para. 9.

service care are the only forms of housing provided, there are barriers to participation inherent in the type of housing itself.

States Parties are required to take whatever steps are necessary to achieve the full realisation of the right to adequate housing. This 'almost invariably require(s) the adoption of a national housing strategy' which should 'reflect extensive genuine consultation with, and participation by, all of those affected.' [30] *Rule 5* of the *Standard Rules* also explicitly supports the participation of persons with disabilities in the development of policy related to access to the physical environment, including housing.

The right to housing as a component of an adequate standard of living is also included in the *Article 14* of the *CEDAW Convention, Article 27* of the *CRC,* and in the *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Draft Convention on Disability, Article 23(2)).*

The *Vancouver Declaration on Human Settlements, 1976*, also known as the Habitat I conference, in *Section III (8)* states that,

> Adequate shelter and services are a basic human right which places an obligation on governments to ensure their attainment by all people, beginning with direct assistance to the least advantaged through guided program of self help and community action. Governments should endeavor to remove all impediments hindering attainment of these goals.

The *Habitat Agenda*, that came out of the Habitat II conference in Istanbul, Turkey in 1996 in *Paragraph 61* states,

> Within the overall context of an enabling approach, Governments should take appropriate action in order to promote, protect and ensure the full and progressive realization of the right to adequate housing.

Independent Living

Article 15 of the *Draft Convention on Disability* incorporates the ideas enshrined in other human rights instruments and says,

> States Parties to this Convention shall take effective and appropriate measures to enable persons with disabilities to live independently and be fully included in the community, including by ensuring that:
>
> 1) persons with disabilities have the equal opportunity to choose their place of residence and living arrangements;
> 2) persons with disabilities are not obliged to live in an institution or in a particular living arrangement;
> 3) persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance, necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community; and
> 4) community services for the general population are available on an equal basis to persons with disabilities and are responsive to their needs;

Integral to their right to housing is the right of persons with disabilities to live independently and be included in their communities. 'Living independently' does not necessarily refer to living alone or separate

[30] Ibid., para. 12.

from family, but refers to independent choice about living arrangements. In many cases, persons with disabilities have been segregated from their communities and housed in institutions where they are vulnerable to human rights abuses.

This problem is also addressed in *Principle 3* of the *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, adopted by the UN General Assembly in 1991, which refers to independent choices related to living independently and participating in the community.

Access to Housing

Access to housing has wide range of implications, and from a disability standpoint the UN *Standard Rules, Biwako Millennium Framework,* and *World Programme of Action concerning Disabled Persons of 1982(WPA)* provide useful guidance.

Rule 5 of *Standard Rules* lists the range of measures that are necessary to ensure access by people with disabilities to physical infrastructure. These include development of standards and guidelines and enactment of legislation. The social institutions given priority include housing, streets and other outdoor environments.

Investments in the removal and prevention of architectural and design barriers are increasingly being justified on economic grounds, particularly in areas most critical to social and economic participation (e.g., transport, housing, education, employment, health care, government, public discourse, cultural and religious activities, leisure and recreation)[31] by persons with disabilities.

Article 23 (1) of the *Draft Convention on Disability* requires the States Parties to take measures to 'ensure access by persons with disabilities to governmental housing programs, including through earmarking percentages of governmental housing for persons with disabilities.'

Accessible housing not only needs to be provided, information about it must also be made available to the disabled. *Article 15(e)* of the *Draft Convention on Disability* is relevant in this regard. It asks for ensuring that 'persons with disabilities have access to information about available support services.'

Forced Eviction

Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups, including persons with disabilities all suffer disproportionately from the practice of forced eviction. The *CESCR* has issued *General Comment No. 7* on *Forced Eviction*, which defines 'Forced Eviction' as, 'Permanent or temporary removal against the will of individuals, families or communities from their homes or land, which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.'

In the view of the Committee, forced evictions also occur in the name of development, in connection with conflict over land rights, development and infrastructure projects, land acquisition measures

[31] *Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons With Disabilities in Asia and the Pacific,* available at www.unescap.org/esid/psis/disability/bmf/bmf.html .

associated with urban renewal, housing renovation, city beautification programmes, unbridled speculation in land, etc.

Moreover, in view of the increasing trend in some states toward greatly reducing government responsibilities in the housing sector, the *CESCR* in *General Comment No. 7* encourages States Parties to ensure that 'legislative and other measures are adequate to prevent, and if appropriate punish, forced evictions carried out without appropriate safeguards by private persons or bodies.'

The UN *Commission On Human Rights Resolution on Forced Evictions,* to which India is a party also reaffirms that, '…the practice of forced eviction constitutes a gross violation of human rights, in particular the right to housing.' It is interesting to note that the inclusion of forced evictions as one of the primary causes of international housing crises in the working paper on the right to adequate housing was done at the initiative of Mr. Rajinder Sachar, a former Chief Justice of the Delhi High Court, who chaired a UN Committee on forced evictions that drafted *General Comment No. 7*.

6.2.2 Domestic Standards

Constitutional Provisions

The right to residence and settlement has been pronounced as an extension of *Articles 14* and *21* of the Constitution. In *Chameli Singh vs State of U.P.*[32], the Supreme Court has observed that 'the right to social and economic justice conjointly co-mingles with right to shelter as an inseparable component for meaningful right to life. In *Shantistar Builders vs Narayan Khimalal Tortame*[33]*,* the court remarked that 'the right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in.' In *Ahmedabad Municipal Corporation vs Nawab Khan Gulab Khan*[34], the Court held that it is the duty of the State to provide housing for the urban poor, and provide adequate facilities and opportunities for settlement of life and erection of shelter over their heads to make the right to life meaningful, effective and fruitful.

Emphasising the need for a *'suitable accommodation'*, which is distinct from the concept of bare shelter, the Supreme Court[35] observes, 'The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body, for a human being it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual.' The same conclusion is reiterated by the court in *Chameli Singh vs State of U.P.*[36] :

> Shelter for a human being, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities.

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[32] *Supra* note 15.

[33] *Shantistar Builders vs Narayan Khimalal Tortame,* [(1990) 1 SCC 520].

[34] *Ahmedabad Municipal Corporation vs Nawab Khan Gulab Khan*[(1997) 11 SCC 121].

[35] *Shantistar Builders vs Narayan Khimalal Tortame* [(1990) 1 SCC 520].

[36] *Supra* note 15.

Indian society has viewed caring for disabled as an inseparable part of the family and community life. Examples of separate living arrangements in isolation from the mainstream are few and far between. To some extent the recent initiatives in law try to maintain this social harmony. For instance, the central object of the *National Trust Act, 1999*[37] is,

> To enable and empower persons with disabilities to live as independently and as fully as possible within and as close to the community to which they belong.

The right to housing is one of the most troubled rights in the Indian jurisprudence; for the simple reason that though the right is well established in theory, the reality is far removed from it. Or perhaps, it may be more appropriate to say that there is a right to housing for some, it is non-existent for most. The dwelling units of about half of India's population would be described unsuitable if assessed from the parameters set out by the Supreme Court.

Census of India 2001 Data on Housing

Although it is the duty of the State to provide housing for the urban poor[38], the situation on ground is rather grim. According to the *Census 2001* data[39], 82 million of the total urban population of 285 million in India lives in slums and other low-income informal settlements. This means that about 30% of country's urban population has little or no access to adequate housing and basic amenities. The situation in rural areas is even more dismal. This is a clear indication of human misery on a colossal scale.

In 1997, the housing shortage was estimated to be 13.66 million units. At present the housing shortage is estimated at 40.8 million. According to the *Census 2001* data, Mumbai, the largest city in India, has a total population of 11.91 million, of which 5.83 million or 49% comprises of slum population. The capital city of New Delhi has a total population of 9.817 million, of which 18.9% or 1,854 million live in slums. Chennai, the largest city in South India has a population of 4.216 million, out of which, according to the *Census 2001* data, the slum population is 0.747 million or about of 17.8%. City's civil society organizations however counter this figure. According to them forty percent of city's inhabitants live in slums. The population of the city of Kolkata is 4.58 million of which the official slum population is 1.49 million, which is 32.53% of the total population. The city has the highest density of population with 24,760 persons living per square km, which is an indicator of the overall degraded, overcrowded and congested living conditions within the city.

It is estimated that people with disabilities make up 15 to 20% of the poor population[40]. The *WPA* in *Concerning Disabled Persons* notes, 'a high proportion of overburdened and impoverished families, and overcrowded and unhealthy housing and living conditions are responsible for the rising numbers of disabled persons and the relegation of disabled persons to the margins of society.'

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[37] www.nationaltrust.org.in

[38] *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Others* [(1997) 11 SCC 121]

[39] Report by National Forum for Housing Rights, *Eviction Watch India,* (Combat Law Publication, Jan, 2003).

[40] ESCAP, 2002 www.unescap.org/esid/psis/disability/bmf/bmf.html .

State Policies and Schemes on Housing

Inequitable economic and social policies have contributed to ever swelling population of people living in extreme poverty. Poor families often do not have sufficient income to meet their basic needs. Inadequate shelter, unhygienic living conditions, lack of sanitation and clean drinking water combined with poor access to health facilities characterize urban slums and dwelling units of rural poor.

The *National Habitat and Housing Policy, 1998* of India in fact clearly establishes the seriousness of the problems of the poor and weaker sections. The Policy document states,

> After fifty years of independence most of us still live in conditions in which even beasts would protest. … The situation is doubtless grim and calls for nothing less than a revolution – 'A Housing Revolution'.

The Policy establishes the need for urgent action to ameliorate the housing needs of the urban poor through construction of houses for the low-income groups (LIG) and economically weaker sections (EWS). Towards this end, the policy agenda sets a target of construction of two million houses every year with emphasis on housing for the poor and deprived.

Recognising a high co-relation between disability and poverty, the *Persons with Disabilities Act* promotes mainstreaming disability in the poverty reduction schemes. *Section 40* of the Act stipulates,

> (A)ppropriate Governments and local authorities shall reserve not less than three per cent in all poverty alleviation schemes for the benefit of persons with disabilities.

As part of this strategy, the disability component is incorporated in a number of schemes. Prominent among these is the *Indira Awas Yojana*. The utilisation of this scheme by the rural disabled however has been insignificant. The gross under-utilisation can be attributed to procedural hurdles and lack of guidelines within the scheme regarding norms for building accessible houses. The Ministry of Urban Affairs has developed and circulated *Model Building By Laws* to all the State Governments and Union Territories. Barring the States of Karnataka, Rajasthan, Punjab and Delhi, others have yet to incorporate these to the existing building codes. Non-availability of accessible houses and lack of information to the rural poor may have added to the problem of under-utilisation, but the question remains how could the funds be allowed to lapse year after year, when the directions given by the Supreme Court clearly prohibit it. The apex court in *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan and Others*,[41] has held,

> [W]hen the State, namely, Union of India or the appropriate State Government or the local bodies implement these schemes for housing accommodation of the Scheduled Castes and Scheduled Tribes or any other schemes, they should, in compliance with mandates of Articles 46, 39 and 38, annually provide housing accommodation to them within the allocated budget … and the budget allocation should not either be diverted or used for any other scheme meant for other weaker sections of the society.

The right to housing in *Persons with Disabilities Act* underscores the principle of *de facto* equality and allows for special measures. Whereas *Section 40* promotes mainstreaming in the ongoing housing schemes for the poor, *Section 43* mandates introduction of special schemes[42]. The latter section stipulates that,

> The appropriate Governments and local authorities shall by notification frame schemes in favour of persons

[41] *Supra* note 34.

[42] An example of a special scheme is the scheme adopted in the year 1980 to make out of turn allotments of residential accommodation to physically disabled employees. See Directorate of Estate's Office, Government of India, Memorandum No. 12029 (2)/ 80-Pol.II).

> with disabilities, for the preferential allotment of land at concessional rates for – (a) house….

For the planning of positive measure schemes, the *Persons with Disabilities Act* envisages Central Coordination Committee in Government of India and State Coordination Committees at the level of States. Their functions and related matters are outlined from *Sections 3* to *24*. The main function of the Central Coordination Committee 'shall be to serve as the national focal point on disability matters and facilitate the continuous evolution of a comprehensive policy towards solving the problems faced by persons with disabilities.'[43] The Committee is also required in *Section 8(1)(c)* to advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to disability. Similar functions are to be performed by the State Coordination Committee.

Theoretically, these mechanisms are in place and functional as well. But there are serious question marks on their efficacy. *Mamta Kumari vs State of Bihar and Others*[44] is a classic example illustrating the ground reality. In this case the court observes,

> The lack of interest in implementing the Act, which specially takes care of disabled persons, can be seen as the inaction of the State Government in planning for the disabled. … The budget outlay, allotment and expenditure on persons with disabilities for 1993-2001 reveal that no programme in the State of Bihar ever took off.

The Indian judiciary rarely allows any concession when an entitlement is guaranteed under the law. In *National Federation of Blind, U.P. vs State of U.P.*,[45] the Allahabad High Court dismissed the respondents' plea saying,

> [T]he contention of the Lucknow Development Authority is that neither the State nor the Lucknow Development Authority has framed any Scheme and notified the Scheme, hence the handicapped persons cannot be given land or house on concessional rates. Such a contention cannot be accepted. It was the obligation of the State Government and all local bodies including the Development Authorities, to frame a Scheme and notify the same. If they had not done so, they cannot take advantage of their own wrong.

Although the right to adequate housing for persons with disabilities has evolved encompassing issues of availability, affordability, and accessibility, little protection against forced evictions is available to the disabled and poor segment of the population. The situation can be assessed from the following description of the demolition of a colony for persons with disabilities.

> Demolition of Viklang Colony in Delhi too started with hardly any notice. Relocation was decided at Holambi Kalan, and when I visited Holambi Kalan I found it a god-forsaken dump with overflowing toilets, no electricity, no schools and mosquitoes everywhere. The eviction of the poor is truly an act of barbarism. All this despite housing being a fundamental right guaranteed under Article 21 of the Constitution, the pronouncements of the apex court, the International human rights law, and specific recommendations of treaty bodies against forced evictions.[46]

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[43] *Section 8(1)* of Persons with Disabilities Act, 1995.

[44] *Mamta Kumari vs The State of Bihar and others*, *Case No. 2894/4/2002-2003/FC*, High Court of Patna.

[45] *National Federation of the Blind, U.P. vs State of U.P.* [AIR 2000 All 258].

[46] Gonsalves, Colin unpublished paper on *Right to Housing,* 2005.

6.3 Right to Health

The right to health for persons with disabilities is often infringed as they have limited access to health services they require. They also do not benefit from available medical services because of assumptions about their quality of life and the belief that the health needs of persons with disabilities are limited to cure or improvement of their impairments. The reported incidences of selective non-treatment of persons with disabilities suggest that medical standards are differentially applied infringing their right to health and rehabilitation. Persons with disabilities are also particularly vulnerable to the negative social determinants of health: poverty, poor housing, unemployment, poor access, etc.

6.3.1 International Standards

The right to health is guaranteed in *Article 12(1)* of the *ICESCR*: 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.' Similar provisions are in the *CEDAW Convention* and the *CRC*:

> *CEDAW Convention, Article 12(1)*: States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
>
> *CRC, Article 24(1)*: States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Two Rules of the *Standard Rules* relate directly to health: *Rule 2* on medical care and *Rule 3* on rehabilitation. *Rule 2* focuses on equal quality of medical services for persons with disabilities, access to treatment or medicines necessary to improve levels of functioning, and adequate training of medical professionals. *Rule 3* addresses the accessibility, design and content of rehabilitation programmes to meet the actual needs of persons with disabilities.

The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care address issues related to the right to health in *Principles 6-14* and *22*. These principles cover confidentiality, role of community and culture, standards of care, treatment, medication, consent to treatment, notice of rights, rights and conditions in mental health facilities, and resources for mental health facilities.

The *CESCR* in *General Comment No. 5* on persons with disabilities quotes the *Standard Rules* in indicating that the same level of medical care within the same medical system for persons with disabilities and persons without disabilities is a key element of the right to health. The *CESCR* interprets *Article 12* of the *ICESCR* as a guarantee 'to have access to, and to benefit from, those medical and social services … which enable persons with disabilities to become independent, prevent further disabilities and support social integration.'[47] The paragraph continues:

> Similarly, such persons should be provided with rehabilitation services which would enable them 'to reach and sustain their optimum level of independence and functioning.' All such services should be provided in such a way that the persons concerned are able to maintain full respect for their rights and dignity.

[47] CESCR *General Comment No. 5*, para. 34.

The *CESCR's* approach to the right to health in the context of disability is important because it recognises the social determinants of health and is premised on the fundamental principles of human rights – that is, self-determination as informed consent, autonomy and dignity, freedom to receive treatment in appropriate manner, and the principle of participation for achieving greater independence. This connection between health status and the exercise of rights has significant implications for persons with disabilities.

The *CESCR's General Comment No. 14* on the right to health discusses the core obligations and elements of the right: availability, accessibility, acceptability and quality.[48] Non-discrimination is a key element of accessibility and the *CESCR* highlights the accessibility needs of vulnerable groups, including persons with disabilities. The *CESCR* stresses 'the need to ensure that not only the public health sector but also the private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities.' Physical or mental disability is specifically mentioned as a prohibited ground of discrimination.[49]

CEDAW General Recommendation No. 24 on women and health refers to the need to give special attention to the health needs and rights of women who belong to vulnerable and disadvantaged groups, including women with physical or mental disabilities.[50] With regard to women with disability it says:

> Women with disabilities, of all ages, often have difficulty with physical access to health services. Women with mental disabilities are particularly vulnerable, while there is limited understanding, in general, of the broad range of risks to mental health to which women are disproportionately susceptible as a result of gender discrimination, violence, poverty, armed conflict, dislocation and other forms of social deprivation. States parties should take appropriate measures to ensure that health services are sensitive to the needs of women with disabilities and are respectful of their human rights and dignity.[51]

The *Committee on the Rights of the Child* has issued a General Comment on adolescent health and development, *General Comment No. 4*. The Committee requires States to 'adopt special measures to ensure the physical, sexual and mental integrity of adolescents with disabilities, who are particularly vulnerable to abuse and neglect.'[52] The Committee notes that systematic collection of data is necessary to be able to monitor the right to health, including data on adolescents with disabilities.[53] The Committee reaffirms that adolescents with mental and/or physical disabilities, 'have an equal right to the highest attainable standard of physical and mental health.' This obligates States Parties to:

(a) ensure that health facilities, goods and services are available and accessible to all adolescents with disabilities and that these facilities and services promote their self-reliance and their active participation in the community;

(b) ensure that the necessary equipment and personal support are available to enable them to move around, participate and communicate;

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[48] CESCR *General Comment No. 14*, para. 12.

[49] Ibid. para. 14.

[50] CEDAW *General Recommendation 24*, para. 6.

[51] Ibid., para. 14.

[52] CRC *General Comment 4*, para. 12.

[53] Ibid., para. 13.

(c) pay specific attention to the special needs relating to the sexuality of adolescents with disabilities; and

(d) remove barriers that hinder adolescents with disabilities in realizing their rights.[54]

The *Draft Convention on Disability*[55] in *Article 21* identifies key human rights issues related to the health and rehabilitation of persons with disabilities. The rights in the draft article address the quality and accessibility of services as well as the availability of a range of services, particularly rights related to:

- free and informed consent;
- prevention of unwanted medical and related interventions and corrective surgeries from being imposed on persons with disabilities;
- protection of the privacy of health and rehabilitation information; and
- participation in legislative and policy development as well as in the planning, delivery and evaluation of health and rehabilitation services.

6.3.2 Domestic Standards

Constitutional Provisions

Articles 39(e), 41 and 42 of the Constitution of India, which fall under the *Directive Principles of State Policy*, deal with the right to 'health' and are theoretically non-justiciable. However, it is well settled through several judgements of the Supreme Court of India that the fundamental right to life, guaranteed under *Article 21* of the Constitution, is an overarching right under which several necessary components of life-related rights are subsumed.

In *Bandhua Mukti Morcha vs Union of India*,[56] the Supreme Court has held that:

> Right to live with human dignity enshrined in article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of article 39 and articles 41 and 42 and at least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and conditions of freedom and dignity … .

Similarly, in *Consumer Education & Research Centre and Others vsUnion of India and Others*,[57] the Supreme Court of India has held, 'The expression 'life' assured in article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of life, hygienic conditions in work place and leisure.' The Court has interpreted the right to health as 'an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour.'[58]

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[54] Ibid., para. 35.

[55] Report of the Working Group to the Ad Hoc Committee for Draft articles for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, www.un.org

[56] *Bandhua Mukti Morcha vs Union of India* [1984 3 SCC 161].

[57] *Consumer Education and Research Centre and Others vs Union of India and Others,* [(1995) 3 SCC 42].

[58] Ibid.

The jurisprudence of personhood or the philosophy of the right to life envisaged in the Indian Constitution includes within its sweep human personality in its full blossom with invigorated health, especially of the workers to secure the dignity and autonomy of the person[59]. The Supreme Court in *C.E.S.C. Ltd. vs Subhash Chandra Bose*[60] has given a wider meaning to the concept of health, saying 'Health is a state of complete physical, mental and social well being and not merely the absence of disease or infirmity.' Upholding the right to health of workers, in the light of *Articles 22* to *25* of the *Universal Declaration of Human Rights,* the *ICESCR*, and socio-economic justice assured in the Constitution, the Court held, **'**right to health is a fundamental human right to workmen.'

Right to Health of Workers

Right to health assumes far greater importance in the context of workers and there are a number of specific enactments to this effect, for example the *Workmen's Compensation Act, 1923* and *Employees State Insurance Act, 1948*. In the *Persons with Disabilities Act, 1995* too the provisions are of significant relevance for the health and safety of workers with disability.

Section 38 (1)(d) stipulates:

> (1) The appropriate Governments and local authorities shall by notification formulate schemes for ensuring employment of persons with disabilities, and such schemes may provide for …(d) health and safety measures and creation of non-handicapping environment in places where persons with disabilities are employed.

Section 67 enjoins:

> (1) The appropriate Government shall by notification frame an insurance scheme for the benefit of its employees with disabilities.
>
> (2) Notwithstanding anything contained in this section the appropriate Government may instead of framing an insurance scheme frame an alternative security scheme for its employees with disabilities.

Right to Health of Women and Children

For women and children, the right to health came into focus after independence. The most significant enactment highlighting this trend is the *Maternity Benefit Act, 1961*. In addition, a wide range of programmes and schemes have been put in place including the establishment of the Department of Women and Child, which administers the Integrated Child Development Scheme (*ICDS*). However, the reach of these schemes remains limited for children and women with disabilities as the overarching purpose of these schemes is to prevent the causes of disability with virtually no regard to the health needs of women and children with disabilities. *Persons with Disabilities Act, 1995* in Chapter IV, entitled Prevention and Early Detection of Disabilities, exemplifies the same perspective.

Mental Health

Since the bio-centric approach to disability equates disability with disease, abnormality and danger, the law and practice in the area of health grounded on this approach generally aim towards prevention of disability

[59] Bhatia, Sita *Right to Health*, unpublished paper, NHRC.

[60] *C.E.S.C. Ltd. vs Subhash Chandra Bose* [(1992) 1 SCC 441].

and conditions in which treatment to cure disability is to be administered. *Mental Health Act* of India is a classic example of this approach but a positive aspect of this enactment is that it promotes dignity, autonomy, and respect of individual receiving treatment in line with constitutional provisions.

For example, *Article 47* of the Constitution *inter alia* prohibits 'consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.' Drawing from this provision of the Constitution, the *Mental Health Act, 1987* in *Section 81* stipulates that,

1) "No mentally ill person shall be subjected during treatment to any indignity (whether physical or mental) or cruelty.
2) No mentally ill person under treatment shall be used for purposes of research, unless-
    i) such research is of direct benefit to him for purposes of diagnosis or treatment, or
    ii) Such person, being a voluntary patient, has given his consent in writing or where such person (whether or not a voluntary patient) is incompetent, by reason of minority or otherwise, to give valid consent, the guardian or other person competent to give consent on his behalf, has given his consent in writing, for such research."

It is a well-known fact that mental health institutions in India continue to rely on Electro-convulsive therapy (ECT), which is banned in most countries. In *S.P. Sathe vs State of Maharashtra*,[61] the Bombay High Court regulated the prescription of indiscriminate electric shocks to mentally ill persons.

Conditions in the mental health institutions have been the focus of several 'soft law' international instruments, such as the *MI Principles*. However, the *Mental Health Act, 1987* does not lay down specific guidelines to ensure minimum standards in the mental health institutions. As a consequence, a number of public interest litigations have been filed by concerned citizens and organisations drawing attention of the Supreme Court to the appalling conditions that generally prevail in the mental health institutions.

In *Rakesh Chandra Narayan vs State of Bihar*, [62] the Supreme Court found the conditions in the Ranchi Mental Hospital to be shocking and inhuman and therefore appointed a committee to ensure proper functioning and management of funds. The Court also gave directions for the mental health institutions to be modeled on the lines of NIMHANS at Bangalore. Similarly, in *S.R Kapoor vs Union of India*[63] the Supreme Court recommended that the hospital management be taken over by Union of India from the Delhi Administration.

The NHRC is mandated under *Section 12* of the *Protection of Human Rights Act, 1993* to visit Government run mental hospitals and study the living conditions of the inmates and make recommendations thereon. The most notable intervention of the NHRC in mental health has been a project on Quality Assurance in Mental Health launched in 1997 to analyse the conditions generally prevailing in Government run mental hospitals in various parts of the country with reference to infrastructure, patient care, admission, discharge and appeal procedure, rehabilitation facilities, client satisfaction and morale of the staff. The project report *'Quality Assurance in Mental Health'*, with comprehensive

[61] *S.P. Sathe vs State of Maharashtra* [1987, Bombay High Court].

[62] *Rakesh Chandra Narayan vs State of Bihar* [AIR 1995 SC 208].

[63] *S.R Kapoor vs Union of India* [AIR 1990 SC 752].

recommendations was circulated by the Commission to the Health Secretaries of all the States and Union Territories.

The *National Health Policy, 2002* of the Government of India also draws from the jurisprudence and guidelines established by the NHRC. The policy recognises that mental health disorders are actually much more prevalent than is apparent on the surface and mental health institutions are woefully deficient in physical infrastructure and trained manpower. The Government envisages a network of decentralized mental health services for ameliorating the more common categories of disorders[64].

The right to health and access to medical services for persons with mental illness has evolved to some extent. However, the law is relatively underdeveloped as far as a broader right to health for persons with disabilities is concerned. For example, questions of availability, affordability, acceptability and accessibility of health services, and participation in planning of health policies by persons with disabilities have yet to form an important part of National and State health policies and programmes and related arrangements for the delivery of health services.

Prevention of Disability

The law in its present form only exemplifies a narrow understanding of the right to health with emphasis on prevention, cure, improvement or elimination of disability, which in any case are conditions that generally exist before the onset of disability and therefore, have no logical connection to the rights of those who are disabled. For example, *Section 25* of the *Persons with Disabilities Act, 1995*, states as follows:

> 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,
> (a) undertake or cause to be undertaken surveys, investigations and research concerning the cause of occurrence of disabilities;
>
> (b) promote various methods of preventing disabilities;
>
> (c) screen all the children at least once in a year for the purpose of identifying 'at-risk' cases;
>
> (e) sponsor or cause to be sponsored awareness campaigns and disseminate or cause to be disseminated information for general hygiene, health and sanitation;
>
> (f) take measure for pre-natal, peri-natal and post-natal care of mother and child;
>
> (g) educate the public through the pre-schools, primary health centres, village level workers and *anganwadi* workers; and
>
> (h) create awareness amongst the masses through television, radio and other mass media on the causes of disabilities and the preventive measures to be adopted.

Examples of restrictive jurisprudence reflect the tendency of viewing right to health for people with disabilities from the narrow concerns of preventing disability. In *Indian Council of Legal Aid & Advice vs Union of India and others*,[65] the appellant filed a writ petition before the Delhi High Court to draw up a scheme for compulsory periodic medical examination and treatment of all blind students who were

[64] *Supra* note 59.

[65] *Indian Council of Legal Aid & Advice vs Union of India and others* [(2000) 10 SCC 542].

inmates of various blind schools in the capital. Since the Ministry of Welfare, Government of India already had introduced a scheme named 'Periodical Check-up and Treatment of Visually Handicapped Persons', the Court directed the State Governments to adopt and implement this scheme (in the schools for blind children).

By emphasising the introduction of the scheme to the schools of the disabled rather than ensuring periodic check up of all the school children in accordance with *Section 25(c)* of the Persons with Disabilities Act, the court ended up compromising the intention of the legislature to some extent.

In conclusion, one can say that the State's concern for creating conditions in which persons can lead their lives free from disability and its life-long implications are very well provided through the legal and administrative initiatives. But the issue of the enjoyment of right to health without discrimination by the already disabled people has yet to be addressed by the lawmakers, the courts and the executive. Although sufficient guidance is available from the monitoring bodies of the international conventions and the *Standard Rules* in particular, the need at the moment is their creative use and application.

6.4 Right to Education

Education is a social right that is intimately connected to the exercise of many other human rights. For example, education is important for the enjoyment of the right to work, right to political participation, and for the exercise of right to culture. Education supports greater autonomy and freedom of participation in all aspects of society.

Failure to access education and training prevents the achievement of economic and social independence and increases vulnerability to poverty leading to what can become a self-perpetuating, inter-generational cycle.[66]

6.4.1 International Standards

Right of Everyone to Education

The right of every child to education is proclaimed in the *Universal Declaration of Human Rights* and has been forcefully reaffirmed by the *World Declaration on Education for All*. This right is also recognised in *Article 13(1)* of the *ICESCR*, which says, 'The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.'

The *CEDAW Convention* also addresses the gender-based discrimination in relation to education and enjoins State Parties to ensure that the women and girls receive education on the basis of equality with men. *Article 10* of the Convention says: 'States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education…' The *CRC* addresses education in two articles: *Article 28*, which focuses on access to education and *Article 29* about the aims and content of education. In the context of children with disabilities, *Article 23* places a clear

[66] *Supra* note 31, *Part IV(C)* para. 25.

obligation on the States Parties 'to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.'

The *Committee on the Rights of the Child* in *General Comment No. 1*, outlines the functions of *Article 29(1)*, in which it 'emphasizes the indispensable interconnected nature of the Convention's provisions.' It establishes that '*Article 29 (1)* is much more than an inventory or listing of different objectives which education should seek to achieve.' It makes an encompassing analysis of the right to education, which takes within its sweep the provisions listed in *Article 23* for children with disabilities.

Inclusive Education

For the education of children with special needs, regular schools with inclusive orientation are perceived most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society, and improving the efficiency and cost-effectiveness of the entire education system[67].

The *WPA* is grounded on the principle of full participation of persons with disabilities in all aspects of social and economic life, meaning that issues concerning persons with disabilities should not be treated in isolation, but within the context of normal community services. The concept of integrated or inclusive education has drawn strength from the principle set out in the *WPA*.

While laying down obligations of the States, the *Rule 6* of *Standard Rules* calls for the recognition of the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities in integrated settings.

An emphasis on education in an inclusive setting is also found in the *UNESCO Salamanca Statement and Framework for Action on Special Needs in Education,* which was adopted by the *World Conference on Special Needs Education* held in 1994. Representatives of ninety-two governments and twenty-five international organizations met to discuss the promotion of inclusive education for all. The Statement reaffirms the right to education for all and recognizes 'the necessity and urgency of providing education for children, youth and adults with special educational needs within the regular education system.' (para. 1) This principle of inclusive education was restated at the *World Education Forum* (Dakar, Senegal, 2000).

Stating the preconditions of integrated education, the *Rule 6* of *Standard Rules* prioritizes the provisions of interpreter, adequate accessibility and support services designed to meet the needs of persons with different disabilities. It also encourages the States to adopt a clearly stated policy, understood and accepted at the school level and by the wider community, and having the provision for curriculum flexibility, addition and adaptation; availability of quality materials, ongoing teacher training and support teachers.

Reiterating the principle of integrated education laid down in *Rule 6* of *Standard Rules,* the *CESCR* in its *General Comment No. 5* on persons with disabilities, says, 'in order to implement such an approach, States

[67] *UNESCO Salamanca Statement and Framework for Action on Special Needs Education*, available at www.unesco.org/education/pdf/SALAMA_E.PDF .

should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers.' The Committee also recommends that, 'in the case of deaf children, for example, sign language should be recognized as a separate language to which the children should have access and whose importance should be acknowledged in their overall social environment.' (para. 35)

The *UNESCO Salamanca Statement* also promotes the principle of 'continuum of support and services to match the continuum of special needs encountered in every school.' Likewise, the *Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region* established the following target,

> Inclusion, by 1997, of girls and boys and women and men with disabilities in all policies, plans and programmes to ensure Education for All, with adequate financial allocations as well as appropriate technical and human resources (including Braille textbooks, education material in audio, visual and other [e.g., large print] formats, indigenous sign language, appropriate assistive devices, physical access and support staff).

The *Draft Convention on Disability* in *Article 17* requires that, as an element of the right to education, States ensure:

> the provision of required support, including the specialised training of teachers, school counsellors and psychologists, an accessible curriculum, an accessible teaching medium and technologies, alternative and augmentative communication modes, alternative learning strategies, accessible physical environment, or other reasonable accommodations to ensure the full participation of students with disabilities.

Specialized Interventions in Separate Settings

The move towards integrated or inclusive education over the last thirty years has gained momentum. At the same time however, there is also a clear recognition that some children with disabilities may require specialised interventions in separate settings. For example, *Rule 6* of *Standard Rules* acknowledges that in some instances special education may currently be considered the most appropriate form of education for some students with disabilities. Safeguarding the interests of those in the special schools, this rule lays down that,

> The quality of such education should reflect the same standards and ambitions as general education and should be closely linked to it. At a minimum, students with disabilities should be afforded the same portion of educational resources as students without disabilities.

The *Salamanca Statement* also provides for separate education but with sufficient safeguards to ensure that separation from the general education system of children with disabilities is used as an exception. According to it,

> Assignment of children to special schools - or special classes or sections within a school on a permanent basis - should be the exception, to be recommended only in those infrequent cases where it is clearly demonstrated that education in regular classrooms is incapable of meeting a child's educational or social needs or when it is required for the welfare of the child or that of other children.

The *CESCR* has issued a General Comment on education: *General Comment No. 13*. The Comment makes a mention of separate education systems (para. 33), but with a word of caution that this should not detract from the overall emphasis on inclusion. Quinn and Degener[68] stress this point stating that:

[68] Quinn, Gerard and Theresia Degener, *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (United Nations, 2002).

> While the Committee concedes in General Comment No. 13 that '[i]n some circumstances, separate educational systems or institutions for groups defined by the categories in article 2 (2) shall be deemed not to constitute a breach of the Covenant,' this concession is best interpreted in the light of the clear affirmation by the Committee in General Comment No. 5 that persons with disabilities are best educated in an integrated educational system. (p.102)

The *Draft Convention on Disability,* while drawing on preceding instruments and the output of treaty bodies, allows for special and alternative forms of education and provides: 'Where the general education system does not adequately meet the needs of persons with disabilities special and alternative forms of learning should be made available. Any such special and alternative forms of learning should reflect the same standards and objectives provided in the general education system' *(Article 17)*

The programmes of education are delivered in a variety of ways deploying face-to-face, distance mode, and IT mediated interactive systems. According to their preference, individual circumstances and means, members of the society opt for the one or the other model. However, freedom of choice in this regard has remained restricted for persons with disabilities. The *WPA*, *Proclamation on the Full Participation and Equality of People With Disabilities in the Asian and Pacific Region*, *Standard Rules* and *Salamanca Statement* unequivocally promote the principle of participation, autonomy and dignity in clear terms with reference to educational placement.

The *WPA* recognizes that persons with disabilities 'have the same right to education as non-disabled persons and they require active intervention and specialized services.' The *Salamanca Statement and Framework for Action on Special Needs Education* states, 'every person with a disability has a right to express her/his wishes with regard to her/his education, as far as this can be ascertained. Parents have an inherent right to be consulted on the form of education best suited to the needs, circumstances and aspirations of their children.' In this respect the *Standard Rules* places parent groups and organizations of persons with disabilities center stage in the education process at all levels. Similarly, *Proclamation on the Full Participation and Equality of People With Disabilities in the Asian and Pacific Region* lays down a target saying, 'By 2002, at least 75 per cent of all children and adults with disabilities should be able to participate in formal and non-formal education programmes on an equal basis with their non-disabled peers and through progressive enrolment, together with the appropriate support services.'

Similar treatment of inherently different people has been found inappropriate from the perspective of equality. This notion is clearly reflected in the 2004 report of the *Special Rapporteur on Education* appointed by the UN Commission on Human Rights, which includes a short section titled *'Segregation or inclusiveness, identical or preferential treatment?'* in which children with disabilities are mentioned.

The *CESCR* in *General Comment No. 13* (para.6) elaborates on the four main elements of the right to education: availability, accessibility, acceptability and adaptability. These parameters are useful in assessing whether the education has acquired capacity to respond to the needs of learners with disability. For an inclusive society it is important that all systems, services and procedures remain within the reach of all members. The *Salamanca Statement* expresses it in the following terms,

> Every child has unique characteristics, interests, abilities and learning needs, … education systems should be designed and educational programmes implemented to take into account the wide diversity of these characteristics and needs, and those with special educational needs must have access to regular schools

> which should accommodate them within a child centred pedagogy capable of meeting these needs.

In fact **non-provision for different learning needs is now perceived discriminatory**. The *Committee on the Rights of the Child* in *General Comment No.1* (para 10) notes that 'discrimination against children with disabilities is also pervasive in many formal educational systems and in a great many informal educational settings, including in the home.' Prohibiting such discrimination the Committee states, in the same comment and para, 'all such discriminatory practices are in direct contradiction with the requirements in *Article 29(1)(a)* that education be directed to the development of child's personality, talents and mental and physical abilities to their fullest potential.

The *CESCR* in *General Comment No. 13* (para 57) emphasises non-discrimination as part of the minimum core obligation for the implementation of the right to education. The General Comment (para 32) also indicates that special measures may be required to realize the right to education for disadvantaged groups.

6.4.2 Domestic Standards

Constitutional Provisions

The Constitution of India not only recognizes right to education but also emphasises its importance for the vulnerable and weaker sections. For instance, *Article 41* of the *Directive Principles* says,

> the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 46 commands that

> the State shall promote with special care of the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes...

Over the last fifty years, right to education has evolved in India, inspired by a host of factors including judicial interpretations, enactment of special laws and amendment to the Constitution. For example, with the *Eighty-Sixth Amendment*, the right to free and compulsory education has become a fundamental right. Originally, this right was a part of the *Directive Principles* under *Article 45*. Other noteworthy aspect of this amendment is that the fundamental right to education has been arranged as an extension of the right to life, as *Article 21A*, which says,

> The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

In a number of cases, the Supreme Court of India has considered the right to education as an important facet of right to life. In *Mohini Jain v. State of Karnataka*[69] , the Supreme Court held, 'the right to education flows directly from right to life. The right to life under *Article 21* and the dignity of an individual cannot be assured unless it is accompanied by the right to education.' Similarly, a five-Judge Constitutional Bench of the Supreme Court in *Unnikrishnan J.P.and Others vs State of Andhra Pradesh and Others, Union of India*[70] held, 'the right to education which is implicit in the right to life and personal liberty guaranteed by *Article 21* must be construed in the light of the *Directive Principles* in Part IV of the Constitution.' In this case the Court had

[69] *Mohini Jain vs State of Karnataka*[(1992) 3 SCC 666].

[70] *Unnikrishnan J.P.and Others vs State of Andhra Pradesh and others, Union of India* [(1993 1 SCC 645)].

the occasion to also examine the extent to which claim to free education can be ascertained. The Court clarified that, '(a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.'

Right to Education of Children with Disabilities

Section 26 of *Persons with Disabilities Act* binds Indian State to provide free education to children with disability up to eighteen years of age, which is four more years than for non-disabled children. This section stipulates,

> 'Appropriate Governments and local authorities shall –
> Ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years'

In the case of *National Federation of the Blind vs Government of NCT of Delhi and Others*[71], the Delhi High Court has held that '…the purposes of the act would be defeated if free education is provided only up to class 10 and not up to the age of 18 years. Since in the latter age, he/she may be able to complete the school education up to class 12.' The Court, therefore, struck down a rule laid down by National Capital Territory of Delhi.

The *Eighty Sixth Amendment* has brought another important facet of education, i.e. early or pre-school education under the constitutional framework. The amended text of *Article 45* reads,

> The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

This provision is of particular relevance for children with disabilities. These amendments are not only important from the perspective of an individual right but they have enlarged the scope of duties both for the State and citizens. The duties of citizens outlined in *Article 51A* of the Constitution now also include the following:

> It shall be the duty of every citizen of India-
> (k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

From the standpoint of persons with disabilities the provisions outlined in Chapter V of the *Persons with Disabilities Act, 1995* entitled 'Education' are of great significance. The Act not only guarantees free education up to the age of eighteen years in an appropriate environment but also casts a positive duty on the appropriate Governments to promote integrated education as well as special schools. *Section 26* of the *Persons with Disabilities Act, 1995* stipulates,

> The appropriate Governments and the local authorities shall:
> (a) ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years;
> (b) endeavour to promote the integration of students with disabilities in the normal schools;
> (c) promote setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools; and

[71] *National Federation of the Blind vs Government of NCT of Delhi and others* [(CW 6456/ 2002, decided on 06.11.2003)].

(d) endeavour to equip the special schools for children with disabilities with vocational training facilities.

Recognizing that persons with disabilities must have equal access to all forms of education through a variety of models, *Section 27* of the Act lays down,

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

In this respect, the Act is modeled on human rights approach and entitles persons with disabilities to all such measures that are necessary for the effective enjoyment of their right to education. First of all, the Act recognizes that trained manpower be made available for special schools and integrated schools for children with disabilities. In this respect *Section 29* casts a duty on the appropriate Governments to,

> (S)et up adequate number of teachers training institutions and assist the national institutes and other voluntary organisations to develop teachers' training programmes specialising in disabilities so that requisite trained manpower is available for special schools and integrated schools for children with disabilities.

A simple reading of *Sections 30* and *31* of the *Persons with Disability Act* affirms the faith of Indian legislature on the introduction of positive special measures to overcome inequalities and discrimination which persons with disability encounter when the education system and related mechanisms fail to recognize and provide for special needs of children with disabilities. On a number of occasions the Supreme of Court of India has justified introduction of special measures to guarantee *de facto* equality. Elaborating on this principle, Hon'ble Justice Krishna Iyer in *Dr. Jagadish Saran and others vs Union of India*[72] has held, 'even apart from *Article 15(3)* and *(4)*, equality is not degraded or neglected where special provisions are geared to the larger goal of the disabled getting over their disablement consistently with the general good and individual merit.'

Sections 30 and *31* outline the special measures to create the concept of appropriate educational environment guaranteed in *Section 26*.

Section 30 states,

> Without prejudice to the foregoing provisions, the appropriate Governments shall by notification prepare a comprehensive education scheme which shall make provision for :
>
> (a) transport facilities to the children with disabilities or in the alternative financial incentives to parents or guardians to enable their children with disabilities to attend schools;

[72] *Dr. Jagadish Saran and others vs Union of India* [(1980) 2 SCC 768].

(b) the removal of architectural barriers from schools, colleges or other institutions imparting vocational and professional training;

(c) the supply of books, uniforms and other materials to children with disabilities attending school;

(d) the grant of scholarship to students with disabilities;

(f) suitable modification in the examination system to climate purely mathematical questions for the benefit of blind students and students with low vision;

(g) restructuring of curriculum for the benefit of children with disabilities; and

(h) restructuring the curriculum for the benefit of students with hearing impairment to facilitate them to take only one language as part of their curriculum.

Section 31 states,

> All educational institutions shall provide or cause to be provided amanuensis to blind students and students with low vision.

Although the Act catalogues a comprehensive range of measures necessary to allow equal participation in all aspects of an educational pursuit, the disabled continue to face numerous obstacles on account of a negative mindset and poor information about the Act itself. For example, one Anka Toppo[73], aggrieved on being denied the right to take the examinations for MBBS final year on losing sight by the All India Institute of Medical Sciences (AIIMS), approached the NHRC. The Respondent was of the opinion that 'in view of the severe visual loss suffered by Shri Toppo, it would not be possible for him to work in the medical profession.' After great persuasion by the NHRC and on exposing the Respondent to numerous examples of blind people successfully pursuing medical profession, the Respondent finally agreed to take steps to examine the petitioner for the MBBS course by offering a modified methodology of examination. In the light of the experience of this case the NHRC at its sitting on 28 May 2001 expressed the view that the Medical Council of India should perform a similar exercise so that the same facility and system is available in other medical institutions of the country as well.

National Association for the Blind & Others vs Central Board of Secondary Education & Others[74] is another landmark case in which the Delhi High Court directed to 'grant an extra hour to blind students (appearing for a written examination): meaning thereby that they shall be given 4 hours instead of 3 hours given to normal students.' Respondent No.1 was also directed to permit the school from which a blind candidate is to appear to choose amanuensis, subject to observance of the relevant rules. Due to paucity of time, the Court did not allow the prayer in respect of modification of the mathematics paper and supply of question papers in Braille. However, it directed that 'so far as the future examinations are concerned, proper curriculum and examination system shall be fixed keeping in view the objectives of the Act.'

In keeping with the idea that placement of children in schools should be decided by the parents in the best interests of the child the *Persons with Disabilities Act* in *Section 30(e)* requires that the appropriate governments and authorities shall *inter alia* set up

> appropriate fora for the redressal of grievances of parents regarding the placement of their children with disabilities.

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[73] *Anka Toppo vs AIIMS*, No.1754/30/2000-2001, available at nhrc.nic.in/disparchive.asp

[74] *NAB & Others vs CBSE & Others*, CWP No 1015/2001 & CM No. 1712/2001.

Section 39 of the *Persons with Disabilities Act* imposes yet another positive obligation on the State by mandating 'all Government educational institutions and other educational institutions receiving aid from the Government,' to 'reserve not less than three per cent seats for persons with disabilities.' This section of *Persons with Disabilities Act* remained under controversy for sometime by its placement under the Chapter on Employment, instead of Education. Finally, the Supreme Court in *All Kerala Parents Association vs State of Kerala*[75], while settling this issue said that the inclusion of the *Section 39* under the chapter on employment is due to an error in drafting and affirmed that reservation of 3% of available seats in government educational institutions for students with disabilities should be applied.

There has been some confusion about who would constitute an 'educational institution receiving aid' from the government within the context of reserving 3% seats for persons with disabilities. In *Social Jurist v. Government of National Capital Territory of Delhi & Others*[76], the High Court of Delhi has taken a broad view while defining 'aid' and has held that the land received on concessional rate to establish a social institution would constitute aid by the Government. The court directed the Delhi Development Authority (DDA) to take 'appropriate action' against 265 'recognized, private unaided' schools in the Delhi region, which had been allotted land by the DDA at concessional rates on condition they reserve a 25% freeships quota for disadvantaged children, for breach of that condition.

Undoubtedly, the right to education has been elaborated from a human rights perspective in the *Persons with Disabilities Act*. There are numerous examples of positive jurisprudence as well. One of the difficulties that could be attributed to the full realization of the right to education is the stringent criteria by which access to an entitlement is subject to a disability certificate awarded by a *medical board*. In that respect, the *Persons with Disabilities Act* is obsolete and reflects a bio-centric approach.

Similar criteria also disadvantage many other members of the weaker sections. In a PIL *Social Jurist vs Union of India and others*[77], the petitioner pointed out that admissions were denied on irrelevant grounds like non-availability of birth certificate, non-availability of ration card, non-availability of affidavit of date of birth duly attested by the executive magistrate, non-availability of disability certificate in the case of disabled child, etc. The view taken by the Respondent, i.e. the Government and the Court only reflects the entrenched understanding based on a bio-centric model, which tends to see disability within the confines of the body of an individual. The medical criteria are used for gate keeping and as a means to check corruption. The following reference from the *Social Jurist vs Union of India*[78] case presents a graphic description of such an approach.

> An affidavit has been filed by Shri S.C. Poddar, District Education Officer, Govt. of NCTD in which it is pointed out that it is proposed to amend the Delhi School Education Rules, in cases where it is not possible to get an affidavit regarding age of a child, the head of the school shall refer the child to the nearest Civil Hospital having facilities for determination of age and in the admission form of the child the midpoint of the suggested age on the basis of the test will be recorded. … We are of the view that in the given circumstance, the amendments to the rules as suggested by the respondents is the best solution of the problem highlighted by the petitioner in this writ petition.

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[75] *All Kerala Parents Association vs State of Kerala* CA No. 6120 of 2001, decided on 11.09.2001

[76] *Social Jurist v. Government of National Capital Territory of Delhi & Others*, CW No. 3156 of 2002.

[77] *Social Jurist vs Union of India* and Others, C.M.6736/2000 in C.W. 3956 of 2000 (Delhi H.C.). The case related material is available at www.socialjurist.com .

[78] Ibid.

The right to education for persons with disabilities has evolved incorporating new approaches to disability. The instruments adopted by the UN and its bodies, and the Government of India have elaborated the content of this right from the perspective of human rights and the lived experience of disability. For better appreciation of the right to education and its ramifications, a reading of *WPA, Standard Rules*, *Salamanca Statement*, *Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region* including its targets and recommendations may prove fruitful. These instruments can be relied upon in ensuring full and effective realization of the right to education by persons with disabilities. They offer useful guidance both for the holders of rights and those who have co-related duties.

6.5 Linguistic Rights

6.5.1 International Standards

Language is an important element of the right to culture. While linguistic rights are not mentioned in the *ICESCR*, *Article 27* of the *International Covenant on Civil and Political Rights* states that where ethnic, religious or linguistic minorities exist, 'persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

Freedom to express oneself in one's own language or communication system is an important component of linguistic rights. Protection and promotion of linguistic rights involves recognition of distinct languages and scripts, including those used by the members of minority communities.

The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities* enjoins in *Article 1(1)* that, 'States shall protect the existence of the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.'

For persons with disabilities it means recognition of sign language for the deaf, Braille for the blind, finger Braille for deaf blind, and so on. The *Biwako Millennium Framework* has identified access to information and communication as one of the seven priority policy areas for action. The framework encourages that

> Governments should develop and coordinate a standardized sign language, finger Braille, tactile sign language, in each country and to disseminate and teach the results through all means, i.e. publications, CD-ROMs, etc.

Rule 5 of the *Standard Rules* addresses accessibility of information and communication by emphasizing, 'Braille, tape services, large print and other appropriate technologies should be used to provide access to written information and documentation for persons with visual impairments.' It also calls for the consideration of sign language in the education of deaf children and encourages sign language interpretation services for facilitating communication between deaf persons and others. Similarly, for persons with auditory impairments or comprehension difficulties, it recommends use of appropriate technologies. The *Salamanca Statement and Framework for Action on Special Needs Education* underlines the importance of sign language as the medium of education for the deaf and encourages the States to ensure that all deaf persons have access to education in their National Sign Language.

The *Draft Convention on Disability* suggests a stronger commitment to the rights of persons who are deaf and

clearly situates their communication issues in terms of linguistic rights. *Article 24* as drafted by the Working Group states: 'Persons who are deaf shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity.'

Linguistic rights assume importance not only in the context of culture; their intrinsic connection with other rights is significant as well. This also demonstrates the interdependence of rights; and several references to sign language, Braille, and other alternative modes of communication in the draft text of the Convention highlight this fact. For instance, it says the following:

> *Article 13*: States Parties shall take appropriate measures to ensure that persons with disabilities can exercise their right to freedom of expression and opinion through Braille, sign language, and other modes of communication.
>
> *Article 17(4)*: States Parties shall ensure that children with sensory disabilities may choose to be taught sign language or Braille, as appropriate, and to receive the curriculum in sign language or Braille.
>
> *Article 19(2)*: States Parties shall also take appropriate measures to
>
> - provide in public buildings and facilities signage in Braille and easy to read and understand forms; and
> - provide other forms of live assistance and intermediaries, including guides, readers and sign language interpreters, to facilitate accessibility to public buildings and facilities.
>
> *Article 10(2)*: States Parties shall ensure that if persons with disabilities are deprived of their liberty, they are, … (b) provided with adequate information in accessible formats as to the reasons for their deprivation of liberty.

6.5.2 Domestic Standards

The Constitution of India in *Article 29(1)* recognizes 'Any section of the citizens residing in the territory of India or any part thereof, having distinct language, script or culture of its own shall have the right to conserve the same.'

Braille

In recognition of Braille as a popular script used by blind persons, the Government of India standardized the *Bharatiya Braille Code* enabling transcription of all Indian languages in Braille script. The standardization of Braille has also proved useful in facilitating communication among blind persons residing in various parts of India, which was not possible earlier.

The *Persons with Disabilities Act, 1995* under the chapter on education provides the availability of all educational materials in Braille, etc. It is another matter that Braille books are not available on the shelf and they often reach the blind students quite late through a cumbersome procedure. Any revision in the curriculum and textbooks further complicates the problem. In 1998, the *All India Confederation of the Blind* filed a writ petition[79] in the Supreme Court seeking direction to ensure availability, in Braille, of all textbooks according to the revised syllabus of NCERT to the visually impaired students without delay.

[79] *All India Confederation of the Blind and Anr. vs Union of India and Anr.*, CWP No. 115/1998 with I.A. No.3 in C.W.P. No. 116/1998, C.A. No. 6442/1998, C.A. No. 6443/1998.

In its interim order dated 28.10.2003, the Court directed 'considering the fact that schools will reopen in May, 2004 it would be appropriate that text-books be made available latest by 31st March, 2004 and not later.'

Sign language

Unlike Braille, the *Persons with Disabilities Act* does not recognise sign language as a medium of education for the deaf. In this respect, the Act falls short of International norms in the education of deaf children, as provided under *Standard Rules* and *Salamanca Statement*.

Linguistic research during the past thirty years has demonstrated that existing sign languages meet all the requirements of human communication. Sign languages have been defined from a linguistic viewpoint as languages, and those using sign languages have been defined as a linguistic minority. The *Ethnologue* – world's most comprehensive database of the world's languages – has catalogued some 6,700 spoken languages and 114 sign languages. Sixty-three sign languages, systems and dialects, and references have been catalogued by Thomas R. Harrington of the Gallaudet University Library[80]. Some, 177 sign languages, dialects, and other sign systems are in use currently. It's interesting to note that sign languages are listed at par with spoken languages. The importance of Sign Language for the deaf has gained momentum across the globe. Some thirty countries have accorded Sign Language the status of an official language of the deaf and some sixty countries are in the process of standardizing National Sign Language.[81]

The Indian deaf community has also asserted their right to a standard sign language. The *Delhi Association of the Deaf* has filed an application before the NHRC[82], alleging that in India there are a number of sign languages in use and these languages differ from place to place and are quite inadequate in meeting the educational requirements of the deaf children. Therefore, it is important to develop a *Standard Sign language* to meet the educational, training and employment needs of the deaf people. After investigating the status of sign languages for deaf children in India, the NHRC is convinced that a child-centered sign language is an important element of the right to education. For its development and popularization, the Commission believes collaborative action by the Government, linguists, deaf persons and their families, and interpreters is essential.

India is a signatory to the *Biwako Millennium Framework*, which encourages development of a standard sign language by the year 2005, therefore, the Commission perceives this as a Constitutional obligation under *Article 51* as well. It is hoped that the move towards the new international convention on the theme of disability would provide a fresh impetus towards the protection of unique linguistic rights of persons with disabilities.

6.6 Access to Places of Entertainment, Sports and Culture

6.6.1 International Standards

Equal participation in the cultural life of one's own community promotes an inclusive society that encourages full participation of persons with disabilities. Participation in entertainment, sports and cultural activities

[80] http://library.gallaudet.edu/dr/faq-world-sl-name.html, www.ethnologue.com

[81] World Federation of the Deaf, 2004.

[82] *NHRC Annual Report, 2003-2004*.

is an aspect of the right to take part in cultural life, guaranteed in *Article 15* of the *ICESCR* which reads:

1. The States Parties to the present Covenant recognize the right of everyone:

   a. To take part in cultural life;

   b To enjoy the benefits of scientific progress and its applications; and

   c. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

In relation to this right, the Covenant further outlines specific duties of the State Parties in *Articles 15(2), 15(3), and 15(4).*

The right to accessible and available cultural and recreational activities was upheld by the *CESCR* in *General Comment No. 5* (para 36), which also included access to places for recreation, sports and tourism. The *CESCR* also encourages the States to eliminate communication barriers to the greatest extent possible to facilitate full participation in cultural and recreational life by persons with disabilities (para 37). The *Standard Rules* refers to cultural life in *Rule 10* and to recreation and sports in *Rule 11*. The Rules clearly emphasise the principle of equal access, participation and envisage a positive role for the States. The *Rule 10* lays down:

1) States will ensure that persons with disabilities are integrated into and can participate in cultural activities on an equal basis.

2) States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas. Examples of such activities are dance, music, literature, theatre, plastic arts, painting and sculpture. Particularly in developing countries, emphasis should be placed on traditional and contemporary art forms, such as puppetry, recitation and story-telling.

3) States should promote the accessibility to and availability of places for cultural performances and services, such as theatres, museums, cinemas and libraries, to persons with disabilities.

4) States should initiate the development and use of special technical arrangements to make literature, films and theatre accessible to persons with disabilities.

It is noteworthy that the *Rule 10* of *Standard Rules* call for the 'development and use of special technical arrangements to make literature, films and theatre accessible to persons with disabilities.' In keeping with these provisions, the *CESCR* in *General Comment No.5* specifies accessible formats such as talking books and adapted television and theatre for deaf persons. The *CESCR* also enjoins the State Parties to promote accessibility of private places for persons with disabilities such as restaurants, hotels, recreation centres and cultural venues. (para 38)

Article 31 of the *CRC* recognizes the rights of children to rest, leisure, play and recreational activities, as well as full participation in cultural and artistic life. Recognizing the special circumstances of children with disabilities, *CRC* in *Article 23(3)* provides,

… that the disabled child has effective access to … recreation opportunities in a manner conducive to the

> child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

Likewise, a provision in *Article 13(c)* of the *CEDAW Convention* emphasises equal participation of women in recreational activities, sports and all aspects of cultural life.

The Working Group that drafted the text of the *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* took an approach that on the one hand promotes access and participation by people with disabilities in the mainstream sports, culture and media, and on the other seeks to afford an environment in which unique talents and cultural identity of the disabled are recognised. *Article 24* of the Convention stipulates,

> States Parties recognize the right of all persons with disabilities to take part in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:
>
> a) have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community;
>
> b) enjoy access to literature and other cultural materials in all accessible formats, including in electronic text, sign language and Braille, and in audio and multi-media formats;
>
> c) enjoy access to television programs, films, theatre, and other cultural activities, in all accessible formats, including captioning and sign language; and
>
> d) enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and the hospitality industry, and, as far as possible, enjoy access to monuments and sites of national cultural importance.
>
> 4. States Parties recognize the right of persons with disabilities, on an equal basis with others, to participate in recreational, leisure and sporting activities and shall take appropriate measures to:
>
> a) encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at regional, national and international levels;
>
> b) ensure that persons with disabilities have an opportunity to organize and participate in sporting activities and to receive the same instruction, training and resources in support that is available to other participants;
>
> c) ensure that persons with disabilities have access to sporting and recreational venues, and that children with disabilities have equal access to participating in sporting activities with the education system;
>
> d) ensure that persons with disabilities have access to services from those involved in the organization of recreational, leisure and sporting activities.

The *Biwako Millennium Framework* conceives a very positive role for the Asian and Pacific States in the promotion of sport and leisure activities for persons with disabilities. It states,

> Governments, in collaboration with other stakeholders, need to provide sport, leisure and recreational activities and facilities for persons with disabilities, as the fulfillment of their basic rights to the improvement of life.

6.6.2 Domestic Standards

The Constitution of India in *Article 15(2)* says,

> No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
> access to shops, public restaurants, hotels and places of public entertainment; or
> the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

The overarching object of this Article is to guarantee access without discrimination. *Articles 15(3)* and *15(4)* of the Constitution establish a very positive role for the State. They encourage introduction of special measures in favour of women, children, Scheduled castes and Scheduled tribes, and other members of socially and educationally backward classes. Upholding access as an indispensable condition for a meaningful right to life, the Supreme Court of India, in *State of Himachal Pradesh vs Umed Ram Sharma*[83] said,

> every person has right … under article 21 to his life and that right under article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself.

However, access without discrimination to public facilities, roads, places of culture and entertainment for persons with disabilities came into focus only with the enactment of *Persons with Disabilities Act, 1995*, which lays down duties of various Government authorities in very clear terms for the creation of barrier free facilities. For instance, *Section 44* states,

> Establishments in the transport sector shall, within the limits of their economic capacity and development for the benefit of persons with disabilities, take special measures to-
>
> a) adapt rail compartments, buses, vessels and aircrafts in such a way as to permit easy access to such persons;
>
> b) adapt toilets in rail compartments, vessels, aircrafts and waiting rooms in such a way as to permit the wheel chair users to use them conveniently.

As per *Section 45*,

> The appropriate Governments and the local authorities shall, within the limits of their economy capacity and development, provide for-
>
> a) installation of auditory signals at red lights in the public roads for the benefit of persons with visually handicap;
>
> b) causing curb cuts and slopes to be made in pavements for the easy access of wheel chairs users;
>
> c) engraving on the surface of the zebra crossing for the blind or for persons with low vision;
>
> d) engraving on the edges of railway platforms for the blind or for persons with low vision;
>
> e) devising appropriate symbols of disability; and
>
> f) warning signals at appropriate places.

Section 46 says,

> The appropriate Governments and the local authorities shall, within the limits of their economics capacity and development provide for-
>
> a) ramps in public buildings;

[83] *State of Himachal Pradesh vs Umed Ram Sharma* [(1986) 2 SCC 68)].

b) adaptation of toilets for wheel chair users;

c) Braille symbols and auditory signals in elevators or lifts;

d) ramps in hospitals, primary health centres and other medical care and rehabilitation institutions.

Precious little has been done by the governments to translate these provisions into reality, so much so, that even necessary amendments in the light of the *Persons with Disabilities Act, 1995* have not been carried out in building by-laws, fabrication standards for buses, rail coaches, vessels, etc.[84] As a result, persons with disabilities have resorted to judicial recourse. For instance, during the visit of Mr. Stephen Hawking, a renowned physicist and a wheelchair user, to New Delhi, the Department of Archaeological Survey of India with the help of Ministry of Social Justice and Empowerment had put up temporary ramps in important monuments, which were later removed. Aggrieved by this action, one Mr. Javed Abidi, a well known disability activist filed a Civil Writ petition[85] before the High Court of Delhi seeking direction to not to remove the wooden ramps and to erect permanent ramps for ensuring barrier free access by persons with disabilities as per the provisions under *Section 46* of the *Persons with Disability Act, 1995*.

Another complaint filed before the Chief Commissioner for Persons with Disabilities relates to denial of entry to the Nahar Singh Stadium at Faridabad, to one Mr. Ajay Hans[86], a wheel chair user, even though he possessed a valid ticket. The administration tried to conceal the inaccessibility of the stadium under the pretext of heavy rush but on finding the actual facts, the Chief Commissioner directed the authorities,

- To arrange orientation course for in service and freshly recruited police personnel regarding the needs of persons with disabilities;
- To ensure that all the stadiums and sports arena are made barrier free within one year ensuring that persons with disabilities, in general, and wheel chair users, in particular, could freely and independently move about and sit;
- To provide at least one barrier free toilet each for females and males with disabilities;
- To ensure that special entrances and exits, sitting places and toilets bear proper signages indicating barrier free facilities for disabled persons. These signages must be displayed in a manner that the users can easily take notice of them; and
- To ensure that barrier free features are provided in accordance with the specifications given in model building bye laws prepared and circulated by the Ministry of Urban Affairs, Government of India.

In order to ensure that persons with disabilities benefit equally from the scientific and technical advancement, the *Persons with Disabilities Act* in *Section 48* encourages appropriate Governments and local authorities to promote and sponsor research in the following areas: -

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[84] *Approach to Disability, 2002* (NHRC), available at www.nhrc.nic.in .

[85] See www.ncpedp.org for case details.

[86] Chief Commissioner for Persons with Disabilities, *Annual Report* - 2000-2001(selected cases).

- prevention of disability;
- rehabilitation, including community based rehabilitation;
- development of assistive devices including their psycho-social aspects;
- job identification; and
- on-site modifications in offices and factories.

It is pertinent to note that the Government of India has established *'Science & Technology Project'* in *Mission Mode* to exclusively sponsor research in the field of assistive technology for persons with disabilities. Furthermore, to encourage eminent scientists and professionals to undertake research in this area, a National Technology Award is conferred each year on the World Disabled Day in recognition of outstanding technological development in the field of disability.

6.7 Access To Media & Information Communication Technologies (ICTs)

6.7.1 International Standards

Article 19 of the *Universal Declaration of Human Rights 1948*, states that everyone has a right to, '... seek, receive and impart information and ideas through any media and regardless of frontiers.'

The *ICCPR* in *Article 19* further expands this right recognising that information can be received and imparted, 'orally, in writing or in print, in the form of art or through any media of [her/his] choice.'

The *UN Special Rapporteur on Freedom of Opinion and Expression* in his *Annual Report, 1998* noted, '[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems… .'

Studies carried out in Asia, Europe and America suggest that disabled and non-disabled have similar media habits. Relevance of television, radio and newspapers is as significant in the lives of persons with disabilities as it is for the non-disabled population.[87]

Rule 5 of the *Standard Rules* also calls on States to 'encourage the media, especially television, radio and newspapers, to make their services accessible' to persons with disabilities.

There is now a political will in many countries to ensure access to various forms of media and culture by persons with disabilities. New legal frameworks and standards are being developed to promote the concept of universal design and universal service. The telecommunication, broadcasting and information laws and regulations falling short of accessibility standards are being repealed or amended. The effort is towards creating systems independent of individual bias as a means to overcome the digital divide.

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[87] Mohit, Anuradha *Information Communication Technologies (ICTs) and Persons with Disabilities* (A Desk Research) (UNESCO, 2002).

Telecommunication

The international efforts for setting universal standards in telecom, media and information processing in last ten years have gone a long way in ensuring access to media, information and culture by persons with disabilities. For instance, six different text telephone systems for the deaf and deaf blind came in use but with serious problems of compatibility, interoperability and limitations in international calling. Therefore, in 1997/98 the *International Telecommunications Union (ITU)* through Study Group T 16 released three major recommendations: [88]

- V.18 describes a multi-function text telephone, which can communicate with the wide variety of text telephones in use today;
- T.140 adds new facilities, which allow text communication using a very wide variety of alphabets such as Arabic, Cyrillic, Kanji etc. as well as Latin-based characters; and
- T.134 describes how these facilities are used in the multi-media communications systems defined by the ITU-T. (Gunnar Hellstrom, 1998)[89]

After having completed work on V.18, T.140 and T.134, the *ITU* focused its attention on three new targets with the objective to:[90]

- Establish an interoperability test for text telephones;
- To establish interworking between text conversation in different environments by adding to Recommendation H.246 on interworking between the different multimedia systems; and
- To establish a service description for multimedia conversation services, including text conversation and video with motion reproduction sufficient for sign language and lip reading.

The *European Telecommunications Standards Institute (ETSI)* has also produced three very significant deliverables that provide guidance to the designers of communication products and services. These include,[91]

- ETR 029: Human Factors (HF); Access to telecommunications for people with special needs; Recommendations for improving and adapting telecommunication terminals and services for people with impairments (1991);
- ETR 116: Human Factors (HF); Human factors guidelines for ISDN Terminal equipment design; (1994); and
- ETR 166: Human Factors (HF); Evaluation of telephones for people with special needs; An evaluation method (1995).

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[88] Mohit, Anuradha *Information and Communication Technologies (ICTs) for People with Disabilities*, (Position Paper for UNESCO, 2003) portal.unesco.org/ci/en/file_download.php

[89] Hellström, Gunnar *Equal Opportunities to Telecommunications,* available at www.omnitor.se .

[90] Ibid.

[91] Ibid.

Web Accessibility

In the last decade or so, Internet has brought about a radical shift in the paradigm of information dissemination, sharing and processing. Using Internet in a variety of information forms like plain/formatted text, pictures, audio and video can be presented to the users across the globe at a fast, reliable and extremely cost effective manner. While the variety in the forms of information makes the content aesthetically very appealing and easy to use, it also poses new challenges for people with disabilities[92] .

Shapiro and Varian, authors of *Information Rules: A Strategic Guide to the Network Economy*, point out that 'today more than 60 percent of Internet traffic is to Web Sites, and of the Web traffic, almost three-fourths is images.' Therefore, information on the web loaded with graphics and images cause a serious threat to the freedom of information for those with sight impairment. Similarly, Web pages with a long list of hyperlinks crowded together could confuse a person with learning disabilities. Even people with hearing disabilities find it difficult to access the content of audio streaming and video clips posted on the Internet in the absence of captioning.[93]

It is worth noting that *Rule 5* of the *Standard Rules* also refers to 'new computerized information and service systems offered to the general public' and urges governments to ensure that they are 'made initially accessible or are adapted to be made accessible to persons with disabilities.'

In consonance with this requirement in the *Standard Rules*, a development worth noticing is the release of the '*Web Content Accessibility Guidelines 1.0*' specification issued by *World Wide Web Consortium (W3C)* on May 5, 1999. This significant development provides a stable specification that has been reviewed and recommended by the *W3C* Membership as a tool for making web sites accessible. The specification contains fourteen guidelines which are general principles of accessible design. Each guideline is associated with one or more checkpoints describing how to apply that guideline to particular features of Web pages. An appendix to the guidelines, '*Checklist of Checkpoints for the Web Content Accessibility Guidelines 1.0*' presents the checkpoints sorted by priority for easy reference.[94]

Several worthwhile initiatives have been reported by the *UN Secretary-General* on the action taken to promote awareness and build national capacities for Internet accessibility. These efforts have been carried out in co-operation with Government, non-government and private bodies in various parts of the world. They are reflected in the *Secretary General's Progress Report* on implementation of the *WPA* to the fifty-fourth session of the General Assembly (1999; document A/54/388/Add.1) and the fifty-sixth session of the General Assembly (2001; document A/56/169) and to the thirty-ninth session of the Commission for Social Development (2001).[95]

The *Biwako Millennium Framework* sets out specific targets under the priority action, which says,

> By 2005, persons with disabilities should have at least the same rate of access to the Internet and related services as the rest of the citizens in a country of the region.
>
> International organizations (e.g., International Telecommunication Union, International Organization for Standardization, World Trade Organization, World Wide Web Consortium, Motion Picture Engineering

[92] Ibid.

[93] Ibid.

[94] Ibid.

[95] http:/www.un.org/esa/socdev/enable/disa56169e1.htm .

Group) responsible for international ICT standards should, by 2004, incorporate accessibility standards for persons with disabilities in their international ICT standards.
Governments should adopt, by 2005, ICT accessibility guidelines for persons with disabilities in their national ICT policies and specifically include persons with disabilities as their target beneficiary group with appropriate measures.

The most recent development in this area is the *World Summit on the Information Society (WSIS)*, which recognizes the need to ensure that developments in information technology address the needs of persons with disabilities. The Declaration from the World Summit acknowledges the 'special needs of older persons and persons with disabilities' (para 13). The WSIS Platform (in paras 9, 19 and 23) mentions these needs in relation to information and communication technology training, access to technology, appropriate design and production, opportunities for teleworking, and use of computer software for alternative forms of communication.

Media

The mass media has undergone rapid transformation by simulating major technological innovations such as electronics editing, publishing and through animated images and digitised production of TV programming. The computerised and communication-assisted publishing of the printed press has also contributed to this revolution. Interactive television and multimedia has opened up unprecedented opportunities for entertainment, education and commerce. If the rapidly developing media technologies are made available based on the principle of universal design, the media's capacity to break down traditional barriers to participation by disadvantaged groups such as the people with disabilities are enormous.

Towards this end, *Biwako Millennium Framework* encourages international organizations (e.g., International Telecommunication Union, International Organization for Standardization, World Trade Organization, World Wide Web Consortium, Motion Picture Engineering Group) responsible for international ICT standards to incorporate by 2004 accessibility standards for persons with disabilities in their international ICT standards.

6.7.2 Domestic Standards

The recognition of a distinct disability culture in countries of Europe and North America has been instrumental in promoting accessible media there. The situation in countries in Asia, Latin America and Africa is not so encouraging. There is a persistent indifference to the cultural identity of persons with disabilities and not much has been done to promote their participation in the mainstream cultural life. As a consequence the related laws in India, such as *Information Technology Act, Prasar Bharati (Broadcasting Corporation Of India) Act, 1990,* and *Telecom Regulatory Authority of India Act* lack disability perspective.

The NHRC is alive to the fact that telecommunications, broadcasting and other systems of information are out of the reach of a vast majority of persons with disabilities due to their cost and standards of design and delivery. Hence, in January 2003 it recommended that Government of India and State Governments should elaborate and adopt a National/State policy on accessible infrastructure for persons with disabilities in order to ensure barrier free access to built environment, transport system, telecommunication, information

and broadcasting and electronic public information facilities.[96]

Broadcasting Norms

Prasar Bharati (Broadcasting Corporation of India) is the State supported broadcaster in India. This autonomous entity is regulated by the *Prasar Bharati (Broadcasting Corporation Of India) Act, 1990*. While specifying the functions of Prasar Bharati the Act focuses on the interests of minority and weaker sections. *Section 12(1)* states the primary duty of the Corporation and *Section 12(2)* outlines the functions as follows:

a) upholding the unity and integrity of the country and the values enshrined in the Constitution;

b) safeguarding the citizen's right to be informed freely, truthfully and objectively on all matters of public interest, national or international, and presenting a fair and balanced flow of information including contrasting views without advocating any opinion or ideology of its own;

c) paying special attention to the fields of education and spread of literacy, agriculture, rural development, environment, health and family welfare and science and technology;

d) providing adequate coverage to the diverse cultures and languages of the various regions of the country by broadcasting appropriate programmes;

e) providing appropriate coverage to sports and games so as to encourage healthy competition and the spirit of sportsmanship;

f) providing appropriate programmes keeping in view the special needs of the youth;

g) informing and stimulating the national consciousness in regard to the status and problems of women and paying special attention to the upliftment of women;

h) promoting social justice and combating exploitation, inequality and such evils as untouchability and advancing the welfare of the weaker sections of the society;

i) safeguarding the rights of the working classes and advancing their welfare;

j) serving the rural and weaker sections of the people and those residing in border regions, backward or remote areas;

k) providing suitable programmes keeping in view the special needs of the minorities and tribal communities; and

l) taking special steps to protect the interests of the children, the **blind**, the aged, the **handicapped** and other vulnerable Sections of the people (emphasis added).

Despite such a clear mandate, as indicated in clause *l* above, there are numerous constraints to access television programming by persons with disabilities. *User Interface Standards, User Presentation Standards* and *Terminal Equipment Standards* need to be developed and redefined so that all analogue and digital broadcasting services are delivered on the principle of universal design and accessibility norms. Towards this end, the NHRC has recommended formation of a multisectoral task force comprising various

[96] *Approach to Disability* (NHRC, 2002), available at www. nhrc.nic.in .

Ministries and autonomous bodies in the Government of India and including people with disabilities and universal design experts. Such a task force has been advised to identify areas of review, assessment, research and finally to come up with a *National Accessible Infrastructure Policy and Plan*.

It is interesting to note that in *Section 12(2)(o)* the *Prasar Bharati Act* provides for 'promoting research and development activities in order to ensure that radio and television broadcast technology are constantly updated.'

In Europe, Governments plan to provide much of their information and services via digital television. Therefore, incorporation of accessible features in the design of digital broadcasting and its delivery system has received considerable attention.[97] Rigorous media research initiatives from a disability perspective have been undertaken through a multidisciplinary approach with broadcasters, ICT companies, and academic and disability organisations working together. The studies of this nature generally analyse user's concerns, information and broadcasting laws, design of existing media products and their delivery mechanism and most often these researches offer design solution based on universal design principles and accessibility norms.[98]

For example, the Netherlands Federation of the Blind and Partially Sighted, the Public Broadcasting Corporation, and the Dutch Federation of Libraries for the Blind jointly worked on a comprehensive research project for a period of four years between 1998 and 2001. The research investigated barriers to television viewing, its causes, and its demographic implications with reference to disabilities. It was found that 30% programmes on Dutch television are in foreign languages. They are broadcast with text subtitles. Consequently, blind, print impaired and elderly persons with visual impairment were unable to access the content of these programmes due to inflexible user presentation standard. The study provided a design solution which involves the integration of speech synthesis and broadcasting software. To encourage the uptake of this new approach, a decoder has been developed which unpacks the sound signal without interfering with the programme. All the three public broadcasting networks in the Netherlands now offer audio caption service with foreign language programming.[99]

In a rapidly changing era of media technology, it becomes all the more important to encourage universal design principles. To accommodate the challenge of technology switchover, parallel changes in the related laws become imperative. UK presents a good case study in this regard where, in the year 1996, the government adopted a new *Broadcasting Act*. This coincided with broadcast technology switch from analogue to digital. The Act mandates broadcast of at least 10% programmes with narration or verbal description of key visual elements of a programme. However, the Act does not contain any provision for audio description transmission and reception standards. Therefore, when digital terrestrial television started in the UK in November 1999, no provision was made for transmission of verbal description of visual elements because the digital terrestrial set top boxes were not configured to download audio description feature[100]. As a result, the blind and elderly persons got deprived of the narrative video service, which would have allowed them full access to television.

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[97] Mohit, Anuradha *Information Communication Technologies (ICTs) and Persons with Disabilities* (A Desk Research) (UNESCO, 2002).

[98] Ibid.

[99] Ibid.

[100] Wall, Sir John 'Audio description and its potential', Joint CEN, CENELEC and ETSI workshop: *TV Broadcasting for all* (Seville: 13th and 14th June 2002).

Since, digital broadcasting can open up a world of interactive services beyond broadcasting, it will increasingly be used to do on-line Internet browsing, shopping, banking and e-mailing. Therefore, incorporating accessible features in the design of digital broadcasting and its delivery system is important; otherwise the disabled people would be forced further away from enjoying full benefits of this latest technology.

Telecommunications

Like television, telephones play an equally important role in the lives of people with disabilities. When Alexander Graham Bell invented the telephone, he was attempting to convert speech into a visual representation to accommodate a greater choice of information modality for his wife who had a hearing loss. Unfortunately, Bell's invention failed to accommodate conversion of information from auditory to visual mode as intended. Instead, the long distance communication scenario got transformed completely, allowing communication in real time for persons who could hear. The intended benefits of telecommunication for the hearing impaired and deaf came about much later. The *Teletypewriter* (TTY) service that enabled communication for the deaf with other TTY users became available in the United States during the mid 70s.[101] The *Tele-relay* service became the second milestone that widened the communication choice as through a relay centre the deaf callers could communicate with hearing persons[102]. These technologies had their own limitations in terms of compatibility, interoperability and long distance calling. The *International Telecommunications Union* (ITU) has addressed all these issues and now norms for accessible telecom are available.

The development of *videophones* has benefited deaf and hard of hearing people beyond estimation. This means that deaf people now can use videophones to communicate in sign language in the same way as hearing people use telephones[103]. In fact, recent improvements in the quality of pictures in the videophone are also an outcome of a disability concern, as sign language users demanded a faster and clearer image processing. After having completed its work on V.18, T.140 and T.134, the ITU focused on establishing a service description for multimedia conversation services, including text conversation and video with motion reproduction sufficient for sign language and lip reading.[104]

The Finnish Association of the Deaf (FAD) launched a Multimedia Project between years 1998-2001 to study whether videophone links and distance interpretation would improve the use of interpreting services, intensify use of the interpreter's working time and reduce expenses by cutting down interpreter's total travel cost. The findings of the study confirmed that videophone enhances the freedom of socialisation of deaf people and also reduces the cost of interpreter's services and travel. In addition, the quality of life improved as many services such as medical consultation, family counseling, distance education and legal advice became possible using videophones linked to interpreter's service.[105]

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[101] Mohit, Anuradha *Information Communication Technologies (ICTs) and Persons with Disabilities* (A Desk Research) (UNESCO, 2002).

[102] Lazzaro, Joseph J. *Adaptive Technologies for Learning & Work Environments*, 2nd ed. (Chicago: ALA (ALA Editions), 2001).

[103] Kauppinen, Liisa '*Municipalities taking on responsibility for videophone services'* 2001.

[104] Ibid.

[105] Mohit, Anuradha, *Information Communication Technologies (ICTs) and Persons with Disabilities* (A Desk Research) (UNESCO, 2002).

Access to telecom services by people with disabilities is also determined by the policy and legal frameworks, as they can always ensure access. For example, *Americans with Disabilities Act (ADA)* mandates, 'one text telephone must be provided inside any building that has four or more public pay phones. In addition, one text telephone must be provided wherever there is an interior public pay phone in a stadium, hotel, convention centre ….. etc.'[106] Similarly in Sweden and Finland, some local Governments have included videophones in the list of assistive devices for persons with disabilities.

Indian telecom laws and regulation do not address the issue of accessibility from the perspective of universal design. This could be attributed to lack of awareness on the part of the Government, telecom authorities, and the disability rights movement. We have touched upon some aspects of telecommunication using examples from other jurisdictions of law and research in related area. These are merely illustrative. Our aim is to encourage critical thinking and review of related laws.

Web Accessibility

In the last few years judicial, quasi-judicial and several administrative authorities have interpreted the anti discrimination provisions to uphold the right to access technology mediated information. The concept of access is very dynamic and disability has contributed to its further evolution. The following examples from the USA, Australia and the UK demonstrate how access is interpreted as a means to achieving non-discrimination in the information society.

> In November 1999, the National Federation of the Blind filed a suit against America Online, Inc., charging that AOL's proprietary browser and Internet web site was inaccessible to consumers who are blind. In March 2000, a settlement was reached under Americans with Disabilities Act (ADA) between the Bank of America and the California Council of the Blind requiring to not only install 2500 talking ATMs in Florida and California, but also to ensure that its website and online banking services were accessible to people using screenreaders.[107]
>
> The Attorney General of Connecticut, USA settled a complaint filed by National Federation of the Blind v/s four online tax filing services. As per this settlement, four online tax filing services listed on the web site of Revenue Department were modified to ensure that people who are blind can access the sites with effect from tax filing year 2000 in accordance with Americans with Disabilities Act.[108] It is pertinent to mention here that Americans with Disabilities Act is a non-discrimination legislation.
>
> By a reference dated 26 August 1999, the Attorney-General (Australia), *inter alia*, advised the Human Rights and Equal Opportunity Commission to examine the difficulties and restrictions faced by older Australians and those with a disability in achieving full and equal access to services utilizing new technologies and deriving full benefit from such technologies.

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[106] Lazzaro, Joseph J., *Adaptive Technologies for Learning & Work Environments*, 2nd ed. (Chicago: ALA (ALA Editions), 2001,

[107] www.isp-planet.com/news/aol_settles.html

[108] Waddell, Cynthia D. and others, *Design for All - The Need for Legislation*, 2001, www.ic**d**ri.org/Europe/european_**d**ay_of_**d**isable**d**_people_.htm

> The Commission was further advised to conduct an audit of the accessibility of Australian government and business Internet sites, with reference to the Disability Discrimination Act and relevant Australian and International guidelines.[109]
>
> The part three of the *Disability Discrimination Act 1995* of the UKrequires providers of goods, facilities and services to make them accessible to people with impairments. This provision has been interpreted to emphasise that 'Unlawful discrimination occurs when a service provider discriminates, by doing one of the following:
>
> Refusing to serve a disabled person;
> Offering a disabled person a lower standard of service;
> Offering a disabled person less favourable terms; and
> Failing to make alterations to a service or facility, which makes it impossible, or unreasonably difficult, for a disabled person to use.'[110]

With the exception of intervention by the NHRC recommending the Government to constitute a multi-sectoral taskforce to ensure access on equal basis to people with disabilities, no other example of a legally mandated entity taking initiative to modify ICT related laws can be found in India. It is ironical that India is an IT leader but its IT laws remain limited in their purpose and scope with no concern for access to public or private sites for persons with disabilities; and all this when the *World Summit of Information Society (WSIS)* is galvanizing a dynamic set of principles that would set the stage for a knowledge based information society in which access without discrimination would be ensured for all.

Whether nurturing of cultures, popularization of science or influencing public opinion, the media is likely to play a more significant role than ever before. Therefore, media's importance in mainstreaming disability has increased manifold. The academics, researchers, and the disability rights' activists need to take a hard look on the laws and regulations that govern media, and information technology services with a view to suggesting improvements from a disability standpoint.

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[109] *Accessibility Of Electronic Commerce And New Service And Information Technologies For Older Australians And People With A Disability,* Report of the Human Rights and Equal Opportunity Commission of Australia on a reference from the Attorney-General, 31 March 2000.

[110] Busby, Geoff *Social Opportunities, Barriers and Dangers in the 21st Century* (2000).

Table 6.1
International Standards on Specific Social and Cultural Rights

	General	Specific to Disabled
Right to Food and Water	ICESCR : Article 11 CEDAW : Article 14 CRC : Article 24 (2) (C)	CESCR • General Comment nos. 12, para 1 & 15
Right to Adequate Housing & Shelter	UDHR : Article 25 (1) ICESCR : Article 11 (1) CESCR :General comment no. 4, para 7 Vancouver Declaration on Human Right Settlement 1976, Section III (8) Habitat Agenda, Istanbul, Turkey, 1996, para 61 UN Commission on Human Rights Resolution on forced evictions	WPA Standard Rules : Rule 5 CEDAW : Article 14 CRC : Article 27 Draft Convention on Disability Principle for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles): Principle 3 Standard Rules : Rule 5
Right to Health	ICESCR : Article 12 (1) CEDAW : Article 12 (1) CRC : Article 24 (1) Standard Rules ▪ Rule 2 ▪ Rule 3	MI Principles: Principles 6 – 14 & 22 CESCR ▪ General Comment No. 5 ▪ General comment no. 14, para 12 ▪ General comment no. 14, para 14 CEDAW: General Recommendations, no. 24, para 6 CRC : General Comment no. 4 Draft Convention on Disability : Article 21
Right to Education	UDHR & World Declaration on Education for All ICESCR : Article13 CEDAW : Article 10 CRC : Article28 & Article29 CESCR : General Comment No. 13	CRC : Article 23 WPA Standard Rules : Rule 6 UNESCO Salamanca Statement, 1994 - World Education Forum (Daker,2000) - General Comment Nos.5&13 CESCR Article17 Draft Convention on Disability Proclamation on the Full Participation &Equality of People with Disabilities in the Asia Pacific Region CRC : Comment No.1

	General	Specific to Disabled
Linguistic Rights	ICCPR : Articles 27 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities: Article 1(1)	Biwako Millennium Framework Standard Rules : Rule 5 Draft Convention on Disability
Right to Access to Places of Entertainment Sports and Culture	ICESCR : Article-15 CESCR : General comment No.5, para 36 CRC : Article-31	CESCR : General comment No.5 paras 37&38 Standard Rule : Rules 10 & 11 CRC : Article 23 (3) Draft Convention on Disability : Article-24 Biwako Millennium Framework
Right to Access to Media and ICTs	UDHR : Article19 ICCPR ITU ETSI W3C Secretary General's Progress - Report on Implementation of WPA Disability Discrimination Act 1995 WSIR	Standard Rules : Rule-5 Biwako Millennium Framework WSIS

Table 6.2
Domestic Standards (Constitution and Acts of Parliament) on Specific Social and Cultural Rights

Right	General	Specific to Disabled
Right to Food and Water	Constitution : Articles 47&39	Persons with Disability Act, 1995 • Section 25 (f)
Right to Adequate Housing & Shelter		National Trust Act, 1999 Persons with Disability Act, 1995 Section 8 (1) (C), Central Coordination Committee
Right to Health	Constitution : Articles 39 (e), 4 &, 42 of Workmen's Compensation Act, 1923 Employees State Insurance Act, 1948 Maternity Benefit Act, 1961 : Article 47	Persons with Disability Act, 1995 Mental Health Act 1987: Section 81 Protection of Human Rights Act, 1993: Section 12
Right to Education	Constitution : Articles 41, 46 & 51(A) 86th Amendment Art.21(A)	Persons with Disability Act • Sections 26, 27, 29-31 & 39
Linguistic Rights	Constitution : Article 29 (1)	Persons with Disability Act, 1995
Right to Access to Places of Entertainment, Sports and Culture	Constitution : Article-15(2), 15 (3) &15 (4)	Persons with Disability Act, 1995 • Sections 44-46 & 48

Table 6.3
Domestic Standards (Court Cases and NHRC Orders & Reports) on Specific Social and Cultural Rights

	General	Specific to Disabled
Right to Food and Water	PUCL vs Union of India and others - NHRC order, 17 Jan 2002 Attakoya Thangal vs Union of India	South Asia Human Development Report 2001 PUCL vs Union of India and others
Right to Adequate Housing & Shelter	Chameli Singh vs State of UP Shantistar Builder vs Narayan Khimalal Tortame Ahmedabad Municipal Corporation vs Nawab Khan Gulab Khan	Mamta Kumari vs, the State of Bihar and others National Federation of the Blind, UP vs State of UP
Right to Health	Bandhua Mukti Morcha vs Union of India Consumer Education & Research Centre and others vs Union of India and others CESC Ltd vs Subhash Chandra Bose	SP Sathe vs State of Maharasthra Rakesh Chandra Narayan vs State of Bihar S. R. Kapur vs Union of India Quality Assurance in mental health, 1997, NHRC report Indian Council of Legal Aid & Advsice vs Union of India and others
Right to Education	Mohini Jain vs State of Karnataka Unni Krishnan J.P & Others vs State of A.P	National Association for the Blind and Others vs CBSE & Others Supreme Court All Kerala Parents Association vs State of Kerala Social Jurist vs Govt. of Delhi & Social Jurist vs Union of India
Linguistic Rights		All India Confederation of the Blind and Anr.vs Union of India & Anr

	General	Specific to Disabled
Right to Access to Places of Entertainment, Sports and Culture		State of H.P. vs Umed Ram Sharma Notice and Orders of the Chief Commission for Persons with Disability

Table 6.4
Executive Policies on Specific Social and Cultural Rights of the Disabled

Executive policies for Disabled	
Right to Food and Water	Antyodaya Anna Yojana (AAA) Cards
Right to Adequate Housing & Shelter	National Habitat and Housing Policy, 1998 Indira Awas Yojana – norms for building accessible houses Model Building Bye Laws – availability of accessible houses
Right to Health	Integrated Child Development Scheme of the Department of Women and Child National Health Policy, 2002
Right to Education	Integrated Education Scheme for Disabled Children (IEDC) Sarv Shiksha Abhiyaan

Part D

Application of Economic Rights in the Context of Disability

NHRC

CHAPTER 7

Evolution and Nature of Economic Rights

This chapter describes various aspects of economic rights at the international and national levels. It analyses the nature of economic rights, relevant international instruments, the Indian legislative and policy framework in the area of economic rights, and details various administrative and other mechanisms for the fulfilment and protection of these rights.

7.1 The Nature and Evolution of Economic Rights

Economic rights are an important facet of human rights and, broadly pertain to the creation of opportunities and facilities for enabling human beings to earn their livelihood in fair and just conditions established on the principle of equality and equity. They also refer to the rights of human beings to own, possess and manage property, both moveable and immovable, and they envisage a system of social security in old age, sickness and similar circumstances.

The international human rights law has developed a wide range of treaty and other instruments, which address issues relating to the economic rights of all persons, including persons with disabilities. The right and the need of persons with disabilities to have economic security - whether by means of access to remunerative work or by access to social security and support when needed - is critical to their full inclusion and participation in society. The economic rights of the disabled are not only necessary for them to lead a life of dignity with equality; they are also a precondition for a robust economy which thrives on the capacity of consumers.

It is now well accepted that there cannot be any strict division between human rights as they are not only inter-dependent, but in fact are indivisible. For example, the international guarantees of rights often bring together economic and social rights, and there are some rights, which may be seen as belonging to both categories. For example, the right to an adequate standard of living – which includes rights to adequate food, shelter, clothing and social services – clearly is closely linked with access to economic resources. Since the social and cultural rights have been dealt in detail in Part C, they are not discussed here. Similarly, the right to form and join trade unions – guaranteed by *Article 8* of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and other international instruments — and the freedom of association guaranteed by the *International*

Covenant on Civic and Political Rights (ICCPR) have a significant overlap with the right to work. They too are not discussed here.

Since different states are at different levels of development and have different resource bases, economic rights along with social and cultural rights are seen non-justiciable. A distinction is thus frequently drawn between civil and political rights – seen as justiciable and forming the starting point of any democratic state, politics and civic life – and economic, social and cultural rights that are seen as non-justiciable and whose realisation is believed to be possible over a period of time due to the resources required for their implementation.

This understanding is reflected in *Article 2(1)* of the *ICESCR*, which provides:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly in adoption of legislative measures.

The Constitution of India also follows the same trend and catalogues economic, social and cultural rights in Part IV under the *Directive Principles of State Policy* that are non-justiciable.

However, traditional ideas about the different nature of the two categories of obligations have been under challenge for a long time, and a more sophisticated understanding of the nature of the rights and the attached obligations has emerged within the United Nations and various countries. The *Committee on Economic, Social and Cultural Rights (CESCR)* has for example stated that some aspects of economic, social and cultural rights are directly implementable[1] . These include obligations of non-discrimination in the enjoyment of rights, but also extend beyond that in some cases. The jurisprudence on social, economic and cultural rights in India over the last two decades has gone far beyond the issue of non-discrimination. In many cases the Supreme Court has established a harmonious relation between the fundamental right to life and many, so called, non-justiciable rights.

The present analysis is informed by efforts to identify different aspects of economic, social and cultural rights and duties of the State to respect, protect, promote and fulfil human rights. Developed initially by Asbjorn Eide[2] and others in the context of the right to food, analysis of this kind has been taken up by many institutions like the *CESCR, Special Rapporteurs* of the *UN Commission on Human Rights*, and in the jurisprudence of the *African Commission on Human and Peoples' Rights*.

Actions of a modern democratic state are supposed to be bounded by a multi-layered set of obligations with regard to rights enjoyed by its citizens. At a primary level, the obligation to respect citizens' rights entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders' freedoms and autonomy, and their liberty to act in manners consistent with the right. With respect to socio-economic rights, this means that the

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[1] APF Submission to the 4th Ad hoc Committee 2004, p, 43; available at www.apf.org

[2] Eide, Asbjorn *Right to Development with reference to Right to Food* (2000); also see http://www.fao.org/Legal/rtf/statemts/dev00.htm

State is obliged to respect the free use of resources owned by, or at the disposal of the individual, alone or in any form of association with others, including the household, joint partnership or community, for the purpose of rights-related needs.

At a secondary level, the State is obliged to protect right-holders against other subjects by legislation and provision of effective preventive and penal remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interference. Protection generally entails the creation and maintenance of a framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

The last layer of obligation requires the State to act to fulfil the rights and freedoms it freely undertook to honour under various human rights regimes. This obligation flows from a positive expectation from the State to move its machinery towards the actual realisation of rights. This is also very much intertwined with the duty to promote the rights mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for obtaining food (direct food aid or social security).

Thus States are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasising the all embracing nature of their obligations, the *ICESCR,* for instance under *Article 2(1)*, stipulates exemplarily that States

> Undertake to take steps … by all appropriate means, including particularly the adoption of legislative measures. Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties.

In relation to the States' obligations to persons with disabilities, the *CESCR* has stated[3]:

> The obligation of States parties to the Covenant to promote progressive realisation of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. **The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.** This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required (emphasis added).

7.1.1 Equality and Non-discrimination in the Enjoyment of Economic Rights

The other important dimension of economic rights is the right to equality in the enjoyment of those rights. *Article 2(2)* of *ICESCR* and other instruments guarantee non-discrimination in the enjoyment of rights

[3] CESCR *General Comment 5*, para 9.

covered in the Covenant, including non-discrimination on the grounds of disability (this falls under the category of 'other status'):

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The *CESCR* has described discrimination on the basis of disability in the following terms:

> For the purposes of the Covenant, **'disability-based discrimination' may be defined as including 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 (emphasis added).

7.2 Economic Rights in International Law

There are a number of important instruments guaranteeing economic rights. The *Universal Declaration of Human Rights* contains such guarantees, including the right to property, which is not contained in either of the two international covenants on human rights. The *ICESCR* brings together a number of important economic, social and cultural rights. India ratified this International Covenant in 1979. The *ICESCR* guarantees the following economic rights:

A. right to work *(Article 6)*

B. right to enjoyment of just and favourable conditions of work *(Article 7)*

C. right of workers to form and run trade unions freely subject to just limitations to protect their interest *(Article 8)*

D. right to have social security and social insurance *(Article 9)*

E. right to an adequate standards of living *(Article 11)*

F. right to own and administer property *(Article 12)*

Though India has not enacted a parallel legislation, various policies and schemes have been formulated and implemented to advance these rights.

The International Labour Organisation (*ILO*) has adopted a number of important conventions which guarantee economic and social rights, primarily in relation to work. Persons with disabilities are entitled to the rights guaranteed by all general *ILO Conventions*, as well as by those conventions and recommendations which deal specifically with disability. There is an extensive *ILO* practice and jurisprudence under a number of important conventions that can be drawn on to help interpret those instruments.

The *Standard Rules on Equalization of Opportunities for Persons with Disabilities* also contain useful guidance in respect of economic rights. At the regional level, among other instruments the *European Social Charter* (and the *Revised European Social Charter*) contains important guarantees of economic rights; these can be the subject of complaints to a committee of experts, which has produced many helpful juridical discussions on economic rights.

7.3 Economic Rights in Indian Law

The Indian Constitution has incorporated some of the economic rights in Part-IV in *Directive Principles of State Policy*, which are not enforceable, but are to be taken into account by the State while formulating its policies and legislation. Various legislative measures have also been undertaken for the protection of economic rights. Some examples of such legislation are the *Industrial Disputes Act 1947,* the *Minimum Wages Act 1948,* the *Factories Act 1948,* the *Employees' State Insurance Act 1948,* and the *Equal Remuneration Act 1976*.

The Constitution has incorporated some of the internationally recognised economic rights. Though, as *Directive Principles* they cannot be enforced by a citizen through the courts of law, the judiciary has played a pro-active role towards the fulfilment of the obligations of the State under the *ICESCR* by interpreting the relevant *Directive Principles* in harmony with the right of equality guaranteed under *Article 14* in Part-III (titled as 'Fundamental Rights'). The economic rights included specifically in the Constitution are:

a) adequate means of livelihood to men and women alike *(Article 39-a)*;

b) equitable distribution of resources *(Article 39-b)*;

c) equal pay for equal work for both men and women *(Article 39-d)*;

d) right to work *(Article 41)*;

e) right to have public assistance in the event of old age, sickness and disablement and in other cases of undeserved want *(Article 41)*;

f) right to have just and humane conditions of work including maternity relief *(Article 42)*; and

g) right to have minimum wages in all sectors of economy *(Article 43)*.

Article 32 of the Constitution provides for a constitutional remedy by investing the High Courts and the Supreme Court of India with extra-ordinary writ jurisdiction for the enforcement of fundamental rights. Human rights activists and non-governmental organisations working on social issues have used this constitutional provision to approach the High Courts and the Supreme Court on matters of public importance through public interest litigation. In the area of economic rights also, such judicial activism has been responsible for the development of jurisprudence to promote these rights.

Three chapters of the *Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* – Chapter-VI titled 'Employment', Chapter-VII titled 'Affirmative Action', and Chapter-VIII titled 'Non-Discrimination' – are relevant for guaranteeing protection of economic rights to persons with disabilities. Broadly, these chapters have incorporated the following measures to empower persons with disabilities to enjoy economic rights:

(a) extension of 3% reservation in favour of persons with disabilities in all posts in every establishment belonging to appropriate government (both central and state governments) and local authorities *(Section 33)*;

(b) creation of non-handicapping work environment *(Section 38);*

(c) reservation of vacancies/benefits in poverty alleviation schemes *(Section 40)*;

(d) provision of incentives to employers both in public and private sectors for ensuring that at least

5% of their workforce is composed of persons with disabilities *(Section 41)*;

(e) provision of aids and appliances to persons with disabilities by appropriate governments *(Section 42)*;

(f) scheme for preferential allotment of land at concessional rates to persons with disabilities for setting up businesses, factories, etc. *(Section 43)*;

(g) provision of accessibility features on roads to enable free movement of persons with disabilities *(Section 45)*;

(h) provision for making the built environment accessible and useable by persons with disabilities *(Section 46)*;

(i) protection of the service of an employee in the government establishment who acquires disability during service *(Section 47(i))*; and

(j) non-discrimination in the matter of promotion on the ground of disability *(Section 47(ii))*.

In conclusion, as we have discussed in this chapter, a number of international instruments and domestic constitutional stipulations and laws exist for protecting and promoting the general economic rights of persons with disabilities. In the next chapter we discuss the law and jurisprudence on some specific economic rights. We describe some aspects of these rights for which remarkable success has been achieved from the human rights perspective. We also identify certain roadblocks that need to be overcome.

CHAPTER 8

International and National Law on Selected Economic Rights

This chapter outlines a brief analysis and description of a selected set of economic rights covering international and domestic standards with examples of corresponding jurisprudence. The rights analysed are:

a. Right to Work

b. Right to Just and Favourable Conditions of Work

c. Right to Social Security

d. Right to Own and Administer Property

Tables 8.1, 8.2, 8.3 and 8.4 at the end of the chapter give a synoptic view of the relevant international and domestic standards on these economic rights.

8.1 Right to Work

8.1.1 International Standards

The right to work has been recognised by the International Covenant on the Economic, Social and Cultural Rights *(ICESCR)* as one of the important economic rights. This right is, in fact, the very basis of ensuring economic independence and protecting human dignity. It implies that every citizen should have the opportunity to have freely chosen employment. It is also synonymous with 'the right to livelihood'.

The international law has recognised that the right to work includes economic security implying the right to engage in gainful employment on the basis of equality with others. *Articles 6* and *7* of the *ICESCR* guarantee the right to work. These provisions need to be read in conjunction with the guarantee of non-discrimination contained in *Article 2(2)* of *ICESCR*.

The *ICESCR* in *Articles 6* and *7* has following provisions:

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; and

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

The Committee on Economic Social and Cultural Rights (*CESCR*) has addressed a number of aspects of the right to work for persons with disabilities in *General comment No 5*. First of all, the committee is critical of certain practices that in the name of providing employment to persons with disability segregate them from the mainstream and are against their right to equality. According to the committee,

> The right of everyone to the opportunity to gain his living by work which he freely chooses or accepts (Art. 6 (1)) is not realized where the only real opportunity open to disabled workers is to work in so-called 'sheltered' facilities under sub-standard conditions. Arrangements whereby persons with a certain category of disability are effectively confined to certain occupations or to the production of certain goods may violate this right. Similarly, in the light of principle 13(3) of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, 'therapeutically treatment' in institutions which amounts to forced labour is also incompatible with the Covenant. In this regard, the prohibition on forced labour contained in the International Covenant on Civil and Political Rights is also of potential relevance.[1]

[1] CESCR *General Comment 5*, para 21.

The committee has also drawn attention to the need to ensure that there are no physical or other barriers preventing access by persons with disabilities to places of work. It has further stressed the need for accessible transport to and from workplaces, and underlined the requirement that persons with disabilities have access to integrated training and vocational programmes and not be discriminated against in relation to rates of pay and other conditions of employment.[2]

Rule 7 of the *Standard Rules* provides a detailed elaboration of many aspects of the right to work, including:

(a) Requiring that law and regulations in the employment field not discriminate against persons with disabilities or raise obstacles to their employment *(Rule 7 (1))*;

(b) Calling on states to support actively the integration of persons with disabilities into open employment *(Rule 7 (2))*;

(c) Calling on State Parties to provide support for the redesign or adaptation of workplaces to ensure accessibility, and the development of new technologies and assistive devices to enable persons with disabilities to gain employment *(Rule 7 (3))*;

(d) Calling on State Parties to play an active role as an employer to promote the employment of persons with disabilities, as well as taking steps to combat prejudices and stereotypes about persons with disabilities *(Rules 7 (4*) and *(5))*; and

(e) The aim should always be for persons with disabilities to obtain employment in the open labour market. For persons with disabilities whose needs cannot be met in open employment, small units of sheltered or supported employment may be an alternative. It is important that the quality of such programs be assessed in terms of their relevance and sufficiency in providing opportunities for persons with disabilities to gain employment in the labour market (Rule 7(7)).

In addition to provisions contained in the *ICESCR*, *CESCR* and *Standard Rules*, the other set of important international conventions related to the right to work for persons with disabilities have been issued by the International Labour Organization (*ILO*). These include the *ILO Convention on Discrimination in Occupation and Employment 1958 (No. 111)*, which was ratified by India on 3 June 1960, and the *ILO Convention on Vocational Rehabilitation and Employment (Disabled Persons) 1983 (No. 159)* (not ratified by India). Other relevant *ILO* Conventions are *Convention No. 142 - Vocational Guidance and Vocational Training in the Development of Human Resources*, *Convention No. 168 - Employment Promotion and Protection against Unemployment*, *Convention No. 102 - Minimum Standards of Social Security*, *Convention No. 121 - Benefits in the Case of Employment Injury* and related ILO instruments, such as the *ILO Code of Practice on Managing Disability at the Workplace*.[3]

Of particular note is the *Discrimination (Employment and Occupation) Convention 1958 (ILO Convention no. 111)* which defines 'discrimination' as:

> [A]ny distinction, exclusion or preference [made on any of the grounds specified in the Convention itself or specified by the State concerned] which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.[4]

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[2] Ibid. paras 22-25.

[3] For the full text of all of these instruments see http://www.ilo.org/public/english/ .

[4] *ILO Convention 111*, Article 1.

The Convention also specifies, in *Article 5*, that special measures, including affirmative action, for people with disabilities may be introduced. These may not be considered as discrimination against other workers. The article provides:

1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.

Biwako Millennium Framework For Action Towards An Inclusive, Barrier-Free And Rights-Based Society For Persons With Disabilities In Asia And The Pacific, 2003-2012 is a recent policy framework that elaborates action by member States with respect to right to work for persons with disabilities on the basis of equality and non-discrimination. It lays down the following areas for action by member States:

1. Governments should examine, ratify and implement the Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159), 1983.

2. Governments should have policies, a written plan, a coordinating body and some mechanism to evaluate the success of including persons with disabilities in training, employment, self-employment and poverty alleviation programmes. These activities should include consultations with organizations of and for persons with disabilities as well as employers' and workers' organizations.

3. Governments should develop and implement employer incentives and strategies to move persons with disabilities into open employment and recognize that government, as a major employer in most countries, should be a model employer with regard to the hiring, retention and advancement of workers with disabilities.

4. Governments should examine and/or enact anti-discrimination legislation, where appropriate, that protects the rights of workers with disabilities to equal treatment and opportunity in the workplace and in the marketplace. Governments should encourage and promote employment of persons with disabilities in the private sector and should provide a mechanism for the protection of rights of those persons with disabilities affected by layoffs and downsizing exercises.

5. Governments, international organizations, NGOs, training institutions and other social partners should collaborate to increase the availability and upgrade the competencies of staff providing training, employment and vocational rehabilitation services to ensure that trained and competent staff is available. Persons with disabilities should be actively recruited and included in such training programmes and hired as staff.

6. Governments, with the assistance of NGOs, should ensure that persons with disabilities have the support services they require to participate in mainstream vocational training and employment, and allocate the additional funds required to remove barriers to inclusion, with the full recognition that the price tag related to exclusion is higher.

7. Governments, NGOs and disabled persons' organizations should collaborate more with employers, trade unions and other social partners to develop partnerships, policies, mutual understanding and more effective vocational training and employment services that benefit persons with disabilities working in formal, informal or self-employment settings.

8. Governments, in collaboration with employers' organizations, workers' organizations, organizations of and for persons with disabilities and other social partners should review current policies, practices and outcomes related to the vocational training of persons with disabilities to identify gaps and needs and develop a plan to meet these needs in the light of workplace changes related to globalization, ICT and the needs of persons with disabilities living in remote and rural communities.

9. Funds must be allocated to meet the needs of those with the most extensive disabilities to provide training and employment services in dignified and inclusive settings to the extent possible, by using strategies such as transitional and production workshops and community-based and supported employment.

10. Recognizing the lack of formal job opportunities in many countries, Governments, international agencies, donors, NGOs and others in civil society must ensure that persons with disabilities and organizations of and for persons with disabilities have equitable access and are included in programmes related to business development, entrepreneurship and credit distribution.

11. Regional organizations, including those of persons with disabilities, in collaboration with national governments and international agencies, should develop mechanisms for the collection and dissemination of information related to good practices in all aspects of training and employment, especially those that reflect regional and cultural needs.

The challenge of including persons with disabilities in the economic mainstream has not been realized fully. Despite international standards and the implementation of exemplary training and employment legislation, policies and practices in some countries, persons with disabilities, and especially women, youth and those in rural areas, remain disproportionately undereducated, untrained, unemployed, underemployed and poor. As a consequence the UN Member States have once again focused their attention in framing specific obligations for an effective realization of the right to work by persons with disabilities. The *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* prepared by the Working Group envisages a wide range of measures, which are as follows:

(a) promote a labour market and work environment that are open, inclusive, and accessible to all persons with disabilities;
(b) enable persons with disabilities to have effective access to general technical and vocational guidance programs, placement services, assistive devices, and vocational and continuing training;

(c) promote employment opportunities and career advancement for persons with disabilities in the open labour market, including opportunities for self-employment and starting one's own business, as well as assistance in finding, obtaining and maintaining employment;

(d) encourage employers to hire persons with disabilities, such as through affirmative action programs, incentives and quotas ;

(e) ensure the reasonable accommodation of persons with disabilities in the workplace and work environment; promote the acquisition by persons with disabilities of work experience in the open labour market; promote vocational and professional rehabilitation, job retention and return-to-work programs;

(f) protect through legislation persons with disabilities with regard to employment, continuance of employment, career advancement, working conditions, including equal remuneration for work of equal value and equal opportunities, and the redressing of grievances, and to ensure persons with disabilities are able to exercise their labour and trade union rights;

(g) ensure that persons with disabilities have equal opportunity to employment in the public sector; and

(h) promote recognition of the skills, merits, abilities and contributions of persons with disabilities to the workplace and the labour market, and to combat stereotypes and prejudices about persons with disabilities in the workplace and the labour market.

8.1.2 Domestic Standards

The right to work is included in *Article 41* of Part-IV of the Constitution of India, which obliges the State to ensure the right to work, subject to its economic capacity and development.

Article 21 of the Constitution guarantees the right to life and liberty. The scope of right to life has come up for adjudication before the Supreme Court of India and the High Courts on many occasions. The Courts have consistently maintained that the right to life does not mean mere animal existence. In a case of forced eviction of pavement dwellers, the apex court extended the scope of right to life to include right to livelihood.[5] In a subsequent case[6] the apex court further clarified its position with regard to the right to livelihood saying,

> There is no doubt that broadly interpreted and as a necessary logical corollary, right to life would include the right to livelihood and, therefore, right to work. It is for this reason that this Court in *Olga Tellis* case while considering the consequences of eviction of the pavement dwellers had pointed out that in that case the eviction not merely resulted in deprivation of shelter but also deprivation of livelihood in as much as the pavement dwellers were employed in the vicinity of their dwellings.

The Court however also noted that,

> This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it, and not

[5] *Olga Tellis vs Bombay Municipal Corporation* [AIR 1986 SC 180]

[6] *Delhi Development Horticulture Employees' Union vs Delhi Administration, Delhi and others,*[AIR 1992 SC 789]

> because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the Chapter on Directive Principles of State Policy.[7]

Equality and Non-Discrimination at Work

Equality is the corner stone of the human rights doctrine and is crucial to the right to work. The strategy to ensure equality adopted by the Constitution and supported by legislation is two-fold. On the one hand, discrimination on grounds of caste, race, religion, sex, place of birth or status etc. has been prohibited, and on the other, affirmative actions and special measures in favour of vulnerable groups have been guaranteed.

Article 14 of the Constitution guarantees right to equality and lays down that every one is equal before law and has equal protection of law. *Articles 15* and *16* guarantee right to equality in specific areas. *Article 16* deals with the right to equality of opportunity and non-discrimination in relation to work. *Article 16(1)* guarantees equality of opportunity to all citizens in the area of public employment, and *Article 16(2)* prohibits discrimination on grounds of race, caste, religion, sex, place of birth or status. *Article 16(4)* empowers the State to make special provisions for the reservation in appointments to public offices in favour of any 'backward class' of citizens 'which, in the opinion of the State, is not adequately represented in the services under the State.'

In the absence of an expressed reference to disability, several doubts had surfaced concerning the permissibility of *Articles 15* and *16* to the rights of disabled. The apex court has set to rest many such doubts. For example, in *Indira Sawhhney vs Union of India*[8] the apex court declared that reservation in favour of persons with disabilities is covered under *Article 16(1)*, and said,

> Clause (1) of article 16 guarantees equality of opportunity for all citizens in matters of employment or appointment to any office under the State. The very concept of equality implies recourse to valid classification for preferences in favour of the disadvantaged classes of citizens to improve their conditions so as to enable them to raise themselves to positions of equality with the more fortunate classes of citizens.

Extending this line of thinking to the context of persons with disability, the Court held that,

> To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Articles 14 and Article 16(1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them.

With reference to the scope of *Articles 16(1)* and *16(2)*, the Courts have laid down the following principles which are now well-settled:

a. Equality of opportunity means that a citizen has an equal chance with others in matters relating to employment under the State.[9]

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[7] Ibid.

[8] *Indira Sawhney vs Union of India* [1992 Supp (3) SCC].

[9] *Parmatma Sharan andAnr. vs Hon'Ble Chief Justice Rajasthan High Court & Ors.* [AIR 1964 Raj 13 (15) (DB)]

b. Equality of opportunity in matters of employment means equality as between members of the same class of employees and not equality between members of separate, independent classes.[10]

c. Clause (1) (of *Article 16*) is much wider in scope than Clause (2) and the grounds of discrimination mentioned in Clause (2) are not exhaustive. Discrimination alleged on grounds other than those stated in *Article 16 (2)* have to be weighed and judged in the light of the general principle laid down in *Article 16 (1)*.[11]

d. Every eligible candidate has a right to be considered. No person has a right to a post.[12]

e. Public employment opportunity is a national wealth in which all citizens are equally entitled to share and no class of people can monopolise public employment in the guise of 'efficiency' or other ground, but the right to equal opportunity to public employment cannot be treated as a new form of private property with its attribute or competitive exploitation.[13]

The right to equality in the area of work as embodied in *Article 16* is however limited to public employment and does not extend to the private sector of the economy. Employment in the private sector has been recognised as a personal contract, which cannot be enforced by civil courts. In the event of a breach of such a personal contract, the only remedy available to the affected party is to claim damages instead of enforcing the contract. The *Persons with Disabilities (Equality of Opportunity, Protection of Rights and Full Participation) Act, 1995* is however an exception because it encourages private employers to employ a certain percentage of persons with disabilities (*Section 41*).

Affirmative Action Measures

As has been pointed out already, the Constitution of India views affirmative action measures as a means to achieve equality and non-discrimination, particularly in the matter of work. This view has determined the policy towards persons with disabilities as well. The Government of India by way of an Executive Order, issued as early as in1977, had introduced 3% reservation in Group C and D posts for persons with disabilities.

Persons with Disabilities Act has also included affirmative action as a strategy in the area of employment. *Section 33* provides for a 3% reservation in favour of persons with disabilities, except persons suffering from mental illness and intellectual disability, in all establishments belonging to the Central and State Governments and Local Authorities. The reservation provided under this section is to be distributed equally to the extent of 1% each among three groups of disabled comprising respectively of the blind or having low-vision, the hearing impaired, and those with loco-motor impairments and cerebral palsy. This is a very important legal provision in the area of ensuring equality of opportunity in public employment. *Section 33* reads as follows:

> Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disabilities of which 1% each shall be reserved for persons suffering from: -
>
> i. Blindness of low vision;

[10] *The General Manager, South Central Railway, Secunderabad and Anr. vs ar Siddhanti and OthersOrs* [AIR 1974 SC 1755 (1760)].

[11] *Sukhnandan Thakur vs State of Bihar and others* [AIR 1957 Pat 617 (629) (DB)] .

[12] *Shri H.K. Agnihotri vs Delhi High Court & Ors.* ILETTER (1974) 2 Delhi 450 (478).

[13] *State of Maharashtra Vs Chandrabhan Tale*, (1984) 48 Fac LR 57 (SC).

ii. Hearing impairment;

iii. Loco-motor disability or Cerebral Palsy.

In the posts identified for each disability :
Provided that the appropriate Government may, having regard to the type of work carried on in any Department or Establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this Section.

It must be pointed out that with the enactment of this Act reservation for persons with disabilities got extended to Groups A and B posts as well. The Government of India and State Governments have issued instructions to this effect. For example, the Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pension, Government of India in its memorandum[14] dated February 18th 1997 issued instructions stating, 'with enactment of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act, 1995*, the reservation to physically handicapped stood extended to identified Group A and B posts filled through direct recruitment.'

In fact Supreme Court of India declared blind persons eligible for Group A and B posts much before the enactment of the Disabilities Act. In *National Federation of the Blind vs U.P.S.C.*[15], the Supreme Court declared that blind persons are eligible to hold group A and B posts and directed the UPSC to allow blind candidates to write the Group A and B Civil Services competitive examination either in Braille or with the help of a scribe.

With the enactment of *Persons with Disabilities Act, 1995* all ambiguities regarding eligibility of persons with disabilities for Group A and B posts have been removed and a bulk of cases can be cited to this effect.
In *Pushkar Singh and Others vs University of Delhi and Others*[16], the court observed that

> [T]o give effect to the theme of Asian and Pacific Decade of Disabled Persons 1993-2002 the Indian Parliament enacted *Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act, 1995*. Therefore, respondents were bound to give 3% reservations to persons with disabilities in view of their own resolution as well as the provisions of the Disability Act. Further, the Court recorded the consent of the respondents to give reservations to persons with disabilities in respect to teaching posts.

In another case[17] in which a blind candidate was denied the benefit of reservation by one of the affiliated Colleges of Delhi University, the High Court of Delhi directed that the scheme of reservation is to be implemented in terms of *Section 33* of the Act.

In *Piyush Agarwal vs C.P.W.D*[18] the complainant, a person with loco-motor disability, approached the Chief Commissioner for Persons with Disabilities when the post of the Junior Engineer (Electrical) was advertised by the Central Public Works Department without mentioning reservation for persons with

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[14] Office Memorandum no. 36035/16/91-Estt (SCT) dated February 18th, 1997.

[15] *National Federation of Blind vs U.P.S.C.* [1993 (2) SCC 41]

[16] *Pushkar Singh and others. vs University of Delhi and others.* (CWPDD2549/1995) decided on 30.1.2001.

[17] *Smt. Shruti Kalra v. University of Delhi and Others.* (CWP-3297 of 1996).

[18] Office of the Chief Commissioner for Persons with Disabilities ,Case No. 2854 / 2004, CCPD, 2004.

disabilities, despite it being an identified post. The Chief Commissioner directed the Department to publish a corrigendum in this regard, with provision for adequate time to submit the applications for the same and make special concession in the Examination Fee as well.

In *Chander Kishore Joshi vs DRDO, Ministry of Defence*[19] the complainant was partially deaf and applied for a position in the Defense Research & Development Organization (*DRDO*), which had no reservations for persons with disabilities. He was given a medical examination and was found unfit for the position. The respondent refused to grant a position to the claimant based on their own caste based reservations on the ground that the *DRDO* could not relax its strict standards for hearing because of the nature of the hostile field conditions in which *DRDO* scientists conducted tests. Hence, hiring physically disabled persons would compromise the efficiency of the work as well as the safety of the disabled persons. Because of the nature of job required and the conditions of the working environment, a separate Expert Committee recommended that the *DRDO* be exempted from keeping reservations for persons with disabilities. The claimant alleged that allowing this exemption would be a violation of the *Persons with Disabilities Act, 1995* and that persons with hearing disabilities could perform the functions of a scientist in certain areas at the *DRDO*. The Supreme Court held that the purpose of the *Persons with Disabilities Act* needed to be upheld in this case. The Court found that the hostile conditions encountered by the scientists were pertinent to orthopaedically disabled and visually impaired persons and not to hearing impaired persons. The court advised the *DRDO* not to deny reservations to persons with disabilities as per the Act and to appoint the complainant as a Scientist.

In *Chief Commissioner Disabilities vs IIM, Lucknow*[20] , the Chief Commissioner took *sou moto* cognizance of an advertisement of the *Indian Institute of Management* (*IIM)* wherein no reservations were made in the posts advertised. In their reply, the Institute averred that reservation is only possible when there is plurality of posts, and reserving the advertised single cadre posts, even on a rotation or roster basis, would culminate in complete and unconstitutional reservation. However, on further enquiry it turned out that the *IIM* had no disabled person amongst the sixty employees in Groups A and B posts and there were only three disabled employees in its 137 non-teaching staff. The Chief Commissioner instructed the *IIM* to maintain a separate roster as per the rules of the Government of India and the DoPT, vide which posts at position 1, 34 and 67 are required to be reserved. The respondent was finally ordered to calculate, as per the above rules, the exact number of backlog vacancies and thereafter, to undertake a special recruitment. This batch of recruitment would only be for persons with disabilities and was to be conducted in six months time. The Chief Commissioner further instructed that the advertisement should contain details of the categories of disabilities that the specific post was suitable for, along with the relevant exemptions, concessions and relaxations.

There is a provision in the *Persons with Disabilities Act, 1995* to accord exemption from the obligation of reserving 3% vacancies in favour of persons with disabilities. The *Section 33* outlines conditions in which exemption can be accorded and lays down criteria by which the application of exemption would be considered. According to *Section 33*:

[19] Office of the Chief Commissioner for Persons with Disabilities, Case No. 2519/ 2002, CCPD, 10.03.2004.

[20] Office of the Chief Commissioner for Persons with Disabilities, Case No. 2455 of 2002, CCPD, 29.07.2003.

> [P]rovided, that the appropriate Government may, having regard to the type of work carried on in any department or establishment by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

Towards this end the Government of India, Ministry of Social Justice and Empowerment has notified an *Inter-ministerial Committee*[21] . Two issues are worth emphasizing:

1) **That no establishment can accord exemption to itself from *Section 33* unless approved by the inter-ministerial committee.**
2) **Blanket exemption to an establishment is not favoured.**

This is best exemplified in *Chander Kishore Joshi vs DRDO, Ministry of Defence* discussed above, where the apex court rejected the approach of the Inter- ministerial committee that accorded blanket exemption to the *DRDO.*

Another important aspect of effecting reservation for persons with disabilities is that the appointment has to be made 'on the posts identified for each disability' (*Section 33*). The identification of posts is stipulated in *Section 32* of the Act that says,

> Appropriate Governments shall-
>
> (a) identify posts in the establishments, which can be reserved for the persons with disability;
>
> (b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

This makes it clear that the government at every level, be it the Centre, States or local, is obliged to undertake the task of identification of posts. It is a sad commentary on the state of disabled persons' rights in the country that despite such clear legal and policy guidelines, the full enforcement of *Section 33* remains suspended in several establishments and public sector undertakings in the absence of any identification of posts reserved for them.

In *Ashok M. Shrimali and Others vs State Bank of India and Others,*[22] the respondent bank denied appointment to a blind person to a II level post on the pretext that suitable post is not available. Recording its deep concern, the apex court observed that there was no constitutional protection when the Central government fails to discharge a statutory obligation by not identifying posts suitable for persons with disabilities as required under *Section 32* of the *Persons with Disabilities Act*. Therefore, it directed the government to carry out identification of posts in favour of persons with disability as contained in *Section 32* and reservation of posts in favour of such persons as required by *Section 33* within a period of six months from date of order. Following this, the Ministry of Social Justice & Empowerment, Government of India issued a revised list of identified post in A, B, C and D categories through Extraordinary Gazette Notification No. DL- 33004/99, dated 30 June, 2001. The notification clarifies that the list identified by the Expert

[21] Order no. 16-31/2000-NI-I (PWD), dated February 20, 2001.

[22] *M. Shrimali & Others vs State Bank of India & Others,* (Supp) Bom. C.R. 132 2001.

Committee is illustrative and by no means exhaustive, and that posts with identical functions under different nomenclature are deemed identified.

The establishments can identify posts on their own. However, this identification should be in addition to the posts already identified and notified by the appropriate government. For example, the Department of Personnel and Training in the Notification on identification of posts no. 36035/5/84-Estt. (SCT) dated 28 February 1986 at para 2 states, 'The list of jobs identified by the Committee is no means exhaustive and Ministries/ Departments etc. may have to further supplement this.' Similar position is reiterated in the latest notification of Ministry of Social Justice & Empowerment, Government of India in Gazette Notification dated 30 June 2001.

In *Government of NCT of Delhi vs Bharat Lal Meena and Surinder Singh*,[23] the High Court of Delhi clarified that in the light of the notification dated 31 May 2001 by the Expert Committee of the Ministry of Social Justice and Empowerment, the post of physical education teachers had not been found unsuitable and hence, was not exempted. In short, this Notification provided that any post that is not suitable for reservation for disabled persons had to be explicitly exempted from reservation under *Section 32* and that the identified posts, under whichever nomenclature, will be considered as identified.

Identification of posts by a body of experts has been employed to protect the right to work of the disabled from prejudice and the stereotypes of helpless victims of *karma* needing mercy and care. But unfortunately, the very provision that was to take care of successful operation of reservations in jobs held these reservations hostage until the court intervened. This trend is best illustrated in the case of *R. Manoj Kumar vs University of Hyderabad*[24] wherein the High Court of Andhra Pradesh clarified that

> [T]he provision does not require for its effectuation any administrative instructions or order of the academic or executive council. Therefore the decision of the academic or executive council of the University was required only for pragmatic facilitation of this mandate. The social welfare legislation could not therefore be subverted by the leisurely approach of the Respondent-University to put its affairs in consonance with the mandate of legislation.

The High Court directed the University to stay further recruitments till it identifies and declares the 3% reservation for persons with disabilities in the total posts advertised.

Since the 3% reservation for persons with disabilities is divided at the rate of 1% each among the blind, the hearing impaired and loco-motor impaired persons, two issues are of critical relevance:

(i) the method by which a vacancy would be carried forward in case it remains unfilled, and
(ii) when and how the vacancies can be interchanged amongst the disabled and with non-disabled.

In this regard, the *Section 36* of the *Persons with Disabilities Act, 1995* lays down,

> Where in any recruitment year any vacancy under section 33 cannot be filled update to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable

[23] *Govt of NCT of Delhi vs Bharat Lal Meena and Surinder Singh* 100 (2002) DLT 157 (DB).

[24] *R. Manoj Kumar vs University of Hyderabad*, WP SR No. 70074/ 2002, Andhra Pradesh High Court, 18.11.2002.

person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year the employer shall fill up the vacancy by appointment of a person, other than a person with disability.

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government.

In the absence of appropriate modifications in the service rules by the States, instances of arbitrary interchange of vacancies have surfaced. For example in *Rajasthan Netraheen Sewa Sangh and Others vs RPSC and others*,[25] the Rajasthan Netraheen Sewa Sangh along with some other affected blind candidates filed a writ petition in the Jaipur High Court challenging the action of the Rajasthan Public Service Commission and other authorities for arbitrarily interchanging vacancies meant for blind and low vision persons with those having locomotive impairment. The High Court dismissed the application for stay. Thereafter an appeal was made before the Division Bench of the High Court, which too was dismissed giving rise to the filing of an *SLP* with the Supreme Court. In its interim order the Supreme Court directed, 'no appointments shall be made in respect of 50% of the 753 posts reserved for disabled persons except that visually impaired persons may fill such 50% posts.'

Since major poverty alleviation schemes focus on creation of job opportunities for persons living below poverty line both in rural areas and urban slums, the *Section 40* of the *Persons with Disabilities Act* is of immense importance in this regard. It mandates to reserve not less than 3% benefits in all poverty alleviation schemes for persons with disabilities. These employment generation schemes are administered by the Ministry of Rural Development and the Ministry of Urban Affairs and Employment. Some important schemes are:

- Sampoorna Grameen Rozgar Yojana (Rural Wage Employment Scheme)
- Swarnjayanti Gram Swarozgar Yojana (Rural Self-Employment Scheme)
- Swarna Jayanti Shahari Rojgar Yojana (SJSRY) (Urban Employment Scheme)

The Central Government has also introduced a Bill called *National Employment Guarantee Bill, 2004* which assures work to the eligible individuals for at least hundred days in a year and aims at progressively granting 'right to work' to all citizens.

To ensure that persons with disabilities benefit equally from provisions of this Bill without any discrimination, the National Human Rights Commission of India (NHRC) proposed the following suggestions:

1) The principle of non-discrimination should be incorporated in draft Section 3(1).
2) Person with disability should be among the non-official members of the implementing and monitoring authorities, that is, the Central Employment Guarantee Council, State Employment Guarantee Councils and the Standing Committees at the district level, as envisaged under Sections 10(3), 12(1) and 13(2) of the Bill.

[25] Case No. Special Leave Petition (Civil) No.6433-6434 of 2005.

The NHRC has also introduced a rather modern approach to equal wages based on the concept of reasonable differentiation. It suggests,

> Where the wages are linked with quantity of work, a separate schedule of quantity of work should be made for the persons with disabilities, wherein the quantum of work (output) should commensurate with the nature and extent of disability. Till the implements of work and the work environment are made fully reflective of the experience of disability, linking wages of persons with disabilities to production equivalent with that of the non-disabled may constitute discrimination. Therefore the wages paid to persons with disabilities should not be less than those paid to the non-disabled, regardless of difference in production levels.

Recognising that the employment opportunities are shifting from public sector to private, the *Persons with Disabilities Act, 1995* in *Section 41* embodies a strategy to ensure that certain percentage of the work force in private sector is composed of persons with disabilities.

Section 41 stipulates,

> The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, provide incentives to employers both in public and private sectors to ensure that *at least five per cent* of their work force is composed of persons with disabilities.

Through a system of quota and levy, countries like Japan, Germany and others have successfully promoted employment of persons with disabilities in the private sector.[26] Unfortunately, India is still to notify an incentive scheme for the private employers under *Section 41* to ensure its successful operation.

> Hiring of a worker has been recognized as a personal contract in the area of employment in private sector and *Section 11* of the *Indian Contract Act* declares persons of 'unsound mind' incompetent, thus excluding persons with intellectual disability and mental illness out of any opportunity to earn livelihood in the private sector.

Section 38 of *Persons with Disabilities Act, 1995* outlines duties of appropriate Government and local authorities to formulate schemes for ensuring employment of persons with disabilities. The Government and local authorities are asked to provide for:

(a) The training and welfare of persons with disabilities;

(b) The relaxation of upper age limit;

(c) Regulating the employment; and

(d) Health and safety measures and creation of non-handicapping environment in places where persons with disabilities are employed.

One of the important facets of non-handicapping environment at work implies availability of appropriate

[26] Thornton , Patricia and Neil Lunt, *Worlds Apart? Employment Policies for Disabled People in Eighteen Countries*; available at www.dinf.ne.jp/doc/english/asia/resource/z00ap/002/z00ap00206.htm .

technology and aids and appliances. *Section 42* of the *Persons with Disabilities Act* guarantees that 'appropriate Governments shall by notification make schemes to provide aids and appliances to persons with disabilities.' The list of identified posts issued by the Government of India also makes reference to the type of equipments that could be deployed in the place of work to ensure suitable and just conditions of work.[27]

The entire approach to the elaboration of the right to work in the *Persons with Disabilities Act, 1995* is underpinned by the principle of equality in the outcome, which may be achieved with the introduction of special/affirmative measures. This principle is very well articulated in the *LIC of India vs Chief Commissioner for Disabilities and Another*[28] wherein the High Court of Delhi held that 'the Disabilities Act calls for affirmative action to ensure the equal status of the disabled amongst us and hence, it would be befitting of LIC to accept the respondent as a peon.'

Self-Employment

The right to work also includes the right to engage oneself in self-employment ventures. Focusing on this aspect, *Section 43* of the *Persons with Disabilities Act* calls upon the State to implement a scheme for the preferential allotment of land at concessional rates to persons with disabilities for setting up business and factories. To this effect, a number of schemes are in place but often they do not extend any concession or preference in the allocation of land. This came to light in the case *Santosh Kumar Rungta vs Delhi Development Authority and Another*[28*] , where the Court directed notification of a scheme both for the allocation of residential accommodations as well as commercial land on concessional rate for persons with disabilities.

The Ministry of Social Justice and Empowerment, Government of India has established *National Handicapped Finance Development Corporation* (NHFDC) for advancing soft loans to persons with disabilities willing to undertake any self-employment venture. This scheme of loan is available to those who do not have either any income or have insufficient income. There are other credit schemes offered by banks and other financial institutions, such as NABARD and SIDBI. Apart from these, persons with disabilities are entitled to preferential allotment in the distribution of PCOs, LPG agencies, petrol pumps etc. However, different norms govern different schemes and very little has been done to redefine these norms in accordance with the *Persons with Disabilities Act,* and other recent legislations. For example, Bharat Petroleum preferred the rule under which only congenitally disabled persons were entitled to allotment of petrol pumps. In *Shaji Kumar vs Bharat Petroleum Corporation*[29] , the Court laid down the principle that benefits for persons with disabilities cannot be based on the cause of disability.

As has already been stated, the situation with regard to right to work in case of persons with mental illness and intellectual disability is rather grim. They have neither any opportunity in the scheme of reservation nor can they opt for self-employment. Persons with intellectual disabilities and mental illness can only opt for sheltered employment. In this regard, the State has earmarked certain items for supply by disability organizations or persons with disabilities. Therefore, through group employment under a protected

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[27] Extraordinary Gazette Notification dated 30 June 2001 by Ministry of Social Justice and Empowerment, Government of India notification No. DL- 33004/99, dated 30 June 2001.

[28] *LIC of India vs Chief Commissioner for Disabilities and Another* 2003 (67) DRJ 136.

[28*] *Santosh Kumar Rungta vs Delhi Development Authority and Another*, (WPC-7799/2000) decided on 10.2.2004.

[29] *Shaji Kumar vs Bharat Petroleum Corporation,* 2004 (1) KLT 961.

environment, there is some opportunity for mentally ill and mentally retarded persons to earn their livelihood in central workshops.

Another option which can be explored for rehabilitation needs of such persons is available in *Section 56(1) and (2)* of the *Persons with Disabilities Act, 1995*, which provides for the maintenance and establishment of institutions for persons with severe disabilities.

Vocational Training

Keeping in view that vocational training is a condition precedent to enable a citizen to exercise her/his right to work, the Government of India has introduced a number of initiatives. The Director General of Employment and Training under the Ministry of Labour operates two schemes, *Craftsmen Training Scheme* and *Apprenticeship Scheme*. While the Craftsmen Training Scheme provides training in Industrial Training Institutes, on the job training in industrial establishments is imparted under the Apprenticeship Scheme. Both these schemes reserve 3% seats for persons with disabilities. The *Apprenticeship Act, 1961* regulates the operation of the Apprenticeship scheme.

The Ministry of Labour under the Directorate General Employment & Training, Government of India has also established *Vocational Rehabilitation Centres for Handicapped* in various parts of the country. These centres offer training in several trades and they also maintain the register of persons with disabilities seeking employment.

The *Persons with Disabilities Act, 1995* emphasizes vocational education for children studying in special schools. *Section 26(d)* mandates,

> The appropriate Governments and the local authorities shall :
> (d) endeavour to equip the special schools for children with disabilities with vocational training facilities.

Apart from this, six National Institutions[30] have been established by the Ministry of Social Justice & Empowerment with an aim to develop training modules for different categories of persons with disabilities.

The quality of vocational trainings imparted and their appropriateness to the contemporary market needs and the conditions of work have been under scrutiny. Many private organizations engage persons with disabilities for years together in production activities under the garb of imparting vocational training and pay them mere stipend. The NHRC has shown its deep concern about the overall working of these vocational training institutions which function far below stipulated standards. In January 2003, the Commission recommended that:

a) A competent authority be established to develop training, work standards and regulations, and to ensure their enforcement.

b) NHRC entrusted Ministries of Social Justice & Empowerment, Labour, Rural Development, and

[30] http://socialjustice.nic.in/disabled/welcome.htm .

Human Resource Development in collaboration with the organizations of persons with disabilities and experts are to identify areas of vocational training.

c) Institutions already engaged in imparting vocational training to the women and the rural poor, and distance education institutions like Indira Gandhi National Open University (IGNOU), National Open Schools, etc. should be encouraged to develop and introduce vocational courses for persons with disabilities for the optimal utilization of self employment and group employment schemes offered by the Ministry of Rural Development and the National Handicap Finance Development Corporation.

To ensure that persons with disabilities benefit from the mainstream vocational and professional training programmes, *Section 30(b)* of the *Persons with Disabilities Act, 1995* requires 'the removal of architectural barriers from schools, colleges or other institutions imparting vocational and professional training.' Accordingly, the Ministry of Human Resource Development undertook a programme to make fifty polytechnics barrier free in the year 1999-2000.

The right to work for a large number of persons with disabilities has remained illusory. A common perception about persons with disability is that they are *unemployable* and *uneducable*. Barring some recent initiatives, these notions seem to have also informed law and policy. For example, *Entry 9* of the *State List* in Schedule-VII of the Constitution juxtaposes disabled with 'unemployable' while mentioning relief and rehabilitation. A provision in the *Contract Act* is also based on a similar notion. *Section 11* of this Act declares persons of 'unsound mind' incompetent to enter a valid contract.

8.2 Right to Just and Favourable Conditions of Work

The right to work also includes just and fair conditions ensuring safety of the worker and efficiency in work. *Article 7* of the *ICESCR* recognizes this right and *Standard Rules* particularly addresses this in the context of career enhancement for persons with disabilities.

The Constitution of India has provisions in Part-IV that guarantee just and favourable conditions of work. *Article 42* promises that the State shall make provisions for securing just and humane conditions of work and for maternity relief. *Article 39(d)* guarantees equal pay for equal work for both men and women.

Following the mandate of *Article 39(d)* of the Constitution, the Parliament enacted the *Equal Remuneration Act, 1976,* for ensuring equal pay for equal or similar work for men and women by every establishment, both in the public and private sectors. *Sections 4* and *5* of the Act prohibit discrimination on the ground of sex in matters such as promotions, training or transfer.

An analysis of the provisions of the Act clearly demonstrates that there is no provision prohibiting discrimination on the ground of disability in the matter of fixation of wages. The *Persons with Disabilities Act* also fails to provide any guidance based on the principle of reasonable accommodation in dealing with the variations in work and related wages. Perhaps for the first time this issue has come into focus with the recommendation of the NHRC in respect of *National Employment Guarantee Bill, 2004* where the Commission suggests,

> Till the implements of work and the work environment is fully reflective of the experience of disability, linking wages of persons with disabilities to production equivalent with that of the non-disabled may constitute discrimination. Therefore the wages paid to persons with disabilities should not be less than those paid to the non-disabled, regardless of difference in production levels.

The right to have just and favourable conditions of work also includes the right to continue in employment unless terminated or retrenched by due process of law. In general, *Industrial Disputes Act, 1947* deals with various aspects of conditions of service of a worker including the procedure to be adopted for dismissal and retrenchment. *Section 2(A)* declares the dismissal from service and other connected matters to be an 'industrial dispute' to be adjudicated upon in accordance with the provisions of this Act. *Section 33* of the Act deals with the conditions of service and provides that the employer cannot alter them during the period of any proceeding for the settlement of an industrial dispute either before the Conciliation Officer, or before a Board or Labour Tribunal. Further, *Section 33(2)(b)* mandates that the employer will have to take the approval of the Labour Tribunal for its order of dismissal from service in respect of a worker. Thus, the worker cannot be dismissed or discharged from service without complying with the procedure laid down in the Act for adjudication of an industrial dispute.

The *Industrial Disputes Act, 1947* also provides for the procedure for retrenchment in *Section 25(F)*. Adequate safeguards have been provided for ensuring that employers do not resort to arbitrary retrenchment of workmen and workwomen. Retrenchment is also regarded as an industrial dispute and therefore the procedure for adjudication of industrial dispute applies to the action of retrenchment as well.

These legal safeguards almost failed to afford equal protection in the event of disability. In fact, physical or mental disability was viewed as a valid ground to dispense away with the services of an employee. *Rule 38* of the *Central Civil Service (Pension) Rules* is a classic example of this trend. Arbitrary dismissal from services is now explicitly prohibited under *Section 47(1)* of the *Persons with Disabilities Act, 1995*, which says:

> No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service.

The section further provides that such an employee will also not be reduced in rank nor will his or her other service benefits be adversely affected. In case he or she is found not suitable to the post which he or she was holding at the time of acquiring the disability, it is the obligation of the establishment to create a supernumerary post and allow the worker to work against such supernumerary post until a suitable post is found for that person with similar benefits as the worker's position before acquiring disability. This provision applies to the establishments as defined in *Section 2(k)* of the *Persons with Disabilities Act.*

Courts have now consistently given benefits of *Section 47(1)* to employees who acquire disability during service. In *Kanwar Pal Singh vs Delhi Transport Corporation (DTC)*, the apex court, in light of *Section 47(1)* of the *Persons with Disabilities Act*, not only protected the service of an employee who acquired disability during service, but also directed the respondent to create a supernumerary post for the appellant in accordance with *Section 47* of the Act.[31]

In *Baljit Singh vs* DTC the High Court of Delhi drew on the principle laid down by the Supreme Court in

[31] *Kanwar Pal Singh vs DTC* com CA NO. 1864/2000

Kanwar Pal Singh (supra), and held: 'when the objective of enactment is to provide proper and adequate opportunities to the disabled in the field of education, employment etc. it is obvious that those who are already in employment should not be uprooted when they incur disability during the course of employment.'[32]

In a case where the DT C retired an employee in February 1994 on account of acquiring disability in June 1991 during the course of service, the benefits of *Section 47* were applied retrospectively. The respondent's contention was that as such Harpal Singh, who was retired prematurely on 22 February 1994, could not be covered by an enactment that came into force only on 7 February 1996. The High Court of Delhi held that the plea of the DTC could not be sustained, as any statutory enactment incorporating a welfare measure, particularly for the weaker sections of society, has to be given full effect. The Court also held that since the reference was made after the Act came into force, the benefit of the Act was available to Harpal Singh in any case and giving the benefit under the Act to him could not in any event be termed as retrospective operation of the Act.[33]

It needs to be emphasized that the compensation on account of disability and continuation in service can be simultaneously claimed. Following examples illustrate this trend.

In *Shri Dharambir Swaroop vs Delhi Transport Corporation*[34] the main issue was whether in view of the payment made to Dharambir as compensation in lieu of disability acquired during the course of his employment and premature retirement on medical ground, he was entitled to reinstatement under *Section 47* of the Act. The High Court held that payment of compensation upon acquiring disability could not be a ground for the denial of reinstatement on the job under *Section 47* of the *Persons with Disabilities Act*.

Kunal Singh vs Union of India[35] is a shining example of the Indian jurisprudence where the Supreme Court granted both the benefit of invalidity pension and continuation of the service under *Section* 47 of the *Persons with Disability Act*. In this case, the Appellant joined as a constable in the Special Service Bureau (SSB) and later lost his leg and was discharged from his duties with an invalidity pension under Rule 38 of the Centre Civil Services (CCS) (Pension Rules), 1972. He challenged his discharge, which was upheld by the High Court on the ground that he had been permanently invalidated on the basis of medical opinion and as such there were no posts in the SSB open to him. An appeal was made before the Supreme Court where the appellant took a fresh ground under *Section 47* of the *Persons with Disability Act*, which protects persons who acquire disability while in employment from termination. The language of *Section 47* was found to be self-explanatory in as much as it cast a statutory duty on the employer to accommodate its employees who acquire a disability while in their employment in alternate posts or to create a supernumerary posts till a suitable post is available. The Supreme Court held that the Rule 38 of CCS (Pension Rules), 1972 does not override *Section 47* of the *Persons with Disabilities Act*, as the doctrine of *generalia specialibus non derogant* would apply. This doctrine can also be found in the Act itself in *Section 72*. Consequently, it does not take away the right of the appellant to claim continuation of his services under the *Persons with Disabilities* Act, while at same time availing the parallel benefit of the 'invalidity pension' under the Pension Rules.

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[32] *Baljit Singh vs DTC*, 83(2000) DLT 286.

[33] *LIC of India vs Chief Commissioner for Disabilities and Another*.2003 (67) DRJ 136.

[34] *Shri Dharambir Swaroop vs Delhi Transport Corporation* , C.W No. 5503 of 1999, Delhi High Court, 13.08.2002

[35] *Kunal Singh vs Union of India* , [(2003) 4 SCC 524].

It must be clarified that *Section 47* does not refer exclusively to an injury sustained during the course of employment. The employee may acquire disability in natural course or by disease or accident, but in all these cases the benefit of *Section 47* will be available to him or her.

This can be very well traced in *Lance Dafadar Joginder Singh vs Union of India and Others.*[36] The appellant was serving in the Army when he sustained severe injuries in an accident while he was on casual leave in the year 1976. Thereupon he was discharged from service and the army pension due to him was paid. However, he was denied the disability pension under the Pension Regulations on the ground that the injury was not sustained in combat. The High Court dismissed the claim of the appellant on the ground of delay in approaching the court in seeking the disability pension. However, the Supreme Court, when deciding on the appeal, opined that the question before it was not the period of limitation. Rather the Court was required to determine the entitlement of the appellant to the disability pension. Since no Army Rule or Regulation showed that a person on causal leave is not to be treated as 'on duty', the Supreme Court was not satisfied that the appellant was not entitled to disability pension.

It is clear from the above discussion that legislative measures have been taken to prevent arbitrary dismissal and retrenchment of an employee and the courts have vindicated the right of employees on a number of occasions.

As already stated, *Section 5* of the *Equal Remuneration Act, 1976* prohibits discrimination in the matter of career enhancement on the ground of sex. Similar protection is now available for employees with disabilities in *Section 47(2)* of the *Persons with Disability Act* which stipulates:

> No promotion shall be denied to a person merely on the ground of his disability …

In the case *Union of India vs Sanjay Kumar Jain*[37] where a person who was blind due to Retinitis Pigmentosa was denied permission to appear for viva voce test for promotion to a Group B post by the management of Western Railway. The Delhi High Court upheld the order of the Principal Bench, Central Administrative Tribunal, and quashed the order of denial of permission to appear in *viva voce* test. It held, 'provision of *Section 47(2)* is mandatory, i.e. no promotion shall be denied to person merely on ground of his disability.'

In *Shri Suhas Vasant Karnik v. Union of India and Others,* the Bombay High Court had the occasion to examine whether person suffering from blindness could be declared ineligible for seeking promotion. The High Court held that the respondent is not entitled to discriminate amongst the members of staff merely because some of its members are physically handicapped. It further held that the respondent is under constitutional obligation to encourage participation of the visually handicapped persons in activities of the Bank on par with other members of the staff and consider the cases of visually handicapped for promotion fairly and equitably. Having regard to the judgement of the Supreme Court in *National Federation of the Blind vs Union Public Service Commission and Others*[38], it allowed the petitioner and all other similarly situated persons to appear in the promotional examination and participate in the process of promotion.

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[36] *Lance Dafadar Joginder Singh vsUnion of Others* [1995 Supp (3) SCC 232].

[37] *Union of India vs Sanjay Kumar Jain,* 102 (2003) DLT 525 (DB) Delhi High Court [CWP-5898/2002].

[38] *National Federation of the Blind vs UPSC and Others* [1993 SCC 411].

There is a provision in the Disability Act to accord exemption to establishments from employing disabled. This is possible only after a set procedure given in *Section 47(2),* which states,

> [P]rovided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provision of this Section.

No guidelines have been evolved nor any rules included in the implementing rules for deciding a case for exemption. In such a situation, there is a danger of arbitrary operation of this proviso jeopardising the future prospects of a disabled employee, as shown by the following example. The Western Railway[39] denied promotion to a blind employee on the ground of his blindness by taking advantage of the proviso to *Section 47(2).* The apex court held that in the absence of any notification exempting the establishment in question, the blind employee could not be denied promotion.

Just and fair conditions of work have a special connotation for persons with disabilities, which relates to accessible workplaces and work processes. The *Persons with Disabilities Act, 1995* refers to non-handicapping conditions of work and safety of disabled workers in *Section 38* and requires removal of architectural barriers and availability of assistive devices and appropriate technologies.

Similarly, the *Factories Act, 1948* regulates the matters connected with the choice of place being used as a factory and also for maintenance of health, safety and other welfare measures. As per *Section 6* of the Act, it is obligatory upon an owner of a factory to submit the plan of construction or addition for the intended factory site to the State Government or the Chief Inspector appointed in this behalf. Such a plan is to be examined by the concerned authority before granting approval and registration of the factory.

Therefore, if the *Factories Act, 1948* is read along with *Sections 38, 42, 44, 45* and *46* of the *Persons with Disabilities Act, 1995,* then a just and fair conditions of work can no doubt be achieved even for workers with disabilities. The need is to create a mechanism for the effective operation of complimentary legislations.

8.2.1 Ensuring Health, Safety and Conducive Conditions of Work

The Constitution of India contains specific stipulations on the occupational safety and health of workers. *Article 24* states that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. *Articles 39(e)* and *(f)* state that the State shall direct its policy towards securing:

> That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; *(Article 39(e)*

> That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. *(Article 39(f)*

[39] Union of India vs Sanjay Kumar Jain, 2004 DLT (113) 61.

The Directorate General, Factory Advice Service & Labour Institutes (DGFASLI), Mumbai, which is an attached office of the Ministry of Labour, functions as a technical arm of the Ministry in regard to matters concerned with safety, health and welfare of workers in factories and ports/docks as per the requirements of *Factories Act, 1948* and the *Dock Workers (Safety Health & Welfare) Act, 1986*. It assists the Central Government in formulation and review of policy and legislation on occupational safety and health in factories and ports, and maintains a liaison with Factory Inspectorates of States and Union Territories in regard to the implementation and enforcement of provisions of the *Factories Act, 1948*.

The *Factories Act, 1948* also regulates health, safety, working hours, leisure and work processes as well as work sites, which are being used as factories. Chapter III of the Act deals with health requirements of workers in a factory whereas Chapter IV deals with the safety of the workers. Chapter V of the Act makes provisions for undertaking welfare activities for workers. Chapter VI deals with the matters pertaining to working hours, leisure, etc.

Although the *Factories Act, 1948* and the *Dock Workers (Safety Health & Welfare) Act, 1986* do not incorporate any provision for workers with disabilities, reading their relevant sections along with Section 38(d) of the *Persons with Disabilities Act, 1995,* which calls for health and safety measures to ensure non-handicapping conditions of work for employees with disabilities, can ensure safety and health of disabled workers.

The *Section 51* of *Employees' State Insurance Act, 1948* prescribes for the payment to insured employee in the event of his or her temporary or permanent disablement due to injury caused in the course of employment. The basis for deciding the entitlement and quantum of disability benefit under this section is largely linked with the loss of earning capacity. Thus, this provision is premised on the assumption that a person with a disability does not have the capacity to continue in productive employment. This assumption not only militates against the right to work granted under the *ICCPR*, but also contravenes *Sections 33* and *47* of the *Persons with Disabilities Act, 1995*.

In brief, it can be concluded that mainstream legislations are not reflective of disability experience but the *Persons with Disabilities Act, 1995* attempts to bridge this gap. For effecting real improvements a coordinating mechanism is a must so that implementing authorities such as the Directorate General, Factory Advice Service & Labour Institutes (DGFASLI) can fulfil obligations of the new enactments.

In the absence of such a mechanism certain contradictory rules would continue to discriminate against disabled people. For example, Rule 38 of Central Civil Services (CCS) (Pension) Rules, 1972 empowers the State to retire an employee on invalid pension in the event of his/her acquiring disability. The rule states,

1. Invalid pension may be granted if a Government Servant retires from the service on account of any bodily or mental infirmity which permanently incapacitates him for the service.

2. A Government servant applying for an invalid pension shall submit a medical certificate of incapacity from the following medical authority, namely: -
   a. A Medical Board in the case of a Gazetted Government servant and of a non-gazetted Government servant whose pay, as defined in *Rule 9(21)* of the fundamental Rules, exceeds

[two thousand and two hundred rupees] ininper menses;

b. Civil Surgeon or a District Medical Officer or Medical Officer of equivalent status in other cases;

3. The form of the Medical Certificate to be granted by the medical authority specified in sub-rule (2) shall be as in Form 23.

4. Where the Medical authority referred to in sub-rule (2) has declared a Government servant fit for further service of less laborious character than that which he had been doing, he should, provided he is willing to be so employed, be employed on lower post and if there be no means of employing him even on a lower post, he may be admitted to invalid pension.

Similarly, the CCS (Leave) *Rule 44* needs to be modified in view of the judicial interpretation of disability. The rule links the entitlement to a special leave with the cause of disability. It says that the competent authority may grant special disability leave to a Government employee, whether permanent or temporary, who is disabled by injury intentionally inflicted or caused in, or in consequence of the due performance of his official duties or in consequence of his official position.

8.3 Right to Social Security

8.3.1 International Standards

'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.' This rather brief guarantee in *Article 9* of the *ICESCR* is fortunately supplemented by the work of the *ILO* in this area. The principal *ILO* instrument on social security is the *Social Security (Minimum Standards) Convention 1952 (ILO 102)* (which India has not ratified). That convention,

> [P]rovides for minimum standards in nine distinct branches of social security (medical care, sickness, unemployment, old-age, employment injury, family, maternity, invalidity, and survivors' benefits). A State must accept at least three of these branches to ratify the Convention. The minimum standard provided by the Convention is defined as regards the scope of protection and the benefits, including their amount. The Convention introduces the idea of a general level of social security that should progressively be attained everywhere, since the system can be adapted to the economic and social conditions prevailing in each country, whatever the degree of its development.[40]

The branches of social security listed in this convention have been taken up by the *CESCR* and appear in the reporting guidelines under the *ICESCR* (which indicate both what the Committee considers is the Covenant coverage and the matters on which States Parties should report).

The *CESCR* has essentially endorsed the *Standard Rules* in this area.[41] *Rule 8* of the *Standard Rules* provides:

> States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities. States should ensure that the provision of support takes into account the costs frequently incurred by persons with disabilities and their families as a result of the disability.

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[40] httpcc//wwwddiloddorg/publicst-englishststandards/norm/whatareststndardsst-secsocddhtm .

[41] CESCR , *General Comment No.5,* para 28.

In addition to endorsing the *Standard Rules*, the *CESCR* has stated that:

> Such support should reflect the special needs for assistance and other expenses often associated with disability. In addition, as far as possible, the support provided should also cover individuals (who are overwhelmingly female) who undertake the care of a person with disabilities. Such persons, including members of the families of persons with disabilities, are often in urgent need of financial support because of their assistance role.[42]

Rule 8 of the *Standard Rules* further provides:

4. Social security systems should include incentives to restore the income-earning capacity of persons with disabilities. Such systems should provide or contribute to the organization, development and financing of vocational training. They should also assist with placement services.
5. Social security programmes should also provide incentives for persons with disabilities to seek employment in order to establish or re-establish their income-earning capacity.
6. Income support should be maintained as long as the disabling conditions remain in a manner that does not discourage persons with disabilities from seeking employment. It should only be reduced or terminated when persons with disabilities achieve adequate and secure income.

Importantly, the *CESCR* also noted in *General Comment No. 5* that, 'Institutionalization of persons with disabilities, unless rendered necessary for other reasons, cannot be regarded as an adequate substitute for the social security and income-support rights of such persons.'[43]

The proposed *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* has elaborated a very comprehensive provision to guarantee social security and social insurance for persons with disabilities. The following areas are specified in draft *Article 23*,

(a) necessary services, devices and other assistance for disability-related needs;

(b) access to social security programmes and poverty reduction strategies;

(c) assistance to cover disability-related expenses including adequate training, counselling, and respite care;

(d) access to governmental housing programs;

(e) access to tax exemptions and tax benefits in respect of their income; and

(f) access to life and health insurance without discrimination.

8.3.2 Domestic Standards

The social security measures in India draw their strength from the *Directive Principles of State Policy*, which *inter alia*, enjoin the State to strive to promote the welfare of the people by securing and protecting, as

[42] Ibid.

[43] Ibid. para 29

effectively as it may, a just economic and social order. The Government has put in place a security net for the workers so that they are secure in times of contingencies such as retirement, resignation, retrenchment, death and disability. The security of the family members, particularly dependent children and disabled children, is also guaranteed in the event of the death of an earning member of a family. However, over ninety percent of Indian workers working in the unorganized sector enjoy no social security.

The principal social security laws are

- The Workmen's Compensation Act, 1923
- The Employees State Insurance Act, 1948
- The Employees Provident Funds & Miscellaneous Provisions Act, 1952
- The Maternity Benefit Act, 1961
- The Payment of Gratuity Act, 1972

Apart from these enactments there are a number of social security schemes in operation. These include,

- Employees Provident Funds Scheme, 1952
- Employees Deposit Linked Insurance Scheme, 1976
- Employees' Pension Scheme, 1995

For persons with disabilities most of these schemes are equally relevant. Yet special security measures are outlined in *Sections 66, 67* and *68* of the *Persons with Disabilities Act, 1995*. *Section 66* mandates the government at all levels to undertake or cause to be undertaken rehabilitation schemes for persons with disabilities through its financial support. Further, *Section 67* obliges the government to frame insurance schemes for the benefit of its disabled employees. *Section 68* obliges the government to frame a scheme for payment of unemployment allowance to persons with disabilities. Some schemes are already in existence in some states where State Governments provide for unemployment allowance to persons with disabilities who have been unable to secure employment for three years or more from the date of registration in the Special Employment Exchanges. It is another thing that the amount given is nothing more than a window dressing as it varies between a meagre Rs. 75 to Rs. 500 a month.

Apart from these provisions, the Act entitles persons with disabilities to poverty alleviation schemes, assistive devices, and 3% housing for the poor disabled.

Another important enactment that elaborates a comprehensive social security is the *National Trust Act*. This Act aims to,

1. Deal with problems of persons with disabilities who do not have a family support;
2. Promote measures for the care and protection of persons with disabilities in the event of death of their parent or guardian;
3. Evolve procedures for the appointment of guardians and trustees for persons with disabilities requiring such protection;
4. Extend support to registered organizations to provide need based services during the period of crisis in the family of persons with disabilities; and
5. Strengthen facilities to provide support to persons with disabilities to live within their own families.

8.4 Right to Own and Administer Property

8.4.1 International Standards

Article 17 of the *Universal Declaration of Human Rights 1948* provides: '(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.' No similar guarantee appears in either the *ICCPR* or in the *ICESCR*, though it does appear in other instruments (such as the right to peaceful enjoyment of one's possessions in *Article 1* of *Protocol 1* to the *European Convention on Human Rights*).

While the content of the right to property has been controversial – in particular as to the conditions (including compensation) which have to be satisfied if a deprivation of property is not to be arbitrary – the issues are perhaps less complex in the context of disability. In the context of disability, the major issues tend to be related to the denial of rights, on the basis of disability, which others enjoy. The claim thus becomes a right to enjoy same rights as others do in the ownership, enjoyment and disposition of property. This claim can be conceived either as the right under *Article 26* of the *ICCPR* to equal protection of the laws, the right under *Article 16* of the *ICCPR* to equal recognition as a person before the law, the right under *Article 14* of the *ICCPR* to equality before courts and tribunals, or as a right to non-discriminatory enjoyment of a right to property guaranteed in customary international law.

The 2004 Ad hoc Working Group of the *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* refers to a number of aspects in which the rights of persons with disabilities may need to be protected. (These are closely related to the recognition of full legal capacity, but also go beyond to guarantee equal access to economic resource more generally). *Draft Article 9* provides that States Parties should:

- Accept that persons with disabilities have full legal capacity on an equal basis as others, including in financial matters (*Article 9(b)*);
- 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, mortgage and other forms of financial credit (*Article 9 (e)*) ; and
- Ensure that persons with disabilities are not arbitrarily deprived of their property (*Article 9 (g)*).

8.4.2 Domestic Standards

The ownership and administration of property in India is regulated by a number of laws including *Transfer of Property Act* and *Indian Contract Act*. Theoretically, the legislative and policy provisions concerning ownership and administration of property do not discriminate against people with disabilities, however numerous instances of discrimination can be found in practice.

To afford protection to the property and affairs of those with intellectual disability and mental illness,

the mechanism of guardianship, wardship and Local Level Committees is envisaged in the *Mental Health Act, 1987* and the *National Trust Act, 1999*. One of the objects of the *Mental Health Act, 1987* is 'to provide facilities for establishing guardianship or custody of mentally ill persons who are incapable of managing their own affairs.' *Section 50* of the *Mental Health Act, 1987* outlines the operational details of entrusting the management of the property and assets to Court of Wards. *Section 50* stipulates,

> (1) Where an alleged mentally ill person is possessed of property, an application for holding inquisition into the mental condition of such person may be made either
>
> (a) by any of his relatives, or
>
> (b) by a public curator appointed under the Indian Succession Act, 1925, (39 of 1925), or
>
> (c) by the Advocate-General of the State in which the alleged mentally ill person resides, or
>
> (d) where the property of the alleged mentally ill person comprises land or interest in land, or where the property or part thereof is of such a nature as can lawfully be entrusted for management to a Court of Wards established under any law for the time being in force in the State, by the Collector of the District in which such land is situated.

In case of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities the *National Trust Act, 1999* establishes a Local Level Committee in each district comprising District Magistrate or the District Commissioner along with one representative from a registered organization and one person with a disability. The committee may appoint a guardian to take care of the person or of the property, or of both. The guardian can also be appointed for the purpose of taking responsibility for the maintenance of persons with disabilities. Another important function of the committee is to look into complaints of misconduct on the part of the appointed guardian, investigate the same through an independent committee and act on its finding after giving opportunity of defence to the guardian. The Act also lays down duties of the guardian who has to furnish periodic returns to the local level committee about the assets of the ward and their disposal in his hands.

The properties and financial matters of persons with disabilities can be adequately protected with these arrangements, provided the Government ensures financial backing and other logistical support to Local Level Committees which have to discharge extremely important functions to safeguard the person and property of most vulnerable among the disabled.

Table 8.1
International Standards for Selected Economic Rights

	General	Specific to Disabled
Right to Work	ICESCR: Articles 6 and 7 ILO Conventions: Discrimination in Occupation and Employment 1958 (No. 111) Convention No. 142 : Vocational Guidance and Vocational Training in the Development of Human Resources Convention No. 168 : Employment Promotion and Protection against Unemployment Convention No. 102 : Minimum Standards of Social Security Convention No. 121 : Benefits in the Case of Employment Injury and related ILO instruments, such as the ILO Code of Practice on Managing Disability at the Workplace. Discrimination (Employment and Occupation) Convention 1958 (ILO Convention no. 111) Standard Rules: Rule 7	CESCR: General Comment No.5 ILO Convention No. 159: Vocational Rehabilitation and Employment (Disabled Persons) 1983. Biwako Millennium Framework: Section D.
Right to Just and Favourable Conditions of Work	ICESCR: Article 7 Standard Rules: Rule 7	
Right to Social Security	ICESCR: Article 9 ILO- Convention 102: Social Security (Minimum Standards) Convention 1952	CESCR Standards Rule: Rule 8 CESCR: General Comment 5 Draft Convention on Disability : Draft Article 23

Table 8.2
Domestic Standards (Constitution and Acts of Parliament) for Selected Economic Rights

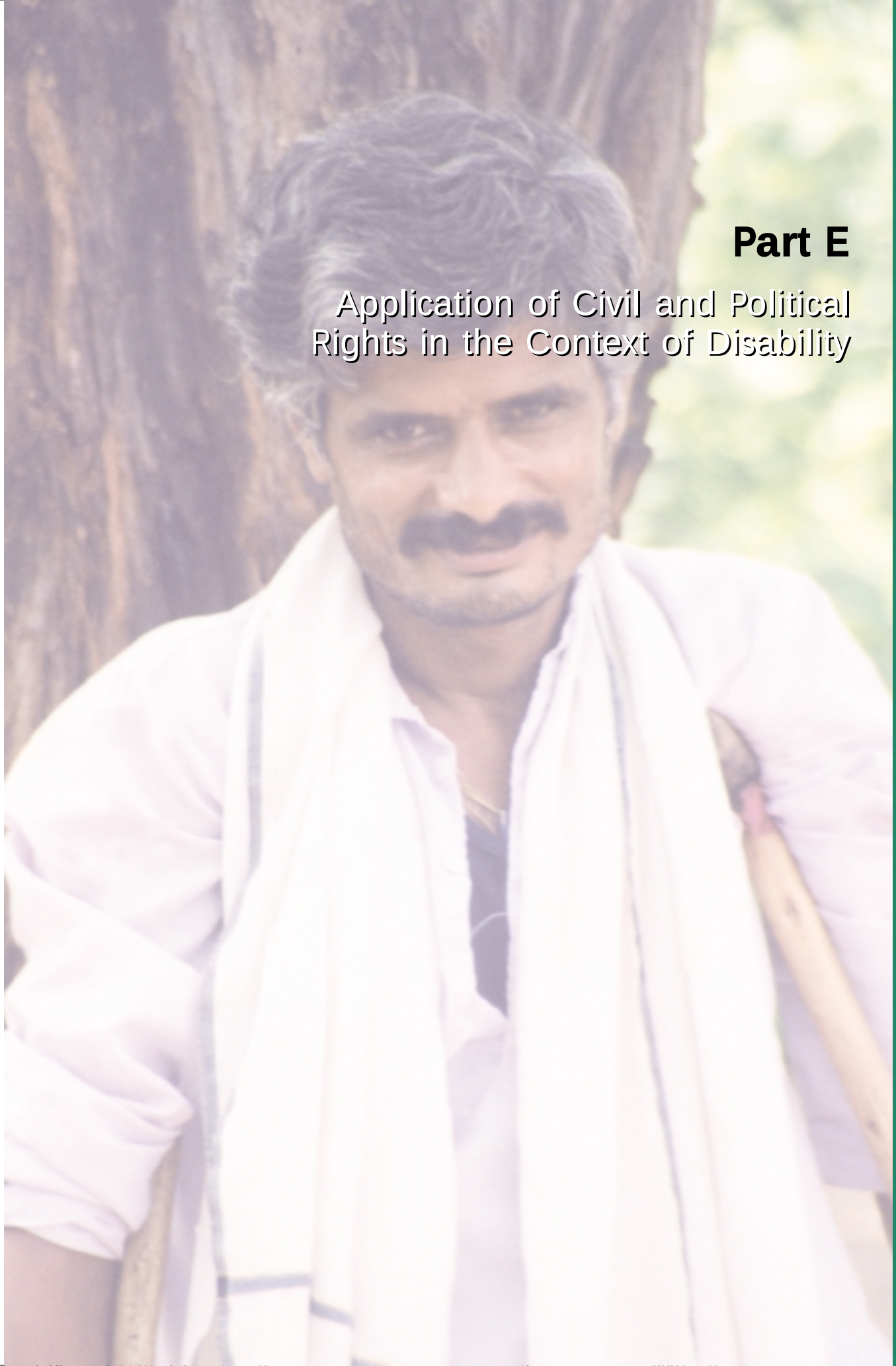
	General	Specific to Disabled
Right to Work	Constitution: Articles 16, 21, 14 & 41 National Employment Guarantee Bill, 2004: Section 10(3), 12(1) & 13(2) Indian Contract Act: Section 11 Apprenticeship Act: 1961	The Persons with Disabilities Act, 1995: Sections 26 (d), 30(b), 32, *33, 36, 4, 42, 43, 56(1)* & *(2)*
Right to Just and Favourable Conditions of Work	Constitution : Articles 24, 39(d), (e), (f) & 42 National Employment Guarantee Bill, 2004 Equal Remuneration Act, 1976: Section 5 The Industrial Disputes Act, 1947: Sections 2(A), 25(F) &33 Dock Workers (Safety Health & Welfare) Act, 1986 Equal Remuneration Act, 1976: Sections 4 & 5 Factories Act, 1948: Sections 3, 4, 5 & 6 Employees' State Insurance Act, 1948: Section 51 Central Civil Service (Pension) Rules: Rule 38	Persons with Disabilities Act, 1995: Sections 2(k), 38, 42, 44, 45, 46, 47(1) & 72.
Right to Social Security	Directive Principles of State Policy: 'States should strive to secure a just economic and social order' The Workmen's Compensation Act, 1923 The Employees State Insurance Act, 1948 The Employees Provident Funds & Miscellaneous Provisions Act, 1952 The Maternity Benefit Act, 1961 The Payment of Gratuity Act, 1972	Persons with Disabilities Act 1995: Sections 66, 67 and 68. National Trust Act: Chapter 3
Right to Own and Administer Property	Transfer of Property Act Indian Contract Act	Mental Health Act, 1987: Section 50 National Trust Act, 1999: Chapter 3

Table 8.3
Domestic Standards (Court Cases) for Selected Economic Rights

	General	Specific to Disabled
Right to Work	Indira Sawhney vs Union of India	Olga Tellis vs Bombay Municipal Corporation Indira Sawhney vs Union of India National Federation of Blind vs U.P.S.C Pushkar Singh & Others vs Univsersity of Delhi & Others Chander Kishore Joshi vs DRDO, Ministry of Defence Chief Commissioner Disabilities vs IIM, Lucknow Ashok M. Shrimali & Others vs State Bank of India & Others Govt. of NCT of Delhi vs Bharat Lal Meena and Surinder Singh R. Manoj Kumar vs University of Hyderabad Rajasthan Netraheen Sewa Sangh and others vs RPSC and others Santosh Kumar Rungta vs Delhi Development Authority and Another Shaji Kumar vs Bharat Petroleum Corporation
Right to Just and Favourable Conditions of Work		Kanwar Pal Singh vs Delhi Transport Corporation Baljit Singh vs DTC Shri Dharambir Swaroop vs Delhi Transport Corporation Kunal Singh vs Union of India Lance Dafadar Joginder Singh vs UOI & Others UOI vs Sanjay Kumar Jain Shri Suhas VSasant Karnik vs Union Of India & Others National Federation of the Blind vs Union Public Service Commission and Others

Table 8.4
Executive Policies for Selected Economic Rights of the Disabled

	Executive Policies for Disabled
Right to Work	Craftsmen Training Scheme and Apprenticeship Scheme Craftsmen Training Scheme Swarnjayanti Gram Swarozgar Yojana (Rural Self-Employment Scheme) Sampoorna Grameen Rozgar Yojana (Rural Wage Employment Scheme) Swarna Jayanti Shahari Rojgar Yojana (SJSRY) (Urban Employment Scheme),
Right to Social Security	Employees Provident Funds Scheme, 1952 Employees Deposit Linked Insurance Scheme, 1976 Employees' Pension Scheme, 1995



Part E

Application of Civil and Political Rights in the Context of Disability

NHRC

CHAPTER 9

Evolution and Nature of Civil and Political Rights

This chapter covers various aspects of civil and political rights both at international and national levels. Broadly, it discusses the nature of civil and political rights, relevant international instruments, the Indian legislative and policy framework in the area of civil and political rights, and details various administrative and other mechanisms for the fulfilment and protection of these rights.

9.1 The Nature and Evolution of Civil and Political Rights

A range of international standards on human rights have been developed through the UN system since 1945. These standards fulfil part of the mandate of the UN under its Charter to promote universal respect for and observance of human rights. In 1948 the UN adopted the *Universal Declaration of Human Rights,* which proclaimed a set of fundamental rights to which 'everyone' is entitled without discrimination. The Declaration was intended as a common standard of attainment for all nations. It was not, however, seen at the time as imposing binding legal obligations on governments (although many international lawyers have concluded that the Declaration now has substantial legal force). Moreover, it proclaimed rights only in general terms, rather than setting out in detail how those rights should be translated into law and practice. The last fifty five years have seen the development of more detailed instruments. Standards have been developed concerning the human rights of particular vulnerable groups. These standards are involved in a series of Declarations, Covenants, Treaties, Principles and Rules.

Many international treaties and other instruments guarantee civil and political rights and include a number of provisions specifically addressing the rights of persons with disabilities. The main treaty at the international level is the *International Covenant on Civil and Political Rights (ICCPR)*. In addition, the *Convention Against Torture (CAT)*, and the *Convention on the Rights of the Child (CRC)* also contain guarantees of civil and political rights, as do the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*, and *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*. Regional human rights conventions also contain guarantees of civil and political rights.

9.2 International Instruments for the Protection and Promotion of Civil and Political Rights

9.2.1 The Coverage of the International Covenant on Civil and Political Rights

The *ICCPR* was adopted by the UN General Assembly in 1966. It requires that all Parties 'respect and ensure to all individuals within their territory and subject to their jurisdiction' the rights which the Covenant recognises. The *ICCPR* covers a range of traditional civil and political rights, often referred to over simplistically as 'negative' rights, enforceable only in relation to the actions of the State. These rights include (amongst others):

- the right to life (*Article 6*);
- the right to freedom from cruel, inhuman or degrading treatment or punishment (*Article 7*);
- the right to liberty and security of the person (*Article 9*);
- the right to be treated with respect for dignity and with humanity, if deprived of liberty *Article 10*);
- the right to freedom of movement and choice of residence (*Article 12*);
- the right to equality before courts and tribunals, and to a fair hearing in any criminal case or law suit; to be presumed innocent until proved guilty if charged with a criminal offence; and, in determination of any criminal charge, to guarantees including the right of every person:
  - to be informed promptly, in detail and in a language the person understands of the nature and cause of the charge;
  - to be tried without undue delay
  - to be tried in his or her presence, and defend himself or herself in person or through counsel of his or her own choosing;
  - to have legal assistance assigned where required by the interests of justice, free of charge where the person has insufficient means to pay;
  - to examine witnesses;
  - to have the free assistance of an interpreter if he or she cannot speak the language used in court (*Article 14*);
- the right to recognition as a person before the law (*Article 16*);
- the right to freedom from arbitrary interference with privacy or family life (*Article 17*);
- the right to freedom of conscience and religion (*Article 18*);
- the right to freedom of opinion, expression and information (*Article 19*);
- the right to freedom of association including the right to form and join trade unions *Article 22*);
- the right to marry and found a family (*Article 23*);
- the right of children to special protection (*Article 24*);
- the right to take part in public affairs, to vote and to be elected, and to have access on equal terms to public service (*Article 25*); and
- the right of people belonging to ethnic, religious or linguistic minorities to enjoy their own culture, practice their religion or use their own language, in community with other members of their group (*Article 27*).

Permeability of the ICCPR in Relation to Non-Discrimination

It can be seen that the *ICCPR* focuses primarily on civil and political rights, but those guarantees may well reach into areas that could be characterised as also involving economic, social and cultural rights. For example, under the European Convention on Human Rights, which has provisions similar to the *ICCPR*, the right to respect for one's private life and home has been used to provide limited protection against environmental degradation and hazards. Of particular importance in regard to the permeability of rights is *Article 26* of the *ICCPR*, which provides a freestanding guarantee of equality, not linked to other rights in the Covenant. In other words, a claim can be made under *Article 26* of discrimination in the enjoyment of social security benefits, even though there is no reference to social security benefits in the *ICCPR* (this right is in the International Covenant on Economic, Social and Cultural Rights).[1]

Clarifying this, the *Human Rights Committee (HRC),* which monitors the implementation of the *ICCPR,* notes in *General Comment No. 28* (para 31),

> The right to equality before the laws and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields. Discrimination against women in areas such as social security laws - Case 172/84, Broeks v. Netherlands (views of 9 April 1987; case 182/84, Zwaan de Vries v. The Netherlands, (views of 9 April 1987); case 218/1986, Vos v. The Netherlands (views of 29 March 1989) -., as well as in the area of citizenship or rights of non-citizens in a country - Case 035/1978, Aumeeruddy-Cziffra et al v. Mauritius (views adopted 9 April 1981) -, violates article 26.

Positive Obligations of the State and its Responsibility in Relation to the Acts of Private Parties

The Covenant is not limited only to requiring the State to refrain from taking steps that infringe directly upon the enjoyment of a right (e.g. by not discriminating against a person, or by not engaging in torture). In certain circumstances the State may have to take *positive steps* in order to ensure the enjoyment of a right, e.g. by passing legislation providing privacy protection. This has special significance in those areas where the primary threat to a person's enjoyment of a right comes not from the State but from private individuals in the community or in the family. So, for example, the Human Rights Committee (HRC) has expressed the view that the State may have to legislate to provide protection against discrimination by private actors in certain circumstances, as well as to take steps to protect women from violence in the family.[2]

The Relevance of Jurisprudence under the European Convention and Other International Human Rights Treaties

There are a number of other international human rights treaties which contain many guarantees which are worded in similar or identical language to provisions in the *ICCPR*. In some cases, the *ICCPR* has acted as a model for these provisions.

While it is important to note that there are differences in the wording of individual rights under the

[1] See the latest synthesis of the Committee's practice and jurisprudence in this regard in its *General comment No 28*, para 31 (2000).

[2] Human Rights Committee, *General comment No 28*, para 32.

various international treaties (in which case the wording of the *ICCPR* must prevail), reference to cases decided under those treaties can be helpful. This is particularly so in the case of the European Convention on Human Rights, which has been the subject of interpretation by the European Commission of Human Rights and the European Court of Human Rights in thousands of cases since 1954.

It should be noted that, while these decisions are frequently cited to the HRC, it rarely refers to the case law of the regional human rights organs (even if it follows the substance of that jurisprudence). On the other hand, many national courts gain considerable assistance from decisions of the regional bodies, as these sometimes contain more detailed reasoning than many of the HRC 's own decisions.

National decisions which invoke or make reference to the *ICCPR* may also be useful in interpreting the *ICCPR* as persuasive sources; similarly, the decisions of courts on similarly worded constitutional human rights guarantees may be useful as comparative sources.

In addition, soft law instruments have frequently been drawn on by international bodies and national courts in the interpretation of provisions of the international human rights treaties.

9.2.2 Convention on the Rights of the Child

The Convention on the Rights of the Child (*CRC*) was adopted by the UN General Assembly in 1989. The Convention applies to all human beings under the age of eighteen and requires State Parties to the Convention to:

> respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, **disability**, birth or other status (emphasis added).[3]

There is absolutely no doubt, therefore, that the non-discrimination provisions of this Convention apply to children with disabilities.

The Convention deals with a much wider range of rights than the Declaration on the Rights of the Child. With regard to civil and political rights these include:

- rights to life, survival and development (*Article 6*);
- rights concerning identity (*Article 8*);
- rights to freedom of expression, association and information (*Articles 13* and *15*);
- rights to protection from abuse, neglect or exploitation (*Article 19* and *Articles 32 - 36*); and
- rights in the administration of justice and for children deprived of liberty (*Articles 37* and *40*).

Consistent with the non-discrimination provision, all rights in the treaty including the rights in each of these areas must be guaranteed to children with disabilities without discrimination.

9.2.3 Disability and Soft Law Instruments

The *Declaration on the Rights of Mentally Retarded Persons* was adopted by the UN General Assembly in 1971, before it was accepted in many countries that the term 'mentally retarded' could be offensive and inappropriate.

[3] Convention on the Rights of the Child, *Article 2(1)*.

With regard to civil and political rights the ***Declaration on the Rights of Mentally Retarded Persons*** provides that a person with an intellectual disability has:

- the same rights 'to the maximum degree of feasibility' as other human beings (*Principle 1*);
- the right to protection from exploitation, abuse and degrading treatment;
- the right, if prosecuted for any offence, to due process of law with full recognition being given to his or her degree of mental responsibility (*Principle 6*); and
- the right that any procedure for restriction of rights due to the severity of a person's handicap must include proper legal safeguards against abuse, including periodic review and a right of appeal.

The ***Declaration on the Rights of Disabled Persons*** was adopted by the UN General Assembly in 1975. With regard to civil and political rights it recognises that people with disabilities are entitled to:

- the inherent right to respect for their human dignity;
- the same fundamental human rights, *whatever the origin, nature and seriousness of their handicaps and disabilities,* as their fellow citizens, including the right to a decent life, as normal and full as possible (*Principle 2*);
- the right to legal safeguards against abuse of any limitation of rights made necessary by the severity of a person's handicap, including regular review and the right of appeal (*Principle 4*);
- the right to protection against exploitation or discriminatory, abusive or degrading treatment (*Principle 10*); and
- the right to qualified legal assistance to protect their rights, and for legal procedures to take their condition fully into account (*Principle 11*).

The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (MI Principles) were adopted by the UN General Assembly and UN Commission on Human Rights in 1991. These principles offer important guidance for standard setting. The Principles focus primarily on human rights in relation to the mental health system. However, they also confirm:

- that every person with a mental illness has the same basic rights as every other person, specifically including the rights set out in the *ICCPR* and the rights recognized in the Declaration on the Rights of Disabled Persons (*Principle 1.5*);
- that discrimination on the basis of mental illness is not permitted (*Principle 1.4*); and
- that people being treated for a mental illness must be accorded the right to recognition as a person before the law (*Principle 13*).

The Principles re-affirm that individuals who have a mental illness or who have experienced mental illness have the right to protection from:

- exploitation - whether economic, sexual or in other forms;
- abuse - whether physical or in other forms; and
- degrading treatment (*Principle 1.3*).

The Principles embody detailed requirements for informed consent, the protection of children and the administration of medication. The Principles also require that patients in mental health facilities be fully informed of their rights, and have access to their own health records except in exceptional circumstances. They require that confidentiality of information must be respected.

Statements of rights without effective monitoring of their implementation, or remedies for their violation, are of little effect – as experience in this area has demonstrated. The Principles therefore require that (*Principle 22*):

> States shall ensure that appropriate mechanisms are in force to promote compliance with these principles, for the inspection of mental health facilities, for the submission, investigation, and resolution of complaints and for the institution of appropriate disciplinary or judicial proceedings for professional misconduct or violation of the rights of a patient.

They also require appropriate legislative, judicial, administrative, educational and other measures of implementation (*Principle 23*).

9.3 Civil and Political Rights in Indian Law

The Constitution of India has privileged civil political rights such as right to life and liberty, equality before the law, freedom of speech and expression, association, religion, etc., by including them as fundamental rights. A number of these rights have been guaranteed for all persons, others can be asserted by citizens only and still others are exclusive to religious and linguistic minorities.

To underscore the primacy of these rights, *Article 13(1)* provides that 'all laws in force in the territory of India before the commencement of the Constitution, in so far as they are inconsistent with the provisions of this part shall to the extent of inconsistency be void.' And *Clause (2)* of the article prohibits the State from making any law which 'takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of the contravention be void.' Rights would just be pious obligations unless remedies are provided. *Articles 32* and *226* of the Indian Constitution provide such remedies. *Article 32 (1)* guarantees the right to move the Supreme Court by appropriate proceedings for enforcement of the fundamental rights and to further emphasise on the importance of the remedial mechanism, *Clause (4)* lays down that 'the right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.' Right to approach the Supreme Court for relief itself has become a fundamental right since it falls under Part III of the Constitution.

The efficacy of the remedial mechanism has been further enhanced by *Article 226* of the Constitution which accords power to High Courts to 'issue to any person or authority, including in appropriate cases any government, … directions, orders or writs for the enforcement of any of the rights conferred by part III …'

On a plain reading of the text of the Constitution, if persons with disabilities belong to any of the groups to whom a right has been guaranteed, they can claim the right. As such persons with disability are not excluded from claiming their rights; at the same time the Constitution does not explicitly prohibit discrimination on the basis of disability as is the case for race, caste, sex, descent and place of birth. This query becomes vital because bearers of civil and political rights are presumed to be autonomous, capable of exercising their capacity before the law and equally enjoy the protection of law. This concept is best articulated in *Article 14* of the Constitution, which says, 'the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' The question remains whether or not persons with disability can exercise their full legal capacity in the absence of explicit protection? This would be examined to some length in the discussion of specific civil and political rights in the following chapter.

CHAPTER 10

International and National Law on Selected Civil Rights

This chapter gives a detailed description of a selected set of civil and political rights. It discusses international and domestic standards with examples of jurisprudence. The rights analysed are:

a) Right to Life, Liberty and Security of the Person

b) Equal Recognition as a Person before the Law and Protection of law.

c) Freedom from Torture or Cruel, Inhuman or Degrading Treatment

d) Freedom of Expression, Opinion and Access to Information

e) Freedom of Association

f) Right to Marry and Found a Family

g) Right to Respect for Privacy of Home and Correspondence

h) Right to Participate in Political and Public Life

The international and domestic standards on selected civil rights discussed in the chapter are tabulated in Tables 10.1, 10.2 and 10.3 at the end of the chapter.

All of the rights guaranteed in the *International Covenant on Civil and Political Rights* (*ICCPR)* and other instruments guaranteeing civil and political rights are of relevance to persons with disabilities.[1] There is significant international jurisprudence on a number of these rights, though it should be noted that not all the case law necessarily reflects modern thinking about disability or adopts the most progressive rights-oriented approach. In addition, one must recall that international tribunals are playing a supranational role of review and often allow national authorities a considerable discretion in tailoring legislative and administrative policies, given the national authorities' greater familiarity with local circumstances. National courts are likely to scrutinise legislative and administrative measures more closely. International standards are often more appropriately seen as the *minimum* levels of protection

[1] For an excellent discussion of the disability issues in the context of civil and political rights, see Quinn, Gerard 'The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework' in Degener, Theresia and Yolan Koster-Dreese (Eds.) *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (Martinus Nijhoff, 1995), 69-93.

applicable across a wide variety of systems. They should be considered as a floor rather than a ceiling for protection of rights.

Two of the areas in which there has been considerable international case law are the rights to liberty and security of the person, and freedom from torture or cruel, inhuman or degrading treatment or punishment. Much of this case law has come from the European Convention on Human Rights, but would be in large part applicable under the *ICCPR*.

Gerard Quinn has categorised the standard civil and political rights under four 'general branches':[2]

- Existence (right to life; right to freedom from torture);
- Liberty (right to liberty and security of the person, liberty of movement, due process rights);
- Social co-operation (right to respect for family life, freedom of association and assembly, right to privacy); and
- Political rights continuum (rights to participate in political and public life, freedom of expression.)

To this should be added the guarantee of equality, which can be viewed as both freestanding, but also as linked to these other rights. The following discussion touches only on some of these rights and provides a discussion of both international and national standards.

10.1 Right to life

10.1.1 International Standards

The right to life appears in all the general universal and regional human rights instruments, including *Article 3* of the Universal Declaration of Human Rights and *Article 6* of the *ICCPR* whose first clause provides:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The *Human Rights Committee (HRC)* has commented in its *General Comment No 6* that the right to life is:

> (T)he supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.

The right to life is not an absolute right to life, but rather a right not to be arbitrarily deprived of life.

Protection by Law of the Right to Life

International law requires that the State provide for effective legal protection of the right to life against

[2] Ibid. pp. 83.

arbitrary deprivation by the State or by non-State actors. This includes the enactment of laws which protect the right to life, regulate the use of lethal force, provide for the investigation of the death of persons resulting from the use of force and the prosecution of those alleged to have killed another person, as well as the effective enforcement and administration of those laws. The European Court of Human Rights has described the obligations under the European Convention on Human Rights (similar to the obligations under the *ICCPR*) in following terms:[3]

> [T]he first sentence of Article 2 § 1 [equivalent to *Article 6(1) of ICCPR*] enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. . .. This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by a law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

Duty of the State to Protect Right to Life from its Own Actions

The State itself is obliged to ensure that it does not violate a person's right not to be arbitrarily deprived of life through acts (or omissions) directly attributable to the State, that is by acts of State officials. The core of the guarantee relates to the direct use of lethal violence by the State resulting in the death of a person. Many international bodies have advanced the reading of the right to life beyond this core obligation and extended State's responsibility to ensure material conditions of existence that will permit a person a decent and dignified life.

Imposition of the Death Penalty

The death penalty is not per se unlawful under international law. Therefore, unless a State is party to one of the instruments which ban the imposition of capital punishment by a State party (such as the Second Optional Protocol to the *ICCPR*), the State may impose death penalty in certain circumstances.

Article 6 of the *ICCPR* sets out substantive and procedural conditions which must be satisfied if the imposition of death penalty is to be consistent with the international law. In particular, this article provides that the death penalty may be imposed only for 'the most serious offences' and may be only carried out 'pursuant to a final judgment rendered by a competent court.' The *HRC* has stated its view that 'the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure.'[4] A capital sentence cannot be imposed for crimes committed by persons less than eighteen years old, and may not be carried out on pregnant women.[5] The Committee has also consistently held that the imposition of the death penalty following a trial in which international standards of a fair

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[3] *Edwards vs United Kingdom*, Judgment of the European Court of Human Rights, 14 March 2002, para 54.

[4] HRC, *General Comment 6*, para 7

[5] In its Concluding observations on the third periodic report of India under the *ICCPR*, the Human Rights Committee in 1997 expressed its 'concern at the lack of compliance of the [Indian] Penal Code with article 6, paragraphs 2 and 5 of the Covenant' and recommended that India 'abolish by law the imposition of the death penalty on minors and reduce the number of offences carrying the death penalty to the most serious crimes, with a view to its ultimate abolition': A/52/40, para 435.

hearing have not been observed is itself a violation of the right to life. These guarantees are reiterated and elucidated in subsequent declarations of the Economic and Social Council.[6]

An important issue in relation to persons with disabilities is the imposition of the death penalty on persons with intellectual impairments. The application of capital punishment to persons who suffer from certain degree of intellectual impairment appears to be unlawful under international law. In 1989 the Economic and Social Council recommended 'eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence',[7] a call reiterated on a number of occasions by the UN Commission on Human Rights. The Special Rapporteur of the UN Commission on Human Rights on extrajudicial, summary or arbitrary executions has also argued that the imposition of the death penalty on persons with mental retardation is in contravention of the international law.[8] In his report for the year 2000, the Special Rapporteur called on States to 'take immediate steps to bring their domestic legislation and legal practice into line with international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons.' [9]

Use of Lethal Force by the State

Considering the lethal use of force by State authorities as 'a matter of the utmost gravity', the *HRC* has commented:[10]

> The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.

Various international instruments lay down very clear standards for the circumstances under which State officials (in particular law enforcement officials) may use force against citizens. These have generally been accepted as providing persuasive interpretations of State obligations under the *ICCPR* and Torture Conventions. They include the Code of Conduct for Law Enforcement Officials.

In addition to ensuring that the law stipulates when lethal force may be used, States are obliged to have in place a system under which there is a proper independent investigation into any case in which a person is killed as the result of the use of lethal force by an official of the State.

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[6] *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, adopted by Economic and Social Council resolution 1984/50 of 25 May 1984.

[7] 'Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty,' ESC resolution 1989/64.

[8] '*Extrajudicial, summary or arbitrary executions*: *Report by the Special Rapporteur*,' E/CN.4/1998/68/Add.3, paras 58 and 145.

[9] '*Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur*,' E/CN.4/2000/3, para 97.

[10] HRC, *General Comment 6*, para 3.

Obligations of the State in relation to Persons in its Custody

The State is under a very clear obligation to ensure the safety of persons under its control or in its custody, whether in prison, in an educational establishment, or in a hospital or health facility — not only against the violation of the right to life by State officials, but also by other detainees or patients. If a person loses his or her life in State's custody, then the State is under an obligation to carry out an independent and effective investigation into the cause of the person's death and to take appropriate steps to avoid such violations in future. Since many persons with disabilities may be detained or living in State institutions, the obligation on the State to provide protection and to ensure a full investigation of any death may be of special importance in this regard.

An example is provided by *Paul and Audrey Edwards vs the United Kingdom* decided by the European Court of Human Rights in 2002. The case involved the killing in prison of one man (Christopher Edwards) who was mentally ill by another man who also suffered from mental illness. The Court held that the authorities 'knew or ought to have known at the time of the existence of a real and immediate risk' to the life of Edwards from the other inmate and that 'they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'[11]

The Court also held that obligations under *Articles 1* and *2* of the European Convention (equivalently *Articles 2* and *6* of the *ICCPR*) required that 'there should be some form of effective official investigation when individuals have been killed as a result of the use of force'; the goal being 'to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.' The investigation must be initiated by the State authorities, must be independent, and effective, 'in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances . . . and to the identification and punishment of those responsible.' The investigation must be a proper one, involving reasonable steps to collect the available witness testimony and real evidence, and should be carried out with reasonable expedition, and be open to public scrutiny, including the involvement of the next of kin in the procedure.[12] The Court concluded that this procedural obligation to carry out an independent and effective investigation with appropriate involvement of the next-of-kin had not been met in the case.

Obligations of the State in relation to the Deprivation of Life by non-State Actors

The State is under a general obligation to formulate laws and provide an effective system of criminal investigation and justice to ensure the apprehension and punishment of persons who commit homicide. While in general the State cannot be held liable for every taking of life by a private individual, there may be circumstances in which the State is under a positive obligation to provide specific protection to a person whose life has been threatened, for example a person who is being targeted politically or a woman who has been subjected to violence at the hands of a partner and who continues to stalk her.

In the case of disappearances, the *HRC* has stated that the obligation of the State is:[13]

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[11] *Edwards vs United Kingdom*, at paras 55 and 60.

[12] Ibid. at paras 69-73.

[13] HRC, *General Comment 6*, para 4.

> To take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

Abortion and the Right to Life and Disability

One of the most contentious issues in relation to the right to life under international law has been the question of whether a foetus should be recognized as the bearer of the right not to be arbitrarily deprived of life, and to what extent the State may regulate access to abortion. International courts and tribunals have not addressed the difficult philosophical issue of when life begins, but have focused on the meaning of the language used in the relevant treaties. They have generally held that the references to 'every human being' or 'everyone' or 'every person' do not include an unborn foetus. (The one exception in this regard is the American Convention on Human Rights, whose *Article 4(1)* explicitly provides that the right to life is to be protected by law 'from the moment of conception.') The right of a woman to her private life has been the basis on which a number of international bodies have upheld the right of a woman to have an abortion. The right to freedom of expression and access to information has been used to argue for the right of women to receive information about abortion options. The right to access abortion may also be based on the right of a woman to decide freely and responsibly on the number and spacing of her children.

On the other hand, the same bodies have also accepted that the State may have a legitimate interest in regulating the right of a woman to terminate a pregnancy, and that there is no right to unrestricted abortion under international law (nor does it appear to be a violation of international law if abortion is freely available).

The disability issue is of some importance in relation to the debate over the lawfulness and permissibility of allowing a woman to decide to abort a foetus if there is evidence that the child will be born with a disability. Could a State lawfully prevent a woman from taking tests to identify whether a foetus shows signs of any disability, or prohibit abortions solely on the basis of a diagnosis of disability? Some disability groups have argued that allowing such abortions is tantamount to a form of genocide, because it is intended to eliminate a particular subgroup of human beings (as much as certain eugenic policies like the sterilization of persons with intellectual disabilities in a number of countries, or the murder of persons with disabilities in Nazi Germany).

At this stage in the development of international law there does not appear to be a consensus that a State could lawfully ban a woman from deciding to abort a foetus with a disability or which was likely to develop a disability. The right of the mother and father in this case is likely to prevail over a State interest in protecting the foetus, or a broader State interest in preserving diversity of human beings by ensuring the preservation of different forms of abilities. On the other hand, these is a clear understanding that the State can not compel a woman to abort a foetus because it has a disability or is likely to develop one after birth. Similarly, it is accepted that the power of the State to ban the use of sex selection tests and abortions of female foetus is consistent with international law, even though it does interfere with a woman's exercise of choice in relation to abortion that she may enjoy on other grounds. Of course, the social and other pressures on a woman may mean that in fact she is not exercising a free choice in such matters.

The Right to Die

International human rights treaties do not contain any express right for a person to choose the time and manner of his or her death (either by suicide or assisted suicide), nor do they prevent a State from providing for such actions to be lawful. In some cases the right not to be subject to inhuman or degrading treatment or punishment may be relied on to reject the provision of artificial or unreasonable measures to keep a person alive against that person's will. The European Court of Human Rights held in *Pretty vs United Kingdom*,[14] a case involving a woman with motor neurone disease who wished to end her life but needed the assistance of others to do so, that the guarantee of the right to life did not include the right to choose when to end one's life and to do so assisted by others.

State's Obligation to Adopt Positive Measures

The Human Rights Committee has stated:[15]

> The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

This would mean that not only would the direct killing of persons with disabilities, as some form of eugenics policy, be a violation of the right to life, but the failure to ensure that they are provided with material necessities of life could also be a violation of the right to life (as well as of a number of other rights including the right to an adequate standard of living and right to health).

10.1.2 Domestic Standards

Right to Life

Article 21 of the Constitution of India provides that 'no person shall be deprived of his life and personal liberty except according to procedure established by law.' The extent of the protection provided by the article came to be disputed soon after the adoption of the Constitution in the case of *A K Gopalan vs State of Madras*[16] where the Supreme Court was required to pronounce on the validity of a preventive detention law. Whilst the Court pondered at length on the meaning of personal liberty, the right to life invited scant attention from the court. The lack of attention to the right to life is demonstrated by the statement of Justice Patanjali Sastri that, '(T) he right to live, though the most fundamental of all, is also one of the most difficult to define and its protection generally takes the form of declaration that no person shall be deprived of it save by due process of law.'[17] Of similar import is the exposition of Justice Das who, whilst expatiating on civil rights of a person pointed out that such rights are generally divided into two classes; one, the rights attached to the person and two

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[14] *Pretty v United Kingdom*, Judgment of the European Court of Human Rights 29 April 2002.

[15] HRC, *General Comment 6*, para 5.

[16] *A K Gopalan vs State of Madras* [AIR 1950 SC 27].

[17] Ibid. para 135.

the rights to things. And amongst the rights attached to the person the first and foremost is the freedom of life which means the right to live[18].

This focus on personal liberty as the critical concept in *Article 21* carried on with a range of subsequent decisions. However, once the Court started to interrogate legislative supremacy post-Emergency and expanded the boundaries of the article the content of the right to life has also been expanded. Thus in *Francis Coralie Mullin vs Delhi Administration*[19] the Court declared that the 'right to life includes the right to live with human dignity and all that goes with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings.' [20]

The court further expounded on the meaning of life in *P Rathinam vs Union of India*[21] wherein it declared that the right to live with human dignity did not mean continued drudgery, rather it takes within its fold the fine facets of civilization which make life worth living.

In line with this extended definition of life, in departure from its earlier rulings,[22] the Court has ruled in *Olga Tellis vs Bombay Municipal Corporation*[23] that the right to life encompasses within it the right to livelihood as 'no person can live without the means of living that is the means of livelihood.' [24]

In consonance with this approach the Court has inducted the right to medical care[25] and education[26] also within the conspectus of the right to life.

It needs to be noted that these developments have occurred in constitutional law and the application of these pronouncements on persons with disability has not been tested out by any class actions or litigations in public interest. The jurisprudence of the Indian Supreme Court has started to fore-ground the inextricable connection between civil-political and social-economic rights. These developments also show how the text of a civil-political right has been imaginatively used by the Court to render social-economic rights justiciable.

However the right to life has been subject of concern for the Court in more traditional terrains also. Thus the Court has been required to pronounce upon the constitutionality of death sentence on several occasions[27] and one of the limbs of the challenge has arisen from *Article 21*. The court has at all points stressed that the

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[18] Ibid. para 266

[19] *Francis Coralie Mullin vs Delhi Administration* [AIR 1981 SC 746].

[20] Ibid. at 753.

[21] *P Rathinam vs Union of India* [AIR 1994 SC 1844] .

[22] In *Re. Sant Ram* [AIR 1960 SC 932]; *A V Nachane vs Union of India* [AIR 1982 SC 1126] and *Begulla Bapu Raju vs State of Andhra Pradesh* [AIR 1983 SC 1073], the court had rejected the argument that the right to livelihood is included within the right to life.

[23] *Olga Tellis vs Bombay Municipal Corporation* [AIR 1986 SC 180].

[24] Ibid at 193.

[25] In *Parmanand Katara vs Union of India* [AIR 1989 SC 2039], the Court stressed on the need to provide medical treatment to accident victims whether guilty or innocent as it was the duty of the State to preserve life. A similar stress on the obligation to preserve life was placed in *Paschim Banga Khet Mazdoor Sangh vs State of West Bengal* [AIR 1996 SC 2426].

[26] *Mohini Jain vs State of Karnataka* [AIR 1992 SC 1858] and *UnniKrishnan vs State of Andhra Pradesh* [AIR 1993 SC 2178].

[27] *Jagmohan Singh vs State of U P* [AIR 1973 SC 947]; *Rajendra Prasad vs State of UP* [AIR 1979 SC 916]; *Bachan Singh vs State of Punjab* [AIR 1980 SC 898] and *Allaudin Mian vs State of Bihar* [AIR 1989 S C 1456].

right to life guaranteed in *Article 21* has only meant that the denial of life has to be by fair procedure[28] in a non discriminatory manner and without resort to cruel and unusual methods[29] . It does not mean that there is an embargo on depriving life.

A disability linked development came to the fore in the case of *A. B Gupta vs Union of India*[30] where the Supreme Court was required to decide upon the relevance of the state of mind of an accused who had been sentenced to death. The accused was convicted of multiple murders and had exhausted all appeals against conviction. In the petition before the Supreme Court it was contended that the execution proceedings should be stayed since the accused was not of sound mind.

The Court dismissed the petition as a desperate argument and refused to grant relief to the petitioner. However, the Court did not confine itself to the facts of the case and went on to rule that there was nothing in Indian law which prohibited the execution of an 'insane convict'. It can well be asked whether the judgment can be considered good law after the Bachan Singh ruling[31] which required the death sentence to be executed in the rarest of rare cases[32] . At the same time the case shows how disability is often employed by non disabled persons as a forensic technique to wriggle out of difficult situations. Thus questions on the continuance of such practices and the need for measures to prevent their misuse continue to come to the fore.

There are two other issues concerning persons with disability which need to be flagged out within the right to life discourse. One relates to the survival of persons with disability in natural or man-made disaster situations — an issue which as yet is still within the realm of executive policy. The other question arises around provisions such as *Section 4 (3) (iv)* of the Preconception and Prenatal Diagnostics Techniques (Prohibition of Sex Selection) Act 1994 which allows for prenatal diagnostic techniques to be employed if ' the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease.' There are no easy answers to such complex issues that entangle the right to life of the disabled with the reproductive rights of women.

Thus the current discourse on the right to life has brought the following to the fore:

- The indivisibility of rights and the inextricable connection between civil-political and social-economic rights;
- The need to interrogate forensic techniques which seem to be taking advantage of the stereotypical perception of disability;
- The necessity of addressing the issue of survival of persons with disability in disaster situations; and

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[28] *Rajendra Prasad*, *supra* note 27.

[29] See *Attorney General of India vs Lachma Devi* [AIR 1986 S C 467], where the Court ruled out public hanging as a barbaric practice.

[30] *A. B Gupta vs Union of India* [AIR 1977 SC 608].

[31] *Supra* note 27

[32] For a more detailed commentary see Dhanda, Amita *Legal Order and Mental Disorder* (News Delhi, Sage Publications, 2000) 88-89.

- Questions about the selection of foetus and the use of technology.

10.2 Liberty and Security of the Person

10.2.1 International standards

Article 9 of the *ICCPR* provides:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 9 of the *ICCPR* is similar to *Article 5* of the European Convention, though that article sets out an exhaustive list of the grounds on which a person may be deprived of his or her liberty, while the *ICCPR* does not contain a specific list.[33]

The case law has developed a reasonably stringent jurisprudence for scrutinising the deprivation of liberty of persons with disabilities (in particular those who may be suffering from mental illness or from an intellectual disability).[34] In particular, both the *HRC* and the European Court have held that the guarantee of *Article 5* is not limited to arrest and detention in the context of investigation of criminal charges, but extends to all deprivations of liberty, including confinement in psychiatric institutions, hospitals and other contexts.

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[33] *Article 5* of the European Convention on Human Rights provides:
1.Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
…
(e) the lawful detention of persons for the prevention of spreading of infectious diseased, of persons of unsound mind, alcoholics, drug addicts, or vagrants.

[34] See the summary of cases under the European Convention on Human Rights prepared by *The Mental Disability Advocacy Center,* available at www.mda.info/resources/echr_cases.htm

In the case of the *ICCPR* the detention of a person must be in accordance with a procedure prescribed by law, and even if 'lawful' it may not be 'arbitrary'; a concept which permits substantive review of the ground on which deprivation of liberty is permitted and incorporates notions of reasonableness, justice and proportionality.

Both articles require that even if a person is detained, he or she must have access to an independent and impartial tribunal to review the lawfulness of the detention, and that where the basis for the detention is an ongoing condition, the detained person should have access to periodic review of the continuing need and legality of the deprivation of liberty.

The *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, adopted by the UN General Assembly in 1991, includes principles that refer to rights to treatment in the least restrictive environment, and other principles related to consent to treatment.[35] *Principles 15* and *16* set out clear criteria for involuntary admission to a mental health facility to ensure that the rights of persons with mental disabilities are respected.

10.2.2 Domestic Standard*s*

Right to Personal Liberty

Article 21 of the Constitution guarantees both the right to life and personal liberty. Whilst the first limb of the article has been discussed in the earlier section, in this segment we focus attention on how questions of deprivation of personal liberty have been addressed by the Courts. As already mentioned, in *A.K. Gopalan vs State of Madras* [36] the Supreme Court first deliberated upon the extent of the guarantee provided by the article. It was argued on behalf of the petitioner that in order to be in conformity with the demands of the article, the law of preventive detention under which the petitioner was detained needed to be in conformity with both *Article 21* and *Article 19 (1) (d)*, which provides right to freedom of movement. Further it was contended that the procedure established by law must be interpreted to mean such procedure as is consistent with the demands of natural justice.

The Supreme Court in its majority judgement did not accept this contention of the petitioner and instead held that each of the fundamental rights had to be viewed as a discrete category. Consequently, legislation was to be invalidated only if it directly and inevitably infringed any right guaranteed in Part III; any consequential or incidental infringement had no effect on the validity of legislation. As the preventive detention legislation directly impacted only on the right to life and liberty, only the requirements of *Article 21* had to be met. The court further held that the procedure established by law meant only that deprivation of personal liberty could not happen through executive order. The demands of the article were fulfilled if the procedure depriving liberty was contained in duly enacted legislation of a duly empowered legislature.[37] The contention that the procedure had to be in conformity with principles of natural justice was not accepted. The court's interpretation in *Gopalan* was criticised for

[35] *Principles 9* and *11*.

[36] *Supra* note 16

[37] It needs to be noted that this interpretation in effect rendered all such legislations incompetent that deprived persons with disabilities of their life and liberty through procedures, which did not fulfil fair process requirements. See for example the discussion on the *Lunacy Act* infra.

being overly restrictive. In *Kharak Singh vs State of UP*[38] the Court did try to loosen the *Gopalan* stranglehold by unanimously finding that the right to personal liberty included the right to privacy and therefore unregulated domiciliary visits to an ex-convict violated *Article 21*. Though the court modified *Gopalan*, it was not willing to agree with Justice Subha Rao when he desired a wider meaning for both 'personal liberty' and 'procedure established by law'.

It was only in *Maneka Gandhi vs Union of India*[39] that the court modified its earlier position on *Article 21* and ruled that 'the article was not just a protection against executive arbitrariness.' Therefore, merely because the liberty is deprived by legislation instead of executive order, it is not a sufficient fulfilment of the requirements of *Article 21*. To meet the mandate of *Article 21* it is necessary that the procedure in the legislation by which the deprivation is determined should be just, fair and reasonable. The protection of the right was not confined to situations of total deprivation, but also extended to less extreme situations of deprivation. The court also recognised the inevitable overlap between the fundamental rights. This was a major change from its earlier ruling, where it had adopted the dominant infringement test and consequently held that a petitioner could in any situation only allege the infringement of one right. The court now accepted that if any law impacted on more than one right, for the legislation to be held valid it was necessary that the requirements of each of the rights, whose infringement was alleged, had to be fulfilled. Thus, the legislation on compulsory detention would not have to fulfil the mandate of *Article 21* only, but also those of *Articles 14* and *19*.

With its decision in *Maneka Gandhi*, the Court opted for an expansive interpretation of the three key terms in *Article 21*, *viz.* 'life', 'personal liberty' and 'procedure established by law.' Thus in *Francis Coralie Mullin*[40], whilst deliberating on the visitation rights of detainees, the court declared that,

> [T]he right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the faculties of thinking and feeling.[41]

In the same case the apex court also ruled that the requirements of the article had to be fulfilled whether the deprivation was permanent or temporary. It further clarified that deprivation was not a one-time episode but a continuing activity, and as long as the continuance happened it had to be in accordance with the demands of fair procedure.

The question however is, what is the relevance of this expanded interpretation of *Article 21* to the disability rights. We will revisit this question after describing the statutory regimes controlling the life and personal liberty of persons with disabilities.

Deprivation of Liberty of Persons with Disabilities

To map out statutory provisions which result in loss of liberty for persons with disability there is a need to closely scrutinize domestic statutory law that regulates institutionalisation of persons with disabilities.

[38] *Kharak Singh vs State of UP* [AIR 1963 SC 1295].
[39] *Maneka Gandhi vs Union of India* [AIR 1978 SC 597].
[40] *Supra* note 19.
[41] Op cit, at 753.

Such institutionalization gets to be ordered in three kinds of contexts. These three situations are: (1) where a person with disability is charged of a crime; (2) where such a person is preventively detained; and (3) where institutionalisation becomes the means of providing shelter to a person with disability.

Rights of Disabled Persons Charged of a Crime

Under *Section 328* of the Code of Criminal Procedure (*CrPC*) when an accused is unable to understand the trial due to unsoundness of mind it is mandatory on the magistrate to refer the accused for a medical examination. Even as the court is required to postpone the trial only if the accused is unable to understand the proceedings by reason of unsoundness of mind, the case law shows that the further inquiry on incapacity is not undertaken and when unsoundness of mind is established, the consequent incapacity is presumed and the trial postponed until the accused regains sanity. *Section 330* of the *CrPC* provides that during the period of postponement, the 'undertrial of unsound mind' should either be released on a bond of safe custody from a relative or friend; or be kept in safe custody in jail or mental hospital. There is no guidance in the statute as regards when each of these options should be utilised. Consequently, an 'undertrial of unsound mind' can obtain the benefit of the less restrictive alternative of being released in the community provided he or she has a relative or friend who is willing and able to offer security. The statute provides no outer limit for which the trial would remain postponed. The prison authorities are under an obligation to send a medical report every six months on the state of mind of the accused and this obligation is the only safeguard against indefinite confinement.

However, *Veena Sethi vs State of Bihar*[42] has demonstrated that this safeguard is observed more in breach. The case has also brought to the fore the cases of individuals who were ordered to be kept in detention after their trials were postponed, as they were incapable of defending themselves on ground of 'unsoundness of mind'. In all cases, the period of detention was longer than what they could have been awarded if they had been punished for the offence with which they were charged. The case also showed that this indefinite duration confinement may have continued without remission unless the Supreme Court intervened.[43]

What needs to be understood here is that the provision of medical examination, as also of postponement, has been incorporated ostensibly to ensure that a person with psychiatric disability is accorded a fair trial. What however is not appreciated is that the person with disability pays the cost of this fair process provision with the loss of liberty, which could be of indefinite duration.

This provision of safe custody does not subsist only in relation to 'insane undertrials'. A similar provision[44] exists for 'insane acquittees'[45] . Thus, when a court acquits a person on grounds of unsoundness of mind, acquittal does not mean discharge. The court can under *Section 335* of the *CrPC* either release the 'insane acquittee' on security of a friend or relative or order the 'insane acquittee' to be kept in safe custody of jail or a mental hospital. Once again, release can be secured only if family support is available. The statute provides no guidelines on the periods for which 'insane acquittees' can be kept in place of safe custody. *Veena Sethi* once again provided evidence on the indefinite nature of this confinement and the unwillingness

[42] *Veena Sethi vs State of Bihar,* 1982 (2) SCC 583.

[43] For a more detailed analysis of these provisions from a human rights perspective see Dhanda, Amita *supra* note 32 .

[44] *Section 335* Code of Criminal Procedure 1973.

[45] The term insane is being used here primarily because in extant legal parlance the acquittal here is being obtained under the general defense of insanity.

of state authorities to order release of 'insane acquittees'. In *Veena Sethi*, the Supreme Court ordered the medical examination of all the 'insane inmates' and the release of all those who had regained sanity. The court ordered release on the evocative ground that they were in detention for periods longer than for which they could be punished, but did not subject the procedure of detention to constitutional scrutiny.

It may be therefore worthwhile to ask:

- Does the procedure ordering the detention of 'insane undertrials' and 'insane acquittees' conform to the procedure prescribed under *Article 21*?
- Have sufficient guidelines been provided to choose between the alternative courses provided in *Section 330* and *Section 335* of Code of Criminal Procedure?
- And if not, can the process of making choice be termed arbitrary and an infringement of *Article 14* of the Constitution?

Compulsory Civil Commitment

Until 1993, admissions to mental hospitals were regulated by the *Indian Lunacy Act of 1912*. The legislation made compulsory civil commitment the rule and voluntary admission for care and treatment the exception. All admissions were made on the order of magistrates, whether executive or judicial, on the ground that 'the lunatic'[46] was dangerous and unfit to be at large. The statute also allowed institutionalisation if a 'lunatic' was subjected to cruelty and neglect[47]. However, intervention in these latter situations was discretionary. Intervention was compulsory when any danger to society was feared.

Magistrates could be activated by police officers or relatives. The decision regarding detention (institutionalisation) could be made on the basis of an application and two medical certificates.[48] Both the notice to the 'alleged lunatic', and personal examination could be waived if the magistrate thought it was not appropriate to issue notice to the alleged lunatic and to call him to court. The duty to give reasons was to be observed only if detention (institutionalisation) was refused.

Questions could perhaps be raised on the fairness of this procedure especially after the *Maneka Gandhi* decision. Before the *Maneka Gandhi vs Union of India*[49], the Supreme Court had found that only the deprivation of liberty by executive order was prohibited by the Constitution. Consequently, once liberty was deprived by legislation the demands of *Article 21* were met and no questions on the fairness of the procedure could be raised. Primarily due to the marginal status of the affected group, the *Lunacy Act* procedure continued without any hindrance even after the Supreme Court ruled that *Article 21* required a fair, just and reasonable procedure.

The *Lunacy Act of 1912* was replaced by the *Mental Health Act 1987*— a substitution which came into effect on April 1, 1993 when the new Act came into force. The *Mental Health Act* retained a number of procedures of admission provided in the *Lunacy Act* with some modifications on the grounds of admission. Thus

[46] *Section 3 (5)* defined a 'lunatic' as an 'idiot or a person of unsound mind'.

[47] *Section 15* of the Indian Lunacy Act 1912.

[48] These medical certificates were to be issued by two medical practitioners who had examined the alleged lunatic independent of each other. The certificate was to desegregate between facts observed by the medical practitioner and facts reported to the practitioner. See *Section 18*, the Indian Lunacy Act.

[49] *Maneka Gandhi vs Union of India and Others*, 1978 1SCC 248.

along with the ground of dangerousness, the severity of illness, health and personal safety were also added.[50] The compulsory medical certificate and optional personal examination procedure were continued as in the *Lunacy Act*.[51] However, a new provision allowing for legal representation and legal aid in proceedings before magistrate and district court has been included.[52] The fair process impact of this legal aid provision is not clear, as only the Gujarat High Court has established legal aid panels in the State.[53] In that State also there is little clarity on the functions of these legal aid panels.

For the first time, medical functionaries have been accorded the power to make limited period compulsory admissions for treatment[54] provided the head of the psychiatric institution believes that it is in the interest of the 'mentally ill person'.[55] There is no mandatory judicial oversight of these admissions; though, the mentally ill person or a relative or friend can apply to a magistrate for discharge[56] . After serving notices to the person on whose behalf the application has been made, and to the psychiatric institution[57] , the magistrate can accept or reject the application. Unlike the *Lunacy Act* where a person was to be discharged within twenty four hours of a discharge request, *Section 16* of the *Mental Health Act* confers discretion on the head of the institution to retain the voluntary patient involuntarily provided a medical board certifies that such further admission is required.[58]

In many ways the *Mental Health Act* is a terminologically modern version of the *Lunacy Act.* However the statute accords more unequivocal acknowledgement to the therapeutic developments in psychiatry than it does to the jurisprudence of human rights. There are procedures provided by which the will of a 'mentally ill person' can be waived, but if a mentally ill person wishes to question his or her detention (institutionalisation) or seeks discharge, all that he or she can do is to make an application to a magistrate. *Section 91* of the *Mental Health Act* provides for legal aid to mentally ill persons at State expense. Such a benefit can also be accessed under the *Legal Services Authority Act, 1986.* The question however remains how would a detainee in a mental institution avail of this legal aid?

That the psychiatric admissions are difficult to question is evident by the fact that there have been less than a dozen cases both under the *Lunacy Act* and *Mental Health Act* which have challenged orders sanctioning admissions to mental hospitals.[59] Every time the affairs of a psychiatric institution are subjected to scrutiny, a fair number of wrongful admission cases are determined.[60] Whilst the *habeas corpus* petitions before independence stressed non-observance of statutory requirements resulting in wrongful deprivation of

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[50] *Section* 20(2) of the Mental Health Act 1987.
[51] Ibid. *Section* 22 (3).
[52] Ibid. *Section* 91.
[53] The Gujarat Legal Practitioners for Mentally Ill Persons Rules 2001.
[54] *Section* 19 of the Mental Health Act 1987.
[55] *Section* 2 (l) of the Mental Health Act 1987 defines a 'mentally ill person' to mean ' a person who is in need of treatment by reason of any mental disorder other than mental retardation'.
[56] Ibid. *Section* 19(3)
[57] Ibid. *Section* 19 (4)
[58] Ibid. *Section* 18(3)
[59] *Dial Singh vs Inspector General Prisons Chandigarh,* 1988 Cri LJ 661; *Abdul Kareem vs T G Nambisan,* 1990 Cri LJ 742; *Meera Nireshwalia vs State of Tamil Nadu,* 1991 Cri LJ 2395; *PC Kakar vs Commandent Military Hospital Trimalgiri,* 1994 Cri LJ 1025 and *Anamika Chawla vs Metropolitan Magistrate Delhi*, 1997 (3) SCALE 761.
[60] See for example the Report of the Commission on the Shahdhra Mental Hospital in *B R Kapur vs Union of India* WP (Crl) No 1777-78 of 1984 .

liberty, the post independence cases have only worried about railroading – that is, the wrongful confinement of the non-mentally ill into psychiatric hospitals. There is no case law analysing the efficacy of the procedure provided to a mentally ill person to challenge the lawfulness of his/her detention and admission to a mental home. Similarly the efficacy of free legal aid is yet to be tested by persons with disability.

Besides individual petitions seeking redress, there have also been public interest actions interrogating questions of arbitrary detentions on the ground of mental health. The public interest actions have expressed concern on two kinds of issues: one, the abysmal conditions in mental hospitals, and two, questions of wrongful confinement. The wrongful confinement cases restrict attention to the site of confinement. Thus in *Sheela Barse vs State of West Bengal*,[61] the housing of mentally ill in jails was questioned, and subsequent to a psycho-legal investigation of the matter,[62] the Supreme Court held the housing of mentally ill in jails to be unconstitutional. In *Regarding Death of 25 chained Inmates in Asylum Fire in Tamil Nadu*,[63] the Court ruled the detention of persons with mental illness in unlicensed private asylums to be in contravention of the *Mental Health Act*. The Court also desired that the various state governments should undertake sensitisation programmes to inform the populace as to how seeking help at faith healing places and temples was superstitious and unscientific. The court has required the union and state governments to establish one central and one state government mental health facility in each state to deal with the problem of mental illness.

If the above issue were dealt within the discourse of civil and political rights it would be necessary to ask:

- Is compulsory commitment an infringement of the right to personal liberty?
- If not, then what commitment procedure would fulfil the mandate of *Article 21*?
- Is the individual interest in liberty of such supervening value that no fair process safeguard can ever offset its loss?
- Can persons be deprived of their personal liberty for their own good?
- If the right to life protects the faculties of thinking and feeling then where would individual preference figure in the provision of compulsory care?
- What manner of evidence would be required before a person can be deprived of liberty on grounds of dangerousness to others?
- Can liberty be deprived on the basis of self risk taking behaviour?
- If yes, then are 'persons with mental illness' the only group susceptible to risk taking behaviour?
- If no, then is compulsory commitment of 'persons with mental illness' an under inclusive classification?

Institutionalisation for Shelter Reform and Rehabilitation of the Disabled

The institutionalisation of persons with disability also takes place for fulfilling their functional needs, especially of shelter and rehabilitation. Some of the institutions where persons with disabilities are sent are places they share with the general populace such as orphanages, licensed institutions for women and children,

[61] *Sheela Barse vs Union of India* (1993)[4 Supreme Court Cases 204].

[62] The Court appointed R Srinivasa Murthy and Amita Dhanda as the psychiatrist and law members respectively and their findings were submitted to the court in *'Unlock the Padlock: Mental Health Care in West Bengal'*, Report of the Supreme Court Commission on Mentally Ill in the Jails of West Bengal in Writ Petition (civil) No 237 of 1989

[63] In *Regarding Death of 25 Chained Inmates in Asylum Fire in Tamil Nadu*, Writ Petition (civil) No 334 of 2001 order dated April 12 2004.

juvenile institutions, and beggar homes. Other places are specially set up for persons with disabilities. Thus *Section 55* of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995* provides that no person shall establish or maintain an institution for persons with disabilities without recognition from the Competent Authority. *Section 56* of the Act provides that the appropriate government may establish and maintain institutions for persons with severe disabilities at such places as it thinks fit.[64]

The National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 contains an analogous provision whereby the trust money can be utilised to provide an adequate standard of living for persons with disabilities and to carry out a range of approved programmes.[65] *Section 11(2)* of the *Trust Act* defines an approved programme to mean, amongst others, any programme that promotes independent living in the community for persons with disabilities, provides respite care, foster family care or day care service; and residential hostels and homes for persons with disabilities.

The above-described provisions are aimed at establishing facilities and for setting up standards for these facilities. It is pertinent to note that the legislation allows for private participation in the setting up of institutions; however, the authority of standard setting resides solely with the government. Also, the standards of recognition and licensing apply only to private institutions; government institutions are exempted. Even though the statutory norms may not apply to these institutions, the Supreme Court has extended constitutional controls on government institutions and formulated minimum standards for their establishment and maintenance.

The crucial point is that whether standards are set by the Government or the Court, the process of norm setting is external and imposed. An inmate of an institution is a passive recipient of the rules and the standards are imposed on him or her by persons in authority. Consequently, even if the admission is not compulsory, the living environment is coercive and restrictive. The constraints of the institutional environment came to the fore when students of a blind school made a petition to the Ministry of Welfare as regards the living conditions of their hostel.[66] As a disciplinary action against of their protest, not only were they rusticated from the hostel, the school refused to forward their names for the Board examination too. Consequently, the improvement the students tried to make at their hostel was forgotten and their attention was entirely devoted to salvaging their educational careers. The case is a live example of the rights-restrictive and non-participatory environment prevailing in institutions, even when entry to them is voluntary and not coercive.

This dimension of the right to liberty raises questions about:

- the indivisibility of the human rights discourse;
- rights of participation in provisioning of shelter; and
- coercion and deprivation accompanying welfare services.

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[64] The reason for examining these provisions in this section on liberty and security is primarily to underscore the non participative and compulsive element in the so called voluntary services.

[65] The Trust has been set up with a one hundred crores one time contribution it has received as corpus from the Central Government. Other than this the Trust can receive movable property from any person for the benefit of persons with disabilities and for furtherance of the objectives of the Trust. The Trust can also receive such sums as may be considered necessary for providing financial assistance to registered organizations for carrying out any approved programs.

[66] *People's Right Organization vs Lt Governor Delhi*, Civil Writ Petition No 4690 of 1994.

10.3 Equal Recognition as a Person before the Law and Full Legal Capacity

10.3.1 International standards

Guarantees of equality and non-discrimination pervade the *ICCPR*, leading commentators to describe equality and non-discrimination as 'the dominant single theme of the Covenant'[67] which 'runs like a red thread throughout the Covenant.'[68] The provisions that guarantee equality or prohibit discrimination include:

- the obligation of States parties to respect and ensure the enjoyment of the rights and freedoms recognised in the Covenant without distinction of any kind (*Article 2(1)*);
- the equal right of men and women to the enjoyment of the rights set forth in the Covenant (*Article 3*);
- the right to equality before the courts and tribunals (*Article 14*);
- the right to equality of rights and obligations of spouses in relation to marriage (*Article 23(4)*);
- the right of children to protection without discrimination (*Article 24(1)*);
- the right to take part in the political and public life of one's country without discrimination (*Article 25*);
- the rights to equality before the law and equal protection of the law (*Article 26*); and
- the rights of minorities (*Article 27*).

The principal equality provisions of the *ICCPR* are *Articles 2(1)* and *26*:

Article 2(1)

> Each State Party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*. [Emphasis added.]

Article 26

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*.[69] [Emphasis added.]

'Other status' includes disability.

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[67] Ramcharan, *Equality And Non-discrimination,* in *INT'L BILL OF RIGHTS: ICCPR*, supra note 84, at 246.

[68] Nowak, Manfred *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1993) 458, 460.

[69] The *ICESCR* also contains a general guarantee of freedom from discrimination in the enjoyment of the rights guaranteed by it.

Article 2

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*. [Emphasis added.]

The following are the major features of the international jurisprudence on the right to equality and non-discrimination under the *ICCPR*:

- a guarantee not merely of *formal* equality in the application of the law (equality before the law), but also a guarantee of *material* equality (equal protection of the law)
- an autonomous right to equality not limited to the rights contained in the *ICCPR* but extending to other fundamental rights and freedoms
  - ♦ the concepts of 'discrimination'/'equality' are to be interpreted against the general international law and consistently with other human rights treaties (*CERD, CEDAW*) – two strands of definition/description, one derived from European Convention jurisprudence, one from the UN definitions of discrimination:

    — 'not every differentiation of treatment will constitute discrimination, if the criteria for differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'[70] Both direct and indirect discrimination are covered.
- the list of prohibited grounds of discrimination in *Article 26* is not exhaustive, but open-ended
- States Parties are required not merely to refrain from discrimination in legislation and administration of the laws, but must also take positive steps to ensure the equal enjoyment of rights without discrimination
  - ♦ temporary special measures/affirmative action to alleviate past disadvantage is permissible and may sometimes be mandatory
  - ♦ other positive action may be required (e.g. enactment of anti-discrimination legislation)
- States Parties are under an obligation to address discrimination by private actors in at least some areas of social life

Recognition as a Person before the Law

Article 16 of the *ICCPR* provides: 'Everyone shall have the right to recognition everywhere as a person before the law.'

Article 14 of the *ICCPR* (and *Article 6* of the European Convention) contains a general guarantee of rights to a fair hearing in the determination of criminal charges against a person, as well as listing a number of specific rights which form part of the overall right (e.g. right to an interpreter, right to legal assistance in certain circumstances, right not to incriminate oneself). These are obviously of importance to everyone, including persons with disabilities, but there may be particular circumstances for some persons with disabilities which require specific steps to be taken to ensure their enjoyment (e.g. by providing sign language interpretation in court so that a person with a hearing impairment can follow and participate in proceedings).

[70] *General Comment 18,* para 13

The sorts of issues which arise for persons with disabilities in relation to this guarantee include assumptions that persons with disabilities lack legal capacity and are not physically or intellectually capable of managing their own affairs; and denial of rights to participate in such capacities as jurors or other public offices. The 2004 Ad Hoc Working Group preparing the *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* identified a number of these in its draft *Article 9*, which set out a clear presumption of legal capacity of all persons with disabilities and required that a person was entitled to such assistance as is necessary to exercise that capacity.[71]

10.3.2 Domestic Standards

Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the laws. The obligation of equality does not bar acknowledging difference, as it does not require that unequals should be treated equally. The article prohibits class legislation, but permits reasonable classification. This means that a group of people may be treated differently from others provided the criteria by which the group is selected are rationally related to the object that is being achieved by such legislation. According to S.P. Sathe, reasonable classification needs to deal with three questions: (1) who are the persons to be treated differently? (2) Why are they being treated differently? (3) What is the different treatment being meted out to this group? Sathe decries the fact that whilst a nexus is required between who are the differentiated group and why are they being treated differently, sufficient attention is not devoted on what is the different kind of treatment being meted out to the differentiated group. He therefore suggests relying on P.K. Tripathi's treatise on the right to equality that a court should not only inquire into whether the criteria for distinguishing a group of people from others are rationally related to the purpose of different treatment, but also the degree the different treatment was required to achieve such purpose.[72]

Even as the Indian Constitution permits classification, it further lays down that there shall be no discrimination on the grounds of religion, caste, and place of birth, descent, sex or any of them. Each of these grounds has been a basis for social discrimination of people. By explicitly naming them, constitution makers had attempted to prevent any legal reinforcement of social discrimination. This attempt could be viewed as somewhat half-hearted, as the Constitution does not totally bar reliance on such criteria, but only prohibits exclusive reliance on them. In this context it is also relevant to appreciate that unlike the *Canadian Charter of Rights and Freedoms* and the German Constitution; there is no provision which explicitly bars discrimination on grounds of disability. The constitution also does not employ an open textured term such as 'other status' as is the case with *Article 26* of *ICCPR* which can be construed to include 'disability'.

The constitution makers recognised that in order to achieve substantive equality it was necessary to protect vulnerable classes from discrimination through special measures explicitly included in the Constitution.[73] Although any affirmative action programmes for persons with disabilities and reservations for persons with disabilities have not been explicitly provided under the special measures, in *Indira Sahwney*[74] the Court clarified that special measures for persons with disabilities were justified under the general right to equality.

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[71] The *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* is online at http://www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm (Dec. 14, 2004).

[72] Sathe, S. P. *Judicial Activism in India* (New Delhi, OUP 2003) 131.

[73] For example other than *Articles 15 (4)* and *16 (4)*, part XVI of the Constitution contains articles whereby special provisions have been made for a whole range of special categories such as Anglo Indians, Scheduled Castes and Scheduled Tribes.

[74] *Indira Sawhney vs Union of India* [AIR 1993 SC 477].

In its post-Emergency constructions the Indian Supreme Court has moved away from the doctrine of reasonable classification and has attempted to wage a battle for substantive equality by holding that any arbitrary action is a violation of the principle of equality. H.M Seervai and S.P. Sathe have criticised this formulation of the court by pointing out that while ordinarily all arbitrary actions would violate the norm of equality, it was incorrect to hold that every violation of the right to equality was arbitrary. In Sathe's opinion, the Court would have been better served if P.K. Tripathi's suggestion of examining the nexus between the kind and extent of different treatment had been more closely examined. Such an examination, he contends, would have allowed for more intensive power of judicial review than the doctrine of arbitrariness.[75]

The purpose of presenting this synoptic version of the sameness-difference debate is to underscore that the equality discourse for persons with disabilities also revolves around these questions. On the one hand, persons with disabilities need the same opportunities, dignity and respect as the non-disabled; on the other they need a reasonable modification of the normative and the built environment to accommodate their difference. In a tone similar to cultural feminists, the recognition of disability is recognition of dissent, diversity and difference – a recognition which would enhance the values of peace, tolerance and acceptance.

Equality of Person before the Law with Full Legal Capacity

Against this backdrop of the constitutional and jurisprudential discourse, we will examine whether a person with disability is a person before the law with full legal capacity.

The law operates on the presumption that all persons are of sound mind and possess legal capacity but the legal personhood of those with unsound mind seems to cease. Once a person is psychiatrically diagnosed as ill, he is believed to have crossed the threshold of normalcy. Though there are examples of judicial pronouncements where a 'psychiatrically ill person' may not be judicially characterised as a 'person of unsound mind', in the main, a psychiatric diagnosis makes a person liable to be found incompetent. This finding of incompetence has far reaching implications because the law perceives it as a ground for divorce, a disqualification for retaining custody of child or taking a child in adoption, and incapacity to enter into any contact.

Further, where a person with mental illness after an investigation by a competent court is found unable to manage his or her affairs, a guardian to his person and a manager for his property are appointed to undertake these tasks. The *National Trust Act, 1999*[76] however, makes a slight departure from the *Mental Health Act* since it requires the decision of guardianship to be taken not by a court, but by a Local Level Committee[77] comprising District magistrate, a parent and a person with disability. Moreover, *Section 14 (3) (a)* of this Act

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[75] *Supra* note 71.

[76] It may be important to note here that this chapter was required to be included in the *National Trust Act* because after the *Mental Health Act 1987* excluded mental retardation from its purview there was no law regulating the guardianship of 'persons with mental retardation'. This omission was in no way considered as a conferral of capacity on the excluded group. Instead, parents and careers were continually confronted with legal hurdles especially in management of property once their child became a major. They could not manage the child's property due to majority and the child was not allowed to manage his or her property due to the attribution of legal incapacity on persons with mental disability.

[77] According to *Section 13 (2)* of the Act the Local Level Committee shall consist of a registered organization , the District Magistrate and a person with disability.

requires that a guardian is to be appointed only if required and only for those matters in which the person with a disability needs assistance.

This issue of legal incapacity is not only limited to the management of personal affairs but it also features in several other formal arrangements. For example, a contract may be nullified due to the absence of contractual capacity in one of the parties; or a guardian *ad litem* may be appointed for a party if such party is considered to be 'mentally infirm' or of 'unsound mind'.

Surprisingly, guardians have also been appointed not just for person with a psychiatric diagnosis, but also for persons found to be 'deaf and dumb'. The disability of hearing and speech impairment also assumes importance in criminal proceedings, which provide the procedure to be adopted when the accused are 'persons who though not of unsound mind cannot be made to understand a criminal proceeding.' Despite the lack of the understanding of the accused, the court is required to proceed with the inquiry or trial. However if such proceeding results in a conviction, then the matter of lack of understanding of the accused is to be reported to the High Court to enable it to determine whether the accused has had a fair trial and whether a conviction should be sustained.

The existence of disability does not always amount to lack of understanding although in a number of cases the Court has drawn this inference.[78] In fact the court is required to find out how do the families of the person with disability communicate with him or her and to endeavour to see whether the accused can be made to understand the proceedings.[79] In order to aid understanding, courts should make available appropriate interpretation facilities.[80]

Detailing the side effects of the 'incompetency labelling', Bruce Winck has found that it enhances an individual's helplessness. [81] Instead of causing persons to raise the bar, it results in their losing the skills they possess. Winck further holds that the finding of incompetence enhances the social stigma subsisting with psychosocial disability. In a comprehensive study of the Indian Laws relating to 'persons with mental illness', Dhanda has found the 'person with mental illness' virtually absent from legislative discourse on insanity and only peripherally present in judicial articulations. [82] Even the patterns of active courts show persons with mental illness as a group on whom (and not for whom or with whom) special laws have been made. Dhanda further finds that the *ab initio* de-recognition of transactions entered into by persons of unsound mind creates a vested interest in mental illness and gives the legal

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[78] *Rex vs Goonga* [AIR 1950 All 143]; *King vs Arakhit* [AIR 1953 Ori 30]; *State vs Genda* [AIR 1954 MB 35]; in re *Padmanabhan Nair* [AIR 1957 Ker 9]; in re *Sankaralingam* [AIR 1957 Mad 24]; in re *Peethambaran* [AIR 1959 Ker 165]; *State vs Radhamal* [AIR 1960 Bom 526]; *State of Kerala vs Challian Kottan* [(1960) 2 Ker L R 206]; *State vs Mookama* [AIR 1964 Mys 182] ; *State vs Kampu Shetty* [AIR 1965 Mys 95];
In re *Oomai* [AIR 1955 NUC (Mad) 2448] the court found it unsafe to convict a deaf and dumb person on the basis of gestures alone. The Court further ruled that it could not then be presumed that a 'deaf and dumb' cannot be tried and convicted. Even as in AIR 1953 *Ori* 30 the court ruled that if the accused is 'deaf and dumb' there is presumption as to absence of mind.

[79] [AIR 1957 Ker 7].

[80] Thus for example in re *Sankaralingam* [AIR 1957 Mad 24] the accused was made to understand proceedings with the help of a teacher in the deaf and dumb school.

[81] Winck , Bruce 'The Side-Effects of Incompetency Labelling and its Implications for Mental Health Law' *Psychology Public Policy and Law*, 1(1) 6-42 (Mar 1995)

[82] Dhanda, Amita *supra* note 32.

construct of 'unsoundness of mind' an existence independent of its medical determination.

In the face of these findings one can say that the legal construction of incapacity is discriminatory. This is the contention that was mounted by the World Network on Users and Survivors of Psychiatry. *Article 9* of the *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* has addressed this concern by declaring that all persons with disabilities are possessed of full legal capacity.[83] And for persons who find it difficult to take decisions it would be more enhancing of respect and dignity to accord recognition to supported decision-making and advance legal directives.

In the circumstances it may be worthwhile to consider:

- The constructed nature of legal capacity and how different groups at different points of time have been found to possess or not possess legal capacity;
- The difference between ability to take a decision and wisdom of a decision;
- Dignity of risk (considering that a certain level of peril subsists in all human activities) an integral component of human dignity;
- The inherent worth to err and learning from failures and mistakes;
- The difference between supported and substituted decision-making; and
- Would the plea of incompetence by any means can safeguard and protect a person with disability .

Incapacity to Access Justice

As already mentioned, the right to equality requires both sameness of treatment and accommodation of difference. Inference can be drawn that the legal construction of capacity discriminates on the ground of disability and that it primarily impacts upon persons with psychiatric and intellectual disabilities but is not confined to them. Even if other persons with disabilities are not explicitly disqualified, the indifference to the distinct means of communication and mobility is widespread and impinges upon their ability to act before the law.

In this respect the effort by the United Nations to elaborate a Convention on the theme of disability may provide an opportunity to reconstruct legal capacity by introducing continuum of measures necessary to exercise it.

10.4 Freedom from Torture or Cruel, Inhuman or Degrading Treatment

10.4.1 International Standards

Protection against torture and from inhuman or degrading treatment provides a shield of immunity ensuring integrity of body and mind. *Article 5* of the Universal Declaration categorically declares:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

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[83] See *Article 9* of the Report of the Working Group to the Ad Hoc Committee on a *Comprehensive and Integral Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* *< http://www.un.org/esa/socdev/enable/documents/ahcdocs03/ahc2draftres.pdf>.*

Article 7 of the *ICCPR* guarantees the right not to be subjected to torture, or to cruel, inhuman or degrading treatment of punishment.

The HRC in its *General Comment No. 20* clarifies that the prohibition in *Article 7* relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. The Committee further notes 'the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as *an educative or disciplinary measure*' (emphasis added). It also emphasizes protection of *children, pupils and patients in teaching and medical institutions.*

People with disabilities – and especially those who live in institutionalized settings – are particularly vulnerable to inhuman or degrading forms of treatment. The clarification by the Committee is thus of profound importance ensuring that people with disabilities retain their physical and psychological integrity.

In order to ensure effective prohibition of torture and inhuman or degrading treatment, the United Nations General Assembly has adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*CAT*).

Article 1 of the *CAT* offers an authoritative definition of torture, which has the potential to cover such instances of treatment that are peculiar to persons with disabilities. Defining torture the *CAT* says:

> [T]he term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 16 outlines the duty of the States to prevent cruel, inhuman or degrading treatment or punishment. In the absence of a clear definition of inhuman and degrading treatment, prevention from it has serious question marks. It is hoped that the supervisory committee established under the *CAT* would throw some light in this direction through the means of general comments etc.

The conditions of institutions, particularly mental health institutions have been under the scanner and many weaknesses in regulations and standards have surfaced. *Article 11* of the *CAT* can be creatively applied as it lays down:

> Each state party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

If this provision is read with *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* (*MI Principles*) it may serve as an excellent guide to prevent physical and mental torture of institutionalized persons with disabilities.

Prevention from torture, inhuman and degrading treatment also involves protection against medical or scientific experimentation without free consent. *Article 7* of the *ICCPR* lays down,

> No one shall be subjected without his free consent to medical or scientific experimentation.

Similarly *Principle 11* of the *MI Principles* states,

> Clinical trials and experimental treatment shall never be carried out on any patient without informed consent, except that a patient who is unable to give informed consent may be admitted to a clinical trial or given experimental treatment, but only with the approval of a competent, independent review body specifically constituted for this purpose.

Somehow these safeguards have not been as effective in affording protection to persons with psychiatric or intellectual disabilities. This could also be attributed to an assumption in most domestic laws that persons with mental disabilities are not competent before the law. Therefore, unless the issue of legal capacity is not settled in clear terms these safeguards may not prove effective. In this respect the current effort towards elaborating a new convention on the theme of disability holds great promise.

The global response to prevention of torture has manifested in various forms. In this regard the office of *Special Rapporteur on Torture* was created by resolution 1985/33 of the United Nations Commission on Human Rights. The United Nations has also instituted *Fund for Victims of Torture* pursuant to General Assembly resolution 36/151 of 16 December 1981. The purpose of the fund is to provide medical, psychological, social, economic, legal, humanitarian and other forms of assistance to victims of torture and members of their families. According to Quinn the fund also welcomes applications for : projects concerning the social or economic reintegration of torture victims into society, including vocational training; projects to organize training courses, seminars or conferences for health or other professionals providing assistance to victims; and projects to carry out investigations or studies or to publish newsletters.[84]

10.4.2 Domestic Standards

Article 21 of the Constitution of India, has been at the foundation of the courts' efforts at reforming the criminal justice system as well as in preventing cruel and inhuman practices. The courts have repeatedly stressed that convicted persons are sent to prison as a punishment and by no means should the treatment in the prison deprive them of their dignity. For example *Section 30 (2)* of the Prisons Act, which required that all persons sentenced to death had to be compulsorily kept in solitary confinement, was held unconstitutional[85] . The court also frowned upon the use of bar fetters when clamped by prison authorities arbitrarily and without observance of procedural safeguards.[86]

The courts' insistence on the basic human rights of detenus has caused it to severely curtail the use of handcuffs.Thus, in *Prem Shankar Shukla vs Delhi Administration* [87] the Supreme Court has held that it would

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[84] Quinn, Gerard and Christina Burke, *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002): Chapter 6, pp. 135-136.

[85] *Sunil Batra vs Delhi Administration* [AIR 1978 SC 1675].

[86] Ibid.

[87] *Prem Shankar Shukla vs Delhi Administration* [AIR 1980 SC 1535].

be unreasonable to use handcuffs or other hoops unless the State is able to make out that no other practical way of forbidding escape is available. And in *D K Basu vs State of West Bengal* [88] the Court found custodial death to be one of the worst crimes that could be practised in a civilized society governed by the rule of law. It therefore devised a detailed set of directions which would usher a culture of accountability and thus protect detainees from the dangers of custodial lawlessness.

In stressing on the rights of detainees, undertrials and prisoners, the Court has in particular underscored protection to the rights of those who are in a situation of disempowerment. It is this same alignment with the weak and defenceless which caused the Supreme Court to take *suo motu* action when twenty-five 'mentally ill inmates' died in a private asylum fire. They were unable to escape because their hands and feet were in chains. The court did not only seek an explanation from the Tamil Nadu government, but required all State Governments of India to ensure that no 'mentally challenged persons' are kept chained or in unlicensed institutions. It required

> [T]he central and state governments to undertake a comprehensive awareness campaign with a special rural focus to educate people as to provisions of law relating to mental health, rights of mentally challenged persons, the fact that chaining of mentally challenged persons is illegal and that mental patients should be sent to doctors and not to religious places such as temples or dargahs.[89]

It could be debated whether the court in issuing the aforesaid direction had moved from the realm of principles to the sphere of programmes. The ruling definitely points how *Article 21* has and can be employed to bar cruel and inhuman treatment of persons with disabilities.

Article 21 has been relied upon by a private psychiatrist to file a petition on behalf of persons with psychiatric illness[90] requesting, amongst other things, that the court should issue appropriate directions to each of the state governments and union territories to forthwith ban the use of unmodified/ direct ECT [electro-convulsive therapies] in institutions whether private or State, and only administer modified ECT with the consent of the mentally ill patient or if recommended by a medical board comprising of at least one medical practitioner, one social worker and one member of an NGO.

It is pertinent to recall here that majority of the countries in the world have discontinued the practice of ECT. Its administration has a profound impact and it induces fear psychosis — a form of mental torture. 'Torture conjures up for most people an image of some of the most cruel forms of physical and psychological suffering such as the extraction of fingernails, the administration of electric shocks and mock executions.'[91]

Subsequent to the PIL by Saarthak, interventions have been filed by the Indian Psychiatric Society, All India Association of Private Psychiatrists, and Delhi Psychiatric Society. All these applications purport to

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[88] *D K Basu vs State of West Bengal* [AIR 1997 SC 610].

[89] Orders of the Court in Feb and Oct 2002 in Writ Petition (civil) No 334 of 2001.

[90] *Saarthak Registered Society vs Union of India*, Writ Petition (Civil) No 562 of 2001.

[91] Gerard Quinn and Christina Burke. *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability*: In Chapter 6, pg.123.

[91] *Sunil Batra vs Delhi Administration* [AIR 1978 SC 1675].

establish that the ECT is an efficacious and safe treatment in a number of mental illnesses. These affidavits also assert that the life risk factors were higher for the modified ECT because of the complications which could happen due to anaesthesia. There is strong objection to a medical board regulating the administration of modified ECT on the ground that the board did not have the expertise to guide the decision and moreover their intervention would needlessly delay treatment.

Another grim aspect of this case is that the consumer's narratives on the ECT experience have neither been cited nor summoned by the Court. This can be attributed to the entrenched legal construction and a disqualifying legal regime. The matter is being played out as a scientific controversy instead of a human rights issue.

Statutory Protection

In addition to constitutional provisions, *Section 81(1)* of the *Mental Health Act 1987* lays down that 'No mentally ill person shall be subjected during treatment to any indignity (whether physical or mental) or cruelty.' Thus, the section does not place a general embargo on indignity or cruelty to any mentally ill person; it does so only during treatment.

In an effort to address the problem of implementation deficits — a situation where a norm is formulated but not implemented — the Saarthak petition had also asked the Court to seek information from various state governments on the use of restraints, solitary confinement and cells. The state governments in their replies have affirmed that only restraints of cotton bandages were used. Solitary confinement whenever employed was a strictly regulated exercise.

Section 25 of the *Mental Health Act* allows for a magisterial complaint to be instituted if any 'mentally ill person' is not under proper care and control or is ill treated or neglected. This complaint can be lodged by the in-charge of a police station or any other private person. Subsequent to inquiry, the magistrate can summon the offending relative or other person. If the person in charge or relative is legally bound to maintain the 'mentally ill person', the magistrate can order such persons to do their duty. On their failure to comply with the magistrate's order a fine of up to rupees two thousand can be imposed. Despite these orders, if the person legally bound to maintain the 'mentally ill person' fails to maintain him or her, or if there is no person who is legally obliged to maintain the 'mentally ill person', then *Section 25 (5)* allows for the compulsory institutionalisation of the ill person.

This section once again shows that the bar on cruelty and inhuman treatment operates on a discourse of duty. Thus, the primary duty of taking proper care and treatment is placed on relatives and the duty to ensure due observance of this obligation has been placed on police officers and private persons. The 'mentally ill person' once again is not perceived to be even able to protest or complain.

The *Mental Health Act 1987* does not define abuse or neglect. *Section 17* of the *National Trust Act* allows a parent, relative or registered organization to move the concerned authority for removal of a guardian if they find that the guardian is abusing or neglecting the person with disability. *Rule 17 (1) (vi)* describes the various acts of commission and omission which shall constitute abuse or neglect on the part of the guardian. The named acts are: solitary confinement of person with disability in a room for a long

period of time; chaining; beating; sexual abuse; long deprivation of physical needs such as food, water and clothing; no provision or non-compliance of rehabilitation or training programmes specified by experts in the field of disability rehabilitation; and lack of facilities or no provision of trained or adequate staff for the training and management needs of persons with disabilities.

The *National Trust Rules* need to be scrutinised to ask:

- Should open textured terms such as abuse and neglect used in the Act be exhaustively defined in the Rules?
- Is it correct to describe non-compliance of rehabilitation or training programme as abuse? A query which needs to be raised because any effort to compulsorily implement these rules could be questioned on the ground of *ultra vires*, meaning that the rule making authority has gone beyond its mandate and hence the rules were beyond its jurisdiction.

It may be significant to ask

- What are the legislative safeguards against torture? Do they apply to persons with disabilities?
- Are there any factors that inhibit persons with disabilities from using the law?
- What specific measures have governments taken to prevent the use of torture and other forms of cruel, inhuman or degrading treatment in the case of persons with disabilities?
- Can a decision on the cruelty of a treatment be decided without the participation of the recipients of the treatment?
- Are the views of users and survivors of psychiatry being devalued because of the legal attribution of incompetence?
- Are persons with disabilities discriminated against by reason of their disability?

10.5 Freedom of Expression, Opinion and Access to Information

10.5.1 International Standards

The UN recognized the right to freedom of information as early as 1946 when the UN General Assembly during its first session adopted Resolution 59(1), which stated:

> Freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the UN is consecrated.

The Universal Declaration of Human Rights (UDHR) also declares:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 of the *ICCPR* further provides:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.

Persons with disabilities have the same right as all other members of the community to the freedom of expression (subject to similar limitations). However, a number of specific issues have arisen in relation to barriers which may stand in the way of full exercise of those rights by some persons with disabilities. These involve questions of linguistic rights and issues of access to information in accessible formats. It has been argued that the freedom to receive information has implicit in it a right to be able to access at least some forms of public information in a format which a person can negotiate without any restriction.

Access to information

In 1993 the UNHRC established the office of the *UN Special Rapporteur on Freedom of Opinion and Expression* to clarify the precise content of the right to freedom of opinion and expression. In 1998 the Special Rapporteur declared that the freedom of information includes the right to access information. In 2000 the Special Rapporteur laid down the principles which included: 'As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information.'

Similarly, the Inter-American Commission on Human Rights recognizes freedom of information as a fundamental right, which includes the right to access information held by public bodies.

Obligations of the State in respect of Persons with Disabilities

The Standard Rules outline the 'Target Areas for Equal Participation'. The overall importance of accessibility in the process of the equalization of opportunities in all spheres of society is highlighted in *Rule 5* saying, 'For persons with disabilities of any kind, States should (a) introduce programmes of action to make the physical environment accessible; and (b) undertake measures to provide access to information and communication. The following guidelines are outlined for access to information and communication:

- Persons with disabilities and, where appropriate, their families and advocates should have access to full information on diagnosis, rights and available services and programmes, at all stages. Such information should be presented in forms accessible to persons with disabilities.
- States should develop strategies to make information services and documentation accessible for different groups of persons with disabilities. Braille, tape services, large print and other appropriate technologies should be used to provide access to written information and

documentation for persons with visual impairments. Similarly, appropriate technologies should be used to provide access to spoken information for persons with auditory impairments or comprehension difficulties.

- Consideration should be given to the use of sign language in the education of deaf children, in their families and communities. Sign language interpretation services should also be provided to facilitate the communication between deaf persons and others.
- Consideration should also be given to the needs of people with other communication disabilities.
- States should encourage the media, especially television, radio and newspapers, to make their services accessible.
- States should ensure that new computerized information and service systems offered to the general public are either made initially accessible or are adapted to be made accessible to persons with disabilities.

The *Biwako Millennium Framework for Action towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific (2002 – 2013)* was adopted by Resolution 58/4. Governments in the region defined seven priority policy areas for action, which, *inter alia*, include access to information and communications.

The five targets set out in the *Biwako Millennium Framework* under the priority action include:

- By 2005, persons with disabilities should have at least the same rate of access to the Internet and related services as the rest of the citizens in a country of the region.
- International organizations (e.g., International Telecommunication Union, International Organization for Standardization, World Trade Organization, World Wide Web Consortium, Motion Picture Engineering Group) responsible for international ICT standards should, by 2004, incorporate accessibility standards for persons with disabilities in their international ICT standards.
- Governments should adopt, by 2005, ICT accessibility guidelines for persons with disabilities in their national ICT policies and specifically include persons with disabilities as their target beneficiary group with appropriate measures.
- Governments should develop and coordinate a standardized sign language, finger Braille, tactile sign language, in each country and to disseminate and teach the results through all means, i.e. publications, CD-ROMs, etc.
- Governments should establish a system in each country to train and dispatch sign language interpreters, Braille transcribers, finger Braille interpreters, and human readers and encourage their employment.

In the 2004 the Ad-hoc Working Group preparing *Draft on Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* identified a number of these issues in draft *Article 13*, which proposed that States be obliged to take steps to ensure that persons with disabilities can:

- exercise their right to freedom of expression and opinion through Braille, sign language, and other modes of communication of their choice, and to seek, receive and impart information, on an equal footing with others, including by:

  (a) providing public information to persons with disabilities, on request, in a timely manner and without additional cost, in accessible formats and technologies of their choice, taking into account different kinds of disability;

  (b) accepting the use of alternative modes of communication by persons with disabilities in official interactions . . .

10.5.2 Domestic Standards

Article 19(1)(a) of the Constitution of India provides that all citizens shall have the right to freedom of speech and expression. As all other rights under *Article 19*, this freedom is not absolute. *Article 19(2)* allows the continuance of existing laws and enactment of future laws so long as any restriction on the exercise the right is reasonable and 'in the interests of the sovereignty and integrity of India, the security of state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement of an offence.'

In *Sakal Papers*[92] the Supreme Court had emphasised the primacy of the right to freedom of speech and expression by stressing that the court shall not allow the right to be restricted on any ground other than that specified in *Article 19(2)*. Further, whilst the restrictions shall be narrowly construed, the right shall be liberally interpreted. This preference was accorded to the freedom of speech and expression by the Court because the functioning of a healthy democracy is dependent on the exchange of ideas, which requires there should not be any unnecessary curbs on this freedom.

The same preferred status that the Court accorded to freedom of speech and expression caused it to frown upon any state initiatives which curbed freedom of the press and consequently muzzled a major medium for dissemination of information to the people. The Court ruled that such information was integral to the effective exercise of the freedom of speech and expression.[93]

If the ruling of the Court in *Bennett Coleman vs Union of India* [94] is logically extended, it could be argued that citizens with disabilities should be provided information by methods and through a medium which they can access. Without such information citizens with disabilities cannot have the informed understanding of issues which is required for them to effectively exercise their freedom of speech and expression. Further, only if persons with disabilities exercise this freedom will their perspective permeate disability law and policy.

It is therefore necessary to highlight the following:

- There is an integral relationship between accessible information and freedom of speech and information.

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[92] *Sakal papers vs Union of India* [AIR 1962 SC 305].
[93] *Bennett Coleman vs Union of India* [AIR 1973 SC 106].
[94] Ibid.

- The non-recognition of sign language, Braille script and other modes of communication is a restriction on the freedom of speech and expression.
- As this restriction results in a total loss of freedom, it cannot be considered reasonable.

The Supreme Court has in various judgments given a broad interpretation to this right, guaranteeing this right as a right to access official information and has equated it with the right to life and liberty.

The linkage between the right to life and liberty, guaranteed by *Article 21* of the Constitution, and the right to know was affirmed in the case of *Reliance Petrochemicals Ltd. vs Proprietors of Indian Express Newspapers Bombay Pvt. Ltd*[95], where Justice Mukharji stated:

> We must remember that the people at large have a right to know in order to take part in a participatory development in the industrial life and democracy. Right to know is a basic right to which citizens of a country aspire under Article 21 of our Constitution.

The principle that the public has a right to receive information has been clearly enunciated in *Indian Express Newspapers (Bombay) Pvt. Ltd. vs Union of India* [96], wherein the Court held,

> The basic purpose of freedom of speech and expression is that all members should be able to form their beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know.

The right to know has been reaffirmed in the context of environmental issues too, which have an impact upon people's very survival. Several High Court decisions have upheld the right of citizens' groups to access information where an environmental issue was concerned. For example, in different cases the right to inspect copies of applications for building permissions and the accompanying plans,[97], and the right to have full information about the municipality's sanitation programme [98] have been affirmed.

The overall impact of these decisions has been to establish clearly that the right to freedom of information, or the public's right to know, is embedded in the fundamental rights provisions of the Constitution.

Right to Information as recognized in various national and international laws, treaties, conventions and as interpreted by the courts gain greater relevance when they are seen in the context of persons with disability. For persons with disability, information is an integral part of enjoying any of the fundamental rights like right to education, right to employment, right to health, right to life, right to family, etc. Information for persons with disability means communicating with the world. In the absence of a distinct recognition of sign language, Braille and other alternative forms of communication, the whole infrastructure that exists for seeking, receiving or imparting information becomes irrelevant for persons with disability. Therefore, for persons with disability the right to information cannot be safeguarded without providing right to access information.

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[95] *Reliance Petrochemicals Ltd. vs Proprietors of Indian Express Newspapers Bombay Pvt. Ltd*, [AIR 1989 SC 190].
[96] *Indian Express Newspapers (Bombay) Pvt. Ltd. vs Union of India* [(1985) 1 SCC 641].
[97] *Bombay Environmental Action Group vs Pune Cantonment Board* Bombay High Court, A.S. Writ Petition No. 2733 of 1986.
[98] *L.K.Koolwal vs State of Rajasthan* [AIR 1988 Raj 2].

10.6 Freedom of Association

10.6.1 International Standards

'The value of solidarity is based on an acknowledgement that mutual ties and obligations exist between people by virtue of their shared concerns.' [99] This recognition is central to the concept of development and thus freedom of association is placed on a high pedestal both in the human rights regime as well as on the development agenda.

Article 20 of the *UDHR* declares that everyone has the right to freedom of peaceful assembly and association. In clause (2) a useful clarification in respect of this freedom is enshrined which points to the suprimacy of self-determination thereby stating that no one may be compelled to belong to an association.

The *ICCPR* not only reaffirms this freedom in *Article 22* but also outlines conditions in which the freedom must remain uncompromised. At the same time, circumstances in which the freedom could be partially and fully suspended have been expressed with suggesting means with which suspension could be achieved.

Article22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

A detailed discussion on Freedom of Association and Protection of the Right to Organize is also available in *Convention (No. 87)* concerning Freedom of Association and Protection of the Right to Organize.[100]

The freedom of associations for minorities and members of other weaker sections plays an instrumental role in the maturation of democracies. Its importance is adequately reflected throughout the human rights regime. For example the *CERD* in *Article 5 (d) (ix)* states 'everyone has a right to freedom of peaceful assembly and association.' The *CRC* in *Article 15* recognizes the rights of the child to freedom of association and to freedom of peaceful assembly. Considering that certain cultural practices and religious beliefs could

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[99] Quinn ,Gerard and Theresia Degener *with* Anna Bruce, Christine Burke, Dr. Joshua Castellino, Padraic Kenna, Dr. Ursula Kilkelly, Shivaun Quinlivan *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability*..

[100] www.unhchr.ch/html/menu3/b/j_ilo87.htm .

interfere with this freedom of the children, the convention obliges the States to ensure that no restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Persons with disabilities are the most qualified and best equipped to support, inform and advocate for themselves and other persons with disabilities. Evidence suggests that the quality of life of persons with disabilities, and of the broader community, improves when disabled persons themselves actively voice their concerns and participate in decision-making. Self-help organizations are the most qualified, best informed and most motivated to speak on their own behalf concerning the proper design and implementation of policy, legislation and strategies which will ensure their full participation in social, economic, cultural and political life and enable them to contribute to the development of their communities.

Rule 18 of the Standard Rules advances this concept by obliging the States to harness knowledge and expertise of disability organizations in planning and policy formulation. The rule *inter alia* lays down:

- States should recognize the right of the organizations of persons with disabilities torepresent persons with disabilities at national, regional and local levels. ...
- States should encourage and support economically and in other ways the formation and strengthening of organizations of persons with disabilities, family members and/or advocates. States should recognize that those organizations have a role to play in the development of disability policy.
- The role of local organizations of persons with disabilities should be developed and strengthened to ensure that they influence matters at the community level.

The right to association raises the issue of access to public and private places where people meet. Disabled individuals need to have the opportunity to join political, social or cultural associations and to form their own organizations.

The *Biwako Millennium Framework* identifies seven priority areas for action, and self help organizations of persons with disabilities is on the top of the list. The key targets under the framework are:

> Target 1: Governments, international funding agencies and non-governmental organizations (NGOs) should, by 2004, establish policies with the requisite resource allocations to support the development and formation of self-help organizations of persons with disabilities in all areas, and with a specific focus on slum and rural dwellers. Governments should take steps to ensure the formation of parents associations at local levels by the year 2005 and federate them at the national level by year 2010.
>
> Target 2: Governments and civil society organizations should, by 2005, fully include organizations of persons with disabilities in their decision-making processes involving planning and programme implementation, which directly and indirectly affect their lives.[101]

[101] www.unescap.org/esid/psis/disability/**bmf**/**bmf**.html .

The freedom of association has gained currency across the sectors including amongst the economists. Nobel laureate Prof. Amartya Sen[102] in his analysis of development has traced the solidarity of people as vital to change. Emphasizing the agency of women he points out, 'any practical attempt at enhancing the well being of women cannot but draw on the agency of women themselves in bringing about such a change.'

The felt and expressed recognition of concerns coupled with collective action influences the course of development and results in reshaping the structures of society. Therefore, as a precondition, Degener highlights the issue of access to public and private places where people meet[103].

Thus, it could be summarized that the freedom of association for persons with disabilities means access to infrastructure, public information, space for participation in policy decision, and recognition of their linguistic rights and other means of communications.

10.6.2 Domestic Standards

Article 19 (1) (c) of the Indian Constitution allows all citizens to form associations or unions. This right can be restricted by the State for sovereignty and integrity of India, public order and morality. Of all the freedoms, it is the exercise of this freedom which has contributed to the creation of a group identity for persons with disabilities and strengthened the disability rights movement. It is the exercise of their rights of association which has allowed persons with disabilities to agitate for their rights.

As already mentioned, the *Persons with Disabilities Act* has provided for the economic rights of persons with disabilities by requiring appropriate governments to formulate suitable schemes. These schemes may never have been formulated but for some very persistent advocacy by the organizations of persons with disabilities.

Henry Shue in his treatise on Basic Rights has categorised the right to association as a basic right.[104] He defines a basic right as that right which has to be guaranteed before other rights can be obtained. The disability rights movement in India establishes the veracity of this statement. Disability advocacy can be credited with a number of disability empowering initiatives such as the enactment of the *Disability Act* or the inclusion of disability as a category in the census or making real a number of economic rights incorporated in the *Disability Act*.

The basic nature of the freedom of association is also demonstrated by the fact that this is one freedom which unlike, for example, freedom of speech and expression, can be exercised by persons with disabilities without seeking any accommodation from the non-disabled world. It is the right of association which substantially contributes to the creation of disability identity, culture and pride.

In addition to the freedom of association guaranteed in the Constitution, there are some statutory provisions which can also be enumerated as acknowledging at least the representational value of association for

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[102] Sen, Amartya *'Development as Freedom'* (New York, 1999).

[103] Degener, Theresia *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability*: Chapter 4, pp. 56.

[104] Shue, Henry *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1996).

persons with disabilities. For example, the members of the Board of the National Trust shall be elected by registered disability organisations and the *Persons with Disabilities Act* inducts 'five persons as far as practicable'[105] in the central and states coordination committees (a multi-sectoral forum for planning). *Section 11 (2)(d)* of the *National Trust Act* allows the utilisation of trust funds for the development of self-help groups of persons with disabilities to pursue the realisation of their rights.

In the face of these advocacy advantages emanating from freedom of association it would be appropriate to ask:

- Should this representation on the Board of the National Trust be only accorded to associations of persons with disabilities?
- Can service organisations or associations of professionals be allowed representation?
- Can representation be accorded to associations of families and caregivers?

10.7 Right to Marry and Found a Family

10.7.1 International Standards

Article 23 of the *ICCPR* affirms the right to marry and to found a family. *Articles 23(2)* and *(3)* provide:

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.

Recognizing that the family is the natural and fundamental group unit of society, the *ICESCR* in *Article 10(1)* mandates, 'The widest possible protection and assistance should be accorded to the family, … particularly for its establishment and while it is responsible for the care and education of dependent children….'

The *General Comment No. 5* of the *CESCR* observes that the rights of persons with disabilities to marry and have their own family are frequently ignored or denied (para 30).

Rule 9 of the *Standard Rules*, while elaborating on the issue of family life for persons with disabilities, calls upon states to 'ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood.'

The discrimination faced by persons with disability in the enjoyment of these rights is also reflected in *General Comment 19* of the *HRC* whereby the committee asks the States to indicate in their reports, 'whether there are restrictions or impediments to the exercise of the right to marry based on special factors such as degree of kinship or mental incapacity.' Further, the Committee (para 5) has underlined that '[t]he right to found a family implies, in principle, the possibility to procreate and live together.' This and the consequent

[105] It may be of interest to point out that the Ministry of Welfare in August 1998 appointed a Committee to suggest amendments to the *Persons with Disabilities Act* after consulting with persons with disabilities. One representation the Amendment Committee received from across disability groups and from different regions of the country was to replace 'as far as practicable' with 'necessarily'. This amendment request underscores how persons with disability believe that their viewpoint would dictate policy only if they are present in significant numbers in decision-making bodies. See Report of the Amendment Committee (Ministry of Social Justice and Empowerment April 1999).

equal rights of persons with disabilities who are parents to the guardianship of their children are also guaranteed.

The working group preparing the *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* has suggested explicit protection of rights related to parenthood in the draft convention similar to *Article 16(1)(f)* of *CEDAW*, which reads:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: … (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.

10.7.2 Domestic Standards

Marriage and Divorce

In view of the fact that India does not have a uniform civil code each community has its own family law. A cursory analysis of these provisions shows that except for Muslim law, unsoundness of mind operates as a disqualification to marry and a ground for divorce in all personal laws. In Muslim law too a Muslim woman can obtain divorce if her husband has been incurable of unsound mind for more than two years.

Such provisions have been by and large formulated from the standpoint of the non-disabled as the options to seek annulment or divorce have been provided in their favour. It is significant to note that the various laws presume that a person with mental and psychosocial disability lacks the capacity to marry and start a family; and to that end they are also disqualified from adopting a child.

A plain reading of *Section 5(2)* of the *Hindu Marriage Act, 1955* confirms this view :

> A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely-
> (ii) at the time of the marriage, neither party-
> - is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
> - though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
> - has been subject to recurrent attacks of insanity.

Section 12(1), the Act lays down conditions of voidable marriage, which includes conditions specified in *Section 5(2)*. Similarly, in *Section 13(1)(iii)*, the Act includes the following grounds of divorce: 'incurable unsoundness of mind, continuous or intermittent mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent, and virulent and incurable form of leprosy.'

The human rights and the disability rights organizations from time to time have expressed their concern for the possible misuse of these provisions of the *Hindu Marriage Act*. A recent case reported by *Tehelka*,

a media company, has brought to fore the abusive use of the Act. A senior psychiatrist, Dr S. K. Gupta, employed at the Agra Mental Institute and Hospital, on the payment of bribes by husbands fabricated at least ten certificates of mental illness of their otherwise perfectly normal wives for securing divorce. Interestingly, these certificates were duly accepted by the courts for granting divorce. [106]

Taking in view the gravity of the offences and the ease with which they had been committed, the National Human Rights Commission of India (NHRC) issued notices to the Home Secretary, Uttar Pradesh Government, and the Director of the Agra Mental Asylum. The case was also followed up by the National Commission of Women which resulted in immediate registration of an FIR into the cases of innocent women who were victimized. Yet, the Women's Commission felt it necessary to approach the Supreme Court of India for seeking a fair, independent and speedy investigation.

The jurisprudence in the last two decades in this area reflects an inhibition on the part of the Courts to grant a decree of divorce merely on the ground of unsoundness of mind.

While deciding a divorce petition of one *Ram Narain Gupta*[107] on the ground that his wife suffered from mental disorder that rendered her unfit for married life, the Supreme Court noted that

> Section 13(1)(iii) of the Hindu Marriage Act, 1955 does not make the mere existence of a mental disorder of any degree sufficient in law to justify the dissolution of marriage. … The context in which the ideas of unsoundness of mind and mental disorder occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of the mental disorder. Its degree must be such that the spouse seeking relief cannot reasonably be expected to live up with the other.

The Court dismissed the petition maintaining, 'All mental abnormalities are not recognized as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage then no marriage would, survive in law.'

Analysing the philosophical basis of mental normalcy or the question as to *'Who is normal?',* the Court[108] said,

> Theories of mind with cognate ideas of perception and consciousness encompass a wide range of thoughts, more ontological than epistemological. Theories of mental phenomena are diverse and include the dualist concept- shared by Descartes and Sigmund Freud- of the separateness of the existence of the physical or the material world as distinguished from the non-material world with its existence only spatially and not temporarily. There is again, the theory, which stresses the neurological basis of the mental phenomenon by asserting the functional correlation of the neurological arrangements of the brain with mental phenomena. The behaviourist tradition, on the other hand, interprets all reference to minds constructs out of behaviour. Functionalism, however, seems to assert that mind is the logical state of physical systems. But all theories seem to recognize, in varying degrees, that the psychometric control over the mind operates at a level not yet fully taught to science. When a person is oppressed by intense and seemingly insoluble moral dilemmas, or when grief on loss of dear ones etch away all the bright colours of life, or where a broken marriage

[106] *www.tebelka.com* .
[107] *Ram Narain Gupta vs Rameshwari Gupta* [AIR 1988 SC 2260].
[108] Ibid.

> brings with it the loss of emotional security, what standards of normalcy of behaviour could be formulated and applied? The arcane infallibility of science has not fully pervaded the study of the non-material dimensions of being.

The Court thus held,

> Two elements are necessary to get a decree. The party concerned must be of unsound mind or intermittently suffering from schizophrenia or mental disorder. At the same time that disease must be of such a kind and of such an extent that the other party cannot reasonably be expected to live with her. So only one element of that clause is not sufficient to grant a decree.

In another case where the petitioner sought a declaration of his marriage void on the ground that he could not cohabitate with his wife for a period of about one month due to unsoundness of her mind, the Supreme Court[109] explained,

> To draw such an inference merely from the fact that the spouses had no cohabitation for a short period of about a month, is neither reasonable nor permissible. To brand the wife as unfit for marriage and procreation of children on account of the mental disorder, it needs to be established that the ailment suffered by her is of such a kind or such an extent that it is impossible for her to lead a normal married life.

Rejecting the plea, the apex court maintained,

> Merely giving a finding that the respondent was suffering from some mental disorder and she did not have cohabitation with her husband during the period they stayed together is not sufficient to comply with the condition prescribed under section 5(ii)(b) of the Hindu Marriage Act.

Parental Rights

The bias against mental disability can also be found in the *Hindu Adoption and Maintenance Act of 1956*. *Sections 7* and *8* of this Act prohibit a person from adopting a child unless the adoptive parents are of sound mind. *Section 9,* titled 'Persons capable of giving in adoption', of this Act states 'parents and guardians of children alone can give children into adoption', but in *Section 9(4)* it is stipulated,

> Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

It is thus evident that unsoundness of the mind may result in permanent separation of children from their parents. As things stand, both international and domestic laws allow the separation of child from parents if required in the best interest of the child. The question is whether the unsoundness of mind of a parent should result in permanent separation or should investments be made for setting up alternative arrangements for protection, care and rehabilitation of their children? *Section 40* of the *Juvenile Justice Act 2000* outlines a range of options for the rehabilitation and social integration of children in need. These include (i) adoption, (ii) foster care, (iii) sponsorship, and (iv) sending the child to an after-care organization. In addition, the act also envisages a child welfare committee in every district (*Sec 29*). In fact, while deciding the fate of children of sex workers the Supreme Court of India in *Gaurav Jain*[110], favoured a community based educational arrangement over institutionalization away from the mothers. It directed to form:

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[109] R. *Lakshmi Narayan vs Santhi* [(2001) 4 SCC 688].

[110] *Gaurav jain vs Union of India* [AIR (SC) 3021, 1997] Indlaw SC 2520, http://www.indlaw.com/

> Development and Care Centres to provide localised services through which the larger interests of these children can be attended to. Such Centres are to be situated in i) the vicinity of red light areas, ii) the vicinity of other areas identified as having a concentration of prostitutes, and iii) those areas where there is a concentration of communities among whom prostitution is the traditional occupation of the women and girls. These Centres will be run by voluntary organization with government fund and have Advisory and Monitoring Committees at Central, State and Local levels.

The provision of giving children away in adoption on grounds of unsoundness of mind of the parent also needs to be viewed from the changing profile of psychiatric disabilities owing to the advances in medicine and psychiatry. The *Indian Lunacy Act* was repealed due to these advancements as it had become out-moded. As a substitute the *Mental Health Act* was enacted. While stating its object the latter Act says:

> The attitude of the society towards persons afflicted with mental illness has changed considerably and it is now realized that no stigma should be attached to such illness as it is curable, particularly, when diagnosed at an early stage…

Thus, the mentally ill people are to be treated like any other sick persons and the environment around them should be made as normal as possible.

Unless the notion of 'unsoundness of mind' is guided by renewed thinking and progressive norms, the problems of discrimination based on disability would continue to deprive disabled even of their family rights. There seems no reason to separate children from the parents on having a mental illness. In fact, the need is to utilize support mechanisms to enable the children to live with their parents unless the nature and degree of disability of the mind of the parent is such that the separation becomes necessary in the best interest of child. But such a separation should be subject to periodic reviews. Ultimately, this would ensure reunion of families[111]. Both legislature and Indian judiciary accord great recognition to the maintenance of the social fabric over separation and institutionalization. Once the provisions depriving persons with psychosocial disability of their parental rights are interrogated, the *Gaurav Jain* kind of community support arrangements could be devised to enable persons with disability to exercise their parental rights.

Forced Sterilization

The embargo on persons with psychosocial disabilities is not limited to the severing of personal relationships. It is also reported that women with psychosocial disabilities are subjected to forced sterilizations and hysterectomies, both in institutions and by families. However, there is no Indian law which explicitly prohibits non-therapeutic hysterectomies of women with psychosocial disabilities.

More than a decade ago an institution in Pune performed forced hysterectomies on some inmates ranging from the age of 12-16 years. The operations were carried out in the name of promoting hygiene as the young girls were unable to manage their menstrual cycle and the attendants in the institution were unwilling to perform the job. It was further contended that this would also save the girls from sexual exploitation. A non-governmental organization moved a petition in the Bombay High Court, which caused the other

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[111] Intervention by National Human Rights Institutions at the Fifth Session of the UN-ADHOC Committee by Mohit, Anuradha (2005). www.asiapacificforum.net .

operations in the case to be stayed. The Court however has failed to pronounce on the illegality of the operations.

In the face of the family law provisions and the rampant practice of hysterectomy and sterilization, it is necessary to raise questions on

- Disqualifications to marry
- Disability as ground for divorce
- Support to persons with disability in child care etc.
- Ban on compulsory sterilizations and hysterectomies

The *CESCR* also points out that women with disabilities have the same rights to protection and support in relation to motherhood and pregnancy as other women (para 31).

10.8 Right to Respect for Privacy of Home and Correspondence

10.8.1 International Standards

Article 17 of the *ICCPR* provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

This article not only requires States to refrain from directly infringing a person's rights, but may also in certain circumstances require a State to take positive steps to ensure that a person enjoys that protection.

The similar guarantee in the European Convention on Human Rights has been used to require States to provide legal protection against sexual assault on persons with intellectual disabilities. In *X and Y v Netherlands* (1985),[112] the European Court of Human Rights considered a case in which a gap in the law meant that there was no possibility of bringing a criminal action against the person who had allegedly sexually assaulted a sixteen year-old girl with a mental disability. The only remedies available were civil and these were found to be inadequate. The Court held that a State has a positive obligation to adopt measures that give effect to the right to protection of family and private life under *Article 8* of the European Convention on Human Rights, that these measures must be effective and appropriate, and that this required the possibility of criminal proceedings in a case of such seriousness.

The guarantee in *Article 17* of the *ICCPR* can thus be drawn on to support the protection against physical and other forms of violence and abuse, in conjunction with the right not to be subjected to cruel, inhuman or degrading treatment or punishment (*Article 7* of the *ICCPR*). The article also has a more positive side so far as the protection of the right of persons with disabilities to form intimate and other relationships, which is seen as part of the right to privacy under international law, is concerned.[113]

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[112] X and Y v Netherlands, European Court and Commission on Human Rights (1985) Series A vol. 91.
[113] See *Toonen vs Australia*, Communication No.488/1992, U.N. Doc CCPR/C/50/D/488/1992.

10.8.2 Domestic Standards

The right to privacy does not find explicit mention in the freedoms enumerated in Part III of the Indian Constitution. *Kharak Singh vs State of UP*[114] held that the right of privacy is encompassed within the right to personal liberty guaranteed by *Article 21*. In *Gobind vs State of Madhya Pradesh*[115] the court again stressed the significance of the right and ruled that it should not be denied unless there is a superior countervailing interest. In *R Rajagopal vs State of Tamil Nadu*[116] the Supreme Court once again reiterated its position that the right to privacy is implicit in the right to life and liberty. At the same time, the court conceded that the right was still in a process of evolution. It is necessary to note that the three above mentioned cases elaborating on the right to privacy in India were raised in the context of police surveillance and public disclosure of the life story of a convicted prisoner. The American Supreme Court, on the other hand, has ruled on the right to privacy in cases which revolved around issues of marriage, procreation, contraceptives and child rearing.

In more recent times the Court has been required to pronounce on the question of privacy in the context of HIV infected persons. Thus, in *Mr X vs Hospital Z* the petitioner, a HIV infected person, contended that the doctors had infringed his right to privacy by disclosing his HIV infected status to his fiancée. The Court being more concerned with the social peril of the virus did not just reject the contention of the petitioner, but also ruled that the doctors were under an obligation to disclose the infected status and failure to do would render the doctor culpable. The Court's refusal to accede the right to marry to HIV infected persons was not confined to the facts of the case but was extended to HIV infected persons generally.[117] In a subsequent order the court has however curtailed the global dimension of the earlier judgment and ruled that the duty to disclose the infected status and the embargo against marriage only operated if the HIV infected person failed to disclose his infected status to the intended spouse. The ruling should not be seen as prohibiting the consensual marriage of an HIV infected person.[118]

The above developments raise issues on the relationship between the duty to disclose and the right to privacy.

10.9 Right to Participate in Political and Public Life

10.9.1 International Standards

The international human rights treaties guarantee a range of fundamental rights and freedoms which underpin the entitlement of persons to take part in political and public life. This discussion focuses on the *Article 25* of the *ICCPR* which contains a specific provision of the right of citizens to engage in political and public life on the basis of equality, including the classic political rights of standing for election, and the right to vote, as well as the right to be appointed to public positions. In addition, freedoms of association and expression are also part of the cluster of rights which are necessary for persons to exercise political rights.

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[114] *Kharak Singh vs State of Uttar Pradesh* [AIR 1963 SC 1295[.

[115] *Gobind vs State of Madhya Pradesh* [AIR 1975 SC 1378].

[116] *R Rajagopal vs State of Tamil Nadu* [AIR 1995 SC 264].

[117] *Mr X vs Hospital Z* 1998 (SC2) GJX 0820 or *Dr. Tokugha Yepthomi vs Appollo Hospital Enterprises Ltd. & Anr.* [AIR 1999 SC 495].

[118] *Mr. X vs Hospital Z* (2003) 1SCC500 .

However, in the case of persons with disabilities a broader perspective may need to be taken in relation to these guarantees, given that persons with disabilities may face additional barriers even before they get to the stage of attempting to exercise these rights. For example, a person who is blind and who cannot get to a polling station may be unable to benefit from voting methods which do not take into account her or his visual impairment; or a person who is unable to access information or to communicate readily with others by telephone may not be in a position to exercise his or her right to form a political association. So it is critical to consider issues of accessibility, resources and other matters in the context of the exercise of political rights.

Article 25 of the *ICCPR* provides:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> (c) To have access, on general terms of equality, to public service in his country.

A similar provision appears in the *CEDAW Convention*.

The Human Rights Committee has adopted a detailed general comment on the right to vote (*General Comment 25)*, a number of sections of which directly address issues related to persons with disabilities:

> 4. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. *For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.*
> …
> 10. The right to vote at elections and referendums must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. *It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements*….
>
> 12. Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice. …
>
> 14. In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are

> deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.
>
> 20. States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant. . . .Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees.

10.9.2 Domestic Standards

The *Preamble* to the Constitution of India declares India to be a sovereign democratic republic. The adoption of a democratic form of government gives to the citizens of India two major political rights: the right to vote and the right to stand for election. The extent to which any group is able to exercise its political rights is an important indicator of its integration with the political system and its participation in it. The due recognition of the political rights of persons with disabilities requires that the norms of political participation in no way exclude them and the procedures of participation are suitably modified to accommodate their needs.

Article 326 of the Constitution lays down that the elections to the House of the People and to the legislative assemblies shall take place on the basis of adult suffrage. This means that every person who is a citizen of India and who is not less than eighteen years on the date that may be fixed for elections by the appropriate legislature and is not otherwise disqualified under the Constitution or any law made by the appropriate legislature on the ground of non-residence, unsoundness of mind, crime or corrupt practice shall be entitled to be registered as a voter.

For purposes of inquiring into the political rights of persons with disabilities, it is significant to note that the Constitution allows for a law to be enacted which disqualifies persons of unsound mind from exercising their right to franchise. In execution of the constitutional sanction, *Section 16 (1) (b)* of the *Representation of People Act 1950* lays down that 'a person shall be disqualified for registration in an electoral roll if he is of unsound mind and stands so declared by a competent court.' If a person acquires the disqualification subsequent to registration, *Section 16 (2)* provides for her or his name to be struck off the electoral roll.

Ordinarily a citizen acquires a conclusive right to vote once he or she is included in the electoral roll and no objection to inclusion has been made within the allotted time. Even this principle is not applicable to 'persons of unsound mind' because *Section 62 (2)* of the *Representation of People Act 1951* expressly provides that the entry in the electoral roll would not be conclusive on franchise rights if the elector is subject to any of the disqualifications specified in *Section 16*.

The Constitution of India and the relevant election laws deny persons of unsound mind the right to vote. This disqualification does not extend to all persons of unsound mind but only to those who have been so declared by a competent court. In order to comprehend the extent of the exclusion it is necessary to ask what declaration and by which competent court will result in the disqualification. In an analysis of this provision, Dhanda has pointed out that due to the all-encompassing impact of

unsoundness of mind on legal capacity, courts are required to pronounce on unsoundness of mind in various legal contexts. However, these pronouncements, even if relevant, could not be conclusive on the question of franchise because those determinations are linked to the functional requirements of their context. For example, a person shall be considered to be of unsound mind in the contractual context if due to unsoundness of mind he is unable to understand the terms of the contract or its impact on his interests.[119]

The *Mental Health Act 1987* has a procedure by which a person could lose autonomy over self and property if, subsequent to an inquisition, the person is found to be a 'mentally ill person', and so is assumed to be unable to look after himself or herself. Depending upon the degree of incapacity, a guardian could be appointed for the person and a manager for the property. However, this finding cannot also be considered the crucial finding since a determination of unsoundness of mind subsequent to an inquisition has not been categorised as a judgement *in rem* by *Section 41* of the *Evidence Act, 1872*. By reason of this exclusion, a finding of unsoundness of mind subsequent to an inquisition cannot be a conclusive proof for other proceedings. The non-inclusion is justified on the reasoning that the unsoundness of mind is not a legal character; it is only a legal attribute whose existence has to be particularly adjudged in each context.

Following this analysis, Dhanda concludes that adjudication of unsoundness of mind in other legal contexts cannot be the basis for disenfranchising a citizen.[120] Such disenfranchisement can only occur if a person entitled to object to the inclusion of ineligible voters seeks a declaratory judgement to that effect. This responsibility may well fall on the Election Commission. Empirical studies on the exercise of the right to vote have also shown that despite the disqualification, persons diagnosed with mental illness have exercised their right to vote.

A normative disqualification which has little practical impact raises questions about:

- What is the purpose of the disqualification?
- If the disability itself is not to be the ground of exclusion, then any person who can perform the voting procedure would have the capacity. If that is the level of functioning required, then would not the process of weeding out invalid votes be sufficient?
- Does the disqualification perform any other role except for enhancing stigma and discriminating on grounds of disability?

According to *Section 3* of the *Representation of People Act 1951,* a person can stand for election only if he has the right to vote. Therefore, one of the reasons given for denying the right to vote to persons with psychosocial disability is to prevent them from standing for elections.

This situation then makes it necessary to consider:

- Is there a case for having varied standards of capacity for exercising the right to vote and to stand for election?
- Can persons with psychosocial disability be disqualified from contesting elections?
- Or will this disqualification be a discrimination on grounds of disability?

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[119] *Supra* note 32, pp 301-306.
[120] Ibid.

Reasonable Accommodation of the Electoral Environment

The above analysis described how persons with psychosocial disability have been normatively ousted from exercising their political rights. In this section we show how reasonable accommodation is essential to enable persons with disabilities to exercise their political rights.

The Kerala High Court showed inflexibility in *K.V. Solomon vs Returning Officer Vyavasaya Cooperative Society*[121] in which a blind voter moved the court to issue a direction to the returning officer to allow his agent to be present whilst he exercised his franchise. He made this request to ensure that the returning officer faithfully carried his preference. The request was turned down by the Kerala High Court on the reasoning that maintenance of secrecy was a superior principle. The court also perceived the request as demonstrating a lack of confidence in the returning officer hence saw it as unimaginable that 'the returning officer who is expected to conduct a free and fair election would go against the wish of such persons.' The Court evidently did not empathise with the agency demands of the person with disability and hence did not consider it necessary to explore methods by which both the autonomy claims of the person with disability and the secrecy requirements of the law could have been met. A ballot paper or electoral instructions in Braille were not even explored.

In contrast, in *Disabled Rights Group vs Chief Election Commissioner,*[122] the issue of access was more appropriately processed. Consequently, the Chief Secretaries of concerned States were asked to make wooden ramps available at polling booths to ensure access to wheelchairs. However, the directions were informed with pragmatism as the court required that the ramps should as far as possible be made available for the elections to be held in April 2004. For the May 2004 elections, the provision of wooden ramps was formulated in more mandatory terms. However, here too pragmatism was not abandoned, as the Court required this facility to be at least provided in cities and urban areas.

In the face of these two cases it is necessary to address following questions.

- How can the state fulfil its positive obligations of reasonable accommodation before persons with disabilities can exercise their political rights?
- Is the assistance which is to be provided to persons with disabilities a support of a substitute?

[121] *K.V. Solomon vs Returning Officer Vyavasaya Cooperative Society* [AIR 1999 Ker 191].

[122] *Disabled Rights Group vs Chief Election Commissioner* , CWP No 187 of 2004 order dated April 19, 2004.

Table 10.1
International Standards for Selected Civil Rights

	General	Specific to Disabled
Right to life	UDHR : Article 3 ICCPR: Articles 2 & 6 HRC: General Comment no 6, paras 3 - 5 European Convention on Human Rights: Articles 1 & 2	Economic and Social Council, E/CN.4/2000/3, para 97 American Convention on Human Rights: Article 4(1)
Right to Liberty and Security of the Person	ICCPR : Article 9 European Convention on Human Rights :Article 5	MI Principles: Principles 9, 11, 15 & 16
Equal Recognition as a Person before the Law and Full Legal Capacity	ICCPR • Articles 2 (1), 3, 14, 23 (4), 24 (1), 25, 26, 27 • Article 16 • Articles 6 & 14	Draft Convention on Disability Article 9
Freedom from Torture or Cruel, Inhuman or Degrading Treatment	UDHR: Article 5 ICCPR: Article 7 HRC: General Comment no 20 CAT : Articles 1, 11 & 16 MI Principles: Principle 11 United Nations Commission on Human Rights • Resolution 1985 / 33 • General Assembly resolution 36 / 151, Fund for Victims of Torture	
Freedom of Expression and Opinion and Access to Information	UN Resolution: 59 (1) ICCPR and UDHR: Article 19 UN Special Rapporteur on Freedom of Opinion and Expression 2000, UNHRC	Standard Rules: Rule 5, Rule 22 Biwako Millennium Framework for Action: Resolution 58 / 4 Draft Convention on Disability : Article 13

	General	Specific to Disabled
Freedom of Association	UDHR: Article 20 ICCPR : Article 22 CERD-:Article 5(d) CRC: Article 15	Standard Rules- Rule 18 Biwako Millennium framework- Targets for Action
Right to marry and found a family	ICCPR: Article 23 (2) (3) ICESCR: Article 10(1) CEDAW: Article16 (1)	CESCR: General Comment No. 5 HRC: Gen Comment No. 19 Draft Convention on Disability: Article 14 Standard Rules: Rule 9
Right to Respect for Privacy of Home and Correspondence	ICCPR: Article 17	European Convention on Human Rights: Article 8.
Right to Participate in political and Public Life	ICCPR: Article 25	HRC: General Comment No.25

Table 10.2
Constitution & Acts of Parliament

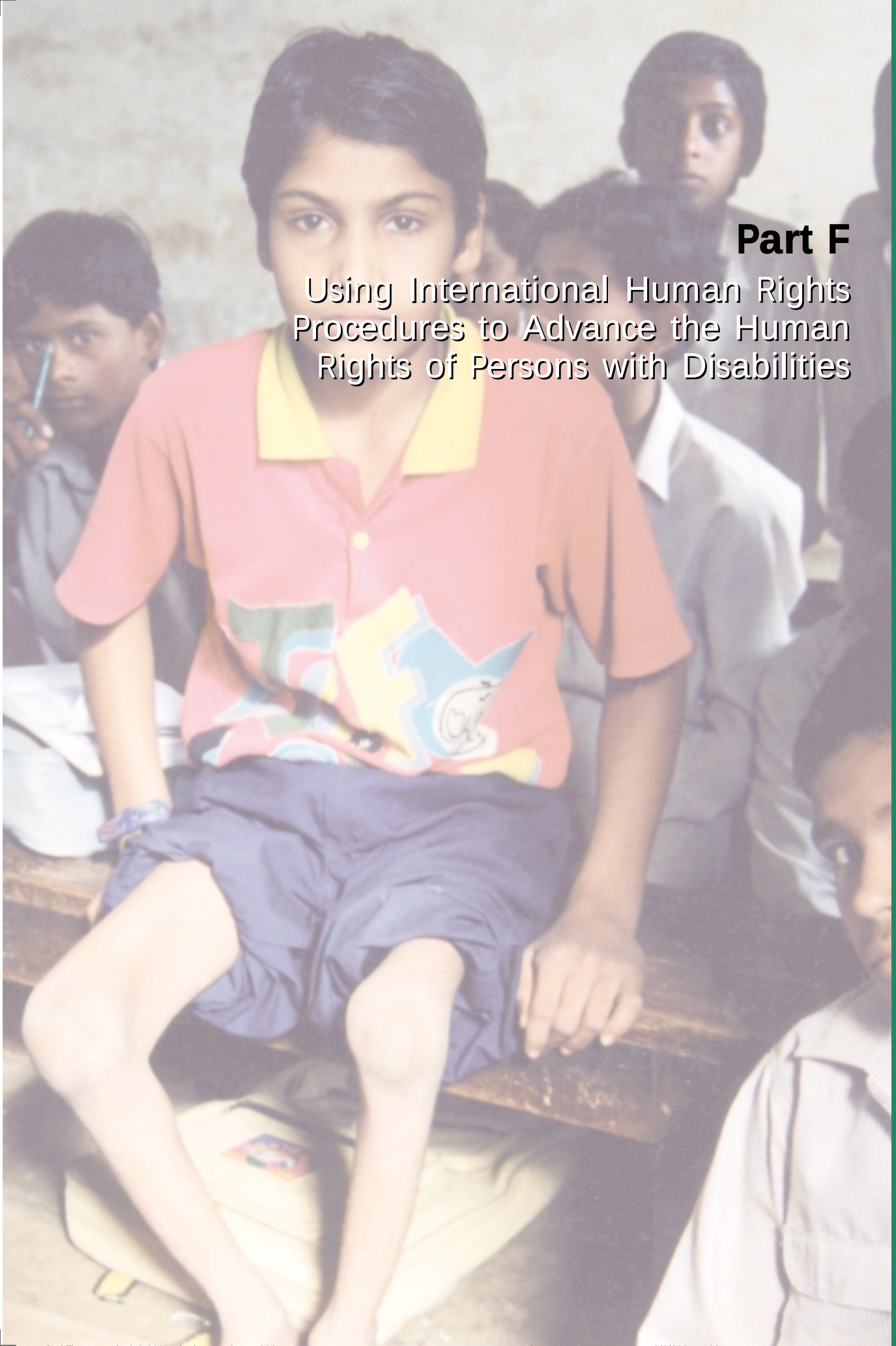
Rights	Domestic Standards	
	Constitution & Acts of Parliament	
	General	**Specific to Disabled**
Right to life	Constitution - Article 21	Preconception and Prenatal Diagnostics Techniques Act, 1994 - Section 4(3)(iv) Protection Of Human Rights Act, 1993 - Section 2(d)
Right to Liberty and Security of the Person	Constitution - Articles 21, 19(1)(d), 14 Code of Criminal Procedure - Sections 328, 330 and 335	Indian Lunacy Act, 1912 - Section 3(5), 15 and 18 Mental Health Act, 1987 replaced Lunacy Act, 1912 - Section 2(1), 16, 18(3), 19, 20(2), 22(3) and 91 Legal Services Authority Act, 1986 Gujarat Legal Practitioners for Mentally Ill Persons Rules, 2001 Persons with Disabilities Act, 1995- Sections 55 and 56 National Trust Act, 1999 – Section 11(2)
Equal Recognition as a Person before the Law and Full Legal Capacity	Constitution - Articles 14, 15, 16 and Part XVI	National Trust Act, 1999 – Section 13(2) and 14(3)(a)
Freedom from Torture or Cruel, Inhuman or Degrading Treatment	Constitution - Article 21	Mental Health Act, 1987 - Section 25 and 81(1) National Trust Act, 1999 - Section 17 National Trust Rules – Rule 17(1)(vi)

	General	Specific to Disabled
Freedom of Expression and Opinion and Access to Information	Constitution - Article 19(1)(a), 19(2), 21	
Freedom of Association	Constitution - Article 19(1)(c)	Persons with Disabilities Act, 1995 National Trust Act, 1999 - Section 11(2)(d)
Right to marry and found a family	Juvenile Justice Act, 2000 - Section 40	Hindu Marriage Act, 1955- Sections 5(2), 12(1) and 13(1)(iii) Hindu Adoption and Maintenance Act, 1956 - Sections 7, 8 and 9(4) Mental Health Act, 1987
Right to Respect for Privacy of Home and Correspondence	Constitution - Article 21	
Right to Participate in political and Public Life	Constitution – Preamble, Article 326 Representation of People Act, 1950 – Sections 3, 16(1)(b) and 16(2) Representation of People Act, 1951 – 16 and 62(2)	Mental Health Act, 1987 Evidence Act, 1872 - Section 41

Table 10.3
Domestic Standards (Court Cases) for Selected Civil Rights

	General	Specific to Disabled
Right to life	A K Gopalan vs State of Madras Francis Coralie Mullin vs Delhi Administration Begulla Bapu Raju vs State of Andhra Pradesh A V Nachane v.s Union of India P Rathinam vs Union of India Olga Tellis vs Bombay Municipal Corporation Parmanand Katara vs Union of India Mohini Jain vs State of Karnataka Paschim Banga Khet Mazdoor Sangh vs State of West Bengal Rajendra Prasad vs State of UP UnniKrishnan vs State of AndhraPradesh Attorney General of India vs Lachma Devi Jagmohan Singh vs State of UP Bachan Singh vs State of Punjab Allaudin Mian vs State of Bihar	Report by Special Rapporteur A.B Gupta vs Union of India
Right to Liberty and Security of the Person	A K Gopalan vs State of Madras Kharak Singh vs State of UP Maneka Gandhi vs Union of India	Veena Sethi vs State of Bihar Dial Singh vs Inspector General Prisons Chandigarh Abdul Kareem vs T G Nambisan, Meera Nireshwalia vs State of Tamil Nadu, Kakar vs Commandent Military Hospital Trimalgiri, Anamika Chawla vs Metropolitan Magistrate Delhi, Sheela Barse vs State of West Bengal Reg. Death of 25 chained Inmates in Asylum Fire in Tamil Nadu People's Right's Organisation vs Lt. Gov. Delhi The Gujarat Legal Practitoners for Mentally Ill Persons.

	General	Specific to Disabled
Equal Recognition as a Person before the Law and Full Legal Capacity		Indira Sawhney vs UOI Rex vs Goonga King vs Arakhit State vs Genda In re Padmanabhan Nair In re Sankaralingam In re Peethambaran State vs Radhamal State of Kerala vs Challian Kottan State vs Mookama State vs Kampu Shetty, In re Oomai
Freedom from Torture or Cruel, Inhuman or Degrading Treatment	Sunil Batra vs Delhi Administration Prem Shankar Shukla vs Delhi Administration D. K. Basu vs State of West Bengal	Saarthak Registered Society vs Union of India Orders of Court in Feb. and Oct. 2002
Freedom of Expression and Opinion and Access to Information	Sakal Papers vs Union of India Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. Indian Express Newspapers (Bombay) Pvt. Ltd. vs UOI Bombay Environmental Action Group v. Pune Cantonment Board L.K.Koolwal v. State of Rajasthan	Bennett Coleman vs UOI
Right to marry and found a family		Ram Narain Gupta vs Rameshwari Gupta R. Lakshmi Narayan vs Santhi
Parental Rights	Gaurav Jain vs Union of India	
Right to Respect for Privacy of Home and Correspondence	Kharak Singh vs State of UP Gobind vs State of MP R. Rajagopal vs State of Tamil Nadu	Mr X vs Hospital Z
Right to Participate in Political and Public Life		K.V. Solomon vs Returning Officer Vyavasaya Cooperative Society Disabled Rights Group vs Chief Election Commissioner



Part F

Using International Human Rights Procedures to Advance the Human Rights of Persons with Disabilities

NHRC

CHAPTER 11

Using International Human Rights Procedures to Advance the Human Rights of Persons with Disabilities

11.1 Introduction[1]

The proliferation of human rights standards at the international level in the last sixty years has been a striking feature of the development of international human rights law. In addition to the development of substantive norms, many bodies and procedures have been established to promote the enforcement and implementation of those norms. While within the European Convention system there has been an enforcement procedure for fifty years (and for even longer within the International Labour Organization), the elaboration of international procedures to promote the implementation of human rights standards has come about in the last twenty five years.[2]

Since disability specific instruments are in the form of 'soft law' – instruments such as declarations, guidelines, etc. — there has been no disability-specific supervisory or enforcement mechanism developed within the United Nations human rights system or its specialised agencies.[3] The adoption of a United Nations convention on the human rights of persons with disabilities seems likely in the near future, and this will very likely contain one or the other monitoring procedures. However, even under the existing international human rights system, there are opportunities to draw on the existing

[1] This chapter draws on material that appeared originally in a revised version of a chapter that originally appeared as: Byrnes, Andrew ' Towards More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures' in Rebecca J. Cook (Ed.), *Human Rights of Women: National and International Perspectives* 189 (University of Pennsylvania Press, 1994) [hereinafter HUMAN RIGHTS OF WOMEN] and in Askin K. and D Koenig (Eds.), *Women's International Human Rights Law*, vol 2 (Transnational Publishers, 2000) 79.

[2] Among the guides to the use of the United Nations, regional and other international systems of supervision, see Hannum, Hurst (Ed.) *Guide to International Human Rights Practice* (Transnational Publishers, 4th ed 2004); Women, Law & Development International and Human Rights Watch Women's Rights Project, *Women's Human Rights Step by Step: A Practical Guide to Using International Human Rights Law and Procedure to Defend Women's Human Rights* (1997) [hereinafter *Women's Human Rights Step by Step*].

[3] The Commission on Social Development has established the Special Rapporteur on Disability of the Commission to monitor and promote the implementation of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities. However, the Special Rapporteur's mandate does not direct her to forward allegations of violations of the Standard Rules or of the human rights of persons with disabilities to governments as do various special Rapporteurs of the Commission on Human Rights.

international procedures to support battles to ensure the human rights of persons with disabilities.

The purpose of this chapter is to provide an overview of international procedures which could be utilised by disability rights advocates to advance the human rights of persons with disabilities at the national level. The task of utilising international standards and procedures to advance disability rights in India is a challenging one for a number of reasons, in particular (a) the lack of disability-specific treaty norms by which India is bound (thus necessitating the use of general human rights norms and procedures); and (b) the limited number of international human rights supervisory procedures which India has accepted Nevertheless, the discussion below shows that there are a number of international procedures which India *has* accepted and which permit at least some scrutiny of the extent to which the human rights of persons with disabilities in India are enjoyed and which can be used by disability advocates in their struggles.

The chapter emphasises those procedures which are available (or might possibly become so) to those working in this area in India, but it also includes reference to other procedures of international and regional protection. Although these may not be directly used to address violations of human rights in India (though some may be in the future), the jurisprudence of these systems and its potential use in the context of Indian advocacy make it useful to refer to them.

The major focus of this chapter is the use of *international* procedures to advance human rights claims of particular importance to persons with disabilities. One of the most important ways of using international law to advance rights at the domestic law is, of course, the deployment of international standards in domestic litigation or other fora. However, as that topic is covered elsewhere in this manual, it is not addressed in this chapter. The chapter discusses the following:

- Some of the important strategic and tactical issues relating to the use of international standards and procedures
- The variety of procedures which are available at the international and regional level for receiving allegations of human rights violations, and some of the limitations and drawbacks of the various types of procedures
- Specific procedures that might be profitably used for pressing claims of violations of the rights of persons with disabilities (and which are presently under-utilised).

11.1.1 International Human Rights Law and Procedures as a Strategic Resource

Although this chapter focuses on a number of procedural and substantive aspects of international human rights practice, it does not do so out of any belief that international human rights law and procedures have a talismanic quality. Even the strongest supporters of the international human rights 'system' and its myriad procedures recognise the limitations of the system and, although there are many concrete cases in which it can be seen to have made a difference, it is frequently difficult to evaluate the importance of the role played by the deployment of international procedures. The assumption that the effort put in at the international level is a cost-effective use of time and resources is to some extent an article of faith among international human rights activists.

The most helpful way to approach the question of utilisation of international human rights mechanisms is to view them as one of a number of ways in which pressure can be exerted on governments or others in

order to achieve the specific goal of promoting the enjoyment of human rights by persons with disabilities is concerned. In order to be most effective, resort to international procedures must form part of a broader political strategy. Recourse to international bodies and procedures may provide some additional leverage to a campaign at the national level. Indeed, in some circumstances the appeal to an international forum and the invocation of international standards may even be counter-productive if the political regime is not open to international procedures.

Using international human rights procedures involves the invocation not just of an international law discourse but of a rights discourse as well. Many of the concerns about appeals to rights which have been expressed in national contexts are applicable to the international level as well. In the international context one may pursue a much broader range of rights claims than is often possible under domestic legal systems, at least if one is trying to utilise a national judicial or quasi-judicial procedure. The whole gamut of economic, social and cultural rights as well as the traditional catalogue of civil and political rights may, depending on the forum, be invoked. That said, it is still the case that the strongest international enforcement procedures of a judicial or quasi-judicial nature are those which relate to the privileged civil and political rights catalogues.

While it is not necessarily the case that all the claims which persons with disabilities might wish to advance can be accommodated with the international 'human rights framework', this chapter proceeds on the basis that the rights framework and the internationalisation of a claim as a human rights claim may provide assistance in pursuing one's goals.[4] This chapter advocates an essentially instrumentalist approach to the deployment of international human rights law and procedures.[5] In some cases existing doctrine can be useful in achieving goals, in other cases there appear to be good prospects of moulding the doctrine in that direction. In other cases, the use of international procedures may not offer much assistance.

11.1.2 Approaching the Problem with an International Perspective

A decision on whether to have recourse to an international procedure is therefore most effectively made in the context of an overall strategy for addressing the particular human rights violation or issue with which an individual or group is concerned. In order to decide whether recourse to an international procedure should be incorporated as part of one's strategy and the means of pursuing it, one will normally have to consider the following matters[6]:

- *The objective being pursued*: this may be obtaining the release of a person who has been imprisoned, obtaining a remedy for a person with disability who has been subjected to a violation of her or his rights, bringing about a change in laws or administrative practices that discriminate against persons with disability, or persuading an international human rights body to adopt a resolution or an interpretation of a guarantee that is informed by disability perspectives

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[4] Cp. Kapur, Ratna 'Feminism, fundamentalism and rights rhetoric in India,' in *Women Living under Muslim Law, Special Bulletin on Fundamentalism and Secularism in South Asia* 35, (1992), 35-36.

[5] That this may give rise to difficulties is clear from the experiences of those who have sought to pursue rights-based feminist litigation strategies at the national level. See, e.g., Sheehy, E. 'Feminist Argumentation before the Supreme Court of Canada in *R v. Seaboyer*; *R v. Gayme*: The Sound of One Hand Clapping,' *Melbourne University Law Review*, 18, (1991), 450.

[6] The following paragraphs draw heavily on *Women's Human Rights Step by Step*, *supra* note2, and H. Hannum, *supra* note 2, at Appendix B.

- *Analysing the violation or issue in (international) human rights terms:* the wrong which has been done must be brought within the scope of a guaranteed right which is bindingon the State concerned and which falls within the mandate of an available procedure

- *Identifying the right procedure or body:* it is necessary to identify a procedure under which violations of the particular right can be considered *and* to which the State is subject; timing may also be important here — some procedures can be utilised at any time; others (such as periodic reporting procedures) may only be available from time to time; ascertaining the formal requirements for lodging a complaint is also necessary (such as whether it is necessary first to exhaust all available remedies at the national level before a complaint can be brought under the international procedure)

- *Evaluating the possible outcomes*: the various procedures produce different outcomes and it is important to evaluate whether success under a particular procedure will help to advance one's objectives

- *Investigating and documenting the violation:* depending on the particular procedure to be utilised, the manner of presenting the violation may vary

- *Liaison with those with expertise/access to international procedures*: it can often be helpful in bringing a complaint internationally to identify and liase with organisations which have had experience in bringing such complaints, work with the body concerned, or have other relevant experience.

- *Cost-benefit analysis:* assessing whether the time and energy required to be spent in a particular case is useful and efficient utilisation of limited resources

- *Lodging and pursing the complaint*

- *Following up the result at the national and international level.*

11.2 Some Hypothetical Cases

Before describing in detail the range of international human rights procedures that are available, it may be useful for the reader first to consider two hypothetical cases involving the human rights of persons with disabilities as a background to that discussion. The reader may wish initially to identify what rights violations might be involved, and what national strategies might be adopted to address them. Then, as the reader works through the following sections, he or she may wish to consider whether any of these issues might be raised under any of the international procedures described below, how that would be done, and the likelihood of a favourable outcome.[7]

[7] See the discussion in Section 11.8 below.

Case No 1

Assume that there is a State election coming up in two months. A number of citizens who are blind object to the fact that the official election material and the material distributed by all candidates in elections is available only in printed format, and that there is no requirement that it be made available in accessible formats for those who have a visual impairment. In addition, nearly all the polling booths in the State capital are inaccessible to persons who use wheelchairs. Assume that attempts by the citizens affected to lobby the legislature to adopt legislation to remedy this have been unavailing, as have appeals to the Electoral Commission and the High Court.

Are there any violations of internationally guaranteed human rights involved here? If yes, are there any international procedures to which the aggrieved citizens might have recourse? How would that recourse relate to any available moves on the national or State level?

Case No 2

Rajeev is a 12-year old boy who has an intellectual impairment, and who also suffers form epilepsy. The local public school, with the concurrence of the district education authorities, has excluded him from classes because 'he is disruptive and hard to teach – the school is simply not set up for students like Rajeev with special needs. He needs to attend a special school for children like him.' The only schools available for students with special needs are schools in which the students do not receive a regular curriculum but are essentially babysat all day. Rajeev's parents are determined to see that he receives a decent education. So far their efforts to lobby the local education authorities have been unsuccessful (they say that they have insufficient money to provide the individualised care that 'children like Rajeev need'). The State High Court has rejected a petition on the grounds that it is not appropriate for it to second guess budgetary decisions by the executive authorities.

Are there any violations of internationally guaranteed human rights involved here? If yes, are there any international procedures to which the aggrieved citizens might have recourse? How would that recourse relate to any available moves on the national or State level?

Case No 3*

The State Girls' Home is an institution where young women and girls with an intellectual disability are accommodated. Most have been placed in the institution by their parents because the parents have felt unable to cope with bringing them up at home. The State authorities have decided that each of the women at the institution should undergo a hysterectomy. The justification offered for this is that it would allow for 'easy management of menstruation', since even though they had tried their best, the Class IV employees (cleaners and sweepers) were unable to handle the mess that was created as a result of the women's inability to deal with their periods. The operations will be carried out by an eminent surgeon who will be using a relatively new but perfectly safe technique. The parents of the women have been informed by letter, and no objection has been received from them.

* Based on an example provided for discussion at the IWRAW Asia-Pacific Consultation on Updating of Skills on Application of *CEDAW*, 16-21 September 2004, Kuala Lumpur.

A local women's group hears of the proposed operations and seeks unsuccessfully to dissuade the State health authorities from going ahead. The High Court refuses on procedural grounds to hear the case. The women's group seeks your advice on the possibility of further avenues they may pursue.

Are there any violations of internationally guaranteed human rights involved here? If yes, are there any international procedures to which the aggrieved citizens might have recourse? How would that

11.3 International Human Rights Mechanisms

At the international and regional level there is a wide range of bodies and procedures which provide avenues for raising human rights grievances. The mandates, the composition of the bodies, the types of complaints which may be brought, the procedures which are followed, and the possible outcomes vary widely. These mechanisms have been described and discussed in many works and only a broad outline of the various types of procedures is attempted here.[8]

In examining the range of international procedures for monitoring human rights one can conveniently distinguish between *complaint* and *non-complaint* procedures. *Complaint procedures* expressly permit or contemplate the submission of complaints of rights violations by individuals or groups of individuals to a body for consideration by that body.[9] The nature of that consideration varies according to the nature of the procedure, in particular whether the procedure is a *complaint-recourse* or a *complaint-information* procedure.[10] Examples of complaint-recourse procedures are the individual complaint procedures established under the First Optional Protocol to the *ICCPR*,[11] and similar procedures under the European Convention on Human Rights, and the American Convention on Human Rights. Examples of complaint-information procedures include the Resolution 1503 procedure established by the UN Economic and Social Council and the communications procedure of the UN Commission on the Status of Women ('communications' is UN jargon for 'complaints').

Maxime Tardu has formulated the distinction between a *complaint-recourse* procedure and a *complaint-information* procedure in the following way:[12]

> Under *complaint-recourse* procedures, the competent international organ is legally bound to take a decision on each and every case brought before it, be it only on admissibility. The goal of the procedure is the redress of specific grievances. The plaintiff is entitled — to various extents — to participate in the proceedings. Such procedures are meant to approximate — however loosely —

[8] For an excellent overview of the various international and regional procedures, see Hannum, *supra* note 2.

[9] Under most of the UN human rights treaties and within the regional frameworks as well, there is provision made for one State party to lodge a complaint against another State party alleging that it has failed to comply with its obligations under the relevant treaty. While this is in theory a possible avenue for recourse, in practice inter-State complaints are extremely rare. This type of procedure is not discussed here. See generally Leckie, Scott 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?,' *Human Rights Quarterly* 10 (1988), 249.

[10] Maxime Tardu *Human Rights the International Petition System* (1979).

[11] See generally Nowak, Manfred *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993); McGoldrick, Dominic *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991).

[12] Tardu, *supra* note 10, at 291-292.

> the judicial model of domestic law. . . .
> *Complaint-information* schemes seek not the redress of individual grievances, but the identification of human rights problems affecting whole populations — e.g., Apartheid or Forced Disappearances — in order to define remedial strategies. Under such procedures, petitions are received only as elements of information. Even if well-founded, the complaint may be discarded if it does not bring fresh data. Accepted petitions loose their individuality, merged into a mass of data. The author has none of the entitlements pertaining to 'a party', often not even the right to be informed of the fate of his communication.

The variety of international procedures available today defies any tidy categorisation and there are a number of complaint procedures which have both a recourse and information component. These *hybrid procedures* include the so-called 'thematic mechanisms' of the UN Commission on Human Rights, which include the Special Rapporteurs appointed by the Commission. These Special Rapporteurs are empowered not only to investigate the extent and nature of particular problems (ranging from summary or arbitrary executions to trafficking in children) to contribute to policy development in the area, but they may also raise individual cases of alleged rights violations with governments as part of their work. This capacity can be particularly valuable, since it is one of the few procedures under which an individual case may be raised with a government on an urgent action basis, something which can be of considerable importance in averting a threatened violation or stopping an existing one. The discussion below shows that these procedures, which can be invoked against any member State of the United Nations (including India), offer significant opportunities for raising individual cases and situations in which there are violations of the human rights of persons with disabilities, as well as contributing to the development of international law and policy on these issues.

Non-complaint procedures are procedures before bodies which do not have an explicit mandate to consider complaints about violations of human rights, but which may nonetheless receive such complaints as a matter of practice on a formal or informal basis. While not competent to investigate allegations in a (quasi-) judicial mode, they may nonetheless act on the information with which they have been provided. These procedures include the reporting procedures under the major UN human treaties, but also the work of the more politicised (though independent) bodies (such as the Sub-Commission on the Promotion of Human Rights) and even the overtly political bodies (such as the Commission on Human Rights), which may consider the human rights situations in individual countries.

11.4 The United Nations Human Rights System (TREATY-BASED PROCEDURES)

11.4.1 India and International Human Rights Procedures[13]

Disability advocates in India are considerably restricted in the international procedures that they may draw on because of India's refusal to accept the full range of the available international complaint procedures. Nevertheless, as a result of its ratification of many international human rights treaties and by virtue of

[13] The electronic publication *For the Record*, produced since1997 by Human Rights Internet, in partnership with the Canadian Department of Foreign Affairs and International Trade, provides a useful overview of the actions of the UN human rights system in relation to particular themes and specific countries in any given year. For example, *For the Record 2003: The UN Human Rights System* provides a compendious overview of the issues that arose under the thematic mechanisms in relation to India during 2003: http://www.hri.ca/fortherecord2003/vol3/indiatr.htm Another extremely useful resource is the *Bayefsky.com* website, which provides access to UN human rights treaty body documents according to country, theme and type of document: www.bafesky.com

its membership of the United Nations and other international organisations, India is subject to a number of international supervisory procedures under which claims of a failure by the State to observe international human rights standards can be raised. In comparison with many other countries (including some in South Asia), India has not (yet) submitted itself to any of the quasi-judicial or inquiry procedures under the UN human rights treaties which permit individuals or groups to bring to a UN human rights treaty body allegations of violations of human rights. Nevertheless, there are opportunities to raise these issues before United Nations human rights bodies, both so far as human rights violations in general and the rights of persons with disability are concerned.

Table 11.1 sets out the major UN human rights treaties with supervisory mechanisms and the status of Indian ratification of those instruments, and indicates whether India has accepted the different supervisory procedures under those treaties. In sum, India is a State party to the *ICCPR*, the *ICESCR*, the CRC, the *CERD* Convention and the *CEDAW* Convention.. It has signed but not ratified the Torture Convention. It has not ratified any of the Optional Protocols to these instruments, or accepted any of the individual complaints or inquiry procedures under those conventions it has ratified. Accordingly, individuals and groups wishing to raise issues of implementation of these conventions by the Indian government before the UN human rights treaty bodies are limited to using the reporting procedure under each treaty (though a number of the committees have also developed urgent action or similar procedures to respond to serious situations in countries). Accordingly, the section describing the individual complaint procedures provides a brief overview of the procedures, the greater emphasis being on the use of reporting procedures and other communications mechanisms which are not treaty-based.

Table 11.1
India and Monitoring Mechanisms under the Principal UN Human Rights Treaties

Treaty	Is India a Party to the Treaty?	Reporting procedure? (Is India Bound?)	Individual Communications Procedures (Is India bound?)	Inquiry Procedure	Accepted by India?
International Covenant on Civil and Political Rights	Yes	Yes (India bound)	First Optional Protocol (India has not accepted the procedure)	No	—
International Convention on the Elimination of All Forms of Racial Discrimination, article 8	Yes	Yes (India bound)	*Article 8* (India has not accepted the procedure)	No	—

Treaty	**Is India a Party to the Treaty?**	**Reporting procedure? (Is India Bound?)**	**Individual Communications Procedures (Is India bound?)**	**Inquiry Procedure**	**Accepted by India?**
Convention on the Elimination of All Forms of Discrimination against Women	Yes	Yes (India bound)	*Article 2* (India has not accepted the procedure)	*Article 8* (India has not accepted the procedure)	No (India is not a party to the Optional Protocol, though it is a party to the *CEDAW Convention*)
Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment	Yes	No (India has not ratified the Convention)	*Article 22* (India has not ratified the Convention)	*Article 20* (India has not ratified the Convention)	No (India is not a party to the Convention)
International Covenant on Economic, Social and Cultural Rights	Yes	Yes	No	No	
Convention on the Rights of the Child	Yes	Yes	No	No	
International Convention on the Rights of All Migrant Workers and Members of their Families	Yes	No (India has not ratified the Convention)	Yes (India has not ratified the Convention)	No	—

11.4.2. Complaint Procedures[14]

Individual complaint procedures under the principal UN human rights treaties

This section briefly describes the types of individual complaint procedures available internationally, followed by mention of some of the problems involved in using them. Under a number of the UN human rights treaties and within the framework of the European Convention on Human Rights and the American Convention on Human Rights, provision is made for the receipt of individual complaints by the monitoring body concerned. The United Nations Educational, Scientific and Cultural Organisation (*UNESCO*) has also established an individual complaint procedure for dealing with allegations of violations of human rights within its areas of competence.[15] Furthermore, the International Labour Organisation has a number of procedures under which complaints of violations of workers' rights or *ILO* conventions can be considered, although these complaints cannot be directly lodged by individuals, but must be lodged through a workers' (or employers') organization, or by a delegate to the International Labour Conference.[16]

At the United Nations level, individual communications procedures are available under the *ICCPR*, the *CERD* Convention, the Convention against Torture, the *CEDAW* Convention, and the Migrant Workers Convention. Inquiry procedures are also available under the *CEDAW* Convention and the Convention against Torture. While there is no complaints procedure under either the *ICESCR* or the *CRC*, there has been ongoing discussion about the adoption of a complaints procedure for both of these. If the United Nations adopts a convention on the human rights of persons with disabilities, there is a good possibility that an individual communications procedure and an inquiry procedure will be included in the convention. However, India has accepted none of the existing procedures, so the following discussion is at present somewhat academic so far as using those procedures to redress violations in India is concerned.

There is no formal complaint mechanism under existing UN human rights mechanisms established to deal with disability-specific complaints. However, such complaints may be raised under other complaint procedures (when the State concerned has accepted them or is otherwise bound by them). For example, a complaint of discrimination on the ground of disability in the enjoyment of almost any human right may be brought under *Article 26* of the *ICCPR*, provided that the State concerned is a party to the First Optional Protocol to the Covenant. Similarly, a complaint of unjustifiable involuntary medical treatment of a person with disability could be brought both under the *ICCPR* or under the individual complaints procedure contained in the Convention against Torture – provided once again that the State concerned has accepted those procedures. As noted above, at the time of writing, India has not yet accepted any of the individual complaints procedures under the UN human rights treaties,

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[14] For an overview of how to lodge complaints with the UN human rights mechanisms (with a main focus on the human rights treaty bodies, but also discussing the other options), see *How To Complain About Human Rights Treaty Violations* (Transnational Publishers, 2002), available at http://www.bayefsky.com/tree.php/area/complain

[15] Discussed below in Section 11.7.1.

[16] See *Handbook of Procedures relating to international labour Conventions and Recommendations*, available at http://www.ilo.org/public/english/standards/norm/sources/handbook/ (1995). See generally Leary, V.A. '*Lessons from the Experience of the International Labour Organisation,'* in Philip Alston, *The United Nations and Human Rights* (Clarendon Press, 1992), 580, at 595-612.

although other South Asia countries have accepted some of them.[17] This fact in itself may be an aspect which Indian human rights groups may wish to take up in their advocacy.

Procedural Matters: Admissibility Criteria, the Hearing and the Decision

In order for a complaint to be considered on the merits under one of the international communications procedures, *admissibility criteria* must be satisfied. These criteria normally prescribe the time limits for the lodging of complaints, the persons who may submit a complaint, requirements that domestic remedies be exhausted, and in some cases restrictions on considering complaints already considered, or currently being considered, under some other international procedure. Of course, the substantive coverage of the individual instruments is of considerable importance; any complaint lodged under one of these procedures may only be considered on the merits if it alleges a violation of one of the rights guaranteed by the governing instrument.

The procedures vary in the way in which a complaint is processed. Before the UN treaty bodies the hearing is on the papers, with both the complainant and the State concerned given the opportunity to respond to each other's submissions. (Under the European Convention and American Convention there may be opportunities for oral hearings at different stages of the procedure.) The decision adopted by the body examining the complaint is made public.

Unlike the judgements of the European Court of Human Rights and the Inter-American Court of Human Rights (which are binding on the State which is party to a case), the views adopted by the UN treaty bodies are not formally binding as a matter of international law. Nevertheless, they are given considerable weight by States and it has been said of the Human Rights Committee that '[N]ormally, it may be expected that States ratifying the Protocol will show themselves inclined to follow the opinion of the Committee, even when it goes against them.'[18]

Where decisions are rendered against a State under one of these procedures, many States, but by no means all, take steps to bring their domestic law and practice into conformity with the international law position as determined by the relevant supervisory body. There are, of course, always exceptions and in some cases the steps taken by a State party to rectify inconsistencies will not always adopt the most generous approach to remedying the defects identified by the international body, but overall the record of compliance is reasonably encouraging.

The opportunity to bring an individual complaint before a body which will consider it within the framework of a quasi-judicial model is one that can be valuable in some cases and that has a particular appeal from a legal perspective because of the possibility of a clear result. Despite a number of drawbacks (such as the length of time required to exhaust domestic remedies and for the international procedure itself to run), the judicious use of these procedures does offer possibilities both for bringing about remedies in individual cases, promoting systemic change, and developing an international jurisprudence that will help to advance the human rights of persons with disabilities.

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[17] Sri Lanka and Nepal have accepted the competence of the Human Rights Committee to receive individual complaints under the First Optional Protocol to the *ICCPR*, and Bangladesh has ratified the Optional Protocol to the *CEDAW Convention*.

[18] Opsahl, T. *'The Human Rights Committee'* in Alston, *supra* note 16, at 431.

11.4.3. Reporting Procedures under the UN Human Rights Treaties

Under all the major UN human rights treaties a system of reporting by States parties is provided for. States parties are required to report on a regular basis to the responsible supervisory body on the steps which they have taken to implement their obligations and the difficulties they have experienced in doing so. These reports are then examined by the relevant treaty body in the presence of representatives of the State concerned. All the committees receive information informally from non-governmental organisations which they may use in their questioning of States. Following a discussion with the State party, the Committees adopt concluding observations or concluding comments in which they set out their summary of the progress made, the principal areas of concern, and specific recommendations to the State for more effective implementation of the treaty.

The functions of the UN treaty reporting procedures have been described in the following terms:[19]

> The reporting procedure may serve a number of objectives – it offers 'an occasion for each State party to:
>
> (a) Conduct a comprehensive review of the measures it has taken to harmonize national law and policy with the provisions of the relevant international human rights treaties to which it is a party;
>
> (b) Monitor progress made in promoting the enjoyment of the rights set forth in the treaties in the context of the promotion of human rights in general;
>
> (c) Identify problems and shortcomings in its approach to the implementation of the treaties;
>
> (d) Assess future needs and goals for more effective implementation of the treaties; and
>
> (e) Plan and develop appropriate policies to achieve these goals.'
>
> The reporting process should also 'encourage and facilitate, at the national level, popular participation, public scrutiny of government policies and constructive engagement with civil society conducted in a spirit of cooperation and mutual respect, with the aim of advancing the enjoyment of all of the rights protected by the relevant convention.' The reporting procedure provides a forum for 'the Committee, and the States parties as a whole, to facilitate the exchange of information among States and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the rights contained in the [relevant treaty].[20]

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[19] Office of the United Nations High Commissioner for Human Rights 'Monitoring implementation of the international human rights instruments: an overview of the current treaty body system,' Background conference document on Fifth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (24 January – 4 February 2005), A/AC.265/2005/CRP.2, para 20, available at http://www.un.org/esa/socdev/enable/rights/ahc5ohchr.doc

[20] CESCR, *General comment No 1*, para. 9.

Of course, there are many factors which influence the effectiveness of the system – including the willingness of States to submit reports – and the system has been under considerable strain for some time.

The treaty bodies have had a mixed record to date in addressing disability issues;[21] while it seems unlikely that they will be able to devote the attention to the issue which a specialist committee would be able to, there are nevertheless many opportunities for disability issues to be brought before the treaty bodies. The discussion in the earlier chapters of this manual has indicated the way in which the guarantees in the various human rights treaties can be drawn on in relation to disability issues – it is important in dealing with each of the different treaty bodies to ensure that the information provided and the violations alleged are framed in terms of the particular treaty.

The examination of a State's report under a treaty can provide an occasion for exerting international pressure on the State. If members of a supervisory body are strongly critical of a State or express the view that the State has not carried out its obligations under the treaty, this can serve to put some pressure on a government, particularly if the proceedings receive international or national publicity.[22] The consideration of a State's report by the monitoring body generally depends on the submission of a report by that State. Many States have fallen well behind in fulfilling their reporting obligations (and some have even failed to submit any reports under individual treaties). It is also a matter of chance whether a State is scheduled to appear before a treaty body which will be considering the substantive issues that one may wish to raise before it. Add to this the fact that the meetings of these bodies are held in Geneva or New York and the cost of sending people to brief members may quickly become prohibitive.

However, Indian disability rights advocates are more fortunate in relation to the potential use of reporting procedures to highlight violations of the human rights of persons with disabilities and to put pressure on the government to bring about change, than they are in relation to using individual communications procedures. As a State party to five of the seven principal UN human rights treaties, India has accepted an obligation under each of those treaties to report on a regular basis to the committee of independent experts established by or under the treaty in question. A report to those committees by the Indian government can provide an important opportunity to generate public discussion at the national level over issues of concern to persons with disability which fall within the scope of rights covered by the particular report. However, India, like many other countries is also behind in the submission of its reports,[23] so one necessary part of any campaign to use the reporting procedures would be encouraging the Indian government to submit those reports which are overdue, as well perhaps as exploring the possibility of persuading one or more treaty bodies to schedule India for hearing in the absence of a report where the report is well overdue. (At the same time, it may be possible to raise disability issues under the thematic procedures of the Commission on Human Rights, which are described below).

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[21] See generally Quinn, Gerard and Theresia Degener, *A Study on the Current Use and Future Potential of the UN Human Rights Instruments in the Context of Disability* (United Nations, 2002).

[22] On the functions of the reporting procedure, see generally Alston, Philip *The Purposes of Reporting* in *United Nations, Manual on Human Rights Reporting* (1991) 13.

[23] As of March 2005, India was overdue with 10 reports: 1 under the ICCPR, 2 under the CEDAW, 4 under CERD and 3 under the ICESCR.

Despite these difficulties, with a certain amount of preparedness, the proceedings before the treaty bodies can be used quite effectively.[24] Information about reporting obligations and whether States have submitted or are overdue with their reports is now readily available on the Internet.[25] Treaty bodies are very receptive to the receipt of material from non-governmental organisations – a number of the committees allow non-governmental organisations to address both pre-sessional working groups which draw up the list of questions for States to answer, and the plenary meetings of the committees. Informal discussions with committee members are also welcomed by many committee members, and these are facilitated in many cases by international NGOs which regularly and closely follow the proceedings of the committee.

The successful use of the reporting procedure involves a number of steps:

- Ascertaining when the government is next due to report under the particular treaty
- Finding out whether the government has already submitted its report or when it is proposing to do so (and lobbying the government to submit a report if it is overdue)
- Encouraging the government to circulate a draft report for comment by NGOs (and/or using the submitted report in public discussion/legislative hearings, etc. at the national level to critique the government's report and focus attention on issues which need attention)
- Bringing relevant information to the attention of the Committee, whether by attending a pre-session working group, getting in touch with Committee members through the Secretariat, or sending written material through NGOs (in the form of a 'shadow report' or other briefing material[26])
- Attending the meeting of the Committee with government representatives and ensuring that publicity is given to the event in media at home
- Using the concluding comments or observations of the Committee as a lobbying document with government.

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[24] For examples of the use of hearings before the Committee on the Elimination on Discrimination against Women to attract international attention to issues see Petersen, Carole and Harriet Samuels, 'The International Convention on the Elimination of All Forms of Discrimination against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organisations in the United Kingdom and Hong Kong' *Hasting International and Comparative Law Review* 1 (2002) 26; McPhedran, Marilou, Susan Bazilli, Moana Erickson and Andrew Byrnes (Eds.) *The First CEDAW Impact Study: Final Report* (Toronto: Centre for Feminist Research, York University and the International Women's Rights Project, 2000) 11-16 [also available on-line at http://www.yorku.ca/iwrp/CEDAW%20Report/Introduction.pdf]. For examples of experiences before other treaty bodies in particular cases, see Kilkelly, Ursula *The UN Committee on the Rights of the Child — an evaluation in the light of recent UK experience*, (1996) 8, *Child & Familay Law Quarterly* 105 (1996) and O'Flaherty, Michael 'The Reporting Obligation Under Article 40 of the International Covenant on Civil and Political Rights Lessons to Be Learned,' 16, *Human Rights Quarterly* (1994) 515; and Byrnes, Andrew 'Uses and Abuses of the Treaty Reporting Procedure: Hong Kong Between Two Systems' in Philip Alston and James Crawford (Eds.), *The Future of the UN Human Rights Treaty System* (Cambridge: Cambridge University Press, 2000) 287-315.

[25] Through the website of the OHCHR (www.ohchr.org). See also the www.bayefsky.com which contains similar information.

[26] See, e.g., the guidance offered by the International Women's Rights Action Watch (Asia-Pacific) in relation to NGO contribution to the CEDAW reporting process: http://www.iwraw-ap.org/using_cedaw/writing_shadow.htm.

11.5 The United Nations Human Rights System (NON- TREATY-BASED PROCEDURES)

11.5.1 Complaint-Information Mechanisms or Procedures

In addition to the procedures described above under the UN human rights treaties, as well as within the *ILO* and *UNESCO*, there are a number of other procedures for the reception and consideration of complaints, not as part of a process leading to a resolution or adjudication of the individual complaints themselves but as a source of information on the human rights situation in individual countries or for policy development along thematic lines. These can nevertheless bring political pressure to bear on governments and may contribute to change in this way.

The Resolution 1503 procedure

Within the UN system the longest established of these is the Resolution 1503 procedure, the first major procedure for the consideration of individual complaints which took effect within the UN human rights framework; also of interest is the communications procedure of the Commission on the Status of Women.

The procedure for the receipt of communications laid down under 'the Resolution 1503 procedure'[27] is intended to identify situations in which there appears to be a consistent pattern of gross and reliably attested violations of human rights so that appropriate action may be taken by the Commission on Human Rights.[28] Originally adopted in 1970, the procedure was revised by the Economic and Social Council (ECOSOC) in 2000.[29] The procedure has a number of stages: after receipt by the secretariat and culling of any clearly inadmissible communications, there is an initial examination of communications by the five-member Working Group on Communications of the Sub-Commission on the Promotion of Human Rights (meeting in closed session) to select those communications which appear to reveal a consistent pattern of gross violations. These are then referred to the Working Group on Situations of the Commission on Human Rights, which consists of five government members of the Commission. This Working Group, which also meets in closed session, may close the file, decide to keep the situation under review, or forward the matter to the Commission with recommendations for action. The Commission may decide to keep a situation under review, appoint an independent expert, decide to discontinue the matter, move the matter from the confidential 1503 procedure to the public procedure of the Commission, or make recommendations to the Economic and Social Council. The first formal public statement of which countries are under review will generally occur after the Commission has considered the situations before it, when the Chairperson announces at a public meeting the countries examined under the procedure and those no longer dealt with under the procedure.[30]

Communications must satisfy admissibility criteria.[31] These have been summarised in the following terms:[32]

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[27] The procedure owes its name to the 1970 resolution of the ECOSOC which established it (ECOSOC Resolution 1503 (XLVIII)). The current form of the procedure is set out in ECOSOC Resolution 2000/3, which provided that the procedure could continue to be referred to as 'the Resolution 1503 procedure'.

[28] See Steiner, Henry J. and Philip Alston *International human rights in context: law, politics, morals* (1996) 376-288; Newman, Frank and David Weissbrodt *International Human Rights: Law, Policy and Process* (2d ed 1996) 185-191; *Women's Human Rights: Step by Step*, *supra* note 2, at 40-44.

[29] ECOSOC Resolution 2000/3. For an overview of the procedure and some discussion of the advantages and drawbacks, see http://www.ohchr.org/english/about/publications/docs/fs7.htm#_ftn14.

[30] India has not been named as subject to the 1503 procedure at the Commission level.

[31] Set out in Sub-Commission resolution 1 (XXIV) of 13 August 1971.

[32] http://www.ohchr.org/english/bodies/chr/complaints.htm

- No communication will be admitted if it runs counter to the principles of the Charter of the United Nations or appears to be politically motivated.
- A communication will only be admitted if, on consideration, there are reasonable grounds to believe - also taking into account any replies sent by the Government concerned - that a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms exists.
- Communications may be submitted by individuals or groups who claim to be victims of human rights violations or who have direct, reliable knowledge of violations. Anonymous communications are inadmissible as are those based only on reports in the mass media.
- Each communication must describe the facts, the purpose of the petition and the rights that have been violated. As a rule, communications containing abusive language or insulting remarks about the State against which the complaint is directed will not be considered.
- Domestic remedies must have been exhausted before a communication is considered - unless it can be shown convincingly that solutions at the national level would be ineffective or that they would extend over an unreasonable length of time.

A major drawback of the procedure is that those who submit communications play no formal role in the process after their communications have been submitted: they are not provided with details of the government's replies to the allegations, nor are they informed of decisions taken by the two Working Groups. It will only be once a public statement on the matter is made that the complainants will formally learn of any progress in the matter.

While the 1503 procedure was an important step forward when it was adopted over twenty years ago, there has been much criticism of the way in which it has operated and of its limitations for providing timely and effective responses to gross violations of human rights. The development of the wide variety of alternative mechanisms for dealing with complaints since the adoption of the 1503 procedure now means that there may be more effective and more transparent alternative procedures that could be utilized,[33] notwithstanding the streamlining of the procedure in the year 2000. So far as addressing issues of the human rights of persons with disabilities are concerned, it does not appear that the Resolution 1503 procedure has yet made a significant contribution.

The Communications Procedure of the Commission on the Status of Women

The UN Commission on the Status of Women also has the power to receive communications relating to the status of women, which would include communications relating to the status of women and girls with disabilities. This procedure is not as well-known as the procedures of the Commission on Human Rights and has been used less extensively.[34] The communications are received as a source of information for the Commission on which it can draw in its own policy-making and its recommendations to the ECOSOC, and is not intended as a means for the redress of individual complaints or even as a

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[33] See Newman & Weissbrodt, *supra* note 28, at 208-216.

[34] For discussions of the communications procedure of the Commission, see *Women's Human Rights: Step by Step*, *supra* note2, at 50-52; Reanda, L. 'The Commission on the Status of Women,' in Alston, *supra* note16, at 295-297; Coliver, S. 'United Nations Machineries on Women's Rights: How Might They Better Help Women Whose Rights are Being Violated?' in Lutz, E., H. Hannum and K.J. Burke (Eds.), *New Directions in Human Rights* (1989) 25.

monitoring mechanism for situations in which there are gross violations of women's rights. The communications are considered by the five government members of the Working Group on Communications of the Commission, which reports to the Commission on the trends and patterns of discrimination against women revealed by the communications; the objective is to bring to the attention of the *CSW* 'a consistent pattern of reliably attested injustice and discriminatory practices against women.' The proceedings are confidential and the persons who submit the communications have no role in their consideration (and until recently, were not even informed of any recommendations the Commission might have made in response to the communications received). It has not made a major contribution to the policy-making work of the Commission and does not appear to have provided an avenue for redress of specific grievances.[35] Nevertheless, it may be one forum in which policy issues relating to women with disabilities might be pursued, though the adoption of the Optional Protocol to the *CEDAW* Convention and the establishment by the Commission on Human Rights of the position of Special Rapporteur on violence against women – each of which is occupied by independent experts — provide other options for addressing individual cases and situations. This is not to say, however, that more creative and effective use of the procedure would not be possible, though the report of the Commission in some years does not appear to go beyond a simple and repetitive listing of the most common categories of communication received, with nothing in terms of specific recommendations addressed to individual countries.

11.5.2 Thematic Procedures

The Commission on Human Rights has developed two additional types of procedures: *thematic* procedures and *country* procedures.[36] The thematic procedures – involving individual Special Rapporteurs or specialist Working Groups — focus on particular types of violation (such as torture, violence against women, or freedom of expression),[37] while the country-specific procedures take as their focus the situation in a particular country. It is the thematic procedures which are of greatest relevance here, as there is no country mechanism relating to India (or indeed to any other South Asian country). While there has not been a general concern across these procedures with issues of disability, there have been some cases raised under those procedures which involve disability issues, a number of the mechanisms have addressed the relevance of disability to their mandate, and there is potential under a number of the procedures to raise matters of concern to the disability community.

Working Group on Disappearances and Working Group on Arbitrary Detention

The Commission on Human Rights has established two thematic working groups comprising five independent members (one form each of the UN regions), which in effect have a complaint-recourse

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[35] The procedure has been the subject of a number of reviews with a view to improving its efficacy or abolishing it if it was seen to be no longer necessary, but the procedure has survived with only minor modifications. The most recent discussion was at the 49th session of the Commission on the Status of Women (2004), at which the Commission decided to defer further discussion of the matter until its 59th session in 2006: CSW decision 48/103, *Report of the Commission on the Status of Women on its 48th* session, E/2004/27, at 28.

[36] The list of the current thematic and country mechanisms appears on the website of the Office of the High Commissioner for Human Rights: http://www.ohchr.org/english/bodies/chr/special/index.htm.

[37] See generally Newman & Weissbrodt, *supra* note28, at 191-202.

function. The Working Group on Enforced or Involuntary Disappearances was established in 1979 and was the first of the thematic mechanisms established by the Commission. The Working Group on Arbitrary Detention was established in 1991.[38] While the mandate of neither of these procedures explicitly includes disability-specific violations, these avenues could be used for such cases if they involved disappearances or arbitrary detention (a concept which covers detention at all stages of the criminal process, including post-sentencing).

For example, the Working Group on Arbitrary Detention has taken up disability issues to some extent. The Working Group consists of five independent members and receives communications against any member State of the United Nations alleging that a person has been detained arbitrarily.[39] The Working Group has an 'urgent action' procedure for contacting governments in cases in which it considers that continued detention may pose a threat to a person's life or in other appropriate circumstances.[40] It also seeks clarification of cases from governments, expresses its opinion in the light of any government response on whether the detention in a particular case is arbitrary or not, and calls on the government concerned to take appropriate action if it finds that the detention is arbitrary. The Working Group has also undertaken a number of country visits.[41] In addition, the Working Group has adopted a number of 'Deliberations', statements 'on matters of a general nature involving a position of principle in order to develop a consistent set of precedents and assist States, for purposes of prevention, to guard against the practice of arbitrary deprivation of liberty.' These have included Deliberations on house arrest, deprivation of freedom for purposes of rehabilitation through labour, and other matters. 'By means of these 'deliberations' it defines the criteria on the basis of which deprivation of freedom linked with such situations may become arbitrary.'

The Working Group's mandate is not restricted to pre-trial detention, but also extends to reviewing detention following a conviction or other final order of a court. It applies not only to detention in the criminal context, but also to administrative detention, including the detention of immigrants and asylum-seekers.

The Working Group has set out its standards for determining whether a detention is arbitrary. In its view, deprivation of liberty is arbitrary if a case falls into one of the following three categories:

> (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him)(Category I);
>
> (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by *Articles* 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by *Articles* 12, 18, 19, 21, 22, 25, 26 and 27 of the International

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[38] CHR Res. 1991/42, UN Doc. E/1991/22, at 105. The group was entrusted with the task of investigating cases of detention imposed arbitrarily or inconsistently with international law standards. In performing its task it is to seek and receive information from governments and from individuals, their families and their representatives.

[39] The Working Group, like all other thematic mechanisms, reports annually to the UN Commission on Human Rights. For an overview of the Working Group's work during 1994, see its report to the 61st session of the Commission (2005), E/CN.4/2005/6. All reports are available on the OHCHR website through http://www.ohchr.org/english/bodies/chr/special/themes.htm . A model questionnaire for complaints to the Working Group can be found at http://www.ohchr.org/english/about/publications/docs/fs26.htm#A5.

[40] www.ohchr.org/english/issues/detention/complaints.htm#2

[41] For details of the procedures followed by the Working Group, see http://www.ohchr.org/english/issues/detention/complaints.htm

> Covenant on Civil and Political Rights (Category II);
>
> (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III).

On its face, the scope of the Working Group's mandate would potentially apply to deprivations of liberty of persons with disability in various contexts, for example, the forced institutionalisation of persons with disabilities.

The potential of the Working Group procedure and the Group's interest in issues of disability is shown by a number of recent statements by the Working Group in relation to detention of persons on the ground of intellectual disability or mental illness. In its report to the 2005 Commission on Human Rights, the Working Group included its *Deliberation No 7*, which addresses a number of aspects of the situation of persons held in 'psychiatric detention'.[42] While the *Deliberation* appears to conflate the situation of persons with an intellectual impairment and persons who may be suffering from mental illness, and uses problematic terminology such as 'persons of unsound mind', the statement is an important recognition of the fact that detention of persons with an intellectual disability and persons suffering from mental illness cannot simply be detained because of their impairment or condition;[43] such detention must satisfy the conditions laid down in the *ICCPR*.[44] While much more needs to be done to ensure the interpretation and application of these standards in a manner which does not rest on stereotypical assumptions, the Working Group may be a useful forum for addressing some of the clearer cases of detention of persons with disabilities of this sort.[45]

Thematic Special Rapporteurs

An important development in the Commission on Human Rights over the last fifteen years has been the development of the mechanism of the thematic Special Rapporteur. As of 2004 the Commission had appointed fourteen special rapporteurs with mandates including summary and arbitrary executions, torture, religious intolerance and the sale of children, and violence against women.[46]

The functions of the Special Rapporteurs have been described in the following terms:[47]

> 133. The functions of the individual Rapporteurs vary according to the different mandates granted to them by the Commission. They include the collection of information about the observance or

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[42] *Deliberation No 7 on Issues related to Psychiatric Detention*, E/CN.4/2005/6, paras 47-58.

[43] The Working Group is also concerned about the use of psychiatric detention on the basis of the asserted mental illness of a person as a means of repressing other freedoms, such as freedom of expression, association, religion and political rights – categories of cases which have come before the Working Group.

[44] E/CN.4/2005/6, para 58.

[45] Details on how a case may be submitted to the Working Group on Arbitrary Detention may be found in *Fact Sheet No 26 – The Working Group on Arbitrary Detention*, available at http://www.ohchr.org/english/about/publications/docs/fs26.htm#A5.

[46] For a full list, see *Special procedures of the Commission on Human Rights*, http://www.ohchr.org/english/bodies/chr/special/themes.htm.

[47] E/CN.6/1991/10, paras 133-134.

> violation of specific rights, the receipt and forwarding to Governments of communications received from individuals or organizations alleging violation of the rights which fall within the relevant mandate (in some cases as a matter of urgent action), reporting on the extent and practice of the violations of the relevant rights, formulating policy recommendations and, in some cases, visiting individual countries at the invitation of those countries.
>
> 134. The report of each Rapporteur to the Commission on Human Rights is a public document that contains summaries of communications and of replies from Governments, as well as more general material. The Rapporteurs do not adjudicate on the accuracy of the allegations contained in material which they receive from individuals and organizations or from Governments in reply.

A number of the rapporteurs could provide a useful avenue for claims of violations of human rights of persons with disabilities to be made. Relatively little use of these procedures has been made to advance disability rights issues. However, in a series of resolutions adopted since 1998, the Commission on Human Rights has invited all its Special Rapporteurs 'in carrying out their mandates, to take into account the situation and human rights of persons with disabilities.'[48] This should provide encouragement to Rapporteurs and to advocates to take up disability issues which fall within the mandate.

Many of the thematic procedures permit allegations of individual violations to be raised with governments by the Special Rapporteur concerned (country visits with the agreement of the country concerned are also possible).[49] In general, the procedures deal with allegations of violations in two ways: (a) through urgent action letters or urgent appeals in cases in which irreparable harm might result if action is not taken immediately; and (b) allegation letters, by which the allegations are drawn to the attention of the government and a response is requested from it.

There are a number of important aspects of the special thematic procedures that distinguish them from the treaty-based procedures discussed earlier. Under the thematic procedures allegations can be raised against *any* member State of the United Nations – it is not necessary as with a treaty-based procedure for a State to have 'accepted' the competence of the mandate to subject its actions to scrutiny. The thematic rapporteurs exercise the power to issue 'urgent appeals' to governments, which are not in anyway dependent on the likelihood satisfaction of admissibility criteria that might limit the power of treaty bodies to request interim measures. Thirdly, recourse to the thematic procedures does not require the exhaustion of domestic remedies (though the failure to exhaust available and potentially effective remedies may mean that the rapporteur is unable to pursue the case very far).

While the processing of allegations forms a larger part of the work of some mandates than others, the following are the procedures under which allegations can be sent to thematic rapporteurs for forwarding to governments in appropriate cases. The allegations must obviously relate to the subject matter of the mandate, but if that is so, then violations of the rights of persons with disabilities in those areas would fall within those procedures.

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[48] See CHR Res 1998/31, para 12; CHR Res 2000/51, para 12; CHR Res 2002/61, para 24; CHR Res 2003/49, para 8; and CHR Res 2004/52, para 8.

[49] For an overview of the mandates, mandate holders and contact details, see the OHCHR website: http://www.unhchr.ch/html/menu2/8/question.htm#special See also http://www.unhchr.ch/html/menu2/2/special-complaints.htm

- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment[50]
- Special Rapporteur on violence against women, its causes and consequences[51]
- Special Rapporteur on the right to education[52]
- Special Rapporteur on extrajudicial, summary or arbitrary executions[53]
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[54]
- Special Rapporteur on the right to food[55]
- Special Rapporteur on trafficking in persons, especially in women and children[56]
- Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression[57]
- Special Rapporteur on freedom of religion and belief[58]
- Special Representative of the Secretary-General on human rights defenders[59]
- Special Rapporteur on the independence of judges and lawyers[60]
- Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people[61]
- Special Rapporteur on the human rights of migrants[62]
- Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance[63]
- Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights[64]

Some Special Rapporteurs have taken up cases of persons with disabilities whose rights are alleged to have been violated, and some have also referred to or addressed disability issues as relevant to the development of their mandate.

For example, in addition to his exploration of the conceptual dimensions of the right to health, the Special Rapporteur on the Right to Health has forwarded details of allegations of violations of the right to health (including of persons with disabilities) to the governments concerned, sometimes in conjunction with

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[50] Urgent appeals (http://www.ohchr.org/english/issues/torture/rapporteur/appeals.htm) and allegation letters (http://www.ohchr.org/english/issues/torture/rapporteur/allegation.htm. See, for example the allegation forwarded to the government of Myanmar in relation to the gang rape and killing of an 18-year old woman with physical and intellectual disability in Myanmar: E/CN.6/2003/75/Add. 2, at para 127.

[51] http://www.ohchr.org/english/issues/women/rapporteur/complaints.htm

[52] http://www.ohchr.org/english/issues/education/rapporteur/complaints.htm

[53] This mandate includes including cases in which person sentenced to death is 'mentally retarded or insane': http://www.ohchr.org/english/issues/executions/model.htm

[54] http://www.ohchr.org/english/issues/health/right/complaints.htm

[55] http://www.ohchr.org/english/issues/food/complaints.htm

[56] http://www.ohchr.org/english/issues/trafficking/complaints.htm

[57] http://www.ohchr.org/english/issues/opinion/index.htm

[58] http://www.ohchr.org/english/issues/religion/index.htm

[59] http://www.ohchr.org/english/issues/defenders/complaints.htm

[60] http://www.ohchr.org/english/issues/judiciary/complaints.htm

[61] http://www.ohchr.org/english/issues/indigenous/rapporteur/index.htm#communications

[62] http://www.ohchr.org/english/issues/migration/rapporteur/complaints.htm

[63] http://www.ohchr.org/english/issues/racism/rapporteur/complaints.htm

[64] http://www.ohchr.org/english/issues/environment/waste/complaints.htm

other special rapporteurs.[65] One example is the Special Rapporteur's communication to the Government of Romania in 2004 in relation to the treatment to patients in a psychiatric hospital in which dozens of persons were alleged to have died as a result of malnutrition and hypothermia.[66] The Government of Romania responded with the details of the steps it had taken or proposed to take;[67] the Special Rapporteur visited the hospital on a mission to Romania and recommended continued monitoring of developments.[68]

But overall, there is relatively little detailed reference to disability issues in many Special Rapporteurs' reports.[69] As they respond to information provided by non-governmental organisations, the challenge is clear – it is to bring more information about cases of alleged violations of disability rights to their attention so that they can take these cases up with the governments concerned.

11.6 The United Nations Human Rights System - 'Political' and 'Policy' Bodies

In addition to the procedures which are either formally designated as complaint procedures or under which allegations of human rights violations may be taken to treaty bodies as part of their review of country reports, there are a number of other procedures available. They might be described as the 'thematic' and expert bodies, on the one hand and the political bodies on the other.

Within the UN system there are various bodies which are examining particular themes and which, although they may not have a specific mandate to consider complaints of human rights violations, may nonetheless receive these as part of their information-gathering. For example, the Working Group on Contemporary Forms of Slavery, a working group of the Sub-commission on Prevention of Discrimination and Protection of Minorities, is a body which considers among other issues trafficking in women and children. (Since there is no monitoring or enforcement mechanism provided for under a number of the major conventions dealing with prostitution and trafficking in women,[70] this body has assumed something of that task.) In so doing it receives information and complaints from NGOs. Considerable use has been made of this forum in recent years by NGOs working in the field. Although taking a matter to this body essentially provides a forum for publicity, States referred to in NGO submissions frequently attend and respond to allegations of rights violations.[71] The Working Group on Traditional Practices of the Sub-Commission played a similar role in investigating the existence and extent of various traditional practices affecting the health of women and children (which included female circumcision, son preference and similar practices).[72] This work was

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[65] See *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,* Paul Hunt, Summary of cases submitted to Governments and replies received, E/CN.4/2005/51/Add.1.

[66] E/CN.4/2005/51/Add.1, para 53.

[67] E/CN.4/2005/51/Add.1, para 54.

[68] E/CN.4/2005/51/Add.1, para 55

[69] For example, the Special Rapporteur on Education does not appear to address the issue in any great depth, though the Special Rapporteur acknowledges (at E/CN.4/2003/58, para 67) the particular discrimination that persons with disabilities face (of whom women with disabilities may be at special risk).

[70] See U.N. Doc.E/CN.4/Sub.2/1989/37.

[71] See, e.g., *Report of the Working Group on Contemporary Forms of Slavery on its twenty-first session*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th session, Item 15 of the provisional agenda, UN Doc. E/CN.4/Sub.2/1996/24 (1996).

[72] For the final report on the work of the group, see UN Doc. E/CN.4/Sub.2/1991/6.

continued in the form of the Special Rapporteur on Traditional Practices of the Sub-commission.[73]

The Sub-Commission on Prevention of Discrimination and Protection of Minorities also provides a forum in which country-specific allegations of rights violations may be raised in public debate.[74]

The 'political' organs of the UN, for example, also provide a forum for airing human rights grievances in public sessions. These may provide an opportunity to place the spotlight on abuses in an individual country and publicity is the major benefit to be gained from using such fora. In fairly egregious cases of rights violations it may be that such a body would be prepared to place additional pressure on a State by adopting a resolution ranging from expressions of concern to expressions of condemnation and even the establishment of a special mechanism to investigate the position in a country.

The main forum of this sort within the United Nations is the Commission on Human Rights, which meets annually early in the year. On its agenda is a wide range of issues and it considers allegations of human rights violations in individual countries and thematic issues.[75]

The Commission on the Status of Women is also a forum that may be used. Of the same formal status as the Commission on Human Rights, the CSW meets once a year for a relatively brief period of two weeks. Interestingly, the CSW has not followed the path of the Commission on Human Rights in debating alleged violations of human rights in particular countries (although as mentioned above, it does consider these by way of its rather ineffectual confidential communications procedure). As Laura Reanda comments:[76]

> . . . there has been no concerted attempt to expand the role of the Commission [on the Status of Women] into a monitoring mechanism with powers of investigation, such as is the case with the Commission on Human Rights.. . .
>
> Clearly, the problem of implementation of women's rights was posed differently from that of human rights. Policies were directed not at attempting to detect violations and ensure respect for basic rights, but rather at assisting governments in identifying needs and encouraging them to adopt enlightened social policies which would promote the 'advancement' of women.

The difficulties with using such procedures can be easily understood. The politicised nature of such bodies can make the merits of a complaint seem almost irrelevant and whether action of any sort is taken depends largely on success in building coalitions between various countries and regional groups. This requires presence at such meetings and familiarity with the procedures involved. Nonetheless, the use of a political forum may be one way of bringing a matter quickly to the international level.

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[73] *Final report of the Special Rapporteur on traditional practices affecting the health of women and children,* Mrs. Halima Embarek Warzazi, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th session, Item 4 of the provisional agenda, UN Doc. E/CN.4/Sub.2/1996/6 1996).

[74] Eide, A. 'The Sub-Commission on Prevention of Discrimination and Protection of Minorities,' in Alston, *supra* note16, 211, at 248-252.

[75] On the powers and actions of the Commission on Human Rights, see Alston, P. 'The Commission on Human Rights,' in Alston, *supra* note16, 126, at 155-164.

[76] Reanda, L. *supra* note 34, 265 at 301-302.

11.7 Complaint and Monitoring Procedures in the Specialised Agencies: the UNESCO and the ILO

11.7.1 The Complaint and Monitoring and Procedure of *UNESCO*

In 1978 *UNESCO* adopted a procedure for the consideration of individual communications submitted to it alleging violations by a member of UNESCO of human rights within UNESCO's spheres of competence.[77] India has been a member of UNESCO since 1946, so is subject to the procedure.
The procedure allows individual communications[78] to be submitted by victims of alleged violations or by persons with reliable knowledge of the violations in relation to the following rights:[79]

- the right to education
- the right to share in scientific advancement
- the right to participate freely in cultural life, and
- the right to information , including freedom of conscience and expression.

In addition, the following rights are also relevant:[80]

- the right to freedom of thought, conscience, and religion
- the right to seek, receive and impart information through any media regardless offrontiers
- the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production
- the right to freedom of assembly and association for the purposes of activities connected with education, science, culture and information
- freedom of movement when related to activities coming within UNESCO's fields of competence
- freedom to emigrate if the profession of the alleged victim falls within UNESCO's field of competence, and
- the right of children to special protection, insofar as it concerns their education and access to culture and information.

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[77] 104 EX/Decision 3.3 (1978),. For a recent description and review of the procedure by UNESCO, see *Examination of the communications transmitted to the Committee on Conventions and Recommendations, Information document*, 169EX/CR/2 (2004), available at www.unesco.org. This document provides an overview of the procedure, and the practice of the Committee, including the types of requests made by the Committee to governments. Details of the procedure are available on UNESCO's website, though not easy to find by intuitive methods or by searching the site: Go to Legal Instruments/Focus on Human Rights, http://portal.unesco.org/en/ev.php-URL_ID=15243&URL_DO=DO_TOPIC&URL_SECTION=201.html

[78] The procedure also permits the Committee to consider relating to 'questions of massive, systematic or flagrant violations of human rights which result either from a policy contrary to human rights applied de iure or de facto by a State or from an accumulation of individual cases forming a consistent pattern': 104 EX/Decision 3.3, para 10(b). However, according to Marks, the Committee has been extremely cautious in dealing with 'questions' and have been reluctant to make significant use of the procedure in relation to such situations: Marks, Stephen P. 'The Communications Procedure of the United Nations Educational , Scientific and Cultural Organization' in Hannum, Hurst (Ed.) *Guide to International Human Rights* Practice (3rd ed 1999), 115.

[79] See *Form for Communications on human rights to be submitted to UNESCO*, 169 EX/CR/2, Annex II(b)

[80] Marks, *supra* note78,108-109. The UNESCO listing of the rights covered include the first four in Marks' list: see 169 EX/CR/2, at para 20. Marks also suggests that the right of minorities to enjoy their own culture, to profess and practice their own religion and to use their own language, and the right of peoples to self-determination, including the right to pursue cultural development might also be relevant. Marks, *supra* note78, at 109.

Unlike the individual communications procedures under the UN human rights treaties or the regional conventions, *UNESCO* procedure is not intended to be a (quasi-)judicial procedure resulting in a finding of violation (or no violation) against the State concerned.

The aim of the procedure is

> not to condemn the governments concerned, nor a fortiori to sanction them, but to improve the situation of the alleged victim. . .. [i]n exercising its mandate, the Committee [on Conventions and Recommendations] endeavoured, for humanitarian reasons, to establish a dialogue with the governments concerned in order to consider with them what might be done to promote human rights falling within the competence of UNESCO by seeking an amicable solution to cases brought to its attention.[81]

A communication must satisfy a range of admissibility criteria for it to be considered by the Committee on Conventions and Recommendations. The procedure is a confidential one, and the complainant is informed of the outcome of the deliberations by the Committee (though is not given the opportunity to respond to information submitted by a government in response to a communication).

Assessment of the effectiveness of the procedure in bringing about positive outcomes for those who suffer violations of the rights concerned have varied[82] – the relatively unknown status of the procedure, the fact that it is a committee made up of governments which considers the communications, the fact that the procedure is conducted confidentially and few details are available in the public domain of the specific outcome of cases (though overall statistics are made available by *UNESCO*), make its impact difficult to assess,[83] and limit the impact that its outcome might have on the development of jurisprudence in this area.

Nevertheless, it may provide some opportunities for disability rights activists to raise issues when it has not been possible to make progress at the national level. Discrimination in the enjoyment of the rights to education (particularly of children, but not limited to them) would appear to be an obvious area, as might issues of accessibility (since this fundamentally affects the ability of persons to move about the community and to participate in cultural life).

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[81] 169 EX/CR/2, at para 9.

[82] For a critical review of the procedure and its effectiveness in producing results for victims of violations, based on a study of cases between 1980 and 1991, see Weissbrodt, D. and R Farley 'The UNESCO Human Rights Procedure: An Evaluation,' *Human Rights Quarterly* 16 (1994), 391. Stephen Marks' 1999 assessment was that the procedure 'holds the promise of contributing significantly to the resolution of such issues on the basis of human rights norms. That promise has yet to be fulfilled.' Marks, *supra* note78, at 117

[83] According to UNESCO figures there were 508 communications considered by the Committee on Conventions and Recommendations from 1978-2003, of which 315 were settled. These included cases in which the person was released or acquitted, released after completion of a sentence, authorized to leave or to return to the State in question, able to resume their employment or activity, able to resume a banned publication or broadcast programme, able to resume a normal life following the cessation of threats, able to benefit from changes in certain education laws which were discriminatory towards ethnic or - religious minorities, or able to obtain passports and/or grants, or receive diplomas. *Summary of the results of the application of the procedure laid down by 104 EX/Decision 3.3*, 169 EX/CR/2, at para 45.

11.7.2. The Complaint and Monitoring Procedures of the International Labour Organisatio

India has been a member of the International Labour Organisation (*ILO*) since the 1940s. As a member of the *ILO* India accepts certain fundamental principles relating to the rights of workers, in particular freedom of association and the right to bargain collectively. In addition, India has ratified over forty international labour conventions.

By virtue of its membership of the *ILO*, India is subject to a number of supervisory procedures, established in the Constitution of the Organisation or by its governing institutions. The first of these is the procedure relating to freedom of association under which an organisation of workers or employers may submit a complaint to the Committee on Freedom of Association to the Governing Body of the *ILO*. This committee, comprising independent experts, considers cases and adopts conclusion and recommendations on them.[84]

In addition, India is subject to a number of other procedures in relation to the international labour conventions which it has ratified. A member State which has ratified a convention must report regularly to the *ILO* on the steps it has taken to implement the convention; these reports are reviewed by the Committee of Experts on the Application of Conventions and Recommendations (and in some cases may be reviewed by Conference Committee on the Application of Standards).[85] Overall, the reporting procedure of the *ILO* and the follow-up and technical assistance provided by the organisation have meant that the implementation of most of the *ILO* conventions is considered very effective.

In addition to these regular supervisory procedures, there are a number of other procedures provided for the in the *ILO* Constitution which allow claims of a failure to give effect to a convention to be considered. Under *Article 24* of the *ILO* Constitution any national or international workers' or employers' organisation may make a 'representation' claiming that a given member State has failed to apply an *ILO* Convention it has ratified The Governing Body considers whether an application is receivable and, if so, appoints a tripartite committee of three to consider the representation. The Governing Body considers the report of the Tripartite Committee, and may publish a report or initiate an *Article 26* procedure.

Under *Article 26* of the *ILO* Constitution an *ILO* member State which is party to a convention or any delegate of the International Labour Conference may lodge a complaint asserting that another member State which is also party to that convention is not securing the effective application of a convention. The Governing Body decides whether to appoint a Commission of Inquiry, which reports its findings to the Governing Body. The Committee of Experts may follow up any recommendations, while the State concerned may refer the matter to the International Court of Justice.

Quite apart form the fact that these complaint procedures are utilised relatively infrequently, in the case of India, the potential for raising issues of the human rights of persons with disabilities within the ILO framework is somewhat limited. India has not ratified the 1989 *ILO Convention No.159* (Vocational

[84] For details, see http://www.ilo.org/public/english/standards/norm/enforced/foa/index.htm
[85] http://www.ilo.org/public/english/standards/norm/sources/handbook/hb7.htm#p53

Rehabilitation and Employment (Disabled Persons) Convention), and is accordingly, not obliged to report under that convention and thus it is not subject to the complaint procedures under the Constitution for any alleged failure to implement the convention.

While India has ratified *ILO Convention No. 111* (Discrimination in Occupation and Employment), the definition of discrimination in that convention does not expressly cover discrimination on the ground of disability.[86] It is open to States parties to the Convention to expand the range of grounds of impermissible discrimination at the national level. However, it is not clear whether the enactment of the Persons with Disabilities Act would have the effect of expanding the scope of India's obligations under *ILO Convention No. 111* to include taking the steps mentioned in *Articles 2* and *3* of the Convention[87] in relation to discrimination in employment and occupation on the ground of disability. If it had done so, then it would appear that India would be obliged to report on that subject in its reports under the Convention and would be potentially subject to complaints or representations under *Article 24* or *26* of the *ILO* Constitution in relation to a failure to carry out its obligations under the Convention in respect of disability discrimination in employment.

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[86] Article 1(1) of the Convention provides:

'1. For the purpose of this Convention the term discrimination includes—

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.'

[87] '*Article 2*

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice—

(a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;

(b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

(c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;

(d) to pursue the policy in respect of employment under the direct control of a national authority;

(e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;

(f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.'

11.8 Revisiting the Hypothetical Cases [88]

Case No 1

In this case the rights of the citizens to participate in public and political affairs (including the right to vote) under *Article 25* of the *ICCPR* would be implicated.

There are a limited number of international procedures open to the persons affected in this case. If India were reporting to the *ICCPR*, then the matter could be brought before the Committee, but it is unlikely to bring about an urgent response (though it may contribute to a solution in the longer term). India is not a party to the First Optional Protocol to the *ICCPR*, so it is not possible to lodge an individual complaint. One might perhaps be able to argue that the citizens' freedom of opinion and expression are implicated and invoke the assistance of the *Special Rapporteur* on Freedom of Expression, or conceivably lodge a communication under the *UNESCO* communications procedure. What other strategies might you employ?

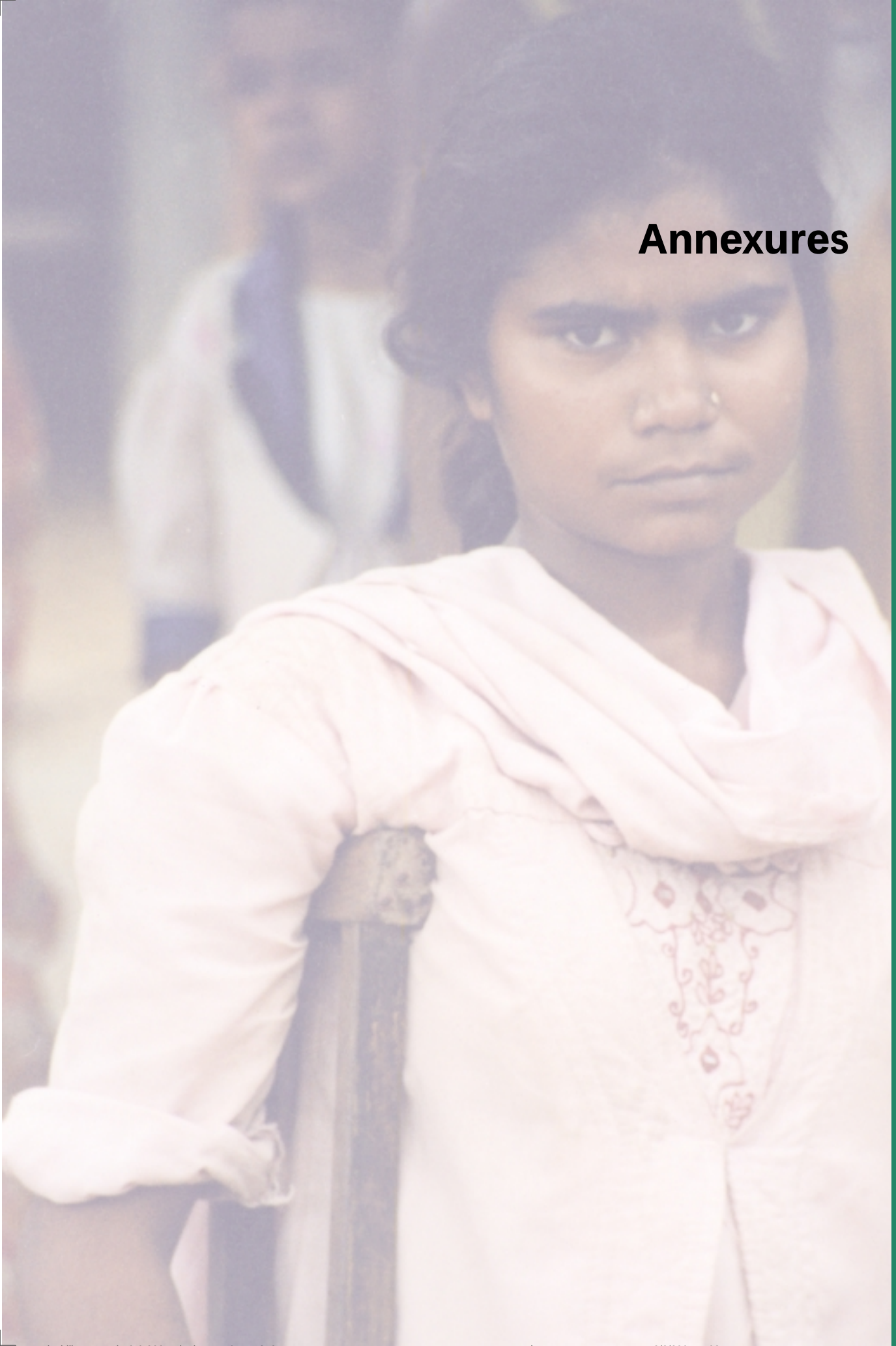
Case No 2

There are a number of rights implicated here, above all Rajeev's right to education and right not to be subjected to discrimination on the ground of his disability. These could be raised with the Committee on Economic, Social and Cultural Rights under the *ICESCR*, the Human Rights Committee under *Article 26* of the *ICCPR*, and with the Committee on the Rights of the Child under the Convention on the Rights of the Child. This would, however, only be possible under the reporting procedure (since there is no available individual complaints procedure), which may not be timely. Other options would be the *Special Rapporteur* on Education, and the UNESCO communications procedure.
Are there other approaches you might adopt?

Case No 3

There is a variety of rights implicated here ranging from the right to integrity of the person, the right not to be subjected to torture or cruel, inhuman or degrading treatment, right ot privacy, right to health, and right not to be discriminated against on the basis of gender and disability. While these issues could be raised in one form or another under the reporting procedures of the *ICCPR, ICESCR, CEDAW* and *CRC* (and should be in order to ensure longer-term policy reform), more immediate action is required in the case. Available options would include a number of *Special Rapporteurs* of the Commission on Human Rights: torture, violence against women, and health are the most obviously ones. The women's group might also wish to invoke the aid of an international NGO such as *Amnesty International* which works in the field of human rights.

[88] See Section 11.2 above



Annexures

NHRC

Annexure 1

PWD ACT, 1995

THE PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995

PUBLISHED IN PART II, SECTION 1 OF THE EXTRAORDINARY GAZETTE OF INDIA

MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS (Legislative Department)

New Delhi, the 1st January, 1996/Pausa 11, 1917 (Saka)

The following Act of Parliament received the assent of the President on the 1st January, 1996, and is hereby published for general information:- No.1 of 1996 [1st January 1996]

An Act to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region.

WHEREAS the Meeting to Launch the Asian and Pacific Decade of Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asia and Pacific held at Beijing on 1st to 5th December,1992, adopted the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region;

AND WHEREAS India is a signatory to the said Proclamation; AND WHEREAS it is considered necessary to implement the Proclamation aforesaid.

Be it enacted by Parliament in the Forty-sixth Year of the Republic of India as follows:-

Chapter I Preliminary
Chapter II The Central Coordination Committee
Chapter III The State Coordination Committee
Chapter IV Prevention And Early Detection Of Disabilities
Chapter V Education
Chapter VI Employment
Chapter VII Affirmative Action
Chapter VIII Non - Discrimination
Chapter IX Research And Manpower Development
Chapter X Recognition Of Institutions For Persons With Disabilities
Chapter XI Institution For Persons With Severe Disabilities
Chapter XII The Chief Commissioner And Commissioners For Persons With Disabilities
Chapter XIII Social Security
Chapter XIV Miscellaneous

CHAPTER I

PRELIMINARY

1. (1) This Act may be called the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may. by notification, appoint.

2. In this Act, unless the context otherwise requires,-

(a) "Appropriate Government" means,-

(i) In relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924, the Central Government ;

(ii) In relation to a State Government or any establishment wholly or substantially financed by that Government, or any local authority., other than a Cantonment Board, the State Government;

(iii) In respect of the Central Co-ordination Committee and the Central Executive Committee, the Central Government;

(iv) In respect of the State Co-ordination Committee and the State Executive Committee, the State Government;

(b) "Blindness" refers to a condition where a person suffers from any of the following conditions, namely:-

(i) Total absence of sight. or

(ii) Visual acuity not exceeding 6160 or 201200 (snellen) in the better eye with correcting lenses; or

(iii) Limitation of the field of vision subtending an angle of 20 degree or worse;

(c) "Central Co-ordination Committee" means the Central Co-ordination Committee constituted under sub-section (1) of section 3;

(d) "Central Executive Committee" means the Central Executive Committee constituted under sub-section (1) of section 9;

(e) "Cerebral palsy" means a group of non-progressive conditions of a person characterized by abnormal motor control posture resulting from brain insult or injuries occurring in the pre-natal, peri-natal or infant period of development;

(f) "Chief Commissioner" means the Chief Commissioner appointed under subsection (1) of section 57;

(g) "Commissioner" means the Commissioner appointed under sub-section (1) of section 60;

(h) "Competent authority" means the authority appointed under section 50;

(i) "Disability" means-

(i) Blindness;

(ii) Low vision;

(iii) Leprosy-cured;

(iv) Hearing impairment;

(v) Loco motor disability;

(vi) Mental retardation;

(vii) Mental illness;

(j) "Employer" means,-

(i) In relation to a Government, the authority notified by the Head of the Department in this behalf or where no such authority is notified, the Head of the Department; and

(ii) In relation to an establishment, the chief executive officer of that the establishment;

(k) "Establishment" means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 617 of 'the Companies Act, 1956 and includes Departments of a Government;

(l) "Hearing impairment" means loss of sixty decibels or more in the better year in the conversational range of' frequencies;

(m) "Institution for persons with disabilities" means an institution for the reception. Care, protection, education, training, rehabilitation or any other service of persons with disabilities;

(n) "Leprosy cured person" means any person who has been cured of leprosy but is suffering from-

(i) Loss of sensation in hands or feet as well as loss of sensation and paresis in the eye and eye-lid but with no manifest deformity;

(ii) Manifest deformity and paresis; but having sufficient mobility in their hands and feet to enable them to engage in normal economic activity;

(iii) Extreme physical deformity as well as advanced age which prevents him from undertaking

any gainful occupation, and the expression "leprosy cured" shall be construed accordingly;

(o) "Loco motor disability" means disability of the bones, joints muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy,

(p) "Medical authority" means any hospital or institution specified for the purposes of this Act by notification by the appropriate Government;

(q) "Mental illness" means any mental disorder other than mental retardation;

(r) "Mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterized by sub normality of intelligence;

(s) "Notification" means a notification published in the, Official Gazette;

(t) "Person with disability" means a person suffering from not less than forty per cent. of any disability as certified by a medical authority;

(u) "Person with low vision" means a person with impairment of visual functioning even after treatment or standard refractive correction but who uses or is potentially capable of using vision for the planning or execution of a task with appropriate assistive device;

(v) "Prescribed" means prescribed by rules made under this Act;

(w) "Rehabilitation" refers to a process aimed at enabling persons with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric or social functional levels;

(x) "Special Employment Exchange" means any office or place established and maintained by the Government for the collection and furnishing of information, either by keeping of registers or otherwise, respecting-

(i) Persons who seek to engage employees from amongst the persons suffering from disabilities;

(ii) Persons with disability who seek employment;

(iii) Vacancies to which person with disability seeking employment may be appointed;

(y) "State Co-ordination Committee" means the State Co-ordination Committee constituted under sub-section (1) of section 19;

(z) "State Executive Committee" means the State Executive Committee constituted under sub-section (l) of section 19

CHAPTER II

THE COORDINATION COMMITTEE

3. (1) The Central Government shall by notification constitute a body to be known as the Central Co-ordination Committee to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.

(2) The Central Co-ordination Committee shall consist of-

(a) The Minister in charge of the Department of Welfare in the Central Government, Chairperson, ex officio;

(b) The Minister of State in-charge of the Department of Welfare in the Central Government, Vice-Chairperson, ex officio;

(c) Secretaries to the Government of India in-charge of the Departments of Welfare, Education, Woman and Child Development, Expenditure, Personnel, Training and Public Grievances, Health, Rural Development, Industrial Development, Urban Affairs and Employment, Science and Technology. Legal Affairs, Public Enterprises, Members, ex officio;

(d) Chief Commissioner, Member, ex officio;

(e) Chairman Railway Board, Member, ex officio;

(f) Director-General of Lab our, Employment and Training, Member, ex officio;

(g) Director, National Council for Educational Research and Training, Member, ex officio;

(h) Three Members of Parliament. of whom two shall be elected by the House of the People and one by the Council of States, Members;

(I) Three persons to be nominated by the Central Government to represent the interests, which in the opinion of that Government ought to be represented, Members;

(j) Directors of the-

(i) National Institute for the Visually Handicapped, Dehradun;

(ii) National Institute for the Mentally Handicapped, Secundrabad;

(iii) National Institute for the Orthopaedically Handicapped, Calcutta;

(iv) Ali Yavar Jung National Institute for the Hearing Handicapped, Bombay,

Members, ex officio;

(k) Four Members to be nominated by the Central Government by rotation to represent the States and the Union territories in such manner as may be prescribed by the Central Government:

Provided that no appointment under this clause shall be made except on the recommendation of the State Government or, as the case may be, the Union territory;

(l) Five persons as far as practicable, being persons with disabilities. to represent non-governmental Organizations or associations which are concerned with disabilities, to he nominated by the Central Government, one from each area of disability, Members:

Provided that while nominating persons under this clause, the Central Government shall

nominate at least one woman and one person belonging to Scheduled Castes or Scheduled Tribes;

(m) Joint Secretary to the Government of India in the Ministry of Welfare dealing with the welfare of the handicapped, Member-Secretary, ex officio.

(3) The office of the Member of the Central Co-ordination Committee shall not disqualify its holder for being chosen as or for being a Member of either House of Parliament.

4. (1) Save as otherwise provided by or under this Act a Member of Central Co-ordination Committee nominated under clause (i) or clause (l) of sub-section (2) of section 3 shall hold office for a term of three years from the date of his nomination:

Provided that such a Member shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) The term of office of an ex officio Member shall come to an end as soon as he ceases to hold the office by virtue of which he was so nominated.

(3) The Central Government may if it thinks fit remove any Member nominated under clause (i) or clause (1) of subsection (2) of section 3, before the expiry of his term of office after giving him a reasonable opportunity of showing cause against the same.

(4) A Member nominated under clause (i) or clause (1) of subsection (2) of section 3 may at any time resign his office by writing under his hand addressed to the Central Government and the seat of the said Member shall thereupon become vacant.

(5) A casual vacancy in the Central Co-ordination Committee shall be filled by a fresh nomination and the person nominated to fill the vacancy shall hold office only for the remainder of the term for which the Member in whose place he was so Dominated.

(6) A Member nominated under clause (i) or clause (l) of subsection (2) of section 3 shall be eligible for (7) Members nominated under clause (i) and clause (1) of sub-section (2) of section 3 shall receive such allowances as may, be prescribed by the Central Government.

5. (1) No person shall be a Member of the Central Coordination Committee, who-

(a) Is, or at any time has been, adjudged insolvent or has suspended payment of his debts or has compounded with his creditors, or

(b) Is of unsound mind and stands so declared by a competent court, or

(c) Is or has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude, or

(d) Is or at any time has been convicted of an offence under this Act. or

(e) Has so abused in the opinion of the Central Government his position as a Member as to render his continuance in the Central Coordination Committee detrimental to the interests of the general public.

(2) No order of removal shall be made by the Central Government under this section unless the Member concerned has been given a reasonable opportunity of showing cause against the same.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (6) of section 4, a Member who has been removed under this section shall not be eligible for renomination as a Member.

6. If a Member of the Central Coordination Committee becomes subject to any of the disqualifications specified in section 5, his scat shall become vacant.

7. Lie Central Coordination Committee shall meet at least once in every six months and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be prescribed by the Central Government.

8. (1) Subject to the provisions of this Act, the function of the Central Coordination Committee shall be to serve as the national focal point on disability matters and facilitate the continuous evolution of a comprehensive policy towards solving the problems faced by persons with disabilities.

(2) In particular and without prejudice to the generality of the foregoing, the Central Coordination Committee may perform all or any, of the following functions, namely:-

(a) Review and coordinate the activities of all the Departments of Government and other Governmental and non-Govemmental Organizations which are dealing with matters relating to persons with disabilities;

(b) Develop a national policy to address issues faced by, persons with disabilities;

(c) Advise the Central Government on the formulation oil policies, programmes, legislation and projects with respect to disability,

(d) Take up the cause of persons with disabilities with the concerned authorities and the international organizations with a view, to provide for schemes and projects for the disabled in the national plans and other programmes and policies evolved by the international agencies;

(e) Review in consultation with the donor agencies their funding policies from the perspective of their impact on persons with disabilities;

(f) Take such other steps to ensure barrier free environment in public places, work places, public utilities, schools and other institutions;

(g) Monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of persons with disabilities;

(h) To perform such other functions as may be prescribed by the Central Government.

9. (1) The Central Government shall constitute a Committee to be known as the Central Executive Committee to perform the functions assigned to it under this Act.

(2) The Central Executive Committee shall consist of-

(a) The Secretary to the Government of India in the Ministry of Welfare, Chairperson, ex officio;

(b) The Chief Commissioner, Member, ex officio;

(c) The Director-General for Health Services, Member, ex officio;

(d) The Director-General, Employment and Training, Member, ex officio;

(e) Six persons not below the rank of a Joint Secretary to the Government of India, to represent the Ministries or Departments of Rural Development, Education. Welfare, Personnel Public Grievances and Pension and Urban Affairs and Employment, Science and Technology, Members, ex officio;

(f) The Financial Advisor, Ministry of Welfare in the Central Government, Member, ex officio;

(g) Advisor (Tariff) Railway Board, Member, ex officio;

(h) Four members to be nominated by the Central Government, by rotation, to represent the State Governments and the Union territories in such manner as may be prescribed by the Central Government;

(i) One person to be nominated by the Central Government to represent the interest, which in the opinion of the Central Government ought to be represented, Member;

(j) Five persons, as far as practicable, being persons with disabilities, to represent non-governmental organizations or associations which are concerned with disabilities, to he nominated by the Central Government, one from each area of disability, Members:

Provided that while nominating persons under this clause, the Central Government shall nominate at least one woman and one person belonging to Scheduled Castes or Scheduled Tribes;

(k) Joint Secretary to the Government of India in the Ministry of Welfare dealing with the welfare of the handicapped, Member-Secretary, ex officio.

(3) Members nominated under clause (i) and clause (j) of sub-section (2) shall receive such allowances as may be prescribed by the Central Government.

(4) A Member nominated under clause (i) or clause (i) of sub-section (2) may at any time resign his office by writing under his hand addressed to the Central Government and the scat of the said Member shall thereupon become vacant.

10. (1) The Central Executive Committee shall be the executive body of the Central Coordination Committee and shall be responsible for carrying out the decisions of the Central Coordination Committee.

(2) Without prejudice to the provisions of sub-section (1), the Central Executive Committee shall also perform such other functions as may be delegated to it by the Central Coordination Committee.

11. The Central Executive Committee shall meet at least once in three months and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be prescribed by the Central Government.

12. (1) The Central Executive Committee may associate with itself in such manner and for such purposes as may be prescribed by the Central Government any person whose assistance or advice it may desire to obtain in performing any of its functions under this Act.

(2) A person associated with the Central Executive Committee under sub-section (1) for any purpose shall have the right to take part in the discussions of the Central Executive Committee relevant to that purpose, but shall not have a right to vote at a meeting of the said Committee, and shall not be a member for any other purpose.

(3) A person associated with the said Committee under sub-section (1) for any purpose shall be paid such fees and allowances, for attending its meetings and for attending to any other work of the said Committee, as may be prescribed by the Central Government.

CHAPTER III

THE STATE COORDINATION COMMITTEE

13. **(1)** Every State Government shall, by notification, constitute a body to be known as the State Coordination Committee to exercise the powers conferred on, and to perform the function assigned to it, under this Act.

(2) the State Coordination Committee shall consist of-

(a) The Minister in-charge of the Department of Social Welfare in the State Government, Chairperson, ex officio;

(b) the Minister of State in-charge of the Department of Social Welfare, if any, Vice-Chairperson, ex officio;

(c) Secretaries to the State Government in-charge of the Departments of Welfare, Education, Woman and Child Development, Expenditure, Personnel Training and Public Grievances, Health, Rural Development, Industrial Development, Urban Affairs and Employment, Science and Technology, Public Enterprises, by whatever name called, Members, ex officio;

(d) Secretary of any other Department, which the State Government considers necessary, Member, ex officio;

(e) Chairman Bureau of Public Enterprises (by whatever name called) Member, ex officio;

(f) Five persons, as far as practicable, being persons with disabilities, to represent non-governmental organizations or associations which are concerned with disabilities, to be nominated by the State Government, one from each area of disability, Members:

Provided that while nominating persons under this clause, the State Government shall nominate at least one woman and one person belonging to Scheduled Castes or Scheduled Tribes;

(g) Three Members of State Legislature, of whom two shall be elected by the Legislative Assembly and one by the Legislative Council, if any;

(h) Three persons to be nominated by that State Government to represent agriculture, industry or trade or any other interest, which in the opinion of State Government ought to be represented, Members, ex officio;

(i) The Commissioner, Member, ex officio;

(j) Secretary to the State Government dealing with the welfare of the handicapped, Member-Secretary, ex officio.

(3) Notwithstanding anything contained in this section, no State Coordination Committee shall be constituted for a Union territory and in relation to a Union territory; the Central Coordination

Committee shall exercise the functions and perform the functions of a State Coordination Committee for the Union territory:

Provided that in relation to a Union territory. The Central Coordination Committee may delegate all or any of its powers and functions under this sub-section to such person or body of persons as the Central Government may specify.

14. **(1)** Save as otherwise provided by or under this Act, a Member of a State Coordination Committee nominated under clause (f) or clause (h) of subsection (2) of section 13 shall hold office for a term of three years from the date of his nomination:

Provided that such a Member shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) The term of office of an ex officio Member shall come to an end as soon as he ceases to hold the office by virtue of which he was so nominated.

(3) The State Government may, if it thinks fit, remove any7 Member nominated under clause (f) or clause (h) of sub-section (2) of section 13, before the expiry of his term of office after giving him a reasonable opportunity of showing cause against the same.

(4) A Member nominated under clause (f) or clause (h) of sub-section (2) of section 13 may. At any time, resign his office by writing under his hand addressed to the State Government and the seat of the said Member shall thereupon become vacant.

(5) A casual vacancy in the State Coordination Committee shall be filled by a fresh nomination and the person nominated to fill the vacancy shall hold office only for the remainder of the term for which the Member in whose place he was so nominated.

(6) A Member nominated under clause (f) and clause (h) of sub-section (2) of section 13 shall be eligible for renomination.

(7) Members nominated under clause (f) and clause (h) of sub-section (2) of section13 shall receive such allowances as may he prescribed by the State Government.

15. **(1)** No pet-son shall he a Member of the State Coordination Committee, who—

(a) Is, or at any time, has been adjudged insolvent or has suspended payment of his debts or has compounded with his creditors, or

(b) Is of unsound mind and stands so declared by a competent court, or

(c) Is or has been convicted of an offence which in the opinion of the State Government involves moral turpitude, or

(d) Is or at any time has been convicted of an offence under this Act or

(e) Has so abused, in the opinion of the State Government, his position as a member as to render his continuance in the State Coordination Committee detrimental to the interests of the general public.

(2) No order of removal shall be made by the State Government under this section unless the Member concerned has been given a reasonable opportunity of showing cause against the same.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (6) of section 14, a Member who has been removed under this section shall net be eligible for renomination as a Member.

16. If a Member of the State Coordination Committee becomes subject to any of the disqualifications specified in section 15, his seat shall become vacant.

17. The State Coordination Committee shall meet at least once in every six months and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be prescribed.

18. **(1)** Subject to the provisions of this Act, the function of the State Coordination Committee shall be to serve as the state focal point on disability matters and facilitate the continuous evolution of a comprehensive policy towards solving the problems faced by persons with disabilities.

(2) In particular and without prejudice to the generality of the foregoing function the State Coordination Committee may, within the State perform all or any of the following functions, namely.-

(a) Review and coordinate the activities of all the Departments of Government and other Governmental and non-Govemmental Organizations which are dealing with matters relating to persons with disabilities.,

(b) Develop a State policy to address issues faced by persons with disabilities;

(c) Advise the State Government on the formulation of policies. Programmes, legislation and projects with respect to disability;

(d) Review, in consultation with the donor agencies, their funding from the perspective of their impact on persons with disabilities;

(e) Take such other steps to ensure barrier free environment in pupil's places. Work places, public utilities, schools and other institutions;

(f) Monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of persons with disabilities;

(g) To perform such other functions as may be prescribed by the State Government

19. (1) The State Government shall constitute a committee to be known as the State Executive Committee

to perform the functions assigned to it under this Act.

(2) The State Executive Committee shall consist of-

(a) The Secretary, Department of Social Welfare, Chairperson, ex officio;

(b) The Commissioner, Member, ex officio;

(c) Nine persons not below the rank of a Joint Secretary to the State Government, to represent the Departments of Health, Finance, Rural Development, Education, Welfare, Personnel Public Grievances, Urban Affairs Labor and Employment, Science and Technology, Members, ex officio;

(d) One person to be nominated by the State Government to represent the interest, which in the opinion of the State Government ought to be represented. Member;

(e) Five persons, as far as practicable being persons with disabilities. to represent non-governmental organizations or associations which arc concerned with disabilities, to be nominated by the State Government, one from each area of disability, Members:

Provided that while nominating persons under this clause, the State Government shall nominate at least one woman and one person belonging to Scheduled Castes or Scheduled Tribes;

(f) Joint Secretary dealing with the disability division in the Department of Welfare, Member-Secretary, ex officio.

(3) Members nominated under clause (d) and clause (e) of sub-section (2) shall receive such allowances as may be prescribed by the State Government.

(4) A Member nominated under clause (d) or clause (e) may at any time resign his office by writing under his hand addressed to the State Government and the scat of the said Member shall thereupon become vacant.

20. **(1)** The State Executive Committee shall be the executive body of the State Coordination Committee and shall be responsible for carrying out the decisions of the State Coordination Committee.

(2) Without prejudice to the provisions of sub-section (1), the State Executive Committee shall also perform such other functions as may be delegated to it by the State Coordination Committee.

21. The State Executive Committee shall meet at least once in three months and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be prescribed by, the State Government.

22. **(1)** The State Executive Committee may associate with itself in such manner and for such purposes as may he prescribed by the State Government any person whose assistance or advice it may desire to obtain in performing any of its functions under this Act.

(2) A person associated with the State Executive Committee under sub-section (1) for any purpose shall have the right to take part in the discussions of the State Executive Committee relevant to that purpose, but shall not have a right to vote at a meeting of the said Committee, and shall not he a member for any other purpose.

(3) A person associated wills the said Committee under sub-section (1) for any purpose shall be paid such fees and allowances, for attending its meetings and for attending to any other work of the said Committee, as may be prescribed by the State Government.

23. In the performance of its functions under this Act,-

(a) The Central Coordination Committee shall be bound by such directions in writing, as the Central Government may give to it; and

(b) The State Coordination Committee shall be bound by such directions in writing, as the Central Coordination Committee or the State, Government may give to it:

Provided that where a direction given by the State Government is inconsistent with any direction given by the Central Coordination Committee, the matter shall be referred to the Central Government for its decision.

24. No act or proceeding of the Central Coordination Committee, the Central Executive Committee, a State Coordination Committee or a State Executive Committee shall be called in question on the ground merely on the existence of any vacancy in or any defect in the constitution of such Committees.

CHAPTER IV

PREVENTION AND EARLY DETECTION OF DISABILITIES

25. 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-

(a) Undertake or cause to be undertaken surveys, investigations and research concerning the cause of occurrence of disabilities;

(b) Promote various methods of preventing disabilities;

(c) Screen all the children at least once in a year for the purpose of identifying "at-risk" cases;

(d) Provide facilities for training to the staff at the primary health centers;

(e) Sponsor or cause to be sponsored awareness campaigns and is disseminated or cause to be disseminated information for general hygiene. Health and sanitation,

(f) Take measures for pre-natal, parental and post-natal care of mother and child;

(g) Educate the public through the pre-schools, schools, primary health Centers, village level workers and anganwadi workers;

(h) Create awareness amongst the masses through television, radio and other mass media on the causes of disabilities and the preventive measures to be adopted;

CHAPTER V

EDUCATION

26. The appropriate Governments and the local authorities shall-

(a) Ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years;

(b) Endeavor to promote the integration of students with disabilities in the normal schools;

(c) Promote setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools;

(d) Endeavor to equip the special schools for children with disabilities with vocational training facilities.

27. The appropriate Governments and the local authorities shall by notification make schemes for-

(a) Conducting part-time classes in respect of children with disabilities who having completed education up to class fifth and could not continue their studies on a whole-time basis;

(b) Conducting special part-time classes for providing functional literacy for children in the age group of sixteen and above;

(c) Imparting non-formal education by utilizing the available manpower in rural areas after giving them appropriate orientation;

(d) Imparting education through open schools or open universities;

(e) Conducting class and discussions through interactive electronic or other media;

(f) Providing every child with disability free of cost special books and equipments needed for his education.

28. The appropriate Governments shall initiate or cause to be initiated research by official and non-governmental agencies for the purpose of designing and developing new assistive devices, teaching aids, special teaching materials or such other items as are necessary to give a child with disability equal opportunities in education.

29. The appropriate Governments shall set up adequate number of teachers' training institutions and assist the national institutes and other voluntary organizations to develop teachers' training programmes specializing in disabilities so that requisite trained manpower is available for special schools and integrated schools for children with disabilities.

30. Without prejudice to the foregoing provisions, (be appropriate Governments shall by notification prepare a comprehensive education scheme which shall make Provision for-

(a) Transport facilities to the children with disabilities or in the alternative financial incentives to

parents or guardians to enable their children with disabilities to attend schools.

(b) The removal of architectural barriers from schools. colleges or other institution, imparting vocational and professional training;

(c) The supply of books, uniforms and other materials to children with disabilities attending school.

(d) The grant of scholarship to students with disabilities..

(e) Setting up of appropriate fora for the redressal of grievances of parent, regarding the placement of their children with disabilities;

(f) Suitable modification in the examination system to eliminate purely mathematical questions for the benefit of blind students and students with low vision;

(g) Restructuring of curriculum for the benefit of children with disabilities;

(h) restructuring the curriculum for benefit of students with hearing impairment to facilitate them to take only one language as part of their curriculum.

31. All educational institutions shall provide or cause to be provided amanuensis to blind students and students with or low vision.

CHAPTER VI

EMPLOYMENT

32. Appropriate Governments shall—

(a) Identify posts, in the establishments, which can be reserved for the persons with disability;

(b) At periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

33. Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent. for persons or class of persons with disability of which one per cent. each shall be reserved for persons suffering from-

(i) Blindness or low vision;

(ii) Bearing impairment;

(iii) Loco motor disability or cerebral palsy, in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

34. (1) The appropriate Government may, by notification. Require that from such date as May he specified. By notification. The employer in every establishment shall furnish such information or return as may be prescribed in relation to vacancies appointed for person, with disability that have occurred or are about to occur in that establishment to such Special Employment Exchange as may be prescribed and the establishment shall thereupon comply with such requisition.

(2) The form in which and the intervals of time for which information or returns shall be furnished and the particulars, they shall contain shall be such as may be prescribed.

35. Any person authorized by the Special Employment Exchange in writing, shall have access to any relevant record or document in the possession of any establishment, and may enter at any reasonable time and premises where he believes such record or document to be, and inspect or take copies of relevant records or documents or ask any question necessary for obtaining any information.

36. Where in any recruitment year any vacancy under section 33, cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if ;r the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no parson with disability available for the post in that Year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person can

not be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government.

37. (1) Every employer shall maintain such record in relation to the person. With disability employed in his establishment in such form and in such manner as may be prescribed by the appropriate Government.

(2) The records maintained under sub-section (1) shall be open to inspection at all reasonable hours by such persons as may be authorized in this behalf by general or special order by the appropriate Government.

38. (1) The appropriate Governments and local authorities shall by notification formulate schemes for ensuring employment of persons with disabilities, and such schemes may provide for-

(a) The training and welfare of persons with disabilities;

(b) The relaxation of upper age limit;

(c) Regulating the employment;

(d) Health and safety measures and creation of a non-handicapping environment in places where persons with disabilities are employed;

(e) The manner in which and the person by whom the cost of operating the schemes is to be defrayed; and

(f) Constituting the authority responsible for the administration of the scheme.

39. All Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three per cent seat for persons with disabilities.

40. The appropriate Governments and local authorities shall reserve not less than three per cent. in all poverty alleviation schemes for the benefit of persons with disabilities.

41. The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, provide incentives to employers both in public and private sectors to ensure that at least five per cent. of their work force is composed of persons with disabilities.

CHAPTER VII

AFFIRMATIVE ACTION

42. The appropriate Governments shall by notification make schemes to provide aids and appliances to persons with disabilities.

43. The appropriate Governments and local authorities shall by notification frame schemes in favor of persons with disabilities, for the preferential allotment of land at concession] rates for-

(a) House;

(b) Setting up business;

(c) Setting up of special recreation centers;

(d) Establishment of special schools;

(e) Establishment of research centers;

(f) Establishment of factories by entrepreneurs with disabilities

CHAPTER VIII

NON-DISCRIMINATION

44. Establishments in the transport sector shall, within the limits of their economic capacity and development for the benefit of persons with disabilities, take special measures to-

(a) Adapt rail compartments, buses. Vessels and aircrafts in such a way as to permit easy access to such persons;

(b) Adapt toilets in rail compartments, vessels, aircrafts and waiting rooms in such a way as to permit the wheel chair users to use them conveniently.

45. The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development. Provide for-

(a) Installation of auditory signals at red lights in the public roads for the benefit of persons with visually handicap;

(b) Causing curb cuts and slopes to be made in pavements for the easy access of wheel chair users;

(c) Engraving on the surface of the zebra crossing for the blind or for persons with low vision;

(d) Engraving on the edges of railway platforms for the blind or for persons with low vision;

(e) Devising appropriate symbols of disability;

(f) Warning signals at appropriate places.

46. The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, provide for-

(a) Ramps in public buildings;

(b) Braille symbols and auditory signals in elevators or lifts;

(c) Braille symbols and auditory signals in elevators or lifts;

(d) Ramps in hospitals, primary health centers and other medical care and rehabilitation institutions.

47. (1) No establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service.

Provided 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.

Provided 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.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

CHAPTER IX

RESEARCH AND MANPOWER DEVELOPMENT

48. The appropriate Governments and local authorities shall promote and sponsor research, inter alia,, in the following areas-

(a) Prevention of disability;

(b) Rehabilitation including community based rehabilitation;

(c) Development of assistive devices including their psychosocial aspects;

(d) Job identification;

(e) On site modifications in offices and factories.

49. The appropriate Governments shall provide financial assistance to universities, other institutions of higher learning, professional bodies and non-governmental research-. units or institutions, for undertaking research for special education. rehabilitation and manpower development.

CHAPTER X

RECOGNITION OF INSTITUTIONS FOR PERSONS WITH DISABILITIES

50. The State Government shall appoint any authority, as it deems fit to be a competent authority for the purposes of this Act.

51. Save as otherwise provided under this Act, no person shall establish or maintain any institution for persons with disabilities except under and in accordance with a certificate of registration issued in this behalf by the competent authority:

Provided that a person maintaining an institution for persons with disabilities immediately before the commencement of this Act may continue to maintain such institution for a period of six months from such commencement and if he has made an application for such certificate under this section within the said period of six months, till the disposal of such application.

52. (1) Every application for a certificate of registration shall be made to the competent authority in such form and in such manner as may be prescribed by the State Government.

(2) On receipt of an application under sub-section (1), the competent authority shall make such enquiries as it may deem fit and where it is satisfied that the applicant has cornplied with the requirements of this Act and the rules made thereunder it shall grant a certificate of registration to the applicant and where it is not so satisfied the competent authority shall. by order. refuse to grant the certificate applied for:

Provided that before making any order refusing to grant a certificate the competent authority shall give to the applicant a reasonable opportunity of being heard and every order of refusal to grant a certificate shall he communicated to the applicant in such manner as may be prescribed by the State Government.

(3) No certificate of registration shall be granted under sub-section (2) unless the institution with respect to which an application has been made is in a position to provide such facilities and maintain such standards as may be prescribed by the State Government.

(4) A certificate of registration granted under this section,-

(a) Shall, unless revoked under section 53, remain in force for such period as may, be prescribed by, the State Government.

(b) May be renewed from time to time for a like period; and

(c) Shall be in such form and shall be subject to such conditions as may be Prescribed by the State Government

(5) An application for renewal of a certificate of registration shall be made not less than sixty days before the period of validity.

(6) The certificate of registration shall he displayed by the institution in a conspicuous place.

53. (1) the competent authority may, if it has reasonable cause to believe that the

Holder of the certificate of registration granted under sub-section (2) of section 52 has -

(a) Made a statement in relation to any application for the issue of renewal of the certificate which is incorrect or false in material particulars; or

(b) Committed or has caused to be committed any breach of rules or any conditions subject to which the certificate was granted,

it may after making such inquiry, as it deems fit, by order, revoke the certificate:

Provided that no such order shall he made until an opportunity is given to the holder of the certificate to show cause as to why the certificate should not be revoked.

(2) Where a certificate in respect of an institution has been revoked under sub-section (1), such institution shall cease to function from the date of such revocation.

Provided that where an appeal lies under section 54 against the order of revocation, such institution shall cease to function—

(a) Where no appeal has been preferred immediately on the expiry of the period prescribed for the filing of such appeal, or

(b) Where such appeal has been preferred, but the order of revocation has been upheld, from the date of the order of appeal.

(3) On the revocation of a certificate in respect of an institution, the competent authority may direct that any person with disability who is an inmate of such institution on the date of such revocation, shall be-

(a) Restored to the custody of her or his parent, spouse or lawful guardian, as the case may be, or

(b) Transferred to any other institution specified by the competent authority.

(4) Every institution, which holds a certificate of registration, which is revoked, under this section shall, immediately after such revocation. Surrender such certificate to the Competent authority.

54. (1) Any person aggrieved by the order of the competent authority, refusing to grant a certificate or revoking a certificate may, within such period as may he prescribed by the State Government, prefer an appeal to that Government against such refusal or revocation.

(2) The order of the State Government on such appeal shall he final.

55. Nothing contained in this Chapter shall apply, to an institution for persons with disabilities established or maintained by the Central Government or State Government.

CHAPTER XI

INSTITUTION FOR PERSONS WITH SEVERE DISABILITIES

56. The appropriate Government may establish and maintain institutions for persons with severe disabilities at such places as it thinks fit.

(2) Where, the appropriate Government is of opinion that any institution other than an institution. Established under sub-section (1), is fit for the rehabilitation of the persons with severe disabilities, the Government may recognize such institution as an institution for persons with severe disabilities for the purposes of this Act:

Provided that no institution shall be recognized under this section unless such institution has complied with the requirements of this Act and the rules made there under.

(3) Every institution established under sub-section (1) shall be maintained in such manner and satisfy such conditions as may be prescribed b), the appropriate Government.

(4) For the purposes of this section "person with severe disability" means a person with eighty per cent. or more of one or more disabilities.

CHAPTER XII

THE CHIEF COMMISSIONER AND COMMISSIONERS FOR PERSONS WITH DISABILITIES

57. (1) The Central Government may, by notification appoint a Chief Commissioner for persons with disabilities for the purposes of this Act.

(2) A person shall not be qualified for appointment as the Chief Commissioner unless he has special knowledge or practical experience in respect of matters relating to rehabilitation.

(3) The salary and allowances payable to and other terms and conditions of service (including pension, gratuity and other retirement benefits of the Chief Commissioner shall be such as may be prescribed by the Central Government.

(4) The Central Government shall determine the nature and categories of officers and other employees required to assist the Chief Commissioner in the discharge of his functions and provide the Chief Commissioner with such officers and other employees as it thinks fit.

(5) The officers and employees provided to the Chief Commissioner shall discharge their functions under the general superintendence of the Chief Commissioner.

(6) The salaries and allowances and other conditions of service of officers and employees provided to the Chief Commissioner shall be such as may be prescribed by the Central Government.

58. The Chief commissioner shall —-

(a) Coordinate the work of the Commissioners;

(b) Monitor the utilization of' funds disbursed by the Central Government;

(c) Take steps to safeguard the rights and facilities made available to Persons with disabilities;

(d) Submit reports to the Central Government on the implementation of the Act at such intervals as that Government may prescribe.

59. Without prejudice to the provisions of section 58 the Chief Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints with respect to matters relating to —

(a) Deprivation of rights of persons with Disabilities.

(b) Non-implementation of laws, rules, byelaws, regulations. Executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights or persons with disabilities. And take up the matter with the appropriate authorities.

60. (1) Every State Government may, by notification appoint a Commissioner for persons with disabilities for the purpose of this Act.

(2) A person shall not be qualified for appointment as a Commissioner unless he has special knowledge or practical experience in respect of matters relating to rehabilitation.

(3) The salary and allowances payable to and other terms and conditions of service (including pension gratuity and other retirement benefits) of the Commissioner shall be such as may he prescribed by the State Government.

(4) The State Government shall determine the nature and categories of officers and other employees required to assist the Commissioner in the discharge of his functions and provide the Commissioner with such officers and other employees as it thinks fit.

(5) The officers and employees provided to the Commissioner shall discharge their functions under the general superintendence of the Commissioner.

(6) The salaries and allowances and other conditions of service of officers and employees provided to the Commissioner shall be such as may he prescribed by the State Government.

61. The Commissioner within the State shall-

(a) Coordinate with the departments of the State Government for the programmes and schemes, for the benefit of persons with disabilities;

(b) Monitor the utilization of funds disbursed by the State Government;

(c) Take steps to safeguard the rights and facilities made available to persons with disabilities.

(d) Submit reports to the State Government on the implementation of the Act at such intervals as that Government may prescribe and forward a copy thereof to the Chief Commissioner.

62. Without prejudice to the provisions of section 61 the Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints with respect to matters relating to—-

(a) Deprivation of rights of persons with disabilities;

(b) Non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights of persons with disabilities, And take up the matter with the appropriate authorities.

63. The Chief Commissioner and the Commissioners shall, for the purpose of discharging their functions under this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:-

(a) Summoning and enforcing the attendance of witnesses;

(b) Requiring the discovery and production of any documents;

(c) Requisitioning any public record or copy thereof from any court or office;

(d) Receiving evidence on affidavits; and

(e) Issuing commissions for the examination of witnesses or documents.

(2) Every proceeding before the Chief Commissioner and Commissioners shall be a judicial proceeding within the meaning directions 193 and 228 of the Indian Penal Code and the Chief Commissioner, the Commissioner, the competent authority, shall be deemed to he a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

64. (1) The Chief Commissioner shall prepare in such form and at such time for each financial year as may be prescribed by the Central Government an annual report giving a full account of his activities during the previous financial year and forward a copy thereof to the Central Government.

(2) The Central Government shall cause the annual report to be laid before each House of Parliament along with the recommendations explaining the action taken or proposed to be taken on the recommendation made therein in so far as they relate to the Central Government and the reasons for non-acceptance, if any, of any such recommendation or part.

65. (1) The Commissioner shall prepare in such form and at such time for each financial year as may be prescribed by the State Government an annual report giving a full account of his activities during the previous financial year and forward a copy thereof to the State Government.

The State Government shall cause the annual report to be laid before each State Legislature along with the recommendations explaining the action taken or proposed to be taken on the recommendation made therein in so far as they relate to the State Government and the reasons for non-acceptance, if any, of any such recommendation or part.

CHAPTER XIII

SOCIAL SECURITY

66. (1) The appropriate Governments and the local authorities shall within the limits of their economic capacity and development undertake or cause to be undertaken rehabilitation of all persons with disabilities.

(2) For purposes of sub-section (1), the appropriate Governments and local authorities shall grant financial assistance to non-governmental organizations.

(3) The appropriate Governments and local authorities while formulating rehabilitation policies shall consult the non-governmental organizations working for the cause of persons with disabilities.

67. (1) The appropriate Government shall by notification frame an insurance scheme for the benefit of its employees with disabilities.

(2) Notwithstanding anything contained in this section, the appropriate Government may instead of framing an insurance scheme frame an alternative security scheme for its employees with disabilities.

68. The appropriate Governments shall within the limits of their economic capacity and development shall by notification frame a scheme for payment of an unemployment allowance to persons with disabilities registered with the Special Employment Exchange for more than two years and who could not he placed in any gainful occupation.

CHAPTER XIV

MISCELLANEOUS

69. Whoever fraudulently avails or attempts to avail, any benefit meant for persons with disabilities, shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to twenty thousand rupees or with both.

70. The Chief Commissioner, the Commissioners and other officers and staff provided to them shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

71. No suit, prosecution or other legal proceeding shall lie against the Central Government, the State Governments or the local authority or any officer of the Government in respect of anything which is done in good faith or intended to be done in pursuance of this Act and any rules or orders made there under.

72. The provisions of this Act, or the rules made there under shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued there under, enacted or issued for the benefit of persons with disabilities.

73. (1) The appropriate Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-

(a) The manner in which a State Government or a Union territory shall be chosen under clause (k) of sub-section (2) of section 3;

(b) Allowances, which members shall receive under subsection (7) of section 4;

(c) Rules of procedure, which the Central Coordination Committee shall observe in regard to the transaction of business in its meetings under section 7;

(d) Such other functions, which the Central Coordination Committee may perform under clause (h) of sub-section (2) of section 8;

(e) The manner in which a State Government or a Union Territory shall be chosen under clause (h) of sub-section (2) of section 9;

(f) The allowances, which the Members shall receive under sub-section (3) of section 9;

(g) Rules of procedure, which the Central Executive Committee shall observe in regard to transaction of business at its meetings under section 11;

(h) The manner and purposes for which a person may be associated under sub-section (I) of section 12;

(i) Fees and allowances which a person associated with the Central Executive Committee shall received under sub-section (3) of section 12;

(j) Allowances which members shall received under sub-section (7) of section 14;

(k) Rules of procedure, which a State Coordination Committee shall observe in regard to transaction of business in its meetings under section 17;

(l) Such other functions, which a State Coordination Committee may perform under clause (g) of sub-section (2) of section 18;

(m) The allowances, which Members shall receive under sub-section (3) of section 19;

(n) Rules of procedure, which a State Executive Committee shall observe in regard to transaction of business at its meetings under section 21;

(o) The manner and purposes for which a person may be associated under sub-section (1) of section 22;

(p) Fees and allowances which a person associated with the State Executive Committee may receive under sub-section (3) of Section 22;

(q) Information or return which the employer in every establishment should furnish and the Special Employment Exchange to which such information or return shall be furnished under sub-section (1) of section 34;

(r) The form and the manner in which record shall be maintained by an employer under sub-section (1) of section 37;

(s) The form and manner in which an application shall be made under sub-section (1) of section 52;

(t) The manner in which an order of refusal shall be communicated under sub-section (2) of section 52;

(u) Facilities or standards required to be provided or maintained under sub-section (3) of section52;

(v) The period for which a certificate of registration shall be valid under clause (a) of sub-section (4) of section 52;

(w) The form in which and conditions subject to which a certificate of registration shall be granted under clause (c) of sub-section (4) of section 52;

(x) Period within which an appeal shall lie under sub-section (1) of section 54;

(y) The manner in which an institution for persons with severe disabilities shall be maintained and conditions which have to be satisfied under sub-section (3) of section 56;

(z) The salary, allowances and other terms and conditions of service of the Chief Commissioner under sub-section (6) of section 57;

(za) the salary, allowances and other conditions of service of officers and employees under sub-section (6) of section 57;

(zb) intervals at which the Chief Commissioner shall report to the Central Government under clause (d) of section 58;

(zc) the salary, allowances and other terms and conditions of service of the Commissioner under sub-section (3) of section 60;

(zd) the salary, allowances and other conditions of service of officers and employees under sub-

section (6) of section 60;

(ze) intervals within which the Commissioner shall report to the State Government under clause (d) of section 61;

(zf) the form and time in which annual report shall be prepared under sub-section (1) of section 64;

(**zg)** the form and time in which annual report shall be prepared under sub-section (1) of section 65;

(zh) any other matter which is required to be or may be prescribed.

(3) Every notification made by the Central Government under die proviso to section 33, proviso to sub-section (2) of section 47, every scheme framed by it under section 27, section 30, sub-section (1) of section 38. section 42, section 43, section 67, section 68 and every rule made by it under sub-section (1). shall be laid. as soon as may be after it is made, before each House of Parliament, while it is in session for a tow period of thirty days which may be comprised in one session or in two or more successive sessions, and if. before the expiry of the session immediately following the session or the successive sessions aforesaid, berth Houses agree in making any modification in the rule, notification or scheme, both Houses agree that the rule, notification or scheme should not be

Made, the rule, notification or scheme shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule. Notification or scheme, as the case may be.

(4) Every notification made by the State Government under the provison to section 33 proviso to sub-section (2) of section 47, every scheme made by it under section 27, section 30, sub-section (1) of section 38, section 42. section 43, section 67. section 68 and every rule made by it under sub-section (1), shall be laid. as soon as may be after it is made, before each House of State Legislature, where it consists of two Houses or where such legislature consists of one House before that House.

74. In section 12 of the Legal Services Authorities Act. 1987, for clause (d), the following clause shall he substituted, namely:-

"(d) a person with disability as defined in clause (i) of section 2 of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act. 1995."

K. L. MOHANPURIA.
Secy. to the Govt. of India

Annexure 2

THE NATIONAL TRUST FOR WELFARE OF PERSONS WITH AUTISM, CEREBRAL PALSY, MENTAL RETARDATION AND MULTIPLE DISABILITIES ACT, 1999

No. 44 of 1999 (30th December 1999)

An Act to provide for the constitution of a body at the national level for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities and for matters connected therewith or incidental thereto.
Be it enacted by Parliament in the Fiftieth Year of the Republic of India as follows:

CHAPTER I

PRELIMINARY

- **Title**
  1. This Act may be called the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999
  2. It extends to the whole of India expect the State of Jammu and Kashmir.

- **In this Act, unless the context otherwise requires,-**
  a. "autism" means a condition of uneven skill development primarily affecting the communication and social abilities of a person, marked by repetitive and ritualistic behavior;

  b. "Board" means Board of trustees constituted under section 3;

  c. "cerebral palsy" means a group of non-progressive condition of a person characterized by abnormal motor control posture resulting from brain insult or injuries occurring in the pre-natal, perinatal or infant period of development;

  d. "Chairperson" means the Chairperson of the Board appointed under clause (a) sub-section (4) of section 3;

  e. "Chief Executive" Officer" means the Chief Executive Officer appointed under sub-section (1) of section 8;

  f. "Member" means a Member of the Board and includes the Chairperson;

  g. "Mental retardation" means a condition of arrested or incomplete development of mind of person, which is specially characterized by sub-normality of intelligence;

h. "Multiple disabilities" means a combination of two or more disabilities as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995;

i. "Notification" means notification published in the Official Gazette;

j. "Persons" with disability" means a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disability;

k. "Prescribed" means prescribed by rules made under this Act;

l. "Professional" means a person who is having special expertise in a field, which would promote the welfare of persons with disability;

m. "Registered organization" means an association of persons with disability or an association of parents of persons with disability or a voluntary, as the case may be, registered under section 12;

n. "Regulation" means the regulations made by the Board under this Act;

o. "Severe disability" means disability with eighty percent or more of one or more of multiple disabilities;

p. "Trust" means the National Trust for Welfare of Persons with Autism, Cerebral Palsy Mental Retardation and Multiple Disability constituted under sub section (1) of section 3.

CHAPTER II

THE NATIONAL TRUST FOR WELFARE OF PERSONS WITH AUTISM, CEREBRAL PALSY, MENTAL RETARDATION AND MULTIPLE DISABILITY

0. With effect from such date as the Central Government may, by notification, appointment, there shall be constituted, for the purpose of this Act, a body by the name of the National Trust for Welfare of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities which shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provision of this Act, to acquire, hold and dispose of property, both movable and immovable, and both movable and immovable, and contact, and shall, by the said name, sure or be sued.

1. The general superintendence, direction and management of the affairs and business of the Trust shall vest in a Board which may exercise all powers and do all acts and things which may be exercised or done by the Trust.

2. The head office of the Trust shall be at New Delhi and the Board may, with the previous approval of the Central Government, establish offices at other places in India.

3. The Board shall consist of -

a. a chairperson to be appointed by the Central Government from amongst, the persons having expertise and experience in the field of autism, cerebral palsy, mental retardation and multiple disability;

b. nine persons to be appointed in accordance with such procedure as may be prescribed from amongst the registered organization out of which three members each shall be from voluntary organization, association of persons with autism, cerebral palsy, mental retardation and multiple disability and from associations of persons with disability, members:

Provided that initial appointment under this clause shall be made by the Central Government by nomination;

c. eight persons not be below the rank of joint Secretary to the Government of India nominated by the Govt. represent the Ministries or Departments of Social Justice and Empowerment, Women and Child Development, Health and Family Welfare, Finance, Labor, Education, Urban Affairs and Employment and Rural Employment and Poverty Alleviation, Members, ex-offico;

d. three persons to be nominated by the Board representing the associations of trade, commerce and industry engaged in philanthropic activities, members;

e. the Chief Executive Officer, who shall be of the rank of Joint Secretary to the Government

of India, Member Secretary, ex-officio;

4. The Board may associate with itself, in such manner and for such purpose as may be determined by regulation, any person whose assistance or advice it may desire for carrying for any other out the objects of the Trust:

Provided that such person shall have a right to take part in the discussion relevant to that purpose but shall not have right to vote at a meeting of the Board and shall not be a member for any other purpose:

Provide further that the maximum number of persons so associated shall not exceed eight and so far as possible the person so associated shall belong to the registered organization or from the professional.

●

0. The Chairperson or a Member shall hold office for a term of three years from the date of his appointment or until his successor shall have been duly appointed, whichever is longer:

Provide that no person shall hold office as the Chairperson or other Member after he has attained the age of sixty-five years.

1. The conditions of service of the Chairperson and other Members shall be such as may be prescribed.

2. A casual vacancy in the Board shall be filled in accordance with the provisions of section 3 and a person appointed shall hold office only for the remainder of the term for which the member, in whose place he was appointed, would have held that office.

3. Before appointing any person as the Chairperson or a Member, the Central Government shall satisfy itself that the person does not and will not, have any such financial or other interest as is likely to affect prejudicially his function as such member.

4. No Member of the Board shall be a beneficiary of the Trust during the period such Member holds office.

5. The Board shall meet at least once in three months at such time and place as may be determined by the Board by regulations and shall observe such rules of procedure in the transaction of business at a meeting as may be prescribed.

6. The Chairperson, if for any reason is unable to attend the meeting of the Board, b any Member elected by the Members present from amongst themselves at the meeting, shall preside at the meeting.

7. All question which come up before any meeting of the Board shall be decided by a majority of votes of the Members present and voting, and in the event of an equality of votes, the Chairperson, or in his absence, the person presenting shall have a second or casting vote.

●

0. The Chairperson may resign his office by writing under his hand addressed to the Central Government:

Provide that the Chairperson shall continue in office until the appointment of his successor is made by the Central Government.

1. A Member may resign from office by writing under his hand addressed to the Chairperson.

- **No person shall be a member if he -**

is, or become, of unsound mind or is so declared by a competent court; or

a. is, or has been, convicted of an offence, which in the opinion of the Central Government, involves moral turpitude; or

b. is, or at any time has been, adjudicated as an insolvent.

- **If a member -**

becomes subject to any of the disqualification mentioned in section 6; or

a. is, without obtaining leave of absence, absent from three consecutive meeting of the Board; or

b. tenders his resignation under section 5, his seat shall thereupon become vacant.

●

0. The Central Government shall appoint the Chief Executive Officer to exercise such powers and performs such duties under the direction of the Board as may be prescribed or as may be delegated to him by the Chairperson.

1. The Board shall, with the previous approval of the Central Government, appoint such other officers and employees as it considers necessary to carry out the objectives of the Trust.

2. The salary and allowances payable to, and the other terms and conditions of service of, the Chief Executive Officer, other officers and employees of the Trust shall be such as may be determined by regulations.

- No act or proceeding of the Board shall be called in question on the ground merely of the existence of any vacancy, in or any defect in the constitution of, the Board.

CHAPTER III

OBJECTS OF THE TRUSTS

- **The objects of the trust shall be:**
  to enable and empower persons with disability to live as independently and as fully as possible within and as close to the community to which they belong;

  a. to strengthen facilities to provide support to persons with disability to live within their own families;

  b. to extend support to registered organization to provide need based services during the period of crises in the family of persons with disability;

  c. to deal with problems of persons with disability who do not have family support;

  d. to promote measures for the care and protraction of persons with disability in the event of death of their parent or guardian;

  e. to evolve procedure for the appointment of guardians and trustees for persons with disability requiring such protection;

  f. to facilitate the realization of equal opportunities, protection of right and full participation of persons with disability; and

  g. to do any other act which is incidental to the aforesaid object.

CHAPTER IV

POWERS AND DUTIES OF THE BOARD

- **The Board shall:**

receive from the Central Government a one-time contribution of rupees one hundred crores for a corpus, the income where of shall be utilized to provide for adequate standard of living for persons with disability;

a. receive bequest of movable property any person for the benefit of the person with disability in general and for furtherance of the objectives of the Trust in particular:

Provide that it shall be obligatory on the part of the Board to make arrangement for adequate standard of living for the beneficiary named in the bequest, if any and to utilize the property bequeathed for any other purpose for which the bequest has been made: Provide further that the Board shall not be under any obligation to utilize the entire amount mentioned in the bequest for the exclusive benefit of the persons with disability named as beneficiary in the bequest;

b. receive from the Central Government such sums as may be considered necessary in each financial year for providing financial assistance to registered organization for carrying out any approved Programme.

For the purpose of sub-section (1), the expression "approved Programme" means

c. any Programme which promote independent living in the community for persons with disability by-

i. creating a conducive environment in the community;

ii. counseling and training of family members of persons with disability;

iii. setting up of adult training units, individual and group homes;

d. any programme which promotes respite care, foster family care or day care service for persons with disability;

e. Setting up residential hostels and residential homes for persons with disability;

f. Development of self-help group persons with disability to pursue the realization of their rights;

g. setting up of local committee to grant approval fir guardianship and

h. such other programmes which promote the objective of the Trust.

- While earmarking funds for the purpose of clause:(c) of sub-section (2), preference shall be given to woman with disability or to persons with severe disability and to senior citizen with disability.

  Explanation:- For the purpose of this sub-section, the expression;-
  "Persons with severe disability" shall have the same meaning as is assigned to it under sub-section (4) of section 56 of the persons with Disabilities (Equal Opportunities, Protection of Right and Full Participation) Act, 1995;

a. "Senior citizen' means a person who is above the age of sixty-five years or more.

CHAPTER V

PROCEDURE FOR REGISTRATION

Any association of person with disability, or any association of parents of persons with disability or a voluntary organization whose main object is promotion of welfare of persons with disability may make an application for registration to the Board.

a. An application for registration shall be made in such form and manner and at such place as the Board may by regulation provide and shall contain such particulars and accompanied with such documents and such fees may be provided in the regulation.

b. On receipt of application for registration, the Board may make such inquires as it thinks fit in respect of genuineness of the application and correctness of any particulars thereon.

c. Upon receipt of such application the Board shall either grant registration to the applicant or reject such application for reasons to be recorded in writing:

Provided that where registration has been refused to the application, the said applicant may again make an application for registration after removing defects, if any in its previous application.

CHAPTER VI

LOCAL LEVEL COMMITTEES

●

The Board shall constitute a local level committee for such area as may be specified by it from time to time.

a. A local committee shall consist of:-

an officer of the civil service of the Union or of the State, not below the rank of a District Magistrate or a District Commissioner of a district;

a. a representative of a registered organization; and

b. a person with disability as defined in clause (t) of section 2 of the persons with disabilities (Equal Opportunities, Protection of rights and Full Participation) Act, 1995

b. A local level committee shall continue to work for a period of three years from the date of its constitution or till such time it is reconstituted by the Board

c. A local level committee shall meet at least once in every three months or at such interval as may be necessary.

●

A parent of a person with disability or his relative may make as application to the local level committee for appointment of any person of his choice to act as a guardian of the persons with disability.

a. Any registered organization may make an application in the prescribed form to the local level committee for appointment of a guardian for a person with disability:

Provide that no such application shall be entertained by the local level committee, unless the consent of the guardian of the disabled person is also obtained.

b. While considering the application for appointment of a guardian, the local level committee shall consider:-

whether the person with disability needs a guardian;

a. the purpose for which the guardianship is required for person with disability.

c. The local level committee shall receive, process and decide applications received under sub-section (1) and (2), in such manner as may be determined by regulation: Provide that while

making recommendation for the appointment of a guardian, the local level committee shall provide for the obligation which are to be fulfilled by the guardian.

d. The local committee shall send to the Board the particulars received by it and orders passed thereon at such interval as may be determined by regulations.

- Every person appointed as a guardian of a person with disability under this chapter shall, wherever required, either have the care of such person of disability and his property or be responsible for the maintenance of the person with disability.

Every person appointed as a guardian under section 14 shall, within a period of six months from the date of his appointment, deliver to the authority which appointed him, an inventory of immovable property belonging to the person with disability and all assets and other movable property received on behalf of the person with disability, together with a statement of all claims due to and all debts and liabilities due by such person with disability.

a. Every guardian shall also furnish to the said appointing authority within a period of three months at the close of every financial year, an account of the property and assets in his charge, the sums received and disbursed on account of the person with disability and the balance remaining with him

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Whenever a parent or a relative of a person with disability or a registered organization find that the guardian is :-
abusing or neglecting a person with disability; or

a. misappropriating or neglecting the property, it may in accordance with the prescribed procedure apply to the committee for the removal of such guardian.

a. Upon receiving such application the committee may, if it is satisfied that there is a ground for removal and for reasons to be recorded in writing, remove such guardian and appoint a new guardian in his place or if such a guardian is not available make such other arrangement as may necessary for the care and protection of person with disability.

b. Any person removed under sub-section (2) shall be bound to deliver the charge of all property of the person with disability to the new guardian, and to account for all moneys received or disbursed by him.

Explanation,- For the Purpose of this chapter, the expression "relative" includes any person related to the person with disability by blood, marriage or adoption.

CHAPTER VII

ACCOUNTABILITY AND MONITORING

The books and documents in the procession of the Board shall be open to inspection by any registered organization

a. Any registered organization can submit a written requisition to the Board the access of any book or document maintained by the Board.

b. The Board shall frame such regulations as it think necessary for allowing the access of any books or document to a registered organization.

- The Board shall determine by regulations the procedure for evaluating the prefunding status of registered organization seeking financial assistance from it and such regulations may also provide for the guidelines for monitoring and evaluating the activities of the registered organizations who are receiving financial assistance from the Trust.

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The Board shall in each year hold an annual general meeting of registered organizations, and not , more than six months shall elapse between the date of one annual general meeting and that of the next.

a. A notice of the annual general meeting along with a statement of accounts and records of its activities during the preceding year be sent by the Board to every registered organization at such time as may be determined by regulations.

b. The quorum for such meeting shall be such number of persons of the registered organization as may be determined by regulation.

CHAPTER VIII

FINANCE, ACCOUNTS AND AUDIT

- The Central Government may, after due appropriation made by parliament by law in this behalf, make to the Trust a one-time contribution of rupees one hundred crores for a corpus, the income whereof may be utilized the objects of the Trust under this Act.

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There shall be constitute a fund to be called the National Trust for Welfare of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple disabilities Fund and there shall be credited there to-
all money received from the Central government;

a. all moneys received by the trust by way of grants, gifts, donation, benefaction, bequests or transfers;

b. all moneys received by the Trust in any other manner or from any other source.

a. All moneys belonging to the fund shall be deposited in such banks or invested in such manner as the Board may, subjects to approval of the Central Government, decide.

b. The funds shall be applied towards meeting the administrative and other expenses of the Trust including expenses incurred in the exercise of its powers and performance of duties by the Board in relation to any of its activities under section 10 or for anything relatable thereto.

- The Board shall prepare, in such form and at such time in each financial year as may be prescribed, the budget for the next financial year showing the estimated receipt and expenditure of the Trust and shall forward the same to the Central Government,

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The Board shall maintain proper accounts and other relevant records and prepare an annual statement of accounts of the Trust including the income and expenditure accounts in such form as the Central Government may prescribe and in accordance with such general direction as may be issued by that Government in constitution with the Comptroller and Auditor-General of India.

a. The accounts of the Trust shall be audited by the Comptroller and Auditor General of India at such intervals as may be specified by him and any expenditure incurred by him in connection with such audit shall be payable by the Board of the Comptroller and Auditor-General of India.

b. The Comptroller and Auditor-General of India and by other person appointed by him in connection with the audit of the accounts of the Trust shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India

generally has in connection with the audit of the Government accounts, and in particular, shall have the right to demand and production of books of accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Trust.

c. The accounts of the Trust as certified by the Comptroller, and Auditor-General of India or any other person appointed by him in this behalf, together with the audit report thereon, shall be forwarded annually to the Central Government, and that Government shall cause the same to be laid before each House of Parliament.

- The Board shall prepare every year, in such form within such time as may be prescribed an annual report giving a true and full accounts of its activities during the previous year and copies thereof shall be forward to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

- All orders and decisions of the Board and instrument issued in the name of the Trust shall be authenticated by the signature of the Chairperson, the Chief Executive Officer or any other officer authorized by the Chairperson, in this behalf.

- The Board shall furnish to the Central Government such reports, returns and other information as that Government may require time to time.

CHAPTER IX

MISCELLANEOUS

Without prejudice to the foregoing provisions of this Act, the Board shall, in exercise of its power or the performance of its duties under this Act, be bound by such direction on questions of policy as the Central Government may give in writing it from time to time:

Provided that the Board shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.

a. The decision of the Central Government whether a question is one if policy or not shall be final.

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If the Central Government on the complaint of a registered organization or otherwise has reason to believe that the Board in unable to perform or has persistently made default in the performance of the duties imposed on it, the Central Government may issue notice to the Board asking why it should not be superseded: Provide that no order superseding the Board shall be made by the Central Government, unless a notice affording reasonable opportunity to the Board has been given in writing that why it should not be superseded.

a. The Central Government after recording reasons in writing and by issuing a notification inthe Official Gazette supersede the Board for a period of not more than six months: provided that on the expiration of the period of super session Central Government may reconstitute the Board, in accordance with section 3.

b. Upon the publication of the notification under sub-section (2),-

all the members of the Board shall, not withstanding that their term of office had not expired as on the date of super session, vacate their office as such members;

a. all the powers and duties which may, buy or under the provision of this Act, be exercised or performed by or on behalf of the trust shall, during the period of supersession, be exercised and performed by such person as the Central Government may direct.

c. On the expiration of the period of super session specified in the notification issued under sub-section (2), the Central Government may:-

extend the period of super session for such further period as it may consider necessary so that the total period of supersession does not exceed more than six months; or

a. reconstitute the Board in the manner provided in section 3.

- Notwithstanding anything contained in the Income-tax Act, 1961, or any other law for the time being in force relating to tax on income. profit or gains, the Trust shall not be liable to pay income-tax or any other tax in respect of its income, profits or gains derived.

- No suit, prosecution or other legal proceeding shall lie against the Central Government or the Trust or any member of the Board or Chief Executive officer or any officer or other employee of the Trust or any other person authorized by the Board to perform duties under this Act for any loss or damage caused or likely to be caused by anything which is done in good faith. Explanation:- For the purpose of this section, the expression "good faith" shall have the same meaning as is assigned to it in the Indian Penal Code.

- All Members, Chief Executive Officer, other officers and employees of the Trust shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Act, to be public servant within the meaning of section 21 of the Indian Penal Code.

- The Board may, by general pr special order in writing, delegate to the Chairperson or any members or any officer of the Trust or any other person subject to such conditions and limitations, if any, as may be specified in the order such of its powers under this Act, (except the power to make regulations under section 35) as it may deem necessary.

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The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

a. In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-

the procedure in accordance with which the person representing registered organization shall be elected under clause (b) of sub-section (4) of section 3;

a. the condition of service of the Chairperson and Members under sub-section (2) of section 4;

b. the rules procedure in the transaction of business at meeting of the Board under sub-section (2) of section 14;

c. the powers and duties of Chief Executive Officer under sub-section (1) of section 8;

d. the form in which an application for guardianship may be made by a registered organization under sub-section (2) of section 23;

e. the procedure in accordance with which a guardian may be removed under section 17;

f. the form in which, and the time within which, the budget of the trust shall be forwarded to the Central Government under section 23;

g. the form in which the annual statement of accounts shall be maintained under sub-section (1) of section 24;

h. the form in which, and the time within which, the annual reports shall be prepared and forwarded under section 25;

i. any other matter which is required to be, or may be, prescribed.

- The Board may, with the previous approval of the Central Government, by notification in the Official Gazette, make regulations consistent with this Act and rules generally to carry out the purpose of this Act.

- In particular, and without prejudice to the generality of the foregoing power, such regulation may provide for all or any of the following matters, namely:-

the manner and purpose for which a person may be associated under sub-section (5) of section 3;

a. the time and place at which the Board shall meet under sub-section (6) of section 4;

b. the terms and conditions of service of, Chief Executive Officer, other officer and employees of the Trust under sub-section (3) of section 8;

c. the form manner in which the application shall be made for registration under sub-section (2) of section 12 and the particulars which such application shall contain under that sub-section;

d. the manner in which application for guardianship shall be received, proceed and decided by the local level committee under sub-section (4) of section 114;

e. the particulars of application and orders passed thereon by the local level committee under sub-section (5) of section 14;

f. the procedure for evaluating the pre-funding status of the registered organization and framing of guidelines for monitoring and evaluating the activities of such registered organization under section 19;

g. the time within which notice for annual general meeting shall be sent and quorum for such meeting under sub-section (2) and (3) of section 20; and

h. any other matter which is required to be, or may be provided by regulation.

- Every rule and every regulation made under this Act shall be laid. as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive session, and if, before the expiry of the session immediately following the session or successive session aforesaid,

both House agree in making any modification, in the rule or regulation or both House agree that the rule pr regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

Annexure 3

THE MENTAL HEALTH ACT, 1987

THE GAZETTE OF INDIA
EXTRAORDINARY

PART II – Section 1

PUBLISHED BY AUTHORITY

NEW DELHI, FRIDAY, MAY, 22, 1987

MINISTRY OF LAW AND JUSTICE
(Legislative Department)
New Delhi, the 22nd May, 1987

The following Act of Parliament received the assent of the President on the 22nd May, 1987, and is hereby published for general information:-

THE MENTAL HEALTH ACT, 1987
No. 14 OF 1987

(22ND, May 1987)

An Act to consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provision with respect to their property and affairs and for maters connected therewith or incidental thereto.

Be it enacted by Parliament in the Thirty–eighth Year of the Republic of India as follows:-

CHAPTER I

PRELIMINARY

1. (1) This Act may be called the Mental Health Act, 1987.

[Short title, extent and commencement]

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification, appoint and different dates may be appointed for different States and for different provisions of this Act, and any reference in any provision to the commencement of this Act in a State shall be constructed as a reference to the coming to force of that provision in that State.

2. In this Act, unless the context otherwise requires: -

a) "cost of maintenance", in relation to a mentally ill person admitted in a psychiatric hospital or psychiatric nursing home, shall mean the cost of such items as the State Government may, by general or special order, specify in this behalf;

b) "District Court" means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and include any other civil court which the State Government may, by notification, specify as the court competent to deal with all or any of the matters specified in this Act;

c) "Inspecting Officer" means a person authorized by the State Government or by the licensing authority to inspect any psychiatric hospital or psychiatric nursing home;

d) "license" means a license granted under section 8;

e) "licensee" means the holder of a license;

f) "licensed psychiatric hospital" or "licensed psychiatric nursing home" means a psychiatric hospital or psychiatric nursing home as the case may be licensed, or deemed to be licensed, under this Act;

g) "licensing authority" means such officer or authority as may be specified by the State Government to be the licensing authority for the purposes of this Act;

h) "Magistrate" means –

(1) in relation to a metropolitan are within the meaning of clause (k) of section 2 of the Code of Criminal Procedure, 1973, a Metropolitan Magistrate:

[2 of 1974]

(2) In relation to any other area, the Chief Judicial Magistrate. Sub-Divisional Judicial Magistrate or such other Judicial Magistrate or the first class as the State Government may, by notification empower to perform the functions of a Magistrate under this Act:

i) "Medical Officer" means a gazetted medical officer in the service of Government and includes a medical practitioner declared, by a general or special order of the State Government, to be a medical officer for the purpose of this Act;

j) "medical officer in charge", in relation to any psychiatric hospital or psychiatric nursing home, means the medical officer who for the time being, is in charge of that hospital or nursing home;

k) "medical practitioner" means a person who possesses a recognized medical qualification as defined –

(i) in clause (h) of section 2 of the Indian Medical Council Act 1956, and whose name has been entered in a State Medical Register, as defined in clause (k) of that section;

[102 of 1956]

(ii) in clause (h) of sub-section (l) of section 2 of the Indian Medicine Central Council Act, 1970, and whose name has been entered in a State Register of Indian Medicine, as defined in clause (j) of sub-section (l) of that section; and

[48 of 1970]

(iii) in clause (g) of sub-section (l) of section 2 of the Homeopathy Central Council Act, 1973, and whose name has been entered in a State Register of Homoeopathy, as defined in clause (i) of sub-section (l) of that section;

[59 of 1973]

(l) "mentally ill person" means a person who is in need of treatment by reason of any mental disorder other than mental retardation;

(m) "mentally ill prisoner" means a mentally ill person for whose detention in, or removal to, a psychiatric hospital, psychiatric nursing home, jail or other place of safe custody, an order referred to in section 27 has been made;

(n) "minor" means a person who has not completed the age of eighteen years;

(o) "notification" means a notification published in the Official Gazette;

(p) "prescribed" means prescribed by rules made under this Act;

(q) "psychiatric hospital" or "psychiatric nursing home" means a hospital or, as the case may be, a nursing home established or maintained by the Government or any other person for the treatment

and care of mentally ill persons and includes a convalescent home established or maintained by the Government or any other person for such mentally ill persons; but does not include any general hospital or general nursing home established or maintained by the Government and which provides also for psychiatric services.

(r) "psychiatrist" means a medical practitioner possessing a post-graduate degree or diploma in psychiatry, recognized by the Medical Council of India, constituted under the Indian Medical Council Act, 1956, and includes, in relation to any State, any medical officer who, having regard to his knowledge and experience in psychiatry, has been declared by the Government of that State to be a psychiatrist for the purposes of this Act:

[102 of 1956]

(s) "reception order" means an order made under the provisions of this Act for the admission and detention of a mentally ill person in a psychiatric hospital or psychiatric nursing home;

(t) "relative" includes any person related to the mentally ill person by blood, marriage or adoption;

(u) "State Government", in relation to a Union territory, means the Administrator thereof.

CHAPTER II

MENTAL HEALTH AUTHORITIES

3. (1) The Central Government shall establish an Authority for mental health with such designation as it may deem fit.

(2) The Authority established under sub-section (l) shall be subject to the superintendence, direction and control of the Central Government.

[Central Authority for Mental Health Services]

(3) The Authority established under sub-section (1) shall -

(a) be in charge of regulation, development, direction and co-ordination with respect of Mental Health Services under the Central Government and all other matters which, under this Act, are the concern of the Central Government or any officer or authority subordinate to the Central Government;

(b) supervise the psychiatric hospitals and psychiatric nursing homes and other Mental Health Service Agencies (including places in which mentally ill persons may be kept or detained) under the control of the Central Government;

(c) advise the Central Government on all matters relating to mental health; and

(d) discharge such other functions with respect to matters relating to mental health as the Central Government may require.

Explanation: - For the purposes of this section and section 4, "Mental Health Services" include, in addition to psychiatric hospitals and psychiatric nursing homes, observation wards, day-care centers, inpatient treatment in general hospitals, ambulatory treatment facilities and other facilities, convalescent homes and half-way-homes for mentally ill persons.

4. (1) The State Government shall establish an Authority for mental health with such designation as it may deem fit.

(2) The Authority established under sub-section (1) shall be subject to the superintendence, direction and control of the State Government.

[State Authority for Mental Health Services]

(3) The Authority established under sub-section (l) shall –

(a) be in charge of regulation, development and co-ordination with respect to Mental Health

Services under the State Government and all other matters which, under this Act, are the concern of the State Government or any officer or authority subordinate to the State Government;

(b) supervise the psychiatric hospitals and psychiatric nursing homes and other Mental Health Service Agencies (including places in which mentally ill persons may be kept or detained) under the control of the State Governments;

(c) advise the state Government on all matters relating to mental health; and

(d) discharge such other functions with respect to matters relating to mental health as the State Government may require.

CHAPTER III

PSYCHIATRIC HOSPITALS AND PSYCHIATRIC NURSING HOMES

5. (1) The Central Government may, in any part of India, or the State Government may, within the limits of its jurisdiction, establish or maintain psychiatric hospitals or psychiatric nursing homes for the admission, treatment and care of mentally ill persons at such places as it things fit; and separate psychiatric hospitals and psychiatric nursing homes may be established or maintained for :-

[Establishment or maintenance of psychiatric hospitals and psychiatric nursing homes]

(a) those who are under the age of sixteen years;
(b) those who are addicted to alcohol or other drugs which lead to behavioral changes in a person;
(c) those who have been convicted of any offence; and
(d) those belonging to such other class or category of persons as may be prescribed.

(2) Where a psychiatric hospital or psychiatric nursing home is established or maintained by the Central Government, any reference in this Act to the State Government shall, in relation to such hospital or nursing home, be constructed as a reference to the Central Government.

6. (1) On and after the commencement of this Act, no person shall establish or maintain a psychiatric hospital or psychiatric nursing home unless he holds a valid license granted to him under this Act:

[Establishment or maintenance of psychiatric hospitals or psychiatric nursing homes only with license.]

Provided that a psychiatric hospital or psychiatric nursing home (whether called asylum or by any other name) licensed by the Central Government or any State Government and maintained as such immediately before the commencement of this Act may continue to be maintained, and shall be deemed to be a licensed psychiatric hospital or licensed psychiatric nursing home, as the case may be, under this Act:-

(a) for a period of three months from such commencement, or
(b) if an application made in accordance with section 7 for a license is pending on the expiry of the period specified in clause (a), till the disposal of such application.

(2) Nothing contained in sub-section (1) shall apply to a psychiatric hospital or psychiatric nursing home established or maintained by the Central Government or a State Government.

7. (1) Every person, who holds at the commencement of this Act, a valid license authorising that person to establish or maintain any psychiatric hospital or psychiatric nursing home, shall, if the said person intends to establish or continue the maintenance of such hospital or nursing home after the expiry of the period referred to in clause (a) of the proviso to sub-section (1) of section 6, make, at least one month before the expiry of such period, an application to the licensing authority for the grant of a fresh license for the establishment or maintenance of such hospital or nursing home, as the case may be.

[Application for license.]

(2) A person, who intends to establish or maintain, after the commencement of this Act, a psychiatric hospital or psychiatric nursing home shall, unless the said person already holds a valid license, make an application to the licensing authority for the grant of a license.

(3) Every application under sub-section (1) or sub-section (2) shall be in such form and be accompanied by such fee as may be prescribed.

8. On receipt of an application under section 7, the licensing authority shall make such inquiries as it may deem fit and where it is satisfied that –

[Grant or refusal of license.]

(a) the establishment or maintenance of the psychiatric hospital or psychiatric nursing home or the continuance of the maintenance of any such hospital or nursing home established before the commencement of this Act is necessary;
(b) the applicant is in a position to provide the minimum facilities prescribed for the admission, treatment and care of mentally ill persons; and
(c) the psychiatric hospital or psychiatric nursing home, will be under the charge of a medical officer who is a psychiatrist, it shall grant a license to the applicant in the prescribed form, and where it is not so satisfied, the licensing authority shall, by order, refuse to grant the license applied for:

Provided that, before making any order refusing to grant a license, the licensing authority shall give to the applicant a reasonable opportunity of being heard and every order of refusal to grant a license shall set out therein the reasons for such refusal and such reasons shall be communicated to the applicant in such manner as may be prescribed

9. (1) A license shall not be transferable or heritable

[Duration and renewal of license]

(2) Where a licensee is unable to function as such for any reason or where a licensee dies, the licensee or, as the case may be, the legal representative of such licensee shall forthwith report the matter in the prescribed manner to the licensing authority and notwithstanding anything contained in sub-section (1), the psychiatric hospital or psychiatric nursing home concerned may continue to be maintained and shall be deemed to be licensed psychiatric hospital or licensed nursing home, as the case may be:-
(a) for a period of three months from the date of such report or in the case of the death of the licensee from the date of his death, or
(b) if an application made in accordance with sub-section (3) for a license is pending on the expiry of the period specified in clause (a), till the disposal of such application.

(3) The legal representative of the licensee referred to in sub-section (2), shall, if he intends to continue the maintenance of the psychiatric hospital or psychiatric nursing home after the expiry of the period referred to in sub-section (2), make, at least one month before the expiry of such

period, an application to the licensing authority for the grant of a fresh license for the maintenance of such hospital or nursing home, as the case may be, and the provisions of section 8 shall apply in relation to such application as they apply in relation to an application made under section 7.

(4) Every licence shall, unless revoked earlier under section 11, be valid for a period of five years from the date on which it is granted.

(5) A licence may be renewed, from time to time, on an application made in that behalf to the licensing authority, in such form and accompanied by such fee, as may be prescribed, and every such application shall be made not less than one year before the date on which the period of validity of the license is due to expire:

Provided that the renewal of a licensee shall not be refused unless the licensing authority is satisfied that –

(i) the licensee is not in a position to provide in a psychiatric hospital or psychiatric nursing home, the minimum facilities prescribed for the admission, treatment and care therein of mentally ill persons; or
(ii) the licensee is not in a position to provide a medical officer who is a psychiatrist to take charge of the psychiatric hospital or psychiatric nursing home; or
(iii) the licensee has contravened any of the provisions of this Act or any rule made thereunder.

10. Every psychiatric hospital or psychiatric nursing home shall be maintained in such manner and subject to such condition as may be prescribed.

[Psychiatric hospital and psychiatric nursing home to be maintained in accordance with prescribed conditions]

11. (1) The licensing authority may, without prejudice to any other penalty that may be imposed on the licence, by order in writing, revoke the license if it is satisfied that

[Revocation of license]

(a) the psychiatric hospital or psychiatric nursing home is not being maintained by the licensee in accordance with the provisions of this Act or the rules made there under; or
(b) the maintenance of the psychiatric hospital or psychiatric nursing home is being carried on in a manner detrimental to the moral, mental or physical well-being of the inpatients thereof;

Provided that no such order shall be made except after giving the licensee a reasonable opportunity of being heard, and every such order shall be set out therein the grounds for the revocation of the license and such grounds shall be communicated to the licensee in such manner as may be prescribed.

(2) Every order made under sub-section(1) shall contain a direction that the inpatients of the psychiatric hospital or psychiatric nursing home shall be transferred to such other psychiatric hospital or psychiatric nursing home as may be specified in that order and it shall also contain such provisions (including provisions by way of directions) as to the care and custody of such inpatients pending such transfer.

(3) Every order made under sub-section (1) shall take effect:-

(a) where no appeal has been preferred against such order under section 12, immediately on the expiry of the period prescribed for such appeal; and

(b) where such appeal has been preferred and the same has been dismissed, from the date of the order of such dismissal.

12. (1) Any person, aggrieved by an order of the licensing authority refusing to grant or renew a license, or revoking a license, may, in such manner and within such period as may be prescribed, prefer an appeal to the State Government:

[appeal]

Provided that the State Government may entertain an appeal preferred after the expiry of the prescribed period if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) Every appeal under sub-section (1) shall be made in such form and accompanied by such fee as may be prescribed.

13. (1) An Inspecting Officer may, at any time, enter and inspect any psychiatric hospital or psychiatric nursing home and require the production of any records, which are required to be kept in accordance with the rules made in this behalf, for inspection:

[Inspection of psychiatric hospitals and psychiatric nursing homes and visiting of patients]

Provided that any personal records of a patient so inspected shall be kept confidential except for the purposes of sub-section (3).

(2) The Inspecting Officer may interview in private any patient receiving treatment and care therein-

(a) for the purpose of inquiring into any complaint made by or on behalf of such patient as to the treatment and care, or

(b) in any case, where the Inspecting Officer has reason to believe that any inpatient is not receiving proper treatment and care.

(3) Where the Inspecting Officer is satisfied that any inpatient in a psychiatric hospital or psychiatric nursing home is not receiving proper treatment and care, he may report the matter to the licensing authority and thereupon the licensing authority may issue such direction as it may deem fit to the medical officer-in-charge or the licensee of the psychiatric hospital, or, as the case may be, the psychiatric nursing home and every such medical officer-in-charge or licensee shall be bound to comply with such directions.

14. Provision shall be made in every psychiatric hospital or psychiatric nursing home for such facilities as may be prescribed for the treatment of every mentally ill person, whose condition does or warrant his admission as an inpatient or who, for the time being, is not undergoing treatment as inpatient.

[Treatment of out patients]

CHAPTER IV

ADMISSION AND DETENTION IN PSYCHIATRIC HOSPITAL OR PSYCHIATRIC NURSING HOME

PART I
Admission on voluntary basis

15. Any person (not being a minor), who considers himself to be a mentally ill person and desires to be admitted to any psychiatric hospital or psychiatric nursing home for treatment, may request the medical officer in charge for being admitted as a voluntary patient.

[Request by major for admission as voluntary patient]

16. Where the guardian of a minor considers such minor to be a mentally ill person and desires to admit such minor in any psychiatric hospital or psychiatric nursing home for treatment, he may request the medical officer-in-charge for admitting such minor as a voluntary patient.

[Request by guardian for admission of a ward]

17. (1) On receipt of a request under section 15 or section 16, the medical officer-in-charge shall make such inquiry as he may deem fit within a period not exceeding twenty-fours and if satisfied that the applicant or, as the case may be, the minor requires treatment as an inpatient in the psychiatric hospital or psychiatric nursing home, he may admit therein such applicant or, as the case may be, minor as a voluntary patient.

[Admission of, and regulation with respect to, voluntary patients]

(2) Every voluntary patient admitted to a psychiatric hospital or psychiatric nursing home shall be bound to abide by such regulations as may be made by the medical officer-in-charge or the licensee of the psychiatric hospital or psychiatric nursing home.

18. (1) The medical officer-in-charge of a psychiatric hospital or psychiatric nursing home shall, on a request made in that behalf -

[Discharge of voluntary patients]

(a) by any voluntary patient; and
(b) by the guardian of the patient, if he is a minor voluntary patient,
discharge, subject to the provisions of sub-section (3) and within twenty-four hours of the receipt of such request, the patient from the psychiatric hospital or psychiatric nursing home.

(2) Where a minor voluntary patient who is admitted as an inpatient in any psychiatric hospital or psychiatric nursing home attains majority, the medical officer-in-charge of such hospital or nursing home shall, as soon as may be, intimate the patient that he has attained majority and that unless

a request for his continuance as an inpatient is made by him within a period of one month of such intimation, he shall be discharged, and if, before the expiry of the said period, no request is made to the medical officer-in-charge for his continuance as an inpatient, he shall, subject to the provisions of sub-section (3), be discharged on the expiry of the said period.

(3) Notwithstanding anything contained in sub-section (1) or subsection(2), where the medical officer in charge of a psychiatric hospital or psychiatric nursing home is satisfied that the discharge of a voluntary patient under sub-section (1) or sub-section (2) will not be in the interest of such voluntary patient, he shall, within seventy-two hours of the receipt of a request under sub-section (1), or, if no request under sub-section (2) has been made by the voluntary patient before the expiry of the period mentioned in that sub-section, within seventy-two hours of such expiry constitute a Board consisting of two medical officers and seek its opinion as to whether such voluntary patient needs further treatment and if the board is of the opinion that such voluntary patient needs further treatment in the psychiatric hospital or psychiatric nursing home, the medical officer shall not discharge the voluntary patient, but continue his treatment for a period not exceeding ninety days at a time.

PART II

Admission under Special Circumstances

19.(1) Any mentally ill person who does not, or is unable to, express his willingness for admission as a voluntary patient, may be admitted and kept as an inpatient in a psychiatric hospital or psychiatric nursing home on an application made in that behalf by a relative or a friend of the mentally ill person if the medical officer-in-charge is satisfied that in the interests of the mentally ill person it is necessary so to do:

[Admission of mentally ill persons under certain special circumstances]

Provided that no person so admitted as an inpatient shall be kept in the psychiatric hospital or psychiatric nursing home as an inpatient for a period exceeding ninety days except in accordance with the other provisions of this Act.

(2) Every application under sub-section (1), shall be in the prescribed form and be accompanied by two medical certificates, from two medical practitioners of whom one shall be a medical practitioner in the service of Government, to the effect that the condition of such mentally ill person is such that he should be kept under observation and treatment as an inpatient in a psychiatric hospital or psychiatric nursing home.

Provided that the medical officer, in charge of the psychiatric hospital or psychiatric nursing home concerned may, if satisfied that it is proper so to do, cause a mentally ill person to be examined by two medical practitioners working in the hospital or in the nursing home instead of requiring such certificates.

(3) Any mentally ill person admitted under sub-section (1) or his relative or friend may apply to the Magistrate for his discharge and the Magistrate may, after giving notice to the person at whose instance he was admitted to the psychiatric hospital or psychiatric nursing home and after making

such inquiry as he may deem fit either allow or dismiss the application.

(4) The provisions of the foregoing sub-section shall be without prejudice to the powers exercisable by a Magistrate before whom the case of a mentally ill person is brought, whether under this section or under any other provision of this Act, to pass a reception under, if he is satisfied that it is necessary so to do in accordance with the relevant provisions of this Act.

PART III

Reception Orders

A. Reception Orders on applications

20.(1) An Application for a reception order may be made by -

[Application for reception order]

(a) the medical officer in charge of a psychiatric hospital or psychiatric nursing home, or

(b) by the husband, wife or any other relative of the mentally ill person.

(2) Where a medical officer in charge of a psychiatric hospital or psychiatric nursing home in which a mentally ill person is undergoing treatment under a temporary treatment order is satisfied that -

(a) the mentally ill person is suffering from mental disorder of such a nature and degree that his treatment in the psychiatric hospital or, as the case may be, psychiatric nursing home is required to be continued for more than six months, or

(b) it is necessary in the interests of the health and personal safety of the mentally ill person or for the protection of others that such person shall be detained in a psychiatric hospital or psychiatric nursing home,

he may make an application to the Magistrate within the local limits of whose jurisdiction the psychiatric hospital or, as the case may be, psychiatric nursing home is situated, for the detention of such mentally ill person under a reception order in such psychiatric hospital or psychiatric nursing home, as the case may be.

(3) Subject to the provisions of sub-section (5), the husband or wife of a person who is alleged to be mentally ill or, where there is no husband or wife, or where the husband or wife is prevented by reason of any illness or absence from India or otherwise from making the application, any other relative of such person may make an application to the Magistrate within the local limits of whose jurisdiction the said person ordinarily resides, for the detention of the alleged mentally ill person under a reception order in a psychiatric hospital or psychiatric nursing home.

(4) Where the husband or wife of the alleged mentally ill person is not the applicant, the application shall contain the reasons for the application not being made by the husband or wife and shall

indicate the relationship of the applicant with the alleged mentally ill person and the circumstances under which the application is being made.

(5) No person -

(i) who is a minor, or
(ii) who, within fourteen days before the date of the application, has not seen the alleged mentally ill person,

shall make an application under this section.

(6) Every application under sub-section (3) shall be made in the prescribed form and shall be signed and verified in the prescribed manner and shall state whether any previous application had been made for inquiry into the mental condition of the alleged mentally ill person and shall be accompanied by two medical certificates from two medical practitioners of whom one shall be a medical practitioner in the service of Government.

21. Every medical certificate referred to in sub-section (6) of section 20 shall contain a statement.

[Form and contents of medical certificates]

(a) that each of the medical practitioners referred to in that sub-section has independently examined the alleged mentally ill person and has formed his opinion on the basis of his own observations and from the particulars communicated to him; and

(b) that in the opinion of each such medical practitioner the alleged mentally ill person is suffering from mental disorder of such a nature and degree as to warrant the detention of such person in a psychiatric hospital or psychiatric nursing home and that such detention is necessary in the interests of the health and personal safety of that person or for the protection of others.

22. (1) On receipt of an application under sub-section (2) of section 20, the Magistrate may make a reception order, if he is satisfied that -

[Procedure upon application for reception order]

(i) the mentally ill person is suffering from mental disorder of such a nature and degree that it is necessary to detain him in a psychiatric hospital or psychiatric nursing home for treatment; or

(ii) it is necessary in the interests of the health and personal safety of the mentally ill person or for the protection of others that he should be so detained, and a temporary treatment order would not be adequate in the circumstances of the case end it is necessary to make a reception order.

(2) On receipt of an application under sub-section (3) of section 20, the Magistrate shall consider

the statements made in the application and the evidence of mental illness as disclosed by the medical certificates.

(3) If the Magistrate considers that there are sufficient grounds for proceeding further, he shall personally examine the alleged mentally ill person unless, for reasons to be recorded in writing, he thinks that it is not necessary or expedient to do so.

(4) If the Magistrate is satisfied that a reception order may properly be made forthwith, he may make such order, and if the Magistrate is not so satisfied, he shall fix a date for further consideration of the application and may make such inquiries concerning the alleged mentally ill person as he thinks fit.

(5) The notice of the date fixed under sub-section (4) shall be given to the applicant and to any other person to whom, in the opinion of the Magistrate, such notice shall be given.

(6) If the magistrate fixes a date under sub-section (4) for further consideration of the application, he may make such order as he thinks fit, for the proper care and custody of the alleged mentally ill person pending disposal of the application.

(7) On the date fixed under sub-section (4), or on such further date as may be fixed by the Magistrate, he shall proceed to consider the application in *camera*, in the presence of –

(i) the applicant;

(ii) the alleged mentally ill person (unless the Magistrate in his discretion otherwise directs);

(iii) the person who may be appointed by the alleged mentally ill person to represent him; and

(iv) such other person as the Magistrate thinks fit,

and if the Magistrate is satisfied that the alleged mentally ill person, in relation to whom the application is made, is so mentally ill that in the interests of the health and personal safety of that person or for the protection of others it is necessary to detain him in a psychiatric hospital or psychiatric nursing home for treatment, he may pass a reception order for that purpose and if he is not so satisfied, he shall dismiss the application and any such order may provide for the payment of the cost of the inquiry by the applicant personally or from out of the estate of the mentally ill person, as the Magistrate may deem appropriate.

(8) If any application is dismissed under sub-section (7), the Magistrate shall record the reasons for such dismissal and a copy of the order shall be furnished to the applicant.

B. Reception orders on production of mentally ill persons before Magistrate

23.(1) Every Officer in charge of a police station,-

(a) may take or cause to be taken into protection any person found wandering at large within the limits of his station whom he has reason to believe to be so mentally ill as to be incapable of taking care of himself, and.

[Powers and duties of police officers in respect of certain mentally ill persons]

(b) shall take or cause to be taken into protection any person within the limits of his station whom he has reason to believe to be dangerous by reason of mental illness.

(2) No person taken into protection under sub-section(1) shall be detained by the police without being informed , as soon as may be, of the grounds for taking him into such protection, or where in the opinion of the officer taking the person into protection, such person is not capable of understanding those grounds, without his relatives or friends, if any, being informed of such grounds.

(3) Every person who is taken into protection and detained under this section shall be produced before the nearest Magistrate within a period of twenty four hours of taking him into such protection excluding the time necessary for the journey from the place where he was taken into such protection to the Court of the Magistrate and shall not be detained beyond the said period without the authority of the Magistrate.

24. (1) If a person is produced before a Magistrate under sub-section(3) of section 23, and if, in his opinion, there are sufficient grounds for proceeding further, the Magistrate shall-

[Procedure on production of mentally ill person]

(a) examine the person to assess his capacity to understand,

(b) cause him to be examined by a medical officer, and

(c) make such inquiries in relation to such person as he may deem necessary.

(2) After the completion of the proceedings under sub-section (1), the Magistrate may pass a reception order authorizing the detention of the said person as an inpatient in a psychiatric hospital or psychiatric nursing home, -

(a)if the medical officer certifies such person to be a mentally ill person, and

(b)if the Magistrate is satisfied that the said person is a mentally ill person and that in the interests of the health and personal safety of that person or for protection of others, it is necessary to pass such order.

Provided that if any relative or friend of the mentally ill person desires that the mentally ill person be sent to any particular licensed psychiatric hospital or licensed psychiatric nursing home for treatment therein and undertakes in writing to the satisfaction of the Magistrate to pay the cost of maintenance of the mentally ill person in such hospital or nursing home, the Magistrate shall, if the medical officer in charge of such hospital or nursing home consents, make a reception order for the admission of the mentally ill person into that hospital or nursing home and detention therein:

Provided further that if any relative or friend of the mentally ill person enters into a bond, with or without sureties for such amount as the Magistrate may determine, undertaking that such mentally ill person will be properly taken care of and shall be prevented from being any injury to himself or to

others, the Magistrate may, instead of making a reception order, hand him over to, the care of such relative or friend.

25. (1) Every officer in charge of a police station, who has reason to believe that any person within the limits of his station is mentally ill and is not under proper care and control, or is ill-treated or neglected by any relative or other person having charge of such mentally ill person, shall forthwith report the fact to the Magistrate within the local limits of whose jurisdiction the mentally ill person resides.

[Order in case of mentally ill person cruelly treated or not under proper care and control]

(2) Any private person who has reason to believe that any person is mentally ill and is not under proper care and control, or is ill-treated or neglected by any relative or other person having charge of such mentally ill person, may report the fact to the Magistrate within the local limits of whose jurisdiction the mentally ill person resides.

(3) If it appears to the Magistrate, on the report of a police officer or on the report or information derived from any other person, or otherwise that any mentally ill person within the local limits of his jurisdiction is not under proper care and control, or is ill-treated or neglected by any relative or other person having the charge of such mentally ill person, the Magistrate may cause the mentally ill person to be produced before him, and summon such relative or other person who is, or who ought to be in charge of, such mentally ill person.

(4) If such relative or any other person is legally bound to maintain the mentally ill person, the Magistrate may, by order, require the relative or the other person to take proper care of such mentally ill person and where such relative or other person willfully neglects to comply with the said order, he shall be punishable with fine which may extend to two thousand rupees.

(5) If there is no person legally bound to maintain the mentally ill person, or if the person legally bound to maintain the mentally ill person refuses or neglects to maintain such person, or if, for any other reason, the Magistrate thinks fit so to do, he may cause the mentally ill person to be produced before him and, without prejudice to any action that may be taken under sub-section (4) , proceed in the manner provided in section 24 as if such reason had been produced before him under sub section (3) of section 23.

C. Further provisions regarding admission and detention of certain mentally ill persons

26 If any District Court holding an inquisition under Chapter VI regarding any person who is found to be mentally ill is of opinion that it is necessary so to do in the interests of such person, it may, by order, direct that such person shall be admitted and kept as an inpatient in a psychiatric hospital or psychiatric nursing home and every such order may be varied from time to time or revoked by the District Court.

[Admission as inpatient after inquisition]

27.An order under section 30 of the Prisoners Act, 1900, or under section 144 of the Air Force Act, 1950, or under section 145 of the Army Act, 1950, or under section 143 or section 144 of the Navy

Act, 1957, or under section 330 or section 335 of the Code of Criminal Procedure, 1973, directing the reception of a mentally ill prisoner into any psychiatric hospital or psychiatric nursing home, shall be sufficient authority for the admission of such person in such hospital or psychiatric nursing home to which such person may be lawfully transferred for detention therein

[Admission and detention of mentally ill prisoner]

3 of 1990, 45 of 1950, 46 of 1950, 62 of 1957, 2 of 1974

28. (1) When any person alleged to be a mentally ill person appears or is brought before a Magistrate under section 23 or section 25, the Magistrate may, by order in writing, authorize the detention of the alleged mentally ill person under proper medical custody in an observation ward of a general hospital or general nursing home or psychiatric hospital or psychiatric nursing home or in any other suitable place for such period not exceeding ten days as the Magistrate may consider necessary for enabling any medical officer to determine whether a medical certificate in respect of that alleged mentally ill person may properly be given under clause (a) of sub-section (2) of section 24.

[Detention of alleged mentally ill person. Pending report by medical officer]

(2) The Magistrate may, from time to time, for the purpose mentioned in sub-section (1), by order in writing, authorize such further detention of the alleged mentally ill person for periods not exceeding ten days at a time as he may deem necessary.

Provided that no person shall be authorized to be detained under this sub-section for a continuous period exceeding thirty days in the agreeable.

29. Whenever any reception order is made by a Magistrate under section 22, section 24 or section 25, he may, for reasons to be recorded in writing, direct that the mentally ill person in respect of whom the order is made may be detained for such period not exceeding thirty days in such place as he may deem appropriate, pending the removal of such person to a psychiatric hospital or psychiatric nursing home.

[Detention of mentally ill person pending his removal to psychiatric hospital or psychiatric nursing home]

D. Miscellaneous provision in relation to orders under this Chapter

30. Where any order under this Chapter is required to be made on the basis of a medical certificate, such order shall not be made unless the person who has signed the medical certificate, or where such order is required to be made on the basis of two medical certificates, the signatory of the respective certificates, has certified that he has personally examined the alleged mentally, ill person,

[Time and manner of medical examination of mentally ill person]

(i) in the case of an order made on an application, not earlier than ten near days immediately before the date on which such application is made; and
(ii) in any other case, not earlier than ten clear days immediately before the date of such order:

Provided that where a reception order is required to be made on the basis of two medical certificates such order shall not be made unless the certificates show that the signatory of each certificate examined the alleged mentally ill person independently of the signatory of the other certificate.

31. A reception order made under this Chapter shall be sufficient authority:-

[Authority for reception order]

(i) for the applicant or any person authorized by him, or
(ii) in the case of a reception order made otherwise than on an application, for the person authorized so to do by the authority making the order,

to take the mentally ill person to the place mentioned in such order or for his admission and treatment as an inpatient in the psychiatric hospital or psychiatric nursing home specified in the order or, as the case may be, for his admission and detention therein, or in any psychiatric hospital or psychiatric nursing home to which he may be removed in accordance with the provisions of this Act, and the medical officer-in-charge shall be bound to comply with such order:

Provided that in any case where the medical officer-in-charge finds accommodation in the psychiatric hospital or psychiatric nursing home inadequate, he shall, after according admission, intimate that fact to the Magistrate or the District Court which passed the order and there upon the Magistrate or the District Court, as the case may be, shall pass such order as he or it may deem fit:

Provided further that every reception order shall cease to have effect –

(a) on the expiry of thirty days from the date on which it was made, unless within that period, the mentally ill person has been admitted to the place mentioned therein, and
(b) on the discharge, in accordance with the provisions of this Act, of the mentally ill person.

32. Every Magistrate or District Court making a reception order shall forthwith send a certified copy thereof together with copies of the requisite medical certificates and the statement of particulars to the medical officer in charge of the psychiatric hospital or psychiatric nursing home to which the mentally ill person is to be admitted.

[Copy of reception order to be sent to medical officer in charge]

33. No Magistrate or District Court shall pass a reception order for the admission as an inpatient to, or for the detention of any mentally ill person, in any psychiatric hospital or psychiatric nursing home outside the State in which the Magistrate or the District Court exercises jurisdiction:

Provided that an order for admission or detention in to or in a psychiatric hospital or psychiatric nursing home situated in any other state may be passed if the State Government has by general or special order and after obtaining the consent of the government of such other State, authorized the Magistrate or the District Court in that behalf.

[Restriction as to psychiatric hospitals and psychiatric nursing homes into which reception order may direct admission]

34. If, after the admission of any mentally ill person to any psychiatric hospital or psychiatric nursing home under a reception order, it appears that the order under which he was admitted or detained or any of the documents on the basis of which such order was made is defective or incorrect, the same may, at any time thereafter he amended with the permission of the Magistrate or the District Court, by person or persons who signed the same and upon such amendment being made, the order shall have effect and shall be deemed always to have had effect as if it had been originally made as so amended, or, as the case be, the documents upon which it was made had been originally furnished as so amended.

[Amendment of order or document]

35. (1) Subject to the provisions of this section the Magistrate may, by order in writing (hereinafter referred to the order of substitution), transfer the duties and responsibilities under this Act, of the person on whose application a reception order was made, to any other person who is willing to undertake the same and such other person shall thereupon be deemed for the purposes of this Act to be the person on whose application the reception order was made and all references in this Act to the latter person shall be construed accordingly:

[Power to appoint substitute for person upon whose application reception order has been made]

Provided that no such order of substitution shall absolve the person upon whose application the reception order was made or, if he is dead, his legal representative, from any liability incurred before the date of the order substitution.

2) Before making any order of substitution, the Magistrate shall send a notice to the person on whose application the reception order was made , if he is alive, and to any relative of the mentally ill person who, in the opinion of the Magistrate, shall have notice.

3) The notice under sub-section (2) shall specify the name of the person in whose favour it is proposed to make the order of substitution and the date (which shall be not less than twenty days from the date of issue of the notice) on which objections, if any, to the making of such order shall be considered.

4) On the date specified under sub-section (3), or any subsequent date to which the proceedings may be adjourned, the Magistrate shall consider any objection made by any person to whom notice was sent, or by any other relative of the mentally ill person, and shall receive all such evidence as may be produced by or on behalf of any such person or relative and after making such inquiry as the Magistrate may deem fit, make or refrain from making the order of substitution:

Provided that, if the person whose application, the reception order was made is dead and any other person is willing and is, in the opinion of the Magistrate, fit to undertake the duties and responsibilities under this Act of the former person, the Magistrate shall, subject to the provisions contained in the proviso to sub-section(1), make an order to that effect.

5) In making any substitution order under this section, the Magistrate shall give preference to the person who is the nearest relative of the mentally ill person, unless, for reasons to be recorded in writing the Magistrate considers that giving such preference will not be in the interests of the mentally person.

6) The Magistrate may make such order for the payment of the costs of an inquiry under this section by any person or from out of the estate of the mentally ill person as he thinks fit.

7) Any notice under sub-section (2) may be sent by post to the last known address of the person for whom it is intended.

36. In any area where a Commissioner of Police has been appointed, all the powers and functions of the Magistrate under sections 23,24, 25 and 28 may be exercised or discharged by the Commissioner of Police and all the functions of an officer in charge of a police station under this Act may be discharged by any police officer not below the rank of an Inspector.

[Officers competent to exercise powers and discharge functions of Magistrate under certain sections.]

CHAPTER V

INSPECTION, DISCHARGE, LEAVE OF ABSENCE AND REMOVAL OF MENTALLY ILL PERSONS

PART I
INSPECTION

37. (1) The State Government or the Central Government, as the case may be, shall appoint for every psychiatric hospital and every psychiatric nursing home, not less than five Visitors, of whom at least one shall be a medical officer, preferably a psychiatric and two social works.

(2) The head of the Medical Services of the State or his nominee preferably a psychiatrist shall be an *ex officio* Visitor of all the psychiatric hospitals and psychiatric nursing homes in the State.

(3) The qualifications of persons to be appointed as Visitors under sub-section (1) and the terms and conditions of their appointment shall be such as may be prescribed.

[Appointment of Visitors]

38. Not less than three Visitors shall, at least once in every month, make a joint inspection of every part of the psychiatric hospital or psychiatric nursing home in respect of which they have been appointed and examine every minor admitted as a voluntary patient under section 17 and, as far as circumstances will permit, every other mentally ill person admitted therein and the order for the admission of, and the medical certificates relating to, every mentally ill person admitted subsequent to the joint inspection immediately preceding, and shall enter in a book kept for that purpose such remarks as they deem appropriate in regard to the management and condition of such hospital or nursing home and of the inpatients thereof :

[Monthly inspection by Visitors]

Provided that the Visitors shall not be entitled to inspect any personal records of an inpatient which in the opinion of the medical officer-in-charge are confidential in nature:

Provided further that if any of the Visitors does not participate in the joint inspection of the psychiatric hospital or psychiatric nursing home in respect of which he was appointed a Visitor for three consecutive months, he shall cease to hold office as such Visitor.

39. (1) Notwithstanding anything contained in section 38, where any person is detained under the provisions of section 144 of the Air Force Act, 1950, or section 145 of the Army Act, 1950, or section 143 or section 144 of the Navy Act, 1957, or section 330 or section 335 of the Code of Criminal Procedure, 1973, -

[Inspection of mentally ill prisoners]

45 of 1950, 40 of 1950, 62 of 1957, 2 of 1974

(i) the Inspector – General of Prisons, where such person is detained in a jail; and

(ii) all or any three of the Visitors including at least one social worker appointed under sub-section (1) of section 37, where such person is detained in a psychiatric hospital or psychiatric nursing home,

shall, once in every three months, visit such person at the place where he is detained, in order to assess the state of mind of such person and make a report thereon to the authority under whose order such person is so detained.

(2) The State Government may empower any of its officers to discharge all or any of the functions of the Inspector-General of Prisons under sub-section (1).

(3) The medical officer in charge of a psychiatric hospital or psychiatric nursing home wherein any person referred to in sub-section (1) is detained, shall once in every six months, make a special report regarding the mental and physical condition of such person to the authority under whose order such person is detained.

(4) Every person who is detained in jail under the provisions of various Acts referred to in sub-section (1) shall be visited at least once in every three months, by a psychiatrist, or where a psychiatrist is not available, by a medical officer empowered by the State Government, in this behalf and such psychiatrists or, as the case may be, such medical officer shall make a special report regarding the mental and physical condition of such person to the authority under whose order such person is detained.

PART II
DISCHARGE

40. (1) Not withstanding anything contained in Chapter IV, the medical officer in charge of a psychiatric hospital or psychiatric Nursing home may, on the recommendations of two medical parishioners one of whom shall preferably by a psychiatrist, by order in writing, direct the discharge of any person, other than a voluntary patient detained or undergoing treatment therein as an inpatient, and such person shall thereupon be discharged from the psychiatric hospital or psychiatric nursing home:

[Order of discharge by medical officer in charge]

Provided that no order under this sub-section shall be made in respect of a mentally ill prisoner otherwise than as provided in section 30 of the Prisoners Act, 1990 or in any other relevant law.

(2) Where any order of discharge is made under sub-section (I) in respect of a person who has been detained or is undergoing treatment as inpatient in pursuance of an order of any authority, a copy of such order shall be immediately forwarded to that authority by the medical officer in charge.

[3 of 1900]

41. Any person detained in a psychiatric hospital or psychiatric nursing home under an order made in pursuance of an application made under this Act, shall be discharged on an application made in that behalf to the medical officer in charge by the person on whose application the order was made:

[Discharge of mentally ill persons on application]

Provided that no person shall be discharged under this section if the medical officer in charge certifies in writing that the person is dangerous and unfit to be at large.

42. (1) Where any relative or friend of a mentally ill person detained in a psychiatric hospital or psychiatric nursing home under section 22, section 24 or section 25 desires that such person shall be delivered over to his care and custody, he may make an application to the medical officer in charge who shall forward it together with his remarks thereon to the authority under whose orders the mentally ill person is detained.

[Orders of discharge on the undertaking of relatives or friends, etc, for care of mentally ill person]

(2) Where an application is received under sub-section (1), the authority shall, on such relative or friend furnishing a bond, with or without sureties, for such authority may specify in this behalf, undertaking to take proper care of such mentally ill person, and ensuring that the mentally ill person shall be prevented from causing injury to himself or to others, make an order of discharge and thereupon the mentally ill person shall be discharged.

43. (1) Any person (not being a mentally prisoner) detained in pursuance of an order made under this Act who feels that he has recovered from his mental illness may make an application to the Magistrate, where necessary under the provisions of this Act, for his discharge from the psychiatric nursing home.

[Discharge of person on his request]

(2) An application made under sub-section (1) shall be supported by a certificate either from the medical officer in charge of the psychiatric hospital or psychiatric nursing home where the applicant is undergoing treatment or from a psychiatrist

(3) The Magistrate may, after making such inquiry as he may deem fit, pass an order discharging the person or dismissing the application.

44. If any person detained in a psychiatric hospital or psychiatric nursing home in pursuance of a reception order made under this Act is subsequently found on an inquisition held in accordance with the provisions of Chapter VI, to be of sound mind or capable of taking care of himself and managing his affairs, the medical officer in charge shall forthwith, on the production of a copy of such finding duly certified bythe District Court, discharge such person from such hospital or nursing home.

[Discharge of person subsequently found on inquisition to be of sound mind]

PART III

LEAVE OF ABSENCE

45. (1) An application for leave of absence on behalf of any mentally ill person (not being a mentally ill prisoner) undergoing treatment as an inpatient in any psychiatric hospital or psychiatric nursing home may be made to the medical officer in charge, -

[Leave of Absence]

(a) in the case of a person who was admitted on the application of the husband or wife, by the husband or wife of such mentally ill person, or where by reason of mental or physical illness, absence from India or otherwise, the husband or wife is not in a position to make such application, by any other relative of the mentally ill person duly authorised by the husband or wife , or

(b) in the case of any other person, by the person on whose application the mentally ill person was admitted:

Provided that no application under this sub-section shall be made by a person who has not attained the age of majority.

(2) Every application under sub-section (1) shall be accompanied by a bond, with or without sureties for such amount as the medical officer in charge may specify, undertaking-

(i) to take proper care of the mentally ill person,
(ii) to prevent the mentally ill person from causing injury to himself or to others and
(iii) to bring back the mentally ill person to the psychiatric hospital or, as the case may be ,psychiatric nursing home, on the expiry of the period of leave.

(3) On receipt of an application under sub-section (1), the medical officer in charge may grant leave of absence to the mentally ill person for such period as the medical officer in charge may deem necessary and subject to such conditions as may in the interests of the health and personal safety of the mentally ill person or for the protection of others, be specified in the order:

Provided that the total number of days for which leave of absence may granted to a patient under this sub-section shall not exceed sixty days.

(4) Where the mentally ill person is not brought back to the psychiatric hospital or psychiatric nursing home on the expiry of the leave granted to him under this section the medical officer in charge shall forthwith report that fact to the Magistrate within the local limits of whose jurisdiction such hospital or nursing home is situate and the Magistrate may, after making such inquiry as he may deem fit, make an order directing him to be brought back to the psychiatric hospital or psychiatric nursing home, as the case may be.

(5) Nothing contained in this section shall apply to a voluntary patient referred to in section 15 or section 16 and the provisions of section 18 shall apply to him.

46. (1) Where the medical officer in charge refuses to grant leave of absence to a mentally ill person under section 45, the applicant may apply to the Magistrate within the local limits of whose jurisdiction the psychiatric hospital or psychiatric nursing home wherein the mentally ill person is detained is situate, for the grant of leave of absence to the mentally ill person and the Magistrate may, if he is satisfied that it is necessary so to do, and on the applicant entering into a bond in accordance with the provisions of sub-section (2), by order, grant leave of absence to the mentally ill person for such period and subject to such conditions as may be specified in the order.

[Grant of leave of absence by Magistrate]

(2) Every bond referred to in sub-section (1) shall be with or without sureties and for such amount as the Magistrate may decide and shall contain the undertaking referred to in sub-section (2) of section 45

(3) The Magistrate shall forward a copy of his order to the medical officer in charge and on receipt of such order the medical officer in charge shall entrust the mentally ill person to the person on whose application the leave of absence was granted under this section.

PART IV

REMOVAL

47.(1) Any mentally ill person other than a voluntary patient referred to in section 15 or section 16 may, subject to any general or special order of the State Government, be removed from any psychiatric hospital or psychiatric nursing home to any other psychiatric hospital or psychiatric nursing home within the State, or to any other psychiatric hospital or psychiatric nursing home in any other state with the consent of the Government of that other state:

Provided that no mentally ill person admitted to a psychiatric hospital or psychiatric nursing home under an order made in pursuance of an application made under this Act shall be removed unless intimation thereof has been given to the applicant.

[Removal of mentally ill person from one psychiatric hospital or psychiatric nursing home to any other psychiatric hospital or psychiatric nursing home]

(2) The State Government may make such general or special order as it thinks fit directing the removal of any mentally ill prisoner from the place where he is for the time being detained ,to any psychiatric hospital, psychiatric nursing home, jail or other place of safe custody in the State or to any psychiatric hospital, psychiatric nursing home, jail or other place of safe custody in any other State with the consent of the Government of that other state.

48. Every person brought into a psychiatric hospital or psychiatric nursing home under any order made under this Act, may be detained or as the case may be, admitted as an inpatient therein until he is removed or is discharged under any law, and in case of his escape from such hospital or nursing home he may, by virtue of such order, be retaken by any police officer or by the medical officer in charge or any officer or servant of such hospital or nursing home, or by any other person authorised in that behalf by the medical officer in charge, and conveyed to, and received and detained or, as the case may be kept is an inpatient in such hospital or nursing home:

[Admission, detention and retaking in certain cases]

Provided that in the case of a mentally person (not being a mentally ill prisoner) the power to retake as aforesaid under this section shall not be exercisable after the expiry of a period of one month from the date of his escape.

49. Any person aggrieved by any order of a Magistrate, passed under any of the foregoing provisions may, within sixty days from the date of the order, appeal against that order to the District Court within the local limits of whose jurisdiction the Magistrate exercised the powers, and the decision of the District Court on such appeal shall be final.

[Appeal from orders of Magistrate]

CHAPTER VI

JUDICIAL INQUISITION REGARDING ALLEGED MENTALLY ILL PERSON POSSESSING PROPERTY, CUSTODY OF HIS PERSON AND MANAGEMENT OF HIS PROPERTY

50. (1) Where an alleged mentally ill person is possessed of property, an application for holding an inquisition into the mental condition of such person may be made either –

[Application for judicial inquisition]

(a) By any of his relatives, or
(b) By a public curator appointed under the Indian succession Act, 1925 or

[39 of 1925]

(c) By the advocate – general of the state in which the alleged mentally ill person resides, or
(d) Where the property of the alleged mentally ill person comprises land or interest in land, or where the property or part thereof is of such a nature as can lawfully be entrusted for management to a court of wards established under any law for the time being in force in this state, by the Collector of the District in which such land is situate,

to the District Court within the local limits of whose jurisdiction the alleged mentally ill person resides.

(2) on receipt of an application under sub-section (1), the District Court shall, by personal service or by such other mode of service as it may deem fit, serve a notice on the alleged mentally ill person to attend at such place and such time as may be specified in the notice or shall, in like manner, serve a notice on the person having the custody of the alleged mentally ill person to produce such person at the said place and at the said time, for being examined by the District Court or by any other person whom the District Court may call for a report concerning the mentally ill person:

Provided that , if the alleged mentally ill person is a woman, who according to the custom prevailing in the area where she resides or according to the religion, to which she belongs, ought no to be compel to appear in public, the District Court may cause her to examine by issuing a commission as provided in the code of civil procedure, 1908.

[5 of 1908]

(2)(3) A copy of the notice under sub-section (2) shall also be served upon the applicant and upon any relative of the alleged mentally ill person or other person who, in the opinion of the District Court, shall have notice of Judicial inquisition to be held by it.

(3)(4) For the purpose of holding the inquisition applied for, the District Court may appoint two or more persons to act as assessors.

51. On completion of the inquisition, the District Court shall record its findings on, -
(i) whether the alleged mentally ill person is in fact mentally ill or not, and
(ii) where such person is mentally ill, whether he is incapable of taking care of himself and of managing his property, or in capable of managing his property only.

[Issues on which finding should be given by District Court after inquisition]

52. (1) Where the District Court records a finding that the alleged mentally ill person is in fact mentally ill and is in capable of taking care of himself and of managing his property, it shall make an order for the appointment of the Guardian under section 53 to take care of his person and of a Manager under section 54 for the management of his property.

(2) where the District Court records a finding that the alleged mentally ill person is in fact mentally ill and is incapable of managing his property but capable of taking care of himself, it shall make an order under section 54, regarding the management of his property.

[Provision for appointing guardian of mentally ill person and for manager of property]

(3) where the District Court records a finding that the alleged mentally ill person is not mentally ill, it shall dismiss the application,

(4) where the district court deems fit, it may appoint under sub section (1) the same person to be the guardian and the manager.

53. (1) where the mentally ill person is incapable of taking care of himself, the District Court or, where a direction has been issued under subsection (2) of section 54, the Collector of District, may appoint any suitable person to be his guardian.

[Appointment of Guardian of mentally ill person]

(2) in the discharge of his functions under sub section (1), the Collector shall be subject to the supervision and control of the state government of any authority appointed by it in that behalf.

54. (1) Where the property of the Mentally ill person who is in capable of managing it is such as can be taken charge of by a court of wards under any law for the time being inforce, the District Court shall authorise the court of wards to take charge of such property and there upon not withstanding anything contained in such law, the Court of wards shall assume the management of such property in accordance with that law.

[Appointment of manger for management of property of mentally ill person]

(2) where the property of the mentally ill person consists

(3) where the management of the property of the mentally ill person cannot be entrusted in whole or in part of land or of any interest in land which cannot taken charge of by the court of wards, the

District court may, after obtaining the consent of the Collector of the District in which the land is situated, direct the Collector to take charge of the person and such part of the property or interesttherein of mentally ill person as cannot be taken charge of by the court of wards to the court of wards or to the Collector under subsection (1) or subsection (2), as the case may be, the District Court shall appoint any suitable person to be the manager of such property.

55. Where the property of a mentally ill person has been entrusted to the collector by District court under subsection (2) of section 54, he may, subject to the control of the State Government or any authority appointed by it that behalf, appoint any suitable person for the management of the property of the mentally ill person.

[Appointment of manager by Collector]

56. Every person who is appointed as the manager of the property of the mentally ill person by the District Court or by the Collector shall, if so required by the appointing authority, entering into a bond for such sum, in such form and with such sureties as that authority, may specify, to account for all receipts from the property of the Mentally ill person.

[manager of property to execute the Bond]

57. (1) No person, who is the legal heir or a mentally ill person shall appointed under section 53, 54 or 55 to be the guardian of such mentally ill person of, as the case may be, the manager of his property unless the District Court or, as the case may be, the Collector, for reasons to be recorded in writing considers that such appointment is for the benefit of the mentally ill person.

[Appointment and remuneration of guardians and managers]

(2) The guardian of a mentally ill person or the manager of his property or both appointed under this act shall be paid, from out of the property of the mentally ill person, such allowance as the appointing authority may determine.

58. (1) Every person appointed as a guardian of a mentally ill person or manager of his property, or of both, under this act shall have the care of the mentally ill person or his property, or of both, and be responsible for the maintenance of the mentally ill person and of such members of his family as are depended on him.

[Duties of guardian and manager]

(2) where the person appointed as guardian of a mentally ill person, is different from the person appointed as the manger of his property, the manger of his property shall pay to the guardian of the mentally ill person such allowance may be fixed by the authority appointing the guardian for the maintenance of the mentally ill person and of such members of his family as are depended on him.

59. (1) Every manager appointed under this act shall, subject to the provisions of this act, exercise the

powers in regard to the management of the property of the mentally ill person in respect of which he is appointed as manager, as the mentally ill person would have exercised as owner of the property had he not been mentally ill, and shall realize all claims due to the estate of the mentally ill person and pay all debts and discharge all liabilities due from that estate:

[Power of Manager]

Provided that the manager shall not mortgage, create any charge on, or, transfer by sale, gift, exchange or otherwise, any immovable property of the mentally ill person or lease out any such property for a period exceeding 5 years, unless he obtains the permission of the District Court in that behalf.

(2) The District Court may, on an application made by the manger, grand him permission to mortgage, create a charge on, or, transfer by sale, gift, exchange of otherwise, any immovable property of the mentally ill person or to lease out any such property for a period exceeding 5 years, subject to such condition or restriction as that court may think fit to impose.

(3) The District Court shall cause notice of every application for permission to be served on any relative or friend of the mentally ill person and after considering objections, if any, received from the relative or fried and after making such inquiries as it may deem necessary, grant or refused permission having regard to the interests of the mentally ill person.

60. (1) Every manager appointed under this act shall, within a period of 6 months from the date of his appointment, deliver to the authority, which appointed him, and inventory of the immovable property belonging to the mentally ill person and of all assets and other movable property received on behalf of the mentally ill person, together with a statement of all claims due to and all debts and liabilities due by, such mentally ill person.

[Manager to furnish in inventory and annual accounts]

(2) Every such manager shall also furnish to the said appointing authority within a period of three months of the close of every financial year, and account of the property and assets in his charge, the sum received and disbursed on account of the mentally ill person and the balance remaining with him.

61. Every manager appointed under this act, may in the name and on behalf of the mentally ill person, -

[Manager's power to execute conveyances under orders of District Court]

(a) exercise all such conveyances and instruments of transfers by way of sale, mortgage or otherwise of property of mentally ill person as may be permitted by the district court: and

(b) subject to the orders of the district court, exercise all powers vested in that behalf in the mentally ill person in his individual capacity or in his capacity as a trusty or as a guardian

62. Where the mentally ill person had, before his mental illness, contracted to sell or otherwise dispose of his property or any portion thereof, and if such contract is, in the opinion of the District Court, of

such a nature as ought to be performed, the District Court may direct the manager appointed under this act to perform such contract and to do such other acts in fulfillment of the contract as the court considers necessary and thereupon the manager shall be bound to act accordingly.

[Manager to perform contracts directed by District Court]

63. Where a mentally ill person had been engaged in business before he became mentally ill, the District Court may, if it appears to be for the benefit of the mentally ill person to dispose of his business premises, direct the manager appointed under this act in relation to the property of such person to sell and dispose of such premises and to apply the sale proceeds thereof in such manner as the District Court may direct and thereupon the manager shall be bound to act accordingly.

[Disposal of Business premises]

64. Where a mentally ill person is entitled to a lease or under lease, and it appears to the manager appointed under this act, in relation to the property of such person that it would be for the benefit of the mentally ill person to dispose of such lease or under lease, such manager may, after obtaining the orders of the District Court, surrender, assign or otherwise dispose of such lease or under lease to such person for such consideration and upon such terms and conditions as the court may direct.

[Manager may dispose of leases]

65. The District Court may, on application made to it by any person concerning any matter whatsoever connected with the mentally ill person or his property, make such order, subject to the provisions of this chapter, in relation to that matter as in the circumstances it thinks fit.

[Power to make order concerning any matter connected with mentally ill person]

66. If any relative of the mentally ill person or the Collector impugns, by a petition to the District Court, the accuracy of the inventory or statement referred to in subsection (1), or, as the case may be, any annual account referred to in sub section (2), of section 60, the court may summon the manager and summarily inquire into the matter and make such order thereon as it thinks fit.

[Proceeding it accuracy of inventory or accounts is impugned]

Provided that the District Court may, in its discretion, refer such petition to any such court subordinate to it, or to the Collector in any case where the manager was appointed by the Collector and the petition is not presented by the Collector.

67. All sums received by a manager on account of any estate in excess of what may be required for the current expenses of the mentally ill person or for the management of his property, shall be paid into the public treasury on account of the estate, and shall be invested from time to time in any of the securities specified in section 20 of the Indian Trusts act, 1882 (2 of 1882) unless, the authority which appointed him, for reasons to be recorded in writing, directs that, in the interests of the

mentally ill person such sums be otherwise invested or applied.

[Payment into public treasury and investment of proceeds of estate]

68. Any relative of a mentally ill person may, with the leave of the District Court, sue for an account from any manager appointed under this act, or from any such person after his removal from office or trust, or from his legal representative in the case of his death, in respect of any property then or formerly under his management of any sums of money or other property received by him on account of such property.

[Relative may sue for account]

69. (1) the manger of the property of a mentally ill person may, for sufficient cause and for reasons to be recorded in writing, be removed by the authority which appointed him and such authority may appoint a new manager in his place.

[Removal of managers and guardians]

(2) Any manager removed under subsection (1) shall be bound to deliver the charge of all property of the mentally ill person to the new manager and to account for all moneys received or disbursed by him.

(4) The District Court may, for sufficient cause, remove any guardian of a mentally ill person and appoint in his place a new guardian.

70. (1) Where a person, being a member of a partnership firm, is found to be mentally ill, the District Court may, on the application of any other partner for the dissolution of partnership or on the application of any person who appears to that court to be entitled to seek such dissolution, dissolve the partnership.

[Dissolution and disposal of property of partnership on a member becoming mentally ill]

(2) Upon the dissolution under subsection (1), or otherwise, in due course of law, of a partnership firm to which that subsection applies the manager appointed under this act may, in the name and on behalf of the mentally ill person, join with the other partners in disposing of the partnership property upon such terms, and shall do all such acts for carrying into effect the dissolution of the partnership, as the District Court may direct.

71. (1) Notwithstanding anything contained in the foregoing provisions, the District Court may, instead of appointing a manager of the estate, order that in the case of cash, the cash and in the case of any other property the produce thereof, shall be realized and paid or delivered to such person as may be appointed by the District Court in this behalf, to be applied for the maintenance of the mentally ill person and of such members of his family as are dependent on him.

(2) A receipt given by the person appointed under sub-section (1) shall be valid discharge to any person

who pays money or delivers any property of the mentally ill person to the person so appointed.

[Power to apply property for maintenance of mentally ill person without appointing manager in certain cases.]

72. Where any stock or Government securities or any share in a company (transferable within India or the dividends of which are payable therein) is or are standing in the name of, or vested in, a mentally ill person beneficially entitled thereto, or in the manager appointed under this Act or in a trustee for him, and the manager dies intestate, or himself becomes mentally ill, or is out of the jurisdiction of the District Court, or it is uncertain whether the manager is living or dead, or he neglects or refuses to transfer the stock, securities or shares, or to receive and pay over thereof the dividends to a new manager appointed in his place within fourteen days after being required by the Court to do so, then the District Court may direct the company or Government concerned to make such transfer or to transfer the same, and to receive and pay over the dividends in such manner as it may direct.

[Power to order transfer of stock, securities of shares belonging to mentally ill person in certain cases]

73. Where any stock or Government securities or share in a company is or are standing in the name of, or vested in, any person residing out of India, the District Court upon being satisfied that such person has been declared to be mentally ill and that his personal estate has been vested in a person appointed for the management thereof, according to the law of the place where he is residing, may direct the company or Government concerned to make such transfer of the stock, securities or shares or of any part thereof, to or into the name of the person so appointed or otherwise, and also to receive and pay over the dividends and proceeds, as the District Court thinks fit.

[Power to order transfer of stock, securities or shares of mentally ill person residing out of India]

74. If it appears to the District Court that the mental illness of a mentally ill person is in its nature temporary, and that it is expedient to make provision for a temporary period, for his maintenance or for the maintenance of such members of his family s are dependent on him. The District Court may, in like manner as under section 71, direct his property or a sufficient part thereof to be applied for the purpose specified therein.

[Power to apply property for mentally ill person's maintenance in case of temporary mental illness]

75. (1) Where the District Court has reason to believe that any person who was found t be mentally ill after inquisition under this Chapter has ceased to be mentally ill, it may direct any court subordinate to it to inquire whether such person has ceased to be mentally ill.

(2) An inquiry under sub-section (1) shall, so far as may be, be conducted in the same manner as an inquisition conducted under this Chapter.

(3) If after an inquiry under this section, it is found that the mental illness of a person has ceased, the District Court shall order all actions taken in respect of the mentally ill person under this Act to

be set aside on such terms and conditions as that Court thinks fit to impose.

[Action taken in respect of mentally ill person to be set aside if District Court finds that his mental illness has ceased]

76. An appeal shall lie to the High Court from every order made by a District Court under this Chapter.

[Appeals]

77. The District Court may, from time to time, make regulations for the purpose of carrying out the provisions of this Chapter.

[Power of District Court to make regulations]

CHAPTER VII

LIABILITY TO MEET COST OF MAINTENANCE OF MENTALLY ILL PERSONS DETAINED IN PSYCHIATRIC HOSPITAL OR PSYCHIATRIC NURSING HOME

78. The cost of maintenance of a mentally ill person detained as an inpatient in any psychiatric hospital or psychiatric nursing home shall, unless otherwise provided for by any law for the time being in force, be borne by the Government of the State wherein the authority which passed the order in relation to the mentally ill person is subordinate, if -

[Cost of maintenance to be borne by Government in certain cases]

(a) that authority which made the order has not taken an undertaking from any person to hear the cost of maintenance of such mentally ill person, and

(b) no provision for bearing the cost of maintenance of such a District Court under this Chapter.

79. (1) Where any mentally ill person detained in a psychiatric hospital or psychiatric nursing home has an estate or where any person legally bound to maintain such person has the means to maintain such person the Government liable to pay the cost of maintenance of such person under section 78 or any local authority liable to bear the cost of maintenance of such mentally ill person under any law for the time being in force, may make an application to the District Court within whose jurisdiction the estate of the mentally ill person is situate or the person legally bound to maintain the mentally ill person and having the means therefor resides, for an order authorising it to apply the estate of the mentally ill person to the cost of maintenance or, as the case may be, directing the person legally bound to maintain the mentally ill person and having the means therefore to bear the cost of maintenance of such mentally ill person.

[Application to District Court for payment of cost of maintenance out of mentally ill person or from a person legally bound to maintain him.]

(2) An order made by the District Court under sub-section (1) shall be enforced in the same manner, shall have the same force and effect and be subject to appeal, as a decree made by such Court in a Suit in respect of the property or person mentioned therein.

80. Nothing contained in the foregoing provisions shall be deemed to absolve a person legally bound to maintain a mentally ill person from maintaining such mentally ill person.

[persons legally bound to maintain mentally ill person not absolved from such liability]

CHAPTER VIII

PROTECTION OF HUMAN RIGHTS OF MENTALLY ILL PERSONS

81. (1) No mentally ill person shall be subjected during treatment to any indignity (whether physical or mental) or cruelty.

(2) No mentally ill person under treatment shall be used for purposes of research, unless-

(i) such research is of direct benefit to him for purposes of diagnosis or treatment; or

(ii) such person, being a voluntary patient, has given his consent in writing or where such person (whether or not a voluntary patient) is incompetent by reason of minority or otherwise, to give valid consent, the guardian or other person competent to give consent on his behalf, has given his consent in writing for such research..

(3) Subject to any rules made in this behalf under section 94 for the purpose of preventing vexatious or defamatory communications or communications prejudicial to the treatment or mentally ill persons, no letters or other communications sent by or to a mentally ill persons under treatment shall be intercepted, detained or destroyed.

CHAPTER IX

PENALTIES AND PROCEDURE

82. (1) Any person who establishes or maintains a psychiatric hospital or psychiatric nursing home in contravention of the provisions of Chapter III shall, on conviction, be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both, and in case of a second or subsequent offence, with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[Penalty for establishment or maintenance of psychiatric hospital or psychaitric nursing home in contravention of Chapter III]

(2) Whoever, after conviction under sub-section (1), continues to maintain a psychiatric hospital or psychiatric nursing home in contravention of the provisions of Chapter III Shall, on conviction, be punishable with fine which may extend to one hundred rupees, for every day after the first day during which the contravention is continued.

83. Any person who receives or detains or keeps a mentally ill person in a psychiatric hospital or psychiatric nursing home otherwise than in accordance with the provisions of this Act, shall, on conviction, be punishable with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees, or with both.

[Penalty for improper reception of mentally ill person]

84. Any manager appointed under this Act to manage the property of a mentally ill person, who contravenes the provisions of section 60 or sub-section (2) of section 69, shall, on conviction, be punishable with fine which may extend to two thousand rupees and may be detained in a civil prison till he complies with the said provisions.

[Penalty for contravention of sections 60 and 69]

85. Any person who contravenes any of the provisions of this Act or of any rule of regulation made thereunder, for the contravention of which no penalty is expressly provided, in this Act, shall, on conviction, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

[General provision for punishment of other offence]

86. (1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

[Offences by companies]

Provided that nothing contained in this sub-section shall render any such person liable to any punishments, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation – For the purposes of this section, -

(a) "company" means a body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

87. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no court shall take cognizance of any offence punishable under section 82, except with the previous sanction of the licensing authority.

[Sanction for prosecutions]. 2 of 1974

CHAPTER X

MISCELLANEOUS

88. The provisions of Chapter XXXIII of the Code of Criminal Procedure, 1973, as far as may be, apply to bonds taken under this Act.

[Provision as to bonds] 2 of 1974

89. The medical officer in charge of a psychiatric hospital or psychiatric nursing home shall, as soon as may be, after any mentally ill person detained therein has been discharged make a report in respect of his mental and physical condition to the authority under whose orders such person had been so detained.

[Report by medical officer]

90. (1) Where any sum is payable in respect of pay, pension, gratuity or any allowance to any person by any Government and the person to whom the sum is payable is certified by a Magistrate under this Act to be a mentally ill person, the officer under whose authority such sum would be payable, may pay to the person having charge of the mentally ill person to much of the said sum, as he thinks fit, having regard to the cost of maintenance of such person and may pay to such members of the family of the mentally ill person as are dependent on him for maintenance, the surplus, if any, or such part thereof, as he thinks fit, having regard to the cost of maintenance of such members.

(2) Where there is any further surplus amount available out of the funds specified in sub-section (1) after making payments as provided in that sub-section, the Government shall hold the same to be dealt with as follows, namely:-

(a) where the mentally ill person is certified to have ceased to be mentally ill by the District Court within the local limits of whose jurisdiction such person resides or is kept or detained, the whole of the surplus amount shall be paid to that person;

(b) where the mentally ill person dies before payment, the whole of the surplus amount shall be paid over to those of his heirs who are legally entitled to receive the same;

(c) Where the mentally ill person comes during his mental illness without leaving nay person legally entitled to succeed to his estate. The whole of the surplus amount shall, with the prior permission of the District Court, be utilized for such charitable purpose as may be approved by the District Court.

(3) The Central Government or the State Government, as the case may be, shall be discharged of all liability in respect of any amounts paid in accordance with this section.

91. (1) Where a mentally ill person is not represented by a legal practitioner in any proceeding under this Act before a District Court or a Magistrate and it appears to the District Court or Magistrate

that such person has not sufficient means to engage a legal practitioner, the District Court or Magistrate shall assign a legal practitioner to represent him at the expense of the State.

[Legal aid to mentally ill person at State expense in certain cases]

(2) Where a mentally ill person having sufficient means to engage a legal practitioner is not represented by a legal practitioner in any proceeding under this Act before a District Court or a Magistrate and it appears to the District Court or Magistrate, having regard to all the circumstances of the case, that such person ought to be represented by a legal practitioner, the District Court or Magistrate may assign a legal practitioner to represent him and direct the State to bear the expenses with respect thereto and recover the same from out of the property of such person.

(3) The High Curt may, with the previous approval of the State Government, make rules providing for –

(a) the mode of selecting legal practitioners for the purpose of subsections (1) and (2)
(b) the facilities to be allowed to such legal practitioners,
(c) the fees payable to such legal practitioners by the Government and generally for carrying out the purpose of sub-sections (1) and (2)

Explanation - In this section "legal practitioner" shall have the meaning assigned to it in clause (i) of section 2 of the Advocates Act, 1961.

[25 of 1961]

92. (1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this act or any rules, regulations or orders made thereunder.

[Protection of action taken in good faith]

(2) No suit or other legal proceeding shall lie against the Government for any damage caused or likely to be caused for anything which is in good faith done or intended to be done in pursuance of this Act or any rules, regulations or orders made thereunder.

93. (1) Any references in this Act to a law which is not in force in any area shall, in relation to that area, be construed as a reference to the corresponding law, if any, in force in that area.

[Construction of refrence to certain laws, etc]

(2) Any reference in this Act to any officer or authority shall, in relation to any area in which there is no officer or authority with the same designation, be constructed as a reference to such officer or authority as may be specified by the General Government by notification.

94. (1) The Central Government may, by notification, make rules providing for the qualifications of

persons who may be appointed as Mental Health Authority under section 3 and the terms and conditions subject to which they may be appointed under that section and all other matters relating to such authority.

[Power of Central Government and State Government to make rules]

(2) Subject to the provisions of sub-section (1), the State Government, with the previous approval of the Central Government may, by notification, make rules for carrying out the provisions of this Act:

Provided that the first rules shall be made by the Central Government by notification.

(3) In particular, and without prejudice to the generality of the foregoing power, rules made under sub-section (2) may provide for all or any of the following maters, namely:-

(a) the qualifications of persons who may be appointed as Mental Health Authority and the terms and conditions subject to which they may be appointed under section 4 and all other maters relating to such authority.

(b) The class or category of persons for whom separate psychiatric hospitals and psychiatric nursing homes may be established and maintained under clause (d) of subsection (1) of section 5;

(c) The form in which –

(i) an application may be made for grant or, renewal of a license and the fee payable in respect thereof under section 7 or, as the case may be, section 9;
(ii) a license may be granted for the establishment or maintenance of a psychiatric hospital or a psychiatric nursing home under section 8;
(i) an application may be made for a reception order under section 20;

(d) the manner in which an order refusing in grant, or revoking a license shall be communicated under section 8 or, as the case may be section 11;

(e) the manner in which a report may be made to the licensing authority under sub-section (2) of section 9;

(f) the minimum facilities referred to in the provisio to sub-section (5) of section 9 including –

(i) psychiatrist – patient ratio;
(ii) other medical or para-medical staff
(iii) space requirement;
(iv) treatment facilities; and
(v) equipment;

(g) the manner in which and the conditions subject to which a psychiatric hospital or psychiatric nursing home shall be maintained under section 10;

(h) the form and manner in which and the period within which an appeal against any order refusing to grant or renew a license of revoking a license shall be preferred the fee payable in respect thereof under section 12;

(i) the manner in which records shall be maintained under sub-section (1) o section 13.

(j) the facilities to be provided under section 14 for the treatment of a mentally ill person as an outpatient.

(k) the manner in which application for a reception order shall be signed and verified under sub-section (5) of section 20;

(l) the qualifications of persons who may be appointed as Visitors and the terms and conditions on which they may be appointed under section 37 and their functions;

(m) prevention of vexatious or defamatory communications and other matters referred to in sub-section (3) of section 81;

(n) any other matter which is required to be, or may be, prescribed.

95. (1) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

[Rules made by Central Government or the State Government to be laid before the Legislatures]

(2) Every rule made by the State Government under this Act shall be laid, as soon as may be after it is made, before the State Legislature.

96. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force and to the extent of such inconsistency that other law shall be deemed to have no effect.

[Effect of Action other law]

97. If any difficulty arises in giving effect to the provisions of this Act in any State, the State Government may by order, do anything not inconsistent with such provisions which appears to be necessary or

expedient for the purpose of removing the difficulty.

[Power in remove difficulty]

Provided that no other shall be made under this section in relation to any State after the expiry of two years from the date on which this Act comes into force in that State.

98. (1) The Indian Lunacy Act, 1912, and the Lunacy Act, 1977, are hereby repealed.

[Repeal and saving] 4 of 1912, Jammu and Kashmir Act 25 of 1977 (1930 AD)

(2) Notwithstanding such appeal, anything done or any action taken under either of the said A shall, in so far as such thing or action is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act and shall continue in force until superseded by anything done or any action shall taken under this Act.

S. RAMAIAH
Secretary to the Government of India

Annexure 4

THE REHABILITATION COUNCIL OF INDIA ACT 1992

Arrangement of Sections

CHAPTER I - PRELIMINARY SECTION

1. Short title and Commencement
2. Definition
3. Rehabilitation Professional

CHAPTER II - REHABILITATION COUNCIL OF INDIA

1. Constitution and incorporation of Rehabilitation Council of India
2. Term of office of Chairperson and Members.
3. Disqualification.
4. Vacation of office by members
5. Executive Committee and other Committees
6. Member Secretary and Employees of Council
7. Vacancies in the Council not to invalidate date acts, etc.
8. Dissolution of Rehabilitation Council and transfer of right

CHAPTER III - FUNCTIONS OF THE COUNCIL

1. Recognition of qualifications granted by University etc., in India for Rehabilitation Professionals.
2. Recognition of qualification by Institutions outside India
3. Rights of persons possessing qualifications included in the schedule to be enrolled
4. Power to require information as to courses of study and examination
5. Inspectors at examinations
6. Visitors examination
7. Withdrawal of recognition
8. Minimum standards of education
9. Registration in Register

10. Privileges of persons who are registered on Register
11. Professional Conduct and removal of names from Register
12. Appeal against Order of removal from Register
13. Register
14. Information to be furnished by council and publication thereof
15. Cognizance of offenses
16. Protection of action taken in good faith
17. Employees of Council to be public servants
18. Power to make rules
19. Power to make regulations
20. Laying of rules and regulations before Parliament

THE SCHEDULE
THE REHABILITATION COUNCIL OF INDIA ACT 1992

No. 34 of 1992
(1st September, 1992)

An Act to provide for the constitution of Rehabilitation Council of India for regulating the training of rehabilitation professionals and the maintenance of a Central Rehabilitation Register and for Matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Forty-third Year of the Republic of India as follows:-

CHAPTER I

PARLIAMENTARY

Short title and Commencement

This Act may be called the Rehabilitation Council of India Act,1992 It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Definition

In this Act, unless the context otherwise requires,-

1. "Chairperson" means the Chairperson of the Council appointed under sub-section (3) section 3;

2. "Council" means the Rehabilitation Council of India constituted under section 3;

3. "handicapped" means a person-
   - visually handicapped;
   - hearing handicapped ;
   - suffering from locomotor disability; or
   - suffering from mental retardation;

4. "hearing handicapped" means with hearing impairment of 70 decibels and above, in better ear or total loss of hearing in both ears;

5. "locomotor disability" means a person's inability to execute distinctive activities associated with moving, both himself and objects from place to place and such inability resulting from affliction of either bones joints muscles or nerves;

6. "member" means a member appointed under sub-section (3) of section 3 and includes the Chairperson;

7. "Member-Secretary" means the Member-Secretary appointed under sub-section (1) of section 8;

8. "mental retardation" means a condition of arrested or incomplete development of mind of person which is specially characterized by sub-normality of intelligence;

9. "notification means" a notification published in the Official Gazette;

10. "prescribed" means prescribed by regulation;

11. "recognized rehabilitation qualifications" means any of the qualifications included in the Schedule;

12. "Register" means the Central Rehabilitation Register maintained under sub-section (1) of section 23;

13. "regulation" means regulation made under the Act; **"rehabilitation professional" means-**

- audiologists and speech therapists; clinical psychologists;
- hearing aid and ear mould technicians;
- rehabilitation engineers and technicians;
- special teachers for educating and training the handicapped;
- vocational counselors, employment officers and placement officers dealing with handicapped;
- multi-purpose rehabilitation therapists, technicians; or
- such other category of professionals as the Central Government may, in consultation with the Council, notify from time to time;

14. "visually handicapped" means a persons who suffers from any of the following conditions namely -
    - total absence of sight;
    - visual acquity not exceeding 6/60 or 20/200(snellen) in the better eye with the correcting lenses; or
    - limitation of the field of vision subtending and angle of degree or worse.

Any reference in this Act to any enactment or any provision thereof shall, in relation to an area in which such enactment or such provision is not in force, be construed as a reference to the corresponding law or the relevant provision of the corresponding law is any in force is that area.

CHAPTER II

THE REHABILITATION COUNCIL OF INDIA

Constitution and Incorporation of Rehabilitation Council of India

With effect from such date as the Central Government may, by notification, appoint in this behalf, there shall be constituted for the purposes of this Act a Council to be called the Rehabilitation Council of India.

The Council shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property both movable and immovable and to contact and shall by the said name sue and be sued.

The Council shall consist of the following members, namely:-

1. a Chairperson, from amongst the persons having experience in social work or rehabilitation, to be appointed by the Central Govt.;
2. three members to be appointed by the Central Government to represent respectively the Ministers of the Central Government dealing with -
   - Welfare
   - Health and
   - Finance
3. one member to be appointed by the Central Government to represent the University Grants Commission;
4. one member to be appointed by the Central Government to represent the Directors General of Indian Council of Medical Research;
5. two members to be appointed by the Central Government to represent the Ministry or department of the States or the Union territories dealing with Social Welfare by rotation in alphabetical order.
6. such number of members not exceeding six as many be appointed by the Central Government from amongst the rehabilitation professionals representatives working in voluntary organization;
7. such number of members not exceeding six as many be appointed by the Central Government from amongst the medical practitioners enrolled under the Indian Medical Council Act 1956 and engaged in rehabilitation of the handicapped;
8. Three members of Parliament of whom two shall be elected by the house of the People and one by the Council of States;

   - such number of members not exceeding three as may be nominated by the Central Government from amongst the social workers who are actively engaged in assisting the disabled;
   - The Members-Secretary ex-officio

9. The office of member of the board all not disqualify its holder for being chosen as, or for being a Member of either House of Parliament

Term of Office of Chairperson and Members

The Chairperson or a member shall hold a office for a term of two years from the date of his appointment or until his successor shall have been duly appointed whichever is longer

A casual vacancy in the Council shall be filled in accordance with the provisions of sections 3 and the person so appointed shall hold office only for the remainder of the term for which the member in whose place he was appointed would have held that office

The Council shall meet at least once in each year at such time and place as may be appointed by the Council and shall observe such rules of procedure in the transaction of business at a meeting as may be presented

The Chairperson or, if for any reason, he is unable to attend the meeting of the council, any member elected by the members present from amongst themselves at the meeting shall preside at the meeting

Disqualification

All questions which come up before any meeting of the Council shall be decided by a majority of votes of the members present and voting and in the event of an equality of votes, the Chairperson, or in his absence, the person presiding shall have a second or casting vote

No. Person shall be a member if he-

- is, or become of unsound mind or is so declared by a competent court; or
- is, or has been, convicted of any offence which, in the opinion of the Central Government, involves moral turpitude; or
- is, or at any time has been adjudicated as insolvent

Vacation of Office by Members

If a member-

1. becomes subject to any of the disqualification mentioned in by members section 5; or
2. is absent without excuse, sufficient in the opinion of the council from three consecutive meeting of the Council; or
3. ceases to be enrolled on the Indian Medical Register in the case of a member referred to in clause (g) of sub-section (3) of section 3;

Executive Committee and other Committees

The Council shall constitute from amongst its members an Executive Committee and such other committee for general or special purposes as the Council deems necessary to carry out the purposes of this Act.

The Executive Committee shall consist of the Chairperson who shall be member who shall be nominated by the Council from amongst its members.

The Chairperson shall be the Chairperson of the Executive Committee

In addition to the powers and duties conferred and imposed upon it by this Act, the Executive Committee or any other Committee shall exercise and discharge such powers and duties as the Council may confer or impose upon it by any regulations which may be made in this behalf

Member Secretary and Employees of Council

The Central Government shall appoint the Member-Secretary of the Member Council to exercise such powers and perform such duties under the direction of the Council as may be prescribed or as may be delegated to him by the Chairperson

The Council shall, with the previous sanction of the Central Government employ such officers and other employees as it deems necessary to carry out the purpose of this Act

The Council shall, with the previous sanction of the Central Government fix the allowances to be paid to the Chairperson and other members and determine the conditions of services of the Member-Secretary, officers and other employees of the Council.

Vacancies in the Council not to Invalidate Date Acts, etc.

No act or proceeding of the Council or any committee thereof shall Vacancies in the be called in question on the ground merely of the existence of any council or a committee thereof as the case may be.

Dissolution of Rehabilitation Council and transfer of right

On and from the date of the constitution of the Council, the Rehabilitation Council shall stand dissolved and on such dissolution:-

1. all properties and assets, movable and immovable, of or belonging Council and to, the Rehabilitation Council shall vest in the Council.

2. all the rights and liabilities of the Rehabilitation Council shall be transferred to, and be the rights and liabilities of, the Council;

3. without prejudice to the provision of clause (b) all liabilities incurred all contracts entered into and all matters and things engaged to be done by, with or for the Rehabilitation Council immediately before the date, for or in connection with the purposes of the said rehabilitation Council shall be deemed to have been incurred, entered into, or engaged to be done by, with or for, the Council;

4. all sums of money due to the Rehabilitation Council immediately before that date shall be deemed to be due to the Council;

5. all suits and other legal proceedings instituted or which could have been instiuted by or against the Rehabilitation Council immediately before that date may be continued or may be instituted by or against the Council; and

6. every employee holding any office under the rehabilitation Council immediately before that date

shall hold his office in the Council by the same tenure and upon the same terms and conditions of service as respects remuneration, leave provident fund retirement and other terminal benefits as he would have held such office as if the Council had not been constituted and shall continue to do so as an employee of the Council or until the expiry of a period of six months from the date of such employee opts not to be the employee of the Council within such period.

Notwithstanding anything contained in the Industrial Disputes Act, 1947 or any other law for the time being in force, absorption of any employee by the Council in its regular service under this section shall not entitle such employee to any compensation under that Act or other law and no such claim shall be entertained by any court, tribunal or other authority.

Explanation:-In this section "Rehabilitation Council" means the Rehabilitation Council a society and registered under the Societies Act, 1860 and functioning as such immediately before the constitution of the Council.

CHAPTER III

FUNCTIONS OF THE COUNCIL

Recognition of Qualifications Granted by University etc., in India for Rehabilitation Professionals

The qualification granted by any University or other institution in India which are included in the Schedule shall be recognized qualifications for rehabilitation professional

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

Recognition of Qualification by Institutions outside India

12 The Council may enter into negotiation with the authority in any country outside India for settling of a scheme or reciprocity for the recognition of qualifications, and the pursuance of any such Scheme, the Central Government may, by notification amend the schedule so as to include therein any qualification which the Council has decided should be recognized and by such notification may also direct that an entry shall be made in the last column of the schedule declaring that it shall be the recognized qualification only when granted after a specified date.

Rights of Persons Possessing Qualifications Included in the Schedule to be Enrolled

Subject to the other provisions contained in this Act, any qualification included in the Schedule shall be sufficient qualifications for enrolment on the Register.

No person, other than the rehabilitation professional who process a recognized rehabilitation qualification and is enrolled in the Register-

1. shall hold office as rehabilitation professional or any such office(by whatever designation called) in Government or in any institution maintained by a local or other authority;
2. shall practice as rehabilitation professional anywhere in India;
3. shall be entitled to sign or authenticate any certificate required by any law to be signed or authenticated by a rehabilitation professional
4. shall be entitled to give any evidence in any court as an expert under section 45 of the Indian Evidence Act, 1872 in any matter relating to the handicapped:

Provided that if a person possesses the recognized rehabilitation professional qualification on the date of commencement of this Act, he shall be deemed to be an enrolled rehabilitation professional for a period of six months from such commencement, and if he has made an application for enrolment on the Register within said period for six months, till such application is disposed of.

Any person who acts in contravention of any provision of subsection (2) shall be punished with imprisonment for a term which may extend to one year or with fine which may extend to one thousand

rupees or with both

Power to Require Information as to Courses of Study and Examination

Every university or institution in India which grants a recognized qualification shall furnish such information as the Council may from time to time, require as to the courses of study and examinations to be undergone in order to obtain such qualification, as to the ages at which such courses of study and examinations are required to be undergone and such qualification is conferred and generally as to the requisites for obtaining such qualification

Inspectors at Examinations

The Council shall appoint such member of Inspector as it may deem requisite to inspect any University or Institution where education for practicing as rehabilitation professional is given or to attend any examination held by any University or Institution for the purpose of recommending to the Central Government recognition of qualifications granted by that University or Institution as recognized rehabilitation qualifications.

The Inspectors appointed under sub-section (1) shall not interfere with the conduct of any training or examination but shall report to the Council on the adequacy of the standards of education including staff, equipment, accommodation, training and other facilities prescribed for giving such education or of the sufficiency of every examination which they attend.

The Council shall forward a copy of the report of the Inspector under sub-section (2) to the University or Institution concerned and shall also forward a copy, with the remarks of the University or the Institution thereon, to the Central Government.

Visitors Examination

The Council may appoint such number Visitors as it may deem requisite to inspect any University or institution wherein education for rehabilitation professional is given or attend any examination for the purpose of granting recognized rehabilitation qualifications.

Any persons whether he is a member of the Council or not,may be appointed as a visitor under sub-section (1) but a person who is appointed as an Inspector under sub-section (1) of section 15 for any inspection or examination shall not be appointed as a Visitor for the same inspection or examination.

The Visitor shall not interfere with the conduct of any training or examination but shall report to the Chairperson on the adequacy of the standards of education including staff, equipment, accommodation, training and other facilities prescribed for giving education to the rehabilitation professionals or on sufficiency of every examination which they attend. The report of a Visitor shall be treated as confidential unless in any particular case the Chairperson otherwise, directs; Provided that if the Central Government requires a copy of the report of a Visitor the Council shall furnish the Same

Withdrawal of Recognition

When upon report by the Inspector or the Visitor it appears to the Council:-

1. that the courses of study and examination to be undergone in or the proficiency required from candidates at any examination held by any University or institution, or
2. that the staff, equipment, accommodation training and other facilities for instruction and training provided in such University or institution do not conform to the standard prescribed by the Council, the Council shall make representation to that effect to the Central Government

After considering such representation the Central Government may send it to the University or institution with an intimation of the period within which the University or institution may submit its explanation to that Government

On the receipt of the explanation or where no explanation is submitted within the period fixed then, on the expiry of that period, the Central Government after making such further inquiry if any, as it may think fit, may, by notification, direct that an entry shall be made in the schedule against the said recognized rehabilitation qualification declaring that it shall be the recognized rehabilitation qualification only when granted before a specified date or that the said recognized rehabilitation qualification if granted to students of a specified University or institution shall be recognized rehabilitation qualification only when granted before a specified date, or as the case may be that the said recognized rehabilitation qualification shall be recognized rehabilitation qualification in relation to a specified University or institution only when granted after a specified date.

Minimum Standards of Education

The Council may prescribed the minimum standards of education required for granting recognized rehabilitation qualification by Universities or institutions in India.

Registration in Register

The Member-Secretary of the Council may, on report of an application made by any person in the prescribed manner enter his name in the in Register provided that the Member-Secretary is satisfied that such person possess recognized rehabilitation qualification.

Privileges of Persons Who are Registered on Register

Subject to the condition and restriction laid down in this Act regarding engagement in the area of rehabilitation of the handicapped by person possessing the recognized rehabilitation qualifications, every person whose name is for the time being borne on the Register shall be entitled to practice as a rehabilitation professional in any part of India and to recover in due course of law in respect of such practice any expenses, charges is respect of medicaments or other appliances or any fees to which he may be entitled

Professional Conduct and Removal of Names from Register

The Council may prescribe standards of professional conduct and etiquette and a code of ethics for rehabilitation professionals.

Regulations made by the Council under sub-section (1) may specify which violation thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any other law for the time being in force.

The Council may order that the name of any person shall be removed from the Register where it is satisfied, after giving that person a reasonable opportunity of being heard and after such further inquiry, if any as it may deem fit to make -

1. that his name has been entered in the Register by error or on account of misrepresentation or suppression of a material fact;
2. that he has convicted of any offence or has been guilty of any infamous conduct in any professional respect, or has violated the standard of professional conduct and etiquette or the code of ethics prescribed under sub-section (1) which, in the opinion of the Council, renders him unfit to be kept in the Register

An order under sub-section (3) may direct that any person whose name is ordered to be removed from the Register shall be ineligible for registration under this Act either permanently or for such period of years as may be specified.

Appeal Against Order of Removal from Register

Where the name of any person has been removed from the Register on any ground other than that he is not possessed of the requisite rehabilitation qualifications, he may appeal, in the prescribed manner and subject to such conditions, including conditions as to payment of a fee, as may be prescribed to the Central Government whose decision thereon shall be final.

No appeal under sub-section (1) shall be admitted if it is preferred after the expiry of a period of thirty days from the date of the order under sub-section (3) of section 21:
Provided that an appeal may be admitted after the expiry of the said period of thirty days if the appellant satisfies the Central Government that he had sufficient cause for not preferring the appeal within the said period

Register

It shall be the duty of the Member-Secretary to keep and maintain the Register in accordance with the provision of this Act and any order made by the Council and from time to time to revise the Register and publish it in the Official Gazette.

The Register shall be deemed to be a public document within the meaning of the Indian Evidence Act 1872 and may be proved by a copy thereof.

Information to be Furnished by Council and Publication thereof

The Council shall furnish such reports copies of its minutes abstracts of its accounts and other information to the Central Government as that Government may require
The Central Government may publish in such manner as it may think fit, any report, copy abstract or other information furnished to it by the Council under this section or under section 16.

Cognizance of Offenses

Notwithstanding anything contained in the code of Criminal procedure 1973, no court shall take cognizance of an offence punishable under this Act expect upon a complaint, in writing, made by any person authorised in this behalf by the Council

Protection of Action Taken in Good Faith

No suit, prosecution or other legal proceeding shall lie against the Central Government, Council Chairperson, members, Member-Secretary or any officer or other employee of the Council for anything which is in good faith done or intended to be done under this Act.

Employees of Council to be Public Servants

The Chairperson members, Member-Secretary, officers and other employees of the Council shall, while acting or purporting to act in pursuance of the provisions of this Act or of any rule and regulation made thereunder be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Power to make Rules

The Central Government may, by notification, make rules to carry out the purposes of this Act.

Power to make Regulations

The Council may, with the previous sanction of the Central Government, make, by notification, regulation generally to carry out the purpose of this Act, and without prejudice to the generality of the foregoing power, such regulations may provide for-

1. the management of the property of the council;
2. the maintenance and audit of the account of the council;
3. the resignation of members of the council;
4. the powers and duties of the Chairperson;
5. the rules of procedure in the transaction business under sub-section (3) of section 4;
6. the function of the Executive Committee and other committee constituted under section 7;
7. the powers and duties of the Member-Secretary under sub-section (1) of the section 8;
8. the qualification, appointment powers and duties of, and procedure to be followed by Inspectors and Visitors;
9. the courses and period of study or of training to be undertaken the subject of examination and standards of proficiency therein to be obtained in any university or any institution for grant of

recognized rehabilitation qualification:

10. the standards of staff, equipment, accommodation, training and other facilities for study or training of the rehabilitation professionals;
11. the conduct of examination, qualification of examiners, and the condition of the admission to such examinations;
12. the standards of professional conduct and etiquette and code of ethics to be observed by rehabilitation professional under sub-section (1) of section 21;
13. the particulars to be stated, and proof of qualification to be given, in application for registration under this Act;
14. the manner in which and the condition subject to which an appeal may be preferred under sub-section (1) of section 22;
15. the fees to be paid on application and appeals under this Act;
16. any other matter which is to be, or may be, prescribed.

Laying of Rules and Regulations before Parliament

Every rule and every regulation made under this Act shall be laid as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if, before the expiry of the session immediately following the session or the successive session aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified from or be of no effect, as the case may be; so, however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

Annexure 5

STANDARD RULES ON THE EQUALIZATION OF OPPORTUNITIES FOR PERSONS WITH DISABILITIES

A/RES/48/9685th Plenary Meeting 20 December 1993

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IV. Monitoring Mechanism

The General Assembly,

Recalling Economic and Social Council resolution 1990/26 of 24 May 1990, in which the Council authorized the Commission for Social Development to consider, at its thirty-second session, the establishment of an ad hoc open-ended working group of government experts, funded by voluntary contributions, to elaborate standard rules on the equalization of opportunities for disabled children, youth and adults, in close collaboration with the specialized agencies, other intergovernmental bodies and non-governmental organizations, especially organizations of disabled persons, and requested the Commission, should it establish such a working group, to finalize the text of those rules for consideration by the Council in 1993 and for submission to the General Assembly at its forty-eighth session,

Also recalling that in its resolution 32/2 of 20 February 1991 the Commission for Social Development decided to establish an ad hoc open-ended working group of government experts in accordance with Economic and Social Council resolution 1990/26,

Noting with appreciation the participation of many States, specialized agencies, intergovernmental bodies and non-governmental organizations, especially organizations of disabled persons, in the deliberations of the working group,

Also noting with appreciation the generous financial contributions of Member States to the working group,

Welcoming the fact that the working group was able to fulfil its mandate within three sessions of five working days each,

Acknowledging with appreciation the report of the ad hoc open-ended working group to elaborate standard rules on the equalization of opportunities for persons with disabilities,

Taking note of the discussion in the Commission for Social Development at its thirty-third session on the draft standard rules contained in the report of the working group,

1. Adopts the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, set forth in the annex to the present resolution;

2. Requests Member States to apply the Rules in developing national disability programmes;

3. Urges Member States to meet the requests of the Special Rapporteur for information on the implementation of the Rules;

4. Requests the Secretary-General to promote the implementation of the Rules and to report thereon to the General Assembly at its fiftieth session;

5. Urges Member States to support, financially and otherwise, the implementation of the Rules.

INTRODUCTION

Background and current needs

1. There are persons with disabilities in all parts of the world and at all levels in every society. The number of persons with disabilities in the world is large and is growing.

2. Both the causes and the consequences of disability vary throughout the world. Those variations are the result of different socio-economic circumstances and of the different provisions that States make for the well-being of their citizens.

3. Present disability policy is the result of developments over the past 200 years. In many ways it reflects the general living conditions and social and economic policies of different times. In the disability field, however, there are also many specific circumstances that have influenced the living conditions of persons with disabilities. Ignorance, neglect, superstition and fear are social factors that throughout the history of disability have isolated persons with disabilities and delayed their development.

4. Over the years disability policy developed from elementary care at institutions to education for children with disabilities and rehabilitation for persons who became disabled during adult life. Through education and rehabilitation, persons with disabilities became more active and a driving force in the further development of disability policy. Organizations of persons with disabilities, their families and advocates were formed, which advocated better conditions for persons with disabilities. After the Second World War the concepts of integration and normalization were introduced, which reflected a growing awareness of the capabilities of persons with disabilities.

5. Towards the end of the 1960s organizations of persons with disabilities in some countries started to formulate a new concept of disability. That new concept indicated the close connection between the limitation experienced by individuals with disabilities, the design and structure of their environments and the attitude of the general population. At the same time the problems of disability in developing countries were more and more highlighted. In some of those countries the percentage of the population with disabilities was estimated to be very high and, for the most part, persons with disabilities were extremely poor.

Previous international action

6. The rights of persons with disabilities have been the subject of much attention in the United Nations and other international organizations over a long period of time. The most important outcome of the International Year of Disabled Persons, 1981, was the World Programme of Action concerning Disabled Persons, adopted by the General Assembly by its resolution 37/52 of 3 December 1982. The Year and the World Programme of Action provided a strong impetus for progress in the field. They both emphasized the right of persons with disabilities to the same opportunities as other citizens and to an equal share in the improvements in living conditions resulting from economic and social development. There also, for the first time, handicap was defined as a function of the relationship between persons with disabilities and their environment.

7. The Global Meeting of Experts to Review the Implementation of the World Programme of Action concerning Disabled Persons at the Mid-Point of the United Nations Decade of Disabled Persons was held at Stockholm in 1987. It was suggested at the Meeting that a guiding philosophy should be developed to indicate the priorities for action in the years ahead. The basis of that philosophy should be the recognition of the rights of persons with disabilities.

8. Consequently, the Meeting recommended that the General Assembly convene a special conference to draft an international convention on the elimination of all forms of discrimination against persons with disabilities, to be ratified by States by the end of the Decade.

9. A draft outline of the convention was prepared by Italy and presented to the General Assembly at its forty-second session. Further presentations concerning a draft convention were made by Sweden at the forty-fourth session of the Assembly. However, on both occasions, no consensus could be reached on the suitability of such a convention. In the opinion of many representatives, existing human rights documents seemed to guarantee persons with disabilities the same rights as other persons.

Towards standard rules

10. Guided by the deliberations in the General Assembly, the Economic and Social Council, at its first regular session of 1990, finally agreed to concentrate on the elaboration of an international instrument of a different kind. By its resolution 1990/26 of 24 May 1990, the Council authorized the Commission for Social Development to consider, at its thirty-second session, the establishment of an ad hoc open-ended working group of government experts, funded by voluntary contributions, to elaborate standard rules on the equalization of opportunities for disabled children, youth and adults, in close collaboration with the specialized agencies, other intergovernmental bodies and non-governmental organizations, especially organizations of disabled persons. The Council also requested the Commission to finalize the text of those rules for consideration in 1993 and for submission to the General Assembly at its forty-eighth session.

11. The subsequent discussions in the Third Committee of the General Assembly at the forty-fifth session showed that there was wide support for the new initiative to elaborate standard rules on the equalization of opportunities for persons with disabilities.

12. At the thirty-second session of the Commission for Social Development, the initiative for standard rules received the support of a large number of representatives and discussions led to the adoption of resolution 32/2 of 20 February 1991, in which the Commission decided to establish an ad hoc open-ended working group in accordance with Economic and Social Council resolution 1990/26.

Purpose and content of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities

13. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities have been developed on the basis of the experience gained during the United Nations Decade of Disabled Persons (1983-1992). The International Bill of Human Rights, comprising the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, as well as the World Programme

of Action concerning Disabled Persons, constitute the political and moral foundation for the Rules.

14. Although the Rules are not compulsory, they can become international customary rules when they are applied by a great number of States with the intention of respecting a rule in international law. They imply a strong moral and political commitment on behalf of States to take action for the equalization of opportunities for persons with disabilities. Important principles for responsibility, action and cooperation are indicated. Areas of decisive importance for the quality of life and for the achievement of full participation and equality are pointed out. The Rules offer an instrument for policy-making and action to persons with disabilities and their organizations. They provide a basis for technical and economic cooperation among States, the United Nations and other international organizations.

15. The purpose of the Rules is to ensure that girls, boys, women and men with disabilities, as members of their societies, may exercise the same rights and obligations as others. In all societies of the world there are still obstacles preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies. It is the responsibility of States to take appropriate action to remove such obstacles. Persons with disabilities and their organizations should play an active role as partners in this process. The equalization of opportunities for persons with disabilities is an essential contribution in the general and worldwide effort to mobilize human resources. Special attention may need to be directed towards groups such as women, children, the elderly, the poor, migrant workers, persons with dual or multiple disabilities, indigenous people and ethnic minorities. In addition, there are a large number of refugees with disabilities who have special needs requiring attention.

Fundamental concepts in disability policy

16. The concepts set out below appear throughout the Rules. They are essentially built on the concepts in the World Programme of Action concerning Disabled Persons. In some cases they reflect the development that has taken place during the United Nations Decade of Disabled Persons.

Disability and handicap

17. The term "disability" summarizes a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.

18. The term "handicap" means the loss or limitation of opportunities to take part in the life of the community on an equal level with others. It describes the encounter between the person with a disability and the environment. The purpose of this term is to emphasize the focus on the shortcomings in the environment and in many organized activities in society, for example, information, communication and education, which prevent persons with disabilities from participating on equal terms.

19. The use of the two terms "disability" and "handicap", as defined in paragraphs 17 and 18 above, should be seen in the light of modern disability history. During the 1970s there was a strong reaction among representatives of organizations of persons with disabilities and professionals in the field of disability against the terminology of the time. The terms "disability" and "handicap" were often used

in an unclear and confusing way, which gave poor guidance for policy-making and for political action. The terminology reflected a medical and diagnostic approach, which ignored the imperfections and deficiencies of the surrounding society.

20. In 1980, the World Health Organization adopted an international classification of impairments, disabilities and handicaps, which suggested a more precise and at the same time relativistic approach. The International Classification of Impairments, Disabilities, and Handicaps makes a clear distinction between "impairment", "disability" and "handicap". It has been extensively used in areas such as rehabilitation, education, statistics, policy, legislation, demography, sociology, economics and anthropology. Some users have expressed concern that the Classification, in its definition of the term "handicap", may still be considered too medical and too centred on the individual, and may not adequately clarify the interaction between societal conditions or expectations and the abilities of the individual. Those concerns, and others expressed by users during the 12 years since its publication, will be addressed in forthcoming revisions of the Classification.

21. As a result of experience gained in the implementation of the World Programme of Action and of the general discussion that took place during the United Nations Decade of Disabled Persons, there was a deepening of knowledge and extension of understanding concerning disability issues and the terminology used. Current terminology recognizes the necessity of addressing both the individual needs (such as rehabilitation and technical aids) and the shortcomings of the society (various obstacles for participation).

Prevention

22. The term "prevention" means action aimed at preventing the occurrence of physical, intellectual, psychiatric or sensory impairments (primary prevention) or at preventing impairments from causing a permanent functional limitation or disability (secondary prevention). Prevention may include many different types of action, such as primary health care, prenatal and postnatal care, education in nutrition, immunization campaigns against communicable diseases, measures to control endemic diseases, safety regulations, programmes for the prevention of accidents in different environments, including adaptation of workplaces to prevent occupational disabilities and diseases, and prevention of disability resulting from pollution of the environment or armed conflict.

Rehabilitation

23. The term "rehabilitation" refers to a process aimed at enabling persons with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric and/or social functional levels, thus providing them with the tools to change their lives towards a higher level of independence. Rehabilitation may include measures to provide and/or restore functions, or compensate for the loss or absence of a function or for a functional limitation. The rehabilitation process does not involve initial medical care. It includes a wide range of measures and activities from more basic and general rehabilitation to goal-oriented activities, for instance vocational rehabilitation.

Equalization of opportunities

24. The term "equalization of opportunities" means the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities.

25. The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.

26. Persons with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of education, health, employment and social services.

27. As persons with disabilities achieve equal rights, they should also have equal obligations. As those rights are being achieved, societies should raise their expectations of persons with disabilities. As part of the process of equal opportunities, provision should be made to assist persons with disabilities to assume their full responsibility as members of society.

PREAMBLE

States,

Mindful of the pledge made, under the Charter of the United Nations, to take joint and separate action in cooperation with the Organization to promote higher standards of living, full employment, and conditions of economic and social progress and development,

Reaffirming the commitment to human rights and fundamental freedoms, social justice and the dignity and worth of the human person proclaimed in the Charter,

Recalling in particular the international standards on human rights, which have been laid down in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,

Underlining that those instruments proclaim that the rights recognized therein should be ensured equally to all individuals without discrimination,

Recalling the Convention on the Rights of the Child, which prohibits discrimination on the basis of disability and requires special measures to ensure the rights of children with disabilities, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which provides for some protective measures against disability,

Recalling also the provisions in the Convention on the Elimination of All Forms of Discrimination against Women to ensure the rights of girls and women with disabilities,

Having regard to the Declaration on the Rights of Disabled Persons, the Declaration on the Rights of Mentally Retarded Persons, the Declaration on Social Progress and Development, the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care and other relevant instruments adopted by the General Assembly,

Also having regard to the relevant conventions and recommendations adopted by the International Labour Organisation, with particular reference to participation in employment without discrimination for persons with disabilities,

Mindful of the relevant recommendations and work of the United Nations Educational, Scientific and Cultural Organization, in particular the World Declaration on Education for All, the World Health Organization, the United Nations Children's Fund and other concerned organizations,

Having regard to the commitment made by States concerning the protection of the environment,

Mindful of the devastation caused by armed conflict and deploring the use of scarce resources in the production of weapons,

Recognizing that the World Programme of Action concerning Disabled Persons and the definition therein

of equalization of opportunities represent earnest ambitions on the part of the international community to render those various international instruments and recommendations of practical and concrete significance,

Acknowledging that the objective of the United Nations Decade of Disabled Persons (1983-1992) to implement the World Programme of Action is still valid and requires urgent and continued action,

Recalling that the World Programme of Action is based on concepts that are equally valid in developing and industrialized countries,

Convinced that intensified efforts are needed to achieve the full and equal enjoyment of human rights and participation in society by persons with disabilities,

Re-emphasizing that persons with disabilities, and their parents, guardians, advocates and organizations, must be active partners with States in the planning and implementation of all measures affecting their civil, political, economic, social and cultural rights,

In pursuance of Economic and Social Council resolution 1990/26, and basing themselves on the specific measures required for the attainment by persons with disabilities of equality with others, enumerated in detail in the World Programme of Action,

Have adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities outlined below, in order:

(a) To stress that all action in the field of disability presupposes adequate knowledge and experience of the conditions and special needs of persons with disabilities;

(b To emphasize that the process through which every aspect of societal organization is made accessible to all is a basic objective of socio-economic development;

(c) To outline crucial aspects of social policies in the field of disability, including, as appropriate, the active encouragement of technical and economic cooperation;

(d To provide models for the political decision-making process required for the attainment of equal opportunities, bearing in mind the widely differing technical and economic levels, the fact that the process must reflect keen understanding of the cultural context within which it takes place and the crucial role of persons with disabilities in it;

(e To propose national mechanisms for close collaboration among States, the organs of the United Nations system, other intergovernmental bodies and organizations of persons with disabilities;

(f) To propose an effective machinery for monitoring the process by which States seek to attain the equalization of opportunities for persons with disabilities.

I. PRECONDITIONS FOR EQUAL PARTICIPATION

Rule 1. Awareness-raising

States should take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution.

1. States should ensure that responsible authorities distribute up-to-date information on available programmes and services to persons with disabilities, their families, professionals in the field and the general public. Information to persons with disabilities should be presented in accessible form.

2. States should initiate and support information campaigns concerning persons with disabilities and disability policies, conveying the message that persons with disabilities are citizens with the same rights and obligations as others, thus justifying measures to remove all obstacles to full participation.

3. States should encourage the portrayal of persons with disabilities by the mass media in a positive way; organizations of persons with disabilities should be consulted on this matter.

4. States should ensure that public education programmes reflect in all their aspects the principle of full participation and equality.

5. States should invite persons with disabilities and their families and organizations to participate in public education programmes concerning disability matters.

6. States should encourage enterprises in the private sector to include disability issues in all aspects of their activity.

7. States should initiate and promote programmes aimed at raising the level of awareness of persons with disabilities concerning their rights and potential. Increased self-reliance and empowerment will assist persons with disabilities to take advantage of the opportunities available to them.

8. Awareness-raising should be an important part of the education of children with disabilities and in rehabilitation programmes. Persons with disabilities could also assist one another in awareness-raising through the activities of their own organizations.

9. Awareness-raising should be part of the education of all children and should be a component of teacher-training courses and training of all professionals.

Rule 2. Medical care

States should ensure the provision of effective medical care to persons with disabilities.

1. States should work towards the provision of programmes run by multidisciplinary teams of professionals for early detection, assessment and treatment of impairment. This could prevent, reduce or eliminate

disabling effects. Such programmes should ensure the full participation of persons with disabilities and their families at the individual level, and of organizations of persons with disabilities at the planning and evaluation level.

2. Local community workers should be trained to participate in areas such as early detection of impairments, the provision of primary assistance and referral to appropriate services.

3. States should ensure that persons with disabilities, particularly infants and children, are provided with the same level of medical care within the same system as other members of society.

4. States should ensure that all medical and paramedical personnel are adequately trained and equipped to give medical care to persons with disabilities and that they have access to relevant treatment methods and technology.

5. States should ensure that medical, paramedical and related personnel are adequately trained so that they do not give inappropriate advice to parents, thus restricting options for their children. This training should be an ongoing process and should be based on the latest information available.

6. States should ensure that persons with disabilities are provided with any regular treatment and medicines they may need to preserve or improve their level of functioning.

Rule 3. Rehabilitation

States should ensure the provision of rehabilitation services to persons with disabilities in order for them to reach and sustain their optimum level of independence and functioning.

1. States should develop national rehabilitation programmes for all groups of persons with disabilities. Such programmes should be based on the actual individual needs of persons with disabilities and on the principles of full participation and equality.

2. Such programmes should include a wide range of activities, such as basic skills training to improve or compensate for an affected function, counselling of persons with disabilities and their families, developing self-reliance, and occasional services such as assessment and guidance.

3. All persons with disabilities, including persons with severe and/or multiple disabilities, who require rehabilitation should have access to it.

4. Persons with disabilities and their families should be able to participate in the design and organization of rehabilitation services concerning themselves.

5. All rehabilitation services should be available in the local community where the person with disabilities lives. However, in some instances, in order to attain a certain training objective, special time-limited rehabilitation courses may be organized, where appropriate, in residential form.

6. Persons with disabilities and their families should be encouraged to involve themselves in rehabilitation, for instance as trained teachers, instructors or counsellors.

7. States should draw upon the expertise of organizations of persons with disabilities when formulating or evaluating rehabilitation programmes.

Rule 4. Support services

States should ensure the development and supply of support services, including assistive devices for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights.

1. States should ensure the provision of assistive devices and equipment, personal assistance and interpreter services, according to the needs of persons with disabilities, as important measures to achieve the equalization of opportunities.

2. States should support the development, production, distribution and servicing of assistive devices and equipment and the dissemination of knowledge about them.

3. To achieve this, generally available technical know-how should be utilized. In States where high-technology industry is available, it should be fully utilized to improve the standard and effectiveness of assistive devices and equipment. It is important to stimulate the development and production of simple and inexpensive devices, using local material and local production facilities when possible. Persons with disabilities themselves could be involved in the production of those devices.

4. States should recognize that all persons with disabilities who need assistive devices should have access to them as appropriate, including financial accessibility. This may mean that assistive devices and equipment should be provided free of charge or at such a low price that persons with disabilities or their families can afford to buy them.

5. In rehabilitation programmes for the provision of assistive devices and equipment, States should consider the special requirements of girls and boys with disabilities concerning the design, durability and age-appropriateness of assistive devices and equipment.

6. States should support the development and provision of personal assistance programmes and interpretation services, especially for persons with severe and/or multiple disabilities. Such programmes would increase the level of participation of persons with disabilities in everyday life at home, at work, in school and during leisure-time activities.

7. Personal assistance programmes should be designed in such a way that the persons with disabilities using the programmes have a decisive influence on the way in which the programmes are delivered.

II. TARGET AREAS FOR EQUAL PARTICIPATION

Rule 5. Accessibility

States should recognize the overall importance of accessibility in the process of the equalization of opportunities in all spheres of society. For persons with disabilities of any kind, States should (a) introduce programmes of action to make the physical environment accessible; and (b) undertake measures to provide access to information and communication.

(a) Access to the physical environment

1. States should initiate measures to remove the obstacles to participation in the physical environment. Such measures should be to develop standards and guidelines and to consider enacting legislation to ensure accessibility to various areas in society, such as housing, buildings, public transport services and other means of transportation, streets and other outdoor environments.

2. States should ensure that architects, construction engineers and others who are professionally involved in the design and construction of the physical environment have access to adequate information on disability policy and measures to achieve accessibility.

3. Accessibility requirements should be included in the design and construction of the physical environment from the beginning of the designing process.

4. Organizations of persons with disabilities should be consulted when standards and norms for accessibility are being developed. They should also be involved locally from the initial planning stage when public construction projects are being designed, thus ensuring maximum accessibility.

(b) Access to information and communication

5. Persons with disabilities and, where appropriate, their families and advocates should have access to full information on diagnosis, rights and available services and programmes, at all stages. Such information should be presented in forms accessible to persons with disabilities.

6. States should develop strategies to make information services and documentation accessible for different groups of persons with disabilities. Braille, tape services, large print and other appropriate technologies should be used to provide access to written information and documentation for persons with visual impairments. Similarly, appropriate technologies should be used to provide access to spoken information for persons with auditory impairments or comprehension difficulties.

7. Consideration should be given to the use of sign language in the education of deaf children, in their families and communities. Sign language interpretation services should also be provided to facilitate the

communication between deaf persons and others.

8. Consideration should also be given to the needs of people with other communication disabilities.

9. States should encourage the media, especially television, radio and newspapers, to make their services accessible.

10. States should ensure that new computerized information and service systems offered to the general public are either made initially accessible or are adapted to be made accessible to persons with disabilities.

11. Organizations of persons with disabilities should be consulted when measures to make information services accessible are being developed.

Rule 6. Education

States should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings. They should ensure that the education of persons with disabilities is an integral part of the educational system.

1. General educational authorities are responsible for the education of persons with disabilities in integrated settings. Education for persons with disabilities should form an integral part of national educational planning, curriculum development and school organization.

2. Education in mainstream schools presupposes the provision of interpreter and other appropriate support services. Adequate accessibility and support services, designed to meet the needs of persons with different disabilities, should be provided.

3. Parent groups and organizations of persons with disabilities should be involved in the education process at all levels.

4. In States where education is compulsory it should be provided to girls and boys with all kinds and all levels of disabilities, including the most severe.

5. Special attention should be given in the following areas:

(a) Very young children with disabilities;

(b) Pre-school children with disabilities;

(c) Adults with disabilities, particularly women.

6. To accommodate educational provisions for persons with disabilities in the mainstream, States should:

(a) Have a clearly stated policy, understood and accepted at the school level and by the wider community;

(b) Allow for curriculum flexibility, addition and adaptation;

(c) Provide for quality materials, ongoing teacher training and support teachers.

7. Integrated education and community-based programmes should be seen as complementary approaches in providing cost-effective education and training for persons with disabilities. National community-based programmes should encourage communities to use and develop their resources to provide local education to persons with disabilities.

8. In situations where the general school system does not yet adequately meet the needs of all persons with disabilities, special education may be considered. It should be aimed at preparing students for education in the general school system. The quality of such education should reflect the same standards and ambitions as general education and should be closely linked to it. At a minimum, students with disabilities should be afforded the same portion of educational resources as students without disabilities. States should aim for the gradual integration of special education services into mainstream education. It is acknowledged that in some instances special education may currently be considered to be the most appropriate form of education for some students with disabilities.

9. Owing to the particular communication needs of deaf and deaf/blind persons, their education may be more suitably provided in schools for such persons or special classes and units in mainstream schools. At the initial stage, in particular, special attention needs to be focused on culturally sensitive instruction that will result in effective communication skills and maximum independence for people who are deaf or deaf/blind.

Rule 7. Employment

States should recognize the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. In both rural and urban areas they must have equal opportunities for productive and gainful employment in the labour market.

1. Laws and regulations in the employment field must not discriminate against persons with disabilities and must not raise obstacles to their employment.

2. States should actively support the integration of persons with disabilities into open employment. This active support could occur through a variety of measures, such as vocational training, incentive-oriented quota schemes, reserved or designated employment, loans or grants for small business, exclusive contracts or priority production rights, tax concessions, contract compliance or other technical or financial assistance to enterprises employing workers with disabilities. States should also encourage employers to make

reasonable adjustments to accommodate persons with disabilities.

3. States' action programmes should include:

(a) Measures to design and adapt workplaces and work premises in such a way that they become accessible to persons with different disabilities;

(b) Support for the use of new technologies and the development and production of assistive devices, tools and equipment and measures to facilitate access to such devices and equipment for persons with disabilities to enable them to gain and maintain employment;

(c) Provision of appropriate training and placement and ongoing support such as personal assistance and interpreter services.

4. States should initiate and support public awareness-raising campaigns designed to overcome negative attitudes and prejudices concerning workers with disabilities.

5. In their capacity as employers, States should create favourable conditions for the employment of persons with disabilities in the public sector.

6. States, workers' organizations and employers should cooperate to ensure equitable recruitment and promotion policies, employment conditions, rates of pay, measures to improve the work environment in order to prevent injuries and impairments and measures for the rehabilitation of employees who have sustained employment-related injuries.

7. The aim should always be for persons with disabilities to obtain employment in the open labour market. For persons with disabilities whose needs cannot be met in open employment, small units of sheltered or supported employment may be an alternative. It is important that the quality of such programmes be assessed in terms of their relevance and sufficiency in providing opportunities for persons with disabilities to gain employment in the labour market.

8. Measures should be taken to include persons with disabilities in training and employment programmes in the private and informal sectors.

9. States, workers' organizations and employers should cooperate with organizations of persons with disabilities concerning all measures to create training and employment opportunities, including flexible hours, part-time work, job-sharing, self-employment and attendant care for persons with disabilities.

Rule 8. Income maintenance and social security

States are responsible for the provision of social security and income maintenance for persons with disabilities.

1. States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities. States should ensure that the provision of support takes into account the costs frequently incurred by persons with disabilities and their families as a result of the disability.

2. In countries where social security, social insurance or other social welfare schemes exist or are being developed for the general population, States should ensure that such systems do not exclude or discriminate against persons with disabilities.

3. States should also ensure the provision of income support and social security protection to individuals who undertake the care of a person with a disability.

4. Social security systems should include incentives to restore the income-earning capacity of persons with disabilities. Such systems should provide or contribute to the organization, development and financing of vocational training. They should also assist with placement services.

5. Social security programmes should also provide incentives for persons with disabilities to seek employment in order to establish or re-establish their income-earning capacity.

6. Income support should be maintained as long as the disabling conditions remain in a manner that does not discourage persons with disabilities from seeking employment. It should only be reduced or terminated when persons with disabilities achieve adequate and secure income.

7. States, in countries where social security is to a large extent provided by the private sector, should encourage local communities, welfare organizations and families to develop self-help measures and incentives for employment or employment-related activities for persons with disabilities.

Rule 9. Family life and personal integrity

States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood.

1. Persons with disabilities should be enabled to live with their families. States should encourage the inclusion in family counselling of appropriate modules regarding disability and its effects on family life. Respite-care and attendant-care services should be made available to families which include a person with disabilities. States should remove all unnecessary obstacles to persons who want to foster or adopt a child or adult with disabilities.

2. Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood. Taking into account that persons with disabilities may experience difficulties in getting married and setting up a family, States should encourage the availability of appropriate

counselling. Persons with disabilities must have the same access as others to family-planning methods, as well as to information in accessible form on the sexual functioning of their bodies.

3. States should promote measures to change negative attitudes towards marriage, sexuality and parenthood of persons with disabilities, especially of girls and women with disabilities, which still prevail in society. The media should be encouraged to play an important role in removing such negative attitudes.

4. Persons with disabilities and their families need to be fully informed about taking precautions against sexual and other forms of abuse. Persons with disabilities are particularly vulnerable to abuse in the family, community or institutions and need to be educated on how to avoid the occurrence of abuse, recognize when abuse has occurred and report on such acts.

Rule 10. Culture

States will ensure that persons with disabilities are integrated into and can participate in cultural activities on an equal basis.

1. States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas. Examples of such activities are dance, music, literature, theatre, plastic arts, painting and sculpture. Particularly in developing countries, emphasis should be placed on traditional and contemporary art forms, such as puppetry, recitation and story-telling.

2. States should promote the accessibility to and availability of places for cultural performances and services, such as theatres, museums, cinemas and libraries, to persons with disabilities.

3. States should initiate the development and use of special technical arrangements to make literature, films and theatre accessible to persons with disabilities.

Rule 11. Recreation and sports

States will take measures to ensure that persons with disabilities have equal opportunities for recreation and sports.

1. States should initiate measures to make places for recreation and sports, hotels, beaches, sports arenas, gym halls, etc., accessible to persons with disabilities. Such measures should encompass support for staff in recreation and sports programmes, including projects to develop methods of accessibility, and participation, information and training programmes.

2. Tourist authorities, travel agencies, hotels, voluntary organizations and others involved in organizing recreational activities or travel opportunities should offer their services to all, taking into account the special needs of persons with disabilities. Suitable training should be provided to assist that process.

3. Sports organizations should be encouraged to develop opportunities for participation by persons with

disabilities in sports activities. In some cases, accessibility measures could be enough to open up opportunities for participation. In other cases, special arrangements or special games would be needed. States should support the participation of persons with disabilities in national and international events.

4. Persons with disabilities participating in sports activities should have access to instruction and training of the same quality as other participants.

5. Organizers of sports and recreation should consult with organizations of persons with disabilities when developing their services for persons with disabilities.

Rule 12. Religion

States will encourage measures for equal participation by persons with disabilities in the religious life of their communities.

1. States should encourage, in consultation with religious authorities, measures to eliminate discrimination and make religious activities accessible to persons with disabilities.

2. States should encourage the distribution of information on disability matters to religious institutions and organizations. States should also encourage religious authorities to include information on disability policies in the training for religious professions, as well as in religious education programmes.

3. They should also encourage the accessibility of religious literature to persons with sensory impairments.

4. States and/or religious organizations should consult with organizations of persons with disabilities when developing measures for equal participation in religious activities.

III. IMPLEMENTATION MEASURES

Rule 13. Information and research
States assume the ultimate responsibility for the collection and dissemination of information on the living conditions of persons with disabilities and promote comprehensive research on all aspects, including obstacles that affect the lives of persons with disabilities.

1. States should, at regular intervals, collect gender-specific statistics and other information concerning the living conditions of persons with disabilities. Such data collection could be conducted in conjunction with national censuses and household surveys and could be undertaken in close collaboration, inter alia, with universities, research institutes and organizations of persons with disabilities. The data collection should include questions on programmes and services and their use.

2. States should consider establishing a data bank on disability, which would include statistics on available services and programmes as well as on the different groups of persons with disabilities. They should bear in mind the need to protect individual privacy and personal integrity.

3. States should initiate and support programmes of research on social, economic and participation issues that affect the lives of persons with disabilities and their families. Such research should include studies on the causes, types and frequencies of disabilities, the availability and efficacy of existing programmes and the need for development and evaluation of services and support measures.

4. States should develop and adopt terminology and criteria for the conduct of national surveys, in cooperation with organizations of persons with disabilities.

5. States should facilitate the participation of persons with disabilities in data collection and research. To undertake such research States should particularly encourage the recruitment of qualified persons with disabilities.

6. States should support the exchange of research findings and experiences.

7. States should take measures to disseminate information and knowledge on disability to all political and administration levels within national, regional and local spheres.

Rule 14. Policy-making and planning
States will ensure that disability aspects are included in all relevant policy-making and national planning.

1. States should initiate and plan adequate policies for persons with disabilities at the national level, and stimulate and support action at regional and local levels.

2. States should involve organizations of persons with disabilities in all decision-making relating to plans and programmes concerning persons with disabilities or affecting their economic and social status.

3. The needs and concerns of persons with disabilities should be incorporated into general development plans and not be treated separately.

4. The ultimate responsibility of States for the situation of persons with disabilities does not relieve others of their responsibility. Anyone in charge of services, activities or the provision of information in society should be encouraged to accept responsibility for making such programmes available to persons with disabilities.

5. States should facilitate the development by local communities of programmes and measures for persons with disabilities. One way of doing this could be to develop manuals or check-lists and provide training programmes for local staff.

Rule 15. Legislation

States have a responsibility to create the legal bases for measures to achieve the objectives of full participation and equality for persons with disabilities.

1. National legislation, embodying the rights and obligations of citizens, should include the rights and obligations of persons with disabilities. States are under an obligation to enable persons with disabilities to exercise their rights, including their human, civil and political rights, on an equal basis with other citizens. States must ensure that organizations of persons with disabilities are involved in the development of national legislation concerning the rights of persons with disabilities, as well as in the ongoing evaluation of that legislation.

2. Legislative action may be needed to remove conditions that may adversely affect the lives of persons with disabilities, including harassment and victimization. Any discriminatory provisions against persons with disabilities must be eliminated. National legislation should provide for appropriate sanctions in case of violations of the principles of non-discrimination.

3. National legislation concerning persons with disabilities may appear in two different forms. The rights and obligations may be incorporated in general legislation or contained in special legislation. Special legislation for persons with disabilities may be established in several ways:

(a) By enacting separate legislation, dealing exclusively with disability matters;

(b) By including disability matters within legislation on particular topics;

(c) By mentioning persons with disabilities specifically in the texts that serve to interpret existing legislation.

A combination of those different approaches might be desirable. Affirmative action provisions may also be considered.

4. States may consider establishing formal statutory complaints mechanisms in order to protect the interests of persons with disabilities.

Rule 16. Economic policies
States have the financial responsibility for national programmes and measures to create equal opportunities for persons with disabilities.

1. States should include disability matters in the regular budgets of all national, regional and local government bodies.

2. States, non-governmental organizations and other interested bodies should interact to determine the most effective ways of supporting projects and measures relevant to persons with disabilities.

3. States should consider the use of economic measures (loans, tax exemptions, earmarked grants, special funds, and so on) to stimulate and support equal participation by persons with disabilities in society.

4. In many States it may be advisable to establish a disability development fund, which could support various pilot projects and self-help programmes at the grass-roots level.

Rule 17. Coordination of work
States are responsible for the establishment and strengthening of national coordinating committees, or similar bodies, to serve as a national focal point on disability matters.

1. The national coordinating committee or similar bodies should be permanent and based on legal as well as appropriate administrative regulation.

2. A combination of representatives of private and public organizations is most likely to achieve an intersectoral and multidisciplinary composition. Representatives could be drawn from concerned government ministries, organizations of persons with disabilities and non-governmental organizations.

3. Organizations of persons with disabilities should have considerable influence in the national coordinating committee in order to ensure proper feedback of their concerns.

4. The national coordinating committee should be provided with sufficient autonomy and resources to fulfil its responsibilities in relation to its decision-making capacities. It should report to the highest governmental level.

Rule 18. Organizations of persons with disabilities
States should recognize the right of the organizations of persons with disabilities to represent persons with disabilities at national, regional and local levels. States should also recognize the advisory role of organizations of persons with disabilities in decision-making on disability matters.

1. States should encourage and support economically and in other ways the formation and strengthening of organizations of persons with disabilities, family members and/or advocates. States should recognize that those organizations have a role to play in the development of disability policy.

2. States should establish ongoing communication with organizations of persons with disabilities and ensure their participation in the development of government policies.

3. The role of organizations of persons with disabilities could be to identify needs and priorities, to participate in the planning, implementation and evaluation of services and measures concerning the lives of persons with disabilities, and to contribute to public awareness and to advocate change.

4. As instruments of self-help, organizations of persons with disabilities provide and promote opportunities for the development of skills in various fields, mutual support among members and information sharing.

5. Organizations of persons with disabilities could perform their advisory role in many different ways such as having permanent representation on boards of government-funded agencies, serving on public commissions and providing expert knowledge on different projects.

6. The advisory role of organizations of persons with disabilities should be ongoing in order to develop and deepen the exchange of views and information between the State and the organizations.

7. Organizations should be permanently represented on the national coordinating committee or similar bodies.

8. The role of local organizations of persons with disabilities should be developed and strengthened to ensure that they influence matters at the community level.

Rule 19. Personnel training

States are responsible for ensuring the adequate training of personnel, at all levels, involved in the planning and provision of programmes and services concerning persons with disabilities.

1. States should ensure that all authorities providing services in the disability field give adequate training to their personnel.

2. In the training of professionals in the disability field, as well as in the provision of information on disability in general training programmes, the principle of full participation and equality should be appropriately reflected.

3. States should develop training programmes in consultation with organizations of persons with disabilities, and persons with disabilities should be involved as teachers, instructors or advisers in staff training programmes.

4. The training of community workers is of great strategic importance, particularly in developing countries. It should involve persons with disabilities and include the development of appropriate values, competence and technologies as well as skills which can be practised by persons with disabilities, their parents, families and members of the community.

Rule 20. National monitoring and evaluation of disability programmes in the implementation of the Rules

States are responsible for the continuous monitoring and evaluation of the implementation of national programmes and services concerning the equalization of opportunities for persons with disabilities.

1. States should periodically and systematically evaluate national disability programmes and disseminate both the bases and the results of the evaluations.

2. States should develop and adopt terminology and criteria for the evaluation of disability-related programmes and services.

3. Such criteria and terminology should be developed in close cooperation with organizations of persons with disabilities from the earliest conceptual and planning stages.

4. States should participate in international cooperation in order to develop common standards for national evaluation in the disability field. States should encourage national coordinating committees to participate also.

5. The evaluation of various programmes in the disability field should be built in at the planning stage, so that the overall efficacy in fulfilling their policy objectives can be evaluated.

Rule 21. Technical and economic cooperation

States, both industrialized and developing, have the responsibility to cooperate in and take measures for the improvement of the living conditions of persons with disabilities in developing countries.

1. Measures to achieve the equalization of opportunities of persons with disabilities, including refugees with disabilities, should be integrated into general development programmes.

2. Such measures must be integrated into all forms of technical and economic cooperation, bilateral and multilateral, governmental and non-governmental. States should bring up disability issues in discussions on such cooperation with their counterparts.

3. When planning and reviewing programmes of technical and economic cooperation, special attention should be given to the effects of such programmes on the situation of persons with disabilities. It is of the utmost importance that persons with disabilities and their organizations are consulted on any development projects designed for persons with disabilities. They should be directly involved in the development, implementation and evaluation of such projects.

4. Priority areas for technical and economic cooperation should include:

(a) The development of human resources through the development of skills, abilities and potentials of persons with disabilities and the initiation of employment-generating activities for and of persons with disabilities;

(b) The development and dissemination of appropriate disability-related technologies and know-how.

5. States are also encouraged to support the formation and strengthening of organizations of persons with disabilities.

6. States should take measures to improve the knowledge of disability issues among staff involved at all

levels in the administration of technical and economic cooperation programmes.

Rule 22. International cooperation

States will participate actively in international cooperation concerning policies for the equalization of opportunities for persons with disabilities.

1. Within the United Nations, the specialized agencies and other concerned intergovernmental organizations, States should participate in the development of disability policy.

2. Whenever appropriate, States should introduce disability aspects in general negotiations concerning standards, information exchange, development programmes, etc.

3. States should encourage and support the exchange of knowledge and experience among:

(a) Non-governmental organizations concerned with disability issues;

(b) Research institutions and individual researchers involved in disability issues;

(c) Representatives of field programmes and of professional groups in the disability field;

(d) Organizations of persons with disabilities;

(e) National coordinating committees.

4. States should ensure that the United Nations and the specialized agencies, as well as all intergovernmental and interparliamentary bodies, at global and regional levels, include in their work the global and regional organizations of persons with disabilities.

IV. MONITORING MECHANISM

1. The purpose of a monitoring mechanism is to further the effective implementation of the Rules. It will assist each State in assessing its level of implementation of the Rules and in measuring its progress. The monitoring should identify obstacles and suggest suitable measures that would contribute to the successful implementation of the Rules. The monitoring mechanism will recognize the economic, social and cultural features existing in individual States. An important element should also be the provision of advisory services and the exchange of experience and information between States.

2. The Rules shall be monitored within the framework of the sessions of the Commission for Social Development. A Special Rapporteur with relevant and extensive experience in disability issues and international organizations shall be appointed, if necessary, funded by extrabudgetary resources, for three years to monitor the implementation of the Rules.

3. International organizations of persons with disabilities having consultative status with the Economic and Social Council and organizations representing persons with disabilities who have not yet formed their own organizations should be invited to create among themselves a panel of experts, on which organizations of persons with disabilities shall have a majority, taking into account the different kinds of disabilities and necessary equitable geographical distribution, to be consulted by the Special Rapporteur and, when appropriate, by the Secretariat.

4. The panel of experts will be encouraged by the Special Rapporteur to review, advise and provide feedback and suggestions on the promotion, implementation and monitoring of the Rules.

5. The Special Rapporteur shall send a set of questions to States, entities within the United Nations system, and intergovernmental and non-governmental organizations, including organizations of persons with disabilities. The set of questions should address implementation plans for the Rules in States. The questions should be selective in nature and cover a number of specific rules for in-depth evaluation. In preparing the questions the Special Rapporteur should consult with the panel of experts and the Secretariat.

6. The Special Rapporteur shall seek to establish a direct dialogue not only with States but also with local non-governmental organizations, seeking their views and comments on any information intended to be included in the reports. The Special Rapporteur shall provide advisory services on the implementation and monitoring of the Rules and assistance in the preparation of replies to the sets of questions.

7. The Department for Policy Coordination and Sustainable Development of the Secretariat, as the United Nations focal point on disability issues, the United Nations Development Programme and other entities and mechanisms within the United Nations system, such as the regional commissions and specialized agencies and inter-agency meetings, shall cooperate with the Special Rapporteur in the implementation and monitoring of the Rules at the national level.

8. The Special Rapporteur, assisted by the Secretariat, shall prepare reports for submission to the Commission for Social Development at its thirty-fourth and thirty-fifth sessions. In preparing such reports,

the Rapporteur should consult with the panel of experts.

9. States should encourage national coordinating committees or similar bodies to participate in implementation and monitoring. As the focal points on disability matters at the national level, they should be encouraged to establish procedures to coordinate the monitoring of the Rules. Organizations of persons with disabilities should be encouraged to be actively involved in the monitoring of the process at all levels.

10. Should extrabudgetary resources be identified, one or more positions of interregional adviser on the Rules should be created to provide direct services to States, including:

(a) The organization of national and regional training seminars on the content of the Rules;

(b) The development of guidelines to assist in strategies for implementation of the Rules;

(c) Dissemination of information about best practices concerning implementation of the Rules.

11. At its thirty-fourth session, the Commission for Social Development should establish an open-ended working group to examine the Special Rapporteur's report and make recommendations on how to improve the application of the Rules. In examining the Special Rapporteur's report, the Commission, through its open-ended working group, shall consult international organizations of persons with disabilities and specialized agencies, in accordance with rules 71 and 76 of the rules of procedure of the functional commissions of the Economic and Social Council.

12. At its session following the end of the Special Rapporteur's mandate, the Commission should examine the possibility of either renewing that mandate, appointing a new Special Rapporteur or considering another monitoring mechanism, and should make appropriate recommendations to the Economic and Social Council.

13. States should be encouraged to contribute to the United Nations Voluntary Fund on Disability in order to further the implementation of the Rules.

Annexure 6

PERSONS WITH DISABILITIES
CESCR General Comments 5. 09/12/94.

Convention Abbreviation: CESCR
GENERAL COMMENT 5

Persons with disabilities
(Eleventh session, 1994)*

1. The central importance of the International Covenant on Economic, Social and Cultural Rights in relation to the human rights of persons with disabilities has frequently been underlined by the international community[1/] . Thus a 1992 review by the Secretary-General of the implementation of the World Programme of Action concerning Disabled Persons and the United Nations Decade of Disabled Persons concluded that "disability is closely linked to economic and social factors" and that "conditions of living in large parts of the world are so desperate that the provision of basic needs for all - food, water, shelter, health protection and education - must form the cornerstone of national programmes" [2/]. Even in countries which have a relatively high standard of living, persons with disabilities are very often denied the opportunity to enjoy the full range of economic, social and cultural rights recognized in the Covenant.

2. The Committee on Economic, Social and Cultural Rights, and the working group which preceded it, have been explicitly called upon by both the General Assembly [3/] and the Commission on Human Rights [4/] to monitor the compliance of States parties to the Covenant with their obligation to ensure the full enjoyment of the relevant rights by persons with disabilities. The Committee's experience to date, however, indicates that States parties have devoted very little attention to this issue in their reports. This appears to be consistent with the Secretary-General's conclusion that "most Governments still lack decisive concerted measures that would effectively improve the situation" of persons with disabilities [5/] . It is therefore appropriate to review, and emphasize, some of the ways in which issues concerning persons with disabilities arise in connection with the obligations contained in the Covenant.

3. There is still no internationally accepted definition of the term "disability". For present purposes, however, it is sufficient to rely on the approach adopted in the Standard Rules of 1993, which state:

> "The term 'disability' summarizes a great number of different functional limitations occurring in any population ... People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature"[6/].

4. In accordance with the approach adopted in the Standard Rules, this General Comment uses the term "persons with disabilities" rather than the older term "disabled persons". It has been suggested that the latter term might be misinterpreted to imply that the ability of the individual to function as a person has been disabled.

5. The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, in so far as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability. Moreover, the requirement contained in article 2 (2) of the Covenant that the rights "enunciated ... will be exercised without discrimination of any kind" based on certain specified grounds "or other status" clearly applies to discrimination on the grounds of disability.

6. The absence of an explicit, disability-related provision in the Covenant can be attributed to the lack of awareness of the importance of addressing this issue explicitly, rather than only by implication, at the time of the drafting of the Covenant over a quarter of a century ago. More recent international human rights instruments have, however, addressed the issue specifically. They include the Convention on the Rights of the Child (art. 23); the African Charter on Human and Peoples' Rights (art. 18 (4)); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 18). Thus it is now very widely accepted that the human rights of persons with disabilities must be protected and promoted through general, as well as specially designed, laws, policies and programmes.

7. In accordance with this approach, the international community has affirmed its commitment to ensuring the full range of human rights for persons with disabilities in the following instruments: (a) the World Programme of Action concerning Disabled Persons, which provides a policy framework aimed at promoting "effective measures for prevention of disability, rehabilitation and the realization of the goals of 'full participation' of [persons with disabilities] in social life and development, and of 'equality'" [7/] ;

(b) the Guidelines for the Establishment and Development of National Coordinating Committees on Disability or Similar Bodies, adopted in 1990;[8/] (c) the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, adopted in 1991;[9/] (d) the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (hereinafter referred to as the "Standard Rules"), adopted in 1993, the purpose of which is to ensure that all persons with disabilities "may exercise the same rights and obligations as others". [10/] The Standard Rules are of major importance and constitute a particularly valuable reference guide in identifying more precisely the relevant obligations of States parties under the Covenant.

I. GENERAL OBLIGATIONS OF STATES PARTIES

8. The United Nations has estimated that there are more than 500 million persons with disabilities in the world today. Of that number, 80 per cent live in rural areas in developing countries. Seventy per cent of the total are estimated to have either limited or no access to the services they need. The challenge of improving the situation of persons with disabilities is thus of direct relevance to every State party to the Covenant. While the means chosen to promote the full realization of the economic, social and cultural rights of this group will inevitably differ significantly from one country to another, there is no country in which a major policy and programme effort is not required. [11/]

9. The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.

10. According to a report by the Secretary-General, developments over the past decade in both developed and developing countries have been especially unfavourable from the perspective of persons with disabilities:

> "... current economic and social deterioration, marked by low-growth rates, high unemployment, reduced public expenditure, current structural adjustment programmes and privatization, have negatively affected programmes and services ... If the present negative trends continue, there is the risk that [persons with disabilities] may increasingly be relegated to the margins of society, dependent on ad hoc support." [12/]

As the Committee has previously observed (General Comment No. 3 (Fifth session, 1990), para. 12), the duty of States parties to protect the vulnerable members of their societies assumes greater rather than less importance in times of severe resource constraints.

11. Given the increasing commitment of Governments around the world to market-based policies, it is appropriate in that context to emphasize certain aspects of States parties' obligations. One is the need to ensure that not only the public sphere, but also the private sphere, are, within appropriate limits, subject to regulation to ensure the equitable treatment of persons with disabilities. In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities. In circumstances where such protection does not extend beyond the public domain, the ability of persons with disabilities to participate in the mainstream of

community activities and to realize their full potential as active members of society will be severely and often arbitrarily constrained. This is not to imply that legislative measures will always be the most effective means of seeking to eliminate discrimination within the private sphere. Thus, for example, the Standard Rules place particular emphasis on the need for States to "take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution". [13/]

12. In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces. Similarly, while it is appropriate for Governments to rely on private, voluntary groups to assist persons with disabilities in various ways, such arrangements can never absolve Governments from their duty to ensure full compliance with their obligations under the Covenant. As the World Programme of Action concerning Disabled Persons states, "the ultimate responsibility for remedying the conditions that lead to impairment and for dealing with the consequences of disability rests with Governments". World Programme of Action concerning Disabled Persons (see note 3 above), para. 3. [14/]

II. MEANS OF IMPLEMENTATION

13. The methods to be used by States parties in seeking to implement their obligations under the Covenant towards persons with disabilities are essentially the same as those available in relation to other obligations (see General Comment No. 1 (Third session, 1989)). They include the need to ascertain, through regular monitoring, the nature and scope of the problems existing within the State; the need to adopt appropriately tailored policies and programmes to respond to the requirements thus identified; the need to legislate where necessary and to eliminate any existing discriminatory legislation; and the need to make appropriate budgetary provisions or, where necessary, seek international cooperation and assistance. In the latter respect, international cooperation in accordance with articles 22 and 23 of the Covenant is likely to be a particularly important element in enabling some developing countries to fulfil their obligations under the Covenant.

14. In addition, it has been consistently acknowledged by the international community that policy-making and programme implementation in this area should be undertaken on the basis of close consultation with, and involvement of, representative groups of the persons concerned. For this reason, the Standard Rules recommend that everything possible be done to facilitate the establishment of national coordinating committees, or similar bodies, to serve as a national focal point on disability matters. In doing so, Governments should take account of the 1990 Guidelines for the Establishment and Development of National Coordinating Committees on Disability or Similar Bodies. [15/]

III. THE OBLIGATION TO ELIMINATE DISCRIMINATION ON THE GROUNDS OF DISABILITY

15. Both de jure and de facto discrimination against persons with disabilities have a long history and take various forms. They range from invidious discrimination, such as the denial of educational opportunities, to more "subtle" forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers. For the purposes of the Covenant, "disability-based discrimination" may be defined as including 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. Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services.

16. Despite some progress in terms of legislation over the past decade, [16/] the legal situation of persons with disabilities remains precarious. In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States parties. Such legislation should not only provide persons with disabilities with judicial remedies as far as possible and appropriate, but also provide for social-policy programmes which enable persons with disabilities to live an integrated, self-determined and independent life.

17. Anti-discrimination measures should be based on the principle of equal rights for persons with disabilities and the non-disabled, which, in the words of the World Programme of Action concerning Disabled Persons, "implies that the needs of each and every individual are of equal importance, that these needs must be made the basis for the planning of societies, and that all resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation. Disability policies should ensure the access of [persons with disabilities] to all community services". [17/]

18. Because appropriate measures need to be taken to undo existing discrimination and to establish equitable opportunities for persons with disabilities, such actions should not be considered discriminatory in the sense of article 2 (2) of the International Covenant on Economic, Social and Cultural Rights as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective.

IV. SPECIFIC PROVISIONS OF THE COVENANT

A. Article 3 - Equal rights for men and women

19. Persons with disabilities are sometimes treated as genderless human beings. As a result, the double discrimination suffered by women with disabilities is often neglected. [18/] Despite frequent calls by the international community for particular emphasis to be placed upon their situation, very few efforts have been undertaken during the Decade. The neglect of women with disabilities is mentioned several times in the report of the Secretary-General on the implementation of the World Programme of Action. [19/] The Committee therefore urges States parties to address the situation of women with disabilities, with high priority being given in future to the implementation of economic, social and cultural rights-related programmes.

B. Articles 6-8 - Rights relating to work

20. The field of employment is one in which disability-based discrimination has been prominent and persistent. In most countries the unemployment rate among persons with disabilities is two to three times higher than the unemployment rate for persons without disabilities. Where persons with disabilities are employed, they are mostly engaged in low-paid jobs with little social and legal security and are often segregated from the mainstream of the labour market. The integration of persons with disabilities into the regular labour market should be actively supported by States.

21. The "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts" (art. 6 (1)) is not realized where the only real opportunity open to disabled workers is to work in so-called "sheltered" facilities under substandard conditions. Arrangements whereby persons with a certain category of disability are effectively confined to certain occupations or to the production of certain goods may violate this right. Similarly, in the light of principle 13 (3) of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, [20/] "therapeutical treatment" in institutions which amounts to forced labour is also incompatible with the Covenant. In this regard, the prohibition on forced labour contained in the International Covenant on Civil and Political Rights is also of potential relevance.

22. According to the Standard Rules, persons with disabilities, whether in rural or urban areas, must have equal opportunities for productive and gainful employment in the labour market [21/] . For this to happen it is particularly important that artificial barriers to integration in general, and to employment in particular, be removed. As the International Labour Organisation has noted, it is very often the physical barriers that society has erected in areas such as transport, housing and the workplace which are then cited as the reason why persons with disabilities cannot be employed [22/] . For example, as long as workplaces are designed and built in ways that make them inaccessible to wheelchairs, employers will be able to "justify" their failure to employ wheelchair users. Governments should also develop policies which promote and regulate flexible and alternative work arrangements that reasonably accommodate the needs of disabled workers.

23. Similarly, the failure of Governments to ensure that modes of transportation are accessible to persons with disabilities greatly reduces the chances of such persons finding suitable, integrated jobs, taking advantage of educational and vocational training, or commuting to facilities of all types. Indeed, the provision of access to appropriate and, where necessary, specially tailored forms of transportation is crucial to the realization by persons with disabilities of virtually all the rights recognized in the Covenant.

24. The "technical and vocational guidance and training programmes" required under article 6 (2) of the Covenant should reflect the needs of all persons with disabilities, take place in integrated settings, and be planned and implemented with the full involvement of representatives of persons with disabilities.

25. The right to "the enjoyment of just and favourable conditions of work" (art. 7) applies to all disabled workers, whether they work in sheltered facilities or in the open labour market. Disabled workers may not be discriminated against with respect to wages or other conditions if their work is equal to that of non-disabled workers. States parties have a responsibility to ensure that disability is not used as an excuse for creating low standards of labour protection or for paying below minimum wages.

26. Trade union-related rights (art. 8) apply equally to workers with disabilities and regardless of whether they work in special work facilities or in the open labour market. In addition, article 8, read in conjunction with other rights such as the right to freedom of association, serves to emphasize the importance of the right of persons with disabilities to form their own organizations. If these organizations are to be effective in "the promotion and protection of [the] economic and social interests" (art. 8 (1) (a)) of such persons, they should be consulted regularly by government bodies and others in relation to all matters affecting them; it may also be necessary that they be supported financially and otherwise so as to ensure their viability.

27. The International Labour Organization has developed valuable and comprehensive instruments with respect to the work-related rights of persons with disabilities, including in particular Convention No. 159 (1983) concerning vocational rehabilitation and employment of persons with disabilities.[23/] The Committee encourages States parties to the Covenant to consider ratifying that Convention.

C. Article 9 - Social security

28. Social security and income-maintenance schemes are of particular importance for persons with disabilities. As stated in the Standard Rules, "States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities". [24/] Such support should reflect the special needs for assistance and other expenses often associated with disability. In addition, as far as possible, the support provided should also cover individuals (who are overwhelmingly female) who undertake the care of a person with disabilities. Such persons, including members of the families of persons with disabilities, are often in urgent need of financial support because of their assistance role. [25/]

29. Institutionalization of persons with disabilities, unless rendered necessary for other reasons, cannot be regarded as an adequate substitute for the social security and income-support rights of such persons.

D. Article 10 - Protection of the family andof mothers and children

30. In the case of persons with disabilities, the Covenant's requirement that "protection and assistance" be rendered to the family means that everything possible should be done to enable such persons, when they so wish, to live with their families. Article 10 also implies, subject to the general principles of international human rights law, the right of persons with disabilities to marry and have their own family. These rights are frequently ignored or denied, especially in the case of persons with mental disabilities. [26/] In this and other contexts, the term "family" should be interpreted broadly and in accordance with appropriate local usage. States parties should ensure that laws and social policies and practices do not impede the realization of these rights. Persons with disabilities should have access to necessary counselling services in order to fulfil their rights and duties within the family. [27/]

31. Women with disabilities also have the right to protection and support in relation to motherhood and pregnancy. As the Standard Rules state, "persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood". [28/] The needs and desires in question should be recognized and addressed in both the recreational and the procreational contexts. These rights are commonly denied to both men and women with disabilities worldwide. [29/] Both the sterilization of, and the performance of an abortion on, a woman with disabilities without her prior informed consent are serious violations of article 10 (2).

32. Children with disabilities are especially vulnerable to exploitation, abuse and neglect and are, in accordance with article 10 (3) of the Covenant (reinforced by the corresponding provisions of the Convention on the Rights of the Child), entitled to special protection.

E. Article 11 - The right to an adequate standard of living

33. In addition to the need to ensure that persons with disabilities have access to adequate food, accessible housing and other basic material needs, it is also necessary to ensure that "support services, including assistive devices" are available "for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights".[30/] The right to adequate clothing also assumes a special significance in the context of persons with disabilities who have particular clothing needs, so as to enable them to function fully and effectively in society. Wherever possible, appropriate personal assistance should also be provided in this connection. Such assistance should be undertaken in a manner and spirit which fully respect the human rights of the person(s) concerned. Similarly, as already noted by the Committee in paragraph 8 of General Comment No. 4 (Sixth session, 1991), the right to adequate housing includes the right to accessible housing for persons with disabilities.

F. Article 12 - The right to physical and mental health

34. According to the Standard Rules, "States should ensure that persons with disabilities, particularly infants and children, are provided with the same level of medical care within the same system as other members of society". [31/] The right to physical and mental health also implies the right to have access to,

and to benefit from, those medical and social services - including orthopaedic devices - which enable persons with disabilities to become independent, prevent further disabilities and support their social integration.[32/] Similarly, such persons should be provided with rehabilitation services which would enable them "to reach and sustain their optimum level of independence and functioning". [33/] All such services should be provided in such a way that the persons concerned are able to maintain full respect for their rights and dignity.

G. Articles 13 and 14 - The right to education

35. School programmes in many countries today recognize that persons with disabilities can best be educated within the general education system. [34/] Thus the Standard Rules provide that "States should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings". In order to implement such an approach, States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers. In the case of deaf children, for example, sign language should be recognized as a separate language to which the children should have access and whose importance should be acknowledged in their overall social environment.

H. Article 15 - The right to take part in cultural life and enjoy the benefits of scientific progress

36. The Standard Rules provide that "States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas. ... States should promote the accessibility to and availability of places for cultural performances and services ... ". [36/] The same applies to places for recreation, sports and tourism.

37. The right to full participation in cultural and recreational life for persons with disabilities further requires that communication barriers be eliminated to the greatest extent possible. Useful measures in this regard might include "the use of talking books, papers written in simple language and with clear format and colours for persons with mental disability, [and] adapted television and theatre for deaf persons". [37/]

38. In order to facilitate the equal participation in cultural life of persons with disabilities, Governments should inform and educate the general public about disability. In particular, measures must be taken to dispel prejudices or superstitious beliefs against persons with disabilities, for example those that view epilepsy as a form of spirit possession or a child with disabilities as a form of punishment visited upon the family. Similarly, the general public should be educated to accept that persons with disabilities have as much right as any other person to make use of restaurants, hotels, recreation centres and cultural venues.

Notes

* Contained in document E/1995/22.

1/ For a comprehensive review of the question, see the final report prepared by Mr Leandro Despouy, Special Rapporteur, on human rights and disability (E/CN.4/Sub.2/1991/31).

2/ See A/47/415, para. 5.

3/ See para. 165 of the World Programme of Action concerning Disabled Persons, adopted by the General Assembly by its resolution 37/52 of 3 December 1982 (para. 1).

4/ See Commission on Human Rights resolutions 1992/48, para. 4 and 1993/29, para. 7.

5/ See A/47/415, para. 6.

6/ Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993 (Introduction, para. 17).

7/ World Programme of Action concerning Disabled Persons (see note 3 above), para. 1.

8/ A/C.3/46/4, annex I. Also contained in the Report on the International Meeting on the Roles and Functions of National Coordinating Committees on Disability in Developing Countries, Beijing, 5-11 November 1990 (CSDHA/DDP/NDC/4). See also Economic and Social Council resolution 1991/8 and General Assembly resolution 46/96 of 16 December 1991.

9/ General Assembly resolution 46/119 of 17 December 1991, annex.

10/ Standard Rules, (see note 6 above), Introduction, para. 15.

11/ See A/47/415, passim.

12/ Ibid., para. 5.

13/ Standard Rules, (see note 6 above) Rule 1.

14/ World Programme of Action concerning Disabled Persons (see note 3 above), para. 3.

15/ See note 8 above.

16/ See A/47/415, paras. 37-38.

17/ World Programme of Action concerning Disabled Persons (see note 3 above), para. 25.

18/ See E/CN.4/Sub.2/1991/31 (see note 1 above), para. 140.

19/ See A/47/415, paras. 35, 46, 74 and 77.

20/ See note 9 above.

21/ Standard Rules (see note 6 above), Rule 7.

22/ See A/CONF.157/PC/61/Add.10, p. 12.

23/ See also Recommendation No. 99 (1955) concerning vocational rehabilitation of the disabled, and Recommendation No. 168 (1983) concerning vocational rehabilitation and employment of persons with disabilities.

24/ Standard Rules (see note 6 above) Rule 8, para. 1.

25/ See A/47/415, para. 78.

26/ See E/CN.4/Sub.2/1991/31 (see note 1 above), paras. 190 and 193.

27/ See the World Programme of Action concerning Disabled Persons (see note 3 above) para. 74.

28/ Standard Rules (see note 6 above), Rule 9, para. 2.

29/ See E/CN.6/1991/2, paras. 14 and 59-68.

30/ Standard Rules (see note 6 above), Rule 4.

31/ Ibid., Rule 2, para. 3.

32/ See the Declaration on the Rights of Disabled Persons (General Assembly resolution 3447 (XXX) of 9 December 1975), para. 6; and the World Programme of Action concerning Disabled Persons (see note 3 above), paras. 95-107.

33/ Standard Rules (see note 6 above), Rule 3.

34/ See A/47/415 para. 73.

35/ Standard Rules (see note 6 above), Rule 6.

36/ ibid., Rule 10, paras.1-2

37/ See A/47/415 para. 79

Annexure 7

BIWAKO MILLENNIUM FRAMEWORK (BMF)

ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC
High-level Intergovernmental Meeting to Conclude the Asian and Pacific
Decade of Disabled Persons, 1993-2002
25-28 October 2002
Otsu City, Shiga, Japan

CONSIDERATION OF A REGIONAL FRAMEWORK FOR ACTION TOWARDS AN INCLUSIVE, BARRIER-FREE AND RIGHTS-BASED SOCIETY FOR PERSONS WITH DISABILITES IN ASIA AND THE PACIFIC

(Item 6 of the provisional agenda)

BIWAKO MILLENNIUM FRAMEWORK FOR ACTION TOWARDS AN INCLUSIVE, BARRIER-FREE AND RIGHTS-BASED SOCIETY FOR PERSONS WITH DISABILITIES IN ASIA AND THE PACIFIC

Note by the Secretariat

SUMMARY

The Commission, at its fifty-eighth session, adopted resolution 58/4 of 22 May 2002 on promoting an inclusive, barrier-free and rights-based society for people with disabilities in the Asian and Pacific region in the twenty-first century, by which it proclaimed the extension of the Asian and Pacific Decade of Disabled Persons, 1993-2002, for another decade, 2003-2012.

The present document sets out a draft regional framework for action that provides regional policy recommendations for action by Governments in the region and concerned stakeholders to achieve an inclusive, barrier-free and rights-based society for persons with disabilities in the new decade, 2003-2012. The regional framework for action identifies seven areas for priority action in the new decade. Each priority area contains critical issues, targets and the action required.

The regional framework for action explicitly incorporates the millennium development goals and their relevant targets to ensure that concerns relating to persons with disabilities become an integral part of efforts to achieve the goals.

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I. PREAMBLE

We, the members and associate members of ESCAP represented at the High-level Intergovernmental Meeting to Conclude the Asian and Pacific Decade of Disabled Persons,

1. Recognize that while an estimated 400 million persons with disabilities have the capacity to contribute to national development in the Asian and Pacific region and have increasingly become agents of change in their communities through their collective action, the majority of persons with disabilities are still excluded from education, employment and other economic and social opportunities and constitute some 20 per cent of the poorest people,

2. Recall that following the International Year of Disabled Persons in 1981, the United Nations General Assembly, in its resolution 37/52 of 3 December 1982, adopted the World Programme of Action concerning Disabled Persons, aimed at achieving full participation and equality and protection of rights of persons with disabilities,

3. Also recall the continuing commitment of Governments in the Asian and Pacific region to the promotion of full participation and equality of persons with disabilities in the Asian and Pacific region and to the improvement of their lives through the proclamation of the Asian and Pacific Decade of Disabled Persons, 1993-2002, at the end of the United Nations Decade of Disabled Persons (1983-1992) and through the adoption of the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region and the Agenda for Action for the Asian and Pacific Decade of Disabled Persons, 1993-2002, at the launch of the Decade at Beijing in 1992,

4. Affirm the policy guidelines set out in the Agenda for Action for achieving the goals of the Asian and Pacific Decade of Disabled Persons within the 12 policy areas (national coordination, legislation, information, public awareness, accessibility and communication, education, training and employment, prevention of causes of disability, rehabilitation services, assistive devices, self-help organizations and regional cooperation) and the 107 specific targets adopted at a regional review meeting in 1995, further strengthened in 1999 and endorsed by the Commission at its fifty-sixth session in 2000,

5. Recognize that in the 1990s, United Nations initiatives concerning global policies and programmes in areas such as education, environment, human rights, population and development, social development, advancement of women, children, and shelter and habitat incorporated disability issues as substantive concerns in their declarations, frameworks and strategic action programmes. In particular, the World Summit for Social Development, held at Copenhagen in March 1995, in its Copenhagen Declaration on Social Development noted that people with disabilities, as one of the world's largest minorities, are often forced into poverty, unemployment and social isolation. It recommended the promotion of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities and the development of strategies for implementation of the Rules,

6. Note that the world community has expressed its commitment to economic and social development in the face of rapid globalization in adopting General Assembly resolution 55/2 of 8 September 2000 entitled

"United Nations Millennium Declaration", embodying a large number of specific commitments aimed at improving the lot of humanity in the twenty-first century,

7. Appreciate that under such a favourable policy milieu at the global and regional levels, ESCAP members and associate members adopted resolution 58/4 of 22 May 2002 on promoting an inclusive, barrier-free and rights-based society for people with disabilities in the Asian and Pacific region in the twenty-first century, by which it proclaimed the extension of the Asian and Pacific Decade of Disabled Persons, 1993-2002, for another decade, 2003-2012. The resolution will give further impetus to the implementation of the World Programme of Action concerning Disabled Persons and the Agenda for Action for the Asian and Pacific Decade of Disabled Persons in the region beyond 2002,

8. Agree that overall improvement has been achieved in all 12 policy areas under the Agenda for Action, but that progress has been uneven, particularly in the continuing and alarmingly low rate of access to education for children and youth with disabilities, and has been marked by significant subregional disparities,

9. Encourage Governments to actively implement the paradigm shift from a charity-based approach to a rights-based approach to the development of persons with disabilities and to move towards the human rights perspective, especially the perspective of the right to development for persons with disabilities, bearing in mind General Assembly resolution 56/168 of 19 December 2001 on a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities,

10. Urge Governments in the region which have not done so to join the signatories to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region and to strive to achieve the 107 targets for the implementation of the Agenda for Action for the Asian and Pacific Decade of Disabled Persons,

11. Adopt the Biwako Millennium Framework for Action to promote an inclusive, barrier-free and rights-based society for persons with disabilities in the region. An "inclusive" society means a society for all and a "barrier-free" society means a society free from physical and attitudinal barriers, as well as social, economic and cultural barriers. A "rights-based" society means a society based on the concept of human rights, including the right to development,

12. Confirm that the Biwako Millennium Framework for Action is set in the context of relevant disability-specific United Nations international instruments, mandates and recommendations, including General Assembly resolutions 2856 (XXVI) of 20 ecember 1971 on the Declaration on the Rights of Mentally Retarded Persons, 3447 (XXX) of 9 December 1975 on the Declaration on the Rights of Disabled Persons, 37/52 of 3 December 1982 on the World Programme of Action concerning Disabled Persons, the Rehabilitation and Employment (Disabled Persons) Convention (No. 159), 1983, adopted by the International Labour Organization on 20 June 1983, and its recommendation on that Convention, General Assembly resolution 48/96 of 20 December 1993 on Standard Rules on the Equalization of Opportunities for Persons with Disabilities and the Salamanca Statement and Framework for Action on Special Needs Education,

13. Anticipate that the Biwako Millennium Framework for Action will contribute to attaining the millennium development goals and targets as issues relating to persons with disabilities are vital concerns to be addressed in realizing the relevant millennium development goals and targets.

II. PRINCIPLES AND POLICY DIRECTIONS OF THE BIWAKO MILLENNIUM FRAMEWORK FOR ACTION

14. To promote the goals of an inclusive, barrier-free and rights-based society for persons with disabilities in the Asian and Pacific region, the Biwako Millennium Framework for Action, is guided by the following principles and policy directions:

(1) Enact and/or enforce legislation and policies related to equal opportunities and treatment of persons with disabilities and their rights to equity in education, health, information and communications, training and employment, social services and other areas. Such legislation and policies should include persons with all types of disabilities, women and men, and people in urban and remote and rural areas. They should be rights-based and promote inclusive and multisectoral approaches.

(2) Include disability dimensions in all new and existing laws, policies plans, programmes and schemes.

(3) Establish or strengthen national coordination committees on disability which will develop and coordinate the implementation and monitoring of the policies concerning disability, with effective participation from organizations of and for persons with disabilities.

(4) Support the development of persons with disabilities and their organizations and include them in the national policy decision-making process on disability, with special focus on the development of women with disabilities and their participation in self-help organizations of persons with disabilities as well as in mainstream gender initiatives.

(5) Ensure that disabled persons be an integral part of efforts to achieve the millennium development goals, particularly in the areas of poverty alleviation, primary education, gender and youth employment.

(6) Strengthen national capacity in data collection and analysis concerning disability statistics to support policy formulation and programme implementation.

(7) Adopt a policy of early intervention in all multisectoral areas, including education, health and rehabilitation, and social services for children with disabilities from birth to four years.

(8) Strengthen community-based approaches in the prevention of causes of disability, rehabilitation and equalization of opportunities for persons with disabilities.

(9) Adopt the concept of universal and inclusive design for all citizens, which is cost-effective, in the development of infrastructure and services in the areas of, inter alia, rural and urban development, housing, transport and telecommunication.

III. PRIORITY AREAS FOR ACTION

15. Further efforts need to focus on priority areas where progress was found inadequate and action was lagging during the implementation of the Asian and Pacific Decade of Disabled Persons, 1993-2002. By resolution 58/4, Governments in the region defined the priority policy areas as:

(a) Self-help organizations of persons with disabilities and related family and parent associations;

(b) Women with disabilities;

(c) Early detection, early intervention and education;

(d) Training and employment, including self-employment;

(e) Access to built environments and public transport;

(f) Access to information and communications, including information, communications and assistive technologies;

(g) Poverty alleviation through capacity-building, social security and sustainable livelihood programmes.

For each priority area, the following have been identified: (a) critical issues, (b) millennium development goals, where applicable, (c) targets of the Biwako Framework and (d) action required to achieve those targets.

IV. TARGETS AND ACTION IN THE PRIORITY AREAS

A. Self-help organizations of persons with disabilities and related family and parent associations

1. Critical issues

16. Persons with disabilities are the most qualified and best equipped to support, inform and advocate for themselves and other persons with disabilities. Evidence suggests that the quality of life of persons with disabilities, and of the broader community, improves when disabled persons themselves actively voice their concerns and participate in decision-making. Self-help organizations are the most qualified, best informed and most motivated to speak on their own behalf concerning the proper design and implementation of policy, legislation and strategies which will ensure their full participation in social, economic, cultural and political life and enable them to contribute to the development of their communities.

17. It is imperative to recognize the right of persons with disabilities to self-representation and to strengthen their capacity to participate in the decision-making process. Persons with disabilities must articulate their own issues and advocate for reforms that will bring about their development and independent living in their communities and society at large. However, when children and others are not able to represent themselves, their parents, family members and other supporters should be encouraged and enabled to help advocate their rights and needs until such support is no longer necessary.

18. The development of a democratic, representative disability movement is one way to help ensure that government provision is appropriate to the needs and rights of persons with disabilities. Self-help organizations of persons with disabilities should include groups and organizations from rural areas as well as those of particularly marginalized disabled persons such as women and girls with disabilities, persons with intellectual disabilities and persons with psychiatric disabilities.

2. Targets

Target 1. Governments, international funding agencies and non-governmental organizations (NGOs) should, by 2004, establish policies with the requisite resource allocations to support the development and formation of self-help organizations of persons with disabilities in all areas, and with a specific focus on slum and rural dwellers. Governments should take steps to ensure the formation of parents associations at local levels by the year 2005 and federate them at the national level by year 2010.

Target 2. Governments and civil society organizations should, by 2005, fully include organizations of persons with disabilities in their decision-making processes involving planning and programme implementation which directly and indirectly affect their lives.

3. Action required to achieve targets

1. Governments should implement measures under the direction of the national coordination committee on disability to increase the level of consultations between self-help organizations of persons with disabilities and diverse sectoral ministries, as well as with civil society and the private sector. These measures should include training of persons with disabilities, including women with disabilities, on how to participate effectively in the various decision-making processes. Governments should establish guidelines for the conduct of consultations and the process should be periodically reviewed and evaluated by representatives of self-help organizations of persons with diverse disabilities.

2. Governments should establish a policy review panel within the national coordination committee on disability consisting of representatives of persons with diverse disabilities. The panel should review all policies and their implementation which directly or indirectly affect persons with disabilities.

3. Governments should take action to increase the representation of persons with disabilities in all areas of public life, including government, at all levels from national to local, as well as the legislature and judicial bodies. This should be promoted by means of affirmative action and anti-discrimination legislation.

4. Self-help organizations should develop programmes for capacity-building to empower their members, including youth and women with disabilities, to take consultative and leadership roles in the community at large as well as in their own organizations and enable them to serve as trainers in the development of leadership and management skills of members of self-help organizations.

5. National self-help organizations of diverse disability groups should develop mechanisms to engage rural persons with disabilities in self-help organizations for mutual support, advocacy and referral to programmes and services, and to collaborate actively with rural and urban development NGOs and Government in rural development initiatives.

6. International funding agencies and NGOs should give high priority in their development policies to providing funding and technical assistance to promote and strengthen self-help organizations of persons with disabilities.

B. Women with disabilities

1. Critical issues

19. Women with disabilities are one of the most marginalized groups in society, as they are multiply disadvantaged through their status as women, as persons with disabilities, and are over-represented among persons living in poverty. Women and girls with disabilities, to a greater extent than boys and men with disabilities, face discrimination within the family, are denied access to health care, education, vocational training, employment and income generation opportunities, and are excluded from social and community activities.

20. Women and girls with disabilities encounter further discrimination as they are exposed to greater risk of physical and sexual abuse, denial of their reproductive rights, and reduced opportunity to enter marriage and family life. In rural areas girls and women are more disadvantaged, with higher rates of illiteracy, and lack of access to information and services. Stigmatized and rejected from earliest childhood and denied opportunities for development, girls with disabilities grow up lacking a sense of self-worth and self-esteem and are denied access to the roles of women in their communities.

21. Within some self-help organizations of persons with disabilities in some countries in the region, women with disabilities have faced further discrimination. Women with disabilities are under-represented in membership of such organizations and scarcely visible in leadership and executive roles. Their concerns are not addressed in the advocacy agenda of self-help organizations and young women with disabilities have not been targeted for leadership training.

22. The mainstream gender movement, which has had a significant effect on improving the equality of lives of non-disabled women, has had minimal effect on the lives of women with disabilities. Women with disabilities have not been included in membership of mainstream gender organizations, their issues have not been addressed other than to note that they are of special concern and they have lacked the advocacy skills to change this situation.

23. Governments have a special responsibility in rectifying the imbalances, providing the needed support services and promoting the full participation of women with disabilities in mainstream development.

2. Targets

Target 3. Governments should, by 2005, ensure anti-discrimination measures, where appropriate, which safeguard the rights of women with disabilities.

Target 4. National self-help organizations of persons with disabilities should, by 2005, adopt policies to promote the full participation and equal representation of women with disabilities in their activities, including in management, organizational training and advocacy programmes.

Target 5. Women with disabilities should, by 2005, be included in the membership of national mainstream women's associations.

3. Action required to achieve targets

1. Governments should implement measures to uphold the rights of women with disabilities and to protect them from discrimination. In particular, measures should be implemented to ensure equal access to health services, education, training and employment, and protection from sexual and other forms of abuse and violence.

2. Governments, NGOs and self-help organizations should implement programmes to raise the public's awareness of the situation of women with disabilities and to promote positive attitudes, role models and opportunities for their development.

3. Governments may facilitate the establishment of a mechanism at the regional, national and subnational levels to disseminate relevant gender-related information among women with disabilities. The information should include, but not be limited to, international documents and information on national legislation.

4. Self-help organizations of persons with disabilities should ensure that women with disabilities are represented at the local, national and regional levels of the organizations.

5. Self-help organizations should ensure that women with disabilities constitute at least half of their delegations at meetings, workshops and seminars.

6. Women with disabilities should be encouraged to take part in and be given priority in receiving training opportunities in managerial and general subjects provided by self-help organizations.

7. Governments, NGOs, self-help organizations and donors should provide leadership training for women with disabilities to raise their awareness of gender issues and to increase their capacity to participate in policy and decision-making processes at all levels of self-help organizations of persons with disabilities and in advocacy and consultative roles with Government and in civil society.

8. Women with disabilities should form self-help groups within self-help organizations and form national and regional networks as a means of support and of disseminating and sharing information.

9. Groups and networks of women with disabilities should promote the development of girls with disabilities, with particular emphasis on access to education, health information, training and social development.

10. National and regional groups and networks of women with disabilities should advocate to mainstream women's groups for the inclusion of women with disabilities, their self-help groups and concerns into the organizations and networks of mainstream women's groups, for information dissemination and support.

11. Mainstream women's organizations should specifically include women with disabilities in their training programmes through providing accessible venues, arrangements and support as well as training materials in accessible formats.

12. All agencies, including Governments, NGOs, self-help organizations, donors and civil society must promote and uphold at all times the rights of women with disabilities to choice and self-determination.

C. Early detection, early intervention and education

1. Critical issues

24. Available evidence suggests that less than 10 per cent of children and youth with disabilities have access to any form of education. This compares with an enrolment rate of over 70 per cent for non-disabled children and youth in primary education in the Asian and Pacific region. This situation exists despite international mandates declaring that education is a basic right for all children and calling for the inclusion of all children in primary education by 2015. Governments should ensure the provision of appropriate education which responds to the needs of children with all types of disabilities in the next decade. It is recognized that there is wide variation in the response which Governments in the Asian and Pacific region have made in providing education for children with disabilities, and that children are currently educated in a variety of formal and informal educational settings, and in separate and inclusive schools.

25. The exclusion of children and youth with disabilities from education results in their exclusion from opportunities for further development, particularly diminishing their access to vocational training, employment, income generation and business development. Failure to access education and training prevents the achievement of economic and social independence and increases vulnerability to poverty in what can become a self-perpetuating, inter-generational cycle.

26. Infants and young children with disabilities require access to early intervention services, including early detection and identification (birth to four years old), with support and training to parents and families to facilitate the maximum development of the full potential of their disabled children. Failure to provide early detection, identification and intervention to infants and young children with disabilities and support to their parents and caretakers results in secondary disabling conditions which further limit their capacity to benefit from educational opportunities. Provision of early intervention should be a combined effort of Education, Health and/or Social Services.

27. Currently education for children and youth with disabilities is predominantly provided in special schools in urban centres and is available to limited numbers of children in many countries of the Asian and Pacific region. The Salamanca Statement and Framework for Action on Special Needs Education recommended that inclusive education, with access to education in the regular local neighbourhood or community school, provides the best opportunity for the majority of children and youth with disabilities to receive an education, including those in rural areas. Exceptions to this rule should be considered on a case-by-case basis where only education in a special school or establishment can be shown to meet the needs of the individual child. It is acknowledged that in some instances special education may be considered to be the most appropriate form of education for some children with disabilities.[1] The education of all children, including children with disabilities, in local or community schools assists in breaking down barriers and negative attitudes and facilitates social integration and cohesion within communities. The involvement of parents and the local community in community schools further strengthens this process.

28. Major barriers to the provision of quality education for children with disabilities in all educational contexts include the lack of early identification and intervention services, negative attitudes, exclusionary policies and practices, inadequate teacher training, particularly training of all regular teachers to teach children with diverse abilities, inflexible curriculum and assessment procedures, inadequate specialist support staff to assist teachers of special and regular classes, lack of appropriate teaching equipment and devices, and failure to make modifications to the school environment to make it fully accessible. These barriers can be overcome through policy, planning, implementation of strategies and allocation of resources to include children and youth with disabilities in all national health and education development initiatives available to non-disabled children and youth.

29. Governments, in collaboration with other stakeholders, need to provide sport, leisure and recreational activities and facilities for persons with disabilities, as the fulfillment of their basic rights to the improvement of life.

2. Millennium development goal

30. In this priority area the millennium development goal is to ensure that by the year 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling and that girls and boys will have equal access to all levels of education.

3. Targets

Target 6. Children and youth with disabilities will be an integral part of the population targeted by the millennium development goal of ensuring that by 2015 all boys and girls will complete a full course of primary schooling.

Target 7. At least 75 per cent of children and youth with disabilities of school age will, by 2010, be able to complete a full course of primary schooling.

Target 8. By 2012, all infants and young children (birth to four years old) will have access to and receive community-based early intervention services, which ensure survival, with support and training for their families.

Target 9. Governments should ensure detection of disabilities at as early an age as possible.

4. Action required to achieve targets

1. Governments should enact legislation, with enforcement mechanisms, to mandate education for all children, including children with disabilities, to meet the goals of the Dakar Framework for Action and the millennium development goal of primary education for all children by 2015. Children with disabilities need to be explicitly included in all national plans for education, including national plans on education for all of the Dakar Framework for Action.

2. Ministries of Education should formulate educational policy and planning in consultation with families and organizations of persons with disabilities and develop programmes of education which enable children with disabilities to attend their local primary schools. Policy implementation needs to prepare the school system for inclusive education, where appropriate, with the clear understanding that all children have the right to attend school and that it is the responsibility of the school to accommodate differences in learners.

3. A range of educational options should be available to allow the selection of a school that will best cater for individual learning needs.

4. Adequate public budgetary allocation specifically for the education of children with disabilities should be provided within the education budget.

5. Governments, in collaboration with others, should collect comprehensive data on children with disabilities, from birth to 16 years old, which should be used for planning appropriate early intervention and educational provision, resources and support services, from birth through school age.

6. Five year targets should be set for the enrolment of children with disabilities in early intervention, pre-school, primary, secondary and tertiary (post-school) education. Progress towards meeting these targets should be closely monitored with a view to achieving the goal of 75 per cent of children with disabilities in school by 2012.

7. Ministries of Health and other concerned ministries should establish adequate early detection and identification services in hospitals, primary health care, centre and community-based health care services, with referral systems to early intervention services for all disabled infants and children (birth to four years old). Governments should routinely screen high-risk pregnancies and high-risk newborn babies for early detection of disabilities at birth or soon thereafter.

8. Ministries of Health and Education should establish early intervention services, in collaboration

with other concerned ministries, self-help organizations, NGO and community-based agencies, to provide early intervention, support and training to all disabled infants and children with disabilities (birth to four years old) and their families.

9. Governments, including Ministries of Education, should work in partnership with NGOs at the national and local level to conduct public awareness campaigns to inform families of children with disabilities, schools and local communities, of the right of children and youth with disabilities to participate in education at all levels, in urban and rural areas, and with particular emphasis on the inclusion of girls with disabilities where there is a gender imbalance in school attendance.

10. The following measures should be taken, where appropriate, by Governments in the region to improve the quality of education in all schools, for all children, including children with disabilities, in special and inclusive educational contexts: (a) conduct education and training for raising the awareness of public officials, including educational and school administrators and teachers, to promote positive attitudes to the education of children with disabilities, increase sensitivity to the rights of children with disabilities to be educated in local schools and on practical strategies for including children and youth with disabilities in regular schools; (b) provide comprehensive pre- and in-service teacher training for all teachers, with methodology and techniques for teaching children with diverse abilities, the development of flexible curriculum, teaching and assessment strategies; (c) encourage suitable candidates with disabilities to enter the teaching profession; (d) establish procedures for child screening, identification and placement, child-centred and individualized teaching strategies and full systems of learning and teaching support, including resource centres and specialist teachers, in rural and urban areas; (e) ensure the availability of appropriate and accessible teaching materials, equipment and devices, unencumbered by copyright restriction; (f) ensure flexible and adaptable curriculum, appropriate to the abilities of individual children and relevant in the local context; (g) ensure assessment and monitoring procedures are appropriate for the diverse needs of learners.

11. Governments should implement a progressive programme towards achieving barrier-free and accessible schools and accessible school transport by 2012.

12. Governments should encourage programmes of research at tertiary institutions to develop further effective methodologies for teaching children and youth with diverse abilities.

13. Organizations of and for disabled persons should place advocacy for the education of children with disabilities as a high priority item on their agenda.

14. Regional cooperation needs to be strengthened to facilitate the sharing of experiences and good practices and to support the development of inclusive education initiatives.

D. Training and employment, including self-employment

1. Critical issues

31. The challenge of integrating and including persons with disabilities in the economic mainstream has not been met. Despite international standards and the implementation of exemplary training and

employment legislation, policies and practices in some countries, persons with disabilities, and especially women, youth and those in rural areas, remain disproportionately undereducated, untrained, unemployed, underemployed and poor.

32. Persons with disabilities have a right to decent work. Decent work is productive work in conditions of freedom, equity, security and human dignity. Persons with disabilities have unique differences and abilities and they should have the right to choose what they want to do based on their abilities, not on their disabilities. They require the same educational, vocational training, employment and business development opportunities available to all. Some may require specialized support services, assistive devices or job modifications, but these are small investments compared to lifetimes of productivity and contribution. Furthermore, a lifetime of exclusion often results in psychosocial barriers, which must be addressed if persons with disabilities are to succeed in training and employment situations.

33. Vocational training and employment issues must be considered within the context of the full participation of persons with disabilities in community life and within the macro context of changing demographics and workplaces. Responses to issues such as globalization, job security, poverty reduction and unemployment among youth and older workers must also consider how these issues and responses affect persons with disabilities.

34. Generally, there is a lack of trained and competent staff working with persons with disabilities, especially with regard to training and employment. Other capacity issues that relate to developing, implementing, evaluating and disseminating effective policies and programmes on national and regional levels must continue to be addressed. Persons with disabilities must also be regularly and actively involved in initiatives related to employment and training, not just as consumers but also as advocates, designers and providers of services.

2. Targets

Target 10. At least 30 per cent of the signatories (member States) will ratify the International Labour Organization Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159), 1983, by 2012.

Target 11. By 2012, at least 30 per cent of all vocational training programmes in signatory countries will be inclusive of persons with disabilities and provide appropriate support and job placement or business development services for them.

Target 12. By 2010, reliable data that measure the employment and self-employment rates of persons with disabilities will exist in all countries.

3. Action required to achieve targets

1. Governments should examine, ratify and implement the Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159), 1983.

2. Governments should have policies, a written plan, a coordinating body and some mechanism to evaluate the success of including persons with disabilities in training, employment, self-employment and poverty alleviation programmes. These activities should include consultations with organizations of and

for persons with disabilities as well as employers' and workers' organizations.

3. Governments should develop and implement employer incentives and strategies to move persons with disabilities into open employment and recognize that government, as a major employer in most countries, should be a model employer with regard to the hiring, retention and advancement of workers with disabilities.

4. Governments should examine and/or enact anti-discrimination legislation, where appropriate, that protects the rights of workers with disabilities to equal treatment and opportunity in the workplace and in the marketplace. Governments should encourage and promote employment of persons with disabilities in the private sector and should provide a mechanism for the protection of rights of those persons with disabilities affected by layoffs and downsizing exercises.

5. Governments, international organizations, NGOs, training institutions and other social partners should collaborate to increase the availability and upgrade the competencies of staff providing training, employment and vocational rehabilitation services to ensure that trained and competent staff are available. Persons with disabilities should be actively recruited and included in such training programmes and hired as staff.

6. Governments, with the assistance of NGOs, should ensure that persons with disabilities have the support services they require to participate in mainstream vocational training and employment, and allocate the additional funds required to remove barriers to inclusion, with the full recognition that the price tag related to exclusion is higher.

7. Governments, NGOs and disabled persons' organizations should collaborate more with employers, trade unions and other social partners to develop partnerships, policies, mutual understanding and more effective vocational training and employment services that benefit persons with disabilities working in formal, informal or self-employment settings.

8. Governments, in collaboration with employers' organizations, workers' organizations, organizations of and for persons with disabilities and other social partners should review current policies, practices and outcomes related to the vocational training of persons with disabilities to identify gaps and needs and develop a plan to meet these needs in the light of workplace changes related to globalization, ICT and the needs of persons with disabilities living in remote and rural communities.

9. Funds must be allocated to meet the needs of those with the most extensive disabilities to provide training and employment services in dignified and inclusive settings to the extent possible, by using strategies such as transitional and production workshops and community-based and supported employment.

10. Recognizing the lack of formal job opportunities in many countries, Governments, international agencies, donors, NGOs and others in civil society must ensure that persons with disabilities and organizations of and for persons with disabilities have equitable access and are included in programmes related to business development, entrepreneurship and credit distribution.

11. Regional organizations, including those of persons with disabilities, in collaboration with national

governments and international agencies, should develop mechanisms for the collection and dissemination of information related to good practices in all aspects of training and employment, especially those that reflect regional and cultural needs.

E. Access to built environments and public transport

1. Critical issues

35. Inaccessibility to the built environment, including the public transport system, is still the major barrier which prevents persons with disabilities from actively participating in social and economic activities in the countries of the region. Some Governments recognize disabled persons' basic right to equal access to built environments. Creating inaccessible built environments, streets and transport systems discriminates against persons with disabilities and other members of society. The concept of universal/inclusive design has emerged as a result of the struggle of persons with disabilities for accessible physical environments. Universal/inclusive design approaches have proven to benefit not only persons with disabilities but also many other sectors within the society, such as older persons, pregnant women and parents with young children.

36. Most of the world's population of older persons resides in the Asian and Pacific region. The numbers are expected to increase dramatically given current demographic trends. The proportion of older women is also steadily growing given that women outlive men in nearly all countries, both rich and poor. As more people - men and women - survive to older age, the numbers of older people with disabilities are rising. Additionally, the onset of physical disability in old age will only exacerbate the social stigma older persons face as they are often viewed as burdens and liabilities. All persons with disabilities, however, whether young or old, have issues in common which affect them equally. These include the barriers in our environment, such as the lack of access to built environments and public transport.

37. The universal/inclusive design approaches provide safer environments for all by reducing the rate of accidents. Physical barriers are known to prevent full participation and reduce the economic and social output of persons with disabilities. Investments in the removal and prevention of architectural and design barriers are increasingly being justified on economic grounds, particularly in areas most critical to social and economic participation (e.g., transport, housing, education, employment, health care, government, public discourse, cultural and religious activities, leisure and recreation). It is important to note that not only facilities but also services should be accessible in their entirety. In this connection dealing with persons with disabilities should be an important part of a staff training curriculum.

2. Targets

Target 13. Governments should adopt and enforce accessibility standards for planning of public facilities, infrastructure and transport, including those in rural/agricultural contexts.

Target 14. All new and renovated public transport systems, including road, water, light and heavy mass railway and air transport systems, should be made fully accessible by persons with disabilities and older persons; existing land, water and air public transport systems (vehicles, stops and terminals) should be made accessible and usable as soon as practicable.

Target 15. All international and regional funding agencies for infrastructure development should

include universal and inclusive design concepts in their loan/grant award criteria.

3. Action required to achieve targets

1. Governments, in collaboration with disabled persons' organizations, civil society groups such as professional architecture and engineering associations and others in the corporate sector, should support the establishment of national and/or regional mechanisms to exchange information on means to realize accessible environments, with display, library and research facilities, and information centres and should network with research and/or educational architectural and engineering establishments.

2. Ensure that professional education and academic courses in architecture, planning and landscape and building and engineering contain inclusive design principles; "teaching the teachers" courses in effective teaching of practical accessible design are established for all design schools in the region, including travelling workshops which involve the active participation of persons with disabilities; and support continuing education professional development courses on best practices in inclusive design techniques for experienced practitioners, including those professionals who work closely with the end-users, such as community-based rehabilitation personnel.

3. Encourage innovative techniques, such as through design competitions, architectural and other awards and various other forms of support, to identify particular applications that enhance accessibility and apply local knowledge and materials. Local materials to make built environments accessible, e.g., tactile blocks and non-slip floor tiles, should be developed and made available. Networks to disseminate innovative techniques should be developed.

4. Support the establishment of appraisal mechanisms on how codes and standards have been developed, applied and enforced and how they have increased accessibility in various countries. Feedback and case studies on areas (rather than on a single new or upgraded building) are important, with publicity and dissemination of the findings, and show how improvements could be made.

5. Ensure that the accessibility needs of persons with disabilities be included in all rural/agricultural development programmes, including but not limited to access and use of sanitation facilities and water supply through a process of consultation that includes disabled user-groups.

6. Create access officers or posts which include the function of access officers at local, provincial and national levels whose functions include providing architects/designers/developers with technical advice and information on access codes and application of inclusive design, and appropriate technology in the natural and built environments in rural, peri-urban and urban contexts.

7. Disabled persons' organizations should implement confidence-building and advocacy measures to present their needs collectively and effectively in the built environment in one voice representing the needs of different disability groups, including not only persons with physical, visual and hearing disabilities but also persons with intellectual disabilities.

F. Access to information and communications, including information, communication and assistive technologies

1. Critical issues

38. ICT has been the engine of economic growth and continues to spur the globalization process. However, the benefits of ICT development have spread unevenly between the haves and the have-nots and between developed and developing countries.

39. The effects of ICT upon persons with disabilities have been both positive and negative. Many disabled persons benefit from ICT development, as the technologies are opening up opportunities for employment at all skill levels and opportunities to live independently in the community. Deaf-blind persons, with proper training, are using a refreshable Braille screen reader and persons with severe cerebral palsy are taking part in information exchange through the Internet. However, benefits are still largely limited to persons with disabilities in more developed countries. The rapid development of ICT has given rise to unanticipated problems for persons with certain disabilities. For example, online processes for registration, banking or shopping transactions may not be accessible to persons with cognitive/intellectual, physical or visual and/or auditory disabilities.

40. The majority of disabled persons in the developing countries in the Asian and Pacific region are poor and have been excluded from ICT use, although there is a great potential benefit for the use of ICT in rural areas in developing countries.

41. The Tokyo Declaration on Asia-Pacific Renaissance through ICT in the Twenty-first Century, adopted by the Asia-Pacific Summit on the Information Society, organized by the Asia-Pacific Telecommunity and held at Tokyo in November 2000, declared that people in the Asian and Pacific region should have access to the Internet by the year 2005 to the extent possible. It also recognized disability as one of the causes of the digital divide, along with income, age and gender. The World Summit on the Information Society will be held at Geneva in 2003 and at Tunis in 2005. At the Summit, issues concerning persons with disabilities and other disadvantaged groups should be considered.

42. In the information society, access to information and communications is a basic human right. Copyright owners should bear responsibility for ensuring that content is accessible to all, including persons with disabilities. Any anti-piracy or digital rights management technology should not prevent persons with disabilities from access to information and communications.[2] Information and communication technology should break down the barriers in telecommunication and broadcasting systems. Developing countries need greater support in the area of ICT.

43. In many countries in Asia and the Pacific, Sign Language, Braille, finger Braille and tactile sign language have not yet been standardized. These and other forms of communication need to be developed and disseminated. Without access to such forms of communication, persons with visual and/or hearing impairments cannot benefit from ICT developments. More importantly, they maybe deprived of the basic human right to language and communication in their everyday lives.

2. Targets

Target 16. By 2005, persons with disabilities should have at least the same rate of access to the Internet and related services as the rest of citizens in a country of the region.

Target 17. International organizations (e.g., International Telecommunication Union, International Organization for Standardization, World Trade Organization, World Wide Web Consortium, Motion Picture Engineering Group) responsible for international ICT standards should, by 2004, incorporate accessibility standards for persons with disabilities in their international ICT standards.

Target 18. Governments should adopt, by 2005, ICT accessibility guidelines for persons with disabilities in their national ICT policies and specifically include persons with disabilities as their target beneficiary group with appropriate measures.

Target 19. Governments should develop and coordinate a standardized sign language, finger Braille, tactile sign language, in each country and to disseminate and teach the results through all means, i.e. publications, CD-ROMs, etc.

Target 20. Governments should establish a system in each country to train and dispatch sign language interpreters, Braille transcribers, finger Braille interpreters, and human readers and to encourage their employment.

3. Action required to achieve targets

1. Governments should promulgate and enforce laws, policies and programmes to monitor and protect the right of persons with disabilities to information and communication; for instance, legislation providing copyright exemptions to organizations which make information content accessible to persons with disabilities, under certain conditions.

Governments, in collaboration with other concerned agencies and civil society organizations, should:

2. Set up an ICT accessibility unit within the ICT ministry/regulatory agency, and encourage private companies to establish an equivalent unit to coordinate activities within and outside agencies/companies.

3. Conduct and encourage awareness-raising training for ICT policy makers, regulatory agencies, representatives as well as technical personnel of private ICT companies to raise understanding of disability issues, including disabled persons' ICT accessibility needs, their capability and aspiration to be productive members of society.

4. Support computer literacy training and capacity-building for persons with disabilities, through training on how to communicate with software and hardware developers and standards organizations to address their needs.

5. Provide various forms of incentives, including exemption of duties for ICT devices used by persons with disabilities and subsidize the cost of assistive technology equipment to ensure that they are affordable for persons with disabilities in need.

6. Support the creation and strengthening of networks, including cooperatives, of consumers with disabilities at the national, regional and international levels in order to increase the bargaining and buying power for ICT products and services, which are generally expensive to buy individually.

7. Take all necessary steps to ensure, in the development of measures and standards relating to ICT accessibility, that organizations of persons with disabilities are involved in all stages of the process.

8. Adopt and support ICT development based on international standards which are universal/open/non-proprietary to ensure the long-term commitment to ICT accessibility for persons with disabilities among all sectors, with special attention to standards that have accessibility components and features with a proven record of effectiveness. Examples of these are the Web Accessibility Initiative of the World Wide Web Consortium and the Digital Accessible Information System Consortium.

9. Require that local language applications and content use national/international standard character encoding and modelling, such as the Unified Modeling Language, and encourage dialogue on accessibility requirements of character encoding and modelling.

10. Support participation of civil society organizations representing and reflecting the requirements of persons with disabilities in discussions on regional and international standards towards a goal of increased harmonization of international standards supporting the requirements of persons with disabilities. Where such international standards are lacking, Governments should support alternative initiatives to address those needs, with attention to compatibility and interoperability with international standards.

11. Bilateral and multilateral donor agencies and international funding agencies should adopt award criteria based on the social responsibility of the receiving agencies/organizations, including their obligation to promote ICT accessibility for persons with disabilities.

12. Support and establish a regional working group to develop standards in ICT, telecommunication and broadcasting to ensure that new and existing technologies are based on disability inclusive standards and are developed on a universal design concept. In addition to ICT, measures to ensure communication of persons with disabilities, including development of standardized Sign Language and Braille, need to be established.

G. Poverty alleviation through capacity-building, social security and sustainable livelihood programmes

1. Critical issues

44. In the Asian and Pacific region, it is estimated that of 400 million persons with disabilities, over 40 per cent are living in poverty. Those persons with disabilities have been prevented from accessing entitlements available to other members of society, including health, food, education, employment and other basic social services, and from participating in community decision-making processes.

45. Poverty is both a cause and consequence of disability. Poverty and disability reinforce one another, contributing to increased vulnerability and exclusion. Poor nutrition, dangerous working and living conditions, limited access to vaccination programmes and health and maternity care, poor hygiene, bad

sanitation, inadequate information about the causes of impairments, war and conflict and natural disasters are factors responsible for disability. Many of these causes are preventable. Disability in turn exacerbates poverty, by diminishing access to means of livelihood, increasing isolation from the marketplace and economic strain. This affects not just the individual but often the entire family.

46. The increasing numbers and proportions of older people living to advanced old age has meant that the number of persons with disabilities will increase and this may be a contributing factor to human poverty. The issues of concern for older persons have to do with disabilities related to ageing and the provision of appropriate health care and social security. In ageing societies, especially, these issues will have a profound impact on national health and long-term care systems and on whether social security schemes are sufficient as currently constituted.

47. The main factors that account for the low level of social services for poor persons with disabilities are household-based and community-based. However, there is little knowledge about the determining factors for the low welfare level of persons with disabilities in the developing countries of the region. Social and economic survey data at the household and community levels, which are necessary for an analysis of the factors, are lacking. It is important to examine to what extent the development of community-level infrastructure affects the provision of services for poor persons with disabilities.

48. An integrated approach is required, linking prevention and rehabilitation with empowerment strategies and changes in attitudes. The significance of disability should be assessed as a key development issue and its importance should be recognized in relation to poverty, human rights and the achievement of internationally agreed development targets. Eliminating world poverty is unlikely to be achieved unless the rights and needs of persons with disabilities are taken into account.

49. One of the millennium development goals has a specific target of poverty eradication. This is a positive approach. However, there is a danger that this strategy may omit the important vulnerable group of persons with disabilities as efforts to achieve the targets could focus on those who can be brought out of poverty most easily and not those in extreme poverty, among whom persons with disabilities are disproportionately represented. The root causes of poverty of persons with disabilities are far more complicated and multifaceted. Hence, conscious efforts should be made to include persons with disabilities in the target groups given priority in the poverty reduction strategy to achieve the millennium development goals.

2. Millennium development goals

50. The relevant millennium development goal in this priority area is to halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger, and by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water.

3. Targets

Target 21. Governments should halve, between 1990 and 2015, the proportion of persons with disabilities whose income/consumption is less than one dollar a day.

4. Action required to achieve targets

1. Governments should immediately include, as a major target group, persons with disabilities in their national poverty alleviation programmes in order to achieve the millennium development goal target to eradicate extreme poverty and hunger.

2. Governments should allocate adequate rural development and poverty alleviation funds towards services for the benefit of persons with disabilities.

3. Government should include disability dimensions and poverty mapping and disability into the collection and analysis of millennium development goal baseline data on income poverty, education, health, etc., so as to ensure baseline data for poor persons with disabilities.

4. Government should mainstream disability issues into pro-poor development strategies through:

(a) Increased resource allocation for poor persons with disabilities and the introduction of social budgeting for disability;

(b Participatory evaluation of existing social and economic policies through more effective methodologies, including the use of citizen's report card method;

(c) Establishment of appropriate social protection schemes, such as schooling subsidy and/or health insurance for poor families with disabled children and older persons with physical and mental disabilities;

(d) Comprehensive development policies targeting persons with disabilities and families with disabled persons.

5. Governments should document and disseminate good field-based practices in poverty alleviation for persons with disabilities that can be used as models for capacity-building in government sectoral ministries, civil society organizations and the private sector.

6. Governments should encourage the building of strategic alliances among and advocating the importance of disability issues to policy makers. organizations of persons with disabilities and community development organizations, with assistance from the United Nations system, with a view to incorporating disability issues into development policies

7. Preventive measures aimed at minimizing the causes of disability and the provision of rehabilitation services should be an integral part of the normal business of Governments, the private sector and NGOs. Programmes aimed at disability prevention and rehabilitation should be included in national plans, policies and budgets.

8. Governments should design and adopt a national strategy on prevention of causes of disabilities and rehabilitation for persons with disabilities.

9. The national strategy should acknowledge the role of all three approaches, institutional, outreach

and community-based, in the rehabilitation of persons with disabilities. Community-based approaches, in particular, should be emphasized to achieve maximum coverage and outreach of services as well as to maximize their cost-effectiveness.

10. The health service delivery structures, both governmental and non-governmental, should include rehabilitation services such as physiotherapy and occupational therapy as well as the provision of essential assistive device services. Little is known about gender-specific measures and health care approaches for mental health and physical disabilities among older women and men. Service provision for mental illness in older people needs attention. Special emphasis should be placed on ensuring that such services are available at the local level, including rural and urban poor areas.

11. Governments should support the formation of self-help groups of persons with disabilities in rural and urban poor areas and their federations, with a view to developing their capacity in mutual support, advocacy and participation in the decision-making process.

V. STRATEGIES TO ACHIEVE THE TARGETS OF THE BIWAKO MILLENNIUM FRAMEWORK FOR ACTION

51. The following strategies should support Governments, in collaboration with civil society organizations, in the achievement of targets cited in chapter IV.

A. National plan of action (five years) on disability

52. A national plan of action concerning disability is vital to implement the Biwako Millennium Framework for Action, 2003-2012, at the national and subnational levels.

Strategy 1. Governments should develop, in collaboration with organizations of persons with disabilities and other civil society organizations, and adopt by 2004, a five-year comprehensive national plan of action to implement the targets and strategies of the Biwako Millennium Framework for Action, 2003-2012. The national plan should have inclusive policies and programmes for integrating persons with disabilities into mainstream development plans and programmes.

B. Promotion of a rights-based approach to disability issues

53. A rights-based approach should be taken to advance disability issues. The civil, cultural, economic, political and social rights of persons with disabilities should be addressed and protected. Disability issues should be integrated into national plans relating to development and into a human rights agenda. Globally, more than 40 countries have adopted non-discrimination laws on disability, but only 9 countries in the Asian and Pacific region have done so.

Strategy 2. Governments should examine the adoption of laws and policies and review of existing laws to protect the rights of persons with disabilities, especially to ensure non-discrimination. They should include a clear and specific definition of what constitutes discrimination against persons with disabilities. Such laws and policies should comply with United Nations standards on human rights and disabilities. Persons with disabilities should have equal access to effective remedies to enforce their rights under such laws.

Strategy 3. National human rights institutions should draw special attention to the rights of persons with disabilities and integrate them into the full range of their functions. Governments should consider, according to the concrete circumstances of their countries and areas, establishing an independent disability rights institution to protect the rights of persons with disabilities.

Strategy 4. Governments should ensure that persons with disabilities, including disability groups in civil society, fully participate from an early stage in helping to shape the laws and policies that will affect their lives and in monitoring and evaluating the implementation of these laws and policies and in recommending improvements.

Strategy 5. States should consider ratifying the core international human rights treaties.3 After consultation with disability groups, Governments should include specific information about the rights

of persons with disabilities in reports submitted to treaty monitoring bodies under the treaties they have ratified.

Strategy 6. Governments should consider support for and contribute to the work of the Ad Hoc Committee established by General Assembly resolution 56/168 of 19 December 2001 to consider proposals for a "comprehensive and integral international convention to promote and protect the rights of persons with disabilities" in the elaboration of the comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities and should encourage and facilitate the full participation of a wide range of disability groups from all regions of the world in contributing to the Committee's work.

Strategy 7. Governments should include persons with disabilities and their organizations, in their procedures at the national, regional and international levels, concerning the drafting and adoption of the proposed human rights convention on disability, (as decided by General Assembly resolution 56/168 of 19 December 2001) which by passing, will ensure a strong consumer-influenced monitoring mechanism on the rights and responsibilities of persons with disabilities.

C. Disability statistics/common definition of disabilities for planning

54. Lack of adequate data has been one of the most significant factors leading to the neglect of disability issues, including the development of policy and measures to monitor and evaluate its implementation, in the region. In many developing countries, the data collected do not reflect the full extent of disability prevalence. This limitation results in part from the conceptual framework adopted, the scope and coverage of the surveys undertaken, as well as the definitions, classifications and the methodology used for the collection of data on disability. It is also recognized that a common system of defining and classifying disability is not uniformly applied in the region. In this connection, a wider usage of the International Classification of Functioning, Disability and Health in countries of the region will be expected to provide a base for the development of such a common system of defining and classifying disability.

Strategy 8. Governments are encouraged to develop, by 2005, their system for disability-related data collection and analysis and to produce relevant statistics disaggregated by disability to support policy-making and programme planning.

Strategy 9. Governments are encouraged to adopt, by 2005, definitions on disability based on the Guidelines and Principles for the Development of Disability Statistics,4 which will allow intercountry comparison in the region.

D. Strengthened community-based approaches to the prevention of causes of disability, rehabilitation and empowerment of persons with disabilities

55. Many developing countries in the region are now beginning to augment and replace traditional institutional and centralized rehabilitation programmes and projects with approaches better suited to their social and economic environments of poverty, high unemployment and limited resources for social services. Community-based rehabilitation programmes form the hub of such strategies. The community-

based approach is particularly appropriate for the prevention of causes of disability, early identification and intervention of children with disabilities, reaching out to persons with disabilities in rural areas, raising awareness and advocacy for the inclusion of persons with disabilities in all activities in the community, including social, cultural and religious activities. Education, training and employment needs could also be met by this approach. It is essential that persons with disabilities exercise choice and control over initiatives for community-based rehabilitation.

Strategy 10. Governments, in collaboration with organizations of persons with disabilities and civil society organizations, should immediately develop national policies, if that has not yet been done, to promote community-based approaches for the prevention of causes of disability, for rehabilitation and for the empowerment of persons with disabilities. Community based rehabilitation (CBR) perspectives should reflect a human rights approach and be modelled on the independent living concept, which includes peer counselling.

VI. COOPERATION AND SUPPORT IN PURSUANCE OF THE BIWAKO MILLENNIUM FRAMEWORK FOR ACTION

A. Subregional cooperation and collaboration

56. One of the important focuses of the new regional framework is to strengthen cooperation and collaboration among Governments at the subregional level. Countries in the same subregion share common concerns, aspirations and constraints and are in the best position to provide mutual support and collaboration. In this regard, Governments in each subregion are requested to formulate their own subregional priorities and a plan of action to seek mutual support in the implementation of the Biwako Millennium Framework for Action.

Strategy 11. Governments, in cooperation with relevant NGOs, such as the Asian and Pacific Disability Forum, and self-help organizations of persons with disabilities in each subregion of Asia and the Pacific, should establish, by 2004, subregional mechanisms to support governments to achieve targets and strategies contained in the Biwako Millennium Framework for Action.

Strategy 12. Governments in each subregion should collaborate with relevant NGOs in establishing focal points within appropriate subregional organizations with a view to coordinating subregional activities on disability.

B. Regional collaboration

1. Collaboration with the Asian and Pacific Development Center on Disability

57. The Asia-Pacific Development Center on Disability will be established towards 2004 at Bangkok, as a legacy of the Asian and Pacific Decade of Disabled Persons, to promote the empowerment of persons with disabilities and a barrier-free society in the Asian and Pacific region. The Center will serve persons with disabilities and persons working with them in training and information support in the Asian and Pacific region.

Strategy 13. Governments, the United Nations system, civil society organizations and the private sector should collaborate, support and take advantage of the training and communication capability of the Center in the field of disability in the region. Capacity-building of persons with disabilities in the Pacific should be also clearly addressed by the Center.

2. Networking among centres of excellence in focused areas

58. There are government institutes and agencies, as well as civil society and private organizations involved in research and development, implementing new approaches in the field of disabilities in the Asian and Pacific region. It would be useful to identify those institutes/agencies/organizations as centres of excellence and to facilitate the exchange among them of information, experiences and personnel to promote networking, with a view to maximizing cooperation and collaboration. The Asia-Pacific Development Center on Disability could play a supporting role in establishing and maintaining such a network.

Strategy 14. Governments, civil society organizations and the private sector should establish a network of centres of excellence in focused areas to maximize cooperation and collaboration.

Strategy 15. ESCAP and other United Nations agencies should assist in the establishment of a network of centres of excellence in focused areas through the identification and promotion of such centres.

Strategy 16. Governments of the region should enter into a suitable agreement on trade, technology transfer and human resource development for fast and efficient sharing of resources. Governments should also promote regional cooperation, share information and document good practices on the achievements of he Biwako Millennium Framework targets.

C. Interregional collaboration

59. The Asian and Pacific Decade of Disabled Persons, 1993-2002, has influenced developments at the international level, in particular in countries in Africa. The African Decade of Disabled Persons, 2000-2009, was declared in 1999. It is also expected that the Arab Decade of Disabled Persons, 2003-2012, will be declared, which will coincide with the newly extended regional framework on disability in the Asian and Pacific region. In order to strengthen regional programmes, learn from other regional experiences and create synergy among the regional frameworks on disability, interregional exchange activities are important.

Strategy 17. The Asian and Pacific region, the African region and the Western Asian region should strengthen their cooperation and collaboration to create synergy in implementing regional decades through interregional exchange of information, experiences and expertise, which will mutually benefit all the regions.

VII. MONITORING AND REVIEW

A. Organization of regional and subregional meetings

60. The Commission, by its resolution 58/4 of 22 May 2002 on promoting an inclusive, barrier-free and rights-based society for people with disabilities in the Asian and Pacific region in the twenty-first century, requested the Executive Secretary of ESCAP to report to the Commission biennially until the end of the Decade on the progress made in implementation of that resolution. ESCAP should convene biennial meetings to review achievements and to identify action that may be required to implement the Biwako Millennium Framework for Action. At those meetings, the representatives of national coordination committees on disability matters comprising government ministries/agencies, NGOs, self-help organizations and the media will be invited to present reports to review progress in the implementation of the Biwako Millennium Framework for Action at the national and subnational levels. Self-help organizations of persons with disabilities should be encouraged to participate actively in the review process. Regional meetings should focus one at a time on the targets adopted in the following thematic areas:

(a) Self-help organizations of persons with disabilities, women with disabilities, education, training and employment;

(b) Access to built environments and access to information and communications;

(c) Poverty alleviation through social security and sustainable livelihoods.

61. Governments in each subregion should organize subregional meetings to review achievements and to identify action that may be required to implement the Biwako Millennium Framework for Action based on their subregional priorities and action plan in a similar manner as at the regional level described in the above paragraph.

B. Regional working group to coordinate and monitor the Biwako Millennium Framework for Action

62. A regional working group comprising the United Nations system, Governments and civil society organizations, including organizations of persons with disabilities in the region should meet regularly to coordinate and monitor implementation of the Biwako Millennium Framework for Action.

C. Mid-point review of the Biwako Millennium Framework for Action

63. A mid-point review of the Biwako Millennium Framework for Action should be conducted. Based on the review, the targets and strategic plans for the second half of the Decade may be modified and new targets and strategic plans formulated.

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[1] See General Assembly resolution 48/96 of 20 December 1993 on Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annex, rule 6. Education, para. 8.

[2] The right to information and communications should include, but not be limited to, disabled persons' access to:

- Computer hardware/software and related accessory devices purchased and used by state agencies or purchased and owned by private agencies for public use;
- Public communication facilities;
- Broadcasting systems, including community radio, video content and digital television;
- Telecommunication systems, including telephone service;
- The Internet, including web, multimedia content, internet telephony and software used to create web content;
- Other consumer electronic/communication devices, including mobile communication devices;
- Interactive transaction machines, including kiosk machines;
- Services provided through electronic information systems;
- Instructional materials, including textbooks, teachers' edition and electronic learning environments;
- Spoken language through sign language interpretation and vice versa;
- Information and communication in the individuals' mother tongue, including indigenous languages which may not have their own written scripts;
- Any print materials, through all means, such as computer screen readers, Braille, other augmentative and alternative methods;
- Any future ICT intended for public use.

When, for whatever reasons, direct access by persons with disabilities to the items listed above cannot be readily achieved, ICT developers should ensure effective interoperability of their products and services with assistive technology used by persons with disabilities.

3 Six core human rights treaties are: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination.

4 United Nations publication, Sales No. E.01.XVII.15.

Annexure 8

PRINCIPLES FOR THE PROTECTION OF PERSONS WITH MENTAL ILLNESS AND THE IMPROVEMENT OF MENTAL HEALTH CARE

Adopted by General Assembly resolution 46/119 of 17 December 1991

Application

These Principles shall be applied without discrimination of any kind such as on grounds of disability, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, legal or social status, age, property or birth.

Definitions

In these Principles:

"Counsel" means a legal or other qualified representative;

"Independent authority" means a competent and independent authority prescribed by domestic law;

"Mental health care" includes analysis and diagnosis of a person's mental condition, and treatment, care and rehabilitation for a mental illness or suspected mental illness;

"Mental health facility" means any establishment, or any unit of an establishment, which as its primary function provides mental health care;

"Mental health practitioner" means a medical doctor, clinical psychologist, nurse, social worker or other appropriately trained and qualified person with specific skills relevant to mental health care;

"Patient" means a person receiving mental health care and includes all persons who are admitted to a mental health facility;

"Personal representative" means a person charged by law with the duty of representing a patient's interests in any specified respect or of exercising specified rights on the patient's behalf, and includes the parent or legal guardian of a minor unless otherwise provided by domestic law;

"The review body" means the body established in accordance with Principle 17 to review the involuntary admission or retention of a patient in a mental health facility.

General limitation clause

The exercise of the rights set forth in these Principles may be subject only to such limitations as are prescribed by law and are necessary to protect the health or safety of the person concerned or of others, or otherwise to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Principle 1
Fundamental freedoms and basic rights

1. All persons have the right to the best available mental health care, which shall be part of the health and social care system.

2. All persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person.

3. All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment.

4. There shall be no discrimination on the grounds of mental illness. "Discrimination" means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights. Special measures solely to protect the rights, or secure the advancement, of persons with mental illness shall not be deemed to be discriminatory. Discrimination does not include any distinction, exclusion or preference undertaken in accordance with the provisions of these Principles and necessary to protect the human rights of a person with a mental illness or of other individuals.

5. Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and in other relevant instruments, such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

6. Any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after a fair hearing by an independent and impartial tribunal established by domestic law. The person whose capacity is at issue shall be entitled to be represented by a counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it. The counsel shall not in the same proceedings represent a mental health facility or its personnel and shall not also represent a member of the family of the person whose capacity is at issue unless the tribunal is satisfied that there is no conflict of interest. Decisions regarding capacity and the need for a personal representative shall be reviewed at reasonable intervals prescribed by domestic law. The person whose capacity is at issue, his or her personal representative, if any, and any other interested person shall have the right to appeal to a higher court against any such decision.

7. Where a court or other competent tribunal finds that a person with mental illness is unable to manage his or her own affairs, measures shall be taken, so far as is necessary and appropriate to that person's condition, to ensure the protection of his or her interest.

Principle 2
Protection of minors

Special care should be given within the purposes of these Principles and within the context of domestic law relating to the protection of minors to protect the rights of minors, including, if necessary, the appointment of a personal representative other than a family member.

Principle 3
Life in the community

Every person with a mental illness shall have the right to live and work, as far as possible, in the community.

Principle 4
Determination of mental illness

1. A determination that a person has a mental illness shall be made in accordance with internationally accepted medical standards.

2. A determination of mental illness shall never be made on the basis of political, economic or social status, or membership of a cultural, racial or religious group, or any other reason not directly relevant to mental health status.

3. Family or professional conflict, or non-conformity with moral, social, cultural or political values or religious beliefs prevailing in a person's community, shall never be a determining factor in diagnosing mental illness.

4. A background of past treatment or hospitalization as a patient shall not of itself justify any present or future determination of mental illness.

5. No person or authority shall classify a person as having, or otherwise indicate that a person has, a mental illness except for purposes directly relating to mental illness or the consequences of mental illness.

Principle 5
Medical examination

No person shall be compelled to undergo medical examination with a view to determining whether or not he or she has a mental illness except in accordance with a procedure authorized by domestic law.

Principle 6
Confidentiality

The right of confidentiality of information concerning all persons to whom these Principles apply shall be respected.

Principle 7
Role of community and culture

1. Every patient shall have the right to be treated and cared for, as far as possible, in the community in which he or she lives.

2. Where treatment takes place in a mental health facility, a patient shall have the right, whenever possible, to be treated near his or her home or the home of his or her relatives or friends and shall have the right to return to the community as soon as possible.

3. Every patient shall have the right to treatment suited to his or her cultural background.

Principle 8
Standards of care

1. Every patient shall have the right to receive such health and social care as is appropriate to his or her health needs, and is entitled to care and treatment in accordance with the same standards as other ill persons.

2. Every patient shall be protected from harm, including unjustified medication, abuse by other patients, staff or others or other acts causing mental distress or physical discomfort.

Principle 9
Treatment

1. Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.

2. The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff.

3. Mental health care shall always be provided in accordance with applicable standards of ethics for mental health practitioners, including internationally accepted standards such as the Principles of Medical Ethics adopted by the United Nations General Assembly. Mental health knowledge and skills shall never be abused.

4. The treatment of every patient shall be directed towards preserving and enhancing personal autonomy.

Principle 10
Medication

1. Medication shall meet the best health needs of the patient, shall be given to a patient only for therapeutic or diagnostic purposes and shall never be administered as a punishment or for the convenience of others. Subject to the provisions of paragraph 15 of Principle 11, mental health practitioners shall only administer medication of known or demonstrated efficacy.

2. All medication shall be prescribed by a mental health practitioner authorized by law and shall be recorded in the patient's records.

Principle 11
Consent to treatment

1. No treatment shall be given to a patient without his or her informed consent, except as provided for in paragraphs 6, 7, 8, 13 and 15 below.

2. Informed consent is consent obtained freely, without threats or improper inducements, after appropriate disclosure to the patient of adequate and understandable information in a form and language understood by the patient on:

(a) The diagnostic assessment;
(b) The purpose, method, Likely duration and expected benefit of the proposed treatment;
(c) Alternative modes of treatment, including those less intrusive; and
(d) Possible pain or discomfort, risks and side-effects of the proposed treatment.

3. A patient may request the presence of a person or persons of the patient's choosing during the procedure for granting consent.

4. A patient has the right to refuse or stop treatment, except as provided for in paragraphs 6, 7, 8, 13 and 15 below. The consequences of refusing or stopping treatment must be explained to the patient.

5. A patient shall never be invited or induced to waive the right to informed consent. If the patient should seek to do so, it shall be explained to the patient that the treatment cannot be given without informed consent.

6. Except as provided in paragraphs 7, 8, 12, 13, 14 and 15 below, a proposed plan of treatment may be given to a patient without a patient's informed consent if the following conditions are satisfied:

(a) The patient is, at the relevant time, held as an involuntary patient;

(b) An independent authority, having in its possession all relevant information, including the information specified in paragraph 2 above, is satisfied that, at the relevant time, the patient lacks the capacity to give or withhold informed consent to the proposed plan of treatment or, if domestic legislation so provides, that, having regard to the patient's own safety or the safety of others, the patient unreasonably withholds such consent; and

(c) The independent authority is satisfied that the proposed plan of treatment is in the best interest of the patient's health needs.

7. Paragraph 6 above does not apply to a patient with a personal representative empowered by law to consent to treatment for the patient; but, except as provided in paragraphs 12, 13, 14 and 15 below, treatment may be given to such a patient without his or her informed consent if the personal representative, having been given the information described in paragraph 2 above, consents on the patient's behalf.

8. Except as provided in paragraphs 12, 13, 14 and 15 below, treatment may also be given to any patient without the patient's informed consent if a qualified mental health practitioner authorized by law determines that it is urgently necessary in order to prevent immediate or imminent harm to the patient or to other persons. Such treatment shall not be prolonged beyond the period that is strictly necessary for this purpose.

9. Where any treatment is authorized without the patient's informed consent, every effort shall nevertheless be made to inform the patient about the nature of the treatment and any possible alternatives and to involve the patient as far as practicable in the development of the treatment plan.

10. All treatment shall be immediately recorded in the patient's medical records, with an indication of whether involuntary or voluntary.

11. Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others. It shall not be prolonged beyond the period which is strictly necessary for this purpose. All instances of physical restraint or involuntary seclusion, the reasons for them and their nature and extent shall be recorded in the patient's medical record. A patient who is restrained or secluded shall be kept under humane conditions and be under the care and close and regular supervision of qualified members of the staff. A personal representative, if any and if relevant, shall be given prompt notice of any physical restraint or involuntary seclusion of the patient.

12. Sterilization shall never be carried out as a treatment for mental illness.

13. A major medical or surgical procedure may be carried out on a person with mental illness only where it is permitted by domestic law, where it is considered that it would best serve the health needs of the patient and where the patient gives informed consent, except that, where the patient is unable to give informed consent, the procedure shall be authorized only after independent review.

14. Psychosurgery and other intrusive and irreversible treatments for mental illness shall never be carried out on a patient who is an involuntary patient in a mental health facility and, to the extent that domestic law permits them to be carried out, they may be carried out on any other patient only where the patient has given informed consent and an independent external body has satisfied itself that there is genuine informed consent and that the treatment best serves the health needs of the patient.

15. Clinical trials and experimental treatment shall never be carried out on any patient without informed consent, except that a patient who is unable to give informed consent may be admitted to a clinical trial or given experimental treatment, but only with the approval of a competent, independent review body specifically constituted for this purpose.

16. In the cases specified in paragraphs 6, 7, 8, 13, 14 and 15 above, the patient or his or her personal representative, or any interested person, shall have the right to appeal to a judicial or other independent authority concerning any treatment given to him or her.

Principle 12
Notice of rights

1. A patient in a mental health facility shall be informed as soon as possible after admission, in a form and a language which the patient understands, of all his or her rights in accordance with these Principles and under domestic law, which information shall include an explanation of those rights and how to exercise them.

2. If and for so long as a patient is unable to understand such information, the rights of the patient shall be communicated to the personal representative, if any and if appropriate, and to the person or persons best able to represent the patient's interests and willing to do so.

3. A patient who has the necessary capacity has the right to nominate a person who should be informed on his or her behalf, as well as a person to represent his or her interests to the authorities of the facility.

Principle 13
Rights and conditions in mental health facilities

1. Every patient in a mental health facility shall, in particular, have the right to full respect for his or her:

(a) Recognition everywhere as a person before the law;
(b) Privacy;
(c) Freedom of communication, which includes freedom to communicate with other persons in the facility; freedom to send and receive uncensored private communications; freedom to receive, in private, visits from a counsel or personal representative and, at all reasonable times, from other

visitors; and freedom of access to postal and telephone services and to newspapers, radio and television;

(d) Freedom of religion or belief.

2. The environment and living conditions in mental health facilities shall be as close as possible to those of the normal life of persons of similar age and in particular shall include:

(a) Facilities for recreational and leisure activities;

(b) Facilities for education;

(c) Facilities to purchase or receive items for daily living, recreation and communication;

(d) Facilities, and encouragement to use such facilities, for a patient's engagement in active occupation suited to his or her social and cultural background, and for appropriate vocational rehabilitation measures to promote reintegration in the community. These measures should include vocational guidance, vocational training and placement services to enable patients to secure or retain employment in the community.

3. In no circumstances shall a patient be subject to forced labour. Within the limits compatible with the needs of the patient and with the requirements of institutional administration, a patient shall be able to choose the type of work he or she wishes to perform.

4. The labour of a patient in a mental health facility shall not be exploited. Every such patient shall have the right to receive the same remuneration for any work which he or she does as would, according to domestic law or custom, be paid for such work to a non-patient. Every such patient shall, in any event, have the right to receive a fair share of any remuneration which is paid to the mental health facility for his or her work.

Principle 14

Resources for mental health facilities

1. A mental health facility shall have access to the same level of resources as any other health establishment, and in particular:

(a) Qualified medical and other appropriate professional staff in sufficient numbers and with adequate space to provide each patient with privacy and a programme of appropriate and active therapy;

(b) Diagnostic and therapeutic equipment for the patient;

(c) Appropriate professional care; and

(d) Adequate, regular and comprehensive treatment, including supplies of medication.

2. Every mental health facility shall be inspected by the competent authorities with sufficient frequency to ensure that the conditions, treatment and care of patients comply with these Principles.

Principle 15

Admission principles

1. Where a person needs treatment in a mental health facility, every effort shall be made to avoid involuntary admission.

2. Access to a mental health facility shall be administered in the same way as access to any other facility for any other illness.

3. Every patient not admitted involuntarily shall have the right to leave the mental health facility at any time unless the criteria for his or her retention as an involuntary patient, as set forth in Principle 16, apply, and he or she shall be informed of that right.

Principle 16
Involuntary admission

1. A person may (a) be admitted involuntarily to a mental health facility as a patient; or (b) having already been admitted voluntarily as a patient, be retained as an involuntary patient in the mental health facility if, and only if, a qualified mental health practitioner authorized by law for that purpose determines, in accordance with Principle 4, that person has a mental illness and considers:

(a) That, because of that mental illness, there is a serious likelihood of immediate or imminent harm to that person or to other persons; or

(b) That, in the case of a person whose mental illness is severe and whose judgement is impaired, failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition or will prevent the giving of appropriate treatment that can only be given by admission to a mental health facility in accordance with the principle of the least restrictive alternative.

In the case referred to in subparagraph (b), a second such mental health practitioner, independent of the first, should be consulted where possible. If such consultation takes place, the involuntary admission or retention may not take place unless the second mental health practitioner concurs.

2. Involuntary admission or retention shall initially be for a short period as specified by domestic law for observation and preliminary treatment pending review of the admission or retention by the review body. The grounds of the admission shall be communicated to the patient without delay and the fact of the admission and the grounds for it shall also be communicated promptly and in detail to the review body, to the patient's personal representative, if any, and, unless the patient objects, to the patient's family.

3. A mental health facility may receive involuntarily admitted patients only if the facility has been designated to do so by a competent authority prescribed by domestic law.

Principle 17
Review body

1. The review body shall be a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law. It shall, in formulating its decisions, have the assistance of one or more qualified and independent mental health practitioners and take their advice into account.

2. The review body's initial review, as required by paragraph 2 of Principle 16, of a decision to admit or retain a person as an involuntary patient shall take place as soon as possible after that decision and shall be conducted in accordance with simple and expeditious procedures as specified by domestic law.

3. The review body shall periodically review the cases of involuntary patients at reasonable intervals as specified by domestic law.

4. An involuntary patient may apply to the review body for release or voluntary status, at reasonable intervals as specified by domestic law.

5. At each review, the review body shall consider whether the criteria for involuntary admission set out in paragraph 1 of Principle 16 are still satisfied, and, if not, the patient shall be discharged as an involuntary patient.

6. If at any time the mental health practitioner responsible for the case is satisfied that the conditions for the retention of a person as an involuntary patient are no longer satisfied, he or she shall order the discharge of that person as such a patient.

7. A patient or his personal representative or any interested person shall have the right to appeal to a higher court against a decision that the patient be admitted to, or be retained in, a mental health facility.

Principle 18
Procedural safeguards

1. The patient shall be entitled to choose and appoint a counsel to represent the patient as such, including representation in any complaint procedure or appeal. If the patient does not secure such services, a counsel shall be made available without payment by the patient to the extent that the patient lacks sufficient means to pay.

2. The patient shall also be entitled to the assistance, if necessary, of the services of an interpreter. Where such services are necessary and the patient does not secure them, they shall be made available without payment by the patient to the extent that the patient lacks sufficient means to pay.

3. The patient and the patient's counsel may request and produce at any hearing an independent mental health report and any other reports and oral, written and other evidence that are relevant and admissible.

4. Copies of the patient's records and any reports and documents to be submitted shall be given to the patient and to the patient's counsel, except in special cases where it is determined that a specific disclosure to the patient would cause serious harm to the patient's health or put at risk the safety of others. As domestic law may provide, any document not given to the patient should, when this can be done in confidence, be given to the patient's personal representative and counsel. When any part of a document is withheld from a patient, the patient or the patient's counsel, if any, shall receive notice of the withholding and the reasons for it and shall be subject to judicial review.

5. The patient and the patient's personal representative and counsel shall be entitled to attend, participate and be heard personally in any hearing.

6. If the patient or the patient's personal representative or counsel requests that a particular person be present at a hearing, that person shall be admitted unless it is determined that the person's presence could cause serious harm to the patient's health or put at risk the safety of others.

7. Any decision whether the hearing or any part of it shall be in public or in private and may be publicly reported shall give full consideration to the patient's own wishes, to the need to respect the privacy of

the patient and of other persons and to the need to prevent serious harm to the patient's health or to avoid putting at risk the safety of others.

8. The decision arising out of the hearing and the reasons for it shall be expressed in writing. Copies shall be given to the patient and his or her personal representative and counsel. In deciding whether the decision shall be published in whole or in part, full consideration shall be given to the patient's own wishes, to the need to respect his or her privacy and that of other persons, to the public interest in the open administration of justice and to the need to prevent serious harm to the patient's health or to avoid putting at risk the safety of others.

Principle 19
Access to information

1. A patient (which term in this Principle includes a former patient) shall be entitled to have access to the information concerning the patient in his or her health and personal records maintained by a mental health facility. This right may be subject to restrictions in order to prevent serious harm to the patient's health and avoid putting at risk the safety of others. As domestic law may provide, any such information not given to the patient should, when this can be done in confidence, be given to the patient's personal representative and counsel. When any of the information is withheld from a patient, the patient or the patient's counsel, if any, shall receive notice of the withholding and the reasons for it and it shall be subject to judicial review.

2. Any written comments by the patient or the patient's personal representative or counsel shall, on request, be inserted in the patient's file.

Principle 20
Criminal offenders

1. This Principle applies to persons serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness.

2. All such persons should receive the best available mental health care as provided in Principle 1. These Principles shall apply to them to the fullest extent possible, with only such limited modifications and exceptions as are necessary in the circumstances. No such modifications and exceptions shall prejudice the persons' rights under the instruments noted in paragraph 5 of Principle 1.

3. Domestic law may authorize a court or other competent authority, acting on the basis of competent and independent medical advice, to order that such persons be admitted to a mental health facility.

4. Treatment of persons determined to have a mental illness shall in all circumstances be consistent with Principle 11.

Principle 21
Complaints

Every patient and former patient shall have the right to make a complaint through procedures as specified by domestic law.

Principle 22
Monitoring and remedies

States shall ensure that appropriate mechanisms are in force to promote compliance with these Principles, for the inspection of mental health facilities, for the submission, investigation and resolution of complaints and for the institution of appropriate disciplinary or judicial proceedings for professional misconduct or violation of the rights of a patient.

Principle 23
Implementation

1. States should implement these Principles through appropriate legislative, judicial, administrative, educational and other measures, which they shall review periodically.

2. States shall make these Principles widely known by appropriate and active means.

Principle 24
Scope of principles relating to mental health facilities

These Principles apply to all persons who are admitted to a mental health facility.

Principle 25
Saving of existing rights

There shall be no restriction upon or derogation from any existing rights of patients, including rights recognized in applicable international or domestic law, on the pretext that these Principles do not recognize such rights or that they recognize them to a lesser extent.

Annexure 9

Convention on the Rights of Persons with Disabilities Preamble

The States Parties to the present Convention,

a. Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,

b. Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,

c. Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,

d. Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

e. Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

f. Recognizing the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities,

g. Emphasizing the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,

h. Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

i. Recognizing further the diversity of persons with disabilities,

j. Recognizing the need to promote and protect the human rights of all persons with

disabilities, including those who require more intensive support,

k. Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

l. Recognizing the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries,

m. Recognizing the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,

n. Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

o. Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,

p. Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,

q. Recognizing that women and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

r. Recognizing that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,

s. Emphasizing the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,

t. Highlighting the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities,

u. Bearing in mind that conditions of peace and security based on full respect for the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation,

v. Recognizing the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,

w. Realizing that the individual, having duties to other individuals and to the community to

which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights,

x. Convinced that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,

y. Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

Have agreed as follows:

Article 1 - Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

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.

Article 2 - Definitions

For the purposes of the present Convention:

"Communication" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;

"Language" includes spoken and signed languages and other forms of non spoken languages;

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with

others of all human rights and fundamental freedoms;

"Universal design" means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

Article 3 - General principles

The principles of the present Convention shall be:

a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

b. Non-discrimination;

c. Full and effective participation and inclusion in society;

d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

e. Equality of opportunity;

f. Accessibility;

g. Equality between men and women;

h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4 - General obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

a. To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

c. To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

d. To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

e. To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

f. To undertake or promote research and development of universally designed goods,

services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

g. To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

h. To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

i. To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.

5. The provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions.

Article 5 - Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 6 - Women with disabilities

1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.
2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 7 - Children with disabilities

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Article 8 - Awareness-raising

1. States Parties undertake to adopt immediate, effective and appropriate measures:

a. To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

b. To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

c. To promote awareness of the capabilities and contributions of persons with disabilities.

Measures to this end include:

a. Initiating and maintaining effective public awareness campaigns designed:

   i. To nurture receptiveness to the rights of persons with disabilities;

   ii. To promote positive perceptions and greater social awareness towards persons with disabilities;

   iii. To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

b. Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

c. Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;

d. Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

Article 9 - Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall 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, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

a. Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

b. Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures to:

a. Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

b. Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;

c. Provide training for stakeholders on accessibility issues facing persons with disabilities;

d. Provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;

e. Provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

f. Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

g. Promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

h. Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 10 - Right to life

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Article 11 - Situations of risk and humanitarian emergencies

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Article 12 - Equal recognition before the law

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.

Article 13 - Access to justice

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.

Article 14 - Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

   a. Enjoy the right to liberty and security of person;

   b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 16 - Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-

focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 17 - Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 18 - Liberty of movement and nationality

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

a. Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

b. Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

c. Are free to leave any country, including their own;

d. Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Article 19 - Living independently and being included in the community

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 20 - Personal mobility

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

a. Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;

b. Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;

c. Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;

d. Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

Article 21 - Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

a. Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;

b. Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;

c. Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;

d. Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;

e. Recognizing and promoting the use of sign languages.

Article 22 - Respect for privacy

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

Article 23 - Respect for home and the family

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

a. The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

b. The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

c. Persons with disabilities, including children, retain their fertility on an equal basis with others.

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

Article 24 - Education

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and life long learning directed to:

a. The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

c. Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:

a. Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

b. Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

c. Reasonable accommodation of the individual's requirements is provided;

d. Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

e. Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

a. Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

b. Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

c. Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

Article 25 - Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

a. Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the

area of sexual and reproductive health and population-based public health programmes;

b. Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

c. Provide these health services as close as possible to people's own communities, including in rural areas;

d. Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

e. Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

f. Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

Article 26 - Habilitation and rehabilitation

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

a. Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;

b. Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

Article 27 - Work and employment

1. States Parties 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 labour market and work environment that is open, inclusive and accessible to

persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

a. Prohibit 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;

b. Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

c. Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

d. Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

e. Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

f. Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

g. Employ persons with disabilities in the public sector;

h. Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

i. Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

j. Promote the acquisition by persons with disabilities of work experience in the open labour market;

k. Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

Article 28 - Adequate standard of living and social protection

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of persons with disabilities to social protection and to the

enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

a. To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

b. To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

c. To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;

d. To ensure access by persons with disabilities to public housing programmes;

e. To ensure equal access by persons with disabilities to retirement benefits and programmes.

Article 29 - Participation in political and public life

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.

Article 30 - Participation in cultural life, recreation, leisure and sport

1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

a. Enjoy access to cultural materials in accessible formats;

b. Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

c. Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

4. Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.

5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

a. To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

b. To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

c. To ensure that persons with disabilities have access to sporting, recreational and tourism venues;

d. To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

e. To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.

Article 31 - Statistics and data collection

1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:

a. Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;

b. Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.

2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

Article 32 - International cooperation

1. States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

a. Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;

b. Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;

c. Facilitating cooperation in research and access to scientific and technical knowledge;

d. Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

Article 33 - National implementation and monitoring

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for

protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

Article 34 - Committee on the Rights of Persons with Disabilities

1. There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as "the Committee"), which shall carry out the functions hereinafter provided.

2. The Committee shall consist, at the time of entry into force of the present Convention, of twelve experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members.

3. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. When nominating their candidates, States Parties are invited to give due consideration to the provision set out in article 4.3 of the present Convention.

4. The members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities.

5. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals at meetings of the Conference of States Parties. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The initial election shall be held no later than six months after the date of entry into force of the present Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit the nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

7. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of six of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in paragraph 5 of this article.

8. The election of the six additional members of the Committee shall be held on the occasion of regular elections, in accordance with the relevant provisions of this article.

9. If a member of the Committee dies or resigns or declares that for any other cause she or he can no longer perform her or his duties, the State Party which nominated the member shall appoint another expert possessing the qualifications and meeting the requirements set out in the relevant provisions of this article, to serve for the remainder of the term.

10. The Committee shall establish its own rules of procedure.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention, and shall convene its initial meeting.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

13. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 35 - Reports by States Parties

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.

2. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.

3. The Committee shall decide any guidelines applicable to the content of the reports.

4. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports, repeat information previously provided. When preparing reports to the Committee, States Parties are invited to consider doing so in an open and transparent process and to give due consideration to the provision set out in article 4.3 of the present Convention.

5. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 36 - Consideration of reports

1. Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned. The State Party may respond with any information it chooses to the Committee. The Committee may request further information from States Parties relevant to the implementation of the present Convention.

2. If a State Party is significantly overdue in the submission of a report, the Committee may notify the State Party concerned of the need to examine the implementation of the present Convention in that State Party, on the basis of reliable information available to the Committee, if the relevant report is not submitted within three months following the notification. The Committee shall invite the State Party concerned to participate in such examination. Should the State Party respond by submitting the relevant report, the provisions of paragraph 1 of this article will apply.

3. The Secretary-General of the United Nations shall make available the reports to all States Parties.

4. States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.

5. The Committee shall transmit, as it may consider appropriate, to the specialized agencies, funds and programmes of the United Nations, and other competent bodies, reports from States Parties in order to address a request or indication of a need for technical advice or assistance contained therein, along with the Committee's observations and recommendations, if any, on these requests or indications.

Article 37 - Cooperation between States Parties and the Committee

1. Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate.

2. In its relationship with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation.

Article 38 - Relationship of the Committee with other bodies

In order to foster the effective implementation of the present Convention and to encourage international cooperation in the field covered by the present Convention:

a. The specialized agencies and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite specialized agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

b. The Committee, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.

Article 39 - Report of the Committee

The Committee shall report every two years to the General Assembly and to the Economic and Social Council on its activities, and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

Article 40 - Conference of States Parties

1. The States Parties shall meet regularly in a Conference of States Parties in order to consider any

matter with regard to the implementation of the present Convention.

2. No later than six months after the entry into force of the present Convention, the Conference of the States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General of the United Nations biennially or upon the decision of the Conference of States Parties.

Article 41 - Depositary

The Secretary-General of the United Nations shall be the depositary of the present Convention.

Article 42 - Signature

The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007.

Article 43 - Consent to be bound

The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the Convention.

Article 44 - Regional integration organizations

1. "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by this Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to "States Parties" in the present Convention shall apply to such organizations within the limits of their competence.

3. For the purposes of article 45, paragraph 1, and article 47, paragraphs 2 and 3, any instrument deposited by a regional integration organization shall not be counted.

4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to this Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 45 - Entry into force

1. The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.
2. For each State or regional integration organization ratifying, formally confirming or acceding to the Convention after the deposit of the twentieth such instrument, the Convention shall enter into

force on the thirtieth day after the deposit of its own such instrument.

Article 46 - Reservations

1. Reservations incompatible with the object and purpose of the present Convention shall not be permitted.
2. Reservations may be withdrawn at any time.

Article 47 - Amendments

1. Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.
2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.
3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of this article which relates exclusively to articles 34, 38, 39 and 40 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

Article 48 - Denunciation

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 49 - Accessible format

The text of the present Convention shall be made available in accessible formats.

Article 50 - Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic.

In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Annexure 10

GLIMPSES OF NHRC'S INTERVENTIONS AND FUTURE DIRECTION OF WORK ON DISABILITY

- The Commission has been encouraging the printing of Braille books. In the year 2005-6, the Hon'ble Chairperson specifically recommended the Chief Ministers of all States & UT administrations that the printing of books in Braille should go ***simultaneously*** with the printing of regular books.
- ***A Judicial Colloquium on Disability & the Law*** was organized in December 2005 at Delhi. The suggestions as extracted from the deliberations of the colloquium were as follows:
- Such colloquiums should also be organized at the State level so that the members of the lower courts could also be sensitized.
- Such colloquiums should also be organized at regular intervals so that an ongoing process of debate and information sharing can be established. The Registrars of High Courts have also expressed their views that such colloquiums should also be organized for judicial officers of all High Courts.
- Finally, the Judges expressed that they feel more sensitized to the issue of Dalits and the disabled through this Colloquium.
- In the meeting held on 26 May 2006 the Commission decided to initiate a project, "Common Sign Language for Deaf Children".
- In the Core group of NGOs held on 12, September 2007 it was suggested that:

i) Involvement of Panchayats and civil society for identification of the disabled.

ii) NHRC could consider holding a Conference on Disability there was a need to focus on the disabled amongst the poorest; there was need for holding 'Disability Adalats' on the lines of Lok Adalats to redress their grievances.

iii)Creation of public awareness on the Rights of Persons with Disability.
Accessibility of physically challenged to public places like banks, trains, buses was stressed and lack of toilets for the disabled in all-long distance trains was noted.

➢ **On Sign Language**

The Commission has been deeply concerned about the discrimination being faced by the persons with hearing impairment, as the deaf children generally do not receive education through the medium of sign language. The reason for this is the non-availability of child centred sign language in the country and the absence of sign language training from the teacher's education programmes for the deaf.

With a view to have a common Sign Language, the Commission organized a Consultative Meeting on 18-19 October 2004 in the Commission with Ministry of Social Justice & Empowerment, Ali Yavar Jung National Institute of Handicapped (AYJNIHH), Rehabilitation Council of India, British Council, JNU and representatives of NGOs. After extensive deliberations and number of meetings organized by the Commission, a project entitled "Indian Sign Language for Deaf Persons" was evolved. The role of the Commission in the project is that of facilitators.

Since then, Ali Yavar Jung National Institute of Handicapped (AYJNIHH) had organized a workshop wherein the modules prepared under the project were presented. The Commission urged the AYJNIHH to involve all stakeholders in this effort.

➢ The Commission played a major role in the drafting of the UN Convention on Rights of Persons with Disabilities and advocated for inserting Art. 33 relating to national implementation and monitoring mechanisms. Thereafter, it advocated with the Government of India for its early ratification, which has since been done in October 2007.

➢ As a follow/ up action, the Commission appointed a **Special Rapporteur** on Disability related issues and also constituted a **Core Group on Disability**.

The Core Group on Disability has the following **terms of reference**:

1. To advice the NHRC on matters connected with and incidental to the promotion, protection, and monitoring of rights mentioned in the Indian Constitution and laws for persons with disabilities and also as envisaged in Article 33 (2) of the UN Convention on the Rights of Persons with Disabilities
2. To support the NHRC in building capacity of primary stakeholders, and other stakeholders who are strategically important on the rights of persons with disabilities and to monitor recommendations made by the NHRC.
3. To study the functioning of focal points/coordination mechanisms set up by the Centre and States and to suggest improvements to the Commission for greater effectiveness.
4. To bring to notice of NHRC cases of violation of rights of persons with disabilities.
5. To advice the Commission on the changes to be brought about in the Indian laws and policies in the wake of India signing and ratifying the UN Convention on Rights of Persons with Disabilities for onward recommendation to Government.

➢ In light of its role as envisaged in Article 33 of CRPD, the Commission held **five regional workshops during 2008-09** in different parts of the country to monitor the rights of persons with disabilities with particular reference to education, employment, access and services.

The Objectives of the regional workshops are -

1. To assess whether existing Programmes and Policies for Persons with Disabilities are having the desired impact and to identify gaps in implementation, if any, and to suggest appropriate strategies to deal with them.
2. The Commission proposes to sensitize all stakeholders regarding provisions of UN Convention on Rights of Persons with Disabilities.

3. The Commission proposes to take up four areas, viz. Education, Employment, Access and Services to ascertain and monitor State-wise progress (both physical and financial) and new initiatives taken in these areas.

4. Evolve strategies, in partnership with SHRCs and NGOs with a view to monitor Education, Employment, Access and Services to PWDs.

The Commission has also evolved a format to collect detailed information with regard to right to education, employment, access and services being provided for the persons with disabilities.

The details of the Regional Workshop held in 2008-9, are as follows :

S.N.	Region	Place of Workshop	Collaborating Institution
	Northern Region (Jammu & Kashmir, Punjab, Haryana, Himachal Pradesh, Delhi, Uttar Pradesh, Uttarakhand, Chandigarh)	Dehradun	National Institute of Visually Handicapped, Dehradun
	Western Region (Rajasthan, Gujarat, Maharashtra, Madhya Pradesh, Goa, Daman & Diu, Dadra & Nagar Haveli)	Nasik/ Nagpur	ILS Law College, Pune
	Southern Region (Karnataka, Andhra Pradesh, Tamil Nadu, Kerala, Pondicherry, Andaman & Nicobar)	Belgum/ Hassan	National Law School of India University, Bangalore
	Eastern Region (Bihar, Jharkhand, West Bengal, Orrisa, Chattisgarh)	Ranchi/ Siliguri	West Bengal National University of Juridical Sciences, Kolkata
	Northeastern Region (Assam, Meghalaya, Tripura, Manipur Nagaland, Arunachal Pradesh, Mizoram, Sikkim)	Imphal	Manipur State Human Rights Commission

The more recent interventions of NHRC in respect of disability related matters include the following:

1. The NHRC has made some broad recommendations to the government of India in respect of a new law which is to replace the existing law on persons with disabilities. These recommendations have been made essentially in the light of the UNCRPD which India has since ratified.
2. The Commission has also made appropriate recommendations to the Government of India in relation to amendments to the Right Copy Act 1957, to address issues of visually disabled and the print disabled.
3. The publication of the updated version of the current booklet on the rights of persons with disabilities is also an important activity aimed at educating concerned stakeholders on the subject.
4. The Commission is actively considering recommending to the government of India to the effect that the optional protocol to the UNCRPD may also be ratified.
5. The Commission has written to the Ministry of Social Justice and Empowerment, Government of India seeking information as to whether persons with disabilities are being closely consulted with and actively involved in the preparation of the first country report on the progress of implementation of the UNCRPD.
6. The NHRC proposes to identify gaps in the implementation of the existing PWD Act in some states.
7. The Commission is considering a proposal to hold a national meet on rights of persons with disabilities to review progress on the implementation of the UNCRPD. Officials of the Union Government and the State governments will be invited to make presentations in the said meeting.
8. The interns who come every year to do internship with the NHRC are also sensitized on issues of rights of persons with disabilities. This is done in order to ensure that the future generations of lawyers, social activists, etc. are oriented to rights of persons with disabilities.

Future Direction

The future thrust of NHRCs work on disability will continue to be on monitoring protection and promotion of human rights and fundamental freedoms of persons with disabilities which figure in the disability specific legislations of India and also in the UNCRPD to which India is a party. Its work will also include the following:

a. Making recommendations for amendments in the existing relevant laws and policies
b. Building capacities of primary stakeholders and also of stakeholders of strategic importance on human rights with persons with disabilities
c. Raising awareness about rights of persons with disabilities among the general public
d. Taking cognizance of cases/complaints of violations of human rights of persons with disabilities.

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NATIONAL HUMAN RIGHTS COMMISSION
Faridkot House, Copernicus Marg, New Delhi 110 001, India
Tel: 23385368 Fax: 23384863
E-mail: covdnhrc@nic.in Website: www.nhrc.nic.in