

Legal Rights of Women with Intellectual Disabilities in India

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Abstract: A Person with a Disability means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his or her full and effective participation in society equally with others¹. Disability in developing countries has a correlation with poverty. Intellectual Sub normality is characterized by sub normal intellectual functioning, deficits in the areas of communication, social skills, self-care and variable capacity for independent living. The most important causes of Intellectual Disability include maternal infections, birth trauma, thyroid deficiency etc. along with genetic causes. Persons with Intellectual disabilities are the worse affected due to their inability to understand, access their basic human rights and even social security and are marginalized. Further, women with Intellectual Disabilities face more atrocities than their men counterparts because of many social factors like attitude of society towards them, abandonment by families, vulnerability of sexual abuses, social stigma and domestic violence in addition to poverty which affects their rehabilitation and inclusion in the society. Women with Disabilities often have no access to education, rehabilitation including vocational training or employment opportunities. They are often subjected to more ill treatment and suppression due to the reasons of lifelong care they need and considered as a liability to the family and society. The United Nations took the initiative for the protection of women with Mental retardation in the form of a Declaration on the Rights of Mentally Retarded persons in the year 1971. Many countries all over the world passed legislations after the UN initiative for the protection of the Rights of Persons with Mental Retardation. India signed and ratified both CEDAW² and the United Nations Conventions on the Rights of Persons with Disabilities³. In India, the Constitution through the fundamental Rights enshrines protection of discrimination on the ground of disability and gender⁴. Further, legislations like Mental Health Act⁵, Rehabilitation Council of India Act, Persons with Disabilities Act⁶, The National Trust Act⁷ and the Rights of persons with Disabilities Act, 2016 protects the rights of persons with Disabilities including women with Intellectual Disabilities. This research attempts to study the legal rights of women with Intellectual Disabilities (mental retardation) in India. [Section 2(s) Rights of Persons with Disabilities Act, 2016].

Keywords: Legal Rights, Intellectual Disabilities, Women with Intellectual Disabilities

1. Introduction

Disability is a part of human life. Every society all over the world have persons with disabilities. Including women with Intellectual Disabilities. According to WHO/World Bank report¹, 15% of the global population live with a disability and out of which about 80% of persons with disabilities live in developing countries* and the female prevalence is 19.2%*. While in India there is no accurate data available regarding the prevalence of women with disabilities. Historically people with disabilities were segregated, viewed as charity, keeping them in residential institutions and special schools. There is a progressive shift towards community and educational inclusion. Attitudes towards people with disabilities have changed drastically. There is movement of attitudinal changes due to viewing disability as a human right issue. This study examines the legal provisions available in India for women with Intellectual Disabilities and how legislations change the lives of these persons. Patriarchal values deeply rooted in Indian Societies. The notion of 'family honor' often restrict women's sexuality, status, mobility and choices. Social, economic and legal barriers constrain women's freedom to have own voice in the social spheres. Further, studies indicate that women belong to marginalized groups and with disabilities experience additional disadvantages. Amongst women with disabilities women with Intellectual disabilities are more relegated. Intellectual disabilities add serious challenges to the affected women in availing basic human rights, accessing information, resources, education, training and rehabilitation services which eventually deprive them decent and productive life. There is inadequate prioritization by families and limited resources in the society which further

reduces their chance to enjoy inclusion*. Only through appropriate legislations with adequate enforcement provisions the rights of women with disabilities can be achieved. Many legislations like Indian Lunacy Act* came into effect before independence. India ratified most of the United Nations Conventions and enacted many legislations.¹

Mental Health Act³, Rehabilitation Council of India Act⁴, PWD Act⁵, National Trust Act⁶ which tried to improve the lives of persons with disabilities. Government, Families and civil society are responsible and accountable for empowering women with disabilities through policies, schemes and legislations with strong implementation provisions. The latest Right of Persons with Disabilities Act 2016⁷ is considered as a landmark legislation for the inclusion of women with intellectual disabilities in India

2. History of Disadvantages faced by Women with Disabilities

Persons with Disabilities especially women face disadvantages are well documented by history of legislations to address exclusion and discrimination. There was a common practice of institutionalizing People with Disabilities during 19th century. There were reports of involuntary sterilization of women with disabilities. In the United States almost half of the states it was legal* (Buck v. Bell)⁸. While in the sixties, there was a mass movement of advocacy towards² protecting the rights of persons with

¹ WHO report 2011

² MHA Act 1987-separated Mental Retardation from Mental Illness

4. RCI Act 1994-

disabilities which in turn lead to many remarkable life changing legislations which lead to deinstitutionalization, the practice of raising children with disabilities by their parents, participation of adolescents with disabilities in their own communities with adequate provision of supports. The important legislations include Social Security Act 1935 (Title V) with provisions for services for people with disabilities. Important legislations in the US include Education of All Handicapped Children Act (1974), Rehabilitation Act, 1973 (Section 504), Americans with Disabilities Act (ADA), 1990 which is considered as the first comprehensive and equality legislation for persons with disabilities. ADA amended in 2008.

3. Influence of United Nations on Disability legislations of India

Since its inception, the United Nations promulgated treaties which implicitly protect persons with disabilities. Theoretically, each of the seven core United Nations Treaties applies to persons with disabilities but unfortunately rarely applied in practice. India ratified most of the UN conventions and treaties. Declaration on Rights of Mentally Retarded Persons* adopted by the UN General Assembly in the year 1971. The Declaration provided the following provisions UN Convention on Elimination of all forms of Discrimination against Women* recognized Mentally ill people as a separate category, the member nations shall ensure economic security to mentally ill, Special care shall be taken to the mentally ill community in social planning by the state. The Vienna Declaration and Program of Action enacted in 1993 which was not directed specifically to the area of Disabilities but it accelerated the social model of disability* by affirming that persons with disabilities should be guaranteed equal opportunity through the elimination of all socially determined barriers.

UNCRPD⁹ The purpose of UNCRPD is to promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect of their³ inherent dignity. Persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments with various barriers may hinder their full and effective participation in society on an equal basis with others. The Preamble of UNCRPD recognizes that women and girls with disabilities are often at greater risk, both within and outside the home of

violence, injury or Article 6 of UNCRPD is for Women with Disabilities and envisages

- 1) That 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 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.

The UNCRPD confirms the right to full legal capacity and right to access to justice in Articles 12 and 13. Persons with Intellectual Disabilities should be able to make legally binding decisions for themselves and access to justice system on an equal basis with others. India is a signatory of Incheon Strategy Mandates enhancing access to physical environment, public transport, knowledge, information and communication for PWD which include women with disabilities too.

Constitutional Rights for Persons with Disabilities in India

Like all Indian citizens women with Mental Retardation too can avail all Fundamental Rights as per the Constitution of India. Article 41 of the Constitution¹⁰ explicitly mention the term 'disablement' as a condition of which the State is to strive, to provide assistance in certain matters including education, work etc. However, for the most important Constitutional Rights which are relevant to women with Intellectual Disabilities are

- Rights against Discrimination Article 15(2)^{11,4}
- Article 21- Right to life and Personal Liberty, Right to Health flows from Right to life.
- Right to Education under Article 21(A) Right to Education

Indian Legislations for Persons with Disabilities in India

Indian legislations for the mentally retarded can be traced back to the following legislations

- Indian Lunacy Act 1912
- Mental Health Act 1987 which separated Mental Retardation from Mental Illness which is considered as a noticeable development. According to MH Act 1987 Section 2(1) defines Mental Illness as a person who is in need of treatment by reason of any mental disorder other than Mental Retardation.
- Rehabilitation Council of India Act 1993
- Persons with Disabilities Act (Equal Opportunities, Protection of Rights and Full Participation) 1995. The necessity of providing equal opportunities and inclusion of persons with Disabilities including women with Mental Retardation was realized for the first time in India through this legislation. Important provisions related to women with Intellectual Disabilities include Establishment of special schools, provision of free education till the age of 18 years, hostel facilities for women with severe mental

5 PWD Act 1995

6 National Trust Act 1999

7. RPWD Act 2016

8 Buck v. Bell 1927 U.S. LEXIS 20. Carrie Buck was a woman with Intellectual Disability (mental Retardation) who was living in a state mental institution in the United States of America. Her condition had been present in her family for the last three generations. A Virginia law allowed for sexual sterilization of inmates of institutions to promote the 'health of the patient and the welfare of the society'. Before the sterilization procedure, a hearing was required to determine whether the operation was a wise thing to do. Citing the best interest of the state, Justice Holmes affirmed the law in order to prevent the nation from 'being swamped with incompetence...there generations of imbeciles are enough'

⁹. UNCRPD- United Nations Convention on the Rights of Persons with Disabilities

11.11. Article 15(2) Protective Discrimination

retardation in every district headquarters. 3% reservation in employment in government jobs.

- The National Trust Act 1999²³- To provide for the constitution of national body for the welfare of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple⁵

Disabilities and for matters incidental thereto. In National Trust Act Section 2(g)(i) and (m) defines Mental retardation. Section 13 and Section 14 of the NT Act provides for the constitution of the Local Level Committees and procedure for appointment of guardianship for people with disabilities including women with mentally retardation.

- Criminal Law (Amendment Act), 2013
- Rights of Persons with Disabilities Act 2016

Rights of Persons with Disabilities Act 2016

India was one of the first countries to ratify the UN Convention on the Rights of Persons with Disabilities. In keeping with this International commitment, the Parliament of India enacted the Rights of Persons with Disabilities Act 2016 which ensure that persons with Disabilities shall enjoy the right to equality, life with dignity and respect for his or her own integrity with others.

The term Mental Retardation is replaced by 'Intellectual Disability'²⁴. Thus, there is a shift to Right based model.

Further, for the first time there is mention of special measures to be taken to ensure women and children with disabilities enjoy rights equally with others. There is Right to Legal Capacity, Right to inherit property, control own finances, accessibility to public buildings, right and accessibility to vote, choice of legal guardian, changing guardians etc. are remarkable. Right to inclusive education, reservation in education (5%). Measures are to be taken for the protection of PWD from being subjected to cruelty, inhuman and degrading treatments and from all forms of abuse, violence and exploitation including subject to research. First time India, there are provisions like if any atrocities on PWD including women with disabilities have been made punishable with imprisonment of 6 months extendable to 5 years and with fine. Availing benefits meant for PWD by anyone has also made punishable. Provisions of free legal aide, special fast track courts for PWD are there. One of the strong mandates of this legislation is on Accessibility and enshrines that all Public buildings to be accessible and all existing buildings to be made accessible within 5 years of the law coming in to effect. Standards to be formulated for accessibility of the Physical environment, Transportation, Information and Communication technology etc. Provisions of reservation for jobs in government sector (5%) but there is no reservation for women with disabilities in particular

The new Disability legislation²⁵ increased the number of disabilities from 7 to 21. The central Government will have power to add more types of disabilities in the list. The new list includes:

- 1) Blindness
- 2) Low vision

- 3) Leprosy Cured persons
 - 4) Hearing Impairment (deaf and hard of hearing)
 - 5) Locomotor Disability
 - 6) Dwarfism
 - 7) Intellectual Disability
 - 8) Mental Illness
 - 9) Autism Spectrum Disorders
 - 10) Cerebral Palsy
 - 11) Muscular Dystrophy
 - 12) Chronic Neurological Conditions
 - 13) Specific Learning Disabilities
 - 14) Multiple Sclerosis
 - 15) Speech and Language Disability
 - 16) Thalassemia
 - 17) Hemophilia
 - 18) Sickle cell disease
 - 19) Multiple Disabilities including Deaf-blindness
 - 20) Acid attack victim and
 - 21) . Parkinson's disease
- This has broadened the range of disorders and affected people would be eligible to benefits and reservations.

4. Judicial Pronouncements in India

Indian Judiciary has adopted a progressive approach towards enforcing the rights of persons with Disabilities including women with disabilities. The Criminal Law (Amendment Act, 2013 includes several provisions to safe guard the rights of women with disabilities. The Government of India established the 'Nirbhaya Fund' for schemes aimed at 'prevention, protection and rehabilitation' of survivors of sexual violence. While specific fund for PWD exists in India and women with disabilities are not explicitly mentioned in the Nirbhaya fund. As women who are subjected to sexual violence such compensations are important especially those who live in rural areas or from marginalized strata of the society.

Landmark case laws include:

Chandan Kumar Banik v. State of West Bengal¹² -In this case a PIL was filed in the Supreme Court against a state run mental hospital where the conditions of patients were found to be pathetic. The Hon'ble Supreme Court of India expressed its displeasure in chaining the inmates, ordered to appoint a competent chief medical officer with administrative abilities and provisions for toilets for women inmates in the hospital.

Legal Aid Committee v. State of MP¹³, the Supreme Court strongly condemned the practice of chaining the inmates of Gwalior Mental Asylum in 1994. Thus the concept of treating persons with intellectual disabilities with dignity is affirmed by the Apex court.⁶

In Reena Banerjee v. UOI¹⁴, pathetic conditions and ill-treatment's and negligence resulted in deaths of girls with intellectual disabilities in Government homes across India. The Hon'ble' Supreme Court directed the central and State Coordination committees set up under the PWD Act 1995 to monitor, review and evaluate the implementation of

⁶12.Chandan Kumar Banik v. State of West Bengal 2010

13. Legal Aid Committee v. State of MP 1994 5 SC 27

programs and condition of Government homes and for introducing welfare measures. Supreme Court had given six months' time for taking remedial measures and directed the Secretaries of the Union and States for Ministry of Health and Social Welfare to monitor the action taken by the coordination committees.

In *Suchita Srivastava v. Chandigarh Administration* (2009)¹⁴ the reproductive rights include a woman's right to carry a pregnancy to full term, to give birth, raise children and these rights are part of a woman's right to privacy, dignity and bodily integrity. This case aroused in the context of medical Termination of pregnancy Act 1971 based on certain conditions which is not kept pace with the needs, changing times and medical advancements. This act limits the woman's' right to reproductive choices. In this case the Supreme Court of India urged the authorities to look beyond social prejudices and accept the fact that even people with borderline, mild or moderate mental retardation are capable of being good parents and ordered that the best medical facilities should be made available to the woman (who is person with intellectual disability) during her pregnancy and post-natal period.⁷

5. Conclusion

Women with disabilities have an invisible existence in the societal cycle. Parents face the stigma of having a child with a disability especially a girl child with Intellectual Disability more. The enactment of National Trust Act for the welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple disabilities Act, 1999 for the first-time recognized women with disabilities as a vulnerable group. Rights of Persons with Disabilities Act, 2016 is a new beginning which provides rights for women with disabilities. While many sensitive issues like rights of women with Mental Retardation subjected to rape and resulting unwanted pregnancies as well as debatable issues related to the interpretation of statutes relevant to the situation need to be considered. Private organizations and employers who employ more Women employees with Intellectual and developmental disabilities need to be encouraged.

Even though first time there is provision of right to information on sexuality women with Intellectual disabilities tend to be less informed about sexuality. They face negative attitude towards sexual actions, experiences of sexual abuse this in turn affect their quality of life. There is a requirement of orientation about their sexuality to parents and care takers and sex education is required.

There is no mention of rights of women with disabilities in sexual harassment at work place and domestic violence legislations.

There should be special measure for inclusion of women with disabilities in the 33% reservation for women in local governance. Women with Intellectual and developmental disabilities were invisible within the social life and were left

out of consideration during the implementation and interpretation of law and Policies of the country. The rights of women with Intellectual Disabilities will be protected only if the new Act will be implemented. Provision of special disability court need to be functional in all states and public servants at all levels should be given orientation about disabilities and legislations. The Government as well as Private sector service providers and the society as a whole need to be sensitized towards the rights, dignity and equality of women with disabilities and the provisions of the new disability legislation so that the inclusion of women with intellectual disabilities will be a reality.

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