

HUMAN AND LEGAL RIGHTS OF MENTALLY RETARDED PERSONS: AN ASSEMENT

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I Introduction:

For most of the civilized societies human rights have assumed the status of a new touchstone. They are premised on an assumption that every one inherently possesses them by virtue of being born as a human being. However, as social group or as community of people or even individually, the mentally challenged have remained ignored, isolated and sidelined. Thus the mentally ill face indignities, discrimination and invisibilisations in almost every walk of life today.

In India and around the world, there has been the neglect of the rights of persons with mental disabilities. Though this is a direct outcome of the lack of strong leading organizations, it is also due to the absence of a collective voice of several service focused organizations¹. This trend in the movement has created the lacuna in the law, both in letter and spirit. The gist of this prime criticism is that the law currently in force has not done, cannot do, justice to the mentally disabled².

All persons with disabilities are largely thought of as having similar issues and facing similar violations, which assumes they need similar remedies. Access, housing, non discrimination, violation of human rights, medical care, assistive aids and appliances may be amongst those concerns where both the mentally and physically disabled stand on the common ground³.

Traditionally, mentally retarded people have been treated as second class citizens in every legal system. Law makers, judges and the most of the public, being poorly informed of the facts,

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¹ Ponday Shruthi ;,Chirimer Priyanka and Desouza Deepak, "*Disabilities and the Law*"(Human Rights Law Network, a Division of socio-Legal information Center, New Delhi June -2005)

² Ibid.

³ Ibid.

which have tended to view retarded persons as somehow less fully human than themselves and therefore not entitled to citizenship status⁴.

In the past and still, to an unfortunate extent –mentally retarded people in our society have suffered denial or infringement of a wide range of basic rights. Those, who are confined to institutions necessarily, suffer infringement on their fundamental right to liberty and on many other fundamental rights that depend on liberty, such as the right to travel, the right to free association and the right to privacy. Once committed to an institution, mentally retarded people are often subjected to other deprivations, as well, including denial of their right to medical treatment, to rehabilitation, to education, to autonomy, to privacy and to sexual expression. Often they are denied even the right to protection from harm⁵.

In the community, mentally retarded persons are also too frequently deprived of fundamental rights enjoyed by normal citizens, including the right to education, to enter into a contract, to be licensed, to buy insurance, to vote and to be free from discrimination in securing suitable employment and housing. Discrimination against mentally retarded people may deprive them of virtually all of their legal rights⁶.

The provisions relating to the human rights of mentally ill patients have hitherto been neither specifically documented in any code nor been prescribed or established by Indian judiciary in India. But it is admitted on all hands that barring few exceptions, the mentally ill persons deserve the same privileges as enjoyed by any other human being. They include a right to better and more accessible care, to good recovery and increased hopes of integration into society. However, the stigma, residual disability and its intolerance, and more importantly the inability of mentally retarded to protest against exploitation, have all made basic human rights of mentally retarded a major cause of growing concern.

The term human rights in a broad sense mean “those claims which every individual has or should have upon the society in which he/she lives. According to Richard Wamerstorm, it means, one ought to be able to claims as entitlements (i.e. human rights) those minimal things without which it is impossible to develop one’s capabilities and to live life as human beings.

⁴ Friedman R.Paul, *Mental Health Prospect*, at 1220, N.W. Washington D.C, 20036.

⁵ *Ibid* p 2036

⁶ *Ibid*.

Thus human rights are about balancing the rights of all of us as individual within the community. In the context of mentally retarded persons, it not only refers to their privileges but remedial right of protection against infringement of their human and other rights.

This article draws on the rights of mentally retarded such as the right to the highest attainable level of mental health care, the right not to be subjected to a clinical trial, equal access to mental health care, and the right to be safeguarded against unjust involuntary acts.

II INTERNATIONAL HUMAN RIGHTS LAW AND MENTAL RETARDATION

International human rights law provides a powerful and often neglected method to advance the rights and freedoms of persons with mental disabilities. There is a need to more effectively apply these rights to the mental health needs of this vulnerable section of the society. Mental health policy affects human rights and human rights violations affect mental health. The positive promotion of both mental health and human rights are to be promoted together.

The human rights standards established by the international and regional bodies are meant to be considered as the minimum core standards that are applicable while international human rights law has grown significantly over the last 35 years, the development of international law to protect the rights of those mentally illness has been slow and limited. Overall, human rights forums have been generally irresponsible to the situation and specific needs of people with disabilities⁷.

- (I) The first international recognition of a right to health care was in the Universal Declaration of Human Rights (UDHR) adopted in 1948⁸. The UDHR recognizes inter alia the right to a standard of living, adequate for health and wellbeing, and to medical care. There is no specific mention of mental health. The United Nations was founded on the principles of equality for all.
- (II) It is in article 12 of the U.N convention on Economic, Social and Cultural Rights (ICESCR)⁹ that the issue of mental health is first addressed. It states : “the state parties to the present Covenant recognize the right of every one to the

⁷ The Human Rights Committees, General Comment NO-18, Non –Discrimination, UN Official Records, Supplement No:40.pp 173-175.

⁸ The Declaration of Human Rights (10 Dec.1948), GA Res 217A (III)

⁹ The Convention on Economic, Social And Cultural Rights (16 Dec 1966) UN Doc A/631, GA Res 2200A(XXI).

- enjoyment of the highest attainable standard of physical and mental health “. Section 2 (d) of article 12 states that there should be “the creation of condition which would assure to all, medical service and medical attention in the event of sickness”.
- (III) In the area of providing access to free medical services to mentally ill patients, Article 19 of 1969, Declaration on social progress and development could be relied upon , which calls for the provision of free health services of the whole population and of adequate preventive and curative facilities and welfare medical services accessible to all.
- (IV) “Declaration on the rights of mentally retarded persons “ was adopted by General Assembly , keeping in view the necessity of providing help to the mentally retarded persons in order to enable them to develop that abilities and promoting their integration in the normal life¹⁰. The Declaration provides a frame work within which national and international actions should be initiated for the advancement of rights set forth in the Declaration. The declaration lays down the following principles:
- 1) The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
 - 2) The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
 - 3) The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform a productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
 - 4) The mentally retarded person, whenever possible should live with his own family, or with foster parents and participate in different forms of community life. The family with which he lives should be provided with assistance.
 - 5) The mentally retarded person has a right to qualified guardian when this is required to protect his personal well being and interests.
 - 6) Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.

¹⁰ Proclaimed by GA Res 2856 (XXVI) of 20 Dec 1971.

- 7) The mentally retarded persons have a right to protection from exploitation, abuse and degrading treatment.
 - 8) Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their person and property.
- (V) The area of mentally retarded is also addressed in the U.N Declaration on the Rights of Disabled Persons (1975)¹¹. The Disability Declaration asserts an extensive set of civil, political, economic, social and cultural rights.
- (VI) The most specific and detailed international document in relation to mental health, is the U.N. Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care(MI Principles)¹².
- (VII) The Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13th Dec 2006, and was signed in the year 2007 by 82 member countries of U.N.O. It is the first comprehensive human rights treaty of the 21st century and is the first human rights convention to be open for signature by regional integration organizations. It makes a “paradigm shift” in attitudes and approaches to persons with disabilities. The Convention is a blue print to end discrimination and exclusion of the physically and mentally disabled in education, jobs and everyday life. Apart from these major conventions and covenants, there are many core U.N. Human Rights Instruments that are non-binding on this area of mentally retarded persons.
- (VIII) International year of Disabled Persons(1981), the General Assembly on 16th Dec 1978, decided to observe the year 1981, as international year for disabled persons with the following objectives:
- 1) Helping disabled persons in their physical and psychological adjustment to society.
 - 2) Promoting all national and international efforts to provide disable persons with proper assistance, training, care and guidance, to make available to them opportunities for suitable work and to ensure their full integration in society.

¹¹ UN Declaration on the Rights of Disabled Persons, GA Res 3447(XXX) 9 Dec 1975.

¹² NU Principles for protection of Persons with Mental Illness and Improvement of Mental Health Care GA Res 46/119 (17 Dec 1991).

- 3) Encouraging study and research projects design to facilitate the practical participation of disabled persons.
- 4) Educating and informing the public of the rights of disabled persons to participate in and contribute to various aspect of economic, social and political life.
- 5) Promoting effective measures for the prevention of disability and for the rehabilitation of disabled person.

III RIGHTS UNDER THE CONSTITUTION OF INDIA

The preamble of the constitution of India assures the equal treatment and equality of opportunity and status to all the citizens. No discrimination is allowed on the basis of race, religion, caste, place of birth, sex code or any of them etc. it assures the dignity of the individual. It is important to point out here that dignity of the individual is a fundamental notion behind all the fundamental rights recognized by number of international treaties and obligations. The preamble and part III of the constitution imposes a negative obligation on the part of the state that not to restrain the liberties and rights guaranteed under the same part. Further the state has been directed under various provisions of the constitution to extend similar treatment to all persons.

Article 41 declares that, the state shall , within the limits of its economic capacity and development make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age , sickness and disablement. Similarly Article 46 lays down an obligation on the state to promote with special care, educational and economic interests of the weaker section of the people, and protect them from social injustice and all forms of exploitation. Apart from this, various international conventions also compelled Indian government to join the worldwide movement to protect the dignity of mental retarded persons.

As citizens of India, they are entitled to all those human rights and fundamental rights which are guaranteed to all by the Constitution of India, their liability do not prevent them from enjoying those rights¹³ or their enjoyment is expressly or impliedly bared by the constitution or by any other statutory law. The fundamental right to life and liberty as interpreted by the Supreme Court of India in a number of land mark cases include the ‘right to live with human

¹³ See Part III of the Indian Constitution, Article 14-32

dignity and the right to health¹⁴. The Supreme Court has also laid down the maintenance and improvement of public health is one of the obligations that flow from article 21 of the constitution. This means that mentally ill have the fundamental/human right to receive equality mental health care and to human living conditions in the mental health hospitals. In the context of mentally retarded person, apart from above narrated rights, it also includes right to live, work as far as possible in the community, to privacy and to lead a normal family life¹⁵.

Thus the Indian constitution recognizes the right of every citizen (including mentally ill person) the right to life and personal liberty under Article 21. Further the Supreme Court has in a plethora of decisions¹⁶ held improvement in public health and medical services as an aspect of Article 21.

IV HUMAN RIGHTS UNDER THE MENTAL HEALTH ACT 1987 AND OTHER STATUTES:

The legislature has also enacted measures such as the Mental Health Act 1987¹⁷, the Rehabilitation Council of India Act 1992¹⁸, Persons with Disabilities Act 1995¹⁹, and the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999²⁰ that in multiple ways recognizes the mental health rights. Amongst these legislations, the Mental Health Act 1987 is the one which contains a very novel and explicit provisions for protection of human rights of mentally ill persons. Section 81 of the Act provides²¹:

- 1) No mentally ill persons 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 the purpose of research purpose unless (i) such research is of direct benefit to him for the purpose of diagnosis or treatment or (ii) such person being a voluntary patient has given his consent in writing or

¹⁴ P.V. Kapoor V. Union of India, (1992) Cir Lj 140 (Del)

¹⁵ National Human Rights Cases, In Re Medical Ethics, Rights of Disabled.ss

¹⁶ Dr. Upendra Bhakshi v. State of U.P (1983) 2 scc 308.

¹⁷ The Mental Health Act, 1987, NO.14 of 1987 (22nd May 1987).

¹⁸ The Rehabilitation Council of India Act, 1992. No-34 of 1992(1st Sept 1992)

¹⁹ Persons With Disabilities (Equal Opportunities, Protection of Rights and Fulparticipation) Act 1995.

²⁰ The National Trust For Welfare of Persons With Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 199, No 44 of 1999 (30th Dec 1999).

²¹ See Section 81 of Charter VIII of The Act 1987.

where such person is incompetent by reason of minority or otherwise to give valid 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, communication or communication pre-judicial to the treatment of mentally ill persons, no letter or other communications sent by or to a mentally ill person under treatment shall be intercepted or detained. Thus the doctrine of informed consent is particularly recognized under this Act, when patient voluntarily admits himself in the hospital or accepts treatment without any admission.

Another major achievement of the Indian Disability Movement is the persons with Disabilities Act 1995²². The preamble of this Act clearly declares its objectives 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.

Though the words disability has not been defined under the Act, but it may be pointed out that the Act covers seven disabilities under section 2(i) of the Act. The same clause of section 2 deals with mental retardation and mental illness. Mentally disabled people mean” mental illness “means any mental disorder other than mental retardation. Mental retardation means a conduct of arrested or incomplete development of mind of a person which is specifically characterized by sub-normality of the intelligence. Prior to the enactment of the Persons with Disabilities Act, Mental health Act 1987 was in application.

Thus historic legislation is a cornerstone of evolution of jurisprudence on the rights of persons with disabilities in India. As a result, disability concerns have come in to sharp focus.

V CONCLUSION

Although People with mental illness and disabilities can experience some of the toughest living condition that exists in any society. Their hardship comes from stigma, neglect and lack of legal protection. One approach to improve these living conditions is to tackle this neglect as a denial of human rights to a marginalized and vulnerable section of population.

²² Supra , P 5.

By taking a human rights approach on behalf of our persons we have the potential of being more successful in improving the lives of those who are voiceless and do not form a voting constituency.

At the international level the concern for the mentally retarded persons is well known. The United Nations since its coming in to force in 1945 has made largest attempt in addressing problems related to the mentally retarded persons. The Constitution of India in part III and IV has echoed the sentiments expressed in the chapter of UN and the Universal Declaration of Human Rights. Further the government of India in the last 64 years has addressed sincerely the problems relating to the mentally retarded persons and has given them all protection which is given to others.

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