

# Disabled persons and Access to Criminal Justice in India



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## Abstract

Law should be effective and everyone should get justice. Providing access to justice to all is considered as one of the basic principles of Rule of Law; without which, people will be unable to have their voice heard, exercise their rights, challenge discrimination or get remedy. But, unfortunately the criminal justice system of India is not so strong where even a normal being faces difficulty in getting justice then we can very well imagine the condition of disabled persons who are isolated from the mainstream of society. Their marginalisation and disempowerment contributes significantly to their victimisation. They are victims of violent crimes, physical and sexual abuse, neglect and exploitation at much higher rates than persons without disabilities, as they are viewed as “easy targets” due to an assumption that they are less capable of defending themselves physically or mentally. People with developmental disabilities are at particular risk because their cognitive abilities and social skills may be compromised, making them more susceptible to predators. Access to justice is also difficult for women and girls with disabilities as they experience ‘double discrimination’ due to the stigma associated with their sexuality and disability. And they often do not get the support they need at every stage of the justice process and even tortured and harassed by the so called protectors of law.

**Keywords:** Disability, Disabled Persons, Criminal Justice

## Introduction

*“We need to keep making our streets safer and our criminal justice system fairer- our homeland more secure, our world more peaceful and sustainable for the next generation.”*

Barack Obama

Justice and Peace are two sides of the same coin. Prof. Roscoe Pound said that Justice is the highest interest of man on Earth. The most important function of a state is that the Law should be effective, so that everyone should get justice and there is peace and harmony. Lord Boynce once observed that there can be no better test of the excellence of a Government than the efficiency of judicial administration. Administration of Justice implies the maintenance of peace and order within the political community by means of state forces. Salmond has pointed out that Justice can be administered only through the instrumentality of law<sup>1</sup>. The administration of Justice has evolved through stages. At the primitive stage, private vengeance and self help were the only remedies against the wrong doer. The second stage was characterized by the State coming into existence in its rudimentary form when it did not have enforcing powers against offenders. And in the third stage, wrongs were redressed by payment of compensation to the victim and in the course of time, the state exerted its authority and took upon the responsibility of administering justice and punishing the wrongdoer under the law. Administration of Justice through courts brings uniformity, certainty, impartiality and equality. Access to justice for all became individual's formal right to litigate or defend.

In Ancient India, the citizens had always access to the king for justice since beginning. The main purpose for Access to Criminal Justice is to get the wrongdoer punished through the instrument of law. Punishment necessarily implies some kind of pain inflicted or some kind of loss caused to the offender for his criminal act. The right to get criminal justice has been considered even under the ancient legal system of the world for the protection and welfare of the state and its people. Manu and Kautilya propagated Indian concept of Justice. According to Manu, *Danda* (punishment) is the essential characteristic of law. He argued that “Punishment keeps the people under control, protects them and it remains

awake when people are asleep. So the wise has recognized punishment itself as a form of 'Dharma'.

The concept of Dharma governed Hindu life ever since the Vedic age, and everyone from the King down to the common man was supposed to follow it. Kautilya's Arthashastra<sup>2</sup> contained and elaborate account of economic, political and legal administration and the procedure to be followed by courts for dispensation of justice in the 4<sup>th</sup> Century B.C. but with the advent of Mughal Rule, the ancient criminal justice system was replaced by their own system and which in turn was replaced by the British modern criminal justice model. And when the Indian courts absorbed the common law of England, the Right to Access to Courts became part of our law even before the formation of Constitution.

#### **Aim of the Study**

The main aim is to understand the problems faced by mostly ignored group of the society, i.e. persons with disability, in getting justice.

This paper outlines the difficulties faced by disabled persons in accessing justice and also the legal provisions in this regard and suggests the measures to combat the problems faced by them in getting justice.

#### **Access to Criminal Justice in India**

'Access to Justice' means having recourse to an affordable, quick, satisfactory settlement of disputes from a credible forum<sup>4</sup>. In our Constitution, it is placed on the highest pedestal of fundamental right. Access to justice is inbuilt in Article 14 which guarantees equality before law and equal protection of laws.<sup>5</sup> As in 1956, the Apex Court while interpreting Article 14 decided that our Constitution is not meant only for the elite, but it is also for "the butcher, the baker and the candlestick maker"<sup>6</sup>. Articles 22(1) and 22(2) specifically ensure the 'access to justice' for persons who are arrested and detained in custody. Article 39A states that the state shall provide free legal aid so as to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. But in spite of these provisions, injustice is rampant across the country and the marginalized are unable to seek justice as they bear the brunt of a system that is broken at various levels. We follow an adversarial model of adjudication which is characterized by high cost, delay, uncertainty of law, lawyer dominated approach and total lack of parity of power between the two parties to the litigation and unfortunately the criminal justice system of India has collapsed. Where a normal citizen found himself helpless in getting justice we can very well imagine the condition of disabled persons.

#### **Disabled Persons and Access to criminal Justice**

Disabled persons are isolated from the mainstream society. Their marginalization and disempowerment contributes significantly to their victimization. Negative attitude towards disability objectify, devalue and dehumanize them, plays a major role in making such disables more vulnerable to crimes. When they are dehumanized, it is easier to justify segregating in institutions, sterilizing against their will, forcing them to work for unacceptably low

wages and in a climate of such imposed hopelessness and disenfranchisement, crimes against them flourish rapidly.

#### **Disabled Persons are more prone to crimes**

Any form of Disability is an unfortunate part of human life as it effects not only the natural way of living but also despair component strength and power. Persons with disability are most disadvantaged section of society, they are also neglected in their own family. As per the report of World Health Organization 2011, fifteen percent of the world's population suffers from one or other disabilities and almost one fifth of the disabled person of the world lives in India<sup>7</sup>. They are victimized at much higher rates than the rest of the population, and are often targeted specifically because of their disabilities. There are social, cultural, economic, physical and psychological factors that contribute to victimization of disabled persons. Some of the factors are:

1. The commission of crime against disabled depends upon the nature of the disability and availability of opportunity to commit offence;
2. Negative attitude of society towards disability and are physically less capable of defending themselves because of deformity;
3. The exclusion or isolation from the society and poverty of disabled people and attitude of their families towards them;
4. There is lack of support, advocacy and safeguards and face humiliation even in shelter homes. Disables in institutions or shelter homes are victimized more because they inherently promote abuse or dehumanization and barely get chance to report against such crimes.
5. Women with disabilities face double discrimination as one because of Gender and other is due to their disabilities;
6. The level of abuse in state institutions and attitude of law protectors towards them; and
7. Perceptions about the credibility of disabled victims as they are not considered as reliable witnesses.

Despite the prevalence of abuse among disabled persons, more than half of victims never seek judicial assistance. They are often reluctant to report acts of physical aggression, domestic violence, sexual assault, and other crimes against them. The most common reasons for not reporting a crime to authorities are as follow:

1. Most of the crimes against them are committed by their closed ones or their care takers and hence there is fear of getting the criminal into trouble as this could snap their bonding and, as a result, jeopardizing their own living arrangements or personal support.<sup>8</sup> The greater the number of carers a disabled person has, the greater the risk of crime being committed
2. They believe that the police would not help them and they are neither well trained to assist disabled persons.
3. There are assumptions that the crime wasn't important enough to report as they faced such crimes since beginning and were always told that it is usual course of their lives.

4. They are not even considered as reliable witnesses and complaints made by them are either dismissed or ignored.

#### **Women and Girls with Disabilities**

In India, where female foeticide is rampant and the girl-child is unwelcomed, a disabled girl-child is at the receiving end of even more contempt and neglect.<sup>9</sup> Access to justice is particularly difficult for women and girls with disabilities largely because of the stigma associated with their sexuality and disability. It is an intersectional category dealing with gender-based as well as disability-based violence. Women with physical disabilities find it more difficult to escape violence. Those who are deaf may not be able to call for help or easily communicate abuse and those who have intellectual or psychosocial disabilities may not know that non-consensual sexual acts are a crime that should be reported<sup>10</sup>. And they often do not get the support they need at every stage of the justice process, such as reporting the abuse to police, getting appropriate medical care, and navigating the court system. Women and girls on whom rape or other sexual offences committed often suffer humiliation at police stations, hospitals and even in courts. Police are unwilling to register their complaints; victims and witnesses receive little protection and are harassed during interrogation, and medical professionals still conduct degrading "two-finger" tests.<sup>11</sup> These obstacles to justice and dignity are compounded by inadequate health care, counselling, and legal support for victims during criminal trials. They don't even have right to reproduction and their pregnancies are terminated without their consent.

#### **Legal and conventional Provisions for Access to Justice**

##### **UN Convention on the Rights of Persons with Disabilities, 2006**

India has ratified the Convention on the Rights of Persons with Disabilities, 2006 (CRPD) in 2007 that ensures access to justice for persons with disabilities. This Convention directs the States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others 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 and shall promote appropriate training for those working in the field of administration of justice, including police and prison staff<sup>12</sup>. They shall not be subjected to torture or to cruel, inhuman or degrading treatment or punishment and no medical experiment shall be performed without their consent.<sup>13</sup> It further provides that States Parties shall make 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.<sup>14</sup>

##### **The Rights of Persons with Disabilities Act, 2016**

This Act is the major legislation for disabled persons in India based on the Convention of 2006 which protects all persons with disabilities from abuse, violence and exploitation and provide equal access to

court in case of violation of their rights. Some of these provisions are enlisted below:

1. Protection from torture and from cruel, inhuman or degrading treatment<sup>15</sup>: The appropriate Government shall take measures to protect persons with disabilities from being subjected to torture, cruel, inhuman or degrading treatment and no research on disabled can be conducted without prior permission from the disabled persons or authority.
2. Protection from all form of abuse, violence and exploitation<sup>16</sup>: cognizance of such offences shall be taken and prescribe the procedure of reporting such incidents and legal remedies should be provided to victims. The state shall take step to rescue, protect and rehabilitate such victimized and also create awareness among them. Information of such incidents shall be given to the Executive Magistrate<sup>17</sup>, who shall take immediate steps to stop or prevent its occurrence, as the case may be, or pass such order as he deems fit for their safe custody or providing maintenance to them. The police on receiving information of such crime shall inform the victim-
  - a) right to apply for protection and the particulars of the Executive Magistrate having jurisdiction to provide assistance;
  - b) the particulars of the nearest organisation or institution working for the rehabilitation of persons with disabilities;
  - c) the right to free legal aid; and
  - d) the right to file a complaint under this Act or any other law dealing with such offence<sup>18</sup>.
3. Right of Access any court, tribunal or any other Authority<sup>19</sup> Persons with disabilities have the right to access any court, tribunal, authority, commission or any other body having judicial or quasi-judicial or investigative powers without discrimination on the basis of disability. The appropriate Government shall take steps to put in place suitable support measures for persons with disabilities specially those living outside family and those disabled requiring high support for exercising legal rights
4. The National Legal Services Authority and the State Legal Services Authorities shall make provisions including reasonable accommodation to ensure that persons with disabilities have access to any scheme, programme, facility or service offered by them equally with others and provide legal assistance to them. The appropriate Government shall take steps to make available all necessary facilities and equipment to facilitate recording of testimonies, arguments or opinion given by persons with disabilities in their preferred language and means of communication.
5. Reproductive Right: Women have right to reproduce<sup>20</sup> and shall not be subjected to any medical treatment which leads to infertility without her consent. Section 3 of the Medical Termination of Pregnancy Act, 1971 that pregnancy of a woman cannot be terminated without her consent.

In *SuchitaSrivastava v. Chandigarh Administration*<sup>21</sup>, the Supreme court upheld that even a mentally retarded woman has right to reproduction.

6. Special Courts are designated in each district to handle cases concerning violation of rights of Persons with disabilities for speedy trial<sup>22</sup>.

#### **Punishment for offences**

The Act also makes the following acts punishable with imprisonment for a term, which shall not be less than six months but which may extend to five years and with fine<sup>23</sup>:

1. Intentionally insults or intimidates with intent to humiliate a person with disability in any place within public view;
2. Assaults or uses force to any person with disability with intent to dishonour him or outrage the modesty of a woman with disability;
3. Having the actual charge or control over a person with disability voluntarily or knowingly denies food or fluids to him or her;
4. Being in a position to dominate the will of a child or woman with disability and uses that position to exploit her sexually;
5. Voluntarily injures, damages or interferes with the use of any limb or sense or any supporting device of a person with disability;
6. Performs, conducts or directs any medical procedure to be performed on a woman with disability which leads to or is likely to lead to termination of pregnancy without her express consent, except when registered medical practitioner found it necessary and also with the consent of the guardian of the woman with disability.

The Criminal Law Amendments, 2013 laid down provisions that aimed at enabling the participation of women and girls with disabilities in the criminal justice process such as:

1. The right to record their statement with police in the safety of their home or a place of their choice<sup>24</sup>;
2. The right to have their police statements videotaped<sup>25</sup>;
3. The right to assistance by a "special educator" or interpreter when the complaint is recorded and during trial; and
4. Exemption from having to repeat their videotaped statement at trial, subject to cross-examination.

#### **Conclusion**

Disabled people are usually not allowed access to mainstream of the society and are more likely than non-disabled people to experience crimes. They report crime less frequently because of their own disabilities or social barriers or any other reason and because of this the offenders do not get punished and if any, then they are more likely to receive leniency in sentencing because of the attitude of Police, Judiciary etc. towards them. Responding to crime victims with disabilities poses unique challenges to the criminal justice system, which is often not equipped to meet their needs. It can be improved by training better advocates. Advocates not only must be knowledgeable concerning relevant laws and

regulations, but also must be able to interact effectively on a personal, professional level with persons who have disabilities.

#### **Suggestions**

1. Laws and Policies are sufficiently framed but Proper implementation to protect rights of disabled persons is necessary;
2. Advocates are the medium for getting justice and for this, they should be trained efficiently not only regarding knowledge of Disability law, but also must be able to interact effectively on a personal, professional level with persons with disabilities. For providing justice it is equally important to understand the problem and for which advocates are require to have friendly attitude towards disables.
3. It is necessary to ensure that police, judicial officers, medical officers and judges receive adequate training for dealing with disabled persons and also for survivors of sexual violence, including women and girls with disabilities. there should also have "special educators" in Courts as well as in Police Department, who can identify disability accurately and provide support or other facilities;
4. There is a need to make constitutional amendments by laying explicit provisions for Persons with Disability.
5. As disables are subject matter of medical science, it is necessary to take assistance of medical departments and follow the protocols for medico-legal care to Disables and for survivors/victims of any or sexual violence.;
6. Another reason for crime rate against disables is lack of available data. Last census available for disabled persons is of years back. It is necessary to have authentic and reliable data of disables and problems witnessed by them in day to day life.
7. It is also necessary to gather and disaggregate data on sexual and gender-based violence, especially against women with disability and to government should lay down policies and initiate programmes so as to better address the needs of such women;
8. Compensation should also be provided uniformly to all victims, especially to assist in litigation and medical expenses and to other urgent needs. Sexually abused disables should be provided extra care and assistance.

#### **Endnotes**

1. *P.J. Fitzgerald: Salmond on Jurisprudence, 12<sup>th</sup> Ed. Salmond defined law as 'the body of principles recognised and applied by the State in the administration of justice.'*
2. *The Arthashastra consists of fifteen chapters, 380 shlokas and 4968 sutras and dealt with a wide variety of subjects like civil administration, criminal justice system, war, etc.*
3. *Rao P.P., 'Access to Justice and delay in disposal of cases', 30 Indian Bar Review 208 (2003)*
4. *Indira Sawhney v. Union of India , A.I.R. 1993 S.C. 447 (India)*

5. *Justice Vivan Bose in Bidi Supply Co. v. Union of India, A.I.R. 1956 S.C. 479 (India)*
6. *World Health Organization, World Report on Disability, 2011.*
7. *Dick Sobsey in his book "Violence and Abuse in the Lives of People with Disabilities" (1994), suggests that the four most common offenders against disabled people are disability service providers, acquaintances and neighbours, family members, and other disabled people. Approximately two-thirds of the people who abused someone with an intellectual disability met that person through a disability service. Sobsey concludes that "much off the excess risk of abuse experienced by people with disabilities may result from their exposure to the (disability) service system".*
8. *Laura Hershey, 'An Interview with Dr Anita Ghai, leading activist for Rights of Disabled Women', Disability World Issue No.8 ,2001 (www.disabilityworld.org/09-10\_01/women/ghai.shtml)*
9. *"Kanchana," a 19-year-old girl with an intellectual disability from a village in West Bengal, was raped several times in 2013 by a local man and was not aware that she should report being raped, which was only discovered when she was five-months' pregnant. And her intellectual disability made it difficult to explain to the police what had happened.*
10. *(Report on 'barriers to justice and support services for sexual assault survivors in India', Nov. 2017)*
11. *"Invisible Victims of Sexual Violence: Access to Justice for Women and Girls with Disabilities in India", Apr. 4, 2018, by Human Rights Watch (HRW), an international non-profit Organisation.*
12. *Article 13 of the CRDP, 2006.*
13. *Article 15 of the CRPD, 2006.*
14. *Article 16 of th CRPD, 2006.*
15. *Section 6 of the Right of persons with Disability Act, 2016.*
16. *Section 7 of the Act,2016.*
17. *If the Executive Magistrate finds that the alleged act or behaviour constitutes an offence under the Indian Penal Code, or under any other law for the time being in force, he may forward the complaint to that effect to the Judicial or Metropolitan Magistrate, as the case may be, having jurisdiction in the matter.(Section 7(5))*
18. *Section 7(4) of the Act of 2016.*
19. *Section 12 the rights of disabled persons Act, 2016.*
20. *Section 10 of the Rights of disabled Persons Act, 2016.*
21. *(2009) 9 SCC 1.*
22. *Section 84 of the Act of 2016*
23. *Section 92 of the Act of 2016*
24. *Section 54-A of Crpc 1973*
25. *Proviso of Section 157 and of 161 of the Crpc 1973*