

**RIGHT OF EQUALITY AND NON-DISCRIMINATION FOR PERSONS WITH
DISABILITIES:
NEED OF CONSTITUTIONALISATION UNDER ARTICLE 15 OF THE
CONSTITUTION OF INDIA**

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ABSTRACT

The Constitution of India prohibits discrimination on the basis of religion, race, caste, sex, and place of birth (Article 15), but not on the basis of disability. This omission has recently come under a lot of criticism, from the CRPD committee and from the disability rights activists and organizations. There has been a constant demand to include disability as a prohibited ground of discrimination under Article 15. This thesis goes behind this demand and explores the need and importance of constitutionalizing disability into the Constitution of India by including it as an enumerated ground of discrimination under Article 15. The thesis relies on an extensive assessment of the domestic legal framework in India to assess the current position on the right of equality and non-discrimination for persons with disabilities in India. This assessment reveals that the current legal framework not only creates limitations on the rights of disabled persons but also demonstrates a pattern of institutional ableism. I contrast this position with the relative position of the right to equality and non-discrimination in South Africa, where disability has been specifically enumerated as a ground of discrimination. It was found that a strong constitutional commitment to equality and non-discrimination for persons with disabilities guides the courts at all levels of the judicial process in South Africa.

Therefore, it is argued that right of equality and non-discrimination should be constitutionalized in India and elevated from a statutory right to a constitutional right. This is necessary to undo the historical injustice of institutional ableism against persons with disability and place them as rights holders along with other minorities. The specific importance of Article 15 over the general equality claim under Article 14 is highlighted in this regard. Comparing and contrasting the positions in India and South Africa, it is also argued that constitutionalizing should happen by including disability as an enumerated ground of discrimination under Article 15 over the alternative of recognizing it as an analogous ground under the same provision. For this purpose, this thesis highlights the advantages and disadvantages of both approaches. The thesis concludes with the idea that the Indian state should constitutionalize the right of equality and non-discrimination for persons with disabilities under Article 15 of the Constitution through a constitutional amendment that specifies disability as a prohibited ground of discrimination.

INTRODUCTION

The Constitution of India holds deep philosophical importance for the country's legal, social and political structure. The judicial culture continuously relies on the constitution to grant rights-based protection to minorities. The Supreme Court of India has constantly been applauded for its role in interweaving international human rights norms into constitutional provisions through its expansive interpretation of Article 21, and its use for the existing fundamental rights in this regard.¹ For this reason, it has been called the ‘bulwark of individual rights’.² The fundamental right, especially the right to equality, has been a consistent tool at the hand of the judiciary in the process.

Article 15 of the Constitution of India provides for a right against non-discrimination. As per this right, discrimination is prohibited based on “religion, race, caste, sex, place of birth.”³ It doesn’t explicitly prohibit discrimination based on disability. Disability remained out of the purview of the constitutional makers, and hence there is no reference to disability under Article 15.⁴ India ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), it enacted the Rights of Persons with Disabilities Act (RPWD Act). It is important to note that the Parliament did not change the Constitution in response to the ratification of UNCRPD.

However, there is a growing consciousness around the need to specifically address discrimination on the basis of disability. In 2016, Parliament Member, Shashi Tharoor introduced the Equality

¹ Vijayashri Spipati, Human Rights in India - Fifty Years after Independence, Denver Journal of International Law and Policy, 26 (1) 1997.

² *Ibid.*

³ Constitution of India, Article 15(1) and 15(2).

⁴ Constituent Assembly of India Debates, Vol. VII, 29 November 1948. Available at <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C29111948.html>. Last accessed 30th June 2022.

and Anti-Discrimination Bill.⁵ This was inspired by the Equality Bill drafted by Dr. Tarunabh Khaitan.⁶ In 2019, an organization started its advocacy to get comprehensive equality legislation in India with its Equality Bill 2019.⁷ All these drafts expressly prohibit discrimination on the basis of disability because the constitutional protection provided by the current framework only extends to a limited category of people.

On 30 October 2015, India submitted its report on the compliance of its domestic framework and the provisions of UNCRPD to the Committee on the Rights of Persons with Disabilities (CRPD Committee).⁸ In its report, it indicated that persons with disabilities are protected by Article 14 (which provides that the state shall not deny any person equality before the law or equal protection of law), Article 15 (which prohibits discrimination on the grounds of religion, race, caste, sex, place of birth or any of them) and Article 16 (which guarantees equality of opportunity in matters of employment).⁹ The same has been contested by the disability rights organizations, which state that disability has been excluded from the purview of Articles 15 and 16.¹⁰ The Committee considered the report submitted by India in its 485th and 486th meetings held on 2 and 3 September 2019. In the concluding observations, it made clear that it is concerned about the “lack of explicit

⁵ Anti Discrimination and Equality Bill, 2016, Bill No. 289 of 2016.

<<http://164.100.47.4/billtexts/lsbilltexts/asintroduced/2991.pdf>> Last accessed 30th June 2022.

⁶ To see more about this please visit, <https://sites.google.com/site/tarunabh/Home/discrimination-law>. Last accessed 30th June 2022.

⁷ The Equality Bill, 2021 (CLPR, 8th January 2021) <<https://clpr.org.in/wp-content/uploads/2020/01/Equality-Bill-2021-8th-January-2021.pdf>> Last accessed 30th June 2022.

⁸ Committee on the Rights of Persons with Disabilities, Initial report submitted by India under article 35 of the Convention, due in 2011, CRPD/C/IND/1, 6 October 2017

<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fIND%2f1&Lang=en> Last accessed 30th June 2022.

⁹ *Ibid*, page 13.

¹⁰ Parallel Report on India's compliance with UNCRPD (NCPEDP, 2017)

<https://ncpedp.org/documents/Parallel_Report.docx> Last accessed 30th June 2022.

prohibition of disability-based discrimination in the Constitution”¹¹ and recommended that India amends its constitution to prohibit disability-based discrimination explicitly.¹²

The recommendation to amend the Constitution to include disability-based prohibition explicitly has been welcomed by the disability rights organizations.¹³ It has been a long-standing demand of scholars and disability rights organizations.¹⁴ As a State Party signatory to the Convention, India is under an obligation to take all measures which will ensure the compliance of its national legal system to the provisions of UNCRPD. According to the recommendations of the Committee, amending Article 15 is one of the measures through which India can fulfill its obligations under the Convention.

The thesis seeks to take this demand forward and argue in favor of the inclusion of disability as a prohibited ground of discrimination under Article 15 of the Constitution of India. To do this, it analyses the current position of the right of equality and non-discrimination in India and the judicial culture of India and contrasts the same with the relative position of the same right in the domestic framework of South Africa and how the South African courts respond to it. The position in South Africa has been used for comparative analysis because the Supreme Court of India, relying on the jurisprudence from South African courts, has recently extended the scope of Article

¹¹ Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of India, 22nd Session (2019), para 12 <<https://digitallibrary.un.org/record/3848327?ln=en#record-files-collapse-header>> Last accessed 13th June 2022.

¹²*Ibid.*, para 13.

¹³ RPWD Act – Article 15 of Indian Constitution needs amendment : UN Committee Experts (*Enabled.in*, 16 October 2019) <<https://enabled.in/wp/rpwd-act-article-15-of-indian-constitution-needs-amendment-un-committee-experts/>> Last accessed 30th June 2022.

¹⁴ Nipun Malhotra, Expanding Article 15 to include discrimination against disabled people (*The Print* 24 October 2017) <<https://theprint.in/opinion/expanding-article-15-to-include-discrimination-against-disabled-people/13283/>>; N Kavita Rameshwar, It's time disability rights find way into the Constitution (*The Times of India*, 27 July 2021) <<https://timesofindia.indiatimes.com/city/chennai/its-time-disability-rights-find-way-into-constitution/articleshow/84781414.cms>>

15 to another ground - sexual orientation.¹⁵ Apart from this, the similar importance of the Constitution in both countries as the symbol of radical departure from the colonial past, their transformative aim and character, and the reliance on equality and human dignity as a constitutional value to achieve the transformative aim make South Africa an ideal framework for comparison.

Chapter 1 of the thesis lays down the importance of equality and non-discrimination for persons with disabilities in the context of UNCRPD. It discusses the approaches to constitutional reform and legislative change through which the state parties incorporate the provisions of UNCRPD into their domestic framework. It also discusses the respective importance and the complexities of these approaches. This chapter sets the context for further analysis of the normative and legal position of the right of equality and non-discrimination for persons with disabilities in India and South Africa.

Chapter 2 of the thesis discusses the normative and legal position of the right of equality and non-discrimination for persons with disabilities in South Africa. Equality in South Africa is a constitutional value, a constitutional right, and a legal right. It has played a vital role in restructuring the unequal fabric of South African society, weaved by the evils of colonialism and apartheid. It is a constitutional right guaranteed under section 9(3) of the Final Constitution (FC). It is also advanced through various legal measures which seek to promote equality and eliminate discrimination in multiple areas of life. This chapter aims to understand this equality in all its facets applies to persons with disabilities and how it influences the courts in South Africa when

¹⁵ Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

adjudicating the claims of persons with disabilities. The analysis will be crucial later in the thesis to make a comparative assessment of the position in India and South Africa.

Chapter 3 of the thesis discusses the normative and legal position of the right of equality and non-discrimination for persons with disabilities in India. The chapter discusses the right to equality and non-discrimination as it is provided in the Constitution of India and the position of the same right as it exists in the context of persons with disabilities. The chapter critically examines the current gaps in interpreting the right to equality and non-discrimination for persons with disabilities in India.

Chapter 4 of the thesis argues that there is a need to constitutionalize disability in the Indian Constitution. To substantiate this, the chapter makes a three-pronged argument about the importance of elevating disability discrimination from a statutory right to a constitutional right, the need to situate disability into Article 15 (right against unfair discrimination) over Article 14 (general equality clause), and lastly, the need for ‘disability’ to be an enumerated ground of discrimination under Article 15 over the alternative of having it read into Article 15 as an analogous ground.

CHAPTER 1 - DISABILITY DISCRIMINATION: FROM UNCRPD TO CONSTITUTION

In the past decades, the discourse around the rights of persons with disabilities has become stronger because of the significant strides made by the disability rights movement around the globe. This is mostly reflected in the departure from the medical model of disability and the adoption of the social model of disability by legal systems around the world. The adoption of the Convention on the Rights of Persons with Disabilities (UNCRPD) has been the most fundamental development in this regard. UNCRPD seeks to ensure that persons with disability enjoy their rights on “equal basis with others”¹⁶ and, for that purpose places equality for non-discrimination for persons with disabilities at the heart of the Convention.¹⁷ The realization of its objective is still subject to the manner and mode of its ratification by state parties.¹⁸ This chapter seeks to understand the importance of equality and non-discrimination for persons with disabilities in the context of UNCRPD and the various approaches through which the same is incorporated by state parties in their domestic framework. The chapter will provide a context for further analysis of the respective position of equality and non-discrimination for persons with disabilities in the domestic legal framework of India and South Africa.

¹⁶ UN Convention on Rights of Persons of Disabilities, Preamble (r)

¹⁷ Committee on Rights of Persons with Disabilities, *General Comment on Equality and Non- discrimination* [2017], art 5, para 8.

¹⁸ Janet E. Lord and Michael Ashley Stein, ‘The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities’ [2008] Faculty Publications 665.

1.1 Equality and non-discrimination: Heart of UNCRPD

The UNCRPD was the result of decades of advocacy efforts of the disability community, academic experts, CSOs engagement and the dedicated efforts of disabled people organizations (DPOs).¹⁹ Guided by the social model of disability, UNCRPD was adopted by the global community in 2006.²⁰ This adoption was the formal expression of the acceptance of the social model of disability. UNCRPD was the most rapidly ratified treaty in the history of international law.²¹

UNCRPD is the first international human rights law treaty which exclusively and comprehensively deals with persons with disabilities. The earlier treaties like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), applied universally to all persons, including persons with disabilities. But the universal application of these earlier treaties did not cater to the specific needs of persons with disabilities, and thus failed to address their individual rights effectively. The adoption of UNCRPD is a testament to the importance of specifying rights based for a specific group of people even when the same could have been dealt by universally applicable provisions.²²

The UNCRPD aims to ensure that persons with disabilities enjoy all human rights and fundamental freedoms on an “equal basis with others”.²³ It therefore recognizes that discrimination on grounds

¹⁹ Arlene S Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (Routledge, 2015) 7.

²⁰ UN Department of Economic and Social Affairs, ‘Convention on the Rights of Persons with Disabilities (CRPD)’ <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>> Last accessed 30th June 2022.

²¹ Janet E. Lord, ‘The U.N. Disability Convention: Creating Opportunities for Participation’ (2010) 19 BUS. L. TODAY, NO.5, 23.

²² Jody Heyman et al, *Advancing Equality, How Constitutional Rights Can Make a Difference Worldwide* (University of California Press 2020) 258.

²³ UNCRPD, Preamble (c).

of disability is a violation of a persons' inherent dignity and human worth.²⁴ The right of non-discrimination is central to the Convention's aim of ensuring that persons with disabilities live with dignity and enjoy rights on equal basis with other. Equality is the cornerstone of all human rights. Regarding the importance of equality and non-discrimination for persons with disabilities, the Committee on Rights of Persons with Disabilities (CRPD Committee) has stated that,

“The phrase “on an equal basis with others” links all substantive rights of the Convention to the non-discrimination principle.”²⁵

Equality and non-discrimination are also central to the approach of social model of disability.²⁶ The medical model did not consider persons with disabilities as right holders, and they were always treated less equally than others resulting in a exclusionary and discriminatory treatment which became a norm.²⁷ This is because the medical model of disability approached disability from a medical perspective and was concerned with disability only as a bodily defect. It thus focused on cure, treatment, and social protection, which would result in socially imposed restrictions. This model has been described as “the most powerful influence on the conceptualization of disability in modern history.”²⁸ The social model in contrast to the medical model focuses on the environment and barriers it creates for the specific needs of persons with disability rather than viewing those specific needs as defects. It locates problems in the environment and not in the

²⁴ UNCRPD, Preamble (h).

²⁵ Committee on Rights of Persons with Disabilities (n 11) para 8.

²⁶ Anna Lawson & Angharad E. Beckett ‘The social and human rights models of disability: towards a complementarity thesis’ (2021) 25 INT’L J.L. HUM. RTS. 348-379

²⁷ Gerard Quinn and Theresia Degener, *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (OHCHR, United Nations, New York and Geneva 2002)

²⁸ Arlene S Kanter (n19) page 7.

disability of the person and thus focuses on removing the barriers in the environment which will enable the full and equal participation of persons with disabilities.²⁹

The social model understanding of disability in association with the physical, social and attitudinal barriers. In its approach, it acknowledges the different needs of every individual and places the burden on society to remove these barriers which can allow for persons with disabilities to enjoy their rights equally as others. As such, non-discrimination is one of the general principles under the Convention³⁰ and state parties are obliged to ensure that all persons with disability enjoy their human rights without any discrimination.³¹ Equality and non-discrimination are thus significant values according to UNCRPD, which intersect all other rights and affect their realization.

Article 5 also recognizes equality and non-discrimination as rights and imposes an obligation on all state parties to recognize that “all persons are equal and under the law and are entitled to equal protection and equal benefit of the law without any discrimination.”³² State parties are to prohibit discrimination on the basis of disability and ensure that reasonable accommodation is provided.³³ In its General Comment No. 6, the CRPD Committee stated that it encourages the state parties to broaden their anti-discrimination laws and to extend protection to persons with disabilities, especially the explicit inclusion of disability as a prohibited ground of discrimination.³⁴

²⁹ Fr'ed'eric M'egret, 'The disabilities convention: Towards a holistic concept of rights' [2008] 12 INT'L J.L. HUM. RTS. 261–77.

³⁰ UNCRPD, art 3(b).

³¹ Ibid., art 4

³² Ibid., art 5(1)

³³ Ibid, art 5(2)

³⁴ Committee on the Rights of Persons with Disabilities (n 11) para 3.

1.2 Disability discrimination in domestic legal framework of state parties

It is axiomatic that the fulfillment of international human rights standards takes place through domestic incorporation.³⁵ UNCRPD, as an international human rights treaty, acts as an important vehicle to bring transformative changes in the national disability law of the state parties to the convention.³⁶ These state parties have an obligation to give full effect to the provisions under CRPD through legal and policy changes and ensure their effective implementation. It is imperative for the state parties to effectively provide for the right of equality and non-discrimination to persons with disabilities in their domestic legal framework. This is because of the importance of equal and non-discrimination to the overall goal of UNCRPD and the substantive obligations imposed by Article 5 of UNCRPD.

Translating the right to equality and non-discrimination into national frameworks can employ various approaches and strategies. Constitutional reform is one such approach where international human rights standards are transposed into the existing constitutional framework. This can happen either by including disability as a prohibited ground of discrimination or by incorporating all standards into relevant constitutional provisions.³⁷ This approach helps enhance the visibility of disability rights issues, providing a robust legal framework for disability rights, and results in the strengthening of the political voice of persons with disability.³⁸ South Africa is an example of a country where disability rights are integrated into the Constitution of South Africa because disability is an explicit ground of unfair discrimination.³⁹ While disability rights also form part of

³⁵ Janet E. Lord and Michael Ashley (n 18).

³⁶ Id.

³⁷ Ibid.

³⁸ Ibid.

³⁹ The Constitution of South Africa, ss. 9(3).

other laws in South Africa, they emanate from the Constitution and serve as an extension of the constitutional rights of persons with disability.

Besides constitutional reform, legislative change is another approach through which international standards under the UNCRPD are incorporated into the domestic framework. This change happens through a democratic process involving disability advocates and civil society organizations. The legislative change enables the forming of a strong constituency for disability and generating awareness on the same.⁴⁰ However, legislative change becomes challenging and complex because of the fragmented nature of disability rights and the intersection of equality and non-discrimination in all substantive rights for persons with disability. The obligation under UNCRPD requires not only the adoption of general law but also a review of all existing laws. It also calls for a review and amendment of all such laws according to the provisions of UNCRPD. India has adopted the legislative change approach by enacting the Rights of Persons with Disability Act, 2006, to ratify the UNCRPD. It has made no change in the constitutional framework.

⁴⁰ Janet E. Lord and Michael Ashley (n 18).

CHAPTER 2- DISABILITY DISCRIMINATION: NORMATIVE AND LEGAL POSITION IN SOUTH AFRICA

Equality in South Africa is a constitutional value, a constitutional right, and a legal right. It has played a vital role in restructuring the unequal fabric of South African society, weaved by the evils of colonialism and apartheid. It is a constitutional right guaranteed under section 9(3) of the Final Constitution (FC). It is also advanced through various legal measures which seek to promote equality and eliminate discrimination in multiple areas of life. This chapter aims to situate the normative and legal position of equality and non-discrimination in South Africa and understand how the same is addressed for persons with disabilities.

2.1 Equality: A constitutional value

Equality is a constitutional imperative in South Africa. The founding provisions of the South African Constitution describe the state as a “sovereign, democratic state founded on the...values of...human dignity, *the achievement of equality* and the advancement of human rights and freedoms, non-racialism, and non-sexism.”⁴¹ Equality as a constitutional value is part of the transformative character of the Constitution of South Africa. The South African Constitution is a normative departure from a “repressive and undemocratic legal order” where a vast majority of people have been a victim of systematic discrimination, which affected all aspects of their life and has, in turn, created vast disparities in the social and economic structure of society.⁴²

⁴¹ Constitution of South Africa, 1996, Preamble

⁴² Stu Woolman and Michael Bishop, *Constitution of South Africa*, (CUP 2013), 35-3.

The South African Constitution has accorded a high value to equality, which must guide all courts' decisions. The South African Constitution understands differences as an inherent value, not a disadvantage.⁴³ It strives for the enhancement of capabilities, individual potential, preservation of dignity and realization of self-worth.⁴⁴ Equal dignity for all human beings is another core value that guides the interpretation of constitutional rights. Dignity as a core value takes on a contextual meaning rather than an abstract meaning by focusing on group-based inequalities in civil, political, and socio-economic aspects of life and the individual sphere of dignity focusing on personal autonomy and self-worth.⁴⁵ This has been clarified in the decision of *Khosa v. Minister of Social Development*, where the Constitutional Court emphasized that dignity is a collective concern. It stated, "Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their well-being and the well-being of the community as a whole."⁴⁶

2.2 Disability Discrimination in South Africa: A Constitutional Right

The Bill of Rights is the "principal source" for addressing inequalities in South Africa because it contains the right to equality.⁴⁷ For this reason, the Bill of Rights is called "a cornerstone of democracy.... that.... affirms the democratic values of human dignity, equality, and freedom."⁴⁸ This right is secured under FC s.9. It contains five provisions that provide for five different aspects of equality guaranteed under the Constitution. The five provisions are to be read

⁴³ Bhabha Faisal, 'Disability equality rights in South Africa: concepts, interpretation and the transformation imperative' [2009] 25 South African Journal of Human Rights 13.

⁴⁴ *Ibid.*

⁴⁵ Stu Woolman (n 42) 35-12.

⁴⁶ *Khosa and Others v Minister of Social Development and Others*, 2004 (6) SA 505 (CC)

⁴⁷ Bhabha Faisal (n 43).

⁴⁸ Stu Woolman (n 42).

harmoniously in accordance with the constitutional value of equality, dignity and the constitutional aim of transformation.⁴⁹ FC s. 9(1) provides that “everyone is equal before the law and has the right to equal protection and benefit of the law.” It deals with individual and group differentiation. This provision provides protection against irrational and arbitrary classification by invoking a standard of reasonableness and proportionality.⁵⁰

FC ss 9(3), 9(4) and 9(5) are the provisions that provide for the right against unfair discrimination against state action (FC ss 9(3)) and against private action (FC ss 9(4)). The prohibition under ss 9(3) and 9(4) is against direct discrimination as well as indirect discrimination. FC ss 9(3) protects the right of unfair discrimination on certain grounds that are listed in the provision. These grounds are “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth.”⁵¹ Disability is specially enumerated as a ground upon which the right of non-discrimination exists.

These lists of grounds also apply to FC s 9(4) and 9(5).⁵² The list of grounds signifies the existing inequalities in societies. FC s 9(5) presumes discrimination based on listed grounds to be unfair unless they are shown to be fair. Positive measures adopted by the state to advance equality are not considered as unfair discrimination under FC s 9(3) because they are protected under FC s 9(2), which states that equality means “full and equal enjoyment of all rights and freedoms”⁵³ which includes “the adoption of positive measures to achieve equality.”⁵⁴

⁴⁹ *Ibid*, page 35-15.

⁵⁰ *Ibid*.

⁵¹ Constitution of South Africa, FC ss. 9(3).

⁵² *Stu Woolman* (n 42) 35-25.

⁵³ Constitution of South Africa, FC ss. 9(2).

⁵⁴ Constitution of South Africa, FC ss. 9(2).

The highest Court in South Africa, i.e., the Constitutional Court of South Africa, has not had many opportunities to evaluate the equality claims for persons with disabilities or expand on the meaning of disability. This is because disability discrimination in South Africa is also addressed through various laws which contain provisions to fulfill the constitutional commitment of advancing equality and eliminating discrimination against persons with disabilities. Equality claims are mostly instituted through those laws before the various courts in South Africa. However, recently in the case of *Hoffman v. South African Airways*,⁵⁵ the Constitutional Court used FC 9(3) and the prohibition of unfair discrimination on the grounds of disability to determine that HIV status can be an analogous ground of discrimination. The Court considered HIV status similar to disability because of the existing stigma and prejudices based on these grounds and the impact of these prejudices on the other aspects of life.

2.3 Discrimination in South Africa: Legal position

South Africa doesn't have disability-specific legislation which comprehensively deals with all issues related to persons with disabilities. Instead, under the current South African legal framework, disability issues are addressed through various laws, and they act complementary to the Constitution of South Africa. There are two laws which address disability discrimination - the Employment Equity Act, 1988 (EEA) and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2001 (PEPUDA).

⁵⁵Hoffman v. South African Airways [2000] 12 BLLR 1365 (CC).

2.3.1. Disability discrimination under PEPUDA

PEPUDA intends to give effect to FC s. 9(3) of the Constitution of South Africa by providing for measures that promote equality and eliminate unfair discrimination.⁵⁶ It acknowledges the transformative vision of the Constitution and places equality at the center of that vision. It is viewed as a legal tool which will enable the society to break away from various inequalities generated by apartheid, colonialism, and cultural challenges.⁵⁷ The preamble also mentions certain international obligations which influence the Act but does not include UNCRPD in it. The Act was promulgated at a time when UNCRPD was not adopted, and the Constitution of South Africa has been the sole normative source for provisions related to disability under the Act. In keeping with constitutional commitment, the Act declares that the eradication of unfair discrimination on the grounds of disability as one of the objectives of the Act.⁵⁸ Disability, along with other grounds as mentioned under FC s 9(3) is stated as one of the prohibited grounds of discrimination under the Act too.⁵⁹

Section 9 of PEPUDA states that “no person may unfairly discriminate against any person on the ground of disability” and elaborates that this would include denying or removing support from any person,⁶⁰ contravention of accessibility codes,⁶¹ and the failure to eliminate obstacles or provide reasonable accommodation.⁶² Section 28 provides that discrimination on the grounds of disability

⁵⁶ PEPUDA, Preamble; S,2

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* S. 1.

⁶⁰ *Ibid.* S. 9(a).

⁶¹ *Ibid.* S. 9(b).

⁶² *Ibid.* S. 9(c).

will be regarded as an aggravating circumstance in an offense.⁶³ It also provides that the state shall take special measures to promote equality and eliminate discrimination⁶⁴ by enacting appropriate laws, developing progressive policies, adopting viable action plans and auditing laws and policies to eliminate discrimination.⁶⁵

PEPUDA also sets up Equality Courts to hear proceedings instituted under this Act.⁶⁶ All High Courts in South Africa are considered as Equality Courts under Act.⁶⁷ Various cases related to disability discrimination have been dealt these High Courts (or Equality Courts under PEPUDA), which have given strong pronouncement of the rights of persons with disabilities. In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*⁶⁸ and *Equal Education v. M.E.C.*⁶⁹, different High Courts have held that failure to provide special facilities to children with disabilities constitutes not only a violation of their right to education but also a violation of their right against unfair discrimination guaranteed under FC 9(3). In *Parvathi Singh v. Minister of Justice and Constitutional Development*, the North Gauteng High Court was asked to answer the question - whether failure to appoint a person with disability as a judge amount to unfair discrimination. The case was not concerned with the fact that a person with disability was not appointed as a judge because of their disability but the fact their disability was not taken into account while making the selection. The Court held that the same constituted unfair discrimination after observing that,

⁶³ Ibid. S. 28(1).

⁶⁴ Ibid. S. 28(3)(a).

⁶⁵ Ibid. S. 28(3)(b).

⁶⁶ Ibid. S. 21.

⁶⁷ Ibid. S. 16.

⁶⁸ *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa and Another*, (2011) 5 SA 87 (WCC).

⁶⁹ *Equal Education and Another v Minister of Basic Education and Others*, [2018] ZAECHC 6.

“The Constitution obliges that the judiciary should be legitimate and diverse, and also that the categories of people who were previously discriminated against should be advanced. The first obligation does not eclipse the latter but reinforces it and compliments it... it is abundantly clear that when her application(s) was considered and the profile was prepared, the appointment committees did not take into account her disability and that it had a duty to advance and promote the position of disabled people...It is not enough to put a symbol of a wheelchair on the letterhead and to allege that the Magistrate Commissioner is sensitive to the plight of disabled people.”⁷⁰

PEUDA also provides that certain Magistrates Court (the lowest level courts in South Africa), as decided by the Minister, will also act as Equality Courts⁷¹ and hear the proceedings instituted under this Act.⁷² These Magistrate’s Courts (or the Equality Courts) have on repeated occasions taken a serious stand on equality claims brought forward by persons with disabilities. On repeated occasions, these Magistrate’s Courts have held that inaccessible infrastructure in courtrooms⁷³, police stations,⁷⁴ and schools.⁷⁵ constitutes unfair discrimination under FC ss 9(3) and violates the dignity of persons with disability. An interesting point to note is that two of these judgments⁷⁶ were pronounced in 2005 and 2007, before the adoption of CRPD. Only one judgment was pronounced in 2010 after the adoption of CRPD, yet the Court made no reference to it.⁷⁷

The constitutional commitment to equality for persons with disabilities was sufficient to realize the rights of persons with disabilities before the courts at the lowest level in South Africa. In

⁷⁰ *Singh v Minister of Justice and Constitutional Development and Others* (57331/2011) [2013] ZAEQC 1 [31]-[33]

⁷¹ PEPUDA, S.6

⁷² *Ibid.*, S. 21

⁷³ *E Muller v Minister of Justice and Department of Public Works* (EqC) unreported case number 01/2003 (20 February 2004)

⁷⁴ *WH Bosch v Minister of Safety and Security* (EqC) unreported case number 25/2005 Port Elizabeth (19 May 2006)

⁷⁵ *LH Oortman v St Thomas Aquinas Private School* (EqC) unreported case number 1/2010 Witbank (1 December 2010).

⁷⁶ *E Muller* (n 73) and *WH Bosch* (n 74).

⁷⁷ *LH Oortman* (n 75).

Bosch,⁷⁸ the Court specifically rebuked the respondent for the delay in making the police premises accessible and directed the police commissioners to apologize to persons with disabilities and acknowledge their inappropriate attitude in this situation.⁷⁹

2.3.2. Disability discrimination under EEA

Like the PEPUDA, EEA also recognizes the structural inequalities that exist in society because of the apartheid and colonial regime and intends to achieve the constitutional right of equality and eliminate unfair discrimination in the employment sector.⁸⁰ It is the only law in South Africa that defines people with disabilities as “people who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in, employment.”⁸¹

The provisions under EEA make the government responsible for implementing measures to eliminate discrimination in employment (Chapter 2) and promote occupational equity (Chapter 3). Section 6 specifically states that no person may unfairly discriminate against an employee on the grounds of disability. Disputes under the Act are judicially determined by Labour Courts.⁸² With regard to disability discrimination, these courts have given a series of positive judgments and have pronounced unfair dismissal on the grounds of disability⁸³, failure to provide reasonable

⁷⁸ *WH Bosch* (n 75).

⁷⁹ *Ibid.*

⁸⁰ EEA, 1998 Preamble.

⁸¹ EEA, 1998 s. 1.

⁸² EEA s. 50.

⁸³ *Legal Aid South Africa v Jansen* (CA3/2019) [2020] ZALAC 37; *Reagan John Ernstzen v Reliance Group Trading Pvt Ltd.* (CA 717/13) (LC) 2015.

accommodation,⁸⁴ and preventing a person with disability from advancing in employment as unfair discrimination on the ground of disability.⁸⁵

It is very clear that disability discrimination is primarily addressed through the Constitution of South Africa. Both the laws which address disability discrimination, apart from the Constitution and through which equality claims for persons with disabilities are addressed, heavily rely on the constitutional right of persons with disabilities guaranteed under FC s. 9(3). This provision is the principal source behind these enactments and the principal concept which allows the courts to interpret the right against unfair discrimination against persons with disabilities in very strong terms.

⁸⁴ IMATU v CCMA and Others (C344/2016) [2017] ZALCCT 1.

⁸⁵ South African Municipal Workers Union obo Damons v City of Cape Town (C306/2015) [2018] ZALCCT 9.

CHAPTER 3- DISABILITY DISCRIMINATION: NORMATIVE AND LEGAL POSITION IN INDIA

Equality is a basic feature of the Constitution of India.⁸⁶ The Preamble of the Constitution declares that “WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens...EQUALITY of status and of opportunity....” It is provided as a fundamental right under Chapter III of the Constitution, which guarantees the right to equality for all citizens. However, for persons with disabilities, the right to equality and non-discrimination has been provided by way of a statute because India has ratified UNCRPD only through legislative change. This chapter seeks to understand the right to equality and non-discrimination as it is provided in the Constitution of India and the position of the same right as it exists for persons with disabilities in the relevant law. The chapter also seeks to take a critical look at the current gaps in the current position on the right to equality and non-discrimination for persons with disabilities in India.

3.1 Disability Discrimination in India: Constitutional Position

The meaning and purpose of the Constitution are at the heart of every constitutional decision.⁸⁷ This is not only because the Constitution of India is the *grundnorm* of the Indian legal system, but because it holds deep philosophical importance in the country's social, political, and legal structure. As such, it continues to guide the vision of judges and scholars alike. The framing of the Constitution marks a departure from colonial rule to the adoption of a democratic order based on

⁸⁶ Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.

⁸⁷ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts*, (1st ed Harper Collins 2019) 11

principles of liberty, equality and fraternity, and respect for the rule of law. In the words of Justice Vivan Bose,

“the Constitution ... blotted out in one magnificent sweep all vestiges of arbitrary and despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power as the State now seeks to uphold ... the past was obliterated except were expressly preserved; at one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis: the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation.”⁸⁸

The adoption of fundamental rights marked “a tectonic shift in the constitutional philosophy” of India.⁸⁹ In addition to restructuring the relationship between the individual and the state, the fundamental rights aim to restructure the social order by recognizing the deprived groups and their rights against the unequal treatment meted to them through the oppressive social structures that continues to exist in society. It is because of these fundamental rights, guaranteed to every citizen, that the Constitution has a “fundamentally transformative” character.⁹⁰

3.1.1 Right to Equality: A mirror to the transformative vision of the Constitution

The fundamental right to equality and non-discrimination reflects the transformative vision and character of the Constitution of India. These rights are contained within Articles 14 to 18 of the Constitution. For this chapter, the discussion will be limited to Article 14 and Article 15. Article

⁸⁸ Virendra Singh v. State of UP (1955) 1 SCR 415, 28.

⁸⁹ Ananth Padmanabhan, ‘Rights’ in Sujit Choudhary, Madhav Khosla, Pratap Bhanu Mehta (Eds.) *The Oxford Handbook of the Indian Constitution* (Oxford University Publication 2016), 581 & 582.

⁹⁰ *Gautam Bhatia* (n 87)12.

16, 17 and 18 which grant equality in matters of public employment, abolishes untouchability, and abolishes titles, respectively are not relevant for this discussion.

Article 14 is a general equality clause that grants every citizen “equality before the law” and “equal protection of laws”.⁹¹ Article 15 prohibits discrimination on specific grounds. Clause (1) of the Article states-

“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”

These grounds under Article 15 recognize the previous social order that the constitution seeks to restructure by identifying the social hierarchies within the citizens of India and the ways and means through which “politics of exclusion and disempowerment” is played.⁹² These grounds have been the premise upon which historical injustice and prejudice have prevailed against certain groups and communities.⁹³ Through these grounds, the Constitution has recognized the marginalized individuals and groups, by constitutionalizing the rights of minorities against the majority.⁹⁴

Article 15(1) is an extension of the general equality clause embodied under Article 14. It relates to the application of the equality provision. The combined effect of Article 14 and Article 15 is that the state cannot pass unequal laws under Article 14, except when these laws have a reasonable basis. However, because of the grounds mentioned under Article 15, these grounds cannot be a valid ground for distinction.

⁹¹ The Constitution of India, art 14.

⁹² Ranabir Samaddar, *Ideas and Frameworks of Governing India* (1st Routledge 2016) 13-28

⁹³ Kanad Bagchi, ‘Transformative Constitution, Constitutional Morality, and Equality’ in *Übersee / Law and Politics in Africa, Asia and Latin America*, 2018, Vol. 51, No. 3, Special Issue „The Indian Supreme Court in Crisis?“ (2018), pp. 367-380, p. 375.

⁹⁴ Kalpana Kannabiran, *Tools of Justice: Non-discrimination and the Indian Constitution* (First published 2013, Routledge) 2

Also, while Article 14 deals with only discrimination by state action, Article 15 also addresses discrimination by private action on the basis of certain grounds. Clause (2) of Article 15 states that the citizens shall not be discriminated on the grounds of “religion, race, caste, sex, place of birth or any of them” in accessing public places or using public facilities.⁹⁵ In a landmark judgment of *IMA v. Union of India*,⁹⁶ the Supreme Court of India clarified that the protection under Article 15(2) also extends to private action. Article 15(2) thus serves as a remedy for discrimination by private actors.

3.1.1 Disability: A Constitutional Omission

‘Disability’ is not one of the grounds of discrimination under Article 15(1) or under Article 15(2). During the drafting of this article, disability remained entirely out of the purview of any discussion during the drafting process.⁹⁷ Any reference to it remained in the context of social disability arising from discrimination based on other grounds. Still, no deliberation was made in the context of disability as a social identity that must be protected against unfair treatment and discrimination. The discussion, in the context of social disability, has also appeared in the final version of Clause (2) of Article 15, which states no person should be subject to any disability on the basis of specified grounds.⁹⁸

⁹⁵ The Constitution of India, art 15(2).

⁹⁶ *Indian Medical Association v Union of India* (2011) 7 SCC 179.

⁹⁷ Constituent Assembly of India Debates (n 4).

⁹⁸ The Constitution of India, art 15(2).

3.1.2 Constitutional denial of political rights for PWDs

Indian democracy grants everyone above the age of 21 years the right to vote and participate in the democratic process.⁹⁹ However, the Parliament by law can disqualify someone from their right to vote on some grounds, such as unsoundness of mind. This is because Article 326 provides every citizen of 18 years and above the right to vote but empowers the legislature to disqualify people with intellectual or psychosocial disabilities. The article states-

*“The elections...shall be on the basis of adult suffrage; but is to say, every person who is a citizen of India and who is not less than twenty one years of age...and is not otherwise disqualified under this constitution...on the ground of non-residence, **unsoundness of mind**, crime or corrupt, or illegal practice, shall be entitled to be registered as a voter at any such election”*

Section 16 of the Representations of People Act, 1951 provides that a person with unsound mind can be disqualified from being registered on the electoral roll. The phrase unsoundness of mind remains undefined in the Constitution and the Act of 1951. The lack of definitions presents a challenge as there are no objective criteria based on which the court can take such a decision.¹⁰⁰ The consequence of it is that due to the stigma around intellectual and psychosocial disabilities, the phrase is liberally applied, which results in the disenfranchisement of many people with intellectual and psychosocial disabilities.¹⁰¹ When Article 326 is read together with Article 15(1),

⁹⁹ The Constitution of India, art 326.

¹⁰⁰ Kalpana Kannabiran (n 94) 46; Center for Law and Policy Research, *Enabling Elections: Making the 2014 General Elections in India Participatory and Accessible for Voters with Disabilities*, (2014).

¹⁰¹ *Ibid.*

it compounds the issue further, resulting in what Kalpana Kannibaran, in her book *Tools of Justice*, referred to as “the double negation of disability by the Indian Constitution.”

“The first negation, namely, the absence of disability in the constitution and the refusal of constitutional courts to bring it within the meaning of discrimination under article 15, further truncates fundamental freedoms for all persons with disabilities.”¹⁰²

3.2 Disability Discrimination in India: Statutory Position

Disability rights have been primarily protected through legislative measures in India. The Parliament of India enacted the Persons with Disabilities (Equal Opportunities, Protection Of Rights And Full Participation) Act (hereinafter referred to as the “1995 Act”) on 1st January 1996. The 1995 Act specified seven conditions as a disability.¹⁰³ A person with disability was defined as a person who ‘*suffers from*’ forty per cent of any of the conditions specified as disability.¹⁰⁴ The 1995 Act provided for non-discrimination against persons with disability, but the same was limited in terms of use of transport,¹⁰⁵ road,¹⁰⁶ built environment,¹⁰⁷ and in government employment.¹⁰⁸ It was also subject to the limits of economic capacity and development. For non-discrimination in government employment, it was limited to people who have acquired disability during the service and provided for the right to not be dispensed with because of his/her disability and not be denied promotion on the same ground.¹⁰⁹

¹⁰² *Kalpana Kannabiran* (n 94) 118.

¹⁰³ RPWD Act 2016, s 2(i)

¹⁰⁴ *Ibid.*, s 2(t)

¹⁰⁵ *Ibid.*, s 44

¹⁰⁶ *Ibid.*, s 45

¹⁰⁷ *Ibid.*, s 46

¹⁰⁸ *Ibid.*, s 47

¹⁰⁹ *Ibid.*

This Act was replaced by a newer enactment called the Rights of Persons with Disability Act (RPWD Act). The Act includes a much broader definition of disability. It defines a person with disability as a person with “long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others.”¹¹⁰ It increased the number of recognized disabilities from seven in the 1995 Act to 21. The Act defines discrimination as “distinction, exclusion, restriction” on basis of disability that has the effect of impairing and nullifying their enjoyment of rights.¹¹¹ It also includes all forms of discrimination within its fold and recognizes denial of reasonable accommodation as discrimination.¹¹² Section 3 of the 2016 Act also provides for a right of equality and non-discrimination which provides that the government shall ensure that persons with disability enjoy their right to equality and their life with dignity. It obligates the government to take steps to provide an appropriate environment in which the full potential of persons with disabilities can be realized.¹¹³ It prohibits actions and omissions which constitute discrimination on the grounds of disability unless they are proportionate means of achieving a legitimate aim.¹¹⁴ It prohibits deprivation on the grounds of disability, and it obligates the government to provide reasonable accommodation to all persons with disabilities.¹¹⁵

The 1995 Act and the 2016 Act, both were enacted by the Parliament of India, in response to international developments. The 1995 Act was enacted to satisfy the commitment made by the Government of India in the Proclamation on the Full Participation and Equality of the People with

¹¹⁰ *Ibid.*, s 2(s)

¹¹¹ RPWD Act 2016, s 2(h)

¹¹² *Ibid.*

¹¹³ RPWD Act 2016, s 3

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

Disabilities in the Asian and Pacific Region.¹¹⁶ Similar to the 1996 Act, the RPWD Act was enacted to fulfill an international commitment made by the state of India as a signatory to the UNCRPD.¹¹⁷

3.2.1 RPWD Act: An ineffective supplement

Legislations and case laws are an extension of the Constitution in providing for the most potent guarantees of individual rights.¹¹⁸ Amy Raub et al. have argued that while examining the extent to which the constitution protects the rights of persons with disabilities, it is essential to study specific laws which, in conjunction with the constitutional provision, guarantee individual rights to persons with disabilities.¹¹⁹ However, having examined the same with regard to India, I argue that the RPWD Act in India does not sufficiently supplement the omission to include disability explicitly as a prohibited ground of discrimination under Article 15 of the Constitution of India.

3.2.1.1 Restricted notion of equality

Section 3 of the Act provides that the “government shall ensure that persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.”¹²⁰ However, this right is restricted if the “act or omission is a proportionate means of achieving a legitimate aim.”¹²¹ Since the act doesn’t define what would constitute a legitimate aim to allow the

¹¹⁶ RPWD Act 1995, preamble

¹¹⁷ RPWD Act 2016, preamble

¹¹⁸ Amy Raub et al, ‘Constitutional Rights of Persons with Disabilities: An Analysis of 193 National Constitutions’ [2016] Harvard Human Rights Journal, 291.

¹¹⁹ *Ibid.*, 239

¹²⁰ RPWD Act 2016, s. 3(1).

¹²¹ *Ibid.*, s. 3(3).

restriction on the right to equality for persons with disabilities, the phrase leaves a wide ambit of scope for legislative, administrative, and private action to be classified as a “legitimate aim.” The Committee on the Rights of Persons with Disabilities, in its Concluding Observations also noted that it is concerned about the exception to the anti-discrimination in Section 3(3) of the Act of 2016 which allows discrimination against persons with disabilities under certain situations.¹²² Compounded by the lack of an explicit prohibition of disability-based discrimination in the Constitution,¹²³ This restriction poses a huge challenge for persons with disabilities in exercising their rights.

3.2.1.2 Continued prevalence of medical model of disability

The RPWD Act has classified the disability into three types: -

1. Person with benchmark disability¹²⁴- a person with not less than 40 percent of disability
2. Person with disability¹²⁵-physical, mental, intellectual and sensory impairment which hinders the full participation in society
3. Person with disability with high support needs¹²⁶-person with benchmark disability certified under Section 58.

While the definition of ‘person with disability’ is based on the definition of disability as provided under the UNCRPD, the definition of ‘person with benchmark disability’ still follows the quantitative approach based on the medical model of disability. All persons with disabilities with

¹²² Committee on the Rights of Persons with Disabilities (n 11).

¹²³ The Constitution of India, 1950, art. 15.

¹²⁴ RPWD Act 2016, s 2(r).

¹²⁵ *Ibid.*, s 2(s).

¹²⁶ *Ibid.*, s 2(t).

more than forty percent of disabilities are classified as persons with benchmark disabilities. The Act provides for certain positive measures to advance equality for persons with disabilities, but the same is extended only to persons with benchmark disabilities. These include free education,¹²⁷ the reservation of posts in higher educational institutions,¹²⁸ and the reservation of posts in public employment.¹²⁹

Currently, the Constitution of India omits to secure the right of equality and non-discrimination of persons with disabilities in an explicit manner. There exists a “theoretical vacuum”¹³⁰ in the constitutional framework through which persons with disabilities can address their issues. While India has chosen to incorporate the provisions of UNCRPD through the complex process of legislative change, the current legal position of disability discrimination is not without its limitations. This analysis of the current normative and legal framework on the right to equality and non-discrimination for persons with disabilities in India and the existing gaps in that framework will provide a context for further analysis on the need for and importance of explicitly prohibiting disability discrimination under Article 15.

¹²⁷ *Ibid.*, s 31.

¹²⁸ *Ibid.*, s 32.

¹²⁹ *Ibid.*, s 34.

¹³⁰ *Kalpana Kannabiran* (n 94) 118.

CHAPTER 4- CONSTITUTIONALISING ‘DISABILITY’ INTO INDIAN CONSTITUTION

To ensure that persons with disabilities enjoy their rights on an equal basis with others, it is crucial for a state to effectively provide for their right to equality and non-discrimination in its domestic framework. In contrast to the South African approach, India has done the same through legislative enactment, and there remains a “theoretical vacuum” with regard to disability rights in the Constitution.¹³¹ This chapter argues that there is a need to constitutionalize disability in the Indian Constitution. The argument is advanced on three levels: the importance of elevating disability discrimination from a statutory right to a constitutional right; the need to situate disability into Article 15 (right against unfair discrimination) over Article 14 (general equality clause); and lastly, the need for ‘disability’ to be an enumerated ground of discrimination under Article 15 over the alternative of having it read into Article 15 as an analogous ground.

4.1 Disability discrimination: Statutory right v. Constitutional right

Currently, the right to equality and non-discrimination against persons with disability is addressed through RPWD Act, 2016. While equality and non-discrimination is a fundamental right under the Constitution,¹³² it does not specifically extend to persons with disabilities. As such, this right is primarily a statutory right. As seen in the previous chapter, this right is also not secured without its limitation. While amendments in the Act are required to remove these limitations, it does not

¹³¹ *Kalpana Kannabiran* (n 94) 118.

¹³² Constitution of India, art 14-18.

replace the need to extend the fundamental right of equality and non-discrimination to persons with disabilities.

4.1.1 Normative value of a constitutional right

The Constitution plays a very important role as a foundational text of all legal and regulatory frameworks. Constitutional provisions not only signify the norms which are the basis of all legal and political structure in the state, but they are also the basis for challenging discriminatory laws and overturning them.¹³³ Right to equality in the constitution plays a very important role in the civil rights litigation which is used for the promotion of equal rights in courts.¹³⁴

The provisions under the international treaties have an expressive function. The acceptance of the treaty provisions by the state parties expresses the values which the state parties share in conjunction with other signatories.¹³⁵ Embodying these values in the domestic legal framework, is an expression of the formal expression of the state's acceptance of these values.¹³⁶ Lord and Stein have also observed,

“Such processes [constitutional-reform] are as important for their visibility-enhancing and constituency-broadening potential as for their capacity to lay the foundation for a solid legal framework for disability rights work.”¹³⁷

The fundamental legal structure emanating from the Constitution, is the starting point for the effective realization of the rights of persons with disabilities. According to Amy Raub et al “global

¹³³ Jody Heyman et al (n 22).

¹³⁴ Amy Raub et al (n 118).

¹³⁵ Janet E. Lord & Michael Ashley (n 18).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

evidence indicate that constitutional provisions have led to legal and cultural changes in societies in favor of recognition of the rights of persons with disabilities”¹³⁸

4.1.2 Remedy for ableist provisions in the constitutional and legal framework

The domestic framework in India suffers from institutional ableism, which can be seen in the way disability continues to be addressed in the Constitution, the laws, the policies, and in the official discourse. The Constitution of India not only omits to provide for the right of equality and non-discrimination for persons with disabilities but also denies the political right to persons with mental disabilities.¹³⁹ The State of India continues to retain around 114 laws that are discriminatory towards persons with leprosy. These laws contain provisions that cause stigmatization of leprosy issues and violate the dignity of persons with leprosy by allowing their isolation and segregation, denying them access to public service, imposing disqualification under personal laws, and prohibiting them from occupying public posts.¹⁴⁰ Personal laws on marriage discriminate against persons with mental disability by allowing divorce on the grounds of ‘unsoundness of mind’ and ‘mental disorder’.¹⁴¹

The official discourse uses the term ‘*divyangjan*’ for persons with disabilities, which literally means, ‘persons with divine bodily parts.’ The term perpetuates the charity notion, which understands the treatment of persons with disabilities as a means to please God.¹⁴² A recently

¹³⁸ Amy Raub et al (n 118).

¹³⁹ Constitution of India, art 326.

¹⁴⁰ Vidhi Centre For Legal Policy v Union Of India 2018.

¹⁴¹ Pinki Mathur Anurag, ‘The soundness of ‘unsoundness’: Marriage, divorce, and mental disability in India’ [2021] 12 Jindal Global Law Review, 293–309

¹⁴² Sangeeta Barooah Pisharoty, ‘Use of ‘Divyang’ is Regressive and Patronising, Say Persons With Disabilities’ (*The Wire*, 1 Mar 2016) <<https://thewire.in/rights/use-of-divyang-is-regressive-and-patronising-say-persons-with-disabilities>> Last accessed 30th June 2022.

proposed law,¹⁴³ the UP-Population Control, Stabilization and Welfare Bill, 2021¹⁴⁴ shows how institutional ableism continues to affect law making. The proposed law seeks to propose a limit of two children for every couple as a measure to control the population. But those couples whose either one or both children ‘suffer’ from any disability will be exempted from the two-child norm.¹⁴⁵

The existing institutional ableism shows that the mere adoption of a law through which the provisions of UNCRPD are incorporated cannot cure the structural stigma against persons with disabilities. Considering the high normative value of the Constitution, its impact on enhancing the visibility of a human right issue, and the hitherto effect on the changing the discourse around the issue, it is important that the Constitution of India makes a strong and specific reference to persons with disabilities as valid right holders along with other citizens of India. Further, the institutional ableism in current laws and policies can only be cured by constitutional means, not through statutory means. An existing law cannot be used to outlaw another law. Only the provisions of the Constitution of India can be relied upon to have these laws declared as unconstitutional and against the values of the Indian state.¹⁴⁶

4.1.3 Stronger mechanism for enforcement

A constitutional remedy against non-discrimination is stronger than a statutory remedy. As non-discrimination is addressed through laws in India, it reduces disability discrimination to a mere statutory issue that can be remedied by proper and effective implementation of the Act. A number

¹⁴³ The proposed laws in India which are being debated in the Parliament are called Bills.

¹⁴⁴ UP Population (Control, Stabilization, and Welfare) Bill, 2021

¹⁴⁵ *Ibid.*, s 15.

¹⁴⁶ Constitution of India, art 13.

of cases concerning accessibility in the education sector and employment sector have reached the courts, which the courts dealt as a statutory issue, which has been consistently being remedied by the courts with a direction to the state to implement the RPWD Act.¹⁴⁷ UNCRPD understands lack of accessibility as discriminatory,¹⁴⁸ but courts in India do not use the right against non-discrimination to remedy these issues.¹⁴⁹ As implementation of the Act is the prerogative of the executive and is subject to budgetary constraints. As such, these directions of the courts haven't had any real impact.

These series of decisions can be contrasted with the way accessibility issues are dealt with in South Africa. In the case of *Equal Education v. M.E.C.*¹⁵⁰ for Education, the court held that “the failure to make provisioning for the diverse transport needs of learners with disabilities constitutes discrimination in terms of section 9(3) of the Constitution.”¹⁵¹ The case of *Bosch* is another excellent example that contrasts the attitude of the Indian and South African judiciary. The Equality court (which is the Magistrate's court in South Africa, i.e. the judicial court at the lowest level) considered inaccessibility of a public premise a violation of the constitution of the dignity of persons with disabilities. It directed the police commissioners to apologize to persons with disabilities and acknowledge the inappropriate attitude in this situation.¹⁵²

4.2 Disability discrimination: Article 14 v. Article 15

When the need for constitutionalizing the right of equality and non-discrimination for persons with disability is established, it can be argued that the same can be done through Article 14, the general

¹⁴⁷ Rajive Raturi, *Disability and the Law* (Universal Law Publishers, 2011).

¹⁴⁸ Committee on Rights of Persons with Disabilities (n 11).

¹⁴⁹ Rajive Raturi (n 147).

¹⁵⁰ *Equal Education and Another* (n 69).

¹⁵¹ *Ibid.*

¹⁵² *WH Bosch* (n 74).

equity clause. Article 14 guarantees equality before the law and equal protection of the law to all. It extends to all persons with disabilities by default. In fact, equality claims related to persons with disability in India are argued primarily on the basis of Article 14. However, the mere extension of a general clause cannot be equated to acknowledging the right of discrimination on the grounds of disability, along with other grounds, under Article 15. The UNCPRD is a testament to the need of specifying extending the right to persons with disabilities, which could have been addressed by the existing treaties through their universal application to ‘all human beings’. The domestic legal framework should be approached with the same spirit that was behind the adoption of UNCPRD.

4.2.1 Normative value of Article 15

Article 15 is not a mere extension of Article 14. It serves a specific purpose. It aims at the emancipation of historically discriminated citizens and the restructuring of social order. Through its application, the courts of India have pronounced significant judgments to eliminate the deep-seated hierarchies (such as gender stereotypes,¹⁵³ women rights,¹⁵⁴ and rights of gender non-conforming people¹⁵⁵ and those of sexual minorities¹⁵⁶) in Indian society. These grounds under Article recognize the social hierarchies within the citizens of India and the ways and means through which “politics of exclusion and disempowerment” is played.¹⁵⁷

While laws under Article 14 can be upheld as constitutional if they have a reasonable basis, Article 15 ensures that the grounds mentioned under Article 15, are not considered reasonable grounds of distinction. Article 15 thus plays a huge role in the transformative vision of the Constitution by

¹⁵³ Joseph Shine v. Union of India (2019) 3 SCC 39.

¹⁵⁴ Indian Young Lawyers’ Association v State of Kerala (2019) 11 SCC 1.

¹⁵⁵ NALSA v Union of India (2014) 5 SCC 438.

¹⁵⁶ Navtej

¹⁵⁷ Ranabir Samaddar (n 92).

acknowledging the structural inequalities. It is for this reason that Article 15 is the only provision that addresses horizontal discrimination on the basis of certain grounds (but not disability) because it is impossible to address the structural inequalities without taking into account the discrimination that stems out of the stigma, bias, and prejudices of individual or private action. It is important to recognize disability as one of the grounds which have been the basis of marginalization and exclusion and to correct the historical injustice perpetrated by the ignorance of the human rights issues of persons with disabilities.

4.2.2 Standard of protection under Article 14 v. Article 15

Explicitly including disability under Article 15 of the Constitution of India holds symbolic importance in recognition of ‘disability’ as a marginalized group. But apart from the normative importance, Article 15 also offers a higher standard of protection than Article 14. The claims under Article 14 are tested on two-fold criteria i.e. whether the distinction was unreasonable and whether the measure adopted to make the distinction was unjust or arbitrary.¹⁵⁸ The traditional jurisprudence used to apply the same test to Article 15.¹⁵⁹ However, claims under Article 15 have to undergo a higher standard of review.¹⁶⁰ The new standard of review treats the grounds under Article 15 as the immutable characteristics that relate to the personal autonomy and dignity of an individual.¹⁶¹

¹⁵⁸ M.P. Jain, *The Constitution of India*, 8th Edition (Lexis Nexis 2018) 1548.

¹⁵⁹ *Ibid.*

¹⁶⁰ Tarunabh Khaitan, ‘Beyond Reasonableness--A Rigorous Standard of Review for Article 15 Infringement’ [2008] *Journal of Indian Law Institute*.

¹⁶¹ *Navtej* (n 15).

Article 15 directs that the state ‘shall not’ discriminate on the basis of certain grounds. The use of the word ‘shall’ not indicate the mandatory nature of Article 15.¹⁶² In *Kathi Raning Rawat v. State of Saurashtra*, the Supreme Court of India stated that, “once discrimination on one of the grounds in Article 15 was made out, it would amount to a violation of a constitutional prohibition.”¹⁶³ The Kerala High Court had also indicated the mandatory nature of Article 15 when it stated in *Rajamma v. State of Kerala* that, “Unlike freedoms in Article 19 of the Constitution, there is no scope for restricting the absolute scope of the rights under Article 15(1) of the Constitution.”¹⁶⁴ The pronouncement of the Delhi High Court in *Amit Bhagat v. Government of NCT Delhi*, serves as another example where the court stated that “Article 14 may allow a legitimate basis to classify on the basis of religion, Article 15(1) forbade such classification.”¹⁶⁵

4.3 Disability discrimination: Analogous ground v. enumerated ground

Considering the importance of situating disability in Article 15, it can be argued that the same be regarded as an analogous ground rather than providing disability as an enumerated ground. However, recognition of disability as an analogous ground not only ignores the normative value of specifying disability as a ground of discrimination under Article 15, but also put a huge challenge on the litigator to have the same recognized by the courts. Instead, disability can be included as an enumerated ground in Article 15 through a constitutional amendment. The Constitution of India has been in existence for around 72 years and in that time frame, it has been amended 105 times. A constitutional amendment doesn’t pose a challenge as big as having

¹⁶² Dhruva Gandhi, ‘Locating Indirect Discrimination in India: A Case for Rigorous Review under Article 14’ [2020] 13 NUJS Law Review.

¹⁶³ *Kathi Raning Rawat v. State of Saurashtra*, 1952 AIR 123, 1952 SCR 435.

¹⁶⁴ *Rajamma v State of Kerala*, O.P No. 5080 of 1976.

¹⁶⁵ *Amit Bhagat v, Government of NCT of Delhi*, WP (C) 6825/2014.

‘disability’ recognized as an analogous ground. Jurisprudence from South Africa also indicates the various advantages of having disability as an enumerated ground.

4.3.1 Reading disability as analogous ground: A litigator’s burden

The protection of Article 15 is not limited to enumerated grounds. Its application was also extended to discrimination based on sexual orientation, recently confirmed by the Supreme Court of India in 2018 in *Navtej Singh Johar v. Union of India*.¹⁶⁶ The Court said that sexual minority was an ‘analogous’ to other grounds enumerated under Article 15, as discrimination based on sexual minority undermines the personal autonomy of the individual, like the other enumerated grounds under Article 15.¹⁶⁷ Various scholars have welcomed this approach¹⁶⁸ for it opens up the possibility of extending the scope of Article 15 to discrimination claims on other unenumerated grounds like disability. While there is this possibility, the same has yet not happened as in *Navtej*; the Supreme Court did not clarify what other grounds will be considered analogous to the grounds enumerated under Article 15. This poses a burden on the litigator to have the same recognized through the process of constitutional litigation.

4.3.1.1 Lack of jurisprudence on analogous grounds

India doesn’t have a concrete jurisprudence on analogous grounds. Till now, it is limited to the recognition of sexual orientation, which has also happened very recently, after a decade of judicial battle. No other grounds are recognized as analogous grounds. The situation can be contrasted with South Africa, where there is a concrete jurisprudence on analogous grounds. The courts in South Africa have, on a number of occasions, deliberated on the right against unfair discrimination and

¹⁶⁶ *Navtej* (n 15).

¹⁶⁷ *Ibid.*, para 15.

¹⁶⁸ Tarunabh Khaitan, ‘Reading Swaraj into Article 15: A New Deal for All Minorities’ [2008] 2 NUJS Law Review.

its application to unspecified grounds. Under the previous list of prohibited grounds of discrimination in the Interim Constitution, marital status was not included as a specified ground.¹⁶⁹ The courts, however, have found it to be an unspecified ground of discrimination on two occasions in *Brink*¹⁷⁰ and *Harksen*.¹⁷¹ This was later made into a specific ground of discrimination with the drafting of Final Constitution and included in FC s 9(3). South African courts have recognized citizenship as an analogous ground of discrimination. Non-citizens in South Africa are a vulnerable group who suffer from discrimination because of xenophobia. The Constitutional court in *Lrbi-Idam* recognized citizenship as a ground of discrimination by observing that citizenship is a personal attribute that has become the subject of intimidation and exclusion¹⁷². This decision was relied upon in *Khosa*, which recognized citizenship as an unspecified ground of discrimination, and extended the special security benefits to permanent residents.¹⁷³ Recently, a constitutional court has found HIV to be an analogous ground of discrimination. The court declared that,

“People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised...The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.”¹⁷⁴

¹⁶⁹ Interim Constitution of South Africa, s 8

¹⁷⁰ *Brink v Kitshoff*, 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC).

¹⁷¹ *Harksen v Lane*, 1998 (1) 300 (CC), 1997 (11) BCLR 1489 (CC), para 47.

¹⁷² *Larbi-Odam & Others v Member of the Executive Council for Education & Another* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC), para 19-20.

¹⁷³ *Khosa & Others v Minister of Social Development & Others; Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004)

¹⁷⁴ *Hoffmann* (n 55).

Thus, having a ground recognized as an analogous ground of discrimination is easier in states like South Africa, where the judicial culture is more accepting of this approach. However, in the Indian judicial culture, it is a challenging approach to do so.

4.3.1.2 Courts' resistance to reading disability into Article 15

The Supreme Court has steered away from reading disability as an analogous ground and extended the scope of Article 15 to persons with disabilities, even after being confronted with multiple opportunities to do so. In a much-welcomed decision of the Supreme Court of India, in *Vikas Kumar v. UPSC*,¹⁷⁵ the Court declared that denying a scribe to a person with dysgraphia (writer's cramp) in a civil service examination is discrimination against that person. In another judgment of the Supreme Court of India in *Rajeev Kumar Dhariwal v. Union of India*¹⁷⁶ the court was looking to answer the question of whether the multiple disciplinary proceedings conducted by the Central Reserve Police Force against a person with a mental disability amounted to discrimination. In both these judgments, the Court limited its analysis to Article 14 of the Constitution, UNCRPD and the RPWD Act, 2016. In doing so the court has steered clear from any discussion about the application of Article 15 to persons with disabilities.

In the Punjab and Haryana Court, in *Vibhu Dayal Sharma v. Director*,¹⁷⁷ counsel argued that constitutional provisions of Articles 15 and 16 need an amendment to include disability as a prohibited ground. Still, the court stayed away from any discussion on the issue. In another petition moved before the Supreme Court of India by disability rights activist Nipun Malhotra it was argued

¹⁷⁵ *Vikas Kumar v UPSC*, Civil Appeal No. 273 of 2021.

¹⁷⁶ *Rajeev Kumar Dhariwal v Union of India*, Civil Appeal No. 6924 of 2021.

¹⁷⁷ *Vibhu Dayal Sharma v. Director*, CWP No. 16108 of 2011.

that the imposition of taxation on disability equipment is discriminatory; yet, the court refused to ‘judicially interfere’ in taxation matters. It requested the petitioner to approach the Goods and Services Tax Council with an expansive interpretation to Article 15 to include people with disabilities remained out of the discussion.¹⁷⁸

Thus, the lack of jurisprudence on analogous grounds and the court’s hesitance in recognizing the same place a very heavy burden on the litigator to have a disability recognized as an analogous ground under Article 15 of the Constitution.

4.3.2 Enumerating disability as specific ground: Advantages

Enumerating ‘disability’ as a particular ground under Article 15 of the Constitution is not just an easier process as compared to having the same recognized through constitutional litigation. It also offers other advantages.

4.3.2.1 Constitutional remedy for horizontal discrimination

Gautam Bhatia defines horizontal discrimination as “discrimination suffered by private entities at the hands of other private entities (individuals or corporations), on the basis of constitutionally proscribed markers: sex, race, caste, religion, place of birth, etc.”¹⁷⁹ It can occur in various forms like denying access to public spaces and exclusion from the market. All these forms involve the conflict between the right of non-discrimination of individuals and groups and the right of other individuals to not associate with others.¹⁸⁰ Article 15(2) provides the right to non-discrimination

¹⁷⁸ Nipun Malhotra v, Union of India, Writ Petition (C) No., 725/2019.

¹⁷⁹ Gautam Bhatia, ‘Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach’ [2016] 11 (1) Asian Journal of Comparative Law.

¹⁸⁰ *Ibid.*

against such social exclusion and, for that reason, extends the protection to even private sphere, unlike other fundamental rights which apply against the state.

In a landmark judgment of *IMA v. Union of India*,¹⁸¹ the Supreme Court of India clarified that the protection under Article 15(2) “imply that the private sector which offers such facilities ought not to be conducting their affairs in a manner which promotes existing discriminations and disadvantages.” The constitution-makers recognized the right to access as an extension of the right to non-discrimination and an important tool to fight social exclusion. However, due to the omission of disability as a constitutionally protected ground in Article 15(2), the same protection of non-discrimination does not extend to persons with disabilities against private actors.

Persons with disabilities continue to face issues regarding access, which is not just limited to physical space, but also extends to social space, where they often have to deal with the derogatory treatment meted out to them by private service providers. Just to look into the recent examples of such treatment, recently, in May 2022, a person using a wheelchair was refused to board an aircraft by Indigo airlines.¹⁸² In another incident, in February 2022, a woman using a wheelchair was denied entry into a restaurant and bar.¹⁸³ A few years back in 2019, a disability rights activist was refused a cab ride.¹⁸⁴ Persons with disabilities thus continue to be socially excluded and having

¹⁸¹ *IMA v. Union of India*. CIVIL APPEAL NO. 8170 OF 2009.

¹⁸² ‘IndiGo: Anger after India airline removes disabled teenager’ <<https://www.bbc.com/news/world-asia-india-61375687>> Last accessed 30th June 2022.

¹⁸³ Shubhangi Misra, ‘Woman with disability claims she was denied entry into Raasta. Pub says never denied service’ <<https://theprint.in/india/woman-with-disability-claims-she-was-denied-entry-into-raasta-pub-says-never-denied-service/828988/>> Last accessed 30th June 2022.

¹⁸⁴ Abdul Gani, ‘Differently-Abled Activist Arman Ali Harassed By Uber Cab Drivers In Chennai’ (*Outlook*, 20 June 2019) <<https://www.outlookindia.com/website/story/india-news-differently-abled-activist-arman-ali-harassed-by-uber-cab-drivers-in-chennai/332639>> Last accessed 30th June 2022.

disability as an enumerated ground under Article 15 of India will extend the protection against horizontal discrimination against persons with disabilities.

4.3.2.2 Scope for extending protection to grounds analogous to disability

Enumerated grounds of disability opens the possibility of extending the protection to grounds that though not specified are similarly impacted like disabilities. This is clearly seen in South Africa, where disability is an enumerated ground of discrimination. In *Hoffman* case¹⁸⁵, disability ground was used by the court to determine HIV as an analogous ground of discrimination. HIV status was considered similar to disability in many ways, and the court stressed the denial of employment and the existing prejudices and stigma that is suffered by HIV-positive people and persons with disability in South Africa. In *IMATU v. City of Cape Town*,¹⁸⁶ the Court extended the protection to a diabetic person and found that rejection of transfer to a diabetic persons constituted discrimination on the grounds of disability.

Indian cases also show a tendency of the courts to be more open to extending protection against unfair discrimination to grounds, which though being unspecified, can be considered similar to the enumerated grounds. This was seen in the case of *NALSA v. Union of India*,¹⁸⁷ where court extended the protection under Article 15 to transgenders, even though gender was not an enumerated ground of discrimination. The courts however read gender into sex, which is an enumerated ground of discrimination. Thus, including disability as an enumerated ground of discrimination will open the possibility of extending protection to grounds which are similarly impacted like disability.

¹⁸⁵ *Hoffmann* (n 55).

¹⁸⁶ *IMATU* (n 84).

¹⁸⁷ *NALSA* (n 155).

4.3.2.3 Scope of extending protection to unrecognized disability

The RPWD Act, 2016 in India recognizes 21 types of disabilities. While it is a significant improvement over the previous law, the 1995 Act which only recognized seven, it still limits the protections under the Act to certain types of disabilities. Disability is not a rigid concept. It has to be understood as arising out of the barriers imposed by the physical and social environment.

UNCPRD defines disability in a similar manner: -

“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.”¹⁸⁸

Not only the Indian law only recognizes 21 types of disabilities, but it also follows a quantitative approach when providing for special measures to advance equality. Special provisions of affirmative action in the education and employment sector only extend to people with benchmark disability i.e., 40% disability.¹⁸⁹ Courts in India have often grappled with litigation that concerns the extension of these provisions to people with less than 40% of disability. While courts in some cases have decided to extend the benefits of these provisions to certain persons with disabilities who do not meet the criteria of 40%¹⁹⁰ In other cases it has also refused to do so and adopted a strict and literal interpretation of the RPWD Act.¹⁹¹

¹⁸⁸ UNCPRD, art 1.

¹⁸⁹ RPWD Act (n 127) (n 128) (n 129).

¹⁹⁰ Vikash Kumar (n 175).

¹⁹¹ In *Bogga Mallesh & Anr. v The Commissioner, Disabled Welfare Department & Ors.* - WP No. 22440 of 2004- The court held that it was a decision of the government, whether to include dwarfism into the category of disability or not.; In *Rasale Gopal v Andhra Bank & Ors.* - 2003 (3) ALT 760; (2003) II LLJ 916 AP- The court held that persons with less than 40% disabilities will not be entitled to any special benefit reserved for persons with benchmark disabilities.

In addition to this extending the benefits of RPWD Act to people with less than 40% of disability, there is also an issue of various invisible disabilities that are not yet recognized.¹⁹² Including disability as an enumerated ground under Article 15 opens up a greater possibility of having the rights of people with less than 40% of disability and people with unrecognized disabilities being recognized in the court. This is because Article 15 is considered with personal autonomy of the person and how the discrimination on the prohibited grounds impacted the dignity of the person.¹⁹³ The courts in South Africa also show a similar trend. In *IMATU v. City of Cape Town*,¹⁹⁴ the Court extended the protection to a diabetic person and found that rejection of transfer to a diabetic person constituted discrimination on the grounds of disability. In *Damons v. City of Cape Town*,¹⁹⁵ the Court held that preventing a diabetic person from advancing to a senior position because of the inability to complete a physical fitness requirement constitutes unfair discrimination on the grounds of disability.

It is also interesting that both these cases emerged from the Labor Court and not the Constitutional Court of South Africa. Having disability as an enumerated ground, combined with the ethos and the constitutional imperative behind FC 9(3) makes the judicial process at every level more open to extending such protection.

¹⁹² 'The Invisible Rights of Persons with Invisible Disabilities Act of India' (*CCYA Network*) <<https://www.ccyanetwork.org/news/the-invisible-rights-of-persons-with-invisible-disabilities-act-of-india>> Last accessed 30th June 2022.

¹⁹³ *Navtej* (n 15).

¹⁹⁴ *IMATU* (n 84).

¹⁹⁵ *Adams Damon v City of Cape Town* CCT 278/20 [2022] ZACC 13.

CONCLUSION

The thesis examined the need for and importance of constitutionalizing the right of equality and non-discrimination under Article 15 of the Constitution of India. The right to equality and non-discrimination is central to the realization of other rights of persons with disabilities. It is for this reason that this right is given very high importance by the UNCRPD and made into one of the general principles of the Convention. To effectively realize the goal that persons with disabilities enjoy their rights on an equal basis with others, this right must be effectively provided within the domestic framework of state parties. The state parties can do this by constitutional reform or legislative change. The CRPD Committee recommends that state parties initiate constitutional reform because of the importance of the constitution as a legal document in the state parties' overall social and political structure.

One effective way of constitutionalizing the right of equality and non-discrimination in the domestic legal framework is through explicitly including disability as a ground of discrimination, as is done in the Constitution of South Africa. Enumerating disability as a specific ground of discrimination makes it a part of the constitutional commitment. It is positively reflected in the laws, policies and judicial pronouncements related to persons with disabilities. In contrast to the South African approach, India has provided for the right of equality and non-discrimination for persons with disabilities through an enactment, while no change has been introduced in the Constitution of India. In India, the constitution does not prohibit discrimination on the basis of disability. The manner in which the law addresses the right of equality and non-discrimination for persons with disabilities has its limitations. Apart from this, certain constitutional provisions, laws, and policies show a pattern of institutional ableism. The disability rights activists in India have

been demanding that India include disability as a ground of discrimination under Article 15 of the Constitution. The CRPD Committee has made recommendations to India on the same lines.

The thesis takes this demand further by highlighting the need to constitutionalize disability, specifically through a constitutional amendment that includes disability as a ground of discrimination. India needs to change the course of institutional ableism and constitutional recognition of disability as a ground under Article 15, which will acknowledge the history of marginalization and exclusion suffered by persons with disabilities. A constitutional right of equality and non-discrimination will also enable to remedy this institutional ableism through a declaration of these laws as constitutionally void. It will further lead to a stronger remedy and a stronger enforcement mechanism for the various issues of persons with disabilities in India. A ground under Article 15 will also give stronger protection to equality claims of persons with disability than the one granted by Article 14, under which the equality claims are currently litigated. This is because of the rigorous standard of examination of equality claims under Article 15. Also, an enumerated ground under Article 15 will ensure that persons with disabilities are constitutionally protected against discrimination by private actors, which the general protection under Article 14 cannot provide.

Further, providing disability as an enumerated ground under Article 15 removes the burden on the litigator to have the same recognized as analogous ground. The burden will be even heavier considering the lack of jurisprudence in India on analogous grounds and the court's hesitance in reading it into Article 15 despite having multiple opportunities to do so. Compared to this, including disability as an enumerated ground will be easier, as the Indian constitution has been

amended numerous times without any difficulty. Lastly, the position in South Africa also indicates that having an enumerated ground of disability opens the possibility of extending the protection to unrecognized disabilities and to grounds analogous to disability.

Thus, it is recommended that the state of India bring out a constitutional amendment to amend Article 15 of the Constitution of India. The amendment should provide disability as grounds for discrimination under clauses (1) and (2) of Article 15.

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