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Disability and its Inclination Towards Human Rights and IPR: A Legal Analysis in the Light of Visually Disabled in India*

(Dr. Anu Prasannan)

Abstract
Disability is an impairment that may be related to cognitive, development, intellectual, activity limitation, sensory or a combination of these. In legal terms it is the want of legal capacity to perform an act. Different conceptual models have been developed by scholars and international bodies to define disability from time to time. In recent times there is a paradigm shift from the medical model to human rights model of disability wherein, human rights model encompasses the values for disability policy that acknowledges the human dignity of disabled persons. Human rights are fundamental rights and though viewed as a human rights model human rights violations are rampant among persons with disabilities. These violations are more among ‘seeing disability’ as India has gigantic blindness problems and the statistics reveals that of the total population, persons with disabilities suffering from ‘seeing disability’ are more compared to the other types of disabilities. The problems faced by the persons with visual impairment are many and varied. They include lack of access to many books due to its high price, stringent intellectual property laws of respective countries, difficulty in procuring braille literature for their further studies or skill development programmes etc., It is to be noted that these problems are in the midst of the ‘right to education’ enshrined as a fundamental right in the Indian Constitution and also ratification of International Convention on disability. To an extent the problem is addressed by the WIPO administered Marrakesh Treaty that makes the production and international transfer of specially-adapted books for people with blindness or visual impairments easier. The treaty allows for copyright exceptions to facilitate the creation of accessible versions of books and other copyrighted works for visually impaired persons, reading disabled persons, those having physical disability etc., Thus the requirement is the effective implementation of the treaty so as to reach its benefits to the millions of beneficiaries spread across the world.....

Keywords: Disability, Human Rights Violation, Visual Impairment, International Convention, Marrakesh Treaty, implementation

Introduction
Charter of United Nations, the most widely ratified treaties in the history of international relations is not only an ordinary treaty but a Constitution in its true sense. The Charter explicitly recognizes that maintenance of “international peace and security” and “protection of human rights” are interdependent and proclaims that promotion of human rights is one of the main objectives of the United Nations. It therefore, imposes a duty and a legal obligation both on the member States and
the United Nations Organisation itself to promote and protect human rights. This is reflected in various provisions of the Charter. In the opening words of the preamble the peoples of the United Nations express determination “to reaffirm faith in fundamental human rights, in the equal rights of men and women and of nations large and small” and “to promote social progress and better standards of life in larger freedom”. Further, it finds expression in the purposes and principles of the UN, in the words “promoting and encouraging respect for human rights” and “assisting in the realization of human rights and fundamental freedoms.” It is pertinent to note that these objectives are achieved not only through the principal organs of the UN but also through its specialized agencies which are linked to UN and complement the action of the UN in related technical fields.

Such a technical field that has attained central importance throughout the globe in recent years is Intellectual property which is mainly the subject matter of World Intellectual Property Organisation (WIPO), which itself is a specialized agency of UN and has also become a part of World Trade Organisation (WTO) regime in 1995. WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) has evolved minimum standards for the protection of intellectual property for the member States to incorporate in their municipal laws. Thus UN through its principal organs and WIPO uphold the realization of civil and political rights and economic, social, and cultural rights. Protecting the rights of the largest minority group, persons with disabilities is one such arena. An attempt is therefore, made to analyze their role in

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2 Chapter I of the UN Charter under Articles land 2 deals with the Purposes and Principles of UN.
3 The contribution of General Assembly, Economic and Social Council and Trusteeship Council is worthy to be noted in the protection and promotion of human rights. Art. 13 Para. 1(b) of the General Assembly provides that the General Assembly shall initiate studies and make recommendations for the purpose of promoting international co-operation in the economic, social, cultural, educational and health fields and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion; Art. 62 Para 2 of the Economic and Social Council provides that it may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all and Art. 76 (c) of the International Trusteeship System provides that the basic objectives of the trusteeship system, in accordance with the purposes of the United Nations laid down in Art. 1 of the present Charter, shall be to encourage respect for human rights and for fundamental freedoms of all. In addition, Art. 56 read with Art. 55 provides that: All Members pledge themselves to take joint and separate action in cooperation with the organisation for the achievement of universal respect for human rights and fundamental freedoms for all. See *Charter of the United Nations and Statute of the International Court of Justice*, (New York: United Nations Publications Edition, 2015).
4 Specialized agencies are international organizations having separate legal personality and are linked to the UN by special agreements. See Philippe Sands Q.C and Pierre Klein, *Bowett’s Law of International Institutions*, 6th edn., (London: Thomson Reuters Sweet & Maxwell, 2005)
5 Intellectual Property thus includes copyright, trade marks, geographic indications, patents, utility models, plant varieties, industrial designs, trade secret, service marks etc.,
6 In 1974 WIPO an intergovernmental organization became the specialized agency of United Nations and its origin goes back to 1883 and 1886 when the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works provided for the establishment of an International Bureau. In the year 1893 these two bureaus were united and in 1970 they were replaced by WIPO by virtue of WIPO Convention. See Convention establishing the World Intellectual Property Organisation, URL: http://wipo.int/treaties/en/convention/
promoting ‘right to education’ which is not only a human right but also a fundamental right enabling the visually impaired to be included in the main stream of the society thereby, removing the barriers of discrimination and social exclusion.

**Human Rights Violations among persons with disabilities**

Disability is an impairment that may be related to cognitive, development, intellectual, activity limitation, sensory or a combination of these. Although defining disability is a complex, complicated and a controversial exercise, it is important to carry out an analytical study on the subject. *Black’s Law Dictionary* defines disability as:

> the want of legal ability or capacity to exercise legal rights, either special or ordinary, or to do certain acts with proper legal effect or to enjoy common privileges or powers of free action.\(^8\)

The International Classification of Functioning Disability and Health (ICF) has been developed by WHO and formally adopted by the General Assembly in 2001 which represented an integration of medical\(^9\) and social model of disability.\(^10\) ICF according to WHO attempts to synthesis both with a ‘biopsychosocial’ approach incorporating the biological, individual and social perspectives on health. The term ‘disability’ in the new ICF is defined as:

> An umbrella term for impairments, activity limitations and participation restrictions. It denotes the negative aspects of the interaction between an individual (with a health condition) and that individual’s contextual factors (environmental and personal factors)\(^11\)

However, in recent times there is a paradigm shift from the medical and social model of disability towards human rights model.\(^12\) Being comprehensive human rights model encompasses both sets of human rights, civil and political as well as economic, social and cultural. However, it is disheartening to see that human rights violations among these persons with disabilities are still rampant in the society exposing them to more and more discrimination. These violations are seen more among ‘seeing disability’. According to WHO there are approximately 2.2 billion people living with some form of vision impairment wherein, 1 billion or almost half of them is preventable in nature.\(^13\) India has gigantic blindness problems and the statistics reveals that of the total population, persons with disabilities suffering from ‘seeing disability’ are more compared to the other types of disabilities. As per 2011 Census, there are 2.68 crore persons with disabilities in

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\(^9\) Views disability as a problem caused by their health condition

\(^10\) Social model of disability views disability as socially created reflecting the nature of the environment in which people live.


India who constitute 2.21% of the total population in which 1.50 crore are male and 1.8 crore are female. These include persons with visual, hearing, mental illness, mental retardation, multiple disabilities, speech, locomotor and other disabilities. Among the total population of 2.68 Crore persons with disabilities in India there are 50,32,463 visually impaired persons wherein, 26,38,516 are male and 23,93,947 are female constituting the largest among other types of disabilities. The problems faced by the persons with visual impairment are many and varied. They include lack of access to many books due to its high price, stringent intellectual property laws of respective countries, difficulty in procuring braille literature for their further studies or skill development programmes, the high cost factor in reproducing the works under copyright protection, lack of adequate infrastructure, lack of Braille teachers etc., which are persisting in the midst of the legal framework in the International and National scenario. In the international level UN adopted the Convention on the Rights of Persons with Disabilities, 2006 the first internationally binding legal treaty on disability rights exclusively and globally representing a paradigm shift from a medical and social model to a human rights model embracing the rights of people with disabilities to be included in the community enabling them to be independent citizens. The Convention has thus recast disability as a social construct and thereby, has brought a human rights dimension to disability issues.\textsuperscript{14} When it comes to the national legislation India enacted a new law on disability namely, the Rights of Persons with Disabilities Act, 2016.\textsuperscript{15} In the midst of these positive developments it is also to be noted that the problems of visually impaired still remain unaddressed and unanswered and can be brought under gross human rights violation namely, the denial of ‘right to education’ wherein, ‘right to education’ is also a fundamental right in the Indian Constitution.

**Marrakesh Treaty as a link between human rights and Intellectual Property Rights**

The International Convention on Disability though the first legally binding instrument to introduce the concept of inclusive education system\textsuperscript{16} at all levels has failed to address the issue of access to copyrighted material by persons with disabilities. In the same lines, the comprehensive legislation of India on disability also does not touch upon the area. Thus it becomes imperative to look into the Indian Copyright laws that has covered a long journey from its earlier days and has now entered into a new world of technological innovations. Though not a single right, copyright is a bundle of rights which can be exploited independently where the nature of these rights depends upon the

\textsuperscript{14} The convention takes the view that disability stems from the failure of social environment to meet the needs and aspirations of persons with disabilities.

\textsuperscript{15} India replaced the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act of 1995 with a new legislation, that is, the Rights of Persons with Disabilities Act, 2016 in order to harmonise all disability-related legislation and policy provisions with the guiding spirits and ethos of the Convention.

\textsuperscript{16} The term ‘inclusion’ refers to attending the same school as the pupil would have attended in the absence of a significant special need. See Prakash, Jayanti (2005), “Inclusive education: voices from the other side”. *I.J.D.S*, 1(1):92-113.
category of work. But one right that is common to all works is the right to reproduce\textsuperscript{17} or make copies of the work. The owner of the copyright may exploit the work himself or license others to exploit any one or more of the rights for a consideration in the form of a royalty or lump sum payment. In normal cases the author of a copyright can either assign whole or part of his rights to others\textsuperscript{18} or give a license\textsuperscript{19} to do some of the rights without which it amounts to an infringement. The Copyright Act, 1957 had been amended many times to meet the national and international requirements. The Copyright (Amendment) Act, 2012 have introduced amendments to facilitate access to works including special provisions for the disabled along with others.\textsuperscript{20} Special provision for access to the disabled can be analysed as follows:

- Compulsory license for the disabled

Sec. 31B provides for compulsory license in works for the benefit of the disabled. On an application for compulsory license by any person working for the benefit of persons with disability on a profit basis or for business the copyright board shall dispose such application within a period of two months from the date of receipt of the same. If the Copyright Board is satisfied after holding an enquiry that a compulsory license needs to be issued to make the work available to the disabled, it may direct the Registrar of Copyright to grant to the applicant such a license to publish the work. Every compulsory license issued under this section shall specify the means and format of the publication, the period during which compulsory license may be exercised and in the case of issue of copies, the number of copies that may be issued including the rate or royalty.\textsuperscript{21}

- Fair use rights for the disabled

The new clause (zb) added to sec. 52 (1) providing for the fair use of the work for the benefit of the disabled facilitates adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format for persons with disability to access works including sharing with any persons with disability for private and public use, educational purposes or research. The rights are available to any persons or organization working for the benefit of the persons with

\textsuperscript{17} Reproduction means not only an exact reproduction but even a copy of the work may be considered as an infringement. If a substantial part of the work is copied it also amounts to infringement.

\textsuperscript{18} Sec. 19 of the Copyright Act, 1957 lays down the conditions for the assignment of the copyright.

\textsuperscript{19} License is different from an assignment and usually involves only some of the rights and not the whole. There are different kinds of licenses. It may be exclusive or non-exclusive; it may be voluntary or granted by the Copyright Board as a compulsory license. See S.K. Singh, \textit{Intellectual Property Rights Laws}, 2\textsuperscript{nd} edn., (Central Law Agency, 2016)

\textsuperscript{20} It includes

- Grant of compulsory Licenses
- Grant of Statutory Licenses
- Administration of copyright societies
- Fair Use provisions
- Relinquishment of copyright

disabilities. Mean while, in the international level till the adoption of the WIPO administered Marrakesh Treaty that made the production and international transfer of specially-adapted books for people with blindness or visual impairments easier the access to copyrighted material was not addressed in any international instrument. It was left to national legislations alone. The Marrakesh treaty allows for copyright exceptions to facilitate the creation of accessible versions of books and other copyrighted works for visually impaired persons, reading disabled persons, those having physical disability etc.,. The treaty is therefore, a link between realizing the human rights of visually disabled and Intellectual Property. Thus the requirement is the effective implementation of the treaty so as to reach its benefits to the millions of beneficiaries spread across the world.

**Analysis of Marrakesh Treaty**

The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print disabled was adopted by the member States of WIPO on June, 2013 after several years of negotiations\(^2\) to address the problems faced by the millions of visually impaired all over the world which is commonly referred as “book famine.”\(^3\) Treaty is referred as the first copyright treaty having human rights perspective which is drafted in the lines of Universal Declaration of Human Rights (UDHR) and UNCRPD.\(^4\) The treaty imposed two obligations on the contracting parties when implementing the treaty at the national level. They are (i) to provide an exception or limitation to domestic copyright law for visually impaired or print disabled people\(^5\) (ii) to allow exchange across borders accessible version of books and other copyrighted works without the copyright holders permission. Under the Marrakesh Treaty beneficiaries are those affected by a range of disabilities that may interfere with the effective reading of printed material. Those with print disabilities include people who are blind, those who have a visual impairment or a perceptual or reading disability and those who are unable to hold or manipulate a book. A print disability can be caused by a visual disability, such as blindness or low vision; a developmental or learning disability, such as dyslexia and autism; or a physical disability, such as Parkinson’s disease and paralysis. The disability does not have to be permanent.\(^6\)

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\(^3\) Treaty came into force on September 30, 2016. The draft treaty was first proposed to WIPO member States by the World Blind Union (WBU). International Federation of Library Associations (IFLA) and other library partners strongly supported negotiations over more than five years at WIPO, and participated in the Diplomatic Conference in Marrakesh that led to the treaty’s adoption.


\(^5\) On ratifying the treaty it enables the member States to allow blind people and their organizations in their national legislation to make accessible books without the need of permission from the holder of copyright.

the condition prevails. The treaty meant for millions of beneficiaries also gives an assurance to the authors and publishers that the system will not expose their published works to misuse or distribution to anyone other than the intended beneficiaries. Marrakesh treaty once implemented into national law transforms library services for people with print disabilities:

a. By removing legal barriers regarding making and sharing accessible format works
b. It immediately increases the amount of reading material available to print-disabled readers.
c. It saves time, money and effort because libraries can pool their resources within a country, within a region or further afield.
d. Libraries can also coordinate the production of works, which results in less duplication where the same book might otherwise be converted multiple times in different countries.

As of January 25, 2021, 79 States became party to the treaty in which India was the first State to ratify the treaty.

**Conclusion**

According to 2011 census there are 2,68,10,557 blind persons in India in which most of them belong to the under privileged strata of the society. Blindness combined with poverty limits their access to education, employment, health services, etc. which finally leads to their socio-economic exclusion. The census provides that 45% of India’s disabled population are still illiterate, compared to 26% of all Indians. Every person has a right to education. The education that is strongly advocated for children with disabilities is inclusive education. The term ‘inclusion’ refers to attending the same school as the pupil would have attended in the absence of a significant special need. It implies a radical shift from segregation, a radical reform of school in terms of curriculum, assessment, pedagogy and grouping of pupils. The visually impaired faces number of difficulties in their struggle for getting education. Technology has made possible to convert the print into braille, audio CDS etc., but there is a lack of awareness among all the stake holders as far as the material to be made accessible to visually challenged in India is concerned. Very few colleges and universities in India are equipped with latest technologies in the disability centre or in the academic libraries for the service of visually challenged. In India various special schools were established for the visually challenged and braille text books were made available to these institutions free of cost by the government but the blind receives education free till they reach 10th standard. In higher education visually impaired persons face the problem of availability of accessible reference books related to their curriculum. The libraries of higher education are still not disabled friendly. These minority groups in India feel neglected and isolated once they reach to higher education. These problems exist in the midst of International Conventions like

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27 People with other disabilities, such as deafness, are not covered by the Marrakesh Treaty (although they might be covered under national copyright law). A person who is deaf-blind would qualify under the Treaty.

28 On October 1, 2018 European Union ratified the Marrakesh treaty making EU a party to the treaty as of January, 1, 2019 and on February 8, 2019 the United States also joined the Marrakesh Treaty.
Convention on Disability, Marrakesh treaty and other national legislations like Copyrights law, Rights of Persons with Disabilities Act, 2016 etc., Stressing on the role of civil society for the visually impaired National Federation of Blind (NFB)\textsuperscript{29}, National Association for the Blind (NAB)\textsuperscript{30} are Indian based NGOs having Blind Braille cum talking library and assistive devices of aids and appliances that enable them to strive for enforcement, protection and promotion of all basic human rights including the right to education. NFB library has around 1,200 collections of books and provides Braille converted language text books to maximum Universities in the State.

An empirical study conducted on NGOs in the state of Karnataka has revealed that they have approached many administrative officers and ministers regarding their willingness to provide free braille text books to the visually impaired in the State for their higher studies which was promised to be considered but still pending. Despite the lack of co-operation among the government most of the institutions and NGO’s are ready to provide much support and assistance to the governmental departments in their own fields of expertise but are still not yet approached and consulted in this regard which results in the failure of the implementation of the Marrakesh treaty in its true sense.

There is need for requirement of co-operation among different ministries of government, library services etc., so as to reach the benefits of access to copyrighted materials to millions of visually impaired………..

\textsuperscript{29} NFB is a self help organization for the blind founded in 1970 with the philosophy “let the Blind lead the Blind”. It is an Indian based NGO having its national and central office located at New Delhi

\textsuperscript{30} NAB, an Indian origin NGO has its head office in Mumbai, Maharashtra. It has its branch in almost every state. They conduct programs for the visually impaired by providing computer based training courses, development of communication skills, Training the trainers under the Program Train the Trainers, operating of digital library, providing employability oriented courses such as skill development and self-employment for visually impaired in Karnataka State.