



ISSN: 0975-833X

## REVIEW ARTICLE

### DISABLED SEXUALITY AND LEGISLATIONS – CURRENT TRENDS AND REFLECTIONS

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#### ARTICLE INFO

##### Article History:

Received 16<sup>th</sup> June, 2015  
Received in revised form  
24<sup>th</sup> July, 2015  
Accepted 23<sup>rd</sup> August, 2015  
Published online 16<sup>th</sup> September, 2015

##### Key words:

Disability, Sexuality, Legislations, Persons with disabilities, Sexual and Reproductive Rights.

#### ABSTRACT

The current paper examines the legislations and policies with respect to persons with disabilities. It traces the recognition of component of sexuality and reproductive and sexual rights of persons with disabilities in various legislations and policies pertaining to them. The paper is based on review of secondary sources of data comprising Constitution, Persons with Disabilities Act, 1995 Mental Health Act, 1987, The National Trust Act 1999, Rehabilitation Council of India Act 1992, National Policy for Persons with Disabilities and United Nations Convention on the Rights of Person with Disabilities. Review of the available legislations and policy indicates the absence of component of sexuality in available legislation and policies pertaining to persons with disabilities. It talks about the need for explicitly incorporating sexual and reproduction rights of person with disabilities in the various legislations and policies.

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**Citation:** Anju Adhikari, 2015. "Disabled sexuality and legislations – Current trends and reflections", *International Journal of Current Research*, 7, (9), 20320-20325.

## INTRODUCTION

Legislations are a term synonyms with statutory laws. These are the laws enacted by a legislature. These laws legally prohibit certain actions and ensure that others are carried out. On the other hand policies are the plan of action which guide towards making sure that laws are complied with. It is a manuscript which outlines what the state is expected to do in order to achieve the objectives set for the society as a whole. It delineates the process and philosophy that government will use to achieve its directives.

In any given society, legislations are important instrument for organizing the society and protecting the interest and rights of its citizens. They act as guideline for what is permissible in society. They are important as they just do not confer rights to the citizen but also determines their responsibilities. In the absence of laws, there would be conflicts between social groups and communities. Legislation regulates the way people live and also improves the lives of people. Legislation can also have many other purposes: to provide, to proscribe, to authorize, to grant, to declare or to restrict. The legislations are dynamic in nature as they are subject to changes with time and need of the hour. They are constantly being amended when needed.

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### Need to talk about disability rights

Persons with disabilities form an integral part of the society. According to census of India 2011, the population of persons with disabilities account for 2.21% of India's population. If we talk in absolute numbers, it is 26.8 million people. Out of these 11.8 million are women and rest are men. There are many Disability rights activist who are of the view that this estimation undermines the actual population of persons with disabilities. Nevertheless, they still constitute a large number to the population of the country. The World Health Organization, which uses a wider definition of disability estimates that 15% of the world's population suffers from identifiable physical or mental disability.

Today there is recognition that persons with disabilities encounter several obstacles due to insensitivity and attitudinal barriers. There is no dearth of literature to support the argument that persons with disabilities face structural, systemic, infrastructural and attitudinal barriers. As per Dr. Renu Addlakha, "Historically in India as elsewhere in the world, there has been a deep-rooted cultural antipathy to persons with disabilities. Throughout the ages disabled have been looked down upon with disdain, almost as if they are sub-human. They have been portrayed as medical anomalies, helpless victims and a life-long burden on family and society" (Addlakha, 2007). In earlier times, the medical and rehabilitation model of disability was prevalent where focus

was on mending the impairment and rehabilitating the disabled persons so they may 'fit in' to society. However, now there is an acknowledgment that disability is not a deviation, and hence the social and right based model of disability is sought after where it is considered that all systems and structures of the society must be enhanced upon so as to allow equal opportunities, access and full participation to persons with disabilities. In this context that it becomes imperative to talk about the rights of persons with disabilities and the ways in which these rights can be conferred to persons with disabilities.

### **Disability, Sexuality and Legislations – A Connect**

Disability and sex; Sex and disability, these two terms are seen as incompatible. Men, and often the women themselves, view women and men with disabilities as "damaged goods" (Phillips, 1990).

The draft definition of Sexuality published by World Health Organization states "*Sexuality is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors*".

Sexual expression is a fundamental right of every individual. Every human beings is sexual and has a right to sexuality education, right to receive affordable and accessible sexual and reproductive health services, right to choose whether to be sexually active or not, right to engage in consensual sex, right to choose partner for marriage, right to decide whether to reproduce or not and when and how to do so. However, persons with disabilities are far too often refused masculinity or femininity, among many other things that are taken for granted for the non-physically challenged population (Hahn, 1981; Milligan and Neufeldt, 2001; Tepper, 1999; Tepper, 2000). For many years disability was defined under a medically oriented approach and was thought of as arising solely from biological causes located within the individual (Stroman, 2003).

There is a widespread assumption through time immemorial and across cultures that persons with disabilities are either libidinous dwarfs or have an exceptionally high libido. Either way, conventional society seldom takes into account the sexual and reproductive rights of persons with disabilities. As Dr. Renu Adlakha, a social scientist and disability rights researcher currently at the Centre for Women's Development Studies in New Delhi says, "*Sexuality is an area of distress, exclusion and self-doubt for persons with disabilities*" (Adlakha, 2007). Very often, persons with disabilities are debarred from their sexual rights. Several times in the past, persons with disabilities have been subjected to forced hysterectomies, castration, and sterilization procedures and

even murdered so that their sexuality could be curtailed by society. Some the examples of violation of sexual rights of persons with disabilities includes cases like the one Kolkata in the year 2012, where a 30-year-old mentally challenged woman was molested by a cook in a government mental hospital. In another case in the year 2000, a girl with hearing and speech impairment was raped in a prison van by two policemen in Kolkata. In the year 1994 in Pune forced hysterectomies were conducted on 11 mentally challenged women between the ages 18 and 35. Likewise, in the year 2008, female patients were found naked in the ward of a Kolkata mental hospital. When the mother of one of the female patient found this, the hospital authorities replied by saying that this happened because their clothes had been sent for washing reflecting total dehumanization of persons with disabilities.

These are not isolated cases. There are many such cases which go unreported and never see the light of the day. However, the harsh reality is that persons with disabilities are denied their basic right of being sexual-beings. When it comes to sexuality, people with disabilities face a very incongruous situation. Isn't ironical that on the one hand where society treats them as asexual, libidinous dwarf yet on the other side, people call them hypersexual and it is propagated that sexual health is important for overall well being of all including persons with disabilities. According to a report submitted by Disabled People's International (India) and its partners to the Committee on the Elimination of Discrimination Against Women (CEDAW) in September 2013,

"Almost 80% of women with disabilities are victims of violence and they are four times more likely than other women to suffer sexual violence,"

In such a scenario where the sexuality of persons with disabilities is expediently ignored, sexual and reproductive rights of persons with disabilities are conveniently denied, sexual segregation, desexualization, marital prohibition is being promoted, there is a need to talk about legislations and polices pertaining to persons with disabilities in general and component of sexual rights in these legislations and policies in particular.

### **Indian constitution and disability**

The Constitution of India is based upon the principle of social justice and human rights. The Preamble, Directive Principles of State Policy and Fundamental Rights given in the Constitution stand testimony to this premise. There are several articles in the constitution which directly or indirectly protect the interest of persons with disabilities. Some of the examples of these articles include Article No. 14 which talks about Equality before law, Article 15 which prohibits discrimination on grounds of religion, race, caste, sex or place of birth, Article 16, which provides for equality of opportunity in matters of public employment, Article 21 which guarantees protection of life and personal liberty, Article 41 which states that, "The State shall, within the limits of its economic capacity and development make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement."

However, these rights are conferred to all the citizens' including persons with disabilities. None of the articles in the constitution makes a specific mention of the words like persons with disabilities or disability. Moreover, the framework of constitution does not talk about the sexual and reproductive rights of persons with disability in particular.

### **Policies and legislations pertaining to persons with disabilities and component of sexual and reproductive rights**

Technically speaking, persons with disabilities are entitled to the same rights (as well as responsibilities) under the Constitution of India like any other non-disabled person and no discrimination is allowed on the grounds of disability; yet the situation is far from reality. The policies and legislations for the PWDs have followed various approaches in India starting from charity model to medical, rehabilitation and social model. There are several legislations being enacted for persons with disabilities to look after their rights including provisions to mainstream them into society. The focus of all these legislations have been towards providing equal opportunities to persons with disabilities, rehabilitation of persons with disabilities, providing educational and employment opportunities and social security provisions for persons with disabilities.

Apart from the constitutional rights which have been conferred to each and every citizen of our country, various legislation formed specifically for the Persons with Disabilities include Indian Lunacy Act 1912 which was replaced by the Mental Health Act of 1987, Rehabilitation Council Act of India, 1992, Persons with Disabilities (Equal Opportunities, protection of Rights and Full Participation) Act 1995 and The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. The researcher has tried to look at the aspect of sexual and reproductive rights in each of these laws

### **Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995**

The Persons with Disabilities Equal Opportunities, Protection of Rights and Full Participation Act, (PWD Act) of 1995 was considered to be landmark legislation, a new dawn in the lives of millions of persons with disabilities in India. It was for the maiden time in the history of Indian legislations, that an independent Act was formulated especially keeping in mind needs and requirements of persons with disabilities. The Act was passed by the Parliament of India on December 1995, and notified on February 1996. PWD Act was enacted under Article 253 of the constitution which gives effect to the proclamation on the full participation and equality of the persons with disabilities in the Asian & Pacific Region and provides for their education, employment, creation of barrier free environment, social security, etc.

As the name suggests, the Act focused on protecting the rights and providing equal opportunities to person with disabilities and thereby ensuring full participation in the society. The main provision of the Act emphasized on the aspects like prevention

and early detection of disabilities, creating education and employment opportunities, non-discrimination, rehabilitation, research and manpower development, affirmative action, social security, grievance redressal and creating the barrier-free environment/social infrastructure for PWDs. The Act is segregated into three parts where the first part talks about administrative arrangements for implementation, the second part deals with rights and correlated obligations and third part comprise mechanism for the monitoring of the Act at state and centre level. It also makes provisions for establishment of office of the Chief Commissioner and State Commissioners for grievance redressal of persons with disabilities. PWD Act stresses on the implementation of the provisions of the Act through collaborative effort of various central and state ministries and department along with cooperation from local bodies.

The PWD Act, 1995 does not recognizes the Sexual and Reproductive rights of persons with disabilities and hence no provisions are being made in the Act with respect to right to marriage and family life, reproductive right, right to sexuality education and Right to safe, accessible and affordable sexual health services of the disabled persons. It focuses only on the so-called much more important aspect like employment, education, rehabilitation and integration of persons with disabilities in the non-disabled world.

However, the activists as well as disabled people have felt that the Act has too many loopholes as well poor implementation. The Act has been criticized a lot recently by the disability rights activists, practitioners, organization working in the field of disability for being very narrow in its definition of disability (recognizes only seven types of disability).

### **Mental Health Act, 1987**

Mental health Act was drafted by the parliament in 1987 and came into effect in all states in April 1993. The Mental Health Act replaced Indian Lunacy Act 1912 which had earlier replaced by Indian Lunatic Asylum Act of 1858. The purpose of the act was to consolidate and amend the laws relating to treatment and care of mentally ill persons and provide for better provisions with respect to property and affairs of mentally ill persons. It focused on changes the offensive terminologies used in Lunacy Act 1912 and seek establishment of appropriate mental health authorities and infrastructure for treatment and care of mentally ill person.

Nevertheless, the Act stands totally mute with respect to the sexual and reproductive rights of PWDs. The Mental Health act does not make any reference to the sexual and reproductive health and rights concerns of persons with disabilities or mental illness.

### **National trust for welfare of persons with autism, cerebral palsy, mental retardation and multiple disability Act, 1999**

In 1999, the National Trust for the Welfare of Persons with Autism Cerebral Palsy, Mental Retardation and Multiple Disabilities Act was passed. This legislation is applicable to those suffering from autism, cerebral palsy, mental retardation

or multiple disabilities. The Act provides for establishment of the Board of the National Trust, Local Level Committees, Accountability and Monitoring of the Trust. It also includes provisions for legal guardianship of the four categories of the persons with disabilities mentioned above and seek creation of enabling environment for their independent living. In nutshell the act envisages to work for affirmative action for categories of persons whose disability may render them incapable of self-care in daily life and independent living (Addlakha, 2005). The specific objectives of the Act included:

- Enabling and empowering PWDs to live as independently and as fully as possible within and as close to the community to which they belong;
- Promoting measures for the care and protection of persons with disabilities in the event of death of their parent or guardian; and
- Extending support to registered organizations to provide need based services during the period of crisis in the family of disabled

However, the act has been criticized a lot for having limited scope. The primary focus of the act had been towards providing enabling environment for independent living of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities. There are certain bits and parts of the act that can be expanded to include sexual and reproductive health and rights. For instance, the health aspects can be expanded to include sexual and reproductive health services and information. The act remains silent when it comes to direct mention of sexual and reproductive rights of person with disabilities.

### **Rehabilitation Council of India Act, 1992**

Rehabilitation Council of India Act was passed by the parliament in 1992. The Act provides for formation of the Rehabilitation Council of India for regulating the training of rehabilitation professionals, and preservation of a Central Rehabilitation Register. It aimed at standardizing manpower training and service delivery, through regulating organizations and institutions working in the disability sector in the country (Addlakha, 2005). Some of the salient features of the Act included:

- Standardizing training courses for professionals dealing with people with disabilities;
- Prescribing minimum standards of education and training of various categories of professionals dealing with people with disabilities;
- Regulating these standards in all training institutions uniformly throughout the country;
- Promoting research in rehabilitation and special education; and
- Maintaining Central Rehabilitation Register for registration of professionals.

The Act regulates training standards for sixteen categories of rehabilitation professionals. The Act strives to proactively promote training and research initiatives utilizing experience of specialized as well as mainstream academic institutions. The

act remains silent of the reproductive and sexual health issues of persons with disabilities. Neither does it recognize any professional training program for catering to the sexuality needs of persons with disabilities let's say sexual counselors for persons with disabilities and therefore negating the importance of sexual rights in the lives of persons with disabilities.

### **National policy for persons with disabilities, 2006**

National Policy for Persons with Disabilities was announced in February, 2006. The Policy Statement for Person with Disabilities recognized persons with disabilities as valuable human resource for the country and seeks to create an environment that provides them equal opportunities, protection of their rights and full participation in society. The policy seeks to achieve the physical, economic and educational rehabilitation of persons with disabilities through various mechanisms as defined in the policy paper along with the focus on prevention of diseases.

### **The salient feature of the National Policy includes**

- Physical Rehabilitation, which includes early detection and intervention, counseling & medical interventions and provision of aids & appliances. It also includes the development of rehabilitation professionals.
- Educational Rehabilitation including vocational training and
- Economic Rehabilitation for a dignified life in society.

Even the National Policy for Person with Disability where the stress is on improving the quality of life of PWDs nowhere talks explicitly about improving the quality of life by providing PWDs with their Reproductive and sexual rights. The policy does not talk in great detail about sexual and reproductive health and rights of PWDs and direct provisions for them though they can be expanded to include them.

### **United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), 2006**

United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) was adopted by the United Nations General Assembly on December 13, 2006, and ratified by India on October 1, 2007 (India was the 7th country in the world and the first significant country to do so). It stated that disabled people are entitled to the complete range of human rights like any other individuals. This was for the first time that a UN Convention which was ratified by India spoke clearly and openly about the sexual and reproductive rights of persons with disabilities. Article 23 of the UNCRPD clearly talks about "Respect for Home and Family".

It states that "*States /parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:*

1. The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

2. The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;
3. Persons with disabilities, including children, retain their fertility on an equal basis with others.”

It is because of the efforts of disability rights experts, a lot of dissatisfaction with the existing PWD Act, and ratification of UNCRPD by the government that the Ministry of Social Justice and Empowerment in April 2010, finally constituted a committee to draft a new legislation for persons with disabilities which goes in congruence with the United Nations Convention on Rights of Persons with Disabilities (UNCRPD). A draft Bill was submitted to the ministry in June 2011 and which included in a comprehensive section on the reproductive rights of disabled women. However, the revised version of the draft Bill on Rights of the Persons with Disabilities 2012 was presented in the parliament which is still not passed. The bill in its current state only provides for a very brief section on the sexual and reproductive rights of persons with disabilities. It talks about the Protection of persons with disabilities especially women from Abuse, Violence and Exploitation. It also contains a very concise section on Reproductive Rights of Persons with Disabilities. It talks about ensuring persons with disabilities access to information regarding on family and reproductive planning on an equal basis with person without disabilities. It also states that no person with disability shall be subject to any medical procedure which leads to or could lead to infertility without their free and informed consent. It seeks to provide sexual and reproductive health especially for women with disabilities.

## DISCUSSION

Despite the fact that India is one of the first few countries to be signatory to UNCRPD, its provisions are yet to be turned into legislations and policies for persons with disabilities. The current status of legislation and policies in the country indicate the dismal state of recognition of sexual rights and sexuality of persons with disabilities. The reason for the same can be attributed to the fact that policy-makers presume that issues related to sexuality do not assume a primary place in the lives of persons with disabilities. The policy-makers of our country have mostly drawn from the medical and rehabilitation model of disability and have disregarded any other aspect of life that falls outside the purview of this definition.

It is ironic that India with highest population of more than one billion (1.22 billion), 26.8 million people with disability, with 2.5 million cases of HIV infection and with more than 60 years of launch of first family planning programme (1952), yet the component of sexual and reproductive rights of people in general and persons with disabilities in particular in legislations and policies is in gloomy state. From the above discussion it can be inferred that Mental Health Act, 1987 Rehabilitation Council of India Act 1992, Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995, National Trust for Welfare of Persons

with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability Act, 1999 are silent on the issues of sexual and reproductive rights of persons with disabilities. There are several other laws and polices like Medical Termination of Pregnancy, 1956, The Protection of Women from Domestic Violence Act, 2005, Immoral Trafficking Prevention Act, 1956, Section 377 of Indian Penal Code, 1860, National Youth Policy, 2003, National Health Policy 2002, National Population Policy 2000 which addresses the issue of sexual and reproductive rights directly or indirectly but none of them explicitly refer to persons with disabilities.

Moreover the only component of sexuality that we see being recognized in the current legislations is the prevention from abuse and provision of sexual health services. But is sexuality all about abuse and prevention from diseases. Is this the only aspect of sexuality of persons with disabilities that needs to be looked into? Isn't sexuality also about knowing, talking expressing and experiencing the pleasure dimension of sexuality? Are not persons with disabilities entitled to the same provision and rights with respect to sexuality? Can any accident, any deformity or deficit of a limb or a body part, any hormonal imbalance take away from a disabled person, the desire of being loved, need for marriage or having their own family? Can a disability make a person with disability a lesser human being or for that matter a lesser sexual-being than a person without disability? If the response to all these questions is “No” then there is a need to recognize the reproductive rights of persons with disabilities in the legislations and policies with respect to persons with disabilities.

One such mini attempt has been made in this regard in the form of Rights of Persons with Disabilities Bill 2012 pending in parliament. Rights of Persons with Disabilities Bill 2012 is an indication of the paradigm shift in the views regarding sexual rights of persons with disabilities. A number of civil society organizations have echoed their voice and starting talking about sexual rights of PWDs. The new draft bill on the Right of Persons with Disabilities is one of the first baby steps in this direction before making a giant leap.

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