

Expanding Horizon of Disability Rights Jurisprudence: Vikash Kumar Vs. UPSC

Paper Submission: 10/12/2021, Date of Acceptance: 23/12/2021, Date of Publication: 24/12/2021

Abstract

This paper examines the significance of the recent Supreme Court Judgement namely Vikash Kumar vs. UPSC Decided on 11/02/2021. This judgement is a watershed in the disability rights jurisprudence as it set at rest the controversy regarding the two terms defined in the Rights of Persons with Disabilities Act, 2006 i.e. Persons with Benchmark Disability and Persons with Disability. The judgement also establishes the concept of Reasonable Accommodation on the firm ground in the Indian law.

Keyword: Disability, benchmark disability, reasonable accommodation, equality, non-discrimination.

Introduction

The status of any person or group in the society is determined mainly upon its participation in the various activities of the society. These activities are also classified as less or more valuable. The caste or varna system prevalent in india is an example of it.

Persons with disabilities have traditionally been denied to participate in the various activities of the society such as education, employment, political and cultural life etc. They are considered to be the most marginalized in the society.

The main reason for this situation is the idea of Normal and Abnormal. The standards were set taking into consideration the needs of so called Normal people who were always in majority. These standards ranged from physical appearance to the various socio-economic and cultural activities.

Approaches to treat disability

The treatment of Disability is a reflection of approaches prevalent in the society. There have been two main approaches to treat Disability.

Individual Approach

Disability is treated as "individual pathology"¹. According to this approach, Disability results from the defect or Impairment present in the person. This approach treats Disability as a Medical issue and believes that Disability requires medical solution.

In India also PWDs especially those having severe disability had to live in Ashrams or home on the mercy of the society. Disability was associated with the bad karma in the previous birth. It was considered to be the pious obligation to provide with them the basic necessities.

"Most of the rehabilitation services in India followed the biomedical model in which hospitals and primary health centres played a key role. Disability was viewed as a diseased state and the emphasis was on curing, correcting or attempting to ameliorate the problem so that PWD became as "normal" as possible. Almost all the older organisations acted as service providers working with the idea of rehabilitation. They simply did not reflect the views of disabled people but instead subscribed to the belief that scientific experts such as physicians, social workers and occupational therapists were best suited to define and solve the problems faced by PWDs²."

Social or Right Based Approach

The second approach treats Disability as a "Social Pathology"[1]. According to this approach, Disability results not from the Defect or Impairment in the person but the Environmental and Situational factors. For example a Person with Locomotor Disability cannot access public transport, services, buildings etc not because of his/her impairment but due to the fact that they have not been designed taking in to considerations his/her needs.

According to this approach, Persons with Disabilities are the Subjects, not the Objects of the Human Rights. Disability is one of the human diversities. There needs to be main-streaming of Disability in law, policy, architectural design of the buildings, roads, modes of transports, education system, workplaces etc. The main-streaming here means that while formulating or designing the above, the special needs of persons with various types of disabilities should be taken into consideration.



Anand Gupta
Assistant professor
School of Law,
IGNOU, New Delhi,
India

"As a social construct, disability encompasses features broader and more comprehensive than a medical condition. The RPwD Act, 2016 recognizes that disability results in inequality of access to a range of public and private entitlements. The handicaps which the disabled encounter emerge out of disability's engagement with the barriers created by prejudice, discrimination and societal indifference. Operating as restraining factors, these barriers have origins which can be traced to physical, social, economic and psychological conditions in society. Operating on the pre-existing restraints posed by disability, these barriers to development produce outcomes in which the disabled bear an unequal share of societal burdens. The legislation has recognized that remedies for the barriers encountered by the disabled are to be found in the social environment in which they live, work and co-habit with others. The barriers encountered by every disabled person can be remedied by recognizing comprehensive rights as inhering in them; rights which impose duties and obligations on others[2]

This paper analyses the Supreme Court case namely Vikash Kumar vs. UPSC decided on 11/02/2021. This case is significant from a number of reasons. Firstly, it in a way operationalises the definition of disability given in the Convention on the Rights of Persons with Disabilities, 2006 which is adopted in the Rights of Persons with Disabilities (RPwD Act, 2006) The judgement categorically holds that every benefit conferred on persons with disabilities need not be limited only to persons with benchmark disabilities as defined in 2016 Act. Secondly, it expands the scope and ambit of the concept of Reasonable Accommodation. The judgement says in clear terms that Reasonable Accommodation is very essential for the realisation of the Right to Equality and Non-discrimination and there should be a dialogue with the person in question while providing any accommodation.

Objectives

1. To examine the concept of Persons with Benchmark Disability and Persons with Disability in the light of this judgement.
2. To analyse the scope of the concept of Reasonable Accommodation.
3. Discuss the effect of the judgement in expanding the scope of disability rights jurisprudence.

Review Literature

Disability is defined in two ways. Firstly, types of disability is enumerated and defined each of them. With regard to the provisions of rights, these countries adopt the social model. for example, Disability Discrimination Act, 1995 (DDA) [UK] and now repealed .Persons with Disabilities (Equal opportunities, protection of rights and full participation) act 1995 [India] adopted the Medical model while defining disability and adopted the Social model while dealing with various rights guaranteed for persons with disabilities.

The Rights of Persons with Disabilities Act, 2006 which replaced Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 under section 2 (r) and Schedule 1 recognises 21 types of disabilities Secondly, The definition of disability sets out the criteria and cover every one who satisfies the criteria. This approach unlike the previous one, does not specifically enumerate the types of disabilities. Article 1 the convention on the rights of persons with disabilities and section 2 (s) of the RPwD act, 2016 which contain analogous provisions [discussed later] follow this approach.

Reasonable accommodation duties are different from accessibility duties[1]. Both aim to guarantee accessibility, but the duty to provide accessibility through universal design [2] or assistive technologies is an *ex ante* duty, whereas the duty to provide reasonable accommodation is an *ex nunc* duty:

Accessibility is one of the Guiding Principles of the CRPD and RPD Act. These instruments however do not define it. "Accessibility" and "Reasonable Accommodation" are generally being used as synonymous. However these terms have different meanings. CRPD [3] and RPD Act [4] however define reasonable accommodation as, "reasonable accommodation" means necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others;

"Accessibility is related to groups therefore accessibility standards must be broad and standardized. whereas reasonable accommodation is related to individuals. Reasonable accommodation is customised as per the requirements of a person with disability in question. "An accommodation is reasonable if it achieves the

purpose (or purposes) for which it is being made.” However In certain cases , the reasonable accommodation provided to an individual may become a general standard which can be useful to a large number of people. Accommodation provided to some individuals may be used as general standards of accessibility. Reasonable accommodation can be denied on the ground that it imposes a disproportionate or undue burden in a particular case. However accessibility cannot be denied on this ground

A *CCPD case*[5] is a good example of how the accommodation provided to an individual can turn out to be a general standard. These directions can be used as standards for hearing disabled candidates appearing for an interview.

In this case, complainant alleged that during the interview, members of interview board neither provided questions in writing nor an interpreter and therefore he could not understand questions properly.

The CCPD observed that since the interview did not materialise as the interviewee could not comprehend the speech of interviewers hence the interview conducted could be termed as null and void. Therefore the commission might conduct a fresh interview, in which complainant should be provided with the necessary arrangement for example sign language, overhead projection to show written version or oral version. Since the complainant had the ability to speak in Hindi therefore he should be allowed to give answer in Hindi or mixture of Hindi and English orally.

The Supreme Court judgement analysed below is a landmark as it for the first time deals with the expansive definition of Disability. It also elaborate on the various aspects of Reasonable Accommodation and involvement of individual in question while provide such accommodation.

Brief Facts

A person with 6 per cent disability having a “chronic neurological condition” termed as bilateral Writer’s Cramp was denied the facility of scribe on the ground that he didn’t have the “benchmark disability”. The appellant argued that medical certificates Certify that he has a Writer’s Cramp and would require a scribe. The appellant falls under Section 2(s) of the Act and is entitled to the protection of the Act. “” Writer’s Cramp, or dysgraphia, is a specific disability and is listed in entry 2(a) of the Schedule to the RPwD Act, 2016. The CSE Rules 2018 and the CSE Notification 2018 are in violation of Section 20 of the RPwD Act, 2016. Under Section 20, every government establishment is required to provide “reasonable accommodation” and a conducive environment to employees with disability. The provision of scribes and compensatory time during the examination to candidates are reasonable accommodations necessary to be provided under the RPwD Act, 2016 The CSE Rules 2018 and the CSE Notification 2018 violate Article 14 and Article 16(1) of the Constitution and the RPwD Act, 2016 as they provide for scribes only for candidates who are blind, those suffering from locomotor disability or cerebral palsy. In the CSE Rules 2018, applications are invited from all persons with disabilities and age relaxation is also provided to them, including for those suffering from learning disabilities. The main arguments of the respondents were that according to the MSJE, Writer’s Cramp is not a disability, but a person suffering from Writer’s Cramp has difficulty in writing. The MSJE had issued comprehensive guidelines dated 26 February 2013 which were revised on 29 August 2018 on the conduct of written examinations for persons with disabilities, provide that the facility of a scribe should only be allowed to a person with a disability of 40% or more. These guidelines provide for the facility of scribes in the category of candidates affected with blindness, locomotor disability and cerebral palsy; and for other persons with benchmark disability, a medical certificate has to be produced certifying that there is a physical limitation to write and a scribe is essential to write the examination on the candidate’s instructions. The court held that the facility of scribe should not be limited to persons with benchmark disability. The court directed the government to revise the guidelines accordingly. These guidelines should also provide for the conditions of medical certificate required to avail this facility to prevent its misuse.

Definition of Disability

The RPwD Act, 2016 embodies two distinct concepts when it speaks of (i) 'persons with benchmark disabilities' and (ii) persons with disability. In defining a person with benchmark disability, Section 2(r) encompasses two categories: (i) a person with not less than 40 percent of a specified disability, where the specified disability has not been defined in measurable terms and (ii) a person with disability where the specified disability has been defined in measurable terms, as certified by the certifying authority

The second concept which is embodied in Section 2(s) is that of a person with disability. Section 2(s) unlike Section 2(r) is not tagged either with the notion of a specified disability or a benchmark disability as defined in Section 2(r). Section 2(s) has been phrased by Parliament in broad terms so as to mean a person with a long term physical, mental, intellectual or sensory impairment which in interaction with various barriers hinders full and effective participation in society equally with others

The court observed that the concept of benchmark disabilities under the Act has specifically been adopted in Chapter VI and Chapter VII. ...”

According to the apex court, to deny the rights and entitlements recognized for persons with disabilities on the ground that they do not belong to benchmark disability would be plainly ultra vires to the RPwD Act 2016.

in India, It is noteworthy that even before coming into force of the 2016 legislation and this judgement, there had been a slight tilt towards the UNCRPD, 2006 approach to define Disability. The Courts have given relief in various types of cases which are not covered under the definition of Disability as defined under 1995 Act which is the predecessor of 2016 Act. Some of the cases are now covered in 2016 Act.

1. Heart ailments being considered within the scope of Disability;
2. Tinnitus being recognised as a Hearing Impairment
3. Dwarf persons being considered for inclusion in the term Locomotor Disability;
4. Dyslexia included within the ambit of disability.
5. Right to alternative employment recognised even cases where the disability is less than 40%
6. Employment cannot be denied on the ground of the Medical History of the person.

Reasonable Accommodation

The principle of reasonable accommodation acknowledges that if disability as a social construct has to be remedied, conditions have to be affirmatively created for facilitating the development of the disabled. Reasonable accommodation is founded in the norm of inclusion. Exclusion results in the negation of individual dignity and worth or they can choose the route of reasonable accommodation, where each individuals dignity and worth is respected. Under this route, the powerful and the majority adapt their own rules and practices, within the limits of reason and short of undue hardship, to permit realization of these ends

Accommodation implies a positive obligation to create conditions conducive to the growth and fulfilment of the disabled in every aspect of their existence whether as students, members of the workplace, participants in governance or, on a personal plane, in realizing the fulfilling privacies of family life. The accommodation which the law mandates is reasonable because it has to be tailored to the requirements of each condition of disability. The expectations

which every disabled person has are unique to the nature of the disability and the character of the impediments which are encountered as its consequence .

The principle of reasonable accommodation must also account for the fact that disability based discrimination is intersectional in nature. The intersectional features arise in particular contexts due to the presence of multiple disabilities and multiple consequences arising from disability. Disability therefore cannot be truly understood by regarding it as unidimensional. Reasonable accommodation requires the policy makers to comprehend disability in all its dimensions and to design measures which are proportionate to needs, inclusive in their reach and respecting of differences and aspirations. Reasonable accommodation cannot be construed in a way that denies to each disabled person the customization she

seeks. Even if she is in a class of her own, her needs must be met. While assessing the reasonableness of an accommodation, regard must also be had to the benefit that the accommodation can have, not just for the disabled person concerned, but also for other disabled people similarly placed in future

The court said that Instead of making assumptions about how the relevant barriers can be tackled, the principle of reasonable accommodation requires dialogue with the individual concerned to determine how to tackle the barrier.

The court referred Syed Bashir-ud-din Qadri v. Nazir Ahmed Shahas an example of reasonable accommodation in which the apex court held, "while a person suffering from cerebral palsy may not be able to write on a blackboard, an electronic external aid could be provided which could eliminate the need for drawing a diagram and the same could be substituted by a picture on a screen, which could be projected with minimum effort."

Moving a step forward, the court questioned the legality of its own 2 judge bench decision in the case of V Surendra Mohan v. State of Tamil Nadu (Mohan). The court observed that the judgement in Mohan was rendered in a case under the 1995 Act which has now been replaced by the RPwD Act 2016 and in light of the absence of a reasonable accommodation analysis, the Mohan judgment stands on a legally vulnerable footing. It would not be a binding precedent, after enforcement of the RPwD Act 2016

The issue was the decision of the Tamil Nadu Public Service Commission to impose a ceiling of 40-50% visual/hearing impairment to be eligible to be appointed as a Civil Judge (Junior Division).

That judgement affirmed the submission of the Madras High Court that a visually or hearing impaired judge, whose disability exceeds 50%, would create avoidable complications. As a result, the impugned ceiling was found to be valid.

The Court observed

53 This judgment was delivered by this Court after India became a party to the UNCPRD and the RPwD Act 2016, came into force. The aforesaid view espoused by this Court is innocent of the principle of reasonable accommodation. This Court did not consider whether the failure of the TNPC to provide reasonable accommodation to a judge with a disability above the impugned ceiling was statutorily or constitutionally tenable. There is no reference in this Courts judgment to whether the appellant would have been able to discharge the duties of a Civil Judge (Junior Division), after being provided the reasonable accommodations necessitated by his disability."

Equality and Non-discrimination as Constitutional Rights of PwDs

The Supreme Court Observed"Part III of our Constitution does not explicitly include persons with disabilities within its protective fold. However, much like their able-bodied counterparts, the golden triangle of Articles 14, 19 and 21 applies with full force and vigour to the disabled. The 2016 RPwD Act seeks to operationalise and give concrete shape to the promise of full and equal citizenship held out by the Constitution to the disabled and to execute its ethos of inclusion and acceptance."

Conclusion

The above analysis shows that the judgement has expanded the equality rights jurisprudence viz a viz persons with disabilities. The benefits and facilities available to persons with disabilities are not limited to persons having 40 per cent or specified disabilities i.e. benchmark disabilities under the RPwD Act, 2016. The benefits such as reservation in education and employment etc has specifically made available to persons with benchmark disability by the act. However other facilities such as scribe during exam, reasonable accommodation etc are available to every person with disability irrespective of the per centage etc. Before this judgement, in some sections there was a view to the extent that the Act applies to persons with "benchmark disability" as defined in the Act only and definition of "persons with disability" in section 2 (s) is redundant. This judgement has set at rest the matter by holding that both the definitions should be given due weightage. The judgement has firmly established the concept of reasonable accommodation as necessary component of equality and non-discrimination. Reasonable accommodation signifies that individualised needs of persons with disabilities be addressed by consulting them. This will help in bringing more cases of individual requirements before courts and policy

makers. These individualised cases may result in general accessibility standards in the future.

References

1. See generally *National Human Rights Commission Disability Manual*, pp. 18-19 (2005).
2. Nilika Mehrotra, "Disability Rights Movements in India", *Politics and Practice* (EPW vol XLVI no 6 2011)
3. See *National Human Rights Commission Disability Manual* pp. 19-20.
4. *Vikash Kumar v. UPSC*, (2021) 5 SCC 370, para 44.
5. *CRPD general comment No. 2, 2014 para-25*.
6. *Rights of persons with disabilities, 2016 S.2 (ze) "universal design" means the design of products, environments, programmes and services to be usable by all people to the greatest extent possible, without the need for adaptation or specialised design and shall apply to assistive devices including advanced technologies for particular group of persons with disabilities*[1] *Convention on the rights of persons with disabilities, 2006 Art-2, Para-4*
8. *Rights of persons with disabilities Act, 2016 S. 2 (y)*
9. *Chandra Kishore Joshi v. Secretary, Union Public Service Commission and Anr 2001 CCDJ 323 Case no. 630 of 2000 – Decided on 03.05.2001*.
10. *Ibid para 25*.
11. *Ibid para 26*.
12. *Kumar Narain Singh v. AAI (2005) V AD 153: 120 (2005) DLT 545 (Del HC)*.
13. *M.V. Ramana Rao v. A.P.S.R.T.C., 2003 (3) ALD 550: 2003 (4) ALT 150 (AP HC)*.
14. *Bogga Mallesh v. The Commissioner, Disabled Welfare Department, W.P. No. 22440 of 2004 (AP HC)*.
15. *Disabled Rights Group v. Delhi University, CWP No. 10055/ 2004 (Del HC)*.
16. *Dilbag Singh v. Delhi Transport Corporation 123 (2005) DLT 318 (Del HC)*
17. *Ranjit Kumar Rajak v. State Bank of India. W.P. No. 576 of 2008*
18. *Supra Note 4 para 44*.
19. *Ibid para 46*.
20. *Ibid para 48*.
21. 2010) 3 SCC 603. Also see,
22. 2019) 4 SCC 237.
23. *Dr D.Y. Chandrachud, J. supra note para 41*