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Denial of Reasonable Accommodation in the Provisions of the Cr.P.C., 1973 Resulting in Violation of the Rights of PwDs & Remedies

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ABSTRACT

Access to justice is an extremely important element of the criminal legal system. As a marginalized section of our society, persons with disabilities (PwDs) face discrimination in almost every facet of their life. Furthermore, they are re-victimized on account of the inadequacies in legal system which impedes their access to justice. The UNCRPD, mandates making provisions for PwDs, to reasonably accommodate them, the failure of which amounts to discrimination. As a signatory to the Convention, India, is bound to make such changes. This paper, therefore, looks at how the Code of Criminal Procedure, 1973 despite having multiple provisions for rights of persons with disabilities, is inadequate in upholding their rights and proposes amendments to the Code as a solution to the same. The body of the paper is divided in three parts and primarily looks at how persons with disabilities are discriminated as a complainant, witness and accused. The paper relies on research papers, legislations such as the Code of Criminal Procedure, Rights of Persons with Disabilities Act, 2016, Indian Evidence Act along with the international convention on the rights of persons with disabilities, the United Nations Convention on the Rights of Persons with Disabilities, 2006, as sources for information.

Keywords: Persons with Disabilities, Code of Criminal Procedure, Access to Justice, Reasonable Accommodation, UNCRPD.

I. INTRODUCTION

Access to justice is a fundamental right guaranteed to all citizens by Article 14 and Article 21 of the Indian Constitution.² While justice for all appears to be the ideal situation, equal access to rights and services remains a challenge for many in India. Persons with disabilities ('PwDs') have long been discriminated against, marginalized, and excluded from the life of mainstream society.³ Additionally, in many jurisdictions they have been fighting for their

¹ Author is a student at Jindal Global Law School, India.

² Anita Kushwaha v. Pushap Sudan (2016) 8 SCC 509. [paragraph 8 and 9].

³ Anna Lawson, *People with Psychosocial Impairments or Conditions, Reasonable Accommodation, and the Convention on the Rights of Persons with Disabilities*, 26 LAW IN CONTEXT: SOCIO-LEGAL JOURNAL 62–63

basic human rights like right to life.⁴ According to the United Nations Convention on the Rights of Disabled Persons (UNCRPD), discrimination on the basis of disability includes denial of reasonable accommodation.⁵ Additionally, the UNCRPD has mandated State parties to make provisions of procedural accommodation for facilitating the roles of PwDs as participants in legal proceedings to ensure PwDs have effective access to justice.⁶ India is a signatory to the UNCRPD, thus, obligated to foster respect for the Convention by the Indian Constitution.⁷ The Code of Criminal Procedure, 1973 ('CrPC') lays down the procedure for administration of the substantive criminal law in India.⁸ However, the CrPC, by not reasonably accommodating the rights of PwDs discriminates against them and impedes their access to justice.

The CrPC has special provisions for PwDs as victims of sexual offences, accused persons of unsound mind, for recording their confession and statements, identification of arrested persons and their attendance as witness. However, these provisions of the CrPC are inadequate to uphold the rights of PwDs. Reasonable accommodation is denied to PwDs who are complainants because sufficient provisions for filing FIR and a complaint are unavailable, PwDs as witnesses face discrimination because the term language does not include sign languages and unspoken languages. PwDs as accused persons face discrimination because sufficient provisions to ensure that they understand the charges that they plead guilty to are unavailable. Additionally, as accused persons of unsound mind, they are discriminated against due to excessive judicial discretion and the permission to keep them detained in safe custody without any mandatory provisions for regular check-ups. This paper will therefore look at how the various provisions of the CrPC discriminate against the PwDs as a complainant, witness and an accused person and provide possible solutions in accordance with the UNCRPD.

II. DISCRIMINATION & PROBLEMS FACED BY PERSONS WITH DISABILITIES DUE TO DENIAL OF REASONABLE ACCOMODATION IN THE LAW

Article 51(c) of the Indian Constitution obligates states to foster respect for international law

(2008).

⁴ Paul Harpur, *Embracing the New Disability Rights Paradigm: the Importance of the Convention on the Rights of Persons with Disabilities*, 27 *DISABILITY & SOCIETY* 1–3 (2012).

⁵ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex I, art. 2, U.N. Doc. A/RES/61/106 (Dec. 13, 2006). [hereinafter CRPD].

⁶ *Id.* art. 13.

⁷ INDIA CONST. art. 51, cl. c. [hereinafter CONST].

⁸ R. V. KELKAR, *CRIMINAL PROCEDURE* 1(ed. 2014).

and treaty obligations.⁹ India has signed and ratified the UNCRPD.¹⁰ Thus, in order to implement the Convention, India enacted The Rights of Persons with Disabilities Act, 2016 ('RPWD') and The Mental Healthcare Act, 2017 ('MHA'). The UNCRPD mandates State parties to ensure effective access to justice for PwDs on equal basis with others by including provisions of procedural accommodation which would facilitate their effective role as direct and indirect participants in all stages of the legal proceedings.¹¹ According to the UNCRPD, discrimination on the basis of disability includes denial of reasonable accommodation.¹² Reasonable accommodation means necessary and appropriate modification where needed in a particular case, to ensure that PwDs can enjoy or exercise all their human rights and fundamental freedoms on an equal basis with others.¹³

III. AS A COMPLAINANT:

Indian criminal law is set into motion when First information report¹⁴ ('FIR') is registered or when information is received by the Magistrate.¹⁵ S. 190 (a) allows the Magistrate to take cognizance of an offence upon receiving a complaint of the facts of the offence.¹⁶ According to S. 2(d) of the CrPC, a complaint is an allegation made orally or in writing to a Magistrate so that they can take cognizance of an offence under the Code without a police report.¹⁷ Additionally, S. 154 of the CrPC deals with information in cognizable cases and states that the information should be given orally to the officer who shall write it down and read it over to the informant who shall later sign it.¹⁸

The Code contemplates that the complainant could be a PwD and allows for provisions such as recording of FIR at a convenient place of the person's choice, in the presence of interpreter or special educator and mandates the videography of the recording.¹⁹ However, these provisions are only available for sexual offences. This understanding, while recognizes that women with disabilities ('WwDs') can be victims of sexual crimes, is fundamentally narrow.²⁰ PwDs can be victims of other offences, too. Therefore, necessary amendments

⁹ CONST, *supra* note 5.

¹⁰ The Rights of Persons with Disabilities Act, 2016, No. 49, Acts of Parliament, 2016, (India). [hereinafter RPWD].

¹¹ CRPD, *supra* note 4, art. 13.

¹² *Id.* art. 2.

¹³ *Id.*

¹⁴ The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973, sec. 154, (India). [hereinafter CrPC].

¹⁵ *Id.* sec.190.

¹⁶ *Id.*

¹⁷ *Id.* sec. 2 (d).

¹⁸ *Id.* sec. 154.

¹⁹ *Id.*

²⁰ Megha Nagpal, *Minimizing Vulnerability of Persons with Disabilities through Legislative Response in Criminal Procedure in India*, 6 NIRMA UNIVERSITY LAW JOURNAL 61 (2017).

should be made which facilitate the process of filing FIR by PwDs, regardless of the offence. This would ensure nondiscrimination²¹ and equality between men and women²². For blind PwDs, a braille should be made available and for the ones with speech and hearing impairment, a sign language interpreter. Provisions can also be made to allow family members or friends chosen by the complainant to interpret their information. FIR is a piece of evidence used to contradict or corroborate the testimony of the complainant.²³ Thus, utmost importance should be given in order to make sure that it is recorded properly. Otherwise, it could have negative implications on the case of the victim.

The restrictions on filing a complaint to the Magistrate either orally or in writing should be relaxed and the complainant should be allowed to file their complaint in their preferred mode of communication which includes various languages, display of text, braille, tactile communication, signs, large print, accessible multimedia, visual displays, sign language, human-reader and augmentative and alternative modes.²⁴ These modifications would reasonably accommodate the PwDs by ensuring full and effective participation and inclusion in society²⁵. It is a general obligation of the States, mandated by Article 4 (i) and Article 13(2) to promote the training of professionals and staff working with persons with disabilities²⁶ including police and prison staff to ensure effective access to justice, thus, language training programs should be held for police officers which include sign languages and other forms of non-spoken languages.²⁷

IV. AS A WITNESS:

S. 118 of the Indian Evidence Act states that all persons can be witnesses provided they understand the questions and answer them rationally.²⁸ Thus, mental disability is not a disqualification unless it restricts the individual from understanding the question and giving accurate answers.²⁹ Despite general perceptions that people with mental retardation make incompetent witnesses, available evidence suggests that they can provide accurate accounts of witnessed events.³⁰ Furthermore, S.119 allows dumb witnesses to give their evidence by

²¹ CRPD, *supra* note 4, art. 3, cl. b.

²² CRPD, *supra* note 4, art. 3, cl. g.

²³ Jitender Kumar v. State of Haryana AIR (2012) SC 2488. [para 11]

²⁴ RPWD, *supra* note 8, sec. 2, cl. f.

²⁵ CRPD, *supra* note 4, art. 1.

²⁶ CRPD, *supra* note 4, art. 4, cl. i.

²⁷ *Id.* art. 1.

²⁸ Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872, sec. 118, (India). [hereinafter IEA]

²⁹ *Id.*

³⁰ Kebbll & Hatton, People with Mental Retardation as Witnesses in Court: a Review, 37 NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION 179- 187 (1999).

writing or signs.³¹ However, S. 277 of the CrPC which deals with the language of recording evidence states that, the witness can either give evidence in the language of the court or any other language.³²

According to Article 348³³ and the Eighth Schedule³⁴, the term language in S. 277 of the CrPC can be interpreted to be English and the twenty - two other languages specified in the Eighth Schedule. Thus, language could hamper the right of PwDs to be included in the system of delivering justice which would violate Article 13 (1) of the UNCRPD. Therefore, the Code should be amended with the inclusion of definition of language, defining the term language as, spoken, and signed languages and other forms of non-spoken³⁵ languages. Furthermore, S. 161 of CrPC must be amended because currently, it only allows for oral examination of witnesses. This could be a barrier for many PwDs to be examined. Therefore, S.161, post-amendment, should provide for an inclusion of provisions for other means of communication as specified in Article 1 of the UNCRPD. These modifications would ensure that the PwDs receive the support that they may require to exercise their legal capacity³⁶ on an equal basis with others.

V. AS AN ACCUSED

According to S. 240 of the CrPC, charges are supposed to be read and explained to the accused and they should be asked if they plead guilty to the charges.³⁷ An additional provision should be added in the Code which necessitates the Courts to verify the mode of communication of the accused with their friends and family³⁸ and then figure out if they are able to understand the proceeding in the presence of a special interpreter. This will make sure that persons with disabilities do not plead guilty to offences that are not committed by them solely due to lack of understanding.

AS AN ACCUSED PERSON OF UNSOUND MIND

While unsoundness of mind during commission of a crime is governed by S. 84 of Indian Penal Code ('IPC'), unsoundness of mind at the time of trial is governed by CrPC. Sections 328 – 339 under chapter XXV of the CrPC deal with provisions for accused persons when

³¹ IEA, *supra* note 26, sec. 119.

³² CRPC, *supra* note 12, sec. 277.

³³ CONST, *supra* note 5, art. 348.

³⁴ CONST, *supra* note 5, sch. VIII.

³⁵ CRPD, *supra* note 4, art. 1.

³⁶ CRPD, *supra* note 4, art. 12, cl. 3.

³⁷ CRPC, *supra* note 12, sec. 240, cl. 2.

³⁸ Gaurav Mukherjee, *The 'Disabled' as a Subject of Law: Utopian Discourse or Pragmatic Paradigm?*, 3 CHRIST UNIVERSITY LAW JOURNAL 1–23 (2014).

they are of unsound mind. S. 328 and S. 329 deal with unsoundness of mind of the accused during inquiry and trial, respectively. These sections state that whenever the Magistrate has reason to believe that accused is of unsound mind and such unsoundness renders him incapable of making his defense, then the Magistrate shall inquire into the fact of unsoundness and cause the examination of such person by a civil surgeon who may refer such person to a psychiatrist or clinical psychologist, who will inform the magistrate about the condition of the accused and they shall act according to the mandate of the section.³⁹

A simple reading of the text highlights that excessive discretion has been given to the Magistrate in deciding the unsoundness of the accused. Additionally, these sections also confer excessive power on the psychiatrist, civil surgeon, and clinical psychologist. While this might not seem problematic, case laws suggest otherwise. In *Ambujam v State*, the Magistrate did not confirm to the requirements of this section and resorted to the extreme unfortunate step of sending the accused who is a lady to the Mental Hospital merely on the police report.⁴⁰ Furthermore, in a case before a division bench comprising of Mr. Justice A.M. Ahamdi and Mr. Justice S. Sen, a 34 year old lady who was to be consigned to a mental asylum shocked everyone when she disclosed that she was never examined by the two doctors who had declared her of unsound mind and a fit case for mental asylum.⁴¹ Judicial discretion while dealing with persons of unsound mind should be curbed and provision for the attendance of a psychiatrist should be made through an amendment in the code during inquiry and trial. In addition, the decisions of psychiatrist or clinical psychologists should also be re-examined before taking any decisions on the same. These provisions are extremely crucial for protecting the human rights of PwDs⁴² and preventing them from being subjected to torture⁴³.

S. 330 allows bail for accused persons of unsound mind in cases of bailable and non-bailable offences.⁴⁴ However, in cases where they cannot be discharged, order for detention of such persons, in safe places where the accused is provided with sufficient care and regular psychiatric treatment, is allowed in accordance with the rules of the State government prescribed in the Mental Health Act, 1987.⁴⁵ Firstly, this should be amended with the Mental Healthcare Act, 2017. Secondly, while these are excellent provisions for persons of unsound

³⁹ CRPC, *supra* note 12, sec. 328 – 329.

⁴⁰ Mukherjee, *supra* note 36.

⁴¹ Hindustan Times 6 (17 August 1995).

⁴² CRPD, *supra* note 4, art. 4, cl. c.

⁴³ *Id.* art. 15, cl. 2.

⁴⁴ CRPC, *supra* note 12, sec. 330.

⁴⁵ *Id.*

mind who do not have friends or relatives who can undertake the obligation of taking care of them, it should be made sure that persons in such detention are safe and all essential services are provided to them. Article 25 of the UNCRPD obligates state parties to make sure that PwDs have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.⁴⁶ Therefore, a provision should be made in the Code which mandates regular check-ups on such persons.

VI. CONCLUSION

Access to justice is a fundamental right. However, this right of the PwDs, too, is violated like almost every other right. This is the reality of the justice system for PwDs, since sometimes the justice system remedies inequality and discrimination, and sometimes it is the justice system itself that perpetuates that very inequality and discrimination.⁴⁷ Persons with disabilities are a part of the marginalized sections of our society. Ergo, being able to access justice becomes even more crucial for them. PwDs face discrimination in the form of denial of reasonable accommodation which impedes their access to justice. CrPC accounts for the rights of the PwDs but to an extremely small extent, such that violation of their rights still remains possible.

The only way ensure that PwDs do not get discriminated is to foremost recognize the fact that they are discriminated and therefore taking steps like amending the provisions of the CrPC in a way that takes into account the best interest of a PwD, regardless of the offence and situation. Availability of special educators and interpreters should be made mandatory at every step of the case including filing of FIR, investigation, while testifying, during trials and inquiries. Mandatory provisions should also be made to train the police and judges in forms of signed and non-spoken languages. Additionally, inclusion of a provision for ensuring that PwDs are aware of the charges they plead guilty to, is crucial. Furthermore, excessive judicial discretion while dealing with accused persons of unsound mind should be curbed and provisions for regular check-ups on such persons detained in safe places should be made.

The core goal of substantive equality of the UNCRPD needs to be realized to ensure full and equal enjoyment of all human rights and fundamental freedoms by all PwDs.⁴⁸ In most circumstances, this would require treating PwDs differently where equal treatment fails to

⁴⁶ CRPD, *supra* note 4, art.25.

⁴⁷ Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities, and the Legal System*, 17 JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 282–317 (2011).

⁴⁸ CRPD, *supra* note 4, art. 1.

deliver justice by failing to recognize their critical needs and the barriers to full inclusion.⁴⁹ The aforementioned modifications will help the PwDs to exercise their rights on an equal basis with others by reasonably accommodating them. If the arc of Indian history is to lead to justice, much of its systemically entrenched deficiencies need rectification, and only time can tell as to whether this would be possible.⁵⁰

⁴⁹ Janet Lord & Rebecca Brown, *The Role Of Reasonable Accommodation In Securing Substantive Equality For Persons With Disabilities: The UN Convention On The Rights Of Persons With Disabilities*, in *CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW* 273–274 (Jan. 2010).

⁵⁰ Mukherjee, *supra* note 36.