

EDITORIAL NOTE

REFORM THAT YOU MAY PRESERVE: THE NEED TO INSTITUTIONALISE PWD REPRESENTATION IN INDIAN ACADEMIA

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I. THE PAST IS A FOREIGN COUNTRY

It has been over two years since the NUJS Law Review was made accessible for Persons with Disabilities ('PwDs').¹ While penning down the Editorial Note for Volume 14(2), we had emphasized how the invisibilisation of PwDs across spheres is affront not only to their constitutional guarantees of equality and non-discrimination, but individual dignity as well.² Since then, there have been significant advancements to ensure the inclusion of PwDs within multiple institutional structures.

For instance, in December 2022, the Chief Justice of India constituted the Supreme Court Accessibility Committee under the chairmanship of Justice S. Ravindra Bhat to identify and address barriers in order to make the Supreme Court accessible to PwDs.³ In its report released in October 2023, the Committee published a slew of recommendations to make the Supreme Court premises disability friendly.⁴ These recommendations *inter alia*, included roadmaps on creating

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¹ *NUJS Law Review Introduces Structural Reforms to its Platforms Making them More Accessible to its Specially Aabled Readers*, October 23, 2011, LIVE LAW, available at <https://www.livelaw.in/lawschool/news/nujs-law-review-online-platform-reforms-for-accessibility-to-specially-abled-readers-184149> (Last visited on February 9, 2024).

² Chandrika Bothra & Tanishk Goyal, *Editorial Note: Deconstructing our Able-Normative Institutional Structures*, Vol. 14(2) NUJS L. REV. 1 (2021).

³ PRESS RELEASE, SUPREME COURT OF INDIA, Accessibility, <https://www.sci.gov.in/accessibility/#:~:text=Constituted%20in%20December%20last%20year,accessible%20to%20persons%20with%20disabilities> (Last visited on February 9, 2024).

⁴ COMMITTEE ON ACCESSIBILITY, SUPREME COURT OF INDIA, A COURT FOR ALL: PAVING THE WAY FOR GREATER ACCESSIBILITY IN THE SUPREME COURT FOR PERSONS WITH DISABILITIES, WOMEN & SENIOR CITIZENS (October, 2023).

designated parking areas with monitoring for persons with disabilities, enhancing accessibility to utilities like washrooms, water units, canteens and ATMs, introducing features like battery operated vehicles, hydraulic lifts in court rooms, auditoriums and the reservation of seats for PwDs, pregnant women, and senior citizens.⁵ This duration also saw the constitution and revival of Accessibility Committees in High Courts such as Delhi, Chhattisgarh & Tripura.

Likewise, Phase III of the E-Courts Project was approved by the Union Cabinet in 2023. This phase of the E-Courts Project allocates an amount of 27.54 crores for “Disabled friendly ICT enabled facilities”.⁶ In addition to a number of initiatives which promise a more accessible and inclusive justice delivery system, Phase-III extends its focus towards PwDs and their interaction with court processes.⁷ Specifically, the project talks about operationalizing an accessible and transparent grievance redressal mechanism for PwDs. The project even lists the preferences of PwDs for the platform as a Key Performance Indicator for its success. More recently, the Supreme Court initiated a public consultation on harmful stereotypes concerning PwDs in legal contexts, with the objective of deterring any explicit or implicit stereotyping of PwDs during adjudication.⁸

On the judicial front, the Delhi High Court directed the producers of movies such as *Pathaan* to embed accessibility features within them upon their release on Over-the-Top platforms.⁹ Subsequently, the Court also introduced a framework enabling PwDs to voice grievances to producers directly, and for such grievances to be resolved in a timely fashion.¹⁰ This framework has ensured that a number of big-ticket movies after *Pathaan* such as *Fighter & Tiger 3* also become accessible to PwDs.

The above instances are emblematic of a judiciary that is committed towards mainstreaming PwDs in the society. More significantly however, the above instances demonstrate a transformative shift within the legal profession from an elitist club towards one which is welcoming for people with diverse lived experiences. If the legal profession is on the path to become diverse today, this exercise should necessarily begin right from law school itself. This is essentially due to the fact that law schools serve as the primary gateway to the legal profession. Furthermore, the scholarships produced in law schools are anchored to the legal

⁵ *Id.*, 7, 12, 27, 34, 64.

⁶ PRESS RELEASE, PRESS INFORMATION BUREAU, *Cabinet Approves E-Courts Phase III for 4 Years* (September 13, 2023).

⁷ *Id.*

⁸ PRESS RELEASE, CENTRE FOR RESEARCH & PLANNING, SUPREME COURT OF INDIA, *PUBLIC CONSULTATION ON HARMFUL STEREOTYPES CONCERNING PERSONS WITH DISABILITIES IN LEGAL CONTEXTS* (December 18, 2023).

⁹ *Akshat Baldwa v. Yash Raj Films*, 2023 SCC OnLine Del 2027, ¶¶5-6.

¹⁰ *Id.*

profession through law reviews.¹¹ Therefore, it would not be wrong to state that the diversity in law school scholarship today is deeply reflective of the diversity within the legal profession in the future.

Against this backdrop, the objective of our special issue is two-fold. First, we want to challenge the homogeneity within academia which has pervaded Indian law schools since time immemorial. Secondly, we want to facilitate the participation of PwDs in academia with a view to increase their subsequent participation in the profession- as judges, litigators, law firm partners, general counsels, etc.

II. LOOKING WITHIN: ‘TALENT LIVES EVERYWHERE BUT OPPORTUNITY DOES NOT’

The NUJS Diversity Census was conducted in 2019.¹² The report of this diversity census revealed that about 33 per cent of students with disabilities who participated in the survey felt that their disability had a high/very high impact on their grades.¹³ Similarly, 40 per cent of the respondents felt that their disability had precluded them from participating in debates, moot courts, and alternative dispute resolution competitions.¹⁴ These statistics remain largely the same across law schools. A direct implication of these statistics within any educational institution is that they lead to the creation of a generation of professionals who have no exposure to marginalised people as equals.¹⁵ These professionals, in turn, perpetuate a horizontality problem because their prejudices were never confronted and dispelled at an early stage.¹⁶

Today, the horizontality problem is reflected in the astronomically high unemployment rate of PwDs in India,¹⁷ the inaccessibility of private service providers, housing societies,¹⁸ gated communities, mobile applications and

¹¹ W. James Harper, *Why Student-Run Law Reviews*, Vol. 82, MINNESOTA LAW REVIEW, 1578 (1998).

¹² *The NUJS Diversity Report*, 2019, available at <https://sja.nujs.edu/storage/The%20NUJS%20Diversity%20Report%2C%202019.pdf> (Last visited on February 9, 2024).

¹³ *Id.*, 30, 103.

¹⁴ *Id.*, 294.

¹⁵ *See for Reference, Women Underrepresented as Law Review EICs, Study Finds*, NATIONAL JURIST, October 9, 2012, available at <https://nationaljurist.com/national-jurist-magazine/women-underrepresented-law-review-eics-study-finds/> (Last visited on February 9, 2024).

¹⁶ *Id.*

¹⁷ PTI, *Half of the Disabled Population in India Employable: Report*, THE INDIAN EXPRESS, July 15, 2021, available at <https://indianexpress.com/article/jobs/half-of-the-disabled-population-in-india-employable-report-7405660/#:~:text=India%20has%20almost%203%20crore,of%20them%20have%20been%20employed&text=The%20vacancy%20positions%20received%20for,of%20reservation%20meant%20for%20PwBD> (last visited on February 9, 2024).

¹⁸ M. Karpagam, *Accessible Homes for Disabled Indians is not a Favour, it's an Obligation*, THE PRINT, September 2, 2022, available at <https://theprint.in/opinion/accessible-homes-for-disabled-indians-is-not-a-favour-its-an-obligation/1107827/> (Last visited on February 9, 2024).

aggregator platforms.¹⁹ In the legal profession, it is reflected in the absence of quality legal representation for PwDs and the reluctance of lawyers to take up disability rights cases *pro bono*.²⁰

Notwithstanding the horizontality problem, these statistics also undermine the ability of even able-bodied professionals to take up cause lawyering for PwDs. This is essentially because in such a scenario, their conception of an individual's disability remains merely academic and not empathetic as it is not suitably informed by the lived experiences of their disabled peers.²¹ A recent study by National Centre for Promotion of Employment for Disabled People ('NCPEDP') amply illustrates this phenomena.²² The NCPEDP study found that only 36 per cent of legal professionals surveyed were aware of the entitlements to PwDs under the RPwD Act, 2016 while only 7 per cent had dealt with disability-related cases.²³ This demonstrates a worrying lack of disability rights awareness across the profession that in turn perpetuates the dearth of academia and jurisprudence on the same.

Another significant implication of this underrepresentation of PwDs in the usual activities of an educational institution is the normalisation of their daily exclusion. In addition to reinforcing their historical subjugation,²⁴ this underrepresentation is likely to make PwDs underconfident about excelling in spheres such as academic writing, mooted or debating. This, in turn, poses a risk to their likelihood to pursue a post-graduate education, or a profession in academia.

As such, confronting this statistic of underrepresentation of PwDs in law school activities is the first step towards making the legal profession truly accessible. The progressive policies of the State and the Judiciary for PwDs can only percolate to them when they are brought to the same starting line as their able-bodied peers. Educational institutions such as law schools serve as ideal sites

¹⁹ Malavika Prasad, *Delhi HC Issues Notice to Centre, Rapido on Plea to Make App-Based Bike Taxi Services Disabled-Friendly*, THE INDIAN EXPRESS, November 10, 2023, available at <https://indianexpress.com/article/cities/delhi/delhi-hc-rapido-app-based-bike-taxi-services-disabled-friendly-9021172/> (Last visited on February 9, 2024).

²⁰ Anurag Kumar Sankrityayan, *Disabled Need Legal Aid*, THE HINDU BUSINESS LINE, April 7, 2023, available at <https://www.thehindubusinessline.com/opinion/disabled-need-legal-aid/article66786020.ece#:~:text=India's%20Rights%20of%20Persons%20with,employment%2C%20healthcare%2C%20and%20accessibility> (Last visited on February 9, 2024) (stating that India has only about a 100 lawyers for every one lakh PwDs).

²¹ Dr. Sanjay Jain, *Comparing Disability Cause Lawyering in India and the United States*, HARVARD LAW SCHOOL CENTER ON THE LEGAL PROFESSION (May/June, 2022).

²² Anurag Kumar Sankrityayan, *supra* note 20, 3.

²³ *Id.*

²⁴ For a general idea on how the conscious/unconscious exclusion of an individual due to their identity reinforces their historical subjugation see *Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, 600 US 19-23 (per Sotomayor, J.) (dissenting).

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to reset this starting line for PwDs. At the NUJS Law Review, by conceptualising a special issue which invites submissions on disability law and encourages PwDs to contribute to the same, we have attempted to do just that. Our hope is that the democratisation of academia will serve as a glowing example for other law school activities to present similar opportunities to PwDs so that they do not feel that their disability has eclipsed their talent or ability to excel in the legal profession.

III. CONCLUSION

Throughout the course of this piece, we have acknowledged the initiatives taken by the State and the Judiciary to make the legal profession accessible for PwDs. Concurrently, we have highlighted that in order to achieve *actual* inclusion, opportunities of integration need to be presented to PwDs at the university level. We have also underscored how the experiences of able-bodied students needs to be informed by similar lived experiences of their disabled peers in order for the former to become better professionals and prevent the horizontality problem from perpetuating. This requires law schools not only to encourage the participation of PwDs in activities originally dominated by able-bodied students but also to facilitate such participation through sustained affirmative action.

At the NUJS Law Review, we are deeply privileged to know that this sentiment has been empathically echoed by the Chief Justice of India in his Foreword for this Special Issue where he calls for not just recognizing the rights of PwDs, but also valuing and celebrating their perspectives. Achieving this feat requires our institutions to move from a reactive model of reasonable accommodations towards a proactive model which can enable PwDs to chart out long-term career paths without the fear of exclusion from their able-bodied peers or society.

IN THIS ISSUE

The NUJS Law Review has had the honour of collaborating with a stellar set of authors, a considerable number of whom are persons with disabilities themselves, for this special issue. With the indefatigable efforts and support of its associate members, the Editorial Board is immensely proud to present Volume 16(3) of the NUJS Law Review.

Adya Jha and Jasel Mundhra in their paper titled “How Accommodating is Reasonable Accommodation: Analysing India’s Rights of Persons with Disabilities Act, 2016” discuss the nuanced differences in the definitions and models of disability across various jurisdictions. They also explore the contours of reasonable accommodation in the spheres of education and employment and highlight the inconsistencies and ambiguities prevalent under the existing statutory regime in India. Their paper draws from the model and principles

established by the American Disabilities Act of 1990 and argues for a broader interpretation to be adopted and applied in the Indian context.

Kriti Sharma and Soumya Vinayan, in their paper titled “Education and Leaving No One Behind: A Critical Analysis of Law and Policy for Children with Disabilities in India” assess India’s compliance with the United Nation’s Sustainable Development Goals, 2030. Their paper studies India’s legal and policy framework with an aim to evaluate whether the needs of children with disabilities are being adequately met by the State under the incumbent regime. It focuses on the Rights of Persons with Disabilities Act, 2016, the Right to Education Act, 2007, the National Education Policy, 2020, as well as various other governmental policy initiatives in order to provide a holistic understanding of inclusivity initiatives at every stage of a child’s education—right from early childhood until senior secondary education.

Shreya Mittal and Himanshu Mishra, in their paper titled “The Idea of Insanity: When Equality Leads to Inequality” discuss the theories of centrality and marginality while exploring the canons of criminal jurisprudence associated with the defence of insanity. Their paper deconstructs the variation in the perception and framing of the defence, while highlighting how the current approach fails to ensure basic rights such as those of equality, non-discrimination and self-determination. The authors argue in expanding the subjective defences of *mens rea* and conclude by underscoring the importance of improving rehabilitation services in India, as opposed to adopting an exclusionary approach.

Rahul Bajaj, Ishika Garg and Ahsnat Mocarim in their paper titled ‘Undue Burden’ Under the Rights of Persons with Disabilities Act, 2016: In Search of a Definitive Legal Standard’ discuss the Rights of Persons with Disabilities Act (‘RPwD’) and the principle of reasonable accommodation that is enshrined in the statute as modeled after Article 2 of the United Nations Convention on the Rights of Persons with Disabilities (‘UNCRPD’). The accommodation is a positive obligation that exists on the part of the state to provide additional support to individuals with disabilities. There exists, however, an exception; if the accommodation causes a ‘disproportionate or undue burden’ then governments and corporations are able to evade the obligation. This exception although granted to allow for reasonableness, is not defined. The paper examines previous case law to understand how courts have defined this term previously and highlights the ambiguities that still exist with regards to the term. Further, the paper engages in an analysis of how other common law countries and the UNCRPD itself have defined and understood the phrase. Drawing from this, the authors outline factors that Indian courts could take into consideration to remove the vagueness surrounding the term to best protect the rights of disabled people.

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Dr. Vijay Kishor Tiwari, Arjun Ghosh and Sushanth Gajula in their article titled ‘Critical Pedagogy of the Disabled in Legal Academy and Possibility of Emancipatory Script of Disability Movements: A Critical Note’ discuss the potential for a transformative pedagogy focused on disabled individuals within law schools, challenged by the dominance of positivism in epistemic imagination. This paper inquires into the framework and trajectory of such pedagogy, unveiling its scope by critiquing the limitations of disability studies and movements entangled in the language of neo-liberal market and state. The paper illuminates the intrinsic exclusionary nature ingrained in legal pedagogy, law schools, and related discourses, emphasizing how the aggressive imposition of the positivist framework sidelines the experiences of disabled individuals. The authors argue for a departure from the confines of positivist jurisprudence to critically assess liberal discussions on accessibility and reasonable accommodation. Through a comparative analysis involving figures like Vikas Kumar, GN Sai Baba, and Stan Swamy and their engagements with the judicial system, the paper exposes the deficiencies of liberal legalism and the restricted perspectives of disability movements limited to middle-class concerns.

We hope the readers enjoy reading these submissions and welcome any feedback that our readers may have for us. We would also like to thank all the contributors to the issue for their excellent contributions, and hope that they will continue their association with the NUJS Law Review!

Truly,

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Former Editors (2021-2023)

The NUJS Law Review