



Law and dis/abilities

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1 Disability, normality, law

We began our Call for Papers for this issue of the *Jindal Global Law Review* (JGLR) with the following provocation: ‘What is the relationship between law and disability? Conventionally, the law can be understood as a discourse of order, and in contrast disability is about experiences that are out of order. In metaphorical terms, disability is marked by lack whereas the law makes claims to restoration and completeness.’ This is a provocation because these “conventional” statements contain normative assumptions about disability and about law that we fully expected our contributors to pick apart. The idea that disability is about lack and about experiences that are ‘out of order’ is, of course, one that has long been questioned by disability studies. Lack and disorder are opposed to completeness and order, which in this context is determined by the norm. And in terms of the body and the mind, deviations from the norm are hierarchised, which is the basis for oppressive social structures.¹

Destabilising the *normal/abnormal* binary has thus been one of the key challenges for disability activists and scholars. Like many normative binaries, it falls apart on closer inspection. As Professor Nilika Mehrotra has noted in her interview in this issue of JGLR, one must look at disability ‘as part of the human condition’. The not-sufficiently-able body, the weakened body, the failing body, the dying body—this is each and every body. The paradox of disability as an axis of oppression is that the experience of the body’s non-ability is universal, but the social experience of *disability* is limited to some. The ‘dis/abilities’ in the title of this issue gestures towards the need to disrupt *disability*, to render it plural, to introduce a critical hesitation. The ‘/’ introduces this rupture in our conception of disability, dissociating the negation from ability, highlighting the contingent nature of the former as well as problematising any unthinking assumption of the latter. The plural

¹ See generally, Lennard J Davis, ‘Introduction: Disability, Normality, and Power’ in Lennard J Davis (ed), *The Disability Studies Reader* (5th edn, Routledge 2017) 15.

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further destabilises the ability/disability dichotomy: if we can accept that disability is universal, there is no singular category of disability, only an infinite number of the body’s configurations—some accepted, welcomed, celebrated; others stigmatised and excluded by our social attitudes and arrangements.

These attitudes and arrangements are typically invisible, taken for granted as being natural and unavoidable. The peculiar circumstances we currently live in put this into stark relief. Software and hardware required in “work-from-home” situations, lines at vaccination centres and Covid testing facilities, seating arrangements in hospitals, questions of triage, access to government aid—the effects of the routine exclusions and discriminations disabled persons encounter have been exacerbated by the pandemic.² The occasional, belated gestures towards addressing these difficulties³ only highlight the apathy of society and state. Indeed, “apathy” is a misleading term, because it implies merely a lack of care; what one needs to highlight is how law and society actively maintain and perpetuate these myriad structural inequities, and thus actively reinforce the artificially constructed category of “disability”.

This also highlights the paradoxical role of law. On the one hand, it is in the theatre of law that emancipatory struggles play out; the rhetoric of law and justice that saturates legal discourse is the one that holds out the promise of change. On the other hand, it is through law—and here one may think not only of not state law but also of other formal and informal practices, discourses, and normative frameworks—that inequality and injustice are maintained. Law is inherently conservative. In the context of disability, law contains a further paradox: it must necessarily draw lines, create categories, emphasise definitions, and rely on “expert”, “scientific”, “objective” evidence in the process of interpreting these categories and definitions. But these inherent tendencies lend themselves to the medical approach towards disability, further classifying and labelling, further emphasising the able/disabled dichotomy, further invisibilising its socially constructed nature. This issue of JGLR is intended to highlight these tensions and paradoxes, to engage with them, and perhaps even—in some modest way, in some of the many areas of law our contributors have addressed—suggest some hesitant solutions or changes, whether in the law itself or in our thinking.

2 The contributions

So, how does the law approach disability? How do legal texts, institutions, practices, discourses conceive of disability? The articles in this issue probe these questions from multiple angles, with multiple perspectives. One common theme is that the

² See e.g., Maya Sabatello et. al., ‘Disability, Ethics, and Health Care in the COVID-19 Pandemic’ (2020) 110(10) *American Journal of Public Health* 1523; Jackie L Scully, ‘Disability, Disablism, and COVID-19 Pandemic Triage’ (2020) 17(4) *Journal of Bioethical Inquiry* 601; Emily M Lund and Kara B Ayers, ‘Raising Awareness of Disabled Lives and Health Care Rationing During the COVID-19 Pandemic’ (2020) 12(S1) *Psychological Trauma: Theory, Research, Practice, and Policy* S210.

³ Rhythmia Kaul, ‘People with Disabilities Can Get Covid Vaccines at Home’ *Hindustan Times* (New Delhi, 24 September 2021). <https://www.hindustantimes.com/india-news/people-with-disability-can-get-covid-vaccines-at-home-101632423306719.html>. Accessed 28 October 2021.

law can rarely, if ever, be free of ableist language and attitudes. This is particularly striking when we find them in texts and practices that are specifically intended to guarantee rights for the disabled. This emerges very clearly in Prannv Dhawan and Mayavan Karpagam’s contribution, where the authors point out how the term “*divyangjan*” (people with divine bodies) used in the official name of the Department of the Empowerment of Persons with Disabilities⁴ (part of the Government of India’s Ministry of Social Justice & Empowerment) merely entrenches the stigmatisation of the disabled. They analyse a Madras High Court judgement where a challenge to this terminology was summarily dismissed, the Court declining to consider what the authors describe as ‘the impact of language in social engineering’, as well as the fact that no disabled scholars and activists were consulted in the naming exercise.

Dhawan and Karpagam’s discussion of “*divyangjan*” highlights the centrality of metaphor in the construction of disability as exception. On the other hand, our language is also saturated with the metaphoric use of disability: “lame”, “blind”, “crippled”, “deaf”. Saptarshi Mandal looks at colour-blindness as metaphor and as materiality: what is the metaphoric use of colour-blindness in legal and political discourse? Is this blindness opposed to emotion, passion, compassion? And how do judges interpret and imagine colour-blindness as actual biological condition?

From an analysis of particular cases to an analysis of the entire Indian constitutional framework: Sanjay Jain’s sweeping study of the ableist configurations of the Indian Constitution encompasses the Constituent Assembly Debates, the Fundamental Rights, the Directive Principles of State Policy, the 7th Schedule, the 9th Schedule—the entire foundation of Indian law is shown to be directly or indirectly anti-disability through the creation of a normative hierarchy.

Jain illustrates some of his arguments through a study of how “unsoundness of mind” is understood as a disqualification in Indian law. Cognitive disability poses particular difficulties in terms of its legal consequences, because it brings agency and capacity into question in multiple spheres of life. Pinki Mathur’s contribution highlights these issues in the private sphere: she exposes the ableist assumptions of Indian marriage law, where “unsoundness of mind” is a ground for divorce. Mathur shows how this provision runs counter to the egalitarian and emancipatory legal framework of disability rights, while highlighting the constructed nature of the able/disabled distinction here: ‘Most of us suffer from varying degrees of neurosis’, she insists, yet only some minds are considered *unsound*.

Several other contributions also shine on a light on the intersection of disability studies and our conception of the private. This “intersection” can be a vexing one, as highlighted in Shampa Dev’s discussion of the difficult philosophical questions raised by scientific developments in the field of prenatal medical technology. If we want to conceive of impairment—in this case, deafness—not as defect but as positive human variation, would it not be acceptable to artificially create such variation in the foetus? Would this raise different arguments from those typically raised against eugenic practices? What about the possibility

⁴ ‘Home’ (Department of Empowerment of Persons with Disabilities, Ministry of Social Justice & Empowerment, Government of India). <http://disabilityaffairs.gov.in/content/>. Accessed 28 October 2021.

of removing deafness before birth? The author guides us through these troubling questions.

Looking at prenatal intervention of a very different kind, Dipika Jain and Shampa Sengupta discuss how the pro-choice feminist movement's approach towards abortion in India can sometimes be in tension with the disability rights movement against disability-selective abortions. Does the emphasis on female bodily autonomy and free choice lend itself to these eugenic practices, which many consider perfectly justified? Such apparent oppositions may be easily resolvable in critical scholarship, but—as the authors show—their discursive consequences may still pose profound difficulties when it comes to political action.

These tensions between the overlapping worlds of research and activism in the contexts of gender and disability are highlighted in Nilika Mehrotra's wide-ranging interview with our editorial team, in which she reflects on her experience with women's movements as well as with disability rights movements in India. Her rich account of this experience brings out how the latter are still in their infancy, because of which the mutual relationship between research, activism, and legal change is not yet fully formed. Despite all the difficulties the movements encounter in the face of stigma and state apathy, Mehrotra leaves us with a sense of optimism; change *is* possible, she implies, if we can begin by radically transforming our imagination.

A different kind of tension (with no optimistic resolution) between an emancipatory discourse and disability studies emerges in Aishwarya Chandran's analysis of the celebrated *Navtej Singh Johar* judgement that (in effect) decriminalised same-sex sexual acts in India. Chandran explores how the judgement's emphasis on privacy and autonomy relies on liberal notions of personhood that imagine an "able" body, thus reinscribing the exclusion of the disabled in the law.

From the private sphere to the sphere of education, which may often be the disabled person's first contact with the social world outside the family: how is this experience structured by the actions and language of peers and educators, and how does the law engage with it? Through a study carried out at a private school in New Delhi, Riya Sharma shows how ableism permeates the educational system in multiple ways. Sharma exposes how teachers and other authority figures reproduce ableist discourses and attitudes that rely on constructions of "normalcy" while also reinforcing them, the consequence of which is the "othering" of children with disabilities (in other words, the solidification of disability as a marker of a separate and inferior identity). She also shows how segregation and exclusion is built into both formal and informal practices, and justified as being natural and necessary.

Despite the obstacles to implementation created by social attitudes as well as the underlying ableist assumptions in legal texts and practices highlighted in several contributions, the *absence* of any formal policy framework is clearly not desirable. Uday Shankar and Ashok Vardhan Adipudi focus on higher education to show how there is such an absence in the context of Specific Learning Disabilities (SLDs). The authors show how there is an underlying assumption that SLDs will be detected and "treated" at the primary and secondary school stage, and that therefore no efforts have been made to facilitate awareness and support for SLDs for older students. As always, without a clear and detailed policy framework, mechanisms for

implementation (both in terms of processes and in terms of sensitisation), or duties placed on institutions of higher education, any rights promised by the law remain illusory.

The illusory nature of the law's promises contrasts with the material experience of disability. In our introduction above, we discussed the paradox of the universality of lack-of-ability in conjunction with the particularity of social experiences of "disability". Perhaps those "outside" these experiences can come closest to imagining them through engaging with personal narratives. We close this issue of JGLR with Devyani Tewari's account of discrimination and exclusion in the workplace, through which she explores the intersection of disability and gender and reflects on how one may attempt to navigate 'an antifeminist ableist world'. The use of the first-person voice, the exposure of the subject's encounter with the world, is what makes a narrative vivid, immediate. It is a truism to say that the experience of disability is uniquely personal; Tewari breathes life into these pages by revealing the self where one such experience is located. It is a reminder that these encounters with "disability"—whether experienced by us or by others—should remain at the centre of our imagination, and continue to animate our critical engagements.

Declaration

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