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Theorizing Discrimination and Disability as a Philosophical Interest in Law

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Introduction

Disability is an extremely indeterminate concept whether taken in law, ethics, or common sense and has no settled meaning. This paper gives an in-depth analysis of the use of capability approach of Amartya Sen towards disability in respect of equality, diversity and prevalent social model of disability that is in relevancy with UNCRPD which emphasizes on the dimension of social development. The reason to use capability approach of Sen towards disability as a philosophical yardstick (legal academic philosophy) of this research is to “emphasize upon the moral significance of individuals’ capability of achieving the kind of lives they have reason to live instead of focusing on subjective well-being or the availability of means to the good life” (as is the subject of utilitarianism or resourcism respectively and the apparent problem faced in developing countries). In this regard, it is insufficient to focus only on means by avoiding what a person can do with them. In contrast to an exclusively economic approach, Sen believes in what one is ‘able to do or to be’¹ with an approach to wellbeing that revolves around the ability of an individual pointing to the significance of the social model of disability. Literature in the form of books, articles and reports is evaluated on the subject which covers various aspects of disability ranging from charity to right based disability model. To ease the readers’ understanding of the relation between capability theory and disability, this paper also describes a detailed view of the five major models of disability.

Key Words: Disability, Social Model, Capability Approach as Philosophical Yard Stick, Capability and Functioning, UNCRPD

Models of Disability

Disability is an extremely indeterminate concept whether taken in law, ethics, or common sense and has no settled meaning. To understand modern disability and its social model that in turn help in structuring and making of laws, the following is a brief review of the five major models of disability,

Medical Model

Being a normative model, it takes disability as an individual problem caused by any health condition including disease, injury which impedes person’s functions to be normal. The model pays significant importance to the use of medical technology in prevention of disability. Medical practitioners and philosophers draw similar conclusions in favor of this model that biological abnormality is the sole reason for the disadvantages of PWDs, and that medical professionals are responsible for fixing it.

¹ Hicks, “Gender Discrimination,” 137,139.



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When a wheelchair user is confined in his/her movement due to an inaccessible environment, the abnormality of the person who uses wheelchair is considered the only reason for restraint and restriction. However, this assessment is rationalized by the “doctrine of biological normality” of Boorse² and Wachbroit,³ the connection of normality to opportunity of Daniels⁴ and then linkage of normality to quality of life of Brock.⁵ The loss of opportunity of abnormal people is conceived as natural, obvious, mild and harmless. Towards definition of disability, Biostatistical Theory of Christopher Boorse is very effective that defines the term disease. His interest is in long-lasting conditions including blindness, limb loss and paralysis, commonly termed disabilities rather than in life-threatening and more episodic conditions usually known as diseases e.g. measles, heart attack or cancer.⁶ He claims that his views on philosophy of medicine fit even the social model of disability and admits the ethical and not a scientific claim. He further adds that “the existence of normal human functional ability; the restructuring/redesigning of the human environment is also demanded by ethics.”⁷

Social Model

In 1970s, the concept of disability in social model sense was discovered in contrast to its old paradigm of medical model. Both models are treated as competitors because they consider disability as a reason of many difficulties. The Medical model treats disability as an individual problem requiring it to be fixed via medical intervention of medical professionals whereas the social model says that disability is a political issue/problem demanding others (citizen) activists to make corrective action. This change of attitude pressurizes the State to reform its functions and roles. Disability here is often examined and understood from the perspective of others. If we consider the concern of this model at political level, it is purely rehabilitative in form of health care and services.

Table 1 Social vs. Medical Model

Disability	
Social Model	Medical model
To alter social arrangements	To alter biological individuals.
To make these arrangements more welcoming to biologically disfigured	To prevent or fix their anomalies to biologically disfigured people.

² Christopher Boorse, “On the Distinction between Disease and Illness,” *Philosophy and Public Affairs* 5(1975): 49–68.

³Robert Wachbroit, “Normality as a Biological Concept,” *Philosophy of Science* 61(1994):579–591.

⁴Norman Daniels, “Justice and Health Care.” in *Health Care Ethics*, ed. D. Van deVeer and T. Regan (Philadelphia: Temple: University Press, 1987), 290, 312.

⁵ Dan W. Brock, *Life and Death: Philosophical Essays in Biomedical Ethics* (Cambridge: Cambridge University Press, 1993),435.

⁶ Boorse, “Disease and Illness,” 53-55.

⁷ Christopher Boorse, “Disability and Modern Theory” in *Philosophical Reflection on Disability*, ed. D. Christopher Ralston and Justin Hubert Ho (Dordrecht: Springer, 2010), 55-88.



people.	
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However, some medical professionals, with responsibility to fix anomalies, are getting closer and closer to the social model. The best example of this is the new report of the Institute of Medicine (IOM) in 2007. The IOM reports of 1991 and 1997 perceives disability as a public health problem, however, its third report in 2007 on “the future of disability in America” have absorbed the ideas and values of a social model. The report gives recommendations on how to prevent disability. It does not take disability as a problem with an individual but believes its interactions between individuals and their social and physical environments. To realize this interaction between individuals and their social environment, report demanded technological advancements to create better assistive technologies to make these interactions with the environment easier.⁸

Social model has 8 main versions including “the social model of the United Kingdom, the oppressed minority model, the social constructionist version of the United States, the impairment version, the independent living version, the postmodern version, the continuum version, the human variation version, and the discrimination version.”⁹

Nagi Model of Disablement

To describe health status in terms of pathology, Nagi model was presented in 1965 by Saad Nagi who was a sociologist. Pathology is an abnormal body entity that causes or leads to impairments, affecting and restricting the normal daily activities and role of an individual. Nagi takes it as a functional limitation and gives a ground-breaking definition of disability. He perceived disability as “a gap between a physical, intellectual, or emotional capabilities of an individual and the demands of that person's physical or social environment.”¹⁰

Nagi model conceptualizes that impairment turns to disability and ultimately becomes a social construct. The Nagi model is important because it supports “social and cultural relativistic view of disability.”¹¹ It can be best illustrated by an example. A 12–13-year-old girl who is, for instance, suffering from mental or physical disability, does not go to school and help in households at home. Under Nagi model, the said girl does not have any disability if she lives in a society where there is no concept of girls’ education and girls usually stay at home. However, she will be deemed disabled if she lives in a society where her age fellows attend the school. It is worth noting that IOM, 1991 was derived directly from Nagi model that is a modern conceptual foundation in disability field.¹²

⁸ Marilyn, J Field, Marilyn Alan, M Jette, *The Future of Disability in America* (US: National Academic Press, 2007) <https://www.ncbi.nlm.nih.gov/books/NBK11415/#a2001315cddd00016> accessed July 17, 2018.

⁹David Pfeiffer, “The Conceptualization of Disability” in *Research in Social Science and Disability: Exploring Theories and Expanding Methodologies*, ed. Sharon N. Barnartt and Barbara M. Altman (Bingley: Emerald Group Publishing Limited, 2001), 30-31.

¹⁰Victor Santiago Pineda, *Building the Inclusive City* (USA: algrave Pivot Macmillan),39. <https://link.springer.com/book/10.1007/978-3-030-32988-4#about> accessed June 12, 2019.

¹¹ Edward N. Brandt and Andrew M. Pope, *Enabling America: Assessing the Role of Rehabilitation Science and Engineering* (Washington D.C: Nation Academy Press, 1997),64.

¹²Ibid.



International Classification of Functions Model

The dynamic level of functioning of a person under “International Classification of Functions” (ICF) is the interaction between one health conditions, personal factors, and environmental actors. ICF was early known and developed by World Health Organization (WHO) as “International Classification of Impairments, Disabilities and Handicaps” (ICIDH) in 1980s.¹³ It is also known as biopsychosocial model of disability to integrate medical and social models. It says that disability originates from health condition which results in impairments causing activity limitations and participation restrictions within contextual factors (background of one’s life-personal, social, environmental).¹⁴ It is noteworthy that participation is not taken in context of “a role to play; but in terms of being engaged or included.”¹⁵

The significance of the model is that it assesses individuals using two measuring scales. One measures the ability to execute tasks and is known as capacity qualifier and the other measures actual lived experience of people and is known as performance qualifier.¹⁶

Human Rights Model of Disability

The Human Rights Model (HR Model) is established on the principles of human rights law. It recognizes the same rights of PWDs like anyone else and admits disability as a natural part of diversity of human beings. Like social model, it does not accept impairment as an excuse to restrict or deny individual’s rights although it acknowledges some impact of impairment in the lives of PWDs. Social model along with human rights principles of HR model can be best used to design legal framework that will address challenges faced by PWDs as the outcome of decisions and actions of the society to be rectified via human rights methodology.

Capability Approach: Capability and Functioning

In Sen’s capability approach, “capability” mean actual opportunity and “functioning” means activity that a person does as well as the desirable conditions, such as “being well nourished” or “being free from disease.” Amartya Sen provides more elaborative view and defines “functioning” as the term used to describe the current life condition of persons.¹⁷ In words of Robert Sugden, an economist, it means “the person's state of being and they are the realized physical and mental states/conditions of an individual or family including quality of health, happiness, income, and nourishment”.¹⁸ Sen defines capability as “alternative combinations of functioning the person can achieve, and from which

¹³Rune, J.Simeonsson, “Revision of the International Classification of Impairments, Disabilities, and Handicaps: Developmental issues” *Journal of Clinical Epidemiology* 53(2000):1.

¹⁴ B. M. Altman, “Disability definitions, models, classification schemes, and applications,” in *Handbook of disability studies*, ed. G. L. Albrecht, K. D. Seelman, and M. Bury (CA: Thousand Oaks, Sage, 2001),110.

¹⁵ Ibid.

¹⁶ Lennart Nordenfelt, “On health, ability and activity: Comments on some basic notions in the ICF,” *Disability and Rehabilitation* 28(2007):1463.

¹⁷ Amartya Sen, “The Living Standard,” *Oxford Economic Papers* 36(1984):84.

¹⁸ Robert Sugden, “Welfare, Resources, and Capabilities: A Review of Inequality Re-examined by Amartya Sen,” *Journal of Economic Literature* 62(1993):1947.



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he or she can choose one collection”¹⁹ including freedom from under-nourishment, the freedom to choose appropriate job, and the freedom to choose an proper education. In other words, capabilities are the set of possible functioning- “The person’s capability set is a set of functioning vectors from which the person has the freedom to choose.” ²⁰

In the light of Sen’s definition, “functioning” are various outcomes like having shelter, having job, being healthy, travelling, voting, collectively termed as “wellbeing” (how ‘well’ is his or her ‘being’). While capabilities are real opportunities to attain these outcomes; like opportunity to be healthy, opportunity to vote and travel and opportunity to participate in community, collectively termed as ‘advantage’. Sen differentiates between capabilities and functioning giving the example of two starving people. Malnourishment is the same and common functioning of both starving individuals; however, their capabilities set varies because one may have decided to starve due to religious faith, whereas the other one may be starving due to poverty. The focus of Sen, therefore, is more on a person’s interests than his/her actions or behavior.

Sen says that the most important thing in evaluation of well-being is considering people’s ability to be and to do that morally assesses and measures the social arrangements outside the development context, for example, disability. Sen’s view on what the person can do and the traditional economic emphasis on a person’s real income is compared to put disability in a new framework particularly in low income or developing countries.²¹ He argues that the commodities or wealth or the mental reaction(utility) of the people provides insufficient or indirect information about their well-being. Sen elaborates it with an example of a standard bicycle which is a means of transportation with transportation characteristics. Whether it provides the characteristics of transportation or not depends on the characteristics of those who are using or trying to use it.²² Bicycle will provide the capability of mobility to people but not those who are without legs. Capability, therefore, does not depend on the presence of physical or mental ability but on practical opportunity.²³ Sen’s approach is useful as it revolves around the welfare economics focusing on concepts like quality of life, standard of living, personal well-being.

Sen admits the significance of the “possession of commodities”, but only to the extent of enabling the person to do a variety of things and that a commodity possesses ‘characteristics.’ This shift addresses the significance of ‘economic causes and consequences of disability’ that exhibits close relation to the recent International Classification of Functioning, Disability and Health of the World Health Organization (WHO; 2001)- the ICF framework is closely linked to the definition of disability under the CA as it combines both personal and environmental factors. It says that environmental characteristics along with

¹⁹Sen, “Capability,” 93.

²⁰ Sophie Mitra, “The Capability Approach and Disability,” *Journal of Disability Policy Studies* 16(2006): 242.

²¹ Sen’s Capability Approach, Internet Encyclopedia of philosophy, a Peer-Reviewed Academic Resource <https://iep.utm.edu/eds/> accessed December 12, 2019.

²² Ibid.

²³ Ibid.



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personal characteristics influence the capability set of an individual²⁴ that reflects the social model of disability to the extent of environmental impact.

If the cost side of achieving capability set is taken, it varies among countries depending on the environment including the “average opulence or real income of the society in which the person lives”. Here Sen means that the issue of economic inequality is not extraordinarily important on its own but is connected to many other topics in the social sciences. In case of disability, the mobility cost of a person with mobility problem depends on the country he lives in, local physical environment and the available assistive technology.²⁵ Poverty assessment of Sen, therefore, is not on income only but on ability to achieve some basic functioning though he does not fix the list of basic functioning. His approach is an open-ended that can be moved in many directions. This contrasts with Nussbaum’s-American philosopher and Professor of Law and Ethics at the University of Chicago, fixed list of ten central capabilities,²⁶ which excludes or only indirectly includes persons with disabilities, i.e., not worthy of human dignity.²⁷ Nussbaum’s model is refused because of his belief in “what should be included and why” denying the possibility of fruitful public participation.²⁸ Furthermore, he clearly talks about the limitation of the human-rights approach.²⁹ In contrast to an exclusively economic approach, Sen believes in what one is ‘able to do or to be’.³⁰

List of basic functioning and its scope will, therefore, vary depending on the topic under consideration and the environment- this variable can be a capability, a functioning or a personal characteristic. As the area of this research is disability, an example in relation to disability in the field of education will be used to elaborate the idea. Education can be deemed a “personal characteristic” affecting work as a capability or as functioning.

²⁴International Classification of Functioning, Disability and Health, <https://www.who.int/classifications/icf/en/> accessed December 12, 2019.

²⁵ Alexandre Apsan Frediani, “Sen’s Capability Approach as a framework to the practice of development,” *Development in Practice Journal* 20 (2010):173-177.

²⁶Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (New York: Cambridge University Press, 2000),78.

²⁷Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006),181.

²⁸Alexandre Apsan Frediani, “Sen’s Capability Approach as a framework to the practice of development,” *Development in Practice Journal* 20 (2010):173-177.

²⁹Ibid,183.

³⁰ Hicks, “Gender Discrimination,” 139.

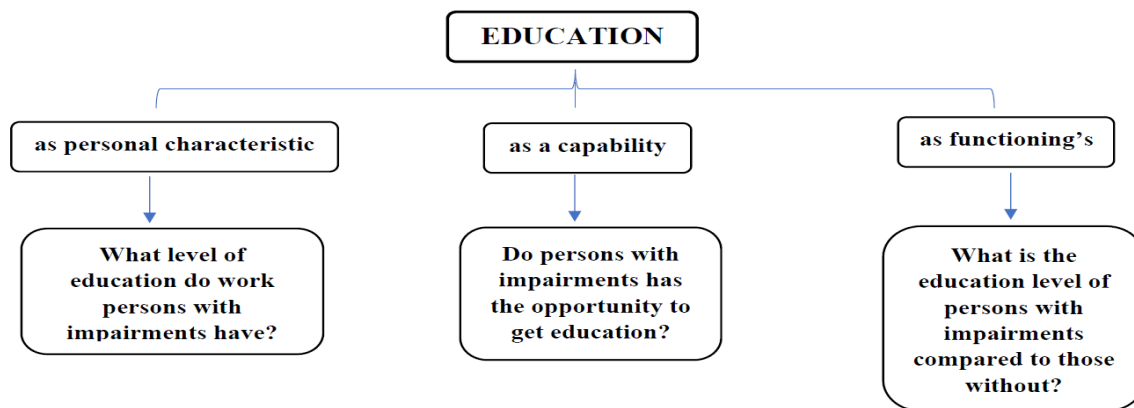


Figure 1 Capabilities and Functioning in PWDs' Education

In respect of capabilities and functioning, the link among the personal characteristics including age, impairment and gender, available resources to the person, and the environment are the cause of deprivation of education in above mentioned case. Sen analyzed disability at two separate points of capabilities deprivation and functioning deprivation, voluntarily leaving CA incomplete to absorb plurality. According to critics, the voluntary incompleteness of the model, however, undermines the usefulness of this approach in defining and formulating disability policies.

Equality with Diversity

In case of disability, the existence of differences leads to more discrimination towards individual disability than it exists which demands equal treatment of the individuals. However, commitment to equality does not mean to be blind towards human differences. Respect for diversity is one of the guiding principles of UNCRPD. In case of some dimensions like rights, happiness, resources and achievements, equality may seem attractive, however, other aspects of human personality like skills and abilities, tastes and preferences and social circumstances entertains human diversity.

Diversity may appear to cause troubles for equality because disability limits the performance and achievement of the least or most basic requirements of life making him vulnerable to discrimination, abuse, and assault. Natural interpretation of equality demands to assure people of equal means to achieve their varying aims creating equally good results and equally good lives, although Sen has rejected both instead. A blanket cling of equality is not encouraged. If the diversity of abilities exists, equally desirable aims will need unequal means and these given differences will yield unequal results.³¹ To understand real differences among human beings, Sen adds that “society is made up of individuals with unequal abilities and needs and, therefore, its basic underlying premise facilitates its application to disability studies.”³² He believes in equality

³¹Analysis of Inequality Reexamined by Amartya Sen <https://www.ukessays.com/essays/economics/analysis-inequality-reexamined-amartya-9317.php>

³²Andrea Broderick, “Equality of What? The Capability Approach and the Right to Education for Persons with Disabilities,” *Social Inclusion* 6(2018):30.



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of capabilities and advocates that social structure of the community should respond to human diversity and allow for human development and flourishing. While considering the diversity of PWDs in various fields of their day to day lives, equality and inclusiveness will remain integral part of those elements which need to be equalized via governmental policies and institutional structures.

Sen calls real or effective freedom as a person's capability for functioning and that a wider choice of functioning is itself an improvement in well-being. He emphasizes upon well-being freedom in Chapter 4 of his book "Inequality Re-examined," and underlines on equally desirable possibilities for functioning and not on ensuring equal means.³³ For example, with differences in talent, the thing that must be ensured is the equal accessibility to a satisfying and engaging work. It is worth mentioning that he does not mean formal equality in accessing jobs here or an equal distribution of self-realization, which is the subject of the welfare policies of developing countries usually.

In other words, equal treatment of people is not undone by diversity or diversity of conceptions. However, in case of disables, diversity of human capacities elevates problems because of their different abilities and capacities to convert resources and means into functioning to achieve desired ends. Therefore, the blind and the sighted, due to existing human diversity, cannot reach the same level of benefit if provided with the same levels of income and wealth.

5 Sen's Capability approach and Social Model of Disability

In relation to social model of disability, capability approach by Sen is deemed more innovative and important to "conceptualize and re-examine disability within special needs as an alternative to the economic, utilitarian approaches, which continue to dominate discussions of quality of life in policy circles".³⁴ "Equality of what" is the landmark lecture of Amartya Sen in 1979 exploring an approach to wellbeing that revolves around ability of an individual.³⁵ For thorough understanding of disability, Reindal suggests the more advanced form of social model-"the social-relational model"- that is more in relation with the contributions, and perceptions of the capability approach.³⁶ He says that the significance of the capability approach is that it goes beyond the dilemma of difference and says that difference is a given variable of human diversity offering a universal model of functioning and disability.³⁷

Capability approach of Sen can also be best used to answer the criticism on the social model which takes disability as a uniform concept under social elements, such as discrimination and oppression. But this is the mistaken concept of understanding of the relationship among "disability, impairment and society".³⁸ Disability under the social model conception is, therefore, not a sole result of the

³³ Amartya Sen, *Inequality Re-examined* (Harvard University Press, 1992),69.

³⁴ Amartya Sen, "Capabilities and well-being," in *The Quality of Life*, ed. Martha Nussbaum and Amartya Sen (Oxford, UK: Clarendon Press, 1993), 30-54.

³⁵ Ibid.

³⁶ Solveig Magnus Reindal, "Disability, Capability, and Special Education: towards a Capability-Based Theory," *European Journal of Special Needs Education*, 24 (2009): 155-168.

³⁷ Lani Florian et al., "Cross-cultural perspectives on the classification of children with disabilities: Part I. Issues in the classification of children with disabilities," *The Journal of Special Education* 40 (2006): 36-45.

³⁸ Sen, "Capabilities," 45.



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effects of impairment but of the oppression, misery, and discrimination.³⁹

The use of capability approach seems more significant in a developing country like Pakistan because it admits that “individuals have both varying needs for resources and varying resources to convert them into functioning” by calling resources as “inadequate indicators of wellbeing”. It proves direct assistance in policy adoption in developing countries. Tania Burchardt analyzes the power of the capability approach in connection to disability theory and adds that capability approach emphasizes on the ends (mobility and nutrition for instance) instead of resources and means (walking and food for instance) of well-being. Further analyzed, this relation shows a close link to the social model’s issue of discrimination and oppression.⁴⁰ In relation to Sen’s CA, UNCRPD position about functioning of individuals with disability to achieve their capacity is based on the human right approach of the UN towards development theory. UNCRPD, therefore, emphasize on the dimension of social development demanding full, effective, and equal participation of PWDs in society to get benefited of the economic and social progress.

Conclusion

Disability as a subject of philosophical interest is relatively new and the philosophical reason for using Sen’s CA to disability is that being an open-ended approach, it can be moved into many directions- disability in present study. Disability doesn’t cause inability, rather it needs to be accepted as diversity and immediate steps need to be taken to include PWDs in any strategy, policy, or law. The capability approach can be used as a source to understand the need and way to structure laws. Although Sen’s CA, to understand the wellbeing and quality of life of the PWDs, is hardly mentioned in a direct way but there is a definite connection between the two. CA provides an alternative concept of well-being as it is a normative theory of social justice. Amartya Sen’s view of “functioning” and “capabilities” in relation to quite narrow “utility theories” and “commodity-based theories” of the living standard concludes that the capability attempt of Sen can be best used to know the nature of disability, describe the social marginalization of the labelled individuals- labelled as disabled- and to structure laws accordingly to address the issues.

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³⁹ Tania Burchardt, “Capabilities and disability: The capabilities framework and the social model of disability,” *Disability and Society* 19(2004): 735–51.

⁴⁰ Reindal, “Disability, capability,”160.



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