QUT Law Review
Volume 15, Issue 2, pp 140-160
ISSN: (Print) 2205-0507 (Online) 2201-7275
DOI: 10.5204/qutlr.v12i2.578

A REFLEXIVE LAW APPROACH AND ACCESSIBILITY RIGHTS OF PERSONS WITH DISABILITIES TO THE VIRTUAL WORLD: SEEKING THE MIDAS TOUCH OF CORPORATIONS

NEHA PATHAKJI*

The United Nations Convention on the Rights of Persons with Disabilities *undeniably made a paradigm shift in the discourse and construction of 'disability'. It seeks to recognise the inherent dignity, value and autonomy of persons with disabilities as members of human society and their right to live in the world in an inclusive and participatory manner on an equal basis with others. The right to live in the world encompasses the right to live in the virtual world. This necessitates ensuring accessibility to the Internet. Whereas international human rights law recognises the state as directly responsible for ensuring accessibility, it is private corporations that effectively function as the gatekeepers of the Internet. Unless corporations are proactively engaged, the virtual world cannot be made inclusive for persons with disabilities. The complexity of this issue requires looking beyond conventional forms of command-control anti-discrimination laws. This article explores a reflexive law approach to create a dialogic web between seemingly differentiated subsystems in society (with their own norms and values) in order to attain accessibility rights for persons with disabilities.*

I INTRODUCTION

When rational people in an asocial state of nature first entered into social cooperation, their underlying motivation was to seek mutual advantage.[1] The very logic of a contract for mutual advantage rested on the fact that social cooperation, though highly desirable, was optional and

*B Com LLM (The Maharaja Sayajirao University of Baroda, India) Assistant Professor of Law and doctoral scholar at NALSAR University of Law, Hyderabad. The present article is a part of the author's ongoing doctoral research which attempts to develop a strategy to obtain corporate compliance to ensure accessibility rights of persons with disabilities to the virtual world enshrined under the *United Nations Convention on the Rights of Persons with Disabilities* (*'CRPD'*). The article should be viewed as a work in progress which explores possibilities and is yet to reach conclusive grounds. The author is thankful to Professor Amita Dhanda (NALSAR University of Law, Hyderabad) for her advice on this paper and to the anonymous referees for their close questioning and insightful comments on the earlier draft. The final version of this paper immensely benefited from the van Calker scholarship generously granted by the Swiss Institute of Comparative Law, Lausanne.

[1] See John Rawls, *A Theory of Justice* (Harvard University Press, 1971). The asocial state is what John Rawls refers to as the original position. Accordingly, no one knows their place in society, their class position or social status, nor does anyone know their fortune in the distribution of natural assets and abilities, their intelligence, strength, and the like. Society, according to Rawls, is a 'cooperative venture for mutual advantage', which is characterised by conflict of interests as well as by an identity of interests. There is an identity of interests since a cooperative scheme is better for each member of society than no scheme at all. The idea is that since everyone's well-being depends upon a scheme of cooperation without which no one could have a satisfactory life, the division of advantages should be such as to draw forth the willing cooperation of everyone taking part in it, including those less well situated.

could be avoided with people from whom no benefits were gained. Social cooperation was believed to take place only amongst those who were 'normal and fully cooperating member[s] of society over a complete life'.[2] Thus, in order to settle the basic structure and principles of society in a 'clear and uncluttered' manner only 'normal functioning members' participated in the initial social contracting restricting 'others' who could not cooperate.[3] This selective participation in initial bargaining culminated into the problem of outliers whereby certain groups, including persons with disabilities, were not considered as subjects of justice. Clearly, the initial societal foundations were neither designed 'by' persons with disabilities nor designed 'for' persons with disabilities. However, it was promised by parties in the original position that the concerns of persons with disabilities would be appropriately addressed at a later stage, but only after the basic social structure was settled.[4]

As a consequence of such an approach, persons with disabilities were subjugated, by what social justice theorists term as 'cultural imperialism'.[5] It is a process whereby abilities of the excluded group were dictated by how the dominant group perceived them. On account of such cultural imperialism, persons with disabilities and their aspirations were rendered invisible, stereotyping them in accordance with the beliefs and perceptions of the dominant group.[6] Such an approach took paternalistic overtones calling for paternalist interventions that required the state to 'protect' persons with disabilities from society by creating special institutions, educational facilities, housing, and accommodation.[7] Thus, society and social security and welfare legislation focused on the impairment of an individual. While this medicalised perception viewed persons with disabilities as innately, biologically different and inferior, the welfarist approach of the state resulted in exclusion and segregation of persons with disabilities.[8]

---

[2] Ibid 10.

[3] According to social contract theorists, if there is a group that is grossly unequal in power and resources to the majority group, where co-operation is not mutually advantageous, they are not capable of participating in the procedures through which basic political principles are settled. Thus, a condition precedent for a valid social contract is payment of adequate consideration in the form of functional abilities that in turn contribute to general social welfare. People with disabilities, as well as some other lower functioning individuals, are thereby excluded from membership in the social contract. In her critique of social contract theory Nussbaum strongly argues how excluding persons with disabilities and postponing justice to them is an urgent issue. See Maratha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Princeton University Press, 2006) 14-22. Disability theorists argued that the very concept of 'normal human being' is a social construct. See also Mary Crossley, 'The Disability Kaleidoscope' (1999) 74 *Notre Dame Law Review* 621.

[4] Pointing towards unresolved questions of social contract, Nussbaum elaborates how core ideas of mutual advantage and reciprocity, specified certain abilities as rationality, language, roughly equal physical and mental capacity as a prerequisite to participate in procedures that chose principles. Such requisites had large consequences for persons with disabilities as recipients or subjects of justice. Their interests were included derivatively, through the parties' own care or commitment or at a later stage, after the principles were chosen. See Nussbaum, above n 3, 16.

[5] Maria C Lugones and Elizabeth V Spelman, 'Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for "The Woman Voice"', cited in Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34 *Syracruse Journal of International and Comparative Law* 429.

[6] Ibid.

[7] Crossley, above n 3, 656.

[8] Harlan Hahn, 'Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective' (1996) 14 *Behavioural Science and Law* 41, 51 cited in Crossley, above n 3.

[9] A defining statement of this model was articulated in 1976 by a British group called the Union of the Physically Impaired against Segregation: 'In our view it is society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society'. Colin Barnes and Geoff Mercer, *Exploring Disability* (Polity Press, 2nd ed, 2010) 31.

The growing dissatisfaction with the medical model of disability led to the search for alternative conceptualisations of disability, which gave rise to the social model. According to the social model, it is the physically engineered environment, and the attitudes that are reflected in its construction, that play a central role in creating the condition termed 'disability'.[9] It asserts that impairment alone is not disabling. It is society which creates disabilities by isolating, excluding, and stigmatising people who have physical or mental impairments.[10] Since disabilities are caused by the socially constructed environment, it is society's ethical or moral duty to change that environment to provide equal access and equal functioning to all its members.[11]

An offshoot of the social model also resulted in the minority model of disability that attributed the marginalisation experienced by persons with disabilities to their minority social status.[12] According to the minority model of disability, since persons with disabilities were perceived to be a minority group, social institutions were designed for and around the needs of the non-disabled while a separate and inferior system was established to cater to the specific needs of persons with disabilities.[13] This model favoured anti-discrimination legislation — inclusion through a reactive approach, to achieve substantive equality.[14] The resulting anti-discrimination laws emphasised negative rights of persons with disabilities without spelling

[10] In order to focus attention on the disabling impact of society, many adherents of the social model favour the term 'disabled people' (in the sense of the disablement caused by society) over that of 'people with disabilities'. Gerard Quinn, 'The Human Rights of People with Disabilities under EU Law' in Philip Alston, Mara R Bustelo and James Heenan (eds), *The EU and Human Rights* (Oxford University Press, 1999) 281, 285.

[11] See generally Saad Z Nagi, *Disability and Rehabilitation: Legal, Clinical, and Self-Concepts and Measurement* (Ohio State University, 1969); Michael Oliver, *The Politics of Disablement: A Sociological Approach* (Macmillan, 1990); Jacobus tenBroek, 'The Right to Live in the World: The Disabled in the Law of Torts' (1966) 54 *California Law Review* 841; Crossley, above n 3, 621. The social model has often been criticised for ignoring the inherent limitations of impaired bodies and focusing on the externalities of the environmental and social causes. For instance, the materialist social model account which identified emergence of capitalism, industrialisation and urbanisation, as main causes for oppression of persons with disabilities has been criticised for its overemphasis on capitalist economics: Olivia Smith, *Disability Discrimination Law* (Thomas Reuters, 2010) 23. Susan Wendell who avers that 'the entire physical and social organization of life' has been created with the notion in mind that 'everyone was physically strong, as though all bodies were shaped the same, as though everyone could walk, hear, and see well, as though everyone could work and play at a pace that is not compatible with any kind of illness or pain.' See Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (Routledge, 1996) 39. Tom Shakespeare, who had been an advocate of the social model, later criticised it for being overly simplistic. In somewhat converging arguments with disabled feminists he pointed out that it is not just the environment that causes disability. Many disabilities are inherently associated with pain, fatigue, or other physical or mental difficulties, irrespective of social arrangements and attitudes. See generally Tom Shakespeare, *Disability Rights and Wrongs* (Routledge, 2006) 29-53. Similarly, Richard Scotch and Kay Schriner observe that real aspects of disability require social responses, and these characteristics shift over time, but they are nonetheless real. See, Richard K Scotch and Kay Schriner, 'Disability as Human Variation: Implications for Policy' (1997) 549(1) *Annals of the American Academy of Political and Social Science* 148.

[12] Often dubbed as 'cultural imperialism' the aspirations of the excluded group are rendered invisible; they are also stereotyped in accordance with the beliefs and perceptions of the dominant group.

[13] Anita Silvers, 'Disability Rights' in Ruth Chadwick (ed), *The Encyclopedia of Applied Ethics* (Academic Press, 1997) vol 1, 781. Silver hypothesises how our social landscape would look different if a dominant group in society used wheelchairs and what social arrangements would be in place were persons with disabilities dominant rather than suppressed.

[14] See generally Harlan Hahn, 'The Potential Impact of Disability Studies on Political Science (as well as vice-versa)' (1993) 21(4) *Policy Studies Journal* 740, 746; JE Bickenbach, 'Minority Rights or Universal Participation: The Politics of Disablement' in Melinda Jones and Lee Ann Basser, *Disability, Diverse-ability and Change* (Martinus Nijhoff Publishers, 1999) 101; Aart C Hendriks, 'Different Definition-Same Problem-One Way Out?' in ML Breslin and S Yee Ardsley *Disability Law and Policy-National and International Perspective* (Transnational Publishers, 2002) 202.

out positive rights.[15] This suggested equality of the treatment of persons with disabilities rather than equality of opportunity. Consequently, even as persons with disabilities were guaranteed rights, they continued to face routine denial of participation and inclusion.[16]

This article is structured as follows: Part II introduces the core issue pertaining to the accessibility rights of persons with disabilities and the agenda it sets for the virtual world and corporations that control access to them. Part III demonstrates how this trajectory is problematic for states that remain answerable for their international commitment, but have little power over the virtual world. Having laid this foundational issue, Part IV briefly evaluates how the existing top-down approach to regulation may not be effective in ensuring accessibility. Part V explains Gunther Teubner's theory of reflexive law in greater detail and explores its relevance to the current issue. I argue that a reflexive law approach would enable evolving a dialogic web that would complement conventional legislative mechanisms. Part VI elaborates on several reflexive law strategies which may be adopted to supplement legislative formulations and Part VII concludes the article.

II DISABILITY RIGHTS AGENDA FOR THE VIRTUAL WORLD

It was progressively recognised by the international community that oppression and exclusion of persons with disabilities must be viewed from the prism of human right violation.[17] People

[15] A number of countries have constitutional anti-discrimination provisions which explicitly include disability. For a comprehensive comparative view see Theresia Degener, 'Disability Discrimination Law: A Global Comparative View' in Anna Lawson and Caroline Gooding (eds) *Disability Rights in Europe: From Theory to Practice* (Hart Publishing, 2005) 87-106. The conventional anti-discrimination law model have been criticised as having certain limitations such as lack of clarity on the extent of reasonable accommodation duties. Thus, even where the existing anti-discrimination laws provide for reasonable accommodation, there are serious limitations in the scope of its practical application as well as lack of clarity of the extent of justification for failure to provide the same. See also Colm O'Cinneide, 'A New Generation of Equality Legislation? Positive Duties and Disability' in Anna Lawson and Caroline Gooding (eds) *Disability Rights in Europe: From Theory to Practice* (Hart Publishing, 2005) 223.

[16] See generally UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Disability: Report by Special Rapporteur: Leandro Despouy, UN Doc E/CN.4/Sub.2/1991/31, UN Sales No. E92.XIV.4 (1993); Gerard Quinn and Theresia Degener (eds), *Human Rights And Disability - The Current Use And Future Potential Of United Nations Human Rights Instruments In The Context Of Disability* (UN, Nov 2002), 23-26 <http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf>.

[17] Even where the International Bill of Human Rights was applicable to persons with disabilities as human beings, it did not explicitly spell rights of persons with disabilities as a distinct group vulnerable to human rights violations. Rather, as Professor Degener emphasised references to disability in human rights law were contextualised only in terms of social security and preventive health policy. See Theresia Degener, 'Disabled Persons and Human Rights: The Legal Framework', in Theresia Degener and Yolan Koster-Dreese (eds), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, (Martinus Nijhoff Publishers, 1995) 9. Persons with disabilities were explicitly referred as subjects of human rights only in the 1970s with the promulgation of the *Declaration on the Rights of Mentally Retarded Persons* (1971) and the *Declaration on the Rights of Disabled Persons* (1975). See *Declaration on the Rights of Mentally Retarded Persons* GA Res 2856, UN GAOR, 26th Sess, Supp No 29, at 93; UN Doc A/8429 (1972). *Declaration on the Rights of Disabled Persons* GA Res 3447, UN GAOR, 30th Sess, Supp No 34, at 88, UN Doc A/10034 (1976). In an effective follow up to the International Year of Disabled Persons in 1981, the General Assembly adopted the *World Programme of Action Concerning Disabled Persons* ('WPA') in 1982, the guiding instrument for the United Nations Decade of Disabled Persons 1982–1993. See United Nations, General Assembly, Implementation of the World Programme of Action Concerning Disabled Persons; Report of the Secretary-General, UN Doc A/54/388/Add.1 (1999). Two thematic reports, on human rights in the field of mental health and on human rights violations with regard to persons with disabilities; prepared by the United Nations Commission on Human Rights were also hinting towards a shift from medical to human rights perspective of disability. These reports were the first to recognise disability as a thematic subject within the human rights division of the United Nations. See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Principles, Guidelines and Guarantees

are to be valued not just because they have functional utility, but because they have inherent self-worth. Recognition of the value of human dignity serves as a powerful reminder that persons with disabilities have a stake in and a claim on society that must be honoured quite apart from any considerations of social or economic utility.[18] Thus, the impetus provided by the human rights approach to disability culminated in the adoption of the *Convention on the Rights of Persons with Disabilities* (*'CRPD'*) by the UN General Assembly in 2006.[19] The *CRPD*, the first human rights treaty of the 21st century, reconceptualised the discourse surrounding the meaning and construction of 'disability' as well as notions of equality, discrimination and exclusion.[20] Based on the concepts of justice, human dignity and autonomy, the *CRPD* visualises persons with disabilities as 'subjects of rights' rather than 'objects of charity'.[21] Predominantly hailed for the paradigm shift it brings for persons with disabilities, the *CRPD* saw the disability discourse move away from the medical model which was located in the impairments of an individual, towards a social model that views disability as a social construct created through social barriers.[22]

The *CRPD* essentially entails that society ought to perceive disability as a part of human diversity and, towards that end, make a major departure from formal equality to substantive equality.[23] The formal approach to equality believes that social structures are constant and

for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder; Report by the Special Rapporteur: Erica-Irene A. Daes, UN Doc E/CN.4/Sub.2/1983/17/Rev 1, UN Sales No E.85.XIV.9 (1997); UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Disability: Report by Special Rapporteur: Leandro Despouy, UN Doc E/CN.4/Sub.2/1991/31, UN Sales No E92.XIV.4 (1993). The General Assembly eventually adopted the non-binding UN *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (Standard Rules) in 1993. See *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48/96, UN GAOR, 48th Sess, Supp No 49, Annex at 202-11, UN Doc A/Res/48/49 (1994). The Committee on Economic, Social and Cultural Rights also adopted a General Comment on how to interpret and implement the ICESCR with respect to persons with disabilities. *General Comment No. 5 (1994) on Persons with Disabilities*, *Report on the Tenth and Eleventh Sessions*, UN ESCOR 1995, Supp No 2 [according to UN Doc E/1995/22/Corr.1-E/C.12/1994/20/Corr.1], 102, [15], UN Doc E/1995/22-E/C.12/1994/20 (1995). Similarly, the Committee on the Elimination of Discrimination Against Women adopted General Recommendations that mandate State parties to include specific information on the status of women with disabilities. *General Recommendation No. 18, Report of the Committee on the Elimination of Discrimination Against Women*, UN GAOR, 46th Sess, Supp No 38, 3; UN Doc A/46/38 (1992). Consensus was slowly emerging in the United Nations, the member states and disability rights organisations to initiate a dedicated human rights of treaty for persons with disabilities.

[18] Quinn and Degener, above n 16.

[19] *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 76th plen mtg, UN Doc A/RES/61/106 (Dec 13, 2006) The *CRPD* owes itself to many years of work within the UN system to place disability rights on the international agenda and to fully integrate disability issues into the broader human rights and international development frameworks.

[20] *CRPD*, GA Res 61/106, UN Doc A/61/611 (13 December 2006), opened for signature 30 March 2007, 46 ILM 433 (entered into force 3 May 2008). An Optional Protocol providing for additional monitoring mechanisms was adopted at the same time. *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 46 ILM 433 (entered into force 3 May 2008).

[21] The UN High Commissioner for Human Rights emphasised this shift to a rights-oriented perspective on the adoption of the *CRPD* in December 2006. See UN High Commissioner for Human Rights, 'Statement by UN High Commissioner for Human Rights on Convention on Rights of Persons with Disabilities' (5 December 2006) <http://www.un.org/esa/socdev/enable/rights/ahc8hrcmsg.htm>.

[22] See Victor Finkelstein, *Attitudes and Disabled People: Issues for Discussion* (World Rehabilitation Fund, 1980); Michael Oliver, *The Politics of Disablement* (Palgrave Macmillan, 1990); Michael Oliver, *Understanding Disability: From Theory to Practice* (Palgrave Macmillan, 1996); Jenny Morris, *Pride against Prejudice* (Women's Press Ltd, 1991); Michael Ashley Stein, 'Disability Human Rights'(2007) 95 *California Law Review* 75.

[23] A formal equality model is based on an idea of 'sameness' or a 'symmetrical approach', assuming that all persons should be treated in the same way or are 'symmetrical' irrespective of the unequal consequences of this

should not be changed. It thereby places emphasis on prohibiting distinctions on the grounds of personal characteristics. The substantive approach to equality, on the other hand, stresses removing obstacles in society so as to allow full participation of persons with certain characteristics.[24]

Around the time when the disability rights movement was gaining momentum and the human rights of persons with disabilities were being asserted to offset past exclusionary practices, the world was gearing up for yet another phenomenal era — the era of the Information Age propelled by proliferation of computers and the Internet at an unprecedented level. Whereas in initial stages the Internet was perceived as just another medium, facilitating communication, it was soon realised that, unlike traditional mediums of communication, the Internet had a global reach, dialogic interaction and plurality of contents which led to the creation of an open-ended space. At the same time, the Internet captured the imagination of the private sector, which saw it as a market without borders, free from regulations. The world quickly realigned itself around Internet-based products, services and activities.[25] For others, it offered an alternative space where individuals began routinely interacting, sharing, participating, socialising and performing a range activities, such as personal interaction, business, work, culture, communication, social activism, and politics.[26]

The advent of the Internet and emergence of the virtual world offered possibilities of sidestepping the barriers created in the physical world. It promised to redress the exclusion experienced by persons with disabilities that was denied in the physical world. Access to the Internet was key to inclusion. To have 'access' was thus to have access to the de facto political, economic, social, informational authority in any given context.[27] However, with advances in technologies and complicated applications, there has been a widespread adoption of inaccessible technology.[28] As technology developed at a fast pace, concerns of usability and accessibility were soon side-tracked. In a sequel to the social contract that had ignored persons with disabilities while designing the basic structure of the physical world, the virtual world has progressively remained oblivious to their accessibility concerns resulting in a digital divide.

---

treatment. This approach is formal in character, in the sense that it does not require a substantive or a normative test of the contents of the treatment as long as there is consistency in treatment. Therefore, it does not address structural disadvantages facing persons belonging to certain groups and consequently equality sought to be achieved fails to acknowledge the differences and specific characteristics that exists among members of the society. Sandra Fredman, 'Equality: A New Generation?' (2001) 30(2) *Industrial Law Journal*, 145, 155; Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59 *The Cambridge Law Journal* 562; Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination Under the European Convention of Human Rights* (Martinus Nijhoff Publishers, 2003) 23 cited in Maria Ventegodt Liisberg, *Disability and Employment: A Contemporary Disability Human Rights Approach Applied To Danish, Swedish And EU Law And Policy* (Intersentia, 2011) 23.

[24] See generally Sandra Fredman, *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2002); Fredman, above n 23.

[25] See generally Gary Annable et al, 'Accessibility, Disability, and Inclusion in Information Technologies: Introduction' (2007) 23(3) *The Information Society: An International Journal* 145; Helen Maskery, 'Crossing the Digital Divide-Possibilities for Influencing the Private-Sector Business Case' (2007) 23(3)*The Information Society: An International Journal* 187; Rikke Frank Jørgensen, *Framing the Net: The Internet and Human Rights* (Edward Elgar Publishing, 2013).

[26] Social network sites are web-based services that allow individuals to construct a public or semi-public profile within a bounded system, articulate a list of other users with whom they share a connection and view and traverse their list of connections and those made by others within the system. Danah M Boyd and Nicole B Ellison, 'Social Network Sites: Definition, History, and Scholarship' (2007) 1 *Journal of Computer-Mediated Communication* 13.

[27] Jørgensen above n 25.

[28] Daniel Goldstein and Gregory Care, 'Disability Rights and Access to the Digital World: an Advocate's Analysis of an Emerging Field' (2012) 59 *Federal Lawyer* 54.

For persons with disabilities, living on the wrong side of the digital divide means a second round of exclusion.

It needs to be underscored that persons with disabilities have a right to live in the world and to have equally meaningful contact with the population and community at large.[29] Thus, the right to live in the world entails not only physical access to areas of public accommodation,[30] but also involves living in the community in a participatory and inclusive manner. In the Information Age, meaningful participation in the community necessarily translates to participation in the virtual community. Therefore, the right to live in the world encompasses the right to live in accordance with an accessible virtual world in general,[31] particularly on the Internet.[32] Since access has the effect of levelling the field for persons with disabilities who may otherwise be precluded from seizing these opportunities, it is indefensible to deny them access to the virtual world. Unlike structures of the real world, the virtual world continues to take shape every day, thus a total disregard to the persons with disabilities and postponement of accessibility for a later stage is not a viable option.

Further, it is vital to examine accessibility to the Internet under the human rights prism provided by the *CRPD*. Accordingly, the *CRPD* acknowledges accessibility as one of its key underlying principles — a vital precondition for the effective and equal enjoyment of different civil, political, economic, social and cultural rights by persons with disabilities.[33] It has been tacitly conceded in the *CRPD* that accessibility is often understood too narrowly in terms of physical environment alone; however, it is all-encompassing.

Conscious of the attitudinal and social barriers in society towards persons with disabilities, the *CRPD* seeks to dismantle these barriers and advance a disability inclusive citizenship. Article 9 seeks to dismantle barriers erected because of the discriminatory attitudes by promoting access, including access to the Internet. Whereas Article 9 does not attempt to enumerate any exhaustive list of the relevant stakeholders, the *General Comment on Article 9* clarifies that the duty to observe accessibility standards applies equally to the public sector as well as private sector. The *CRPD* marks a clear shift in focus from the nature of the service provider to the nature of the service. In other words, it has been categorically explained that where the goods, products or services are available to the general public, the same must be accessible irrespective of the legal personality of the provider or whether the provider is a public authority or private enterprise. Any denial of access amounts to disability-based discrimination. While such

[29] tenBroek, above n 11, 848 (arguing for participatory justice for persons with disability and calling for 'integrationalism' of persons with disabilities).
[30] Ibid.
[31] Different terminologies are used to address this space-virtual world: cyberspace, information society, information highway. Often, the explanation of one term leads to the evolution of the other. Virtual world or cyberspace represents not a physical or tangible space, but rather a giant network which interconnects innumerable smaller groups of linked computer net-real works. The resulting whole is a decentralised, global medium of communications — or 'cyberspace' — that links people, institutions, corporations, and governments around the world. What results is a seamless web of communications networks, computers, databases, and consumer electronics that will put vast amounts of information at user's fingertips. See Llewellyn Joseph Gibbons, 'No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace' (1997) 6 *Cornell Journal of Law & Public Policy* 475.
[32] Bradley Allan Areheart and Michael Ashley Stein, 'Integrating the Internet' (2015) 83(2) *George Washington Law Review* 449. The authors argue that the Internet is a place of public accommodation and therefore needs to be accessible. The authors extend tenBroek's 'integrationalism' to the Internet so as to advance the personal autonomy and self-expression for persons with disabilities.
[33] Committee on the Rights of Persons with Disabilities, *General Comment on Article 9: Accessibility*, 11th sess, UN Doc CRPD/C/11/3 (11 April 2014).

isolated reading of the articles may tend to confine accessibility to availability of goods or products simpliciter, the *CRPD* does not favour reading accessibility either in a restricted view or in isolation from other rights.

A conjunctive reading of the general principles in Articles 3-9 (including accessibility and awareness-raising) together with articles of general and cross-cutting application serve as a guide to the interpretation of the accessibility mandate.[34] For instance, when Article 19 guarantees the right of persons with disabilities to live independently and to be included in the community, the said right necessarily extends to the virtual world and needs to be implemented in an inclusive manner which respects diversity. In a similar vein, the right to be educated in an inclusive and non-discriminatory manner under Article 24 entails ensuring that education opportunities, information, admission process, online examinations are made available to persons with disabilities on an equal basis with others.

Thus, the *CRPD* neatly chalks out the mandate for the creation of an accessible virtual world, which is to be observed both by the state as well as the private sector. However, a closer look at the virtual world reveals that it is primarily dominated by corporations. Whilst the state remains responsible for its international commitment to ensure accessibility rights of persons with disabilities, the real power at the practical, day-to-day business level rests with corporations.

At this juncture, it would be vital to be informed of certain ground realities in the context of disability rights. First, unlike the regulatory and normative frameworks for environmental and labour laws that forthrightly address the private sector, anti-discrimination laws of several states set relatively higher thresholds to hold the private sector liable for disability discrimination.[35] Second, unique features of the virtual world pose serious challenges to the regulatory and governance power of the state which has already allegedly 'retreated'[36] and left the private sector to manage this arena of life in our neoliberal world. Third, in the absence of a consensus on the place of corporations under international human rights laws (including whether, as legal 'persons' human rights should extend to these artificial legal 'persons'),[37] the problem is aggravated with corporations adopting a 'bystander rhetoric'[38] thereby escaping

[34] It has been the basic scheme of the *CRPD* that all other articles specifying substantive rights covering civil, political, economic, social and cultural rights are to be read in conjunction with the cross-cutting articles so as to advance the core principles of autonomy and participation. Andrew Power, Janet E Lord and Allison S Defranco, *Active Citizenship and Disability: Implementing the Personalisation of Support* (Cambridge University Press, 2013) 28.

[35] Most anti-discrimination laws are reactionary in nature, thereby making the burden of proof fall on the person with disability alleging disability discrimination. Most of them invariably comprise an 'unjustifiable hardship' clause when implementing reasonable accommodation for person with disability. See generally, Brian Doyle, 'Enabling Legislation or Dissembling Law? The Disability Discrimination Act 1995' (1997) 60 *The Modern Law Review* 64.

[36] For detailed discussion, see generally Susan Strange, *The Retreat of the State: the Diffusion of Power in the World Economy* (Cambridge University Press, 1996).

[37] The question whether corporations are bearers of human rights obligations under international law is necessarily entwined with the issue of the international legal personality of corporations, yet the two questions are not identical. See generally Markos Karavias, *Corporate Obligations Under International Law* (Oxford University Press, 2013).

[38] Jena Martin Amerson, '"The End of the Beginning?": A Comprehensive Look at the UN's Business and Human Rights Agenda from a Bystander Perspective' (2012) 17 *Fordham Journal of Corporate & Financial Law* 871. Amerson labels the escapist approach of corporations from liability towards human rights violation as a bystander rhetoric. Accordingly, transnational corporations employ bystander rhetoric to distance themselves from underlying human rights violation and placing the blame on the State or community. Thus, in the event of a human rights violation, corporations take a position that they were merely bystanders-witnesses to the underlying event.

accountability on human rights violation. Fourth, the substantive equality approach of the *CRPD* entails the state to adopt a proactive approach while addressing discrimination and to promote equality by altering the practices and structures in order to 'bring about real change'.[39] The complexity of the situation calls for looking beyond conventional forms of command-control regulations.

It is in this backdrop that this article sets out to explore a reflexive law[40] approach as an effective option to identify and coordinate seemingly differentiated subsystems to create a dialogic web. This does not suggest that reflexive law should be the only means of obtaining corporate compliance to accessibility. Neither does it suggest that coercive measures in terms of the legislation or mandatory regulation be substituted altogether. On the contrary, the idea is to have a judicious mix of each of these mechanisms to obtain corporate compliance.

Before proceeding further, I provide certain clarifications at the outset. I perceive the Internet as a culture, a public sphere, a community.[41] The Internet, is thus, a symbol of a new and more democratic frontier of civilisation which provides individuals with a richer choice of communities and online spaces. I do not, therefore, see accessibility as particularly restricted to the provisioning of goods or services through the Internet.[42] Rather, accessibility in the present context entails ensuring participatory justice and inclusion of persons with disabilities in the virtual world on an equal basis with others. In other words, assuming the virtual society is in asocial state in terms of Rawlsian understanding, persons with disabilities should be

---

Amerson emphasises that the bystander rhetoric is significant since under most legal theories, bystanders cannot be held liable for the acts in question.

[39] Fredman, above n 23.

[40] The concept of reflexive law approach introduces reflexivity in law and regulation. Accordingly, law will not command any particular outcome, but will encourage and guide corporations in reflecting and re-examining their practices critically and continually and reform those practices based on the most current information. See generally Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239.

[41] The culture metaphor is reflected in a large body of research that explores the Internet from the perspective of its cultural practices, focusing on various examples of Internet communities, including their norms and values, identity formation, sharing and collaboration, and means of social control. See generally, Jørgensen above n 25, Sherry Turkle, *Life on the Screen: Identity in the Age of the Internet* (Simon & Schuster, 1995); David Silver, 'Looking Backwards, Looking Forward: Cyberculture Studies' in David Gauntlett (ed), *Web.Studies: Rewiring Media Studies for the Digital Age* (Arnold, 2000) 19; Clay Shirky, *Here Comes Everybody: The Power of Organizing Without Organizations* (Penguin Press, 2008).

[42] Whereas the *CRPD* does not define the term 'accessibility', the International Telecommunication Union ('ITU') has developed a definition. Accordingly, accessibility is a measure of the extent a product, service can be used by a person with disability as effectively as it can be by a person without that disability. International Telecommunication Union, *Introduction to E-Accessibility Basics* <http://www.e-accessibilitytoolkit.org/toolkit/eaccessibility_basics/introduction_to_e-accessibility%20basics>. The same is progressively gaining acceptance amongst several jurisdictions whilst formulating e-inclusion policy or accessibility policy. According to the Web Accessibility Initiative of the World Wide Web Consortium ('W3C'), web accessibility means that people with disabilities can perceive, understand, navigate, and interact with the web, and that they can contribute to the web. W3C, 'Introduction to Web Accessibility' *Web Accessibility Initiative* (2005) <http://www.w3.org/WAI/intro/accessibility.php>. The ITU definition tends to view the right to access the Internet as confined merely to accessible products or services. Such an approach tends to overlook the growing significance of the Internet as a virtual community and, at the same time, unknowingly tends to diminish persons with disabilities as mere customers. The definition of accessibility by W3C appears broader in its scope and perception than the one forwarded by the ITU. The W3C definition takes on board the inter-activeness of the Internet for persons with disabilities yet it does not appear to articulate the participatory justice and inclusiveness in the virtual world. Professor Peter Blanck observes that unfortunately accessibility and usability are often used interchangeably. The situation has led to the lack of principled application of these terms in practice. See Peter Blanck, *eQuality: The Struggle for Web Accessibility by Persons with Cognitive Disabilities* (Cambridge University Press, 2014) 45.

accorded recognition as parties who shall have an equal voice in determining the basic principles of the virtual world.

The term 'corporation' should be construed to mean an organisation of persons and material resources included, with a distinct legal personality, of limited liability and licensed by the state for the purpose of conducting profit-seeking business activities.[43] In this context, I broadly categorise companies in the virtual world as: supply companies and consumer companies. Supply companies are companies on the supply side of the virtual world; that is, companies engaged in providing infrastructure, such as search engines, Internet service providers, online service providers, web developers, application developers, and hardware manufacturers. Consumer companies are end-users themselves or companies which have a virtual world presence to influence their real world business, or are engaged in business that primarily uses the Internet and related services to conduct their operations.

III PROBLEMATISING THE SITUATION

The *CRPD* mandate broadly underscores the obligation to attain substantive equality and to proactively identify and dismantle barriers including those to the virtual world. The goals are clearly spelt out; the real challenge is in implementing the mandate. For the purpose of this article, I identify two main challenges. The first one inherently flows from the peculiar features of the virtual world. The second challenge is attributed to the position taken by international human rights laws vis-a-vis corporations.

The virtual world being a multi-layered, fragmented and complex space created by interconnected computers operates not by one technology, but an assembly of many technologies at different levels. Since a large part of this technical development and dissemination is undertaken by commercial private entities, very little of the current Internet is owned and operated by governmental bodies. Given the Internet's openness, its global interconnectedness, its decentralised nature, and the interrelationships among the players, it is remarkably resistant to the traditional tools of state governance.[44] Lawrence Lessig had developed the code thesis: this is the notion that the architecture of the Internet has profound implications for its legal regulation.[45] Accordingly it has been argued that the code determines what actions are feasible and what options become available, and may prove more effective than legal rules in directing human behaviour.[46] It was predicted that the code can achieve a nearly perfect control in the cyberspace and, therefore, the architecture becomes the most powerful regulator. Since the code is constantly designed and revised by the private companies, they are accorded with regulatory power in shaping the information environment. Overall, the private sector in the digital environment enjoys more power in setting the agenda and shaping the priorities.[47]

---

[43] Karavias, above n 37, 4.

[44] Joe Waz and Phil Weiser, 'Internet Governance: The Role of Multi Stakeholder Organisations' (2012) 10 *Journal on Telecommunication and High Technology* 331.

[45] Lawrence Lessig, *Code, and Other Laws of Cyberspace* (Basic Books, 1999).

[46] Ibid. Lawrence Lessig describes the constraints of architecture. This constrains by imposing conditions on the way in which users can operate online. Lessig gives numerous examples of this: the requirement of an access password, the ability to participate anonymously, or to have multiple email identities.

[47] Two fundamental insights have been forcefully and eloquently presented in the work of Lessig. The first insight can be called the 'code thesis'; this is the notion that the architecture of the Internet has profound implications for its legal regulation. The second insight can be called the 'end-to-end principle'; an idea from network engineering that Lessig applies to the Internet regulatory policy. Emphasising networks as dominant social structures, Spanish sociologist Manuel Castells's theory posits the transformation in the distribution of power with information as the

While the real power to create an accessible virtual world rests with corporations, the classical international human rights law recognises the state as the only protectors and promoters of human rights. Consequently, regardless of the fact whether the human right is 'negative', commanding abstinence from arbitrary interference with rights or 'positive', requiring to ensure the wellbeing of its nationals, the state is the addressee of human rights obligations. Even so, efforts have been stepped-up to entrust corporations with human rights obligations.[48] Yet normative foundations and practical implications of such obligations remain far from settled.[49] While one may concede to the end of the beginning by the UN Protect, Respect and Remedy Framework which endorses corporations' responsibility to respect human rights, the same has left much of the regulatory burden at the doorstep of the state. Whereas such an

key factor. See Manuel Castells, *The Rise of the Network Society* (Willey-Blackwell, 2nd ed, 2009). Lessig's work could be read in conjunction with Castells's theory to demonstrate how the question of power as traditionally formulated does not make sense in the network society and new forms of domination and determination are critical in shaping peoples' lives regardless of their will. Thus, there are power relationships at work, albeit in new forms and with new kinds of actors. According to Castells, in a world of networks, the ability to exercise control over others depends on two basic mechanisms: (a) the ability to constitute network(s) and to program/reprogram the network(s) in terms of the goals assigned to the network; and (b) the ability to connect and ensure the cooperation of different networks by sharing common goals and combining resources while fending off competition from other networks by setting up strategic cooperation.

[48] These efforts took the shape in theory and practice in academia as well as in the international community. For academic discussions see Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443; Kenneth Paul Kinyua, 'The Accountability of Multinational Corporations for Human Rights Violations: A Critical Analysis of Select Mechanisms and Their Potential to Protect Economic, Social and Cultural Rights in Developing Countries' (Working Paper No K33, Stellenbosch University, 30 September 2009), which discusses several mechanisms to hold multi-national corporations accountable for economic, social and cultural rights; David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, which argues that the current state-based framework for human rights accountability is inadequate and duties for transnational corporations ('TNCs') under international law should be implemented; Paul Redmond, 'Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance' (2003) 37 *International Lawyer* 69, which argues for an international legal framework for TNCs; Rachel J Anderson, 'Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations' (2010) 88 *Denver University Law Review* 183, which argues for the creation of global human rights law, as distinct from international human rights law, to be the law paradigm for TNCs; Cynthia Williams, 'Corporate Social Responsibility in an Era of Economic Globalization' (2002) 35 *UC Davis Law Review* 705, which argues that a new paradigm needs to be created that incorporates the reality of how corporations do business today.

[49] International human rights law has been oscillating between propositions to impose human rights obligations on corporations and those denying any such obligation on corporations. Whilst the UN Global Compact was based on voluntary initiatives of corporations, the UN *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* adopted a mandatory top-down approach. The same resulted in a stalemate which was successfully broken by the UN *Protect, Respect and Remedy: A Framework for Business and Human Rights*. However, the issue remains unresolved. The 26th session of the Human Rights Council adopted a resolution 'to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights'. Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 26th sess, Agenda Item 3, UN Doc A/HRC/RES/26/9 (24 June 2014). See also The United Nations Global Compact, *About Us*, <http://www.unGlobalcompact.org/AboutTheGC/index.html>; United Nations Economics and Social Council, Sub-Commission on the Promotion and Protection of Human Rights, Economic, Social, and Cultural Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev 2 (26 August 2003); John Ruggie, Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008).

approach may work for obtaining corporate involvement on certain issues, it may not be helpful for the disability rights agenda.[50]

Joining the dots backwards one stumbles upon a crucial problem area that requires immediate attention. Although international human rights law recognises the state as directly responsible for ensuring accessibility, states have little control over the decentralised and privatised virtual world. Private corporations which own the means of accessing the virtual world effectively function as the gatekeepers and thus possess the power for persons with disabilities to access the virtual world. As such, a normative and regulatory void exists that needs addressing to ensure persons with disabilities have effective access to the Internet. Our current legal discourse is ill-equipped to safeguard the legitimate interests of users of the Internet.[51] The absence of normative and regulatory frameworks and inadequacies of the legal framework regulating access to the virtual world presents challenges to ensuring corporate compliance. This may not be unique to disability rights jurisprudence and may be logically extended to other problem areas, such as environmental issues, climate change, labour relations or indigenous communities. The difference lies in the fact that whereas other issues have already gained momentum, corporate obligation towards emerging disability rights is a niche area which is yet to gain recognition.

IV CONVENTIONAL REGULATORY MODELS

Besides the normative and practical challenges of corporate obligations, it is essential to be alert about regulatory goals. Ensuring accessibility rights of persons with disabilities requires proactive measures from corporations. Therefore, the regulatory challenge lies in seeking a proactive involvement of corporations in the creation of an accessible virtual world. Over the years, several regulatory theories, strategies and models have been mooted on how the behaviour of targeted subjects can be regulated and how optimal results for the internalisation, implementation and enforcement of given rules can be achieved.[52] The theory of responsive regulation put forth by Ian Ayres and John Braithwaite has proved to be highly influential in the context of corporate regulation.[53] Ayres and Braithwaite introduced the model of 'responsive regulation' based on the assumption that 'the achievement of regulatory objectives is more likely when agencies display both a hierarchy of sanctions and a hierarchy of regulatory strategies of varying degrees of interventionism'.[54] The central aspect of the responsive

[50] Over the years, corporations have become aware of human rights closely associated with environmental issues or labour laws; however, the same has not happened for disability concerns. On the contrary, corporations have been exempted on several occasions from the application of disability based discrimination laws. Paul Harpur, 'From Universal Exclusion to Universal Equality: Regulating Ableism in a Digital Age' (2013) 40(3) *Northern Kentucky Law Review* 529, 543-550.

[51] See Nicolas Suzor, 'On the (Partially) Inalienable Rights of Participants in Virtual Communities' (2009) 130 *Media International Australia* 90, which discusses how the current cyber property debates frame issues which facilitate marginalisation of participants' interest and suggests that a recognition of the hybrid nature of cyberspace may enable better regulatory conclusions.

[52] Scholars have canvassed regulatory tools, such as command and control, voluntarism, self-regulation, enforced self-regulation, responsive regulation, reflexive regulation, and information-based regulation. See generally, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), Neil Gunningham et al, *Smart Regulation: Designing Envrionmental Policy* (Oxford Claredon Press, 1998); Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance* (Brookings Institution Press, 2000); Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy*, (Cambridge University Press, 2002).

[53] Ayres and Braithewaite, above n 52.

[54] Ibid 5, 6.

technique method of regulation is the enforcement pyramid, which deploys a mix of incentives and sanctions in order to ensure compliance from corporations.

The enforcement pyramid presupposes the existence of both persuasive and punitive measures at the disposal of the regulator, so as to enforce a tit-for-tat strategy.[55] A foundational question arises about whether the state has such a wide range of persuasive and punitive measures to ensure accessibility compliant behaviour from corporations. Does the anti-discrimination law across jurisdictions allow multiple options or have any in-built techniques? Is there any other sanction or threat available under the domestic framework apart from litigation which may act as a sanction in terms of the enforcement pyramid? Most anti-discrimination laws do not.

The United Nations and several disability right groups saw merit in anti-discrimination laws in establishing a proper command-control model of regulation sufficiently backed by sanctions to propel change.[56] Such a top-down approach values legitimacy and enforcement power. The state also has the power to overcome the collective action problem and to coordinate diverse interests into a single system. Thus, many groups not represented on the Internet, but affected by it, can influence the government by communicating their preferences which results in a system's legitimacy. Further, states can require firms to conform to rules, unlike private regulatory entities, thus having a relative advantage over private agencies to seek cooperation globally and coordinate regulatory norms. Therefore, the international community favours strong anti-discrimination disability legislation which comprehensively carries mandates that enforce rights.[57]

However, it needs to be pointed out that most anti-discrimination laws are primarily reactionary. The structure of such laws typically adopt a negative covenant which command ('thou shalt not discriminate on the basis of ...'), rather than impose positive obligations ('thou shalt do justice'). Thus, corporations are not encouraged to develop new solutions to existing (or potential) problems, but only to meet a certain minimum level of behaviour. Rather, organisations tend to take defensive steps to meet their legislative obligations, which creates a culture of negative compliance.[58]

Most of the existing anti-discrimination laws predate the information age and their command-and-control regulations have also been criticised as inadequate to address the *CRPD* paradigm.[59] Statutes enacted at a particular time in history are limited by the available knowledge of the time, especially scientific and technical knowledge. Since the command-and-

[55] In order to effectively apply a tit-for-strategy, it is crucial that a regulator is equipped with both persuasive as well as punitive measures. Critiquing enforcement pyramid, Surya Deva notes that in areas such as health, safety and environment, escalating punishments hardly exists with regulators. Surya Deva, *Regulating Corporate Human Rights Violation: Humanising Business* (Routledge, 2012) 188.

[56] 'In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States parties.' *General Comment No. 5 (1994) on Persons with Disabilities, Report on the Tenth and Eleventh Sessions*, UN ESCOR 1995, Supp No 2 [according to UN Doc E/1995/22/Corr.1-E/C.12/1994/20/Corr.1], 102, [6], UN Doc E/1995/22-E/C.12/1994/20 (1995).

[57] Ibid.

[58] Critics argue that the *Americans with Disabilities Act* (*'ADA'*) civil rights approach hurts the integration of people with disabilities in the labour market, daily life, and in their right to live equally in the world. For discussion, see generally Peter Blanck '"The Right to Live in the World": Disability Yesterday, Today and Tomorrow' (2008) 13(2) *Texas Journal of Civil Liberties and Civil Rights* 369.

[59] Harpur, above n 50, 541 closely scrutinises anti-discrimination laws in the US and UK and observes that the duties under the UK and US regimes have traditionally relied upon negative duties supported by weak control mechanisms. It is recent amends in US and UK laws that introduces limited positive duties.

control statutes cannot 'learn' easily by changing circumstances and developing knowledge, they often fall short of achieving their objectives in a rapidly changing world.[60] This holds true in the context of accessibility to the Internet, as most anti-discrimination laws pre-date the Information Age and consequently do not include provisions addressing this issue.

Also, anti-discrimination law excessively relies on individual litigation as a means of enforcing its precepts and, in this sense, places considerable burdens on the individuals.[61] It concentrates on individual retrospective fault-finding and assumes that willingness to obey the law and avoid sanctions in the form of compensation awards are sufficient means of achieving discrimination laws' ambitiously stated objectives. Thus, even where an action is brought, the focus is on remedying individual acts of discrimination after the event, not on the elimination of structures and patterns of behaviour that perpetuate discriminatory practices. This makes existing anti-discrimination law of limited use in combating institutional discrimination in both public authorities and private organisations. The existing anti-discrimination laws and conventional command-control measures of regulation are deficient in either persuading corporations or obtaining a proactive compliance.

From the available models of anti-discrimination laws, the *Equality Act, 2010* of the United Kingdom and the *Disability Discrimination Act, 1992* (*'DDA'*) of Australia are notable exceptions. Instead of merely prohibiting discrimination, these jurisdictions have introduced a model of positive requirements.[62] Guided compliance operates both on an informal as well as formal level. At the informal level, it helps provide guidance for voluntary organisational responses to rectify social imbalance and, at the formal level, it enables legal requirements to redesign specific aspects of social life in order to bring about social justice for persons with disabilities.[63] Under a guided compliance approach, the state seeks to engage in some form of dialogue with the duty bearers. Such a process tends to first create an understanding among the duty bearers by sensitising them and encouraging them to anticipate the impact of their actions. It helps to avert causing damage in the first place which then may require subsequent prolonged litigation. For instance, the *DDA* requires that the community take responsibility for the integration process through action plans. Service providers are encouraged to voluntarily develop an action plan, laying out the process by which the organisation proposes to eliminate discriminatory practices.[64] Rather than combating disability based discrimination through

[60] Eric W Orts, 'Reflexive Environmental Law' (1995) 89(4) *Northwestern Law Review* 1227, 1338.
[61] See Smith, above n 11.
[62] For instance, the *Equality Act 2010* in the United Kingdom consists of several provisions that public authorities should adopt. With respect to discharging the equality duty, the public authorities are required to be proactive to eliminate discrimination and take steps to increase participation in public life. The Australian *Disability Discrimination Act* (*'DDA'*) consists of several positive measures that complement anti-discrimination provisions. Thus, by virtue of *DDA 1992* (Cth) s 31, the Attorney-General can formulate a disability standard in a number of areas covered by the *DDA*, including education, employment, public transport, accommodation and access to public premises. Similarly, *DDA 1992* (Cth) s 64 states that action plans are to be developed voluntarily by service providers in order to lay out the process to eliminate discriminatory practices in organisations. See Lee Ann Basser and Melinda Jones, 'The *Disability Discrimination Act 1992* (Cth): The Three Dimensional Approach to Operationalising Human Rights' in Peter Blanck (ed), *Disability Rights Essays* (Ashgate, 2005) 203, which argues how the *DDA* adopts a three-dimensional approach consistent with application of human rights and thereby empowers persons with disabilities.
[63] The *DDA* is administered by the Human Rights and Equal Opportunities Commission ('HEROC') and, together with the Attorney-General, HEROC plays a continuing role over and beyond the normal administration of an anti-discrimination law. The *DDA* envisaged that other than fulfilling its role as conciliator, HEROC would take the lead in developing standards designed to redress systemic discrimination and would issue guidelines to clarify the terms of the *DDA* such that the complaints process could be avoided.
[64] *Disability Discrimination Act 1992* (Cth) s 64.

complaint driven reactive mode, this process allows service providers to create an understanding of the impact of discriminatory practices and take steps to address inequality. Voluntary industry codes of conduct have developed to eliminate discriminatory practices at an industry level, though the *DDA* does not provide for the same. The code of conduct allows the community to recognise the problems of inclusion, and allows ordinary citizens to work creatively to prevent exclusion. This relatively new approach and its effectiveness needs to be tested; it tends to advance the goals of substantive equality envisaged by the *CRPD*.

The aforesaid discussion should not be construed as under-estimating the power of the state to address discriminatory practices towards persons with disabilities. On the contrary, it is conceded that the state necessarily is in a position to respond to social demands for regulation, whether or not there is a social consensus. The discussion underscores that, since minority rights in a democratic society do not always rest on the majority consensus, the international legal norms should be the yardstick by which such rights ought to be legislated or enforced. Thus, the state definition of rights becomes a point of reference for the private sector. This article is not in any ways in disagreement with having a strong rights-based anti-discrimination legislation or does not express distrust in its capabilities; however, it is crucial to be introspective and question whether traditional anti-discrimination laws hold adequate responses to meet obligations under the *CPRD*.[65] It is important to re-emphasise that corporations are not required to merely abstain from violating rights of persons with disabilities to an accessible virtual world. Rather, the aim is to obtain corporate responsiveness towards compliance of accessibility mandates under the *CRPD*.[66] Even where the *CRPD* ambitiously sets the goals of attaining substantive equality and establishing a rights-based regime, the shadows of attitudinal bias and social welfare constructs of disability are still looming large. This article seeks to caution that, given the complexity of the current issue and unique set of challenges it offers, traditional command control tools of regulation alone may not be useful to ensure the desired outcome.

V REFLEXIVE LAW APPROACH

Responsive regulation freed up the regulators from the dichotomous choice between co-operative self-regulation and deterrence based command-control laws.[67] Yet it ended up stacking available options in a hierarchical order applicable in a vertically stratified society where values cherished by one become the command of the other. However, it needs to be acknowledged that late-modern or post-modern society has become complex and it no longer consists of a single system. Thus, traditional stratification of the rulers and the ruled has been replaced with the present social order, separated into distinct subsystems based on functions such as science, religion, family life, education, politics, and law. Each of these subsystems has

[65] For a comprehensive discussion, see Harpur, above n 50, which argues that the *CRPD* and human rights paradigm requires the state to look beyond traditional anti-discrimination laws.

[66] Here, I draw distinction between what is known as corporate responsiveness, corporate responsibility and corporate accountability. Corporate responsiveness refers to the capacity of a corporation to respond to social pressures. John Boatright distinguishes social responsibility from social responsiveness with an analogy: '[A] responsible motorist is one who stops to offer whatever aid is available to another motorist in distress; but a responsive motorist is one who carries a flashlight, tools, battery cables, and so on and is prepared to offer effective aid': John R Boatright, *Ethics and the Conduct of Business* (Pearson, 1993) 390 quoted in David Hess, 'Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness' (1999) 25 *Iowa Journal of Corporate Law* 41, 54. Corporate accountability, on the other hand, entails a more direct legal obligation for behaviour. If I translate it to the analogy used by Boatright, an accountable motorist is one whose omission or commission resulted into distress to another motorist and is, therefore, mandated to offer aid to prevent further damage.

[67] See generally Sharon Oded, *Corporate Compliance* (Edward Elgar Publishing, 2013).

their own world view and discourse. Consequently, there prevails 'value pluralism' where each subsystem appears to pull in its own direction, resulting in what Teubner dubs as 'Crisis of Interventionist State'.[68]

According to Teubner, such crisis results from substantive law's inability to meet the demands placed on it by an increasingly 'differentiated' society with autopoietic systems,[69] functionally closed. Such self-referentially closed systems only interact internally with their own elements. It is crucial to compensate for this radical mutual inaccessibility by constructing internal models of the outside world with which subsystems are able to interact internally. Thus, the purpose of a reflexive law is 'to foster internal reflection to force the organization to internalise outside conflicts in its own decision structure, to become socially sensitive to the externalities caused by its own behaviours and so "to develop effective internal control structures"'.[70]

When we transplant this observation in the present study, we can identify clusters of systems — disability constituency, information society, and corporations each having their own set of norms and values. This makes it difficult for one system to influence the other in the way that system intends.[71] Subsystems interpret the commands of the legal system according to their own logic. Consequently, they may end up responding and interpreting through the lens of their own discourse thereby distorting the message. This can lead centralised directives to misfire.[72]

Based on the premise that although states and their agents remain the primary norm-generators, they are not the exclusive ones; the reflexive law approach creates space for corporations as major contributors to the content and shape of regulation.[73] Thus, the 'reflexive' approach encourages corporations to reflect on how their behaviours impact wider society. Reflexive laws do not mandate specific technologies like traditional regulation. Nor do they require specific results like outcome-based rules. Instead, they use tools, such as information disclosure, stakeholder involvement, and planning requirements, to motivate companies to undertake their own, self-directed improvement efforts, while leaving it up to the companies to determine procedures through which ultimate outcomes shall be attained.[74]

Reflexive law, thus recognises the limited ability of the law in a complex society to direct social change in an effective manner.[75] Instead of trying to suppress the complexity and diversity in society through extensive regulation, reflexive law aims to guide behaviour and promote self-regulation. Thus, the reflexive law approach, when applied to corporations to attain goals of accessible virtual world for persons with disabilities, proceeds on a two-fold agenda: one, to make corporations to reflect upon their conduct so as to internalise accessibility as an

[68] Teubner, above n 40.
[69] The term 'autopoiesis' is used by Niklas Luhmann to describe social subsystems that operate by their own logic relatively autonomously of one another. Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, 1993) 30.
[70] Jean L Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton University Press, 2002) 155. Cohen proposes the regulation of sexual privacy be accomplished through reflexive law.
[71] David J Schneider, 'Radical or Rational? Reflexive Law as Res Novo in the Canadian Environmental Regulatory Regime' in Michael MacNeil, Neil Sargent and Peter Swan (eds), *Law, Regulation, and Governance* (Oxford University Press, 2002) 97, 99, 105.
[72] Dennis D Hirsch, 'Green Business and the Importance of Reflexive Law: What Michael Porter Didn't Say' (2010) 62(4) *Administrative Law Review* 1063, 1109; Cohen, above n 70, 153-4; Orts, above n 58, 1265.
[73] Guy Mundlak and Issi Rosen-Zvi, 'Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment' (2011) 12 *Theoretical Inquiries in Law* 603.
[74] Hirsch, above n 72, 1063.
[75] Orts, above n 60.

organisational norm; and two, to encourage corporations to have a self-regulatory mechanism so as to respect their autonomy.

VI REFLEXIVE LAW STRATEGIES

A *Information Based Strategy: Human Rights Due Diligence*

Given the growing pressure on corporations to respect human rights and abstain from violating them,[76] it is crucial for corporations to undertake some self-reflection. The reflexive law technique in the form of human rights due diligence does not command any particular outcome. Rather, it guides corporations in thinking critically, creatively and continually about their influence on human rights issues and whether they are a part of the problem or the solution, and in the case of the former how could they mitigate their impact. It is a process whereby companies not only ensure compliance with national laws, but also manage the risk of human rights harm with a view to avoiding it.[77] Such a technique is applicable to both supply companies and consumer companies.[78]

Such due diligence may further inform the code of conduct for corporations or alternatively suggests measures to mitigate discriminatory practices. When studied in the context of virtual accessibility rights, companies may undertake access audits of their products, services and websites. This kind of accessibility audit is akin to the architectural audit of physical barriers. This allows companies to see where they stand with respect to accessibility of their digital information. This can then be translated into practice while putting warranties and indemnities into purchasing contracts which ensures that companies do not buy new problems. Collection and dissemination of positive information about accessibility will encourage others to improve and follow the best practice.

B *Procedure-Based Strategy: Code of Conduct*

Codes of conduct can be broadly defined as 'commitments voluntarily made by companies, associations or other entities, which put forth standards and principles for the conduct of business activities in the marketplace'.[79] These are peculiarly voluntary in nature and have no legal binding. Although codes may take several forms, these are broadly classified into two prominent variants: a) 'public' codes established by the state through agreements under

[76] Ongoing debates discussing social responsibilities of private entities under international law culminated in the appointment of Professor John Ruggie as United Nations Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises. Ruggie's three-fold framework of a state's duty to protect human rights, a corporate responsibility to respect human rights and access to remedies was unanimously accepted by member states of the Human Rights Council in June 2008. The framework was welcomed in a joint statement by human rights non-government organisations as well as by the International Organization of Employers, International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD ('BIAC'). See Human Rights Council, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, P 1, UN Doc A/HRC/8/5 (Apr 7, 2008) (by John Ruggie) <http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/29Apr08_7_Report_of_SRSG_to_HRC.pdf> and reactions to it <http://www.businesshumanrights.org/Documents/RuggieHRC2008>.

[77] Ibid.

[78] See the categorisation above in Part II.

[79] Working Party on the Trade Committee, 'Codes of Corporate Conduct: An Inventory' (Report, TD/TC/WP (98)74/ Final, Organisation for Economic Cooperation and Development, 1999).

international law or through the norms of international organisations for corporations; [80] and b) 'private' codes that are company specific or industry specific where corporations commit themselves, effectively in public relations terms, to standards in the above-mentioned issue areas and promise their implementation.[81]

These are further sub-classified as : i) individual company codes, adopted on the firm's own initiative; typically developed without any outside participation, they either relate to the company's own operations or are applied specifically to their suppliers; ii) codes issued by industry and trade associations reflect a negotiated consensus among member firms in a particular industry and bear the advantage of being competitively neutral, as all the enterprises that are otherwise competitors are subject to the same standards of conduct; iii) multi-stakeholder codes are framed upon consultation among interested parties in a particular industry, such as trade unions and non-government organisations as well as corporations and their industry associations, which have the advantage of wider public credibility; iv) model codes designed to provide a benchmark of what a particular organisation regards as good practice in terms of codes of conduct.[82] They are not generally applied in practice, but intended as a model which companies or trade associations could follow.[83]

Codes of conduct have a distinct advantage as a strategy for achieving the corporate observance of human rights standards, in general, and accessibility, in particular. First, the codes provide greater flexibility in norm setting; they can be updated time and again based on experience. Second, by adopting a code of conduct, corporations make huge reputational investment which can prove to be highly detrimental if wide gaps are found between commitments made and actual practice. Third, codes effectively create a web of transnational obligation which proves helpful in areas of limited statehood. This particularly holds true both for supply companies and consumer companies. For instance, such codes can make a real impact if consumer companies adopt a private code of conduct to create accessible products or provide accessible

[80] Such inter-governmental codes are negotiated at international level and agreed to by national governments. For instance, the Organisation for Economic Cooperation and Development ('OECD') Guidelines for Multinational Enterprises emanated as recommendations addressed by industrialised states to multinational enterprises. The guidelines are statement of the standards expected by home governments of their corporations operating abroad. The guidelines are voluntary and are not legally enforceable. The guidelines have been revised in order to keep them in alignment with international developments. For the initial draft, see OECD, 'OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context' (OECD Ministerial Meeting, 25 May 2011). The International Labour Organization ('ILO') adopted a *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* in 1977 (*'ILO Declaration'*). The *ILO Declaration* offers a set of core principles and guidelines for corporations with respect to employment, training, working conditions and industrial relations. The instrument is voluntary in nature. See International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* adopted by the Governing Body of the International Labour Office 204th sess (Geneva, November 1977) as amended 279th sess (November 2000) and 295th sess (March 2006).

[81] The first significant appearance of voluntary codes dealing with human rights was in the late 1980s among US-based clothing manufacturers and retailers. Levi Strauss, with its Business Partner Terms of Engagement adopted in 1992, was one of the first companies to establish this type of code, and it was followed by a number of other clothing manufacturers and retailers. Jean-Paul Sajhau, 'Business Ethics in the Textile, Clothing and Footware (TFC) Industries' (Working Paper SAP 2.60/WP 1.10, Sectoral Activities Programme, International Labour Office 2000) <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1008&context=codes>.

[82] Helen Keller, 'Corporate Code of Conduct and their Implementation: The Question of Legitimacy' in Rudiger Wolfrum and Volker Roben (eds) *Legitimacy in International Law* (Springer, 2008) 238.

[83] For instance, the International Confederation of Free Trade Union in its 111th Meeting adopted a text for a 'Basic Code of Conduct covering Labour Practices' with an aim to establish a minimum list of standards that ought to be included in all codes of conduct covering labour practice.

services. Once committed publicly, consumer companies will endeavour research and development in creating accessible products, which also benefits other users.

C *Communication-Based Strategy: Social Reporting*

One of the prevailing approaches to encourage corporate accountability is mandating social reporting. It is believed to strike a balance between too soft codes of conduct, due diligence and corporate social responsibility, on the one hand, and too-tough regulations and sanctions, on the other.[84] Such mandatory social reporting is largely perceived as a means of assessing 'the ethical behaviour and social impact of an organisation in relation to its aims and those of its stakeholders. Stakeholders include all individuals and groups who are affected by, or can affect, the organization'.[85] Raymond Bauer and Dan Fenn categorise four approaches to social reporting. First, a report can show that the company is not doing any social harm, such as the company is not currently under indictment by any government agency. Second, a social report may simply show the 'subjective impressions of knowledgeable and concerned people who have collected some data and talked with many observers'. Third, the report could thoroughly review a corporation's action in specific areas of activity. Fourth, a report may attempt to 'develop sophisticated quantitative measures of social responsibility'.[86] It contributes to a process where values become integrated into the organisation and encompasses more than just a snapshot at a particular time; its design, development and interpretation contribute to an ongoing 'dialogue culture' where values become vital to the organisations self-reference.[87]

The scope and concept of mandatory social reporting can possibly be further expanded to attain transparency in corporate behaviour. The rationale behind reporting's efficacy is that information on a company's social behaviour creates a link between public obligation and private choice.[88] Information 'can force choices (for individual action) even when the moral foundation of those choices remains contested (in the community).'[89] Social reporting may not require any changes in how directors or managers exercise their fiduciary responsibilities, but it creates pressure on directors about how they balance the competing demands of various constituencies. The production and dissemination of such information would produce greater corporate social transparency, actuating the goal of enhanced corporate social accountability without directly undermining the traditional corporate law goal of shareholder accountability. That social accountability may, in turn, help to produce structural pressures to instil humanistic concerns into otherwise brutal global competition.[90]

VII CONCLUSION

The proponents of the reflexive law approach claim that it is an answer to the evolving structure and systems in society — that reflexive law can be used to regulate corporations 'that otherwise

[84] See Hess, above n 66.
[85] Simon Zadek and Richard Evans, *Auditing the Market: A Practical Approach to Social Accounting* (New Economics Foundation, 1993) 7.
[86] Raymond Bauer and Dan H Fenn Jr, *The Corporate Social Audit* (Russell Sage Foundation, New York ed, 1972) 16–17.
[87] Simon Zadek, Richard Evans and Peter Pruzan, *Building Corporate AccountAbility: Emerging Practices in Social and Ethical Accounting, Auditing and Reporting* (Taylor & Francis, 1997) 66.
[88] Larry Cata Backer, 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations' (2008) 39 *Georgetown Journal of International Law* 591.
[89] Ibid.
[90] Williams, above n 48.

would be impossible to regulate'.[91] Whilst reflexive law strategies discussed here hint towards a new development, it needs to be acknowledged that the same strategies also have certain inherent limitations. Sceptics charge mechanisms such as those discussed here are mere public relations exercise on the part of corporations keen to deflect criticism of their activities.[92] Consequently, code, due diligence and social reporting are seen as providing vague and ambiguous standards that shield corporations from government regulation. Since the code of conduct involves a statement of principles concerning business behaviour, it is often witnessed that many corporations fail to practice what they tend to preach. Hence, compliance with the code and its actual effectiveness depends upon its implementation. There are internal systems of monitoring that entrusts monitoring to the company itself. Such mechanisms are criticised for allowing fox to guard the hen-house.[93]

Similarly, the success of social reporting as a communication-based strategy depends upon what content companies prefer to communicate with stakeholders. More often it is suggested that the implementation ought to be assessed by an independent monitor. This enhances the credibility of a monitoring exercise on account of direct involvement of third parties, workers or local organisations. Unfortunately, accessibility audits are not given due importance in corporations, and may be looked upon as inviting trouble. It needs to be understood that acknowledging accessibility barriers will not mean causing an additional burden, rather it helps to raise company credibility in the sense that the company recognises the problem and seeks assistance to fix it.

Given these limitations, one also needs to appreciate that various strategies are demonstrative of how reflexive law mechanisms influence the process of decision making at the right points of corporate structure. When human rights due diligence requires corporations to undertake a self-inspection or develop a code of conduct to publicly ratify societal expectations and organisational norms and commitments, it tends to place strong emphasis on self-regulation by corporations. Additionally, social reporting is seen by the community as a platform where corporations and stakeholders could exchange notes and engage with each other in a positive manner to understand expectations and challenges involved in the process.[94] Systems theory predicts that a part of the problem is the lack of communication between the systems, and thus part of the solution involves in opening up discourse, norms, values and language with other systems so that it can be heard and incorporated. Communication-based initiatives, such as social reporting, when combined with information-based strategies facilitates two differentiated systems to persuade each other to align norms and behaviours.

Whilst the problem of ensuring creation of an accessible virtual world for persons with disabilities is complex, the solutions required also need to be innovative. The challenge lies in appreciating emerging disability rights jurisprudence and harmonising it with the evolving corporate responsiveness towards human rights norms as well as shaping the virtual world governance. It is crucial that policy makers, legislators, academia and society shift focus from

[91] Alberto Febbrajo, 'The Autopoietic Approach and its Form' in Gunther Teubner and Alberto Febbrajo (eds), *State, Law and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Milan, 1992) 19, 30.

[92] Rhys Jenkins, 'Corporate Code of Conduct: Self-Regulation in a Global Economy' (Technology, Business and Society Programme Paper Number 2 April 2001, United Nations Research Institute for Social Development).

[93] Sean D Murphy, 'Taking Multinational Code of Conduct to the Next Level' (2005) 43(2) *Columbia Journal of Transnational Law* 389.

[94] Keller, above n 82.

over reliance on purely regulatory modes and formalisation of rules towards a wholesome involvement of stakeholders through encouraging dialogues and self-regulation.

Reflexive law remains highly aspirational in its approach. It serve as a 'normative point of reference'[95] to be taken into account in the process of generating, recognising and connecting operations as decisions to prior decisions.[96] Reflexive law primarily adopts a process-oriented rather than outcome-oriented approach, creating norms through reflexive processes, which are valuable provided they achieve a desirable outcome. According prominence to deliberative democratic processes and thereby galvanising proactive involvement of corporations to address accessibility issues requires a well-thought out strategy. Whilst one does not negate the potential of legislation, the reflexive law approach is also a viable option to seek the Midas touch of corporations to create an accessible virtual world for persons with disabilities.

[95] Jan Achterbergh and Dirk Vriens, *Second 'Arche' Organizations: Social Systems Conducting Experiments* (Heidelberg, 2010) 148.
[96] Ibid 157.