



**IMPLEMENTATION OF THE
MARRAKESH TREATY, 2014 IN
INDIA AND AUSTRALIA- A
COMPARATIVE STUDY**

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INTRODUCTION

Copyright offers an effective incentive for the creator of copyrighted works thereby promoting creation of knowledge and dissemination of knowledge, thereby creating a sound viable knowledge-based economy as well as society across the borders. However, the same has created a huge gap between the haves and have nots across the world. Here, we are referring the term haves and have not's not in terms of economy but in terms of accessibility and affordability of copyrighted works to the person who are visually impaired, blind and other disability. It should be remembered that the copyrighted products are market driven. The international community did not worry about the digitally accessible deficit existing between the person who are print disabled and print non-disabled. The TRIPS agreement of WTO has provided three-step test as a measure of uniform protection for all IP products throughout the global. The international community has taken tireless efforts to strike a balance to achieve the objectives of UNCRPD and that of the TRIPS agreement of the WTO.

Finally, they found the way to break the deadlock and to work out a pragmatic solution to fulfill the aspirations of millions of visually impaired in the form of MARRAKESH Treaty 2014, and the same as come into operation on 30thSeptember 2016

without violating the TRIPS agreement of WTO. This treaty is hailed by the international community as the best treaty strengthening the aspects of IP as well as human rights. In this context, the researcher would like to analyze the methods/ modality and mechanism pertaining to the implementation of the MARRAKESH Treaty in India and Australia. It should be remembered that both the countries are having quite similarities and dissimilarities. For example, both of them happened to be members of TRIPS agreement of WTO and WIPO and CRPD. In addition to this, they are following the common law systems. On the other hand, India is a developing country whereas Australia is a developed country. In this context, the topic assumes more importance. For the convenience of the reader, the paper has been divided into following parts

- a. International law related to copyright including VIP treaty
- b. International law relating to disability rights
- c. National regime on copyrights as well as disability rights

It compares the relationship between Australian and Indian law. Conclusions and suggestions which focus on the lessons that can be learned by both the countries based on the mutual supportive cooperation and implementation of the MARRAKESH treaty.

INTERNATIONAL LAW RELATING TO PERSONS WITH DISABILITIES:

The UN has adopted several international instruments for the purpose of protecting human rights in general, which includes the protection of the rights of the PWDs. However, it has rightly recognized that the



afore stated instruments have not provided the adequate and appropriate protection and necessary safeguards for the protection of the rights and interests of PWDs.¹Therefore, the UN has rightly framed and adopted a specific and comprehensive instrument known as CRPD.²In addition to the Convention, it has also adopted the Protocol for the aforesaid purpose. A few years later, one of the specialized agencies of the UN namely, the WIPO has adopted a specific instrument for the purpose of protecting the rights and the interests of persons who are visually challenged and affected by other print disabilities. In this part, let us analyse that how far the aforesaid instruments have contributed to the promotion of accessibility of PWDs.

SALIENT FEATURES OF THE CRPD:

The CRPD consists of a Preamble and 50 Articles. It lays down the substantial and procedural aspects including the organizational setup.

OBJECTS OF THE CONVENTION:

The Convention does not contain an object clause. However, the objects of the Convention can be inferred from the language used in the Convention viz., it provides guarantee to all PWDs to the full enjoyment of all the human rights and the fundamental freedoms guaranteed in the various international instruments such as the UN Charter, UDHR, CRC, CEDAW and other international human rights instruments.³Secondly, the interrelationship of general human rights and that of the PWDs

has been recognized by the Convention.⁴Thirdly, it recognizes the importance of the special measures guaranteed by the various international instruments relating to the PWDs adopted by the UN.⁵Fourthly, the Convention recognizes the specific and different needs of the PWDs depending upon the nature of the disability. To put it differently, it recognizes the diversity among the PWDs as the part of the human diversity. Fifthly, it provides special and additional protection to the PWDs in need of intensive care and protection,⁶women and girls with disabilities, children with disabilities and others.⁷Sixthly, it recognizes the potentialities and the contribution made by the PWDs to the development of the community and the society, as part of the sustainable development.⁸Seventhly, the Convention recognizes the specific and active role to be played by various entities such as individuals, family, community, society and the state in the process of empowering the PWDs to take part in the decision making process. It also guarantees the access to the health, employment and education so that it will enable the PWDs to take part in all the walks of life such as the civil, political, economic, cultural spheres in the developing countries as well as developed countries.⁹The Convention aims to protect, promote and to ensure that all the human rights and fundamental freedoms are fully and effectively enjoyed by the PWDs.¹⁰

DEFINITIONS:

¹ Refer Para (e) of the Preamble of the CRPD.

² Refer Para (y) *ibid*.

³ Refer Para (a) to (d) *ibid*.

⁴ Refer Para (h) *ibid*.

⁵ Refer Para (e) to (k) *ibid*.

⁶ Refer Para (k) *ibid*.

⁷ Refer Para (p) to (r) *ibid*.

⁸ Refer Para (l) and (g) *ibid*.

⁹ Refer Para (s) to (y) *ibid*.

¹⁰ Refer Art 1 *ibid*.



The Convention defines the following terms such as, “persons with disability”,¹¹ “language”, “communication”, “discrimination”, “reasonable accommodation” and “universal design”.¹² India has adopted all these terms defined in the CRPD in the RPD Act, 2016.¹³

GENERAL PRINCIPLES:

The Convention prescribes certain fundamental principles to be followed by all the member countries in the process of empowering the PWDs.¹⁴ Firstly, it mandates the member countries to respect the inherent dignity of the PWDs and to ensure that they make their own choices with greater autonomy and independence.¹⁵ Secondly, it mandates the member countries to accept the PWDs as part of humanity and human diversity and to respect their difference.¹⁶ Thirdly, it mandates the states to ensure the full and effective participation of the PWDs and to create the inclusive society.¹⁷ Fourthly, the convention lays down the following principles such as accessibility,¹⁸ non-discrimination¹⁹ and equality of the opportunity for all the PWDs, including the women and children with disability.²⁰

GENERAL OBLIGATIONS:

The Convention also imposes certain general obligations upon the State, individuals, families, community, public institutions, authorities, and other sections of the society

for the purpose of implementing the Convention and to empower the PWDs. Firstly, it mandates the member countries to bring the necessary and appropriate legislations, regulations and administrative measures for the purpose of implementing the right embodied in the CRPD.²¹ Secondly, the states have been mandated to abolish the existing practices, customs, legislations, regulations, and others acts which constitute discrimination against the PWDs through appropriate actions.²² Thirdly, it mandates the member countries to take into account the human rights of the PWDs in the decision making process including the issues concerning them in the process of making programmes and policy decisions of the state.²³ Fourthly, the Convention mandates the public institutions/authorities, individuals and families to act in conformity of the provisions of the Convention. Fifthly, it mandates the states to provide the mobility aids and universally designed goods and services to the PWDs at the lesser cost. In addition to this, it also mandates the states to take appropriate measures for the purpose of carrying the research and development so as to improve the quality, availability, accessibility of the aforesaid goods and services which are useful to the PWDs through technology development and to train the personnel involved in the of empowering the PWDs.²⁴ Fifthly, it also mandates the member countries to implement the

¹¹ Refer Art 1 *ibid.*

¹² Refer Art 2 *ibid.*

¹³ Refer the 2012 Draft Bill relating to the Rights of the PWDs.

¹⁴ Refer Art 3 (a) to (h) of the CRPD.

¹⁵ Refer Art 3 (a) *ibid.*

¹⁶ Refer Art 3 (d) *ibid.*

¹⁷ Refer Art 3 (c) *ibid.*

¹⁸ Refer Art 3 (f) *ibid.*

¹⁹ Refer Art 3 (b) *ibid.*

²⁰ Refer Art 3 (e), (g) and (h) *ibid.*

²¹ Refer Art 4 (1) (a) *ibid.*

²² Refer Art 4 (1) (b) *ibid.*

²³ Refer Art 4(1) (c) *ibid.*

²⁴ Refer Art 4 (1) (d) to (h) *ibid.*



provisions of the Convention in all the territories of the federal states.²⁵

RIGHTS AND FREEDOMS GUARANTEED BY THE CONVENTION:

The Convention mandates the all the states to guarantee the following rights and freedoms to all the PWDs viz., the right to equality before the law,²⁶ the right to equal recognition before the law as persons,²⁷ the right to exercise /the legal capacity, right to life,²⁸ right to property, right to privacy, right against exploitation and torture, right to education, right to health and others.

The Right to Equality before the Law and Equal Recognition before the Law:

The Convention mandates the state parties to respect and to guarantee to all the PWDs the right to equality before the law and to ensure that the PWDs are entitled to get the “equal protection” and “equal benefit of the law”.²⁹ The states have been clearly and strongly mandated to take the appropriate and the necessary measures for the purpose of promoting the right to equality and eliminating the discrimination against the PWDs on all grounds.³⁰ The Convention makes it very clear that the special and the specific measures taken by the states parties for the purpose of achieving the *de facto* equality should not be treated as discrimination.³¹ The Convention mandates the member countries to incorporate the principle of reasonable accommodation for the purpose of achieving the right to equality

for PWDs.³² Apart from this; the Convention provides the right to equal recognition of the PWDs as persons before the law. The member countries have been mandated to take appropriate steps to ensure that the PWDs exercise their legal capacities effectively and provide the necessary safeguards for the aforementioned purpose.³³ The PWDs have been guaranteed the right to own and to inherit the property on an equal basis with others; to enjoy the access to the bank loans and other financial facilities.³⁴ The Convention clearly mandates the member countries not to deprive the aforesaid right arbitrarily against the PWDs.

Freedom of Expression, Opinion and Access to Information:

The freedom of expression has been guaranteed by the Constitution of India to all persons generally. Whereas, the CRPD guarantees this right to the PWDs in the specific manner which is accessible and usable by the PWDs in a disability friendly environment by appropriate technological measures to be adopted by the states parties, the mass media and the internet service providers.³⁵ The Convention mandates the state parties to provide information, which is intended to be provided to the general public on an equal basis to the PWDs in accessible formats in a timely manner and without additional costs.³⁶ It also mandates the member countries to recognize and use the Braille system, sign language and other forms of communication in the official interaction

²⁵ Refer Art 4 (5) *ibid*.

²⁶ Refer Art 5 to 8 of the CRPD.

²⁷ Refer Art 12 *ibid*.

²⁸ Refer Art 10 *ibid*.

²⁹ Refer Art 5 (1) *ibid*.

³⁰ Refer Art 5 (2) *ibid*.

³¹ Refer Art 5 (4) *ibid*.

³² Refer Art 5 (3) *ibid*.

³³ Refer Art 12 (1) to (4) *ibid*.

³⁴ Refer Art 12 (5) *ibid*.

³⁵ Refer Art 21 (1) (a) to (d) of the CRPD.

³⁶ Refer Art 21 (1) (a) *ibid*.



with the PWDs.³⁷ It is highly appreciable that this mandate of the Convention has been carried out by the Government of India by incorporating a specific provision in the Right To Information Act (RTI) Act in the process of providing the information in the accessible format. However, the Act does not mandate the competent authorities to receive the application for the information from the PWDs in an accessible format. For example, there is no provision mandating the authorities to receive the application for the information in the Braille format from the visually challenged persons. The ministry of Information and Broadcasting, IT and Telecommunication has to play a leading role in the process of enforcing this mandate of the Convention. The Government of India should bring suitable amendments in various legislations, including in the IT Act.

Right to Education:

The Convention prescribes the following goals to be achieved education system of the member countries they are: Firstly, the education system should promote a sense of dignity, self-worth and respect for human rights, fundamental freedom and human diversity.³⁸ Secondly, it should promote the fullest potential, talents, creativity and the personality of the PWDs.³⁹ Thirdly, it should promote the enablement of full participation of PWDs in the free society.⁴⁰ The Convention provides the right to have access to free, compulsory and quality primary as well as secondary education to all children with disabilities.⁴¹ It empowers the PWDs to

pursue all kinds of education such as professional, vocational and technical education.⁴² It mandates the states to provide reasonable accommodation for the PWDs in the all educational institutions.⁴³

POLITICAL AND CULTURAL RIGHTS:

The Convention empowers the PWDs to enjoy political and cultural rights such as the right to vote, the right to contest in elections, the right to form trade unions and NGOs for the purpose of protecting their rights.⁴⁴ It mandates the member countries to provide the reasonable accommodation for the purpose of enabling the PWDs to enjoy the cultural rights such as, the sports, leisure and recreation activities.⁴⁵ The Convention makes it very clear that the IPR should not become an unreasonable barrier to PWDs with respect to the cultural material.⁴⁶ The above said mandate of the Convention has been made by the international community as compatible with the provisions of the TRIPS Agreement of WTO⁴⁷ by adopting the specific treaty, known as the WIPO Copyright Treaty for the Blind.

MEASURES RELATING TO AFFIRMATIVE ACTION:

In addition to the rights guaranteed by the Convention, it also prescribes certain affirmative action to be taken by State Parties for the purpose of empowerment of the PWDs. It is important to understand that the rights can be enforced against the state authorities and its entities.⁴⁸ However affirmative actions are applicable to non-state

³⁷ Refer Art 21 (1) (b) *ibid.*

³⁸ Refer Art 24 (1) (a) of the CRPD.

³⁹ Refer Art 24 (1) (b) *ibid.*

⁴⁰ Refer Art 24 (1) (c) *ibid.*

⁴¹ Refer Art 24 (2) (a) to (d) *ibid.*

⁴² Refer Art 24 (5) *ibid.*

⁴³ Refer Art 24 (3) and (4) *ibid.*

⁴⁴ Refer Art 29 *ibid.*

⁴⁵ Refer Art 30(5) *ibid.*

⁴⁶ Refer Art 30(3) *ibid.*

⁴⁷ Refer Art 13 of the TRIPS Agreement.

⁴⁸ Refer Art 12 of the Constitution of India.



entities including the private sector.⁴⁹The Convention provides the following affirmative action for the purpose of the empowerment PWDs viz., the measures relating to raising of awareness which includes the development of an attitude of respect for the rights of the PWDs in the minds of children in schools through the educational system, portraying the capabilities and the contribution of the PWDs in media⁵⁰and prohibiting stereotypes, prejudice and harmful practices against the PWDs in all walks of life.⁵¹The Convention mandates the member countries to identify and eliminate barriers to access by PWDs of public services and facilities on an equal basis with others. It clearly mandates the states to develop, promulgate, implement and monitor the accessible standards to be complied by the private sector i.e., providing public facilities and services such as transportation, roads, Information and Communication Technology, etc.,⁵²

INTERNATIONAL LAW RELATING TO COPYRIGHT OF PERSONS WITH DISABILITIES

There are many international instruments which protect and promote copyrights and copyrighted works in different fields in different modes (digital & non digital) in different points of time.⁵³ However, it did not address the concerns of disabilities in general visually impaired in particular. This has been effectively addressed by the WIPO through adoption of the MARRAKESH treaty 2014.

THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS TO THE PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINTS DISABLED:

The Marrakesh Treaty has been adopted by the WIPO⁵⁴for the purpose of facilitating access to published copyrighted works in the normal as well as in digital mode by the persons who are visually challenged and print disabled. This treaty is also known as WIPO Treaty for the Visually Challenged. The adoption of the aforesaid treaty by the WIPO marks a milestone in the history of implementation of the CRPD in the process of empowering the PWDs in general and the visually challenged persons in particular. India is one of the first few countries which has signed and ratified the treaty. It is highly pertinent to note that the Government of India has implemented the provisions of the treaty prior to its commencement in the year 2012 by incorporating the necessary amendments in the Indian Copyright Act, 1957. In this context, it is highly desirable to study the contribution made by the treaty and its impact in India in the process of carrying out the affirmative action to be taken by the international community including India for the purpose of promoting the rights relating to the freedom of expression and right to education, the opportunity to conduct research, the enjoyment of the cultural rights and sharing of the benefits arising out of the scientific developments by the visually challenged persons as mandated by the

⁴⁹ Refer Art 27(1) (h) of the CRPD.

⁵⁰ Refer Art 8(2) (a) to (c) *ibid*.

⁵¹ Refer Art 8(1) (b) *ibid*.

⁵² Refer Art 9(2) (a) to (h) *ibid*.

⁵³ Refer from Berne Convention, 1972 to TRIPS agreement, 1994 and the world internet treaties.

⁵⁴ The treaty has been adopted by WIPO in Marrakesh on the 31st of July 2013 (Available at: www.wipo.org).



CRPD⁵⁵ and the WIPO Treaty⁵⁶.

OBJECTS OF THE TREATY:

The treaty aims to achieve the following objectives. They are; the promotion of affirmative action for the purpose of ensuring the rights relating freedom of expression, the right to education and the opportunity to conduct research by visually challenged persons by facilitating timely and effective access to published works in accessible formats to the visually challenged persons.⁵⁷ It also recognizes the role of the authors and the right holders in the process of ensuring and making available their copyrighted works in accessible formats.⁵⁸ Further it provides a balancing mechanism between the rights of the authors and larger interest of the visually challenged persons by timely and effective access to copyrighted works in the accessible formats.⁵⁹ The treaty further provides a mechanism for the purpose of harmonizing the international law relating to copyrights and the law relating to the rights of the PWDs and the visually challenged person. It also promotes the cross-border exchange of the copies in the accessible formats to authorized entities and the beneficiaries.⁶⁰

DEFINITIONS:

The treaty provides the definitions to the following terms. They are “works”, “authorized entities”, “accessible format” and “beneficiary” and others. The treaty does

not define the term work specifically. On the other hand, it has adopted the term “literary and artistic works” as embodied in the Berne Convention.⁶¹ It defines the term accessible format in a manner so as to enable the visually challenged persons to read the published works feasibly and comfortably. The definition accommodates the special needs of the visually challenged persons as well as the rights of the authors.⁶² The treaty provides an inclusive definition for the term beneficiaries including the persons who are blind, visually impaired and print disabled.⁶³

MEASURES RELATING TO THE FACILITATION OF ACCESS TO VISUALLY CHALLENGED PERSONS:

The treaty has taken the following measures for the purpose of facilitating the access to the published works by the visually challenged persons. Firstly, it mandates the member countries to incorporate the necessary provisions relating to limitations and the exception in national copyright law for the purpose of facilitating the access to the published works by the visually challenged persons in the accessible formats.⁶⁴ Secondly, it permits the member countries to adopt the same measure for the purpose of enabling the visually challenged persons to have access to public performances.⁶⁵ Thirdly, it empowers the member countries to issue a compulsory license for the abovementioned purpose with or without remuneration to the right holder of the copyrighted works.⁶⁶ Fourthly, it allows

⁵⁵ Refer Arts 30 to 33 and 38 of the CRPD.

⁵⁶ Refer the Preamble of the Marrakesh Treaty (hereinafter the WIPO Treaty for the Visually Challenged).

⁵⁷ Refer the Preamble of the WIPO Treaty for the Visually Challenged.

⁵⁸ *ibid.*

⁵⁹ *ibid.*

⁶⁰ Refer the Preamble and Art 5 and 9 *ibid.*

⁶¹ Refer Art 2 (1) of the Berne Convention 1971 and Art 9 (1) of the TRIPS Agreement OF WTO.

⁶² Refer Art 2 (b) of the WIPO Treaty for the Visually Challenged.

⁶³ Refer the Preamble and Art 3 *ibid.*

⁶⁴ Refer Art 4 (1) (a) *ibid.*

⁶⁵ Refer Art 4 (1) (b) *ibid.*

⁶⁶ Refer Art 4 (5) *ibid.*



the member countries to freely import the accessible format copies for the purpose of facilitating access to visually challenged persons.⁶⁷ Fifthly, it mandates parties to the treaty to ensure that the legal protection against the circumvention of effective technological measures do not prevent access by the visually challenged persons to the published works in the digital environment including in the internet.⁶⁸ Sixthly, it promotes the cross-border exchange of the accessible format copies between the member countries⁶⁹ and mandates the International Bureau to setup an information centre for facilitating international cooperation to achieve the objectives of the treaty.⁷⁰ In addition to this, the treaty mandates the member countries to respect the privacy of the beneficiaries in their access to the copyrighted works⁷¹ and respect the three-step test as embodied in the Berne Convention, the WTO and TRIPS Agreement of the WTO.⁷² It also provides flexibilities to the LDCs in the process of carrying out the provisions of the treaty.⁷³

CONCLUSION

No doubt both the countries have taken necessary and effective steps for the purpose of implementing CRPD and the MARREKESH treaty for the purpose of promoting accessibility of copyrighted goods and services to PWDs. However, the modality of implementation varies. For example, the government of Australia has carried a thorough study before

implementing the treaty and mandated the necessary stakeholders to implement the treaty wholeheartedly.⁷⁴ India didn't carry such a thorough study. Though India had taken early steps, it didn't take effective steps comparing with Australia. For e.g. the copyright rules amendment pertaining to accessibility is itself not available in accessible format. India has to take lot of measures to comply/fulfil the obligations arising out of the MARRAKESH treaty. It should fully utilise the international cooperative mechanism and the ABC made available by WIPO. They can also enter into a MOU with to promote cross border exchange of accessible materials. India should take effective steps to make available accessible materials to school kids. In this regard the state governments should play a crucial role. The govt of India should establish a necessary mechanism for the purpose of coordinating various entities and institutions, monitoring the implementation, regulating the accessible standards to be complied by various stakeholders including private publishers and finally there shall be an effective mechanism for a periodical review to be undertaken for the purpose of ensuring the efficacy of accessible measures to be complied by various entities for the purpose of promoting copyrighted goods and services for PWDs.

⁶⁷ Refer Art 6*ibid.*

⁶⁸ Refer Art 7*ibid.*

⁶⁹ Refer Art 5 and 9 *ibid.*

⁷⁰ Refer Art 9*ibid.*

⁷¹ Refer Art 8*ibid.*

⁷² Refer Art 10 and 11 of the WIPO Treaty for the visually challenged.

⁷³ Refer Art 12*ibid.*

⁷⁴ Refer the study made by the AG of government of Australia & Australia Law commission report related to copyright reforms.