

A CRITICAL ANALYSIS OF THE RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016

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Abstract

In ancient time, in Greece, if a child was born with disability, the child used to be brutally cast away. It was unthinkable; that the child may have meaningful contribution to the society in future. At present, in all modern Civilizations, disability of a child is treated with empathy. There are Constitutional and legal protection for them in all the modern Countries, especially in the West. All types of disable person are now termed as alternatively able and with the empathy of the family, Society, State, these alternatively able people, positively contribute to the growth of the Society and State. These alternatively able people deserve to enjoy all kind of Human Rights and above all an emotional support from the near and dear ones. This paper will test the efficacy of “The Rights of Persons with Disabilities Act” in the present social, legal and Constitutional context.

Key Words: - Constitution and Law, Alternatively able, The Rights of Persons with Disabilities Act, Empathy.

I. Introduction: - India was a party to the **International Convention of Rights of Persons with Disabilities** concluded on the 13th day of December, 2006; and the Convention was implemented through **Article 253 of the Indian Constitution**. The main principles¹ of the Convention was fully aligned with the values of the Indian Constitution. Indian Constitution in its Preamble mentions “**Social, Economic and Political Justice**”. **Alternatively able person** must have **Social, Economic and Political empowerment** to provide meaningful contribution for the Society, State and Nation. **Article 14-18 of the Indian Constitution** provides various facets of “**Equality**”.

II. Constitutional Bedrock:-Article 14 of the Indian Constitution provides a negative and positive concept of “Equality”, that is prohibition of inequality (Equality before law) and positive discrimination, that is to lessen the inequality. (Equal protection of law(s).)

Article 15(1)² is fully aligned with the first phrase of the **Article 14** of the Indian Constitution that is “**Equality before law**”. Article 15(3) of the Indian Constitution provides for special provision for Women and Children. Article 15(4) of the Indian Constitution provides for positive discrimination for **socially and educationally backward persons and Scheduled Caste and Scheduled Tribe**. **Article 15(5)** of the Indian Constitution provides reservation for the SC/ST population in private institutions also. This is also an example of “**Positive discrimination**”.

Article 16(1) of the Indian Constitution provides for “**Equal Opportunity**” in State jobs and **16(4)** provides reservation for backward people who are not adequately represented in the State jobs. These backward people also get seniority compared to others. All of these provisions are examples of “**Positive discrimination**” though no where **disable or positively discriminated people** are expressly mentioned in the Indian Constitution.

In the case law of **Indra Sawhney vs Union of India**³, Sawant J, in paragraph 398 states that “if however clause (4) is treated as an exception to clause (1) and clause (4) deemed to exhaust all the exceptions that can be made in clause (1). It would then not to be open to make provisions for reservations in services in favour of say, physically handicapped, army personnel, freedom fighters and their dependants, project affected persons, etc.” (**Article 16(1) and (4)**).

Thus alternatively able persons were impliedly protected under the provisions of the Indian Constitution.⁴

¹ (a) respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;

(b) non-discrimination;

(c) full and effective participation and inclusion in society;

(d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(e) equality of opportunity;

(f) accessibility;

(g) equality between men and women;

(h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities;

Judiciary or any other Authority while dispensing justice must observe the above mentioned principles.

² State shall not discriminate any person on the ground of race, caste, sex, place of birth or any of them.

³ AIR 1993 SC 477(480)

⁴ **Article 335. Claims of Scheduled Castes and Scheduled Tribes to services and posts:-**The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance

III. Legislative Analysis:- Section 2 (c) of the **Rights of Persons with Disabilities Act, 2016** provides, “**barrier**” means any factor **including communicational, cultural, economic, environmental institutional, political, social, attitudinal or structural factors** which **hampers the full and effective participation of persons with disabilities in society**;

Section 2 (d) provides that “**care-giver**” means any person including parents and other family Members who with or without payment provides **care, support or assistance to a person with disability**;

Section 2(f) “communication” includes means and formats of communication, languages, display of text, Braille, tactile communication, signs, large print, accessible multimedia ,written, audio, video, visual displays, sign language, plain-language, human-reader, augmentative and alternative modes and accessible information and communication technology;

Section 2(h) “discrimination” in relation to **disability, means any distinction, exclusion, restriction on the basis of disability which is the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis** with others of **all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field** and includes **all forms of discrimination and denial of reasonable accommodation**;

Section 3 of the said Act provides a true reflection of the **Article 21 of the Indian Constitution**.⁵

Section 4 of the said Act provides a reflection of the Article 15(3) of the Indian Constitution.⁶

Section 5 of the said Act reflects, the part-IV, **the Directive Principles of State Policy** under the **Indian Constitution**.⁷ The Community has a duty towards the alternatively able person in full realisation of his rights.

of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State: Thus it can be presumed that same principle will apply for the alternatively disable person.

⁵ **Section 3, Equality and non-discrimination:-.**

(1) The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.

(2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.

(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.

(4) No person shall be deprived of his or her personal liberty only on the ground of disability.

(5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities.

⁶ **Section 4. (1) The appropriate Government and the local authorities shall take measures** to ensure that the **women and children** with disabilities enjoy their rights equally with others.

(2) The appropriate Government and local authorities shall ensure that all children with disabilities shall have right on an equal basis to freely express their views on all matters affecting them and provide them appropriate support keeping in view their age and disability.”.

⁷ **Section 5 (1) The persons with disabilities shall have the right to live in the community.**

Section 6 and 7 of the said Act provides the executive part of the State, the Government, to protect these groups of marginalized people from inhuman treatments. One can say that legislature can always be approached for justice. **It is a rule of recognition**⁸. Yet, it is expressly mentioned in the section of the said Act. Thus it means, **State**⁹ is reminded of its duty as an abundant caution.

Section 8 provides **equal right** of protection to the alternatively able person during armed conflict, emergency etc. All the international Conventions like Geneva Convention will be applicable for them.

Section 9, 10, 11 of the said Act provides for rights of **Home and family, reproductive and voting rights** (Provided they understand the implication of Voting).

Section 13 of the said Act provides equal legal right for the alternatively able person like inheriting property, control their finance and access to bank loans etc. If needed they will be given required assistance.

Section 14 of the said Act provides, alternatively able person has right to enjoy guardianship, if they are not able to be biological parent.

The said Act seems to be silent about the right of “**Adoption**” for the **alternatively able person**.

Section 16, 17, 18 under the **Chapter-III of the Act** provides that **all educational institutions** recognized and funded by the appropriate government must educate and provide inclusive education to these marginalised groups of persons. **Local Authorities**¹⁰ must play such role.

Under Chapter-IV of the said Act, there are provisions for Skill Development and Employment Policies, for vocational training and self employment. It is provided by the “Appropriate government.”

Section 20(1) of the said Act is true reflection of the **Article 16(1) of the Indian Constitution**, where there will be no discrimination for the alternatively able persons. **Section 20(2)** of the said Act will provide barrier free environment, like lifts, special toilets etc.

Section 20(4) of the said Act provides that “**No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:**”

Thus disability covered under this Act is also acquired during the process of life.

⁸ **Rule of Recognition**, as per opinion of the H.L. A. Hart is the touchstone by which other rules are recognized.

⁹ Indian Judiciary as per the Constitutional and legal scheme(s) can provide remedies to these marginalized group of people. See **Section 12 of the Rights of Persons with Disabilities Act, 2016**

¹⁰ See Article 12 of the Indian Constitution.

Under section 23 of the said Act in every Government establishment, there will be Grievance Redressal Officials. The Act is silent whether such facility will be extended to the private establishment or not.

Under Chapter-V, section 24(1) of the said Act, The appropriate Government shall within the limit of its economic capacity and development formulate necessary schemes and programmes to safeguard and promote the right of persons with disabilities for adequate standard of living to enable them to live independently or in the community.

The Chapter –V, closely resembles the “Directive Principles” of the Indian Constitution. There is an implied bar to approach the Court, under the legal provision, because the appropriate government may argue of limit of economic capacity.

Under Chapter VI of the said Act, section 31 will provide, (1) “Notwithstanding anything contained in the Rights of Children to Free and Compulsory Education Act, 2009, every child with benchmark disability between the age of six to eighteen years shall have the right to free education in a neighborhood school, or in a special school, of his choice.”

Section 35 of the Act provides that appropriate government within their economic capacity, will provide incentive to the private sector to include 5 percent of the total work force as alternatively able person.

Under the Chapter-X of the Act, section 56, under the heading “Guidelines for assessment of specified disabilities.” provides “Notification” “guidelines for the purpose of assessing the extent of specified disability in a person.”

As per section 57(1) of the said Act, “The appropriate Government shall designate persons, having requisite qualifications and experience, as certifying authorities, who shall be competent to issue the certificate of disability”.

Section 58 of the said Act provides procedure for applying a disability certificate and if refused, being aggrieved can appeal to an Appellate Authority, as the State Government **may designate.**

The “may” word seems to be used as **directory in nature, as “**Right of Appeal**” is not a natural right and the State Government can always plead the unavailability of fund, as per the scheme of the said Act.**

Under Chapter XI of the said Act, through section 60, 66, and 72; the Central AND State Advisory Boards on Disability And District Level Committee are entitled to exercise their power under the Scheme of the Act.

Under Chapter-XII of the Act, through section 74 and 79, Chief Commissioner and State Commissioner for Persons with Disabilities established by the Central Government and State Government will exercise their **power and function under the Scheme of the Act.**

Under Chapter-XIII of the Act, the Special Court may be established by the State Government with consultation of the chief justice of High Court for speedy trial. (As impliedly enshrined under Article 21 of the Indian Constitution).

Under Chapter-XIV of the said Act, under section 86, there shall be a “National Fund for Persons with Disabilities.”

Under Chapter XV, through section 88, there shall be a “State Fund for Persons with Disabilities.”

Under Chapter XVI, there are provisions of offences as for example, Section 89, (Punishment for contravention of provisions of Act or rules or regulations made there under.) Section 90, (Offences by companies). Section 91, (Punishment for fraudulently availing any benefit meant for persons with benchmark disabilities.), Section 92 (Punishment for offences of atrocities.) etc.

***Mens Rea* seems to be an essential ingredient in the provisions under the Chapter XVI, of the said Act, to be established by the Public prosecutor of the State.**

Conclusion

If we critically examine the **Rights of Persons with Disabilities Act, 2016**, we comprehend that; the said Act reflects part-III and part-IV of the Indian Constitution, which itself is a compact Code. After *Minerva Mill’s* case,¹¹ it was laid down by the Apex Court of India that part-III and part-IV of the Indian Constitution will be interpreted harmoniously, like two wheel of a fast moving chariot. Taking cue from the interpretation of the Apex Court of India, we reach to a conclusion that the said Act, protects entrenched fundamental rights of the alternately able persons and enable them to play a role of constructive duty towards communities and vice-versa. The rights of these marginalised groups of people are more elaborate in the said Act than the fundamental rights mentioned in the Indian Constitution, which is obvious, as these alternately gifted people require more empathy, assistance from their fellow Human beings and the State.

¹¹ 1981 SCR (1) 206