



## A CRITICAL ANALYSIS OF THE RESERVATIONS FOR THE “FORGOTTEN CLASS - DIFFERENTLY ABLED” IN INDIA

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### **Abstract**

#### **Background of Reservation**

*The preamble of the Constitution of India describes attaining of social, economic and political justice, along with the liberty and equality of its citizens as the objectives. Though ‘Equality’ is declared to be the basic structure of our Constitution, but when it comes to the people who are differently abled, we can hardly see them being treated on par with the abled ones, be it in the government sector or in the private sector.*

*Article 15 & 16 of the Constitution clearly mention that no discrimination be done and the State can make any special provision for the advancement of any socially and educationally backward classes of citizens, which can be presumed to include women, children, senior citizens and differently abled persons.*

#### **The Problem of Reservation for Differently Abled**

*The Persons with Disabilities (Equality of Opportunities, Protection of Rights and Full Participation) Act, 1995 prescribes for reservation in government appointments, it should cover direct recruitment, promotion and even deputation. If a person is disabled, he is always disabled. So long as the disability continues, he should continue to get reservation benefits. The Act is a beneficial legislation and so, it should be interpreted in a broader way to confer benefits to the differently abled. The three percent reservation as given under the Act, is in reality only to the extent of one percent each for the blind or low visioned; hearing & speech impaired and persons suffering from locomotor disability or cerebral palsy.*

However, there are other disabled persons, like- leprosy cured, acid attack survivors etc. who have not been included in the list of the differently abled entitled for reservations in services. The reservations to the differently abled have been categorized to be horizontal as against the vertical reservations for SC/ST.

This paper seeks to bring out the existing reservations for the differently abled and thereby highlight the relevance of reservations for them, on par with the SC/STs. Also, it will point out the lacunae in the present laws and come out with the workable suggestions to bring the differently abled to the mainstream.

**“All countries today need to apply affirmative action to ensure that the women and the disabled are equal to all of us.”**

**: Nelson Mandela**

### **I. Introduction**

The differently abled persons have always been considered as subjects for social welfare, charity, and protection. Disability was thought to be an issue for assistance through social security or welfare and not as a rights or equality issue. Disability has only recently from the 1990s gained recognition as a legitimate subject of anti- discrimination legislation.<sup>1</sup>

It is true that there is no consensus on the size of disabled population because researchers, concerned experts and authorities have not, so far, agreed on what constitutes ‘disability’. There are an estimated 700 million persons living with disabilities in the world today. Approximately two- thirds live in developing countries. In some developing countries nearly 20 per cent of the general population is affected. If we include the members of their families, there are approximately 2.5 billion persons who are directly or indirectly affected by disability. That is the reason why disability ranks as the Nation’s largest public health hazards and concerned issues affect not only the disabled person and his family, but also, society and nation, at large.

The definition of ‘disability’ under the Human Rights concept and philosophy is wide and covers various forms of disability. Disability in the Act means, physical disability or impairment, physical ailments, psychiatric illness, intellectual or psychological or anatomical structure or function, reliance on a wheel chair or other remedial means, in the presence of body or organism capable of causing illness.

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<sup>1</sup> *The Americans with Disabilities Act, 1990.*



## II. Legislations Concerning Disability

Legislative protection of citizens is a matter of paramount importance for the citizens of any country.<sup>2</sup> No right can have a better protection unless it is recognised by passing laws. The special legislations concerning disability that have been passed till now are:

- The Mental Health Act, 1987.
- The Rehabilitation Council of India Act, 1992.
- The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.
- The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

In addition to the above mentioned specific laws for the protection of differently abled, there are beneficial labour legislations such as The Workmen's Compensation Act, 1923, The Employees' State Insurance Act, 1948 and The Public Liability Insurance Act, 1991, which protect and promote the rights of persons disabled during the course of employment.

## III. Disability Under the Human Rights Concept

The human rights are sure and sound guarantees of Democracy. Every person should know that he has rights and they are protected by the State. A supplementary recognition and human rights respecting guarantee is the harmonization of the juridical frame of the Republic and the international normative acts to which the Democratic Republic has adhered to. Human rights and its respect obviously and evidently confirm the degree and the status of civilisation of a Nation. It is the universal truth that all the people are born equal, that their Creator invests them with some inherent, indivisible, inalienable, non-negotiable and non-derivable natural and basic rights and through this we can count the effort to decent life, liberty, freedom, happiness, and harmony.<sup>3</sup> Human rights are also characterized as fundamental rights or basic rights.

Human rights are the rights available to every individual, let the differently abled defend them and promote them. It is required that the human rights of the differently abled be understood, nourished, flourished and enriched so as to follow and implement Normalisation, Equalisation, Inclusion and Rehabilitate them in the mainstream of normal- social life.

## IV. Justification for Reservation in Indian Constitution

The Constitution lays down as fundamental in the governance of this country, the establishment of Welfare State and social order for the promotion of democratic republic and secular values. Thus, we have accepted the doctrine of social order in a Welfare State. Therefore, the main goal should be to minimize inequalities, inequities, injustice and provide maximum means of livelihood to raise the level of nutrition and standard of living of the people, improve public health to provide public assistance. Hence, it is this objective that should be implemented for the upliftment of the disabled people and we should make a sincere effort to bring them to the mainstream.

The preamble of the Constitution of India describes attaining of social, economic and political justice, along with the liberty and equality of its citizens as the objectives. The fundamental rights in Part III and the directive principles in Part IV are the key to achieve the objects of the Constitution. Though 'Equality' is declared to be the basic structure of our Constitution, but when it comes to the people who are differently abled, we can hardly see them being treated on par with the abled ones, be it in the government sector or in the private sector.

Article 15 of the Constitution mentions that the State can make any special provision for the advancement of any socially and educationally backward classes of citizens, which can be presumed to include women, children, senior citizens and differently abled persons. Article 16 says that the State can make any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Further, right to work, and the right to public assistance in cases of unemployment, have been recognised in Article 41 of the Constitution of India. Article 42 emphasizes just and humane conditions of work, and Article 43 stipulates that the State shall secure to all workers a living wage and conditions of work to ensure a decent standard of life. These provisions are enshrined in the directive principles of state policy and are, therefore, subject to the economic capacity of the State.

<sup>2</sup> Gautam Bannerjee, "Legal Rights of Persons with Disability", Rehabilitation Council of India, 23- A, Shivaji Marg, New Delhi.

<sup>3</sup> Justice Jitendra Bhatt, "Handicapism: Disabling Images or Images Disabling", IBR, Vol.28(4) 2001 at p.17.



## V. The Problem of Reservation for Differently Abled

There is a dearth of analysis on the consequences of disability. However, disabled persons and their families are more likely than the rest of the population to live in poverty. And this poverty may lead to lack of resources to pursue education, thereby leading to illiteracy in turn. Hence, reservations for the differently abled will help combat their problems like poverty, illiteracy, unemployment *etc.*, thereby improving their economic position.

The problem of unemployment is high among persons with disability who experience a high degree of labour market disadvantage, both in developed and developing countries. Unemployment is around 80% in some countries (ILO, 2008). The ILO (2008) estimates that globally, about 386 million of the world's working-age people have some kind of disability. Often, employers assume that persons with disability are unable to work. Though the population of differently abled is more, their employment needs remain unmet, despite the People with Disabilities Act, which reserves 3% of government jobs for them.<sup>4</sup>

There is a growing evidence that people with disabilities comprise between 4 and 8 percent of the Indian population. The Persons with Disabilities (Equality of Opportunities, Protection of Rights and Full Participation) Act, 1995 prescribes for reservation in government appointments, it has been held to cover direct recruitment, promotion and even deputation. If a person is disabled, he is always disabled. So long as the disability continues, he should continue to get reservation benefits. The Act is a beneficial legislation and so, it should be interpreted in a broader way to confer benefits to the differently abled.

The right to employment for the disabled can be divided into two categories, namely, (i) right of the disabled to secure employment, and (ii) the rights of persons becoming disabled during employment.<sup>5</sup> In so far as rights of the first kind are concerned, the Disability Act<sup>6</sup> provides for 3% reservation of vacancies for differently abled. Also, it provides<sup>7</sup> where in any recruitment year any vacancy under Section 33 cannot be filled up due to non-availability of suitable candidates with disability, such vacancy is to be carried forward to the succeeding recruitment year. The reserved seats can be filled by persons other than the disabled, only when there is no disabled person available for that vacancy for the successive recruitment year. The Act<sup>8</sup> also provides incentives to public and private sector players who ensure that atleast 5% of their workforce is constituted of differently abled. Under Section 38 of the Act, the Government is required to identify jobs that could be performed by disabled persons suffering from various kinds of disabilities.

However, experience has shown that these provisions are hardly given effect to. This is because of the general misconception among non-disabled that persons with disabilities are not capable of doing any job properly. Even private organisations fail to recognise the potential of the differently abled and, therefore, reject them as candidates for employment.

The three percent reservation as given under the Act, is in reality only to the extent of one percent each for the blind or low visioned; hearing & speech impaired and persons suffering from locomotor disability or cerebral palsy. However, there are other disabled persons, like- leprosy cured, acid attack survivors *etc.* who have not been included in the list of the differently abled entitled for reservations in services. The reservations to the differently abled has been categorized to be horizontal as against the vertical reservations for SC/ST. Also, there must be reservations for the differently abled in educational level.

Giving a level-playing field to more than four crore people with disabilities in India, the apex court has held that the Centre, states and Union Territories are obligated to implement the rules of reservation for this class in the matters of appointment, selection, direct recruitment, deputation and also for promotions. It asked the Centre to show a big heart and give the differently-abled people their due in all central and state government jobs.<sup>9</sup>

## VI. Role of Judiciary in Reservations to the Differently Abled

Though the Constitution of India does not provide directly for any reservations to the differently abled, but the Supreme Court and the High Courts have been providing the remedy justifiable to the differently abled in so far as reservations in the

<sup>4</sup> P. Princy Yesudian & D. P. Singh, "The Pattern of Disability", *The Indian Journal of Social Work*, vol.71 (2), Apr.2010 at p.228.

<sup>5</sup> Justice S. B. Sinha, "Disability Law vis- a- vis Human Rights", *S.C.C. Jr.Sec.*,(2005)3, p.8.

<sup>6</sup> Section 33 of *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act, 1995.*

<sup>7</sup> Section 36 of *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act, 1995.*

<sup>8</sup> Section 41 of *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act, 1995.*

<sup>9</sup> [www.indianexpress.com](http://www.indianexpress.com) visited on 01.03.2016.



employment are concerned. The judiciary has played a commendable role over the years in transcribing the principles articulated in the Constitution and other laws into reality.<sup>10</sup>

In *Indra Sawhney v. Union of India*<sup>11</sup> (Mandal Commission Case) the disability rights were interpreted, on an intervention application filed by the National Federation of Blind. The specific issue was whether “backward classes of citizens” could also include persons with disabilities, and it was examined as a sub- issue within the larger issue. It was held by a majority judgment that even though “backward classes of citizens” as used in Article 15(4) and 16 did not cover persons with disabilities. This case also clarified the issue of reservation in favour of differently abled as a ‘horizontal reservation’ and not vertical reservation.

In *LIC of India v. Chief Commnr. For Disabilities*<sup>12</sup> the Delhi High Court did not find any substance in the view of LIC that a person with 45% disability was incapable of performing his duties as peon and so directed LIC to employ the disabled. The Andhra Pradesh High Court in *Perambaduru Murali Krishna v. State of A.P.*<sup>13</sup> has ruled that visually challenged persons who were selected for the post of Secondary Grade Teacher/School Assistant, but were later deprived of their legitimate right owing to their disability, were entitled to a supernumerary post as Secondary Grade Teachers.

In *Vinod Kumar v. U.P.S.C.*<sup>14</sup> Allahabad High Court, also, held that in future, 3% reservation would have to be made for physically handicapped persons for vacancies in the UP Nyayik Seva. In *Nand Kumar Ghodmare v. State of Maharashtra and Others*<sup>15</sup> Nand Kumar filed a writ petition as he was denied appointment in the Agricultural Dept. because of his colour blindness. The Court held that should be appointed to any of the posts which doesn’t require perfect vision and hence directed the State of Maharashtra to make the appointment within two months.

The Supreme Court in *Kunal Singh v. Union of India*<sup>16</sup> held that Section 47 of the PWD Act must be interpreted liberally so that the object and purport of the Act viz. Equal opportunities to the disabled persons, protection of their rights and full participation is advanced.

In *Jayaprakash P.K. v. The Joint Registrar*<sup>17</sup> the Supreme Court held that the reservation available for the disabled is characterized as horizontal as against the vertical reservation for SC/STs and other backward castes. In *Md. Shah Afzal v. Medical Council of India & Antr*<sup>18</sup> Supreme Court held that when proceeding on the basis of reservations to the disabled is mandated, the physically disabled persons cannot claim parity with SC/ST candidates. In *Nishant S. Diwan v. High Court of Delhi*<sup>19</sup> Supreme held that it is categorical about the imperative nature of the provisions of The Disabilities Act *vis-a- vis* reservation of posts for the differently abled.

## VII. Conclusion

As per 2001 Census, there are 21.9 million persons all over India who were enumerated as disabled. Among the five kinds of disabilities, blindness is reported as the highest form of disability. Nearly 40% of the persons with disability in seeing are working. This could be due to, among other things, the government’s initiation to support persons with this disability to open up telephone booths and other business initiatives.

They are not a homogenous group and their needs are differ with respect to the kind of disability they have and the socio-economic situation they live in. Those having disabled children or disabled family members to care for should be given flexible working hours.

<sup>10</sup> Justice S. B. Sinha, *Supra note 5 at p.3.*

<sup>11</sup> (1992) Supp. (3) SCC 217.

<sup>12</sup> (2002) 101 DLT 434.

<sup>13</sup> WPs Nos.3997 and 4041 of 2002, decided on 20.12.2002.

<sup>14</sup> MANU/UP/0241/2002; Decided on 11.03.2002 (unreported) in the High Court of Allahabad.

<sup>15</sup> (1995) 6 SCC 720.

<sup>16</sup> (2003) 4 SCC 524.

<sup>17</sup> www.indiankanoon.com decided on 31.03.2010 [visited on 01.03.2002].

<sup>18</sup> www.indiankanoon.com decided on 06.07.2010 [visited on 01.03.2002].

<sup>19</sup> www.indiankanoon.com decided on 25.03.2014 [visited on 01.03.2002].



The employers are often seen to be reluctant to employ differently abled persons. Hence, favourable employment opportunities for differently abled should be implemented. To improve the socio- economic status of the differently abled, reservation in, both, education and employment is necessary. Thereby it would also positively help in making them literate. It would improve their economic status and their problem of poverty may be tackled by this.

There is a need to review the concept of disability. Appropriate steps should be taken to include other disabilities (in the definition) like, acid- attack survivors, leprosy- cured, *etc.*, as the Supreme Court has already directed to include acid- attack survivors in this list. But they have not been considered in this list of persons with disabilities.

In the present economic system it is not enough that the reservations for the differently abled is provided in public sector, it is required for the private sector, also, to adopt such social policies as are progressive and more egalitarian for the differently abled persons, for their all- round upliftment from their state of deprivation. There must be a mixed effort by the public sector and private sector to provide employment opportunities, thereby reserving at least 6% vacancies for the differently abled. The government should monitor the reservations in public and private sectors to bring social justice. At the same time steps must be taken to provide vertical reservations to the differently abled, on par with the SC/STs and other backward castes, rather than horizontal reservations. Article 15 & 16 should be meant to include the differently abled also.

It is required that the international accountability be strengthened for emphasizing reservation for the differently abled in public and private sector. These people should be informed and educated in a well co- ordinated manner. However, law alone cannot guarantee employment to the differently abled. Let NGOs and Self- Help Groups be included in this programme.

The role of special Employment Exchanges and special cells in employment exchanges to promote placement of the differently abled in jobs, should be well specified. The scheme of assistance to voluntary organisation for training of differently abled persons should also be considered. The economic rehabilitation of the differently abled persons seeking employment should be taken care of.