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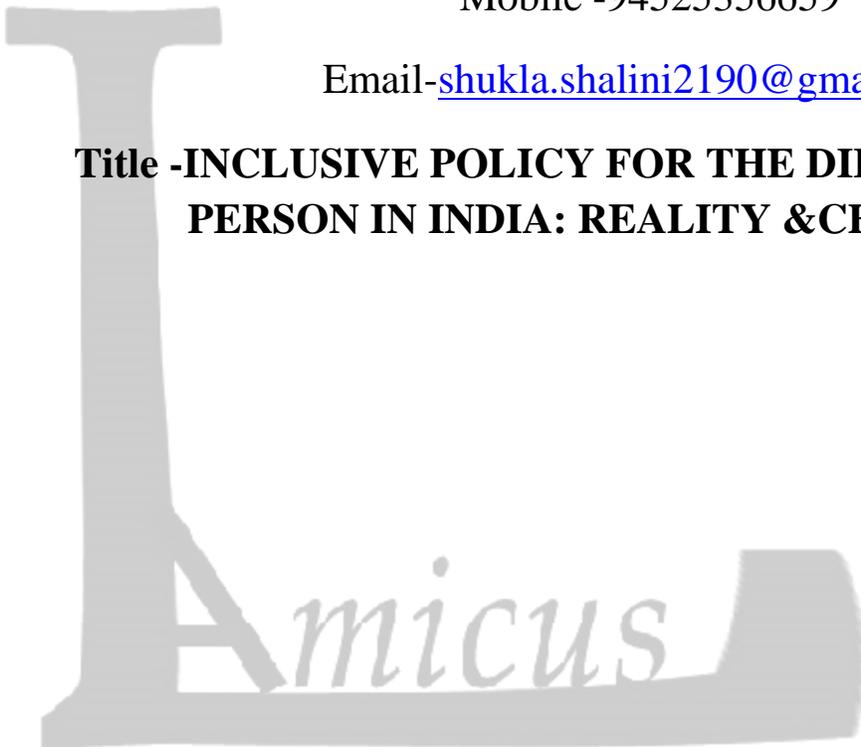
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**Title -INCLUSIVE POLICY FOR THE DIFFERENTLYABLE
PERSON IN INDIA: REALITY &CHALLENGES**



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“Inclusive Policy for the differently able Person in India: Reality & Challenges”

I. Introduction: Disability as a stigma

Disable people constitutes largest minority in the world with over 600 million person suffering from one or other kind of disabilities especially in developing countries. Census 2001 has revealed that over 21 million people in India as suffering from one or the other kind of disability. This is equivalent to 2.1% of the population. Among the total disabled in the country, 12.6 million are males and 9.3 million are females. The number of disabled is more in rural than the urban areas. Among the five types of disabilities on which data has been collected, disability, in seeing at 48.5% emerges as the top category. Others in sequence are: In movement (27.9%), Mental (10.3%), in speech (7.5%), and in hearing (5.8%). Across the country, the highest number of disabled has been reported from the state of Uttar Pradesh (3.6 million).¹

Disability cause social stigma because the condition of disability is considered as “undesired differentness” from socially defined norm of “normality”.² From a long time people with disabilities have to face discrimination, neglect, prejudice and exclusion in the society. In pre modern period the disabled people were eliminated from the society through killing programmes and sterilization and were considered as second class citizens.³ Because of this social stigma differently able person often finds ‘crises of identity’ for themselves.

Assumptions about the disabled-

Some stereotyped presumptions prevailed about the disabled in our country like:

1. Disabled people are the most vulnerable section of society and have been ignored by state and society alike since long.

¹http://censusindia.gov.in/Census_And_You/disabled_population.aspx

²V.K.Dixit, “Historical Foundation of disability Discrimination in Classical Hindu Law” XX DLR 65-70(1998)

³ Samuel R. Bagenston, “Subordination, Stigma and Disability” 86(3)

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2. Disabled people have always been dependent and, therefore, need helping hands and gracious charity.
3. Disabled people are victims of their own bad luck.
4. Disableness is the punishment for sins the person has done.

Such assumptions about the disabled do nothing to help them. This approach perpetuates the stereotype of the disabled as victims and objects of pity and charity.

The concept of disability equality-

The demand for equality is based upon the concept of human autonomy, which consists of personal capacities to have an access to opportunities that society offers to all the people. As has been observed by Joseph Raz:⁴

“The ideal of personal autonomy is the vision of people controlling to some degree, their own destiny fashioning it through successive decisions throughout their lives.”

John Rawls describes personal autonomy *“as the ability to frame, to revise and to pursue a conception of the good and to deliberate in accordance with it”*.⁵

The ethical principle of equality that all human beings are equal in their self worth, dignity and autonomy would be false for people with disabilities. The disabled people would demand a concept of equality in which society should undertake special efforts in order to equalize opportunities for them. In the context of disability the notion of substantive equality or genuine equality would be more appropriate. Substantive equality seeks to aid the disadvantaged or otherwise vulnerable groups by giving them special treatment in an effort to enhance their equal rights. Thus notion of equality takes account of both personal and environmental barriers that may inhibit societal participation. Rawlsian concept of maximum justice also supports the notion of substantive equality according to which goods should be distributed equally-as opposed to the

⁴ J. Raz, The Morality of Freedom 369 (1986)

⁵ J. Rawls, Political Liberation 72 (1993)

“same”-among the members of society unless an unequal distribution will be to the advantage of less fortunate.⁶

II. Constitutional provisions and disabilities

The preamble of the constitution provides for the attainment of social, economic and political justice along with liberty and equality of its citizens. The Constitution of India, like that of German Constitution does not provide any specific provision in the Chapter of Fundamental Rights for disable people. There is no specific mention that no person shall be disadvantaged on account of his or her disability and that no person shall be subjected to disability discrimination. **Seventh Schedule List II Entry 9** contains a sub heading “Relief of the disabled and Unemployable” and **Article 41** provides an unenforceable directive principle contains a reference to the ‘public assistance in cases of disablement’.

Article 14 is the most crucial fundamental right as it guarantees equality to all the persons. The Supreme Court and various High Courts have left no doubt on the issue that Article 14 contains “Substantive equality” as opposed to “Formal equality”. This implies that only equals must be treated as equals and unequals may not be treated as equals. Article 15 and 16 of the Constitution take forward the substantive equality of Article 14⁷ and provides exception to make special provisions for backward section of the society but the question arose whether backward class also includes persons with disabilities under Article 15⁸ and 16.⁹ In **Indra Sawhney and others v. Union of India and others (famously known as Mandal judgment)** the disability rights were interpreted. It was held by a majority judgment that even though ‘backward classes of citizen’ did not cover ‘persons with disabilities’ but the spirit of Article 14,15(4) and 16(1) allowed for reservation and other affirmative action, in favour of persons with

⁶ J. Rawls: A Theory of Justice 303 (1971)

⁷ Article 14: Equality before Law “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”

⁸ Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

⁹ Article 16: Equality of opportunity in matters of public employment

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disabilities. Besides it the provision of Article 21,¹⁰ 39A,¹¹ 41,¹² 46¹³ and 47¹⁴ gives the scope for the welfare of disabled both directly and indirectly.

Disability and Law-

Legislative protection is of paramount importance for citizens in any country. The government response in protection of disabled was not satisfactory. It was the Constitution and judicial interpretation which was the savior for the disabled before coming of specific legislation for them. The first exclusive measure taken by Government of India was Executive Order, issued in 1977, had introduced 3% reservation in Group C and D posts for persons with disabilities. The specific legislation which were enacted later, are as follows-

- 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

III. Disability and International Concern

The **United Nation** was founded on the principle of 'Equality'. The United Nation has dedicated itself to defend basic human rights of all persons including disabled. UN started assisting the

¹⁰ Article 21: Protection of life and personal liberty "no person shall be deprived of his life or personal liberty except according to procedure established by law"

¹¹ Article 39A: Equal justice and free legal aid

¹² Article 41: The state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness, and disablement, and in other cases of undeserved wants.

¹³ Article 46: The state shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled castes and Scheduled tribes, and shall protect them from social injustice and all forms of exploitation.

¹⁴ Article 47: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

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disabled since Second World War understanding the needs of individual who were injured in the war. **Article 25 of the UDHR**sates that each person has *“the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”*The following are few important Conventions, Declarations, Resolutions, Decisions and Recommendations made by the UN in support of the Persons with Disability.

- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights,1966
- The Declaration on the Rights of Mentally Retarded Persons, 1971
- The Declaration on the Rights of Disabled Persons, 1975
- The World Programme of Action Concerning Disabled Persons 1980
- United Nations Decade of Disabled Persons, 1983-1992
- The Standard Rules on Equalization of Opportunities for Persons with Disabilities 1994
- Convention on the Rights of Persons with Disabilities 2007.

The approach of welfare for disable was promoted during the **International Year of Disabled Persons in 1981** and embodied in the World Programme of Action concerning Disabled Persons that was adopted in 1982.

IV. Disability and Right to Employment: An overview

“The problem is not how to wipe out the difference but to how to unite with the differences intact”-**Rabindranath Tagore**

Question regarding person with disability and how person with disabilities perceive themselves are knotty and complex .It is no accident that these questions are emerging at the same time that the status of the persons with disabilities in society changing dramatically .There are estimated 650 million living with disabilities in the world today .If one includes the members of their families ,there are approximately 2 billion persons who are directly affected by the disability, representing almost onethird of world’s population, approximately two third live in developing countries .In certain developing countries nearly 20 %of the general population is disabled ;if

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the impact on their families is taken into account, 50 % of the population is affected¹⁵. Number of disabled person continues to increase in tandem with the growth of the world population. Factor causing an increase in their number include war and other forms of violence, inadequate medical care natural and other disasters. Not surprisingly many of the disabled are poor the overwhelming majority –perhaps 80 % live in isolated rural areas- almost as many, lives in areas where the services needed to help them are unavailable. So often their lives are handicapped by physical and social barriers in society, which hamper their full participation because of this in all parts of this world they often face a life that is segregated and debased, and without help many life in isolation and insecurity. Work of descent quality is most effective means of escaping the vicious circle of marginalization, poverty and social exclusion. People with disability are frequently trapped in the vicious circle and positive action is needed to assist them in breaking out of it. barriers which disabled people face in getting jobs and taking their place in society can and should be overcome through a variety of policy measures, regulations, programmes and services.¹⁶

V. Judiciary and Disability

The courts of India has expounded the rights of disabled with the help of PWD Act, National Trust Act and Constitution of India. The issue of mandatory reservation, reinstatement when disability is acquired during service pay scale, payment of minimum wages etc. where the courts have dealt with iron hand to protect the interest of disabled under the PWD Act. **In National Federation of Blind Vs .U.P.S.C**¹⁷ the coveted civil service of the country, which is still today considered to be a magic box of the bureaucracy was brought in for sharp criticism by the Supreme court; UPSC discriminated the candidature of visually impaired to write their examination either in Braille-script or with the help of scribe. **In Vinod Kumar Raj Vs UPSC**¹⁸ the Allahabad high court held that the reservation of 3% vacancies should be given for the physically handicapped individuals, it has also been held that in future 3% reservation must be given to such candidates in UP NyayikSewa. **In Nand Kumar Narayanrao Ghodmare Vs.**

¹⁵<http://www.un.org/esa/socdev/enable/dis50y10.htm>

¹⁶ <http://www.ilo.org/public/english/employment/skill/index.htm>

¹⁷ AIR 1993 SC 1916

¹⁸ MANU/UP/0241;DECIDED ON 11.03.2002 IN THE HIGH COURT OF ALLAHABAD

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State of Maharashtra and ors.¹⁹ in this case Nandkumar was selected for the post in the Agriculture department .However he could not be selected on account of his colour blindness, court held that in such case Nandkumar may be appointed in other second grade job in same department other than the post in which clear vision is required .In **D. Saibaba Vs Bar Council Of India**²⁰ Saibaba as the person is the orthopedic handicapped. He was allotted a STD quota of handicapped person to earn the livelihood .As time went by ,he graduated from the law school and was enrolled as a lawyer in under the Advocates Act 1961. In the meantime his father who has retired from the service took the task of looking after the STD Booth. As the allotment stood in the name of SaiBaba`s name, he was advised by the Bar council to surrender the booth .He sought time in the booth on the ground that here were some outstanding dues to be collected, which would become difficult if he abruptly surrendered the booth .The Bar council however ordered for the cancellation of his name from the rolls of the Advocates. Faced with this situation, saibaba within few days of the order of bar council, surrendered the license to operate the STD and appealed to the bar council to recall and suitably modify its earlier order of deletion of his name from the roll, in the view of this corrective action Supreme court held that the order of Bar council should be set aside and enrollment of saibaba should be restored. In **T. Raja Ram Mohan Rao Vs. Income tax officer**²¹ Raja Ram Mohan Rao was suffering from some permanent physical disability working as stenographer in LIC and has claimed tax deduction of Rs 10,000 for the assessment years 1983-84 to 1985-86 under Section 80U of the Income tax Act 1961. In view of this the assessment were under section 143(1) of the Income Tax Act .The commissioner invoked the section of the Income Tax Act and held that he is not entitled for this exemption .The court held that that the commissioner has misinterpreted the section 80U .This section provides exemption to the permanent disabled person .Further this section also requires the production of certificate of medical practitioner while making the claim under section 80U. Before the income tax officer Ram Mohan was not promoted and could not be called for gainful employment .For these reasons, it was concluded that the order of commissioner could not be sustained.

¹⁹ (1995)6 SCC 720

²⁰ AIR 2003 SC 2501

²¹ (1981)281 ITD534(NULL).IN THE ITAT ,Hyderabad

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In **Daljeetsingh Vs Delhi transport corporation**²² all the employees of the DTC were suffering from one or another form of disability at the time of filling the petition but were not disabled at the time of the birth or while entering service. They had been medically fit, and were appointed to different post in the corporation after undergoing proper selection and were working as regular employees. In the course of service they acquired some form of disability .On the ground of their disability, they were retired prematurely thus rendering them unemployed .They filled writ petition before the high court challenging their premature retirement and all the petitions were heard together and disposed by this common order .Court ordered that the DTC should fill this common direction 1.) To take the petitioner back in the service and reimburse all salary due and to treat them as if they continue employment without any break,2.)To reabsorb them against equivalent post according to their suitability and, 3.) To compensate the petitioner for the cost of the petition at the Rs 3000/- for each petition.

In **Jai Bhagwan Vs .Union of India and ors.**²³Jai Bhagwan was enrolled as corps of engineers and about a year later he was granted casual leave for a period of five days .After coming to rejoin his duty he met with an accident and due to this accident he was treated in the hospital and was later placed in the CEE(permanent),medical category .Thereafter he was issued a notice directed him to explain why he should not be discharged from service .The court directed Indian Army to pay disability pension at 50% to the Jai Bhagwan from the date of discharge ,and court further directed that he should be paid all the arrears .

The above cases are few, in which rights of the disabled have been protected. The courts have time and again interpreted the law favouring the needy.

RECENT DEVELOPMENT

In May this year India's 2.68 crore persons with disabilities who constitute 2.21% of the total population (rights organisations put the estimate at 5%) got a new nomenclature. Henceforth, they were to be described as *divyang* (divine-bodied) rather than the hitherto *viklang* (disabled). The protests that followed said that the disabled wanted an enabling environment, not a new description. However, fulfilment of that demand would entail not only access to education and

²² 83 (2000) DELHI LAW TIMES 286

²³ 121(2005)DELHI LAW TIMES 505

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work skills but also jobs. The minister for social justice and empowerment admitted in the Lok Sabha in May that employment of persons with disabilities (PWD) has been “far less” than the specified 3% reservation in all categories of government jobs in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act. In a recent ruling, the Supreme Court said that there is hardly any representation of disabled persons in the higher governmental hierarchy even though certain posts have been identified as suitable for them. This state of affairs ties in with the oft-repeated complaint by disability rights activists that the disabled are either not recruited at all or are expected to be grateful for employment in low-paying, lower grade jobs²⁴.

Over the years, the private sector has shown an increasing willingness to employ the disabled though it is nowhere close to what is needed. Some hospitality and retail chains along with information technology (IT) and knowledge companies have been proactive in training and employing disabled youth. The live registers of employment exchanges and special cells have an inordinately large number of the disabled looking for jobs though reliable data as to how many are actually employed is hard to come by. The International Labour Organization (ILO) report says that the employment rates vary with geographical location, gender, education and type of disability with the rural and women disabled bearing the brunt of low access to education and health services as well as vocational training and the labour market. It points out that “lower labour market participation is one of the main pathways through which disability leads to poverty.”

The apex court’s ruling quashed the central government’s confinement of reservation to Group C and D posts, the distinction that had been made between posts to be filled through direct recruitment and through promotion. The petition filed before the Court challenged the government’s policy that vacancies in Groups A and B (in identified and reserved posts suitable for the PWD) would be filled only through direct recruitment in the PrasarBharati. This meant that disabled employees in the Groups C and D category were denied the chance of promotion to the higher ranks.

²⁴ ECONOMIC AND POLITICAL WEEKLY ;Vol. 51, Issue No. 28, 09 Jul, 2016 » 'Divine-bodied'
Disabled

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While this ruling clears the way for promotions for the disabled in government employ, disability rights activists observe that overall recruitment, whether in the private or the public sector, is hampered by sociocultural prejudices against the disabled. Again, disabled women face greater obstacles as compared to their male counterparts. Among those employed, the group that is most favoured is the one with locomotor disabilities and within that the ones with milder forms of it. The impediments in the way of implementing even the 3% reservation in government sector jobs are many and have been listed by rights activists. They include an unduly heavy dependence on the courts to enforce the guaranteed reservation and the identification of jobs as suitable for PWDs based on biased and whimsical assumptions about their capability.

The court rulings and media coverage coupled with the efforts of rights activists have all helped to ensure increased sensitivity to the disabled in government policies and society's attitudes at large. However, given their share in the population and the efforts needed to help them access basic services and more significantly, education and employment, these efforts seem woefully inadequate.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act's intent is to turn those whom it hopes to benefit into "agents of their own destiny." Intentions must be backed by actions.

VI. Conclusion

Employer very often shows reluctance in employing person with disabilities because of discriminatory attitudes, practice and mistaken beliefs that employees with disabilities will necessarily entails high costs for the employer .The truth is that the cost of accommodating the worker with disabilities can be minimal ,with many requiring no special accommodation at all.²⁵The problems discussed above do not have instant and magical remedies nor they can be solved overnight .Uniting public, private, SHG, NGOs and the common public for the common cause of ensuring that person with disability can have access to decent work is critically important in order to represent them in the development agenda on an equal basis with others.

²⁵ information on the 2007,international day of disabled persons, descent work of persons with disabilities "from the united nations enable websites ,at <http://www.unorg/disabilities>

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Increased access to data and statistics will increase ability to ensure that programmes target the areas where need is greatest. The development and dissemination of such data as well as knowledge including good practices, lesson learned and sources of expertise will assist all 'actors' in actual in total implementation at the local, national and international levels. The integral involvement of civil society including organizing person with disability at the national and international level should be essential ingredients in effectively guiding the development agenda towards integrating and including person with disabilities.

References

1. Constitution of India, Bare Act, Eastern book company (24th edition)
2. V.K.Dixit, Historical Foundation of disability Discrimination in Classical Hindu Law
3. Samuel R. Bagenston, Subordination, Stigma and Disability
4. J. Raz, The Morality of Freedom (1986)
5. J. Rawls, Political Liberation (1993)
6. J. Rawls, A Theory of Justice (1971)
7. <http://www.un.org/esa/socdev/enable/dis50y10.htm>
8. <http://www.ilo.org/public/english/employment/skill/index.htm>
9. http://censusindia.gov.in/Census_And_You/disabled_population.aspx
10. Delhi Law Times

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