

RIGHTS OF PERSONS WITH DISABILITY: AN OVERVIEW

*Santosh Rungta**

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 provides for the protection of rights of persons with disabilities as well as for making enabling provisions to equate persons with disabilities, to compete, to enable them to compete on equal terms with non-disabled persons. During 1980s, the struggle by the National Federation for the Blind and other NGO's was two-fold. The one was against the policy makers and the society, the other was within itself. Because at that time even people from the disability sector believed that persuasive methods would alone guarantee the rights and make the infrastructure accessible to them. With the enactment of the Persons with Disabilities Act, a beginning was made to at least recognise their right to equality, their right for enablement to enjoy the right to equality, which has been guaranteed as a fundamental right by the Constitution of India.

The Constitution-makers had a broad perspective in mind, while drafting the Constitution. From the perspective of persons with disabilities, it may be stated that the Constitution is a manifestation of negative policy mind-set of the society. When I am saying so I am saying it with full responsibility and with full understanding of the subject. If we look at the Constitution, we find mention of disabled in the most negative sense in entry 9 of the State list. This talks about relief to the disabled and unemployed. This word 'and' is a very tricky word. And it starts with the word relief. That means that the Constituent Assembly was mindful of the initial policy which treated persons with disabilities as mere object of charity and passive community gear. This was reflected in this entry. Further, if we look at the Constitution it guarantees right to equality and prohibits discrimination on various counts, but excludes discrimination on the ground of disability. That also reinforces the above statement. Therefore, the struggle for an enactment on the rights of the disabled became more difficult and complex in view of the above Constitutional provisions.

As one may recall, March 16, 1980 was a turning point in the lives of the disabled. On this day there was a significant shift in the policy-

* General Secretary, National Federation of the Blind and Advocate, Supreme Court of India,

focus, which led the policy-makers to think in terms of equality, instead of institutionalisation, in terms of inclusion in place of exclusion, and this was no favour; in fact it was in the best national interest. Because the cost of exclusion of persons with disabilities who constitute about eight to ten percent of the total population is more than the cost of inclusion. No society for that matter, even a capitalist society, can feed ten percent of the population as a liability. Therefore, the shift was also guided by the national interest, apart from the late recognition of their rightful demand to provide protection to the rights of disabled persons on the one hand and on the other hand to make enabling provisions in the Act to enjoy the real equality which has been guaranteed by the Constitution of India as a fundamental right.

While the National Federation of the Blind was fighting the case of UPSC, which opened the door for entry into IAS for the visually disabled, Justice Pandian while hearing the matter asked the first and the foremost thing, how would you read the documents and other files? And my answer was I would read as I am arguing the case now before you. And in fact this was the force, which led to this judgement when Justice Kuldeep Singh finally pronounced in our favour and held that blind persons are also eligible on equal terms to compete in IAS exams and it is the responsibility of UPSC to give them either a scribe or provide paper in braille. That was a historic judgement in the sense that even without having any Act, we could succeed in persuading the judges that we have, under Article 16(1) of the constitution, the right to equality of opportunity in the matter of employment. And that in fact was the foundation of actually getting reservation of three percent in group A and B, as persons working in the disability area would know that initially, prior to the enactment of this Act, the reservation was only in group C and D.

If we look into the provisions of the 1995 Act, no doubt so far as intentions are concerned, it is full of very good intentions. It recognises various available rights beginning from the right of prevention where the Act guarantees to us, rather cast an obligation upon the state to conduct surveys and take all steps for preventing the occurrence of disability. In education, it guarantees a right to have free education in accessible and appropriate environment up to the age of eighteen years. It is not merely giving admission, it is more than that. Though the aspect of reservation in education is placed in chapter relating to employment yet the contents remain the same. It doesn't matter where it is embodied but the right guaranteed by section 39 of the Persons with Disabilities Act is that we must have reservations up to three percent in all educational institutions and also in employment.

Though the Disabilities Act contains provisions providing for three percent reservations in employment, the Department of Personnel and Training (DoPT) has fore-stalled the implementation of reservations

granted to persons with disabilities. For instance, if one reads section 33 the first and foremost problem that has been created by the DoPT is that it talks of three percent reservation only against identified posts, which is a misnomer, because the Act has to be read in totality and sections 32 and 33 have to be read in conjunction with each-other. And if we read those two sections together it would make things clearer that three percent reservation has to be given in all the vacancies occurring in a particular recruitment year after computing the vacancies that are to be reserved, against identified posts. Very strangely DoPT has chosen to interpret this section in two different ways for group A and B and group C and D. I am also a practising lawyer; unfortunately, I am unable to understand how can one provision be interpreted in two different ways. But still the understanding of the Law Ministry is that it also advises the same way to the DoPT. Even though the Act has recognised and guaranteed the right to equality and the right to participate but the mind-set of the bureaucrats who have to implement the Act still remains unfortunately the same.

Now another important issue that has come up and which needs to be taken care of either by judicial activism or by the amendment committee set-up by the Government to review the 1995 Act is relating to employment, which does not find place here and it seems that though at that time Dr. Manmohan Singh had clearly stated and gone far ahead in his process of globalisation and privatisation, yet at that time we lost sight of this issue, and, therefore, it doesn't find place in this Act. This is resulting into threat of losing jobs by persons with disabilities because of (a) privatisation of public sector, (b) retrenchment in the government sector, through voluntary retirement schemes, special voluntary retirement schemes, (c) declaration of staff as surplus, and (d) in worse scenario of retrenchment may be closure. This is the biggest threat because most of the work force of persons with disabilities is engaged in government and public sector. And this process is beating us in two ways, on the one hand, the challenge is to save the jobs of those who are already in, and, on the other hand, the challenge is to tackle the problem of already scarce employment market which is shrinking because of the privatisation. This is another issue which the amendment committee took into consideration and suggested various safeguards. One of them was that in any case the public sector which is being privatised, there should be a Memorandum of Understanding with the successor body, with a clause, which should ensure that in no case, the services of persons with disabilities would be dispensed with and they would continue to serve in the successor body as a continuum of their earlier employment with the public sector with the same benefits. Then another important and most vital area of this legislation, where this legislation is not only weak, but does not have any proper provision, is enforcement of the provisions of the Act.

Quite apart from this, if you look at the Act there is no disincentive for those who violate the provisions of the Act, who do not discharge their duty, which has been cast on them under the provisions of the Act., for instance, if any employer or public sector employer, as UGC refuses to give reservation.¹ Now this is a clear violation of the Act, but since the Act does not stipulate any sanctions or any disincentive, the officers often than not choose not to implement, not to extend reservation because they know nothing is going to happen. I would give a very concrete example of the Staff Selection Commission (SSC), which notified about six thousand vacancies of LDCs. Last year it was in the process of filling five thousand nine hundred eighty vacancies. We were in the process of negotiating with them to get one percent reservation for the blind out of those five thousand nine hundred eighty posts. Suddenly this came as a bolt from the blue when this advertisement appeared and said blind and low vision need not apply. Only with the intervention of certain NGOs including the Federation that the Secretary, Personnel called a meeting of Joint Secretary, Social Justice and Empowerment and Chairman, SSC. The meeting ended with a decision to let the Secretary, Personnel write to all departments to notify vacancies to be reserved for the blind to SSC. And then SSC would conduct special exams for the blind. But the departments had already notified these vacancies to the SSC, which were reported from the departments and out of these reservation of two categories-those with hearing impairment and with low disability were given. You are leaving out blind only. So there was no question of new vacancies to notify? Unfortunately by the time this meeting was over the advocates strike started. So I have not yet filed but I am planning to file a petition. Why I am giving you this example is that such plain things are made or presented in such a way that ultimately either you surrender or you have to fight it out.

All this happened because enforcement mechanism is practically nil. What is there in the Act in the form of enforcement mechanism, it is the Chief Commissioner for the disabled at the Central level and the Commissioners for the disabled at the state levels, and the section relating to these Chief Commissioner and Commissioners is so ambiguously framed, that it does not give much power, for the Chief Commissioner or the Commissioners for the disabled, at the State levels to ensure that their orders are complied with. Supposing a Chief Commissioner passes an order, which is in favour of persons with disabilities. What is there to ensure its compliance because the other department would say look, I am acting as per the business rules and I am a department independent of you.

1. In 1999, the UGC issued a circular wherein it was stated (that circular was shown last year in fact), that it would not be in the national interest to employ the blind as lecturers.

As it is if you know about Scheduled Caste Commission, what is the sanctity? I was arguing one case on the question of reservation to Scheduled Caste in the High Court, and the judge asked me initially, at the beginning itself, because I was basing all my arguments on the findings of the Scheduled Caste Commission. He enquired about the binding force of his order. And I had no answer. Our Commissioner is even weaker than the Scheduled Caste Commission because they at least have an added advantage of being a politically viable constituency, which we are not. Now, therefore, what I think that as the amendment committee what we did, we looked at various models of enforcement mechanisms and decided finally to suggest that there should be a tribunal for the disabled at least at every State level, which should have the powers equivalent to the high court and should decide on all issues relating to discrimination on the ground of disability or relating to encroachment on the rights of persons with disabilities guaranteed by the Act. The amendment committee has suggested that the Chief Commissioner and Commissioners should act as conciliatory officers as is the case in labour laws as people might be knowing that labour commissioners act as conciliatory officers before they decide on making a reference to the industrial tribunal for adjudication.

In view of the above, it may be stated that the 1995 Act is a shift of policy focus from institutionalisation to mainstreaming and from exclusion to inclusion. This Act guarantees various rights in different spheres of life but does not guarantee or provide for any proper mechanism to enforce those rights. The fact that the amendment committee was constituted by the government merely after three years of its enactment, was itself an evidence of the point that it is weak on many counts and it needed strengthening, to meet the aspirations or rather to meet the bare minimum needs of persons with disabilities and to ensure proper protection of their rights which have been guaranteed either by this Act or by the Constitution or by any provision or by any law which is in force.

Now the last question, which is of course a debatable question, is the definition of disabilities. And here the amendment committee looked at this question in quite a detail, and decided to suggest that there has to be included various other disabilities, including medical disabilities, but the approach that we adopted in making our recommendations was that the benefits under the Act would be given to respective disability in different chapters. For instance, medical disability will get the benefits in the chapter relating to medical benefits and medical insurance. So that was the approach we adopted and more on substance we decided that the definition should not be all-inclusive, it should be exhaustive with the power of the central government to include more disabilities as and when it so decides. I would say that the 1995 Act is a good combination of right based legislation and enabling legislation. Because if one looks at

American Disabilities Act, or Australian Act, those are only right based legislation, and they do not provide for enabling provisions, which is an extreme step of thinking that persons with disabilities if their rights are protected they would have equality, no. Definitely there are provisions, which are needed for enabling them to enjoy equality. Therefore, it is a good combination of the enabling provisions and right-based provisions. But as said above, it is weak in enforcement compared to other laws and other institutions.

To conclude, it may be emphasised that in a country like India, there is a need to have a strong tie between lawyers and disabled activists to ensure that, on the one hand, they properly educate the bureaucrats, the judges and others who matter influencing the opinion of the society, including the media and, on the other hand, they take-up their matters together for ensuring that persons with disabilities march on the path of equality and full participation without facing any type of discrimination on the ground of disability and enjoying the enabling rights, which are essential to enable them to enjoy real equality.