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“Dharma is to protect the Needy”

LEGISLATIVE REVIEW on
RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016
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INTRODUCTION OF THE ACT

RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016

The new act has followed the principles from the UN convention so as to fight discrimination that is nondiscrimination, equality of opportunity, equality between men and women, respect for their right to preserve their identities. We can see there is a shift from the 1995 act to the new one when it recognizes the right to equality, preservation of dignity and personal liberty. Earlier there was ignorance for the recreational approaches and was limited social security for only financial assistance and insurance coverage-community participation. Special provisions for persons with benchmark disabilities. The new act is also gender sensitive. The new act has recognized the intellectual disability and related to speech and language

The new act was the first time when the disabled had legal rights against discrimination. Under section 89, there are offences for the organization in form of fines and for the person in form of imprisonment in case he is found insulting, assaulting, denying foods, exploiting sexually or injuring the assistive devices.

There has been a proposed amended section 95A giving authority to the chief or state commissioners to withdraw cases with the consent of the aggrieved party. The difficulty arises when we know that discrimination is subjective and disabled face it daily. The only route to fight against it is the legal route. However as the new amendment proposes compounding of the offences and an out of court settlement, then it would have been better if the distinction could be made as to what type of cases should be compounded and what not.¹

DUTIES OF THE EMPLOYER UNDER THE ACT-

Section	The provision
8	Protection and safety in cases of risk, armed conflicts, natural disasters or humanitarian emergencies.
20	No discrimination in matters related to employment and to ensure reasonable accommodation and a barrier free conducive working environment. No denials of promotion on grounds of disability.

¹ Nipun Malhotra, India wants to dilute its disabilities act- to enable ease of doing business. Published on july 06th 2020, scroll.in.

21	Notification of the equal opportunities policy detailing the measures proposed.
35	Having incentives for private employees who shall have 5% of their workforce with persons with disabilities.
22	Maintenance of such employees
36	Establishment of special employment exchange

IS THE ACT ANTI DISCRIMINATION LAW

Can we say that the act is an anti-discrimination law? Following are the conditions² by tarunabh khaitan in the reading of preclude to the theory of discrimination which could make us understand the nature of the act-

- i. There is a connection between the act prohibited and the ground. The ground being a disability.
- ii. A protected group i.e. disability have been capable of classifying persons in more than one class of persons. The new act has been gender sensitive.
- iii. Within a given group there is a group of persons who are significantly more likely to suffer substantial damage than at least one other group. The act has specific provisions for the persons with benchmark disabilities acknowledging the same principle.
- iv. The law should be formed in a way when the substantive benefits are direct to some and not all of the protected group. However this has not been done in the legislation. The duty on the employers to refrain from discriminating on such grounds while hiring have not entailed a duty upon them to hire all. There is no segregation of percentage for the different types of disabilities to be hired when there is an incentive provided for a 5% quota for the private companies. The norms are not decided to benefit every member of the desired group. Although group discrimination was the focus but we realize that individual discrimination is also a part thereof but the legislation has failed to do so. The same would be seen when we see intra disability discrimination between

² Tarunabh khaitan , preclude to the theory of discrimination

the physically and mentally handicapped individuals. The same has been researched extensively for the next assignment, Research paper.

The four conditions seem to be not met with. Therefore, we look into the merits and demerits of the act through principles of discrimination law.

UNDERSTANDING DISCRIMINATION

The understanding of discrimination in the act can be guided by the definition of discrimination under section 2(h) seems to be most comprehensive relative to other Indian legislations. However, the expansive nature of the definition has been whittled by section 3(3). The definition has been remotely inspired by the definition of discrimination against women in the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW). According to Facio and Morgan³ the definition of discrimination has the following features-

- i. It captures the different types – distinction, exclusion, restriction.
- ii. It captures the degree- partial, impairing, total, nullifying.
- iii. There is a prohibition of direct as well as indirect discrimination.
- iv. It recognizes different stages where discrimination can take place- recognition, exercise of a right and employment.
- v. There is an application on all domains.

ACT ADDRESSING DISCRIMINATION

There are different types of disability discrimination which the act has addressed-

- Direct discrimination – someone treating you worse than the normal person in a similar situation.
- Discrimination arising from disability- this happens when you are treated differently bad due to something connected to your disability. This has to do with the disparate impact theory looked later in this assignment.
- Harassment- when the disabled person is treated in a way wherein he is humiliated, degraded or offended. There can be no justification for harassment.
- Victimization – this happens when the disabled is treated badly because of the representation made in a complaint against discrimination due to disability.

³ Alda Facio & Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW's Equality Principles*, 60(5) ALABAMA L.REV.1133, 1142-44 (2008-9).

NOT DESIGNED TO ADDRESSED DISCRIMINATION

NEED TO CHANGE THE ATTITUDE

We can say that the law has simply not addressed discrimination not in the sense of the normative theory about it but when we look at it in terms of prevention. There has been no mention as to the need for a transformative ideology or perception about disability. Why is it that we do not see disability prevention discriminatory as we see gender or racial prevention methods discriminatory? The law of course goes on the commonsensical view that it is more difficult being a disabled child than being a female child or a Dalit. Measures to prevent such other things might be seen objectionable for certain special justifications whereas preventing disabilities will be presumptively acceptable. A good suggestion for the lawmakers to adopt the suggestions made by Elizabeth emans⁴ wherein she puts a framing context prompting the non-disabled to think about disability including a more realistic and balanced information about such ground of discrimination. Purpose not only being to modify the behavior but to change the attitude towards disability. It might still cause discomfort to disabled people but it will be less embarrassing. But as far as we still see preventive measures, we still see it as not being anti discriminatory.

MULTIPLE AND INTERSECTIONAL DISCRIMINATION OVERLOOKED.

There is no reference in the legislation to look at intersectional discrimination for the people with disabilities, for eg when we look at caste and disability. There is a need to create awareness on the high incidence of disability in dalits or adivasis due to poor nutrition, health and hazardous working conditions. However when we see the act interconnected to the constitutional protection under article 16 it has addressed intersectional discrimination but only confined to employment. It refers to SC/ST only two times.⁵ Although the act has included gender sensitivity for education, employment but no form of aggravated discrimination based on caste has been addressed.⁶ The law has failed to recognize that disability does not exist in a social vacuum. For instance section 20(3) provides that promotion should not be denied to a person merely on the ground of disability. Effect of which is when the employer demonstrates that a hindu blind has not

⁴ Elizabeth Emens , “Framing Disability”, (2012) U. Ill. L. Rev. 1383–441

⁵ Section 60 and section 66. But the same has not been implemented. Only 50% of the states have included members from the SC/ST. Explanatory Notes to the Rights of Protection of Persons with Disabilities 2016: These states are Assam, Goa, Himachal Pradesh, Kerala, Madhya Pradesh, Manipur, Meghalaya, Nagaland, Odisha, Punjab, Tamil Nadu and Uttarakhand.

⁶ Jayna Kothari, Almas Shaikh, Aj Agrawal, ‘The Intersection of Disability and Caste: A Policy Paper’ (CLPR, Bangalore, 2020).

been discriminated against, the SC blind will have no remedy to claim the discrimination based on his caste.⁷ However the MH act has considered intersectional discrimination. It has recognized the need to be treated equally with a physically handicapped person and the right against discrimination includes any other basis as well.⁸

DISTINCTION BETWEEN HORIZONTAL AND VERTICAL RESERVATION

There has been no intersection of horizontal and vertical reservation in the act. The act through section 3(1) provides the central government to ensure their enjoyment of the right to equality , life with dignity and respect for integrity equally with others. There is no inclusion of private entities as well.

INDIRECT DISCRIMINATION

Where the policy of the organization where you are working has a worse impact on the disabled than the non-disabled. It is presumed to be unlawful unless the good reason for the policy to be proportionate is shown. This is referred to as objective justification. The clause of discrimination in the act has been critically looked upon as section 3(3) of the act permits any sort of discrimination if proved that the act or omission is a proportionate meaning for achieving a legitimate aim. This has left open the interpretation for the bureaucracy thereby giving them an unfettered power for their discretion. There seems to be no logic for this restriction when we have judgments permitting reasonable classification. The rules will be made separate by the states as well as the centre. There is scope for subjectivity by the states.

REASONABLE ACCOMMODATION

The act has not made the principle for reasonable accommodation a right but only an enabling provision which depends on some factors such as the resources available for the organization to make adjustments. However, we need to shift relating reasonable accommodation to the theory of distributive justice and see the law as anti-discrimination only when we acknowledge it as an expression of stereotyping, contempt or devaluation and not just an unfair frugality in distribution of the resources.⁹

⁷ This example is based on the explanation of intersectionality in Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, UNIVERSITY CHICAGO LEGAL F. 139 (1989).

⁸ MH Act, Section 21(1)(a).

⁹ Is disability discrimination different. David Wasserman. Philosophical Foundations of Discrimination Law Edited by DEBORAH HELLMAN and SOPHIA MOREAU

INTENT OVER DISPARATE IMPACT THEORY

When an employers' neutral policies have an adverse effect on the members of a protected group it is referred to as the theory of disparate impact. In such cases there is no need to show intentional discrimination but to show how a policy can have an adverse impact. The employer always has a defense of "business necessity".¹⁰ In June 2020 the ministry of social justice and empowerment had expressed¹¹ the need to dilute clauses for the punishment for the offenses under the act. it reasoned that risk of imprisonment for acts or omissions which are not necessarily fraudulent or are not malafide intent will be a bigger hurdle for attracting investments. Criminal penalties including imprisonment for minor offences hurt investments from the domestic as well as the foreign markets. In such instances according to the proposed amendment and acknowledging the current provision more regards has been made to prove the intention behind discriminating rather than the use of disparate impact theory. Why is intention more important than the disparate impact? The impact of such an approach has been analyzed in a paper¹² where it is concluded that intention requirements for some claims and damages will not be proper damages the policy should guide the court to determine whether reasonable accommodations have been denied rather than dismissing cases in the absence of malicious intent.

CONCLUSION

The act has enriched the equality and non discrimination. It has the potential to transform the existing realities.¹³ The act is based on the theory of discrimination by perception and the theory of discrimination by association. The former is when someone acts thinking the person to be disabled whereas the latter is when someone is affected by being related to a person with disability. The act is predominantly an anti discrimination norm according to the conditions by tarunabh khaitan except for the loopholes due to the difference in physical and mental impairment. The act has addressed direct discrimination, harassment and victimization, but it has failed to address indirect discrimination, reservations, reasonable accommodation, attitudinal transformation and

¹⁰ Johnston, Sara Pfister. "Unequal treatment or uneven consequence: a content analysis of Americans with Disabilities Act Title I disparate impact cases from 1992 - 2012." PhD (Doctor of Philosophy) thesis, University of Iowa, 2013. Pg 92.

¹¹ A letter written to seven BGOs titled decriminalization of minor offences for improving business settlement and unclogging court processes, amendment in RPWD act 2016.

¹² Mark C. Weber, Accidentally on Purpose: Intent in Disability Discrimination Law, 56 B.C.L. Rev. 1417 (2015), <http://lawdigitalcommons.bc.edu/bclr/vol56/iss4/4>.

¹³ RIGHTS OF WOMEN WITH DISABILITIES UNDER INDIAN LEGISLATIONS —Swagata Raha* & Shampa Sengupta SOCIO-LEGAL REVIEW VOL. 14.

intersectional discrimination. The act does not cater to intersectional discrimination substantially but procedural framework under the act may make structural reforms with their socio-economic empowerment. It is highly suggested that we need to give more importance to the theory of disparate impact rather than the intention, the same has been justified with support of a proposed amendment by the lawmakers.

