CHAPTER – 4

PROTECTION OF RIGHTS OF PERSONS WITH DISABILITIES DURING THE CONSTITUTIONAL ERA

Constitution of India and protection of the rights of the persons with disabilities:
As already pointed out, commencement of the Constitution of India created a new horizon for growth of the rights of the people with disability and provoked legislators and policy makers by creating an imperative to do more about the protection of rights of persons with disabilities in an articulated manner. Constitutional text particularly chapter III and IV provided great vigour to the Indian legislation and made them sensitive towards the cause of the persons with disabilities which subsequently yielded good fruits in the form of some good legislations dealing exclusively with the rights of the persons with disabilities.
Now in order to make a micro analyses in this respect we should make a brief reading of the relevant text of the Constitution of India, 1950 and their implications.
Part III and part IV of the Indian Constitution enumerates the Fundamental rights and Directive Principles respectively. At the time of framing of the Constitution, it was viewed that special legislation should be made for women, children and for those who were socially and educationally backward class though not specifically for disable person since concern for them did not grow adequately.

However, latently Constitution directed the states to ensure that disability does not become a reason to deny to any citizen opportunity for securing justice and equality.

The various Articles as understated bear the testimony to the fact-
Article 14 which guarantees the right to equality provides *the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.* Therefore physical or mental disability is not a barrier to avail the right of equality.
Article 15\(^1\) which make guarantee the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. It will be seen that the prohibition of discrimination applies to State action relating to the citizen’s political, civil or other rights. It applies to all representative public bodies such as municipal or local bodies. The right guaranteed under this Article ensures that there is no discrimination by the State against citizens in matters of access to shops, public restaurants, hotels and place of public entertainment. It also applies in respect of use of wells, tanks, bathing ghats, roads and place of public resort which are maintained wholly or partly out of State funds or dedicated to the use of the general public. This right has therefore, affects the citizen as individual and is a guarantee against the citizen not to be subjected to discrimination whether he is disabled or not.

\(^1\) Article 15 of the Constitution states that (1) The State shall not discriminate against any citizens on grounds of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to:
(a) Access to shops, public restaurants, hotels and places of public entertainment; or
(b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of the State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
Article 16 which provide equality of opportunity in matters of public employment, that is opportunity to all citizens in the matter of appointment to any office or other employment under the State. Here it needs to be mentioned that under section 39 of the PWD Act 1995, 3% reservation in employment has been guaranteed for persons with disabilities. If Justice is to be done to Article 16 which is an example of protective discrimination then the vacant post should be properly identified to suit the requirements of the persons with disabilities.

The true meaning of equality of opportunity is not just a matter of legal equality. It depends on the person’s efficiency and capabilities. It is open to the appointing authority to lay down conditions of service for proper discipline amongst employees. This Article applies to appointment, promotion and covers all posts under the State whether permanent or temporary. Thus under this Article every citizen whether disabled or not has a right to apply for any post under the Government and the right to be considered on the merits for the post applied for. What is guaranteed is equality of opportunity and not any right to be appointed to the post under the State. The Article does not
prohibit the State to prescribe reasonable rules for selection or promotion.\textsuperscript{2}

Article 17 speaks about abolition of Untouchability

"Untouchability" is abolished and its practice in any form is forbidden. According to the Article of any disability arising out of 'untouchability' is an offence punishable in accordance with law.

The object of the Article is to free the society from prejudices and make it progressive and to have broad outlook. Parliament has enacted the Untouchability (Offences) Act, 1955 for prohibiting the practice of untouchability. The expression 'untouchability' refers to those social disabilities which have been imposed on some people since their birth. Likewise persons with disability, physical or mental may also find themselves victims of this practice. Leprosy cured persons who are recognised as a group of disabled persons under PWD Act\textsuperscript{3} is often treated as untouchables. The Protection of Civil Rights

\textsuperscript{2} In the case of Gazula Dasaratha Rama Rao v. State of A. P., AIR 1961 SC 564. Justice Das said "Article 14 guarantees the general right of equality; Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Article 15 is more general than Article 16, the latter being confined to matters relating to employment or appointment to any office under the State. Article 15 does not mention descent as one of the prohibited grounds of discrimination as Article 16 does."

\textsuperscript{3} The Person's with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.
Act, 1955 also provides for punishment for practicing untouchability in any form. In this respect the researcher finds it to have similarity with the Lepers Act of 1898.

Article 21\(^4\) is a guarantee of life and personal liberty of a citizen and that the procedure established by law will be followed if a person is deprived of the same. The procedure must be reasonable, fair and just. The Article ensures the right to live with human dignity, the right to livelihood, to shelter right to decent environment, reasonable accommodation, right to good health, right to vote, water, education, medical care and the right to have the necessities of life as a human being.

The Article is the heart and soul of the Constitution. This Article negatively is a guarantee against state interference in the lives of the disabled person also; on the other hand positively the Article assures if a handicap person needs any apparatus or any assistance to live a life with dignity, it must be provided by the State. It is only because of this Article that other provisions in various others Acts relating to protection of persons with disabilities becomes meaningful.

\(^4\) Article 21 states that No person shall be deprived of his life or personal liberty except according to procedure established by law.
Article 23 also provides a guarantee against trafficking against human beings and all forms of forced labour. However, the State can impose compulsory services for public purpose. This Article also includes trafficking in women and children for immoral and other purposes. Physically challenged person are often found to become 'begar' and are vulnerable to this kind of exploitation. Therefore, the article also provides protection to the persons with disability.

Article 41 is the most important Article meant for people with disability. Though it is not enumerated under the Fundamental Rights Chapter and falls under the Directive Principles of State Policy, therefore, the infringement of this right cannot be sued in the Court of Law. But if conjointly read this Article as a part of right to life, which the Apex judiciary in more than one case has

5 Right against exploitation
1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and nay contravention of this provision shall be an offence punishable in accordance with law.
2) Nothing in this Article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

6 Right to education and to public assistance in certain cases
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 underserved want.
upheld the view, then this Article will become the most important human right for the persons with disabilities. The Constitution in this Article refers to "disablement" which actually has reference to persons with disabilities. The directions contained in this Article is for making effective provision for securing right to work, education and public assistance incase of unemployment, sickness and disablement. In this respect it appears to be justified that fatal disease or any kind of severe illness which leads to disablement should be protected under the broad umbrella this Article. The expression 'in other cases' also relates to persons with disabilities and also includes disabilities which are medically recognized throughout the world.

In its earlier study that is in Chapter I, it has been observed that the term 'disablement' mentioned anywhere be it constitutional text refers not only to international human rights documents recognised by law, but also to other forms of disabilities, like the victims of war crimes or of terrorist activities. Therefore, disablement held in Article 41 includes all forms of 'disabilities' i.e. all kinds of mental and physical inabilities and against all such cases the State is liable to take appropriate steps.

Protection of the rights of the persons with disabilities under Indian Law in post – Constitutional Era.
THE REPRESENTATION OF THE PEOPLE'S ACT 1950 passed *interalia* which was in order to give every citizen important political rights provides in *Section 60* that only citizens having sound mind a voting right. Apart from mental disability, no other physical disability can disqualify a person to exercise his political right to vote.

In this respect it is to be noted that this right of the disabled persons has become operational recently in the 15th Loksabha General Election 2009. The major political parties in the 15th Loksabha Elections 2009 has ensured in their ‘Political Manifesto’ to give equal rights and justice to persons with disabilities.

SPECIAL MARRIAGE ACT 1954 is another piece of legislation which has the provision for a special form of marriage in certain cases, for the registration of such marriage and certain other marriages and for divorce also. Provisions relating to persons with disability are covered under Section 4
and Section 27 of the Act, where unsoundness of mind is a ground of divorce. Similarly, in two other Acts that is HINDU MARRIAGE ACT 1956 AND HINDU SUCCESSION ACT 1956 has provided more provision for mentally disabled persons. In the former Act marriage is not allowed if one of the partners is lunatic at the time of marriage and lunacy is a ground for divorce and in later Act unsoundness of mind is a bar to inheritance of property. All these Acts recognize mental disability as a negative aspect of a person's life which curtails his ability to act as normal human beings. However, conversely

7 Section 4 states that Conditions relating to solemnization of special marriages - Notwithstanding anything contained in any other law for the time being in force relating to solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of marriage the following conditions are fulfilled, namely,-

1. neither party has a spouse living;
2. neither party – i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or iii) has been subject to recurrent attacks of insanity or epilepsy.

Section 27 states that Divorce—Subject to the provisions of this Act and to the rules made there under, a petition for divorce may be presented to the District Court either by the husband or the wife on the ground that the respondent – has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent. As marriage is an integral part of life therefore mental disorder of unsoundness of mind has been given due importance than any kind of physical disability.
it protects unsound persons not to the exploited in the name of marriage.

Also though most of the laws dealing with marriage and divorce have a provision relating to insanity, mental disorder and lunacy as valid ground of divorce. But apart from such mental disability, other forms of disability are not valid ground for divorce in the eye of law whether it may be blindness, dumb or deaf or locomotor disability. In this way, this Acts protects other category of disabled persons other than the unsound person.

CHILDREN ACT 1960 is another Act which seeks to provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children including children suffering from leprosy, unsoundness of mind and for the trial of delinquent children in the Union Territories.  

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8 Section 47 deals with Transfer of Children of unsound mind or suffering from leprosy – (1) If it appears to the Administrator that any child kept in a special school or children’s home is suffering from leprosy or is of unsound mind, the Administrator may order his removal to a leper asylum or mental hospital or other place of safe custody for being kept there for the remainder of the term for which he has to be kept in custody under the orders of the competent authority or for such further period as may be certified by a medical officer to be necessary for the proper treatment of the child.

(2) Where it appears to the Administrator that the child is cured of leprosy or of unsoundness of mind, he may, if the child is still liable to be kept in custody, order the person having charge of the child to send him to the special school or children’s home from which he was removed or, if the child is no longer liable to be kept in custody, order him to be discharged.
Analyses of the provisions of the Children Act 1969, reveals that proper care and protection of children suffering from leprosy or unsoundness of mind and their rehabilitation in the society are the main concern of this legislation.

INCOME TAX ACT 1961 is another example of beneficial legislation which to some extent renders benefits to disable persons. Certain sections of this Act have been dedicated to the person with disabilities by granting tax concessions to them. However in a limited way, because only disabled person as a handicapped person, who is suffering from a permanent physical disability (including blindness) or disable persons who is subject to mental retardation which has the effect of reducing considerably such person’s capacity for normal work or engaging in a gainful employment or occupation, as is stated in section 80DD of the Act will be receiving such concession. By a recent amendment to this section made by the Finance Act, 2004, the persons with autism, cerebral palsy and multiple disabilities under the National Trust for Welfare of Persons with Autism Cerebral Palsy, Mental Rehabilitation and Multiple Disabilities Act 1999 have also been covered by the said section for the purposes of availing tax benefits and this is no doubt a
positive attempt to give coverage of tax benefits to the persons with disabilities.\textsuperscript{9}

Under Section 80DD of the Income Tax Act, 1961, it has been provided that deductions will be available to an assessee resident in India, being an individual or Hindu Undivided Family in respect of maintenance including medical treatment of a handicapped dependant. It provides that where the assessee

\textsuperscript{9} Section 30 of the Act states that how lunatic prisoners are to be dealt with ------
Where it appears to the State Government that any person detained or imprisoned under any order or sentence of any court is of unsound mind, the State Government may, by a warrant setting forth the grounds of belief that the person is of unsound mind, order his removal to a lunatic asylum or other place of safe custody within the State there to be kept and treated as the State Government directs during the remainder of the term for which he has been ordered or sentenced to be detained or imprisoned or, if on expiration of that term it is certified by a medical officer that it is necessary for the safety of the prisoner or others that he should be further detained under medical care or treatment, then until he is discharged according to law.

(2) Where it appears to the State Government that the prisoner has become of sound mind, the State Government shall, by a warrant directed to the person having charge of the prisoner, if still liable to be kept in custody, remand him to the prison from which he was removed, or to another prison within the State or if the prisoner is no longer liable to be kept in custody, order him to be discharged.

(3) The provisions of section 9 of the Lunatic Asylums Act, 1858, shall apply to every person confined in a lunatic asylum under sub-section(1) after the expiration of the term for which he was ordered or sentenced to be detained or imprisoned and the time during which a prisoner is confined in a lunatic asylum that sub-section shall be reckoned as part of the term of detention or imprisonment which he may have been order or sentenced by the Court to undergo.

(4) In any case in which the State Government is competent under sub – section(1) To order the removal of a prisoner to a lunatic asylum or other place of safe custody within the State, the State Government may order his removal to any asylum or place within any other State or within any part of India to which this Act does not extend by agreement with the State Government of such other State and the provisions of this section respecting the custody, remand and discharge of a prisoner removed under sub-section(1) shall, so far as they can be made applicable, apply to a prisoner removed under this sub-section.
during the previous year has incurred any expenditure for the medical treatment (including nursing), training and rehabilitation of a handicapped dependant or paid or deposited any amount under a scheme framed in this behalf by the Life Insurance Corporation of India or Unit Trust of India and approved by the Central Board of Direct Taxes for the maintenance of a handicapped dependant would get tax benefit under this section.

In such event the assessee will be allowed deduction of a sum of Rs. 50,000/- in respect of the previous year. The deduction shall be allowed only if a scheme of LIC or UTI provides for payment of annuity or lump-sum amount for the benefit of a handicapped dependant in the event of the death of the individual. The assessee has to nominate either the handicapped dependant or any other person or a trust to receive the payment on his behalf for the benefit of the handicapped dependant. If the handicapped dependant pre-deceases the individual or member of the Hindu Undivided Family the amount so deposited is deemed to be the income of the assessee of the previous year in which such amount is received by the assessee and shall be chargeable to tax as income of that previous year.
A handicapped dependant, has been defined to mean a person who is a relative of the individual or a member of the Hindu Undivided Family and is not dependant on any person other than such individual or HUF for his support or maintenance. Also, the handicapped dependant should be suffering from a permanent physical disability (including blindness) or is subject to mental disability as specified in Rule 11A\(^{10}\) made by the Central Board of Direct Taxes for the purpose of this Section. The said disability must be certified by the physician, surgeon, a psychiatrist, as the case may be, working in a Government hospital and which has the effect of reducing considerably such person’s capacity for normal work or engaging in a gainful employment or occupation\(^{11}\).

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\(^{10}\) Rule 11 A – Central Board of Direct Taxes for the purpose of Section 80D, States that
i) Permanent physical disability shall be regarded as a permanent physical disability if it falls in any one of the categories specified below, namely :-
   a. Permanent physical disability of more than 50 per cent in one limb; or
   b. Permanent physical disability of more than 60 per cent in two or more limbs; or
   c. Permanent deafness with hearing impairment of 71 decibels and above; or
   d. Permanent and total loss of voice;

ii) Blindness shall be regarded as a permanent physical disability.

iii) Mental retardation shall be regarded as a mental retardation if intelligence quotient is less than 50 on a test with a mean of 100 and a standard deviation of 15 such as the Wechsle scale.

\(^{11}\) Supra n.10
In this context it is to be noted that under the Finance Act 2003, the meaning of the term ‘disability’ was brought in conformity with the Persons with Disability Act 1995, for income earned during the financial year 2003-2004. Prior to the Finance Act 2003 disability was referred to as handicap and was defined in Rules 11A and 11D of the Income Tax Rules. Curable disability or disability which is severe now but may not be severe later requires to be certified for a limited period by the medical practitioners. The burden of proof for such certification lies on the disabled persons. Since disability has a larger meaning and includes those who are leprosy cured or with locomotor disability and mentally ill, are also covered by the Income Tax Act 1961. The Income Tax return has a column in which disabled assesses needs to fill for deduction claimed under Section 80U. An original disability certificate has to be attached at the time of the first application. In successive years the photocopy of the same can be submitted, if the disability is of a permanent kind. Under Section 80DD, the deduction limit has been increased to Rs. 50,000/- per annum from Rs. 40,000/-.  

Where the disability is a severe one, the deduction is of Rs.

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12 It has been certified by the CBDT by its Circular No.702 dated 3.4.1995 that in respect of any expenditure on maintenance admissible under Section 80Dd there is no need for proof of expenditure as long as the person has incurred some expenditure and provided the necessary certificate of disability.
75,000/- By the Finance Act, 2004 those suffering from autism, cerebral palsy and multiple disability have also been included within the purview of the Income Tax Act 1961 for claiming deduction under Sections 80U and 80DD. In the case of transport allowance for blind or orthopaedically disabled employees for commuting between their residence and places of employment, they can get exemption to the extent of Rs. 800/- per month. If they happen to be blind or orthopaedically handicapped with disability of lower extremities, the transport allowance is exempted upto Rs. 1600/- per month under Rule 2BB of the Income Tax Rules. However, this allowance will be exclusive of the salary or has to be separately given as the exemption is not deductible from the salary itself. Under the Finance Act, 2003, a certificate of disability for a limited number of years where the nature of disability requires re-assessment needs to be submitted. The disability certificate is to be renewed after the expiry of the period specified in the original certificate, wherever it is for a limited period.
From such analysis it can be said that in the post Constitutional period, the Income-Tax Act 1961 provides considerable tax relief for persons with disabilities and Indian legislature deserves all praise for providing such benefit through the
Income Tax Act and such a tax relief provided therein is exclusively meant for the welfare of the persons with disabilities.

Simultaneously with the Income Tax Act 1961, the APPRENTICE ACT 1961 was enacted in the same year which states that even if a person is physically handicapped he can be engaged as an apprentice in a particular trade. But this engagement as an apprentice can be done only if the person is found fit for such apprenticeship. The provision itself protects the right of the disabled against any discrimination in becoming an apprentice under the law.  

LIMITATION ACT 1963 is noteworthy legislation which confers a right to persons with disabilities. Under Section 7 of the Act it is being stated that when one of several persons jointly entitled to file a suit or make an application for the execution of a decree is under any disability and a discharge can be given without the concurrence of such persons, time will run against them all, but where no such discharge can be given time will not run as against any of them until one of them becomes capable of

13 Singh, A.N.; Enabling the Differently Able, Shipra Publications, 1st ed. 2003, p.18
giving such discharge without the concurrence of the others or until the disability has ceased.

But it may be pointed out that the Act has not provided the definition or their term 'disability' anywhere. Such a shortcoming may sometimes create a bar against the disabled persons to enjoy their rights. Otherwise, both the Apprentice Act 1961 and Limitation Act 1963 have incorporated few provisions which render benefits to the persons with disabilities.

MEDICAL TERMINATION OF PREGNANCY ACT 1971 is another ancillary substantive social legislation which seeks to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. Section 3(4)(a) of the Act provides that in the case of the pregnancy of a woman who is above eighteen years and is a lunatic, her pregnancy can be terminated only with the consent of her guardian in writing. It is a welcome provision made in the Act considering well being of lunatic mother and welfare aspect of the child but not without controversy. The controversy arises on the fact that since right to motherhood is a basic human right of a woman, therefore can it be taken away by legislation? It obviously proves that she was not taken adequate
care by her family members, be it parental home or in laws house. Therefore, termination of the pregnancy of lunatic mother cannot be the only solution.\textsuperscript{14} She should be provided proper medical treatment to overcome her disability and thereafter can be a mother so that proper care of the child can be taken by her own.

CRIMINAL PROCEDURE CODE 1973, which is a major procedural criminal law of India, in Section 125 has stated that a Magistrate can pass order for the maintenance of wives, children and parents in circumstances which they are unable to maintain themselves. Clause (c) of sub-section (1) of section 125 provides that if a person having sufficient means neglects or refuses to maintain his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury is unable to maintain himself, a Magistrate of the first class may order such person to make a monthly allowance for the maintenance of such child. The matter needs to be disposed of within sixty

\textsuperscript{14} Such a view was highlighted in the Regional Workshop on Disability Organized by National Human Rights Commission and National University of Juridical Science at Kolkata 22-23\textsuperscript{nd} August 2008.
days from the date of the service of notice of the application to such person.\textsuperscript{15}

CONSUMER PROTECTION ACT 1986 is a kind of social legislation where disability arising out of medical negligence has been brought to focus. Cases of various kinds of disabilities i.e. permanent, partial, loss of an organ occurring due to wrong treatment or incorrect diagnosis are sometimes awarded compensation by the Court, if it is caused by the mistake or negligence by the other party.

In one such instance of medical negligence, the complainant was a healthy girl of 17 having no complication and had no complaint when she underwent a cosmetic surgery to improve her height with kings fixator. But due to defect in the operation and treatment, her left leg remained shorter by $1\frac{1}{2}$ inch than the right leg and hence she had to lean on the left. In such

\textsuperscript{15} Apart from this chapter XXV the Code also deals with provisions as to accused persons of unsound mind.
Sections 328 to 339 falling within this Chapter deal specifically with the procedure in case of accused being lunatic, procedure in case of person of unsound mind tried before Court, release of lunatic pending investigation or trial, enquiry or trial, procedure on accused appearing before Magistrate or Court, when accused appears to have been of sound mind, judgment of acquittal on ground of unsoundness of mind, person acquitted on such ground to be detained in safe custody, power of State Government to empower officer-in-charge to discharge, procedure where lunatic prisoner is reported capable of making his defence, procedure where lunatic detained is declared fit to be released, and delivery of lunatic to care of relative or friend. So, unsound and lunatic accused are entitled to separate treatment under the Criminal Procedure and there are sure reasons to justify such separate or distinct procedure.
circumstances giving due regard to the nature of the case and on the basis of evidence tendered by the complainant, the opposite parties were directed to pay Rs. 5,00,000/- to the complainant\textsuperscript{16} under the Consumer Protection Act 1986.

This proves that provision made under the Act can protect an able person who acquires disability due to medical negligence.

LEGAL SERVICES AUTHORITIES ACT, 1987 which \textit{interalia} seeks to constitute legal service authorities to provide free and compulsory legal services to the weaker sections of the society to ensure that justice should not be denied to any citizen due to economic or other disabilities. Section 12 has laid down the criteria which entitled a person to receive legal services under this Act which also includes a mentally ill or otherwise disabled person.\textsuperscript{17}

\textsuperscript{16} Nadiya vs. Proprietor, Fathima Hospital, II (2001) CPJ 93
\textsuperscript{17} Section 12 Clause (d) and (g) of the Act states, the criteria for giving legal services. Every person who has to file or defend a case shall be entitled to legal services under this Act and the two clauses specially states that

(a) A person with disability as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);

(g) In custody, including custody in a protective home within the meaning of clause (g) Of section 2 of the Immoral Traffic (Prevention) Act, 1956, or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986, or in a psychiatric hospital of psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987.
Hence this Act like the PWD Act 1995 ensures legal service to these vulnerable classes of persons, so they are not denied of justice.

Prior to the enactment of Mental Health Act 1987, Constitutional accountability towards the persons with disability did not take any articulated shape through any comprehensive legislation; rather this agenda was set apart and did not get priorities or national agenda. However, during more than four decades in post Constitutional era few legislations were passed where the issues of disable persons were taken as an ancillary matter and was dealt accordingly. But with the passing of the Mental Heath Act 1987 and other few Acts to deal with the protection of disable persons exclusively like Rehabilitation Councils of India Act 1992, Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act 1995 and The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999 a new era of the legislative protection for disable persons began to set in. This thing will be more clear and evident if we examine these Acts in some detail and make a microfine analysis of them.
THE MENTAL HEALTH ACT 1987 as already pointed out, one of the most important Acts exclusively dedicated to disable persons. This Act was passed considering the fact that mentally disabled persons are the most vulnerable section in the society. They face more risks in their day to day life, become neglected, abused and are prone to injury accident and impairment along with loss of their property and other belongings.

Therefore, in order to protect them from every risks and to ensure them proper treatment and rehabilitation, Indian Parliament enacted the Mental Health Act, 1987. The Act extends to the whole of India. Previously the treatment and care of the mentally ill persons was regulated under the Indian Lunacy Act, 1912. Under this Act, mentally ill person are those persons who are in need of proper treatment for any mental disorder apart from mental retardation.

The aims and objectives of passing the Act is stated in the Act itself. It aims to change the attitude of the society and ensures that no stigma should be attached to such illness as it is curable particularly if diagnosed at an early stage. Thus, the mentally ill

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18 This Act is to consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provision with respect to their property and affairs and for matters connected or incidental thereto and is enacted by Parliament in the Thirty-eighth year of the Republic of India.
persons are to be treated like any other sick persons and the environment around them should be made as normal as possible.

The objective or goals to be achieved by the Act are:-

i) To regulate admission to psychiatric nursing homes of persons who are mentally ill;

ii) To protect citizens from being detained in psychiatric hospitals or psychiatric nursing homes without any reason or enough cause;

iii) To regulate responsibility for maintenance charges of mentally ill persons who are admitted to psychiatric hospitals or psychiatric nursing homes;

iv) To provide facilities for establishing guardianship or custody of mentally ill persons who are incapable of managing their own affairs;

v) To provide for the establishment of Central Authority and State Authorities for Mental Health Services and to regulate the powers of the Government for establishing, licensing and controlling such psychiatric hospitals and psychiatric nursing homes for mentally ill persons;

vi) To provide for legal aid to mentally ill person at State expense in certain cases.
With these aims the Act practically attempts to support the mentally ill persons in a comprehensive way. Among few important sections which strike to achieve these goals Section 3 of this Act is notable one. It enables the Central Government to establish an Authority which shall be in-charge of regulation, development, direction and coordination of mental health services, supervision of psychiatric hospitals, psychiatric nursing homes, including the places where mentally ill persons are kept or detained section also authorize such authority to provide advice to the Government on matters relating to the mental health because anything associated with brain is very much delicate matter to deal with.

Similarly, Section 4 empowers the State Government to establish an authority which shall look after the similar activities indicated in Section 3, to regulate mental health services at state level.

Section 5 says that Central Government in any part of India and the State Government within its jurisdiction may open psychiatric hospitals and psychiatric nursing homes for admission, treatment and care of mentally ill persons. Further
suggests to open separate psychiatric hospital or psychiatric nursing homes for those who are below 16 years of age, drug/alcohol addicted and are convicted of any offence and such other category of persons.

Section 6 states that except Governmental psychiatric hospitals, existing Psychiatric hospitals /psychiatric nursing homes shall apply for license within three months after the commencement of this Act. It also says that on and after commencement of this Act, no person shall open a Psychiatric Hospitals/Psychiatric Nursing Home without obtaining a valid license as stated in the Act and the licensing authority after making necessary inquiry of its justification may grant the license. In case of refusal the applicant is to be communicated back with reasons for such a refusal.

License granted under this Act is valid for 5 years. For the renewal of the license, application is to be made at least one year before the date of expiry.19

The measures suggested in this Section, unfortunately is not being implemented strictly. Also in case or licenses obtained through fraud or any illegal means or incase of failure to obtain such license, the Act has not prescribed any punishment.

19 Section 9 of the Mental Health Act 1987
Section 13 empowers inspecting officers to inspect the hospital or psychiatric home as and when such an inspection is necessary. They are authorized to take an interview of any patient in a private chamber, if there is any reason to believe that the patient is not getting suitable treatment and care and accordingly can send a report in the matter to the licensing authority. The licensing authority can in turn issue necessary order to such hospital for suitable treatment and proper care of the patients.

Another important section in the Act is Section 23 where, the officer-in-charge of the police station may be informed the cause for taking patient under protection (i) if any person found wandering in the limits of the police station because of the mental illness or (ii) who is dangerous by reason of mental illness. Person taken into protection under this section shall be informed the reason for his protection. In case, he lacks the power to understand, his family or relatives or friends will be informed of his detention. The detained person shall be produced before the Magistrate within 20 hours of such detention and he may be ordered by the Magistrate for medical examination. Further if the person is found mentally ill, he may be ordered for treatment in psychiatric hospital or psychiatric nursing home. Section 25 says that when a police officer or any
other officer has the reason to believe that mentally ill person is neglected or not under proper care and control, on receiving such information, local Magistrate may order the family or relative concerned to maintain the mentally ill person and to take proper care and control over him. If there is no person legally bound to look after the ill person or such person or a person who is legally bound to take care, refuses to take care, the Magistrate shall send the mentally ill person to a psychiatric hospital or psychiatric nursing home.\textsuperscript{20}

Another important provision of this Act is Section 37 which states that the Government (either Central / State) as the case may be shall appoint at least five visitors of whom one shall be Medical Officer and two Social Workers for every Psychiatric Hospital / Psychiatric Nursing Home, whereas the head of the

\textsuperscript{20}Section 27 indicates that an Order passed under The Prisoner Act, 1900, Air Force Act 1950, Army Act, 1950, Navy Act 1957 or under Section 330 of the Criminal Procedure Code 1973, directing the reception of a mentally ill person into a psychiatric nursing home or psychiatric hospital is sufficient for admission. Section 36, points out that a Commissioner of the police may exercise the powers and the functions of a Magistrate under Section 23, 24 and 28 and the functions of an officer incharge of the police station may be exercised by police officer and below the rank of Inspector.
medical services of the state shall be an ex-officio visitor to all the psychiatric hospitals/psychiatric nursing homes.\textsuperscript{21}

Section 50 of the Act provides that in case where an alleged mentally ill person having property, application for the investigation of the mental condition of such person may be filed either by relative or public prosecutor or Advocate General of the state, stating whether property includes land or interest in land. On receipt of an application for investigation, the District Court shall serve notice to the alleged mentally ill person and to the person who has such custody to appear for examination. Subsequently according to Sections 52, 53 & 54 of the Act, if court finds in an enquiry that a mentally ill person is incapable of taking care of himself and managing his property, the court, shall order for the appointment of a guardian for care of the mentally ill person and for management of his property. In case,

\textsuperscript{21}Section 39 says that persons detained in a Jail under Air Force Act, 1950; Army Act 1959; or Navy Act 1957; or under Section 330 or 335 of the Criminal Procedure Code 1973 or if such persons is detained in a Psychiatric Hospital/ Psychiatric Nursing Home, at least three of the visitors including a social worker shall visit at least once in three months to assess the mental condition of the detained person and shall require to make a report to the Authority under whose order the detention has been sanction. Similarly, Medical Officer In-charge of the hospital shall make special report regarding mental health of the person admitted, and submit it to the authority under whose order detention has been made. In case such person has been detained in the jail, a psychiatrist shall once in three months visit the jail and make a report about the physical and mental health conditions of such person to the same authority.
where if it is found that the person is not mentally ill, the court shall dismiss the application.\textsuperscript{22}

Thus it is seen that the Act attempts to protect mentally ill persons who have become dangerous and creates nuisance to others. The Act protects citizens who may be thrust in the psychiatric hospitals or nursing homes without sufficient causes. The Act also provides security to mentally sick persons by fixing responsibility of the authority to the Hospitals and Nursing Homes and also when such persons are admitted to such Hospitals and Nursing homes. In addition, the Act also provides facilities for establishing guardianship or custody for mentally ill persons who is incapable of managing their needs.\textsuperscript{23}

The Mental Health Act 1987 also defines in detail the qualifications and duties of a legal guardian and / or manager of a mentally ill person and thus subserve a great need for those cases where the person is unable to manage his / her own property affairs. Practically speaking, this Act provides a broad legislative paradigm which the Indian Judiciary followed

\textsuperscript{22}Section 56 reads that the manager appointed under this Act shall execute a bond with sureties, to account for all receipts from the property of mentally ill person and shall exercise all powers on behalf of the ill persons.

\textsuperscript{23}Singh, A.N.; Enabling the Differently Able, Shipra Publications, 1\textsuperscript{st} ed. 2003, p.46
subsequently. In several judgments, both under the Mental Health Act 1987, the courts have paid enough attention to the legal consequences and gravity of declaring a person to be of “unsound mind” and have directed that justice must be done but with due care. The legislative intention embedded in this comprehensive Act is to protect the person and property of the mentally ill. Judiciary did never overlook the intention of the legislature inherent in the statute. Also it never absolves the natural guardians i.e. the parents from the responsibility of approaching the appropriate courts to appoint guardians of their own children after the attaining the age of majority. The Act however has its own seamy side. The major drawback of the enactment is that government medical officers are not made answerable for making wrong assessments. Also there is no provision for penalty of offering false medical opinion and even permits the authority to go scot free misusing its powers. The Mental Health Act 1987 also fails to consolidate the laws governing persons with mental disabilities. Enactments, like the Medical Termination of Pregnancy Act allow, the termination of pregnancy on the ground of apprehension that the child may be born with a serious physical or mental disability. Even Prisons Act continues to apply the backdated Indian Lunacy Act of 1912
to determine the procedure for dealing with mentally ill convicts. Such things continues despite the fact that the Criminal Procedure Code 1973 lays down extensive procedural laws if an accused is found to be mentally ill or disabled. Despite such drawbacks, it can be said that Mental Health Act 1987 is the first of its kind in India which is by nature a comprehensive law dealing with mentally disabled persons. It is true that PWD Act of 1995 recognised mental illness as one form of disability, together with other form of disabilities, yet the Mental Health Act 1987 remains the only Act enacted exclusively for the mentally ill persons.

This enactment has given the rule making provisions to the authorities constituted under the Acts for its better implementation. It has conferred powers under sub section 1 and sub section 2 of Section 94, the rule making powers to the Central Government namely The Central Mental Health Authority Rules 1990 and to the State Government namely The State Mental Health Rules 1990.
The Central Mental Health Authority Rules, 1990

The Central Government in exercise of the powers conferred by subsection 1 of Section 94 of the Mental Health Act 1987 together with Section 22 of the General Clauses Acts 1897 made the following Rule.24

Apart from the definition clauses in Chapter 1, Chapter 2 consists of the constitution of the Central Mental Health Authority, the disqualification of its members and terms of office of the members. Chapter 3 consists of the proceedings to be undertaken by the Central Mental Health Authority including the subjects of special meeting and annual meeting under Rule 8 & 9. The subjects, which are to be considered in these meetings are:

Firstly, the review of the progress of implementation of various provision of Mental Health Act during the preceding one year; Secondly, any other business brought forward with the consent of the Chairman or with the consent of the Officer presiding at the meeting in his absence. Apart from the procedures of the meeting and the proceedings of the Authority rule 14 also states that Secretary who is to be appointed by the Chairman from among the persons possessing post graduate degree in

24 Enforced w.e.f. 1-4-1993 vide SO 43(E), dt. 11-1-1993
Psychiatry and 3 years experience in such field, shall forward the copies of the proceedings of the Authority to the Central Government periodically.\textsuperscript{25}

These are the different aspects upon which these Rules has emphasized. Thus it is evident that the Rules aims at the implementation of the Act though a detailed procedure and method are not envisaged in it. It appears to the researcher that the Act itself deals with a confined and limited area of disability i.e. mental health only where a detailed Rule making power is thought to be not necessary or required.

\textbf{The State Mental Health Rules, 1990}\textsuperscript{26}

The Central Government in exercise of the powers conferred under subsection 2 of section 94 of the Mental Health Act 1987 together with section 22 of the General Clauses Act 1897 made these Rules which is comparatively detailed than the Central Mental Health Rules 1990.

Just like the Central Mental Health Rules, 1990, The State Mental Health Rules 1990 contains similar provisions like the

\footnotesize{\textsuperscript{25} Banerjee, Goutam; Disability and the Law, Commercial Law Publishers Pvt. Ltd., Delhi, June 2005, p.384
\textsuperscript{26} Has come into force w.e.f. 1-4-1993}
definition clauses, constitution of State Mental Health Authority, the disqualification and terms of office of its members, meetings, the subject matter of the meetings and its procedure, including the power of the secretary to forward copies of the proceedings of the Authority to the State Government periodically.

Apart from these provisions Chapter 4 of the Rules, states the license giving power under Rule 15 to Rule 21. This is the most important rule making power conferred on the Authority. It gives a detail picture on how application for license and grant of license is to be made; the licensing Authority has the power to refuse license if the applicant does not fulfill the condition laid down in Section 8 of the Act.27

27 Section 8 states that ‘Grant or refusal of license on receipt of an application under section 7, the licensing authority shall make such inquiries as it may deem fit and where it is satisfied that–
a) The establishment or maintenance of the psychiatric hospital or psychiatric nursing home or the continuance of the maintenance of any such hospital or nursing home established before the commencement of these Acts necessary;
b) The applicant is in a position to provide the minimum facilities prescribed for the admission, treatment and care of mentally ill persons; and
c) The psychiatric hospital or nursing home will be under the charge of a medical officer who is a psychiatrist shall grant a license to the applicant in the prescribed form and where it is not so satisfied, the licensing authority shall, by order, refuse to grant the license applied for: PROVIDED that before making any order refusing to grant a license, the licensing authority shall give to the applicant a reasonable opportunity of being heard and every order of refusal to grant a license shall set out therein the reasons for such refusal and such reasons shall be communicated to the applicant in such manner as may be prescribed’. The order of refusal of license should be communicated to the applicant.
Under Rule 19 there is a scope for renewal of license and even refusal of renewing the license under Section 9 of the Act. Rule 21 provides that the applicant who has agreed by the order of the licensing authority either refusing to grant or renew a license has a right to appeal to the State Government within 60 days. Apart from this Rule 21 imposes the manner and condition of maintaining psychiatric hospitals or nursing homes. This is the most important Rule provided here because in case of mental patients or persons suffering from different mental disorders has the right to stay in such hospitals or nursing homes which has a congenial environment as required for their treatment. The only aim and objective of the Mental Health Act 1987 is to provide for adequate care and all possible treatments necessary for the disabled persons. Therefore the State Mental Health Rules also aims to achieve these objectives of the Act.

It is also noteworthy, that Chapter 5 of the Rules states the minimum facilities required for treatment of outpatients in psychiatric hospital and nursing homes for the better treatment of patients. Even rule 23 clearly provides that if these minimum
facilities are not available the licensing Authority can revoke the license of such hospitals and nursing homes.\textsuperscript{28}

Another important aspect of the Rules is that the Miscellaneous Chapter (VI) provides for the qualification and function of persons to be appointed as visitors under Section 37 of the Act for e.g. he needs to have a degree in medicine with postgraduate degree in Psychiatry and experience as social worker or clinical psychologist; the visitors would be responsible for review of admission and discharge of patients, inspection of the wards and outdoor patients departments, functioning as liaison officer between the government and the hospital and such other functions necessary for better treatment of the mental patients. Thus the rules itself provides such detailed provisions for better treatment care and protection of the mentally disabled persons so that it facilitates the better implementation and application of the Mental Health Act 1987.

After perusing the Act and Rules relating to mental disabilities, the researcher has arrived at the conclusion that mental disabilities has been neglected for long and there is no collective voice to demand justice for them. It has been thought that all

\textsuperscript{28} Parmar S.P. & Desai S.S.; Law of Disability (Medical & Non Medical), Dwivedi & Company, Allahabad, 1\textsuperscript{st} ed., 2003.
persons with disabilities are largely thought of as having similar issues and facing similar violations, which assumes they need similar remedies.

The history of mental health legislations in India clearly demonstrate that though this need has long been recognized, legislative attempts to address it have not been satisfactory. The Lunatic Asylums Act of 1858 was the first enactment solely governing persons with mental disabilities. It was repealed by the Indian Lunacy Act 1912, which was in force for over three decades after Independence. The Mental Health Act of 1987, the statute currently in force, also has its inherent shortcomings.

The continuing discrimination between the mentally and the physically disabled has not yet been adequately addressed through legislation. It appears to the researcher that guarantee against discriminating between persons with mental disabilities and those with physical disabilities, discrimination amongst various forms and degrees of disabilities and discrimination between the disabled and the non-disabled have all to be regarded as equally inviolable.

The lack of collective voice in the area of the rights of mentally disabled persons is probably why the Mental Health Act and its Rules thereto remains unchanged in India.
REHABILITATION COUNCIL OF INDIA ACT, 1992

This is the next important legislation regarding welfare of the disabled after the Mental Health Act. This Act was enacted to replace and substitute the erstwhile Rehabilitation Council, a society formed and registered under the Societies Registration Act, 1860 and give it a statutory form. The Rehabilitation Council of India was set up by the Government of India in 1986 initially as a society to regulate and standardize training policies and programmes in the field of rehabilitation of persons with disabilities. The need for minimum standard was felt as the majority of persons engaged in education, vocation training, and counseling of persons with disabilities were not professionally qualified. Poor academic and training standards affects the chances of disabled succeeding in any work. Therefore, an Act of Parliament in 1972 converted the status of the Council to a statutory body with following aims.

1) To standardize training courses for professionals dealing with disabilities.

29The Act came into force on 1st September 1992 and has provisions relating to the constitution of the Rehabilitation Council of India, its functions and incidental provisions. The Act was amended in the year 2000 by Amendment Act No. 38 of 2000 w.e.f. 4th September 2000.

30 Media Style Guide–Rehabilitation Council of India New Delhi 2008
2) To prescribe minimum standards of education and training of various courses for professionals dealing with persons with disabilities.

3) To regulate these standards in all training institutions uniformly throughout the country.

4) To promote research in rehabilitation and special education.

5) To maintain Central rehabilitation Register for registration of professionals.

Functions of the Council

The functions usually performed by the council can be summarized as follows:

1. The qualifications granted by any University or other institutions in India that are included in the schedule of the Act have been recognized by the council time to time as qualifications for Rehabilitation Professionals.

2. Any University or other Institution which grants qualification for the rehabilitation professional but which are not included in schedule of the Act and on the basis of application of such universities to the Central Government to have any such qualification recognized, the Central Government, after consulting the Council may, by notification has amended the schedule so as to include such qualification.
3. The Council can also negotiate with the authority in any other country for setting of a scheme of reciprocity for the recognition of qualifications, and in pursuance of any such scheme, the Central Government can notify to amend the schedule so as to include any qualification which the Council deems necessary.

4. The Council has the power to register Rehabilitation Professionals in the Central Rehabilitation Register of persons possessing the recognized rehabilitation qualifications as per the schedule attached to the RCI Act.

5. The Council prescribes the minimum standards of education required for granting recognized rehabilitation qualification by Universities/Institutions in India.\(^\text{31}\)

6. The council prescribes the standards of professionals conduct and etiquette & code of ethics for Rehabilitation Professionals.

7. The Council has the power to inspect and recognize institutions/universities for training of professional, conduct courses in the field of rehabilitation and to recognize the degrees/diplomas/certificates awarded by these institutions.

\(^{31}\) Supra n.25
and to withdraw recognition, if such institution
universities does comply with its Rules.\textsuperscript{32}

Achievements of Rrehabilitation Council of India (RCI)

When the RCI was set up there were just 20 training institutions
for this purpose and by March 2005, this number of recognised
institutions was 184. Out of them 29 was chosen as best by the
Assessment and Accreditation Committee, which was accorded
accredited status since the process in this respect started in 2000.
These institutions have so far conducted over 250 programmes
containing approximately 250 batches at different levels from
certificate programmes to master's degree. Till date as many as
25,600 professional personnel are registered with RCI with
recognized qualifications in the area of rehabilitation and special
education. It has so far developed and approved 98 training
programmes to meet the manpower requirements of the 16
categories of professionals. However, 45 old/outdated courses
have been discontinued as recommended by an Expert
Committee and presently it is running 53 such courses.

\textsuperscript{32} The information are procured through telephonic conversation and from the
materials provided by the then Deputy Director, Administrator of RCI, B22 Qutub
Institutional Area, New Delhi-16.
Universities and other institutions have adopted these courses.\(^{33}\) RCI also offers assistance to institutions for conducting Continuing Rehabilitation Education (CRE) programmes to update the knowledge and skills of professionals already working in the field.

The council has taken another most important step in conducting a National Bridge Course from time to time to upgrade the skills of those working in this field even prior to 1993 by extending facility of registration to them as Rehabilitation Personnel. This is the landmark contribution made by RCI for the persons with disabilities. Started in 1998, total 12,665 special teachers and rehabilitation workers are imparted training in this course. The bridge course was conducted through 163 institutions in 23 States. This project has introduced reform in the disability sector.\(^{34}\)

Another major national programme conducted by RCI is related to orientation training of Primary Health Centre (PHC) doctors for disability management. Through this training programmes RCI has taken due care of medical aspects of the disabled

\(^{33}\) [www.disabilityworld.org](http://www.disabilityworld.org).

\(^{34}\) The success of this programme is evident from the fact that it was highlighted in the Limca Book of Records 2005 for training maximum number of candidates in a short span of time.
persons. At the grassroots level, the disabled at first approach the PHCs when they get any problem and if the doctors are not properly trained, they would not be in a position to realise the special needs of the disabled. So the RCI started a national programme of orientation of medical officers working in this field towards disability management in 1999.\footnote{The programme has successfully concluded in March, 2004 and has trained 634 master trainers and 18,657 medical officers in 32 States. In another initiative, the RCI launched a B.Ed. (Special Education) course in the distance mode through the Madhya Pradesh Bhoj (Open) University in August 2001. The programme has proved very successful and more than 6,000 candidates have joined the course.}

Since the Rehabilitation Council of India Act-1992 was essentially meant to regulate the training policies and programmes in the field of rehabilitation of disabled persons, therefore, Act itself has suggested the different categories of professionals and personnel who can undertake such training and will be under the purview of the Council, like audiologists, speech therapists, chemical Psychologists, Rehabilitation Engineers, technicians and such other professionals.

Last but not the least, the RCI has so far successfully utilized human resource to achieve universalisation of special education, a better environment for the rehabilitation of the disabled and for the promotion on research for proper rehabilitation and such
other activities that suits the Indian context which interalia includes the promotion of human resource development in the field of rehabilitation taking such other steps, so that the disabled persons could be absorbed in the various poverty alleviation programmes of the country.\textsuperscript{36}

Though it is a comprehensive Act, yet there are certain grey areas which seem to be unreasonable and illogical. It appears that under the Act only those rehabilitation professionals can register who has undergone a course run by the RCI. The RCI for the rehabilitation professionals has set certain minimum standards of education, training and experience as required. These sometimes may not be acceptable by heart to rehabilitation professionals who possess higher qualification and years of experience. This breeds in an undesirable situation where highly qualified rehabilitation professionals are denied registration, whereas persons with a certificate of a bridge course of one month from RCI could easily register themselves, which naturally lowers the self respect of the professionals who are qualified and working in this field for a considerable time.

\textsuperscript{36}Bedi, Vandan, ‘Rehabilitation Council of India Act: An Overview and Emerging Issues,’ seminar lecture compiled and pub. by The Indian Law Institute, New Delhi 2002, 1\textsuperscript{st} ed., p.172
Under the Act, it is presumed that persons who have done one/two months bridge course on disability offered by RCI could cater the needs of persons with disability whatever may be his/her educational qualifications seems to be unreasonable. Such an apparent prejudice in favour of the persons with lowest qualifications can broadly affect the overall service quality which the intends to provide for the disabled persons.

The plausible solution in this situation may be that the professionals undergoing bridge course and professionals having education and experience should be treated equally under the Act and even sometimes professionals having experience and knowledge should be given preference in the Act than the persons doing bridge course. When the Act was enacted the discrimination and inequality could not be apprehended and therefore, these provisions need immediate amendment.

In addition, in order to make RCI Act, more technically sound and affective, observations as stated below may be taken into account as research output.

1. The RCI should be more dynamic and acceptable to the society and in order to make that it should change its role.
RCI can become a networking body with the concerned
Ministry like the HRD Ministry and Department of Education
so as to work in fruitful manner for the persons with
disabilities. It should not be a mere training body.

2. There should be alternatives to Central Registry at the State
and District levels. Special Educators should register with the
Department of Education, Ministry of HRD and other
professional agencies with their respective parent bodies. It is
not enough to have a single central registry.

3. Section 13 clause (3) relates to punitive action against non-
registered professionals. But such a clause should be removed
from the section as it is illogical and unreasonable to punish
experienced professionals for not registering with RCI. The
sustainable view suggests that experienced professionals in
this field should be given their due respect by giving them
proper recognition by RCI.

In this context it is also to be taken into account that in
pursuance of the recommendations made by the Committee of
experts set up by the Government of India to review the
Rehabilitation Council of India Act 1992, the Parliament
enacted the Rehabilitation Council (Amendment) Act, 2000.
The said amended Act brought the conformity in the definition
of disabilities provided under the RCI Act and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. It also provides for the appointment of the Chairperson from amongst the persons having experience in administration, with professional qualifications in the field of rehabilitation and special education. The new amendments additionally grant exemption to medical professionals, in some disciplines, namely, physical medicine, rehabilitation, orthopedics, ear, nose or throat (ENT), ophthalmology or psychiatry and paramedics from the requirement of registration under the Act. In spite of these minor amendments, the Act still needs to be altered and modified to serve the purpose of the persons with disabilities along with the lines as indicated earlier.

The Rehabilitation Council of India Act 1992 does not provide for any rule making power because it is a concise and comprehensive Act dealing with the rehabilitation of the persons with disabilities only.

PROTECTION OF HUMAN RIGHTS ACT 1993:
After ratification of International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR), India brought into force the
protection of Human Rights Act, 1993. This Act provides for the establishment of National Human Rights Commission and State Human Rights Commissions for better protection of human rights of all section of people of the society.

In this context, it is also to be noted that even after passing of Rehabilitation Council of India Act 1992 and Protection of Human Rights Act 1993 as the question of protecting disability rights, India lagged far behind the Western World. But it was during the tenure of Mrs. Indira Gandhi as Prime Minister i.e. in the year of 1971, for the first time in the history of independent India, a formal policy was announced to provide job opportunities to the persons with disabilities. It was also a moment of victory in the war against Pakistan. Significantly, this announcement was made on the day when treaty was signed between India and Pakistan through Shimla Accord. Mr. Lalkrishna Advani, then Officer on Special Duty (OSD) in the Ministry of Welfare was entrusted with the task of preparing a paper on the strategies for comprehensive development of programmes and services and opportunities for disabled persons.\(^{37}\) But for any outcome, we had to wait till 1981, when

\(^{37}\) *Supra* n.30
Mrs. Gandhi announced a National Plan of Action (Government of India, 1981) for the all-round development of persons with disabilities. Accordingly, Advani drafted a similar bill based on the earlier one.

Thereafter, Prime Minister Mr. Rajiv Gandhi appointed a Committee on Legislation for the Handicapped on December 1, 1987 under the Chairmanship of Justice Mr. Bahrul Islam then an M.P. and the retired judge of the Supreme Court. Representatives of NGOs for the blind, deaf, orthopaedically disabled and mentally retarded persons were also involved in the preparation of the report. The Committee submitted its report, containing many suggestions, to the then Union Minister of Welfare (Mrs. Rajendra Kumari Bajpai) on June 26, 1988. Mrs. Bajpai also made assurance about the passage of the bill. It is surprising to note that the report was not placed on the Parliament till the defeat of the Rajiv Gandhi Government in 1989.

38 Supra n.30.
39 The National Front Government led by Mr. V.P. Singh came to power. The Welfare Minister in the National Front Government Mr. Ram Vilas Paswan assured the disabled community that the Bahrul Islam Committee Report would be brought to the Parliament in the Budget Session of 1990. This is left undone and thus, the National Front Government also could not fulfill the expectations of the disabled, who anxiously waited for the legislation. The Chandra Shekhar Government though its tenure was very short also vainly made efforts in this regard.
By early 1990, almost 300 NGOs then working throughout the country came forward to create a space for the disabled, removing discrimination against them, to rehabilitate, make special welfare for them and to arouse the same responsibility of the State for such disadvantaged people. Meanwhile, at the international level the Economic and Social Commission for the Asia-Pacific region convened a meeting in Beijing in December 1992 with a view to launch the decade of 1993-2002 as The Asia-Pacific Decade of Disabled Persons with “full participation and equality of people with disabilities” as its basic objective. On 30th April 1993 a private member’s bill entitled The Blind and the Other Physically Handicapped Persons (Rehabilitation, Employment and Welfare (Bill), 1993 was also introduced in the Rajya Sabha. Thereafter the Narasimha Rao Government constituted various sub-committees to investigate the different aspects of the Bill. Many Human Rights activists gave pressure on politicians in this regard. But eventually the bill on Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) 1995 was passed by the Parliament in December 1995 and then sent for the Presidential assent and the same was made effective from February 7, 1996.
PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995

Persons with Disabilities Act (Equal Opportunities, Protection of Rights and Full Participation) Act (PWD Act) came into force in 1995. The title of the Act highlights that its major aim and object is to enable a disabled individual to attain his or her 'personhood'. The Act came into force by the notification of the central government and extends to the whole of India except the state of Jammu and Kashmir.40

The Act has been divided into 14 Chapters. Chapters 1 deals with the preliminary provisions, Chapter 2 deals with Central Coordination Committee, Chapter 3 deals with State Coordination Committee, Chapter 4 deals with prevention and early detection of disability, and Chapter 5 deals with education for the disabled. Chapter 6 deals with employment with regard to the persons with disabilities. Chapter 7 deals with affirmative action that needs to be taken. Chapter 8 deals with non-discrimination in transport, on the road, in environments and in Government employments. Chapter 9 deals with research and

manpower development. *Chapter 10* deals with recognition of institutions for persons with disabilities. *Chapter 11* deals with Institutions for persons with disability. *Chapter 12* deals with the setting up of the Office of Chief Commissioner for persons with disability at the National level and State Commissioner for persons with disability at the State Levels. These Commissioners have the power to look into complaints of discrimination and deprivation of the rights of person with disability. *Chapter 13* deals with social security schemes for rehabilitation of persons with disability such as having insurance schemes and providing for unemployment allowance. Finally *Chapter 14* provides for punishment of those who by fraudulent means try to avail any benefit meant for person with disability and the other general provision. Twenty-eight States and Union Territories at present have adopted this Act in their States.

Major objective of the PWD are -

a) Protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;

b) To create a free environment for disabled individuals with their able bodied counterparts
c) To lay down strategies for the development of comprehensive programmes and services and the equalization of opportunities for disabled individuals. This is, indeed, the first sincere effort to make employment a right of the disabled persons.

As defined in the Act there are 7 categories of disability.\(^{41}\)

1. Blindness
2. Low vision
3. Leprosy cured
4. Hearing impairment
5. Locomotor disability
6. Mental retardation
7. Mental illness\(^{42}\)

These disabilities have been further defined in the Act like “blindness” which refers to that state where a person suffers from any of the following conditions, namely:

a) total absence of sight; or

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\(^{41}\) Section 2(a) (i) of PWD Act 1995 mentions seven categories of disabilities.

\(^{42}\) The Act in Section 2 (t) clearly points out that ‘persons’ with disability’ means a person suffering from not less than 40% of any disability mention in Section 2(a)(i) of the Act as certified by a medical practitioner. It is noteworthy that persons having 39.9% disability are not considered as disabled in the eye of law.
b) visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with correcting lenses; or

c) “hearing impairment” which means loss of sixty decibels or more in the better ear in the conversational range of frequencies;

d) “leprosy-cured person’ which means any person who has been cured of leprosy but is suffering from

i) loss of sensation in hands or feet as well as loss of sensation and paresis in the eye and eye-lid but with no manifest deformity;

ii) manifest deformity and paresis but having sufficient mobility in their hands and feet to enable them to engage in normal economic activity;

iii) extreme physical deformity as well as advance age preventing the person from undertaking any gainful occupation – all these aspects are evident in a ‘leprosy cured person’ and are therefore identified as ‘person with disabilities’.

e) “locomotor disability” which means disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy.
f) “mental illness” which refers to any mental disorder other than mental retardation;

g) “mental retardation” which means a condition of arrested or incomplete development of mind of a person which is specially characterized by sub normality of intelligence.

The Act provides for the promotion of a Central Coordination Committee comprising of the Minister-In-Charge of the Department of Welfare and also the Minister of State in that department in the Central Government. Presently, it is the Ministry of Social Justice and Empowerment which deals with the welfare of the disabled persons which was being looked after by the Department of Welfare earlier.

The enactment is a great achievement of the Indian disability movement. Preamble to this Act clearly enshrines its objective of promoting and ensuring equality and full participation of persons with disabilities. The Act aims to protect and promote economic and social rights of people with disabilities.

The Act lays down the responsibilities of the Government at all levels including all establishments under its control. It provides for specific measures for the development of services and programmes for equalizing opportunities, so that right to
education, work, housing, mobility and public assistance in case of severe disability and unemployment can be enjoyed without discrimination. To execute these responsibilities, a Central Coordination Committee and State Coordination Committees has been made representing major development ministries including members of Parliament and NGOs and having a woman with disability as its members. Further, the Act has provided the provision for the institution of Chief Commissioner in the Centre and Commissioner for Persons with Disabilities in States. These are empowered to redress individual grievances, provide safeguards to the rights of persons with disabilities, monitor implementation of disability related laws, rules and regulations and to note utilization of budget allocated to disable people. Such quasi-judicial bodies are also vested with the powers of a civil court.

Due to such elaborate arrangement made in the Act for protection of rights of the disabled persons, the Act may be rightly called a historic legislation and a starting point of the evolution of jurisprudence on the rights of persons with disabilities in India. As a matter of fact this Act brought disability issues into sharp focus.
However, within a period of ten years of its enforcement its weaknesses began to come out in surface mainly due to the lack of sincerity of its proper implementation. The government soon realized these weaknesses and responded timely to make an urgent review of the Act. Towards this end, a Committee was constituted which consolidated the views of the disability sector and relevant bodies in its comprehensive report\textsuperscript{43}.

The intention of the legislature as reflected in this Act is to provide equal opportunities, protection of rights and full participation to the disabled in all spheres of life. The provisions that requires to be highlighted are the 3\% reservation of physically challenged persons in government jobs and employment in local authorities. In addition, provision of the Act also provides for reservation of seats for disabled students in all academic institutions controlled by the Government as well as those receiving governmental aid. The Act also lays down provisions for free education to all persons with disabilities till 18 years of age, supply of free transport facilities, books and uniforms to disabled children in order to motivate them to attend academic institutions.

\textsuperscript{43} Rungta, Santosh, 'Rights of Persons with Disability: An Overview', seminar lecture compiled and pub by The Indian Law Institute, New-Delhi, 1\textsuperscript{st} ed. 2002, p.142.
Such things contained in the provisions of the Act, clearly indicate the intention of the legislature who wanted to make an enactment covering all aspects or rather the problems of disability. Notably the two main areas focused by this Act are the a) Education b) Employment. The Act has not defined the term ‘Inclusive education.’ Similarly the term ‘special schools’ has been mentioned at several places in the Act, but now where it is defined precisely. However, inclusive education has been promoted in the Act through provisions like section 28 which provides for designing and developing new devices for assistance, teaching aids, special teaching material or other such items as necessary to give ‘equal opportunities in education’ to a child with disability. Clauses (f), (g), (h) of section 29, which provide for suitable modification in the examination system to eliminate purely mathematical questions for the benefit of blind students and those with low vision (Clause f); restructuring of curriculum for the benefit of children with disabilities (Clause g); restructuring the curriculum for benefit of students with hearing impairment to facilitate them to take only one language as part of their curriculum (Clause h), and Section 31 which states that all educational institutions shall provide amanuensis (scribes) to blind students and students with low vision. All
these provisions appeared to be clumsy provisions and there by demands separate legislations.

In this respect a separate legislation modeled on US laws like *Individuals with Disabilities Education Act* (IDEA) could do justice to disable persons. This Act provides a scheme for ensuring two basic rights for children with disabilities i.e. the right to a free and appropriate public education and the right to education in the least restrictive environment. The American Act ensures that children with disabilities are educated in regular classrooms with non-disabled children. This US Act has formally recognized ‘inclusive education philosophy’ as the ideal one which could have been a good model for the Indian laws and also for the government to include inclusive education as the first step towards the proper rehabilitation of the persons with disabilities in India.

Critical view is also there that the PWD Act 1995, has only laid down the law recognizing the right of the disabled to be educated. under section 39 of the Act. But it is unfortunate that this provision is placed under the ‘employment chapter’ and not in the ‘education chapter’ of the said Act. Such an arrangement in other way round has triggered another controversy regarding
legislative intention as to whether reservation of disabled persons should prevail only in employment and educational institutions or it should also prevail in case of educational institution as well. This is not at all desirable legislative provision. It should always be clear and precise. The ground taken by educational institutions in their efforts to deny admissions to disabled persons was that the Act laid provisions for reservation of posts in educational institutions and not seats for admission to students with disabilities. The courts finally settled this matter in favour of disabled students and interpreted the section to mean reservation of seats for admissions also and not merely posts. So its insertion in the Act seems to have been a typographical mistake. The courts thereafter has recognized and granted the right of inclusive education to disabled students in professional educational institutions also.

Even though there seems to be no litigation relating to admission in schools at elementary and primary levels, this provision must be considered for the right to inclusive education in schools at primary levels too. The Supreme Court in the landmark case of Unnikrishnan J. P. & Ors. vs. State of Andhra
Pradesh & Ors. Union of India\textsuperscript{44} holds the right to free and compulsory education for all children from six to fourteen years as a fundamental right which undoubtedly includes children with disabilities also. Therefore, the 86th Constitutional Amendment incorporated Article 21B in the Constitution and it increased the level of expectation of every disabled child who dreams of being educated.

Another contradiction that may be found in the policy that needs to be addressed by the researcher is that while education for non-disabled persons comes under the Ministry of Human Resource Development, education for disabled persons comes under the Ministry of Social Justice and Empowerment. This anomaly in distribution of the education portfolio between two separate Ministry is a mistake on the part of the policy makers.

Apart from education, this is the next important area that needs to be critically analysed. In a third world country like India due to its socio-economic condition employment cannot be made a fundamental right. It has been incorporated as a Directive Principle in our Constitution and did not achieve equal footing with the Fundamental Rights. Accordingly in the field of Employment the PWD Act 1995 (Section 33) does not give the

\textsuperscript{44} (1993) 1 SCC 645
right to employment to every disable person. Employments rights are available to only those persons who falls within the three categories of disabilities namely:

i. Persons with blindness or low vision.

ii. Persons with hearing impairment

iii. Persons with locomotor disability or cerebral palsy.

Moreover, persons with mental illness and mental retardation are excluded from the employment provisions, irrespective of the nature and extent of their disability and also irrespective of the nature of employment. The fallacy in the employment chapter is that the reservation of 3% is available in Government sector only, a sector where employment oppurtunity is too limited till date. So the private sector where the availability of jobs are relatively more, is not bound by the law of 3% reservation, because it is not mandatory for them; therefore no steps can be taken against the private sectors to make this law as enforceable to them. In this context the legislative mandate given under section 41 has also not been obeyed strictly and therefore has become almost futile. It’s only in the present 5 years plan i.e. the Eleventh Five Year Plan (2007-2012) it has

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45 Section 41: 'The appropriate Governments and the local authorities shall within the limits of their economic capacity and development, provide incentives to employers both in public and private sectors to ensure that at least five percent of their work force is composed of persons with disabilities'.
been reiterated that. The Cabinet Committee on Economic Affairs approved the Scheme under which the government will provide for employer's contribution to the Employer's Provident Fund and the Employee's State Insurance towards a disabled person employed by them at a minimum salary of Rs. 25,000/- per month. The "historic decision" would involve Government outlay of Rs. 1,800/- crore during the 11-th Five Year Plan.\(^{46}\)

The decision of the Government in this regard can only be appreciated if it can be duly implemented because what process is to be followed for its enforceability is a pertinent question. Apart from these drawbacks, identification of posts is another point of dissatisfaction because the method of identification has proved to be ineffective and inadequate. Under this method the capacity of the person with disability is evaluated and the posts are identified in accordance with the understanding of a non-disabled person, without consulting with disabled individuals themselves. As a result, post remains vacant for long time.

The NGOs are also no less skeptical about the effectiveness of this legislation which seeks to ensure full participation and equality of opportunity of disabled persons. They held such a view by saying thus 'It is a strategy that promises everything yet

\(^{46}\) Economic Times 30\(^{th}\) September 2008.
ensures nothing”. NGOs like Voluntary Health Association of India (VHAI), The Spastic Society of India, the All India Confederation of the Blind, People’s Rights Organization and the Child in Need Institute have raised six critical points regarding functional aspects of the Act.⁴⁷

Firstly, according to the critics certification process should be obliterated or detailed.

Secondly, the composition of the Central and State Coordination Committee has also been questioned. It is not enough to have persons with disability as representatives on the Committees. Instead, individuals who have made significant contribution in the field of disability and promotion of the rights of the disabled should have been appointed/nominated as members.

Thirdly, family members of persons with disabilities should also be included as representatives in the Committees.

Fourthly, employment should not be restricted to reservations. The disabled persons should have a job guarantee.

The intention of the authorities as reveal in this Act is to help the integration of the disabled students in normal schools.⁴⁸ But

⁴⁸Section 26(b) says, “endeavour to promote the integration of students with disabilities in the normal schools”. Of course, the Section 26 seeks to ensure every contd...
the government cannot ensure this without providing reservations in educational institutions. Moreover, without providing reservation for students with disabilities, in schools, colleges and other training and vocational institution, 3% reservation for vacancies and posts become meaningless. No one can compete for a job without required educational qualifications. If children with disability do not have access to educational institutions, then to have reservation in jobs becomes meaningless for them. But making such contradictory situations was obviously not the intentions of the legislature or the bureaucrats who drafted the Act in order to give effect to the Proclamation on the Full Participation and Equality of People with disabilities in the Asian and Pacific Region to which India was also a signatory,\(^*\) Denial of reservations in educational institutions is against the very title of the Act, because can a child with disability without admission to a school or college ever dream of equal opportunities, protection of his or her rights

\(^*\) Supra n.37.
and full participation? With this end in view, it should be mentioned that in spite of many shortcomings (as discussed subsequently in Chapter VII) this enactment still stands as a landmark achievement for the protection of the persons' with disabilities in their struggle to achieve equal status with the able persons in Indian society as a whole and the state of West Bengal in particular.

Here it needs to be mentioned that the Act has given the rule making provisions to the authorities constituted under the Acts for its better implementation.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules 1996:

In exercise of the powers conferred by sub-sections (1) and (2) of Section 73 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act 1995 (1 of 1996), the Central Government made the Rules in 1996. In these rules three specific areas needs to be discussed.

Firstly : The process of certification
Secondly : The reservation in employment
Thirdly : The complaints to the Chief Commissioner.
These are the 3 major areas on which the Government has the rule making power.

1. Disability Certificate
The Rules have set the guidelines for evaluation and assessments of various disabilities.

A disability certificate is to be issued by the Medical Board duly constituted by the Central and State Government consisting of at least 3 members out of which one should be specialist in the particular field for assessing locomotor and visual disability. The Board is supposed to give a permanent disability certificate after due examination only if there is no chance of variations in the degree of disability; but if there is any chance of variation in the degree of disability then the board shall indicate the period of validity in the certificate issued by them. After availing the certificates the persons with disabilities can apply for identity cards to be issued by the office of the Commissioner (Disabilities) at Ganesh Chandra Avenue, Kolkata or by the District Social Welfare Boards. The said cards makes a person eligible to apply for facilities, concessions benefits as admissible under the schemes of the Governments or Non-Governmental

50 Enforceable with effect from 31-12-1996.
organization. Normally disability certificate is not refused unless an opportunity is given to the applicant of being heard.\textsuperscript{51}

After minutely observing the procedure of availing an identity card by a person with disability, it has appeared to the researcher that the whole system is totally unscientific and unsympathetic towards the needs of the disabled person. The Medical Boards in the government hospitals or District hospitals do not sit at regular intervals. In fact there is no rule as to when such a Board would be constituted. The hospital authorities are of opinion that medical examination to issue a disability certificate should be arranged by the Commissioners (Disabilities) Office and it should be their responsibility whereas the Commissioner’s Office has no power to arrange for such medical boards to detect the degree of disability of the disabled persons. Only on the other hand the persons having disability are subject to extreme harassment as they need to run to these hospitals day after day to get the information as to when the Board would be constituted and they would have to appear. Moreover even if a person having disability avails the identity cards from the Commissioners Office, still some government departments like the Railways does not approve them directly; instead on the

\textsuperscript{51} Under Rule 4 and 5 of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Rules 1996.
basis of such identity cards they further issue railway cards to get the facilities or concessions given by the railway department. The researcher finds the entire process very unfair for these unfortunate persons who, most of the time, do not raise a voice to protest against the system; instead in the fear of going through such tiresome exercise, most of the persons with disabilities do not approach the Commissioner Office to get the identity cards.

2. Reservation in Employment

Chapter 5 of the Rules states the computation of vacancies for persons with disabilities in group A, B, C and D post and the computation of the vacancies shall be made in such manner as may be determined by the Government. A Special Employment Exchange is to be set up for the persons with disabilities. Notification of vacancies is to be made in such exchanges. Like vacancies in post of technical and scientific nature carrying a basic pay of Rs. 1400/- or more per month or vacancies which an employer may desire to be circulated outside the State or Union Territory where the establishment is situated may be notified in such exchanges. Vacancies are to be notified at least
30 days before the date on which the applicants will be interviewed or tested.\textsuperscript{52}

3. Complaints to the Chief Commissioner

Chapter 6, Rule 42 states that a complaint can be made to the Chief Commissioner by the Complainant in person or by his agent or through registered post. Such Complaint should contain the name, description, and address of the complainant, the name, description, and the address of the opposite party, the facts relating to the complaint, documents in support of the allegations and the relief which the complainant claims. The opposite party is supposed to give his version of the case within a period of 30 days or such extended period not exceeding 15 days as granted by the Chief Commissioner. After hearing the case the Commissioner may give necessary directions and if the parties fail to appear personally or through his agent the Chief Commissioner may dispose of the Complaint ex parte. It is also mentioned under sub-rule 8 of rule 42 that the complaints need to be decided as far as possible within a period of 3 months from the date of notice received by the opposite party.

\textsuperscript{52} As stated in Rule 36 of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Rules 1996
Apart from these three areas the Rules to the Persons with Disability Act mentions the day to day functioning of the Central Coordination Committee and the Central Executive Committee. The Rules 44 & 45 categorically states that the Chief Commissioner shall submit a report to the Central Government within an interval of 6 months so that at least two reports are sent in one financial year.

In particular the annual report should contain information regarding name of Officers, Staff of the Board, and the chart showing the organizational set up: The functions which the Chief Commissioner has been empowered under section 58 & 59 of the Act and the highlights of the performance in this regard: Apart from it any other such matter as the Chief Commissioner may deem fit or specify by the Central Government from time to time. These are the main areas that The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) rules 1996 has highlighted.

In this context the researcher feels it necessary to mention that on the basis of these rules if we focus our attention to the State of West Bengal, it is surprising to note that the complaint cases

53 Rule 42 Clause (7) of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Rules 1996
filed before the Commissioner (Disabilities) West Bengal are not properly recorded. In most of the cases the Commissioner merely gives a direction to the concerned opposite party having no mechanism of enforcing the same. Even as the researcher approached the then Commissioner, the answer was that as the office has minimum member of staffs it will take a long time to find out the records of the complaint cases and produce them before the researcher. The situation therefore proves beyond doubt that though a Commissioner (Disabilities) Office exists in Kolkata, hardly it has got the capacity or ability to successfully handle the problems of disability.

Apart from these few areas the other major drawbacks of the Rules has been discussed in the concluding chapters (i.e. Chapter VII) of this research paper.

THE NATIONAL TRUST FOR WELFARE OF PERSONS WITH AUTISM CEREBRAL PALSY, MENTAL RETARDATION AND MULTIPLE DISABILITIES ACT 1999

Apart from the Persons with Disabilities Act 1995, another not most important Act which has enacted for the physically challenged persons is the National Trust for Persons with
Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

This Act reflects increasing concern of the government of India about the need for affirmative action in favour of persons with autism, cerebral palsy, mental retardation and multiple disabilities.

Acknowledging the competency of these individuals, the Central Government wanted to set up a National Trust to be known as a National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability.\textsuperscript{54} It seeks to uphold promote and develop the interests of persons with the said diseases.

To achieve the objective of the Act, the National Trust supports programme which promote independence, facilitating guardianship where necessary and address the concerns of those special persons who do not have their family support. The motive of the Trust is to strengthen families and protect the interest of persons with autism, cerebral palsy, mental retardation and multiple disabilities after the death of their parents.

\textsuperscript{54} Banerjee, Goutam; Disability and the Law; Commercial Law Publishers Pvt. Ltd., Delhi, \textit{1\textsuperscript{st} ed June 2005, p.405
For the sake of detail analysis, some important provisions of the Act dealing with above mentioned interest of the disabled persons may be pointed out here.

Section 3(1) of the Act provides for constitution of a Trust called the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability\textsuperscript{55}. The financial requirement of the Trust is difficult to estimate because it depends on so many factors such as number of persons with autism, cerebral palsy, mental retardation and multiple disability, who would be receiving assistance through the Trust. However, as per statutory arrangements the Central Government is required to provide a fund of Rs. 100 crores (Rupees one hundred crores) to the Trust, the income from which is to be utilized for the purpose of the Trust. Clause 21 also provides that the Central Government may, after the deliberation, made by Parliament by law in this behalf, pay to

\textsuperscript{55} The Act provides for the constitution of a Trust and the constitution of a Board under the Trust consisting of a Chairperson, not more than nine Members to represent the voluntary organisations, eight members to represent the Ministries of the Central Government dealing with Social Justice and Empowerment, Health, Labour, Finance, Urban Affairs and Employment and Education and three persons representing associations of trade, commerce and industry.

The National Trust is a body corporate having a name, having perpetual succession and a common seal.
the Trust in a financial year such sums as may be considered necessary.

The Act also provides that the conditions of service of the Chairperson and Members shall be such as is prescribed in its provisions. Clause 3, sub-clause 4(e) and Clause 8(2) provide for appointment of Chief Executive Officer and other employees to carry out the objectives of the Trust.\(^{56}\)

Section 34 of the Act empowers the Central Government to make rules by notification in the official Gazette to provide, inter-alia, for the appointment of persons under item (b) of sub-clause (4) of clause 3; conditions of service of members, rules of procedure to be followed by the Board in the conduct of its meetings; powers and duties of the Chief Executive Officer; the form in which and the time within which the budget of the Trust shall be forwarded to the Central Government; the manner in which and the time within which annual report is to be forwarded.

This particular Act is enacted with the objective to enable persons with disability to live independently and close to the

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\(^{56}\)The power to make Rules for carrying out the provisions of the Act vests with the Central Government. Accordingly, the Central Government has made the National Trust Rules, 2000, which has been brought into force from 27th July, 2000 on which date the same were published in the Official Gazette. The Central Government has not only general powers to make rules but it also has power to make rules for specific matters as laid down in the section.
community to which they belong. The idea is to encourage them to live within their family. But there are people with severe disabilities who may not be able to move. Thus, there could be a possibility of providing rehabilitation services in the home. The main objective is to provide services during the period of crisis in the family of a person having disability. Crisis comes mostly in nuclear families, while looking after the persons with disabilities. At this point of time it becomes a responsibility of the state to provide the guardianship or look after them. Thus there is a need to have an enactment to take proper care and protect them in the event of the death of their parents or guardian. They have the right to have proper homes to themselves and to be looked after by the State if need arises. For example, people with mental retardation still today either go to Juvenile Homes, in mental hospitals, or they end up in jails.

The next important objective is to make procedures for appointment of guardians and trustees for persons with disability requiring such protection. In a family, the natural guardian or whosoever is the head of the family becomes the natural guardian, is suppose to look after the property inherited by person with mental retardation or persons with multiple disabilities and is unable to manage his or her own property. In
these cases parents may have a safeguard of appointing somebody as a guardian or to appoint somebody as a trustee to look after the person with disability.
The National Trust is expected to fulfill the need of the family where transportation costs are met by the Trust. Similarly, another support to the family could be that if a person is unable to send his child for physiotherapy or occupational therapy outside the endotherapy centre, therapists are specially trained to come and visit the home and provide home based training programme to the child. The family could be given support by the National Trust to purchase or seek services from teachers or therapists.57

Another important aspect of this Act is its provision for training and counseling. Counseling and training to members is necessary because family members may not have appropriate ideas about the capabilities of a person with disabilities. Sometimes family members overestimate the capabilities of a person with disability, sometimes they underestimate or sometimes they think that the person is a burden in the family. In these cases, he is almost bound to consider himself as not

capable of living with the family. Hence, there is a need to support the family in terms of counseling so that the persons with disability could have the right to live within the family. In this respect setting up of adult training units\(^{58}\) are also a successful protective mechanism as envisaged in the Act for the persons with disabilities.

The programme of respite care, foster family care, and day-care services is also of utmost importance. Respite care is necessary when parents go for work; and there are occasions when parents leave the child in the neighborhood. The respite care sometimes may require some professionals to be appointed. The salary of the professionals is met by the National Trust. Similarly the foster family care is a concept that a family could adopt a person with disability and the National Trust could give money like eight or nine hundred rupees per month for keeping a person with disability in that foster family.\(^{59}\)

The National Trust Act makes it obligatory to create Local Level Committee (LLC) comprising of District Magistrate along with one representative from a registered organization and one


\(^{59}\) ibid
person with a disability. The LLC is vested with the authority to
decide upon applications for legal guardianship. The Act
provides for the manner in which legal guardians are to be
appointed.
The overall supervision of this Act is vested with a National
Trust Board appointed through a democratic process. The
Government has contributed rupees one billion in the year 2009
to the trust fund. The interest earned is used in supporting
activities as necessary and required for persons with disabilities.

From such analysis, it may be said that the main objective of the
Act is to promote independence, facilitate guardianship where
necessary, and to take care of those disable persons who do not
have their family support. The aim of the Trust is to strengthen
families and protect the interest of persons with autism, cerebral
palsy, mental retardation and multiple disabilities after the death
of their parents.
The objective for enacting this Act undoubtedly reflects the
broad minded intentions of the legislature. It surely opts to give
support and help this unprivileged class of persons, so that they
need not move door to door asking for any kind of aid.
The aim and objective of the Act is based on humanitarian principles. On one hand it extends help to the families of persons with disabilities and on the other it evolves procedure to appoint guardians for them. But close scrutiny on the aspects of application and implementation of the Act reveals the following gaps-

1. The supervisory or monitoring activity (section 19 of the Act) of the Board is not up to the mark. All the registered organisations under the Trust, are supposed to receive financial grants from the Trust. Therefore, it becomes the duty of the Board to inspect the working and activities of the registered organizations functioning under it. The monitoring responsibility of the Trust and the Board thereof needs to be strictly followed. But one can find more laxity in this respect.

2. As the registered organizations working for the welfare of the persons with disabilities receive funds from the Trust, the persons with disabilities coming to these registered organization are suppose to get service free of cost, but unfortunately funds received from the Trust in this purpose are often misappropriated and the persons with disabilities do not get much benefit out of this fund.
3. The Board is empowered under section 11 to receive bequest of immovable property for the person with disabilities; but on the other hand the board under the proviso of the same section is empowered not to utilize the entire amount earmarked in the bequest for the exclusive benefit of the persons with disabilities named as beneficiary in the bequest. Through this section the Act gives enormous power to the Trust and its trustees and thus creates an environment misusing the bequest property for their own selfish interest.

4. The Act provides that the Trust will support and provide financial assistance to organisation working for the persons with disabilities who are registered under it or to the organisations of the parents of the persons with disabilities. By doing this, the Act excludes the parent as guardians of the disable to receive financial help registering themselves individually on behalf of disable persons. This make them dependent upon the agency or organisation to get financial help. These agencies if not properly controlled may sometimes Act for cross purposes.

5. The Act in section 13 provides for the constitution of the local level committee where the parent or even a registered organization can make an application for appointment of
guardians for persons with disability. But in this regard it would be better to entrust some responsibility on the Councilor to participate in the process of appointment of guardians for the persons with disability because the Councilors are supposed to be knowing the persons individually as they are working in the grass root level of the whole system of administration.

6. Another fundamental drawback of the National Trust Act which is similar to that of the PWD Act that is this Act is also without any penal measures. As there is no penalty for the misuse of funds either by the registered organisation or by the Trustees themselves there is always a probability that the finance will not be properly utilised for the welfare of the persons with disabilities.

Apart from funds, another aspect which deserves attention is Section 17 i.e. the provision for the removal of guardian in case of misappropriation of funds. It is a strange feature of the Act that in case of abuse or misappropriation of funds by the guardian the Act remains silent. This is indeed a grave mistake on part of the legislator that needs immediate rectification.
The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000:

This Rule has been made by the Central Government in exercise of powers conferred by Section 34 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999.

This Rule mainly enumerates four basic aspects namely

1) Powers of the Chairperson
2) Powers of The Chief Executive Officer
3) Application for Guardianship and procedure for removal of a Guardian and
4) Maintenance of Funds and Investments⁶⁰

(1) Powers of the Chairperson: The most important powers conferred by the Chairperson is to call and preside over the meetings; to see the proper functioning of Trust and the Local Level Committees and ensure implementation of policies and programmes; to give necessary directions to the chief Executive Officer. The power entrusted to the Chairperson rightly proves that he is supposed to supervise the overall functioning of the Trust.

⁶⁰ Enforceable w.e.f. 27-7-2000
(2) Powers of The Chief Executive Officer: The Chief Executive Officer has been entrusted with the powers like to run the management of the Trust and to execute the powers delegated to him by the Chairperson; the Chief Executive Officer, above all is to be responsible for maintaining for proper accounts and records.

(3) Application for Guardianship and procedure for removal of a Guardian: This is the most important Rule making power conferred by the National Trust Act.

An application can be made to the Local Level Committee by a parent, relative, registered organization for appointment of a guardian for a person with disability as given in Form ‘A’ of the Rule. The confirmation of appointment of guardian after such application is to be made according to Form ‘B’ of the Rule. A quarterly report is to be given by the Local Level Committee to the Board or to the State Level Agency authorized by the Board stating clearly particulars of the applications received and the orders passed thereto.

The procedure of removal of guardian is given in Rule 17. It states that the Local Level Committee after receiving an application for removal of a guardian from a parent or relative of a person with disability or from a registered organization on the
grounds of abusing or neglecting a person with disabilities; misappropriating or neglecting the property, it may in accordance with the prescribed procedure apply to the Committee for the removal of such guardian shall appoint a team of investigators of not less than 3 persons. The team shall consist of 1 representative of parent organization, 1 representative from the association of the disabled and 1 official of the Government associated with disability not below the rank of Assistant Director. The investigator needs to submit their report within 10 days and the Local Level Committee after receiving such report shall take the final decision within 10 days on the issue of the removal of the guardian after giving the said Guardian and opportunity of being heard. The local level committee must record in writing the reasons either for removal of the guardian or rejection of the application.

61 The team of investigators while investigating has to follow the guidelines specified by the Board for assessing the abuse or neglect of the person with disabilities, like solitary confinement of person with disability in a room for a longer period of time; chaining of person with disability; beating or treating a person with disability resulting in bruises, skin or tissue damage (not due to his injurious behaviour indulged by the persons with disabilities); Sexual abuse; long deprivation of physical needs such as food, water and clothing; no provision on non-compliance of rehabilitation or training programmes as specified by experts in the field of disability rehabilitation; Misappropriation or misutilisation of the property of the person with disability; lack of facilities or no provision of trained or adequate staff for meeting the training and management needs of the persons with disabilities.
The procedure for appointment and removal of guardian appears to show that the requirements of the given individuals has been duly considered because the responsibilities of the guardians plays a vital role in the life of the persons with disabilities. Therefore proper care should be taken before their appointment.

(4) Maintenance of Funds and Investments:

According to Rule 19 the fund of the Trusts shall be deposited in the nationalized bank and operated by any two of the 3 signatories nominated by the Board, 1 of the 3 being the Chief Executive Officer. A proper account and such other records is to be maintained by the Trust and should prepare an annual statement of accounts including Statement of Income & Expenditure, Receipt and Payments and the Balance Sheet. The Controller and Auditor General of India at certain intervals shall audit the accounts of the Trust. The account of the Trust as certified by the Controller and Auditor General or any other person appointed by him together with the Audit Report shall be forwarded by 31st December to the Central Government and the Government in turn shall lay it before each house of the Parliament.
Under Rule 21 the Trust may invest its funds in short or long term deposit to get better returns as necessary. The Chief Executive Officer is entrusted to maintain a Register of Securities held by the Trust and all investments of the funds shall be made in the name of the Trust including all purchases, sales or alternation of investments and any such other movable or immovable property.

Therefore it can be concluded that microfine analysis of the contribution made by the Indian legislature in protecting the rights of the persons with disabilities conclusively shows that the Indian legislature in post independents era from time to time has given a new dimension to the rights of the disable persons. The first four decades of the commencement of the Constitution of India was a slow period of emergence of the right of the disabled persons. But the fifth decade (1990-2000) was highly a fertile era of the growth of the rights of the persons with disabilities. This period gave the maximum number of legislations enacted by the Indian legislature protecting the rights of the persons with disabilities.
The net output of the above development was that in protecting the rights of the persons with disabilities in India, Indian legislature thus finally provided us a broad legislative paradigm. Subsequently, on the basis of this legislative foundation, in a number of cases the Supreme Court and High Courts made important innovations opening some new frontiers of the rights enjoyed by them in India.