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CHALLENGES TO PERSONS WITH DISABILITIES IN PAKISTAN AND UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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Abstract

In Pakistan, disability has different meaning with different barriers of different types that needs different means and approaches to tackle the issue. As the United Nations Convention on the Rights of persons with Disabilities (UNCRPD) marks a shift from ‘soft law’ to ‘hard law, it ultimately depends on the accountability of the legally bound member states to reinforce and realize their pre-existing obligations where gaps are observed.

Disability legislation, therefore, works as a direct instrument to address and abolish discrimination against persons with disabilities (PWDs). This paper discusses the social, organizational and legal challenges faced by PWDs and gives recommendations in light of UNCRPD to address these issues.

Key Words: Disability Discrimination, UNCRPD, PWDs, Pakistan, Legislation, Recommendations.

3.1 Introduction

Pakistan signed UNCRPD on 25 September 2008 and pledged to follow the provisions contained in the UNCRPD by ratifying it on 5 July 2011. After ratification, Pakistan bears legal responsibility to enact new disability laws in consonance with United Nations Convention on the Rights of persons with Disabilities (UNCRPD) in addition to harmonize its existing laws with international standards either by abrogation or amendment. Legal

lacunas and various other challenges in Pakistan in relation to fulfillment of UNCRPD obligations are debated to evaluate the existing state of PWD's rights. There is lack of appropriate legislation and governance to implement policies and plans in accordance with the UNCRPD framework.

Since independence, the only existing federal law on disability in Pakistan is Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 (the ordinance 1981). Further, the outdated, scattered and insufficient disability legislation in Pakistan still revolves around the medical model of disability taking disability as impairment only instead of considering it a social factor under social model of disability. This study thoroughly observes various challenges in this regard including cultural, organizational and legal issues faced by PWDs which needs an immediate social and legal redress. This paper offers corresponding detailed recommendations (suggestive legislative changes) to be the integral part of any disability specific law in Pakistan.

3.2 Challenges in the Realization of the Convention

Pakistan faces many challenges on its way to meet the goals of UNCRPD.

3.2.1 Cultural and Societal Challenges

The first main challenge faced is its culture that takes disability sympathetically. The word culture has been defined as a "particular way of life which expressed certain meanings and values, not only in art and learning, but also in institutions and ordinary behavior".¹ It is influenced by various factors such as politics, economics and religion.² Fulcher³ supports the view that it is not the physical or mental factor and manifestation of disability that result in the complexity of the issue but the social and political use and framework it is placed in depending upon the views, perceptions, and beliefs of each country and society. Disability is, therefore, shaped by the broader culture where a disabled is defined to get its direct impact from surrounding society.

General practice in Pakistan shows it extremely tough to differentiate between the religious and cultural practices of the individuals. Faith is an integral part of every religion of the world and has its roots deep in the

¹ R. Williams, *The long revolution* (Ontario, Canada: Encore editions from Broadview Press, 1961),57

² M.F. El-Islam, "Arab culture and mental health care," *Transcultural Psychiatry* 45(2008): 671–682.

³Gillian Fulcher, *Disabling policies'? A comparative approach to education policy and disability* (Philadelphia: PA Falmer, 1989), 25.

psyche of the common man. Most Muslim States with no exception of Pakistan are developing, and majority of their population is religious, that results in a massive connection between religious values and local cultural ones. Shaheen Sardar Ali rightly mentions that the plurality of institutions and variety of laws which works at parallel levels in Pakistan results in a complicated framework.⁴ She places the legal pluralities effecting the lives of people in Pakistan into four concentric circles where the Constitution and the statute law makes the outer core whereas religious laws and customary traditions forms the inner layer closest to the lives of people.⁵

With the huge impact of customs and cultural values, there is a feeling of embarrassment attached with disables and their families. Severe physical and mental disabilities are usually attributed to supernatural causes like a curse, a spell, or a test from God. It leads to consult faith healers strengthening the belief that it is a kind of possession by evil spirits. Social stigma has been attached to these beliefs under various cultural interpretations. One of them is the obvious trend to lack and refuse treatment in an underdeveloped society. PWDs are still at the mercy of quacks and shrines where the usual way of treatment is amulets, spiritually treated water, burning incense (dhooni), or reciting incantations.⁶ Healers may use harmful methods and purposely deceive patients and their relatives by diverting them from needed care and treatment. Shrines and such like set ups led by “pirs” (saints) are used for healing the crippled, the blind, the lepers and mentally disabled⁷ and are an alternative for medical treatment of PWDs. As far as law is concerned, these practices are very common despite that such spiritual-healers can be charged with exploitation and use of illegal treatment procedures, punishable with a fine of up to Rs. 50,000 and imprisonment.⁸ Pakistan Penal Code (XLV OF1860) contains punishment for cheating which is punishable with imprisonment that extends to one year, or with fine, or with both.”⁹ The ground reality in Pakistan shows the loopholes of the existing law in theory and practice in the form of implementation gap.

Due to many superstitious beliefs and cultural myths towards PWDs in Pakistan, they are rarely believed to function as productive and useful members of society. PWDS are constantly faced by negative social attitudes and

⁴ Ali, “Disability, human rights,” 17.

⁵ Ibid.

⁶ Raheelah Amin and others, ‘Psychiatric disorders; Pattern and trends of patients attending out patient department at Govt. Sarhad Hospital for psychiatric illnesses, Peshawar’ <http://www.theprofesional.com/article/2013/vol-20-no-1/022%20Prof-2078.pdf> accessed May 12, 2019.

⁷ Olaf Caroe, *The Pathans 550 B.C.- A.D. 1957*(Oxford University Press: Karachi, 1958),198-99

⁸Mental Health Ordinance 2001 Pakistan, Article 52 (5).

⁹ Pakistan Penal Code (XLV OF1860), Section 417.

stigma that plays as a hindrance to the integration of PWDs in community. The mobility and access needs of PWDs are seldom catered at public and work places. In such like situation, disability affects not only the life of a PWD, but their families for the ridicule attached to disability. Negative attitudes of peers force families to hide disability of their family member particularly mental disability. As a result, PWDs spend their lives behind closed doors leading to disease like depression, sadness, and hopelessness.

The comparison of disability estimate of 5th Population and Housing Census of 1998 and 6th Population and Housing Census of 2017 identifies a sharp decrease in number of PWDs in Pakistan (fallen from 2.38% in 1998 to 0.48% in 2017).¹⁰ Societal stigma and ridiculous attached to disability are one of the reasons among many for the so called drastic fall in disability estimate in Pakistan. The Supreme Court of Pakistan (SC) showed its concern on it via petition under Article 184 (3) of the Constitution of Pakistan. Showing its annoyance, the SC stated that Pakistan Bureau of Statistics gave many excuses by referring to various issues for not counting disabled persons after the very recent census had already begun across the country.¹¹ The intervention by the SC made it possible, although at a later stage, to add disability question as a part of the population survey.

In a nutshell, different attitudes to various anomalies are therefore the outcome of cultural differences that needs social factors within society to be focused on.

3.2.2 Organizational Approach as a Challenge

UNCRPD admits the significant role of civil society and their representative organizations. Article 33 (3) of the UNCRPD recognizes the significance of organizations like Civil Society Organizations (CSOs) and Disabled People Organizations (DPOs) and requires States to involve them in the monitoring process. But with almost no background in human rights, these organizations lack capacity in project designing, evaluation, management by adopting “service delivery approach” to improve the lives of PWDs. It is worth mentioning that most organizations - working in Pakistan for PWDs rights- have adopted a welfare and charity centered approach (against the spirit of UNCRPD) than right-based agenda towards PWDs. Being funded by multinational companies and international

¹⁰ [Population census 2017: Transgender, disabled count might not be thorough: PBS](https://nation.com.pk/07-Feb-2018/population-census-2017-transgender-disabled-count-might-not-be-thorough-pbs)". *Nation.com.pk*. 7 February 2018. <https://nation.com.pk/07-Feb-2018/population-census-2017-transgender-disabled-count-might-not-be-thorough-pbs> accessed September 8, 2020.

¹¹ Haseeb Bhatti. “SC orders govt to count disabled people in ongoing census,” *Dwan*, March 16, 2017 <https://www.dawn.com/news/1320852> accessed March, 2020.

training organizations, the focus of DPOs is mostly conferences, consultations and specific trainings with no or very little knowledge about projects, policies, and strategies in public and private sectors and about the international agreements, protocols and conventions including UNCRPD.

As a developing country and with lack of expertise, government of Pakistan too cannot handle everything to protect and promote the rights of PWDs. Implementation of UNCRPD in Pakistan is a serious issue because the complicated nature of “rights-based” issues of the PWDs needs support and commitment from government and civil society. Similarly, PWDs are unable to be best represented through individual effort. A positive trend can be initiated in form of cooperation and work collaboration between disability specialized organizations and local governments. With structured dialogues and planning between the two, successful projects can be developed and implemented. Organizations with PWDs representation can play a more effective role of mediator/link between provincial and federal government at pre legislative phase of law making.

Articles 4 (3) and 33 (3) of the UNCRPD specifically mentions the involvement and participation of PWDs through representative organizations, or organizations of persons with disabilities. Distinction between “civil society organizations” and “organizations of persons with disabilities” has also been made.¹² In accordance with Article 33 (3), all CSOs are required to play an active part in monitoring the enforcement of the Convention. This needs the involvement of various sectors and branches of the government at all levels through legal measures and regulatory frameworks.¹³ Similarly the use of phrase “concerning issues relating to persons with disabilities” in Article 4 (3) covers a complete range of “legislative, administrative and other measures” bearing either a direct or indirect impact on the lives of PWDs.¹⁴ Participation of PWDs through representative organization will cause life experiences of PWDs that may be considered when deciding upon new measures including legislative, administrative and others.

3.2.3 Legal and Some Other Challenges

The only existing federal law on disability in Pakistan is the outdated Ordinance, 1981. As a State party, UNCRPD obligates Pakistan to adopt all appropriate legislative, administrative and other measures to overcome

¹²General comment No.7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, (2018) para 14.

¹³ Ibid, para 15.

¹⁴ Convention 2006, Article 4(3).

disability based discrimination.¹⁵ These appropriate measures include new legislation and modification/abolishment of all existing discriminatory laws, regulations, policies, customs, and practices. In addition to the general provisions contained in Article 4, UNCRPD in some cases also suggests for legislative measures to be taken by State parties.¹⁶ The situation of PWDs turns miserable when lack of anti-discrimination law is combined with patterns and practices of unchallenged discrimination against PWDs.

Following legal and other issues have been analyzed under existing legal framework in Pakistan through the prism of UNCRPD.

I. Disability Assessment and Information

Inaccurate disability data is a major impediment to accountability and monitoring of rights in Pakistan. Article 31 of the UNCRPD on statistical and research data collection is to assess the implementation of States Parties' obligations under the present Convention. As national data sets on disability are highly different both in respect of "quality" and "type of collected information," such data, therefore, cannot be used for cross countries comparison.

Pakistan has not fulfilled its obligation under Article 31 to develop adequate indices for disability assessment. Underestimated statistical data on disability in Pakistan has not only its negative impact on disability rights realization and formulation of future policies but gives rise to another serious concern. The underestimated number of PWDs in Pakistan manifests those multiple issues faced by PWDs in society including stigma attached to disability, negative social attitudes, and other challenges related to measurement and the pattern survey and census questions are phrased. Similarly, the collection of information on protected characteristics like disability does require careful information which cannot be satisfied with general approach and simple yes-no questions in census. Such queries constitute infringement of privacy rights of PWDs under UNCRPD.¹⁷

II. Disability Certification and Registration

¹⁵ Convention 2006, Article 4.

¹⁶ Ibid.

¹⁷ Convention 2006, Article 22.

A person is declared disabled and is issued a disability certificate only when the medical assessment board has declared him/her a disabled person. In employment case, for example, the medical board even indicates the type and nature of work that suits a specific PWD. This goes against the spirit of UNCRPD because such assessment is purely based on one's impairment without considering qualification, capability, and skills. Similarly competitive exams and Central Superior Service of the country shows selective groups open for disabled persons.¹⁸

Once the disability certification has been made, a PWD is required to undergo a cumbersome process of registration to get employment and resulting quota. A PWD needs to be registered in the "employment exchanges or the office of District Labor Officer" whereas the employment exchanges exist only in the Sind Province. In addition to disability certificate, special documents like "employment exchange card" and "Special Computerized National Identity Card" for disabled are also required. The acquirement of such documents is itself a challenge in Pakistan where accessibility issues and reasonable adjustment duty are not addressed by law to meet UNCRPD standards.

III. Definition of Disability

Definition of disability in Pakistan does not cover the advanced theme on the issue. Under UNCRPD, disability includes all arising from, or in consequence of one's disability including long-term conditions with adverse effect on a normal day-to-day activity. Pakistani law and case law on disability has seldom touched this aspect of disability definition to meet UNCRPD standard. Although definition of disability in the ICT Rights of Persons with Disability Act 2020 is tried to be in line with UNCRPD, the Act is limited only to Islamabad territory and its benefits to general masses and whole country cannot be extended. It repealed the "Disabled Persons (Employment and Rehabilitation) Act 1981" to the extent of Islamabad only.

Definition of disability in "Disabled Persons (Employment and Rehabilitation) Ordinance 1981" (the ordinance 1981) is in absolute contrast to UNCRPD and is called 'handicapped' like past. Scattered pieces of legislation in Pakistan cause further confusion where different provinces are making strides in various directions

¹⁸Employment of Persons with Disabilities <https://paycheck.pk/labour-laws/illness-work/employing-disabled-person> accessed 13 May 2021.

with no visible impact on the lives of PWDs. The disability definition in Pakistan does not align with the improved disability definition either in India (having almost common legal history and culture as Pakistan) or UK (a developed country having model disability and anti-discriminatory laws with effective enforcement) and needs to be rectified

IV. Employment Quota

First Pakistani law in respect of physical disability was “Disabled Persons (Employment and Rehabilitation) Ordinance 1981” but when analyzed under the spirit of UNCRPD, it proved to be unresponsive to many rights of the PWDs except few rehabilitation issues including employment quota. UNCRPD makes no mention of quotas and provides equal educational and employment opportunities. In a developing country like Pakistan, quota system or else pay a penalty to encourage employment are good only as starters to change attitudes. Ordinance is also not clear on allocation and enforcement of quota for PWDs who can claim seats on merit. Enforceability impact of quota is also missing.

It is further disappointing to note that institutions/establishments who employ a total of 100 and more employees, are provided with a choice to refuse employment to PWDs without justification if they agree to deposit a nominal fund to the Disabled Persons Rehabilitation Fund.¹⁹ Any organization that fails to pay under Section 11 will be subject to penalty under Section 20 of the Ordinance. Establishment/Organization is required to pay penalty of Rs. 1000 each month to rehabilitation fund. In case of non-payment of fine, organization may be ridiculously charged with an additional fine which may extend to ten rupees for every day during which the payment of fine is not made.²⁰ Existing law does not address the effective utilization of funds.

V. Domestic Monitoring and Enforcement

UNCRPD recognizes enforcement as a domestic issue under Article 33 and emphasizes on monitoring and implementation of disability legislation at national level. Article 33 gives 4 key provisions to meet this standard. First, it demands State parties to “designate one or more focal points” for respective domestic implementation.

¹⁹ The Ordinance 1981, Section 1.

²⁰ The Ordinance 1981, Section 20.

UNCRPD hereby recognize enforcement as a domestic issue. Connection of the focal points with central authority can best influence other govt. ministries and institutions. Second, member States in the light of their legal and administrative systems, are required “to give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.”²¹ This provision extends the enforcement responsibility among various government sectors. Third, member States need to create and support one or more independent mechanisms to “promote, protect and monitor” the implementation of UNCRPD. The notion of “promotion, protection and monitoring” at national level has been kept open that might vary from State to State to absorb flexibility. Fourth that PWDs and their representative organizations should have full participation in monitoring process.²² To ensure this, there should be no condition requiring DPOs to be registered before taking part in broad consultation processes.

Disability law in Pakistan is still conventional and does not accommodate UNCRPD guidelines in true sense. It has no regulations that guide its implementation as per Section 33. The proposed national commission under “National Commission for Persons with Disabilities Act, 2018” has recommended establishment of a Commission for PWDs. A short two-page bill does not contain any noteworthy point to secure PWD’s rights. The traditional structure of proposed Commission does not give direct representation to PWDs. Similarly, it mentions of the review of facilities available to PWDs without any mechanism to achieve the purpose. It is ridiculous to note that the proposed Commission for PWDs reminds of National Commission on Human Rights (NCHR) established in 2012 in accordance with the Paris Principles to promote, protect and fulfill human rights embodied in the Constitution and international standard. NCHR was mandated to be directly accountable to parliament working independent of government. With no apparent impact on the lives of victims of human right violations, the NCHR became defunct on 30 May 2019 after completing its four years tenure.

VI. Non-Discrimination and Inherent Dignity

²¹Convention 2006, Article 33.

²² Ibid.

The preamble of the UNCRPD recognizes the inherent dignity of the person and that any disability based discrimination is violative to the worth of the human person.²³ Article 2 of the UNCRPD defines discrimination as any distinction, exclusion or restriction on the basis of disability that hinders the recognition of PWDs on equal basis with others.²⁴ To facilitate these provisions, Article 5 of the UNCRPD explains about the equality of all persons before law and entitles them to equal protection and benefit of the law.

The Ordinance 1981 does not mention or define employment discrimination against PWDs. Disability Discrimination has been defined in new ICT Act 2020 as “any distinction, exclusion or restriction based on disability nullifying the recognition, enjoyment, and exercise of all human rights on an equal basis with others.” However, the said legislation on the subject to the extent of Islamabad Capital Territory would only serve as an example for provinces.

To claim disability discrimination, said disability must be defined and covered by the Ordinance 1981 that still takes disability as an impediment against the spirit of UNCRPD. National Commission for Persons with Disabilities Act, 2018 is bill introduced in National Assembly but the definition and type of disability in the said bill has not yet been worked on in accordance with human rights standards, and there is a little hope for its realization.

VII. Reasonable Accommodation

Reasonable accommodation/adjustment of PWDs has been given wide cover in UNCRPD that means “necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden.”²⁵ Out of total 37 views adopted by Committee on the Rights of Persons with disabilities (CRPD) on individual complaints received to it, 12 cases clearly mentioned of reasonable adjustment duty of the States.²⁶ Failure to make reasonable adjustment for a disabled job applicant is the most common type of discrimination under UNCRPD but laws in Pakistan does not contain any such adjustment provisions. In *Barrister Asfandiyar Khan Tareen case*, LHC mentioned the term reasonable adjustment; however, the reference was in respect of fundamental rights available to everyone under the Constitution.

²³ Convention 2006, Preamble.

²⁴ Ibid, Article 2.

²⁵ Convention 2006, Article 2

²⁶ Committee on the Rights of Persons with Disabilities’ Views on Individual Communications under the Optional Protocol <https://www.internationaldisabilityalliance.org/crpd-committee-interpretation> accessed 12 July 2020.

The definition of discrimination in Article 2 covers all forms of discrimination, including denial of reasonable accommodation. Convention further says “to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”²⁷This provision of the Convention signifies that any disadvantage faced by a PWD to reasonably adjust his/her disability will constitute discrimination and that the requirements to establish “substantial disadvantage” and to “justify discrimination” are incompatible with the UNCRPD. Such discrimination is not acceptable in any of these provisions of the UNCRPD. UNCRPD is only limited in relation to adjustments that are unreasonably or disproportionately burdensome.²⁸

VIII. Equal Recognition Before Law

The idea behind the guardianship laws, in first sense, is to place disadvantageous segment of society including disables (mentally retarded), children and orphans in guardianship to obtain the legal authority to make decisions for another person. In second sense, guardianship focuses on person’s manner of duty, kindness, and fairness. In third sense it means that the guardianship ends once an individual gains decision-making capacity. The second view read together with third refers to the new idea of ‘supported decision making’ embodied in Article 12 of UNCRPD than conventional notion of ‘substitute decision making.’

PWDs have the right to recognition everywhere as persons before the law. Under Article 12 of the UNCRPD, full guardianship may or may not protect the PWDs and is believed that when it is required to provide guardianship, partial or limited guardianship is desirable than full or absolute guardianship. The concept of supported decision-making assists PWDs particularly in their health, accommodation, and lifestyle decisions. Pakistan still has conventional guardianship laws in form of Guardian and Wards Act, 1890 with no specific mention of disability or PWDs. Under Section 147 of the Code of Civil Procedure 1908, the ‘legal capacity to act’ is still being restricted and legal custodians are appointed and removed by court decision.

As no concluding observation of the CRPD on the periodic report of Pakistan is yet available, the Committee’s remarks on Indian report may be used as an example in almost similar situation in Pakistan. CRPD required Indian government to immediately inform in detail on progress to repeal its incapacity and custody laws. In

²⁷ Convention, Article 5(3).

²⁸ Ibid.

compliance with Article 12 on legal capacity of UNCRPD, India was required to abolish all forms of guardianship and establish a “supported decision-making” mechanism for PWDs.²⁹ In its general comment No. 1 (2014) on equal recognition before the law, CRPD calls “legal capacity” as a key to access full and effective participation of PWDs in society.³⁰ To respect the autonomy of a person, government, therefore, should ensure to make arrangements for the availability of supported decision-making. This in turn ensures the participation of PWDs in policymaking and consultations.

IX. Accessibility Participation Issue

UNCRPD demands accessibility to justice,³¹ information and communication services,³² education,³³ health,³⁴ habilitation and rehabilitation,³⁵ work and employment,³⁶ adequate standard of living and social protection,³⁷ participation in political and social life,³⁸ and participation in cultural life, recreation, leisure, and sport.³⁹ Article 9 of the UNCRPD particularly talks on physical and environmental accessibility that demands an enabling environment for PWDs.

Ordinance 1981 is completely silent on this issue. An unsuccessful attempt was made in form of a two-page bill named Disabled Persons' Employment and Rehabilitation (Amendment) Act 2014 which demanded insertion of Section 10 (A) after Section 10 of the Ordinance on amending by-laws on building access. With no definition and forms other than physical accessibility, the said bill does not meet the approach of UNCRPD on accessibility being adopted in *Simon Bacher vs. Austria*.⁴⁰ Introduction of legal provisions for construction of accessibility features in new buildings with no realistic penalty or workable mechanism to assure barrier-free environment brings no positive change to the lives of PWDs. Seldom any case law in Pakistan has discussed the issue of accessibility.

²⁹Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of India, para 12(a), May 15, 2019.

³⁰ General Comment No. 1 of CRPD Committee on Article 12 on equal recognition before the law (2014).

³¹ Convention 2006, Article 13,

³² Ibid, 21.

³³ Ibid, 24.

³⁴ Ibid, 25

³⁵ Ibid, 26.

³⁶ Ibid, 27.

³⁷ Ibid, 28.

³⁸ Ibid, 29.

³⁹ Ibid, 30.

⁴⁰*Simon Bacher vs. Austria*- Case No. 26-2014-16-02-2018.

PWDs as a part of the community with freedom in broader way (political life) are protected under Article 21 of the UNCRPD which do not separate out the PWDs. Similarly, equal chances and rights at work and education as others are enshrined in Articles 27 and 24 respectively. However, the idea of segregated education and sheltered workshops for PWDs still prevails in Pakistan.

New Law and Recommendations

I The Purpose of Disability Legislation

In the light of above mentioned issues, Pakistan needs a comprehensive piece of civil rights legislation to prohibit discrimination and provide equal participation of opportunities to PWDs in mainstream life like anyone else. The purpose of the legislation will show a clear connection between UNCRPD and national legislation. In line with UNCRPD, the new legislation will aim to *“promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”*⁴¹

II Participation during Consultation on Legislation

PWDs in personal and representative capacity will be made a direct part of the consultation process. The new Act will be enacted after effective public participation in the consultation phase. Public consultation will help to understand what goes into the establishment of effective legislation which will assist in removing social barriers and changing the existing culture on disability. It also provides the basis for sound relation between government and PWDs that leads to effective and purposeful legislation on important issues, for instance, discrimination and equality, wages, working time, training, occupational health and treatment of PWDs. This will help to regulate the future environment and terms and conditions of the employment. Similarly considering and enhancing the inclusiveness of PWDs at initial and pre-legislative level will prove a key source for reducing inequality and extending protection to PWDs.

III Disability Enumeration and Assessment Criteria

⁴¹ Convention 2006, Article 1.

The issue of disability enumeration will be addressed by the Act. The new law must provide to link statistical data with rights. For this purpose, government will be made responsible to ensure inclusive public services. As a result, statistical data regarding disability will be conveniently available at regional and local government levels that can be usefully utilized at national level to plan and structure policies and laws.

Other than disability count, adequate and sensitive disability assessments must be carried. Disability assessment is a type of assessment that is used to determine the “nature of physical or mental limitations” of an individual (if any exist). These assessments can determine whether the disability of an individual disqualifies them from a position. The assessment must be multi-pronged instead of purely medical based. It will specifically take place within a great deal of legal context to avoid unfair discrimination against disabled workers. The new law should deal disability assessments as “fit to work assessments” banning any information about a disability until after a conditional employment offer has been made (except those required to make reasonable adjustment). Employers will also bear a specific obligation to review the particular risks faced by any PWD in the workplace.

IV Disability Definition

Act must contain a separate provision on the definition of all terms used in the Act in the light of UNCRPD to meet the requirements of social model of disability. UNCRPD does not restrict its coverage to specific individuals and use the term “includes”⁴² to keep its application open. Law must be very clear on the definition of disability. In addition to protected specified disabilities in the Act, the term “other disabilities” or “unless the context otherwise requires” should be added to enhance the scope of law if name of all impairments cannot be specifically covered. It will cover all arising from, or in consequence of one’s disability including long-term conditions with adverse effect on a normal day-to-day activity (the issue that is seldom debated in any court case of disability discrimination or violation in Pakistan). The Section on the definition of a PWD should be clear enough that a PWD is a person who possesses physical or mental impairment limiting one or many of the main activities of life.

Outdated or demeaning terminologies used in other national laws will be brought in compliance with international standards. By the time new consolidated national disability legislation is put forward and implemented

⁴²Convention 2006, Article 1

in true sense, definition of disability can be placed into two groups. One may be the official definition of disability developed on a pattern by professionals and academics in UK and India while other is the definition produced by people with disabilities and the organizations run by the people with disabilities in addition to existing scattered and obsolete definition of disability in various Acts.

The new definition will focus not only on functional limitations of the victim but the behavior of the alleged discriminator. This will place obvious obligations on public authorities, service providers and employers than disabled individual.

V Disability Certification

To replace pure medical opinion-based certification of disability, application for certificate of registration as disabled will be made to the designated authority in such a form and in such a manner as may be specified by the federal government. The focus of the disability certification will be to show that how well the new Act or any other statutory provision is able to achieve its objective independent of medical proof.

New Act will possess complete details on the designation of the certifying authorities, procedure of certification, and appellate authority to make appeal of grievances. The competent authority, after fulfilling all the requirements of the Act and rules made therein, will issue disability certificate within sixty days from the date of application. Under new law, disability certificate will require to be renewed after every five years. Disability certificate may be revoked if received fraudulently or disability is ceased.

Refusal to grant disability certificate by the competent authority, if not satisfied, will be an order in writing containing the ground for refusal. Appeal of such grievances can be made to any such appellate authority, as may be notified by the government.

VI Discrimination under New Act

In Pakistan, disability cases are mostly limited to employment related discrimination of the PWDs only. PWDs are not aware of their widespread rights granted by UNCRPD. The new Act will be clear on types of discrimination. Inaccessible websites for a blind person, for example, amounts to disability discrimination.

Inaccessible polling station for a wheelchair user to poll his vote is again a serious kind of disability discrimination.

No fulfillment of “reasonable accommodation duty” on the part of employers, public/private institutions, and government presents another gloomy aspect of disability discrimination. However, the use of terms like “proof of substantial disadvantage by victim” and “the justification for discrimination” will be discouraged by the new law for being incompatible with the CRPD spirit.

In the absence of law, such discriminations are seldom challenged and addressed by courts in Pakistan. Act will provide additional clarity on how these disability nondiscrimination laws apply to individuals.

VII Equality Duty

On pattern of public sector equality duty (PSED) in Equality Act 2010, UK, the equality duty under the Act will require public authority to eradicate all types of harassment discrimination against PWDs to provide them equality of opportunity. If any equality gap is predicted, anyone performing public function/duty will be under obligation to take positive action and therefore anything done contrary to it will amount to a breach of that duty. To make it more effective, public bodies will be made responsible to regularly review to know the impact of their policies and strategies on PWDs. More important in this regard is that public authority will provide evidence how it has done this.

PWDs do not constitute a homogenous group because they have diverse strengths and needs. Law needs to address the notion of “equality” with more individualized approach that will be reflective of and consistent with their dynamic abilities, capabilities, and vulnerabilities. New law will reflect the notion of “equality with diversity.”

VIII Equal Recognition before Law

The Act will ensure PWDs to have the right of equal recognition everywhere as any other person before the law. Taking equality, non-discrimination, and autonomy as obligatory requirements of the society, the Act will be clear enough on the appointment and removal of the guardian in the spirit of UNCRPD that moves beyond the traditional substitute decision making because complete denial of legal capacity leads to serious violations of the rights of PWDs.

If a district court or any competent authority, as per notification of the government, finds that a PWD who is already provided with an appropriate support (support decision making) is unable to take legally binding decision, s/he will be provided further support of a limited guardian. Courts, in guardianship cases, will be made obliged to identify and determine those specific areas which demands guardianship while in all other areas of life, one may retain full decision-making capacity. Law on legal capacity of a PWD can be made more vibrant and effective by more awareness on Article 13 of the UNCRPD (access to justice) among judges, lawyers, police officers and prison staff.

IX Possible Future Disability Claims

Legislation will guide and provide on “possible future disability claims.” The rejection of a non-disabled applicant on the perception that a condition could become a disability in future will amount to direct disability discrimination and is unlawful.⁴³It will prohibit the employer to draw conclusions about disability where conditions exist. The Act will address the issue under term “dismissal in advance” in case of wrong perception and assumption of the disability of the employee by the employer. This will be taken as differential treatment than perceiving someone’s actual abilities that amounts to direct discrimination. Being a direct discrimination and a potential threat to the human rights of a PWD, the law will deal it with penalty and fine.

X Rights of the Caregivers

Laws and courts in Pakistan are completely silent on the innovative idea of care giving by caregivers in comparison to India and UK. The rights of a caregiver arising from caring for relatives or friends with disabilities are not known either. Apart from helping the PWDs in recovery, care givers may have to look after the financial, social, and personal needs of a PWD. Care giving services also depend on the cultural context and locally available support systems. Care giving and community care services are socially acceptable because family structure is generally supportive in Pakistani culture.

⁴³*Chief Constable of Norfolk vs. Coffey*, [2018] UKEAT/0260/16/BA.

A “caregiver” in new proposed Act will be a person who “provide or intends to provide unpaid care to a family member, relative or friend.”⁴⁴As the care taking responsibility of the caregivers directly affect their key tasks and role at home, household activities, education, employment, recreation or any other. Law, therefore, needs to entitle them to some rights to ensure protection against discrimination arising from their care providing role. New law will be clear enough on kinds of discrimination made against a caregiver.

It will constitute direct discrimination if the employer refuses to offer a job or less favorable treatment because of one’s caring role. Associative discrimination will be in form of policy or practice that disfavor someone for his care giving role. Act will entitle caregivers to flexible working requests and hours relaxation. This may include 12 weeks of unpaid, job protected leave per annum to the caregiver. The “family caregiver leave” must be a job protected unpaid leave for a caregiver in job. It can be adjusted under “reasonable adjustment duty” of the employer/service providers based on care giving role of a caregiver and not on claimant’s disability.

Similarly, the financial burden of an informal caregiver both due to disability related factors of a PWD and difficulties in maintaining job due to care giving burden should be catered by new law. There should be a separate funding agency or department under Government of Pakistan with primary objective to financially help these informal caregivers in form of care giving allowance. In advanced countries on the globe, the caregiver should provide at least a 20 hours per week care giving to be entitled to said allowance.⁴⁵ Care giving should not be placed as family’s private responsibility. The new law should contain a detail of “respite services” available to these caregivers. There should be provision to initiate capacity building program and training on care giving covering the type of service or assistance provided and sought by the caregiver. Along with new law, legal provisions should be brought in Pakistan labor legislations to protect the jobs of caregivers by providing job protected paid or unpaid leave. A separate department should be established to assess the lost earning and needs of caregivers due to their care giving obligations. In case of financial constraint to compensate the caregiver, State should take the onus of providing and sharing care for the PWD in various forms (like hours relation, duty rotation, and others).

XI Accessibility Issue

⁴⁴ Care Act 2014, Section 10(3).

⁴⁵BW, Chan and AM. O’Brien. “The right of caregivers to access health information of relatives with mental illness,”*Int J Law Psychiatry* 34(2011):386-92.

The Act will contain a separate section on the issue of accessibility demanding newly constructed or duly altered places of public accommodation and commercial facilities to meet the needs of PWDs. Provinces, organizations, and establishments will be made obliged to follow the standards of the Act for accessible designs usually through building codes.

Act will contain a term “universal design” in its definition section that will include design of environments, products, programs, and services. It will provide a time limit for the adoption of required changes by service providers whether government or private, that may be three years from the date of notification of such rule. With punitive outcomes, this will be done by federal government in consultation with Chief Commissioner.

A special department will be authorized by federal government to issue certificate that accessibility standards are met. It will check all federal and provincial accessibility standards, their modifications and enforcement. It may provide informal guidance regarding the extent to which they are consistent with the minimum accessibility requirements of the Act. In exercising its certification authority, the department will work closely with provincial and local officials.

New law will absorb accessibility as an umbrella concept. Along physical accessibility, transportation and telecommunication accessibility with modification to discriminatory policies to make them accessible will be covered by the law. Telecommunication service providers and telecommunications equipment manufacturers will be obligated under the Act to ensure the accessibility and usability of such services and equipment to PWDs.

XII Reasonable Accommodation

Common perception on reasonable accommodation in Pakistan means adjustments to only physical working environment and does not perceive it as “any form of support to make a PWD to live and work effectively.” Reasonable accommodation, when interpreted under the Act, will mean positive obligation of the State and private bodies to provide additional support.⁴⁶ Language of the Act will not entertain “standard reasonable adjustment criteria” because the proportion of reasonableness may vary from case to case.

⁴⁶*Vikash Kumar vs. Union Public Service Commission & Ors.* [Civil Appeal No. 273 of 2021 Special Leave Petition (C) No. 1882 of 2021].

No fulfillment of “reasonable adjustment duty” in traditional sense is usually met by compensation to a PWD. However, the new law/Act must take it as a device requiring employers and others to fulfill their duty to remove specific hindrances and disadvantages caused by their rules, policy, criteria, practices, and premises. The Act will be clear on relevant controversial terms like “proof of substantial disadvantage”, “constructive knowledge of disability by the employer”, and “justification defense to meet the failure of making reasonable adjustment.”

Act will accommodate very new forms of reasonable adjustments including pay protection,⁴⁷ poor memory caused by disability,⁴⁸ reduction in hours,⁴⁹ expectation to work late,⁵⁰ and employer’s duty to consider all reasonable adjustments before performance reviews.⁵¹ Reasonable adjustment under the Act will also accommodate time off for treatment.

XIII Enhanced Access to Justice

PWDs should be provided with the same legal rights and access to justice⁵² as the non-disabled individuals. PWDs in case of discrimination will have an easy access to redress that will include an order for reinstatement; an order to stop and compensate discriminatory acts; an order to take wide-ranging remedial measures, an order to make reasonable accommodation; damages; an apology and other measures.

In the absence of equality legislation, there is no available redress and cure for discrimination and harassment cases before they happened in Pakistan. The legal focus is on rectifying them after they occurred with onus of proof on disabled individual. The new Act will adopt preventive and proactive measures to stop happening of such cases. Act will consist of a special provision on “*Burdon of Proof*” particularly designed not to replicate the effect of provisions in the previous legislation where the burden of proof at first lies with the complainant (usually a PWD). It will provide that once a discriminated, harassed or victimized disabled claimant has provided sufficient facts, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act. It will bear a direct impact on cases where discriminator/employers breach their reasonable adjustment duty and escape justice

⁴⁷*G4S Cash Solutions (UK) Ltd vs. Powell* [2016] IRLR 820 EAT.

⁴⁸*Perratt vs. City of Cardiff Council* EAT/0079/16.

⁴⁹*Ring vs. Dansk almennyttigt Boligselskab DAB; Skouboe Werge vs. Dansk Arbejdsgiverforening* Cases C-335/11 and C-337/11 ECJ.

⁵⁰*Carreras vs. United First Partners Research* EAT/0266/15.

⁵¹*South Staffordshire and Shropshire Healthcare NHS Foundation Trust vs. Billingsley* EAT/0341/15.

⁵² Convention 2006, Article 13.

system due to lack of proof. The exception to this rule is if the proceedings relate to a criminal offence under this Act.

From human rights aspect of PWDs' rights, common barriers in accessing justice system will be addressed. Barriers include physical inaccessibility of courts, inaccessibility to legal information, lack of financial resources to pursue legal assistance, negative attitudes of some justice system employees, lack of expertise and experience in disability law among legal service providers, and limited representation of PWDs among justice system professionals.

XIV Criminal Justice System

Disability discrimination law is usually linked to Civil Right Acts; however, PWDs like anyone else may encounter the criminal justice system of the country as suspects, defendants, incarcerated persons, victims, or witnesses. PWDs face more victimization than non-disabled persons if caught in criminal justice system. Lack of experience, insufficient and inaccurate knowledge about disabilities on the part of criminal justice professionals further deteriorates the situation which results in high risk of false confessions, inappropriate placement in institutions and unknowing waiver of rights.

The Act will provide guidance to facilitate criminal justice entities' compliance with the new law in their interaction with PWDs and their own compliance with these obligations. Awareness and training program of criminal justice personnel will be a part of new law to effectively handle discrimination, harassment, or victimization of PWDs. Help may be sought from international standards and case law where a disabled plaintiff alleged that police officers violated his right as they failed to reasonably adjust his disabilities during his arrest and post-arrest proceedings.⁵³ Amendments to the existing codes in Pakistan will improve the situation.

To facilitate all this, Act must contain a separate provision titled "protection from abuse, violence and exploitation." It will give special powers to the police and Executive Magistrate (disability) to handle complaints of violence and exploitation of the PWDs. Steps to avoid occurrence of any such incidence of abuse and prescribed procedure for its reporting, if occurred, will be given. If the alleged act or behavior constitutes an offence under the

⁵³*Robinson vs. Farley*1:15-cv-00803-KBJ (D.D.C.).

Pakistan Penal Code 1860), or under any other law for the time being in force, the complaint will be forwarded to judicial magistrate having jurisdiction.

To reduce stigma and bullying against PWDs, ‘disability hate crimes’ should be defined and covered by law to ensure the prosecution and conviction of the committers of these crimes. Similarly, the Act will consist of a separate chapter on offences against PWDs and respective penalties. The chapter titled “alternative punishments” will include penalty for infringing the provisions of the Act or any rule and regulation made under the Act, any offence committed by company or any corporate body, or to fraudulently avail any benefit meant for PWDs. The list will contain punishment for offence of atrocities including humiliation, harassment, assaults, and voluntarily injures, damages to PWDs or any other.

XV Disability Rights Tribunal and Types of Claims

To provide speedy trial under the Act, disability right special tribunal will be created to ensure compliance with laws, policies and rules related to PWDs. Federal government will notify each provincial government to specify a “court of session” to be a special court for each district. It will try the offences under disability Act with the accord of the chief justice of the High Court. The approval will be given in the form of notification by the chief justice of the High Court.

Act will be much clear on types of disability discrimination claims to be entertained by Special Disability Rights Tribunals. Depending on the nature of the case and disability or the wishes of the claimant, special provision will be added to appoint an assessor to assist the court when hearing discrimination cases.

Conclusion:

Keeping in view the miserable and marginalized position of PWDs, this paper attempts to highlight the issues and challenges faced by PWDs in Pakistan. UNCRPD does not give new legal rights but can be used with the laws of each country to change things for PWDs. Similarly, it does not create new rights of PWDs but ensures PWDs to get same rights as everyone else.

Under the shadow of various societal and cultural issues, legal compliance to the provisions of UNCRPD in Pakistan has been analyzed that shows lack of performance and understanding in applying UNCRPD at national level. To make disability discrimination law more effective and vibrant, Pakistan needs legislation to entertain innovative legal reforms to address all challenges of disability discrimination because previous law is almost silent on these aspects and issues of disability discrimination. This study proposes new legislation and some of its key features in line with the theme of UNCRPD, practices and legal framework of civilized nations to address disability discrimination. The proposed recommendations in this paper will help academicians in future research. It will help policy makers to make new laws and policies in consonance with the social model of disability and provisions of UNCRPD.

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