

**DISCRIMINATION IN REALIZING DISABILITY RIGHTS:
THE IMPLEMENTATION OF THE UNITED NATIONS
CONVENTION ON THE RIGHTS OF PERSONS WITH
DISABILITIES IN PAKISTAN**



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Dedicated to

My beloved Parents

Shaista Naznin

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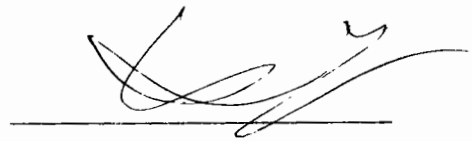
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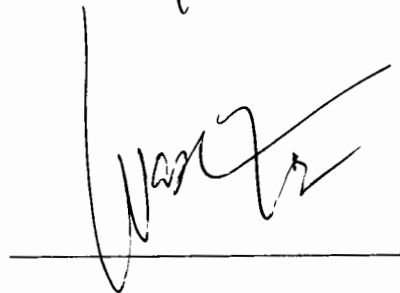
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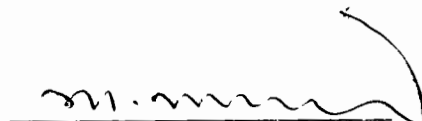
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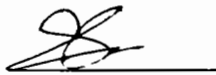


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ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
ADL	Activities of Daily Living
AIIMS	All India Institute of Medical Sciences
BISP	Benazir Income Support Program
BST	Bio Statistical Theory
CA	Capability Approach
CBR	Community-Based Rehabilitation
CDT	Critical disability theory
CII	Confederation of India Industry
CJEU	Court of Justice of the European Union
CRA	Caregiver Recognition Act 2011 of Canada
CRC	Convention on Rights of the Child 1991
CRPD	Committee on the Rights of Persons with Disabilities
CSOs	Civil Society Organizations
CSR	Corporate Social Responsibility
CWDs	Children with Disabilities
CWSN	Children with Special Needs
DB	Division Bench
DCCA	Disability Concession Card Act 2009
DDA	Disability Discrimination Act, 1995
DLEC	District Legal Empowerment Committees
DPOs	Disabled People's Organizations

DTC	Delhi Transport Corporation
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECP	Election Commission of Pakistan
ECtHR	European Court of Human Rights
ESCAP	Economic and Social Commission for Asia and Pacific
ET	Employment Tribunal
EU	European Union
GA	General Assembly
GoP	Government of Pakistan
HC	High Court
HED	Housing, Economic and Demographic Survey 1973
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICF	International Classification of Functions
ICIDH	International Classification of Impairments, Disabilities and Handicaps
ICT (Act)	Islamabad Capital Territory Rights of Persons with Disability Act 2018
ICT	Information and Communications Technology
IEDC	Integrated Education for Disabled Children
ILO	International Labor Organization
IOM	Institute of Medicine

IYDP	International Year of Disabled Persons
LABARD	Lahore Businessmen Association for Rehabilitation of the Disabled
LDA	Lunatics Detention Act, Gambia
LHC	Lahore High Court
LIC	Life Insurance Corporation of India
LOIs	List of Issues
MO	Medical Officer
NADRA	National Database & Registration Authority
NCPEDP	National Centre for Promotion of Employment for Disabled People
NIC	National Informatics Centre, India
NGOs	Non-Government Organizations
NPA	National Plan of Action for Persons with Disabilities 2006
NPE	National Policy on Education 1986
NTCD	National Training Centre for the Disabled
OAS	Organization of American States
ODI	Office for Disability Issues
OP-UNCRPD	Optional Protocol to United Nations Convention on the Rights of Persons with Disabilities
PBS	Pakistan Bureau of Statistics
PCO	Pakistan Census Organization
PET	Physical Education Teacher
PIED	Project for Integrated Education Development
PHC	Peshawar High Court

PSED	Public Sector Equality Duty
P.S.R.D	Pakistan Society for the Rehabilitation of the Disabled
PWDs	Persons with Disabilities
RML	Ram Manohar Lohia Hospital
RPWD	Rights of the Person with Disability Act, 2016
RRA	Race Relations Act 1976
RTE	Right to Education Act 2002,2009
RTI	Right to Information Act 2013
SC	Supreme Court
SDGs	Sustainable Development Goals
SESE	Senior Elementary School Educator [Arabic]
UDHR	Universal Declaration on Human Rights
UGC	University Grants Commission
UKIM	UK Independent Mechanism
UN	United Nations
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UNICEF	United Nations International Children's Emergency Fund
UNO	United Nations Organization
UNOHCHR	Office of the United Nations High Commissioner for Human Rights
UPE	Universal Primary Education
WHO	World Health Organization
ZMR	Zonal Medical Referee

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ABSTRACT

This research examines the legal discourse and politics of human physical disability in the light of United Nations Convention on the People with Disabilities (UNCRPD) and the domestic legal framework in Pakistan to see its contribution in struggle for disability justice.

Since independence, the only existing federal law on disability in Pakistan is Disabled Persons (Employment and Rehabilitation) Ordinance, 1981. The ordinance was promulgated in 1981 during “international year for disabled persons” to provide support to persons with disabilities (PWDs) in getting employment in commercial, industrial as well as government establishments. Different aspects like census data analysis, definition of disability, employment opportunity and quota, provision of education and others in respect of disability have been examined to see how far Pakistani legislation is capable to take pace with the emerging modern notion of disability under UNCRPD. Social attitude, State policy and outdated disability law as main hurdles in PWDs participation, representation, and inclusion has been examined in the light of various courts decisions. In absence of an appropriate legal framework to address disability issue, superior courts in Pakistan have attempted to interpret and give judgments on various issues brought to it. However, in the absence of purpose-oriented law, court judgments can fill the gap only. Pakistan ratified UNCRPD in 2011. This requires Pakistan to adopt UNCRPD standards at national level in its letter and spirit. Pakistan has made few little efforts at provincial level after 18th amendment to the Constitution of Pakistan, but these segregated efforts generally proved ineffective against disability discrimination. What adds to the situation are various

issues including legal, political, social, cultural, and economic that hinders realization of UNCRPD at domestic level.

Being a signatory to UNCRPD and a neighboring country that inherit same legal history, cultural and socio-political situation as Pakistan, situation analysis of disability in India has been made. Legal framework of disability before and after ratification of UNCRPD has been analyzed. It will provide a comparative view of the changes and developments disability law has absorbed in India after the creation of UNCRPD. Similarly, United Kingdom's modern disability legislation and various remarkable court judgments have been discussed to give some recommendations (with a critical view too in some areas) for legislatures, professionals, and government in Pakistan. It discusses that how courts investigate and give various innovative interpretation to complex terms in disability law, for example, reasonable adjustment duty, subsistence disadvantage, and justification of failure to make reasonable accommodation.

Progress of societies in protecting human rights- particularly the rights of marginalized ones- can be best analyzed through monitoring and enforcement. UNCRPD is one among those significant and core international human rights conventions that gives key importance to national and international level monitoring and enforcement of disability legislation and policies. Analysis of the periodic reports on progress of the UNCRPD implementation status in Pakistan, India and UK provides an understanding of factual situation in these territories.

Central theoretical framework adopted in this research is Amartya Sen's (Indian economist and philosopher) capability approach (CA). Potential suitability and usefulness

of capability approach at normative level is evaluated to understand that capability approach justify labor and human rights discourse of law.

In these pages, various aspects of disability discrimination have been examined. The analysis of various aspects of employment and education related laws and policy on disability in Pakistan has been made to see how effective the existing disability laws in Pakistan are to curb disability discrimination and exploitation. Finally, some recommendation and a proposed model Act in pace with UNCRPD and other best international practices has been given.

INTRODUCTION

Thesis Statement

There is a lack of legislation in Pakistan for the persons with disabilities, the position is further aggravated after 18th amendment, therefore, there is a dire need for making a Model Federal Law for the provinces, and particularly when this law is made in the light of practices of developed countries and International Conventions

Summary

The experience of PWDs under social model of disability is one linked with inequality and discrimination in society. The said model can prove more effective in collectivist cultures like Pakistan and India where the needs and well-being of groups are prioritized than the needs of individuals in individualistic cultures like United Kingdom (UK) and United States of America (USA). Cultural and socio-political perspective in Pakistan is of extreme importance to understand the actual situation of individuals with disabilities particularly when legislation is either in infancy or in non-existence to address the firmly entrenched social inequalities. Disability is a common factor with direct outcome of misery, violation, mortality, and loss of efficiency in human society. Hardly any law in Pakistan regulates the societal aspect of disability. Individuals with disabilities are even discriminated in advanced countries in their societies¹ and jobs.² What adds to the situation is the de jure discrimination against PWDs. Individuals with disabilities are particularly subject to de jure discrimination i.e., legal capacity, guardianship and other arbitrary denial

¹ *Olmstead vs. L.C.*, 527 U.S. 581 (1999).

² *Zebbiche vs. Veolia ES (UK) Ltd t/a Veolia Environmental Services* EqLR 382(2012).

of rights depriving them of autonomy and self-determination against the guiding principles of UNCRPD that stresses on the adoption of measures to provide support to disabled persons in exercising their legal capacity.³

Disability doesn't cause inability rather it needs to be accepted as diversity and immediate steps are needed to be taken to include PWDs in any strategy, policy, or law. This arises a dire need to enact new disability specific laws and amend the existing ones if any as some policies and regulations prevent PWDs from fundamental rights like employment choice, decision making, voting, or standing for office.⁴ Efforts may be initiated with awareness raising under Article 8 of the UNCRPD. However, Government has not paid due attention and publicity to the matter except a Lahore-based non-governmental organization- "Pakistan Society for the Rehabilitation of the Disabled" (PSRD) who initiated awareness although it is State's responsibility under UNCRPD.⁵

The "United Nations (UN) High Commissioner for Human Rights", at the time of its adoption, claimed that the "Convention on the Rights of persons with disabilities" (UNCRPD) adopt and cherishes a paradigm shift in attitudes from understanding of PWDs "as objects of social protection, medical treatment and charity" to accept them as "subjects of rights".⁶ UNCRPD obligates member states to revamp disability laws. To achieve this

³ Convention on the Rights of Persons with Disabilities 2006, Article 12(3).

⁴ Anna Lawson, "The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?" *Syracuse Journal of International Law and Commerce* 34 (2006-2007): 563-567.

⁵ Convention 2006, Article 8.

⁶ L. Arbour, "Statement on the Ad Hoc Committee's Adoption of the International Convention on the Rights of Persons with Disabilities;" December 5, 2006 accessed May 1, 2019.
<<http://www.ohchr.org/English/issues/disability/docs/statementhcdco6.doc>>

purpose, UNCRPD provides for a detailed monitoring and enforcement mechanism under Article 33 at national level.

Original Contribution and Significance of the Study

This research aims to offer an original contribution in the field of disability law by evaluating the social model of disability from the perspective of the capabilities approach, which will in turn enables to produce innovative policy recommendations. Indeed, the UNCRPD is an example of an emancipatory law, placing disability into a new legal order and social model. Yet, in a developing country like Pakistan, the situation reminds of Charles Fourier model, a French philosopher and a socialist thinker (1772 – 1837), saying that, “the world’s oceans would turn to lemonade.”⁷ What he called utopia is the dream of well-being without the means of execution, without an effective method.⁸ This research will thus produce an analysis and effectiveness of the social model of disability that is only possible with real and practical legislation instead of cosmetic and ineffective changes to law.

The capability approach of Sen, as a philosophical interest of the thesis, suggests a direction of analysis but cannot tell anyone just how to do it⁹ (that can be best done with legal approach). It enriches the discourse on laws and offers new understanding of the need and the way to structure laws.

⁷ Hakim Bay, *The Lemonade Oceans and Modern times* (1991).

⁸ M.C. Spencer, *Charles Fourier* (Boston: MaTwayne Publishers, 1981), 126.

⁹ Simon Deakin and Frank Wilkinson, “The Law of the Labour Market: Industrialization, Employment and Legal Evolution,” in *Labour Law’s Theory of Justice*, ed. Guy Davidov and Brian Langille, (OUP 2011), 290.

Research will further investigate in an original way into the means and methods that how international law promotes the status of individuals with disabilities. More specifically, analysis of disability situation in UK and India through focus on the achieved functioning by transformation of available resources,¹⁰ this research will offer new insights into how societies vary in their attitude towards individuals with disabilities and how their legal frameworks may reflect and reply to those attitudes. The suggested shift in discourse from first generation rights to second generation rights and then, from second generation rights to a capabilities approach, can be particularly fruitful in field of education and employment.

Statement of Aims

The key objectives of the PhD research include contribution towards the development of a critical consciousness of the harmful everyday discourses on disability to analyze and assess the impact of discriminatory practices on PWDs. It will further examine the real transformation and scope for improvement in Pakistan's policy and legislation relating to disability discrimination, particularly what is required at domestic level once the UNCRPD is ratified. To achieve this objective, study will research and analyze domestic disability discrimination laws and cases in Pakistan in relation to laws and court cases in United Kingdom and India who has ratified UNCRPD providing an understanding that how the States and societies vary in their attitude towards PWDs and how their laws may reflect and response to those attitudes.

¹⁰ Douglas A. Hicks, "Gender, Discrimination, and Capability Insights from Amartya Sen," *Journal of Religious Ethics* 30 (2002): 147.

In the end, study will significantly put forward recommendations to improve and strengthen the legal framework available to PWDs in Pakistan.

Research Questions

To achieve the aim and objectives stated, this PhD research will endeavor to answer the following research questions in various chapters:

- How is disability constructed socially in a variety of discourses (medical, legal, historical, and literary)?
- What factors contribute to individuals with disabilities becoming socio-economically deprived (in the fields of education and employment particularly)?
- Whether there exists any Pakistani legislation on law of disability in pace with advancement of UNCRPD and some other advanced jurisdiction?
- If yes, whether the existing legislation provides a mechanism for identification, collection, preservation of disabled data, monitoring and enforcement of right-based liberty in education and employment and the rights of care givers?
- Whether the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 should be amended/replaced to define and impose a more rigorous requirement for the collection of disability data and identification and enforcement of the rights of disables?
- What factors have contributed to the, so far, negligible, and unsatisfactory results in Pakistan in terms of the incorporation of and respect for the anti-discrimination international legal framework on discrimination?

- In the context of a developing country like Pakistan, with limited economic resources and great social-economic disparities, how can the UNCRPD and proposed equality laws in Pakistan benefit individuals with disabilities in the light of discussion with some other jurisdictions namely UK and India?
- Whether the establishment of a regional tribunal to adjudicate cases of persons with disabilities in the South Asia region can help UNCRPD to be no more an empty shell in developing countries?
- How the proposed federal disability discrimination legislation in Pakistan can assist in improving the lives of PWDs?

Methodology

To achieve the said aims and objectives, the PhD research is intended to work in three different main phases.

1st– Desk/library-based work: intense research in libraries of different disciplines, using historical, analytical, and comparative approach:

2nd–multi-disciplinary (with a legal focus) and relative analysis of the available disability prevalence:

3rd–writing up:

Following a multi-disciplinary, mixed approach methodology, the research will rely on studies produced in the context of different disciplines on the theme of disability, above all law, but also sociology, philosophy, political science, and history. A library/desk-based doctrinal and documentary approach will be adopted entailing the analysis of a range

of primary (mostly statutory and case law) and secondary (mostly scholarly work) sources related to disability.

It will further take the analysis of disability law and policy in the light of academic literature in Pakistan, UK, and India. It will help to find how and to what extent the domestic policy and law of Pakistan, UK and India is influenced by initiatives of UNCRPD; putting the relationship between international and domestic disability policy with a variety of hard and soft law measures which attempt to influence the direction of domestic disability policy directly and indirectly. Being British colonies, both Pakistan and India have inherited British legal system. All three jurisdictions are member States to UNCRPD. Therefore, a detailed and critical view of UK's past and current disability discrimination legislation with relevant case laws will prove helpful for Pakistan to design and enact future disability specific law. Similarly, an insight of disability situation and policy and legal framework of India (having cultural and societal similarities with Pakistan in addition to legal and political commonalities) will be analyzed. The key justification for studying India and UK in relation to Pakistan is to draw insights from the UK and Indian legislation. With particular focus on disability situation in Pakistan, analysis of existing laws under UNCRPD will help to create a proposed federal disability discrimination legislation in compliance with UNCRPD comprised of the outcome of this research.

Reliance will be on material in the form of books, statutes, articles, reports and decided cases of superior courts including domestic and foreign courts and tribunals.

Review of the Literature

Literature in the form of books, articles and reports is evaluated on the subject which covers various aspects of disability ranging from charity to right based disability model. However, the disability's sociological dimension has been neglected in developing countries like India and particularly Pakistan where medical and charity approach persists and dominates. This research attempts to provide a good insight in this regard. Academia in Pakistan has almost neglected this area to consider and accept disability as an axis of inequality. Although the role of academic institutions to change public perception regarding disability is advocated by some writers, universities have been rather slow on this account.¹¹ World Health Organization (WHO) mentioned the limitations of data collection/availability of its project¹² and non-availability of standard research.

Two models defining disability which are often discussed are the medical model and the social model. Traditional medical model of disability relies just on impairment that needs to be intervened via medical treatment. Social model of disability, however, views impairment and disability separately. It takes disability as a social construct and interaction of the impairment with the environment causing social and physical restrictions. It believes that the organization of society and not the impairment matters to exclude or include people with disabilities.¹³ People with disability are excluded from society by various barriers.

¹¹ G.N Karna, *Disability Studies in India: Retrospects and Prospects* (New Delhi: Gyan Books, 2001), 112-116.

¹² *Mental Health Atlas 2005*, World Health Organization mentions, 13.

¹³ Hosseinpoor AR, Stewart Williams J, Jann B, Kowal P, Officer A, Posarac A and Chatterji S. "Social determinants of sex differences in disability among older adults: a multi-country decomposition analysis using the World Health Survey" *International Journal for Equity in Health* 11(2012) 2.
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3463479/pdf/1475-9276-11-52.pdf/?tool=EBI> accessed March 11, 2020.

Some of these barriers include social and cultural discrimination; negative attitudes and limited social support, inaccessible products and built environments, information formats, inflexible organizational policies, procedures and practices; lack of services; and a lack of involvement.¹⁴ And people are disabled by these social factors. Social model of disability recognizes to eliminate these factors and promote embracing disability as a normal and acceptable way of being.¹⁵

To explain the relationship between PWDs and society, Devlin and Pothier's work provides a comprehensive analysis of Critical disability theory (CDT).¹⁶ The work proved to be very extensive and thorough because there is rarely any literature that covers the contents and philosophical origin of the CDT as a theory.¹⁷ They characterize political, economic, and social marginalization of PWD's as a regime of dis-citizenship.¹⁸ Besides development and realization of progressive disability policy, social model of disability fits the ideals of rights, equality, and nondiscrimination in the framework of social participation and inclusion in community which recognize PWDs as key performers in awareness raising about disability. Rosemary Calderbank, a disability writer in UK, calls the social discrimination of disabled as violation of one of their civil rights. Her article titled "abused and disabled people: vulnerability or social difference" that was published in UK in 2000 aimed to study whether it is an individual vulnerability and susceptibility or the societal

¹⁴ Colleen Dockerty, Dr Justin Varney, Rachel Jay-Webster "Disability and domestic abuse Risk, impacts and response"

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/480942/Disability_and_domestic_abuse_topic_overview_FINAL.pdf accessed July 3, 2019.

¹⁵ Lipson, J. and Rogers, J. "Cultural aspects of disability" *Journal of Transcultural Nursing* 11(2000): 212-219.

¹⁶ Richard Devlin and Dianne Pothier, "Introduction: Toward a Critical Theory of Dis-citizenship" in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, ed. Richard Devlin and Dianne Pothier, (London: University of British Columbia Press, 2006), 124

¹⁷ Ibid.

¹⁸ Ibid.

attitudes toward disabled individuals that results in their abuse and exploitation. She showed the plight of PWDs against whom abuse, and discrimination is made in the modern western world even. To rectify, it need justice and not therapy confirming that disability is not a health condition as considered by medical model but the result of close link between PWDs and their environment filled with physical, attitudinal, communication and social barriers.

Reference to the past is necessary for recovering histories of disabilities in south Asia to create self-help strategies. It is believed that the best response to disability in South Asia is within the family, however, the historical documentation of the family or community first level response to disability is hardly found.¹⁹ Semi-formal and informal responses are observed, largely, in the dependency-enhancing, top-down, charitable mode towards disability but social history of South Asia is evident of transmission towards role-models of independent living. In respect of responsibility, it narrows down the case of disability and society to the connection between handicapped kids and their non-handicapped siblings.²⁰ This work is focused primarily on the link between handicapped kids and their non-handicapped siblings which may be extended to other care takers. Caregivers are the individuals who care for friends and family members with mental health, cognitive, and/or physical needs. Australia, Canada, and UK played progressive role in adopting the right-based approach towards caregiving where caregivers are regarded as “rights’ holders”. To balance the employee’s caregiving obligations and work, Caregiver

¹⁹ M. Miles, "Community and Individual Responses to Disablement in South Asian Histories: Old Traditions, New Myth" *Asia Pacific Disability Rehabilitation Journal* 12 (2002):13.

²⁰ Susan M. McHale, Wendy C. Gamble and Terese M. Pawletko, *The effects of disability, and illness on sibling relationships* (Maryland: P.H. Brookes Publishing Co. 1987),5-7.

Recognition Act 2011 of Canada (CRA) focused on increased awareness and family caregiver's recognition.²¹ UK's "Recognition and Services Act 1995", the "Carers (Equal Opportunities) Act 2004", "the Carers and Disabled Children Act 2000" recognizes carers and caregivers as rights holders. The modern attempt in this regard is Care Act 2014. These laws bound organizations to ensure caregiver's basic human rights. The carer's struggle for equal treatment achieved a milestone in the shape of Equality Act 2010. Historic judgement of ECJ in *Coleman vs. Law* (2008) paved way for it. It is an employment law case where Ms Coleman was expelled on accusation of manipulating working time requests by using her child as an excuse. It was heard by European Court of Justice (ECJ). The Court framed an issue on the question that whether the discrimination policy of European Union (EU) only apply on disabled people and not on the people discriminated due to the fact or reason that they are connected or having responsibility of disabled people. The ruling of the ECJ was remarkable with its impact on future carers law in UK. It clarified that "disability discrimination by association is unlawful in the workplace."²² The significance of the case is that the ruling of the regional court- ECJ- was used to analyze the then status of UK's law on associative discrimination and carers rights. After the ruling of ECJ, Coleman case went back to the Employment Tribunal to investigate and decide that whether the Disability Discrimination Act 1995 (DDA) in its current form covers associative discrimination or whether UK law needs to be amended.²³ The impact of the case was vital on new legislation to establish anti-discrimination rights for carers.²⁴

²¹ S. Osborne-Brown and M. Daye, *Human Rights, Family Status, Caregiving Responsibilities & the Workplace Presentation* (Vanier Institute of the Family, October 31, 2013), 111.

²² *Coleman vs. Attridge Law and another* C-303/06 [2008] IRLR 722 (ECJ)

²³ Ibid.

²⁴ Luke Clement, *Carers and Their Rights, 7th edition* (Carers UK, London SE1 4LX, 2018), 7.
<http://www.lukeclements.co.uk/wp-content/uploads/2015/07/Carers-Guide-6th-pre-pub-2015-05.pdf>
 accessed July 17, 2020.

UNCRPD too places significance on age and gender-sensitive support and care of carers for people with disabilities.²⁵ Recent observation is that few advanced developed countries have recognized the significance of the role played by informal carers and effective policies are, therefore, generated in these countries to support the informal family carers in many ways.²⁶ However, the right-based approach towards carers' is almost missing in developing Asian countries like India and Pakistan. Rights are talked about the people with disabilities to some extent but not about the persons who care for these physically challenged persons. Hareesh Angothu in his work "Civic and Legal Advances in the Rights of Caregivers for Persons with Severe Mental Illness Related Disability" concludes that "the current Indian government and cultural frameworks implies that caregiving is a responsibility of relative of the person with disability."²⁷ He further adds that the extent of responsibility of the relative is unknown. The responsibility needs to be shared by civic society (in form of community care) and government (recognition of carers' rights through law policy reforms) to provide respite services to carers.

Issue of disability can be visualized as a policy matter when societal differences of PWDs are considered. Bynoe and Barnes outlined that the promotion of the equal rights of PWDs is possible via comprehensive policy.²⁸ But in the context of various societal backgrounds and different policies and plans, a question on the use and applicability of a blanket system to treat disability is still there. Although, a human rights approach on

²⁵ Convention 2006, Article 16(2).

²⁶ Policies to Support Family Carers by the Organisation for Economic Co-Operation and Development (OECD). <https://www.oecd.org/els/health-systems/47884889.pdf> accessed January 14, 2019.

²⁷ Hareesh Angothu, Santosh K. Chaturvedi "Civic and Legal Advances in the Rights of Caregivers for Persons with Severe Mental Illness Related Disability," *Indian Journal of Social Psychiatry* 3(2016): 33

²⁸ Ian Bynoe, Mike Oliver and Colin Barnes, *Equal rights for disabled people* (London: Institute for Public Policy Research, 1990),56.

disability towards disparity and enactment of legislation may help to lessen or eliminate the inequalities, but local statutes and legislation in the absence of effective monitoring and enforcement mechanism alone may introduce only “formal equality” that results in failure to achieve “real equality” in situations faced in practical life by PWDs.

Oliver, a scholar, activist and first professor of the modern disability studies in the UK, emphasized that a demeaning and discriminatory social and institutional structure imposes disability upon the person that goes beyond the scope of his/her impairment and needs a policy and legal remedy to harmonize domestic law with UNCRPD.²⁹ United Nations, in its report on legal position of disability in developing countries, says that legal and policy frameworks often provide insufficient protection to PWDs. In some cases, laws may discriminate or harm the interests of PWDs. And thereby demands such a legal framework and its implementation to have a positive impact on the lives of PWDs, their families, carers and communities. The legal conduct of the study will cover disability related legal platforms in detail in Pakistan, India, and UK in the light of UNCRPD in separately designated chapters.

In relation to social model of disability, capability approach by Sen is deemed more innovative and important to “*conceptualize and re-examine disability within special needs as an alternative to the economic, utilitarian approaches, which continue to dominate discussions of quality of life in policy circles*”.³⁰ “*Equality of what*” is the landmark lecture of Amartya Sen in 1979 exploring an approach to wellbeing that revolves around ability of

²⁹ Michael Oliver, *Understanding Disability: From Theory to Practice* (Basingstoke: Palgrave, 1996), 32.

³⁰ Amartya Sen, “Capabilities and well-being,” in *The Quality of Life*, ed. Martha Nussbaum and Amartya Sen (Oxford, UK: Clarendon Press, 1993), 30–54.

an individual.³¹ For thorough understanding of disability, Reindal suggests the more advanced form of social model-“the social-relational model”- that is more in line with the contributions, and perceptions of the capability approach.³² He says that the significance of the capability approach is that it goes beyond the dilemma of difference and takes the difference as a specific variable of human diversity offering a universal model of functioning and disability.³³

Capability approach of Sen can also be best used to answer the criticism on the social model which takes disability as a uniform concept under social elements, such as discrimination and oppression. But this is the mistaken concept of understanding of the relationship among “disability, impairment and society”.³⁴ Disability under the social model conception is, therefore, not a sole result of the effects of impairment but of the oppression, misery, and discrimination.³⁵

The use of capability approach seems more significant in a developing country like Pakistan because it admits that “*individuals have both varying needs for resources and varying resources to convert them into functioning*” by calling resources as “inadequate indicators of wellbeing”. It proves of direct assistance in policy adoption in developing countries. Tania Burchardt analyzes the strength of the capability approach in connection to disability theory and adds that capability approach emphasizes on the ends (mobility and

³¹ Ibid.

³² Solveig Magnus Reindal, “Disability, Capability, and Special Education: towards a Capability-Based Theory,” *European Journal of Special Needs Education*, 24 (2009): 155-168.

³³ Lani Florian et al., “Cross-cultural perspectives on the classification of children with disabilities: Part I. Issues in the classification of children with disabilities,” *The Journal of Special Education* 40 (2006): 36-45.

³⁴ Sen, “*Capabilities*,” 45.

³⁵ Tania Burchardt, “Capabilities and disability: The capabilities framework and the social model of disability,” *Disability and Society* 19(2004): 735-51.

nutrition for instance) instead of resources and means (walking and food for instance) of well-being. Further analyzed, this relation shows a close link to the social model's issue of discrimination and oppression.³⁶ In relation to Sen's capability approach, UNCRPD position about functioning of individuals with disability to achieve their capacity is based on the human right approach of the UN towards development theory. UNCRPD, therefore, emphasize on the dimension of social development demanding full, effective, and equal participation of PWDs in society to get benefited of the economic and social progress.

Structure of the Thesis

This thesis consists of eight chapters including conclusion and recommendations.

Chapter One of the thesis provides an understanding of the theoretical framework of the study. The capability approach of Amartya Sen addresses that everyone has an equal opportunity to access the same services and facilities, etc., ratifying the rights-based perspective of the UNCRPD. It also covers that how some people need more help, resources, and support to achieve same ends (disable in this case). Chapter covers the link between disability and poverty in developing countries and that how capability approach may offer solution to such situation. It also gives a brief overview of disability prevalence and notion of States' obligation. Chapter explores the influence of capability approach on law particularly in labor law and human rights law discourse.

Chapter Two provides an understanding of the UNCRPD as paradigm shift on disability and its peculiarities. It discusses some international efforts made on disability and towards the creation of UNCRPD. UNCRPD demands member states to realize

³⁶ Reindal, "Disability, capability," 160.

obligations within their domestic legal order. This Chapter provides about key features of the UNCRPD and the role of its optional protocol on “individual complaint mechanism” with detailed mention of some individual complaint cases from member States. It also analyzes the management and general implementation of UNCRPD in developing country through detailed discussion of national and international monitoring mechanism of the UNCRPD. Significance of the regional efforts and recommendation for the establishment of a regional court to see and resolve disability issue at regional level is a part of this Chapter. It particularly sees the impact of UNCRPD on the case law of European Court of Human Rights (ECtHR).

Chapter Three covers the prevalence of disability in Pakistan and the current status of laws, policies, and programs on disability. To identify the loophole and legal problems, various Pakistani laws/policies, statutory efforts, and court judgements on disability are analyzed to see whether disability remained or turned an inclusive topic in Pakistan as per UNCRPD version. In the light of superior courts judgements, this Chapter highlights that how contentious is disability data and definition in Pakistan for several reason. It gives a short overview of the education and employment policy regime in Pakistan and its impact on PWDs lives.

Chapter Four is about domestic obligations of Pakistan after it has ratified UNCRPD in 2011. A detailed view of various challenges faced by Pakistan in adoption and fruitful implementation of the convention has been given. It includes various cultural, societal, organization, and legal challenges. Importance of inclusive education for PWDs as a preliminary and significant step is covered to ensure their equal participation in society. The importance of inclusive education for PWDs under Article 24 of the UNCRPD has

been evaluated in Pakistan where getting education is even a challenge for non-disabled individuals. To evaluate the current implementation status of UNCRPD, Chapter gives the critical evaluation of Pakistan's first periodic report submitted to the Committee on the Rights of Persons with Disabilities (CRPD) in recent past for evaluation although no concluding observations have yet been made by CRPD.

Chapter Five provides on Indian disability legislation. It covers an understanding of various legislative enactments in past before and after the ratification of UNCRPD. It elaborates current legal definition of disability in India and that how it has been improved in the light of UNCRPD requirements. Chapter also explores that how the changing perceptions of disability have influenced judicial interpretation by Indian courts. A brief view of previous and current Indian law on associative rights of PWDs is provided (carer rights). It also debates on the need of this study by highlighting commonalities between India and Pakistan to address disability issue.

Chapter Six is on the equality and discrimination law of UK. It briefly discusses Caroline Gooding idea of social construction of disability and its impact on British legal thought which then played a crucial role in shaping the Disability Discrimination Act of 1995. It also discusses the Equality Act 2010 and Care Act 2014 that place significant new rights for disables and carers in England respectively. Two main disability legislation of UK are discussed in employment-related aspects of disability with relevant case laws to see the impact on and implications for disability. Chapter also presents the review of the progress report of UK by CRPD to examine the implementation status of UNCRPD in UK. It may prove helpful and guiding for Pakistan in designing future legal framework on disability.

Chapter Seven provides the outcome of this research in the form of proposed federal disability discrimination legislation in compliance with UNCRPD and other international standards. Highlighting the significant impacts of the model enactment, the Chapter will provide an insight as to what issues and concerns may be examined to make legal reforms and enact an effective disability specific legislation.

Final Chapter gives conclusion of the thesis and offers various recommendations.

CHAPTER1: THEORIZING DISCRIMINATION AND DISABILITY AS A PHILOSOPHICAL INTEREST

1.1 Introduction

This chapter gives an in-depth analysis of the use of Sen's capability approach towards disability. The reason to use Sen's capability approach towards disability as a philosophical yardstick (academic philosophy) of this research is to "*emphasize upon the moral significance of individuals' capability of achieving the kind of lives they have reason to live instead of focusing on subjective well-being or the availability of means to the good life*" (as is the subject of utilitarianism or resourcism respectively and the apparent problem faced in developing countries). In this regard, it is insufficient to focus only on means by avoiding what a person can do with them. In contrast to an exclusively economic approach, Sen believes in what one is 'able to do or to be'.³⁷

This theory provides a substitute to the narrowly economic yardsticks and is tilted more towards social model in the context of human development. Capability approach proves very helpful for law discourse particularly labor law theory and human rights law. It covers the link between disability and poverty and suggests the possible solution.

1.2 Models of Disability

Disability is an extremely indeterminate concept whether taken in law, ethics, or common sense and has no settled meaning. There are instances when situations are deemed

³⁷ Amartya K. Sen, *Inequality Re-examined* (Oxford: Clarendon Press, 1992), 75

disabilities in one context but not in another. To understand modern disability and its social model, following is a brief review of the five major models of disability.

1.2.1 Medical Model

Being a normative model, it takes disability as an individual problem caused by any health condition including disease, injury which impedes person's functions to be normal. The model pays significant importance to the use of medical technology in prevention of disability. Medical practitioners and philosophers draw similar conclusion in favor of this model that biological abnormality is the sole reason for the disadvantages of PWDs, and that medical professionals are responsible to fix it.

When a wheelchair user is confined in his/her movement due to an inaccessible environment, the abnormality of the wheelchair user is considered the only reason for confinement. However, this assessment is rationalized by the "*doctrine of biological normality*" of Boorse³⁸ and Wachbroit,³⁹ the connection of normality to opportunity of Daniels⁴⁰ and then linkage of normality to quality of life of Brock.⁴¹ The loss of opportunity of abnormal people is conceived as natural, obvious, mild and harmless. Towards definition of disability, *Biostatistical Theory* of Christopher Boorse is very effective that defines the term disease. His interest is in long lasting conditions including blindness, limb loss and paralysis, commonly termed disabilities rather than in life-threatening and more episodic

³⁸ Christopher Boorse, "On the Distinction between Disease and Illness," *Philosophy and Public Affairs* 5(1975): 49–68.

³⁹ Robert Wachbroit, "Normality as a Biological Concept," *Philosophy of Science* 61(1994):579–591.

⁴⁰ Norman Daniels, "Justice and Health Care," in *Health Care Ethics*, ed. D. Van deVeer and T. Regan (Philadelphia: Temple: University Press, 1987), 290, 312.

⁴¹ Dan W. Brock, *Life and Death: Philosophical Essays in Biomedical Ethics* (Cambridge: Cambridge University Press, 1993),435.

conditions usually known as diseases e.g. measles, heart attack or cancer.⁴² He claims that his views on philosophy of medicine fit even the social model of disability and admits the ethical and not a scientific claim. He further adds that “normal human functional ability does exist; the restructuring/redesigning of the human environment is also demanded by ethics.”⁴³

1.2.2 Social Model

In 1970s, the concept of disability in social model sense was discovered in contrast to its old paradigm of medical model. Both models are treated as competitors because they consider disability as a reason of difficulties. Medical model treats disability as an individual problem requiring it to be fixed via medical intervention of medical professionals whereas the social model takes disability as a political problem demanding others (citizen) activists to make corrective action. This change of attitude pressurizes State to reform its functions and roles. Disability here is often examined and understood from the perspective of others. If we consider the concern of this model at political level, it is purely rehabilitative in form of health care and services.

⁴² Boorse, “Disease and Illness,” 53-55.

⁴³ Christopher Boorse, “Disability and Modern Theory” in *Philosophical Reflection on Disability*, ed. D. Christopher Ralston and Justin Hubert Ho (Dordrecht: Springer, 2010), 55-88.

Disability	
Social Model	Medical model
To alter social arrangements	To alter biological individuals.
To make these arrangements more welcoming to biologically disfigured people.	To prevent or fix their anomalies to biologically disfigured people.

Table 1 Social vs. Medical Model

However, some medical professionals, with responsibility to fix anomalies, are getting closer and closer to social model. The best example of this is the report of Institute of Medicine (IOM) in 2007. The IOM reports of 1991 and 1997 perceives disability as a public health problem, however, its third report in 2007 on “*the future of disability in America*” have absorbed the ideas and values of a social model. The report gives recommendations on how to prevent disability. It does not take disability as a problem with an individual but believes its interactions between individuals and their social and physical environments. To realize this interaction between individuals and his social environment, report demanded technological advancements to create better assistive technologies to make these interactions with the environment easier.⁴⁴

Social model has 8 main versions including “the social model of the United Kingdom, the oppressed minority model, the social constructionist version of the United

⁴⁴ Marilyn, J Field, Marilyn Alan, M Jette, *The Future of Disability in America* (US: National Academic Press,2007) <https://www.ncbi.nlm.nih.gov/books/NBK11415/#a2001315cddd00016> accessed July 17, 2018.

States, the impairment version, the independent living version, the postmodern version, the continuum version, the human variation version, and the discrimination version.”⁴⁵

1.2.3 Nagi Model of Disablement

To describe health status in terms of pathology, Nagi model was presented in 1965 by Saad Nagi who was a sociologist. Pathology is abnormal body entity that causes or leads to impairments effecting and restricting the normal daily activities and role of an individual. Nagi takes it as functional limitation and gives a ground-breaking definition of disability. He perceived disability as “a gap between a physical, intellectual, or emotional capabilities of an individual and the demands of that person's physical or social environment.”⁴⁶

Nagi model conceptualizes that impairment turns to disability and ultimately becomes a social construct. The Nagi model is important because it supports “*social and cultural relativistic view of disability*.”⁴⁷ It can be best illustrated by an example. A 12–13-year-old girl who is, for instance, suffering from mental or physical disability, does not go to school and help in households at home. Under Nagi model, the said girl does not have any disability if she lives in a society where there is no concept of girls’ education and girls usually stay at home. However, she will be deemed disabled if she lives in a society where

⁴⁵ David Pfeiffer, “The Conceptualization of Disability” in *Research in Social Science and Disability: Exploring Theories and Expanding Methodologies*, ed. Sharon N. Barnartt and Barbara M. Altman (Bingley: Emerald Group Publishing Limited, 2001), 30-31.

⁴⁶ Victor Santiago Pineda, *Building the Inclusive City* (USA: algrave Pivot Macmillan), 39.
<https://link.springer.com/book/10.1007/978-3-030-32988-4#about> accessed June 12, 2019.

⁴⁷ Edward N. Brandt and Andrew M. Pope, *Enabling America: Assessing the Role of Rehabilitation Science and Engineering* (Washington D.C: Nation Academy Press, 1997), 64.

file:///C:/Users/HP/Downloads/Enabling_America_Assessing_the_Role_of_Rehabilitat....pdf

her age fellows attend the school. It is worth noting that IOM, 1991 was derived directly from Nagi model that is a modern conceptual foundation in disability field.⁴⁸

1.2.4 International Classification of Functions Model

The dynamic level of functioning of a person under “*International Classification of Functions*” (ICF) is the interaction between one health conditions, personal factors, and environmental factors. ICF was early known and developed by World Health Organization (WHO) as “International Classification of Impairments, Disabilities and Handicaps” (ICIDH) in 1980s.⁴⁹ It is also known as biopsychosocial model of disability to integrate medical and social models. It says that disability originates from health condition which results in impairments causing activity limitations and participation restrictions within contextual factors (background of one’s life-personal, social, environmental).⁵⁰ It is noteworthy that participation is not taken in context of “*a role to play; but in terms of being engaged or included.*”⁵¹

The significance of the model is that it assesses individuals using two measuring scales. One measures ability to execute tasks and is known as capacity qualifier and the other measures actual lived experience of people and is known as performance qualifier.⁵²

⁴⁸ Ibid.

⁴⁹ Rune, J. Simeonsson, “Revision of the International Classification of Impairments, Disabilities, and Handicaps: Developmental issues” *Journal of Clinical Epidemiology* 53(2000):1.

⁵⁰ B. M. Altman, “Disability definitions, models, classification schemes, and applications,” in *Handbook of disability studies*, ed. G. L. Albrecht, K. D. Seelman, and M. Bury (CA: Thousand Oaks, Sage, 2001), 110.

⁵¹ Ibid.

⁵² Lennart Nordenfelt, “On health, ability and activity: Comments on some basic notions in the ICF,” *Disability and Rehabilitation* 28(2007):1463.

1.2.5 Human Rights Model of Disability

Human Rights Model (HR Model) is established on the principles of human rights law. It recognizes same rights of PWDs like anyone else and admits disability as a natural part of human diversity. Like social model, it does not accept impairment as an excuse to restrict or deny individual's rights although it acknowledges some impact of impairment in the lives of PWDs. Social model along with human rights principles of HR model can be best used to design legal framework that will address challenges faced by PWDs as the outcome of decisions and actions of the society to be rectified via human rights methodology.

1.3 Capability Approach: Capability and Functioning

In Sen's capability approach, "*capability*" mean actual opportunity and "*functioning*" means activity that a person does as well as the desirable conditions, such as "*being well nourished*" or "*being free from disease.*" Amartya Sen provides more elaborative view and defines "*functioning*" as the term used to describe the current life condition of persons.⁵³ In words of Robert Sugden, an economist, it means "*the person's state of being and they are the realized physical and mental states/conditions of an individual or family including quality of health, happiness, income, and nourishment*".⁵⁴ Sen defines capability as "*alternative combinations of functioning the person can achieve, and from which he or she can choose one collection*"⁵⁵ including freedom from under-nourishment, the freedom to choose appropriate job, and the freedom to choose an proper education. In other words,

⁵³ Amartya Sen, "The Living Standard," *Oxford Economic Papers* 36(1984):84.

⁵⁴ Robert Sugden, "Welfare, Resources, and Capabilities: A Review of Inequality Re-examined by Amartya Sen," *Journal of Economic Literature* 62(1993):1947.

⁵⁵ Sen, "Capability," 93.

capabilities are the set of possible functioning- “*The person’s capability set is a set of functioning vectors from which the person has the freedom to choose.*”⁵⁶

In the light of Sen’s definition, “functioning” are various outcomes like having shelter, having job, being healthy, travelling, voting, collectively termed as “wellbeing” (how ‘well’ is his or her ‘being’). While capabilities are real opportunities to attain these outcomes; like opportunity to be healthy, opportunity to vote and travel and opportunity to participate in community, collectively termed as ‘advantage’. Sen differentiate between capabilities and functioning giving the example of two starving persons. Malnourishment is the same and common functioning of both starving individuals; however, their capabilities set varies because one may have decided to starve due to religious faith, whereas the other one may be starving due to poverty. The focus of Sen, therefore, is more on person’s interests than his/her actions or behavior.

Sen says that the most important thing in evaluation of well-being is considering peoples’ ability to be and to do that morally assesses and measures the social arrangements outside the development context, for example, disability. Sen’s view on what the person can do and the traditional economic emphasis on person’s real income is compared to put disability in a new framework particularly in low income or developing countries.⁵⁷ He argues that the commodities or wealth or the mental reaction(utility) of the people provides insufficient or indirect information about their well-being. Sen elaborates it with an example of a standard bicycle which is a mean of transportation with transportation

⁵⁶ Sophie Mitra, “The Capability Approach and Disability,” *Journal of Disability Policy Studies* 16(2006): 242.

⁵⁷ Sen’s Capability Approach, Internet Encyclopedia of philosophy, a Peer-Reviewed Academic Resource <https://iep.utm.edu/eds/> accessed December 12, 2019.

characteristics. Whether it provides the characteristics of transportation or not depends on the characteristics of those who are using or trying to use it.⁵⁸ Bicycle will provide the capability of mobility to people but not those who are without legs. Capability, therefore, does not depend on the presence of physical or a mental ability but on practical opportunity.⁵⁹ Sen's approach is useful as it revolves around the welfare economics focusing on concepts like quality of life, standard of living, personal well-being.

Sen admits the significance of the "possession of commodities", but only to the extent of enabling the person to do a variety of things and that a commodity possesses 'characteristics.' This shift addresses the significance of 'economic causes and consequences of disability' that exhibits close relation to the recent International Classification of Functioning, Disability and Health of the World Health Organization (WHO; 2001)- the ICF framework is closely linked to the definition of disability under the capability approach as it combines both personal and environmental factors. It says that environmental characteristics along with personal characteristics influence the capability set of an individual⁶⁰ that reflects the social model of disability to the extent of environmental impact.

If the cost side of achieving capability set is taken, it varies among countries depending on the environment including the "average opulence or real income of the society in which the person lives". Here Sen means that the issue of economic inequality is not extraordinarily important on its own but is connected to many other topics in the

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ International Classification of Functioning, Disability and Health, <https://www.who.int/classifications/icf/en/> accessed December 12, 2019.

social sciences. In case of disability, the mobility cost of a person with mobility problem depends on the country he lives in, local physical environment and the available assistive technology.⁶¹ Poverty assessment of Sen, therefore, is not on income only but on ability to achieve some basic functioning though he does not fix the list of basic functioning. His approach is an open-ended that can be moved in many directions. This contrasts with Nussbaum's- American philosopher and Professor of Law and Ethics at the University of Chicago, fixed list of ten central capabilities,⁶² which excludes or only indirectly includes persons with disabilities, i.e., not worthy of human dignity.⁶³ Nussbaum's model is refused because of her belief in "what should be included and why" denying the possibility of fruitful public participation.⁶⁴ Furthermore, he clearly talks about the limitation of the human-rights approach.⁶⁵ In contrast to an exclusively economic approach, Sen believes in what one is 'able to do or to be'.⁶⁶

List of basic functioning and its scope will, therefore, vary depending on the topic under consideration and the environment- this variable can be a capability, a functioning or a personal characteristic. As the area of this research is disability, an example in relation to disability in the field of education will be used to elaborate the idea. Education can be considered a "personal characteristic" that influences work as a capability or as functioning.

⁶¹ Alexandre Apsan Frediani, "Sen's Capability Approach as a framework to the practice of development," *Development in Practice Journal* 20 (2010):173-177.

⁶² Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (New York: Cambridge University Press, 2000),78.

⁶³ Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006),181.

⁶⁴ Alexandre Apsan Frediani, "Sen's Capability Approach as a framework to the practice of development," *Development in Practice Journal* 20 (2010):173-177.

⁶⁵ Ibid,183.

⁶⁶ Hicks, "Gender Discrimination," 139.

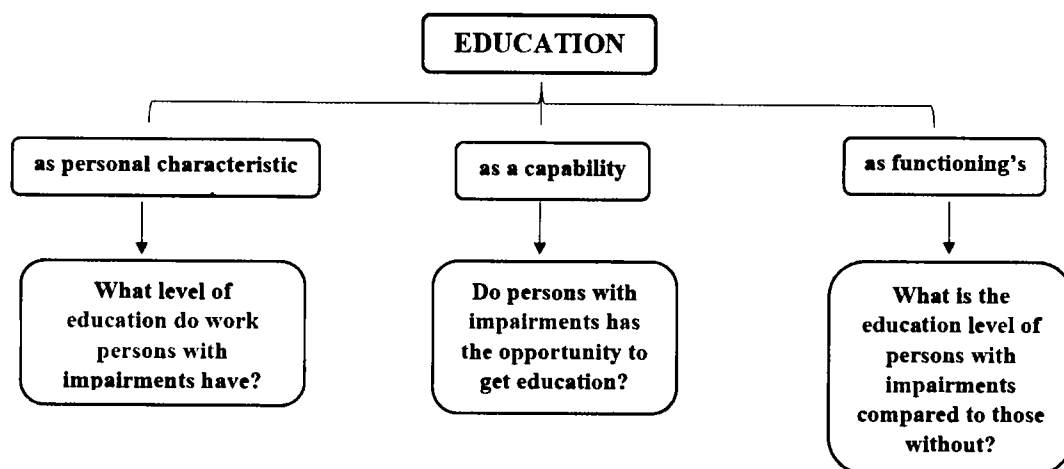


Figure 1 Capabilities and Functioning in PWDs' Education

In terms of capabilities and functioning, the link among the personal characteristics including age, impairment and gender, available resources to the person, and the environment are the cause of deprivation of education in above mentioned case. Sen analyzed disability at two separate levels of capabilities deprivation and functioning deprivation, voluntarily leaving capability approach incomplete to absorb plurality. According to critics, the voluntary incompleteness of the model, however, undermines the usefulness of this approach in defining and formulating disability policies.

1.4 Equality with Diversity

In case of disability, the existence of differences leads to more discrimination towards individual disability than it exists which demands equal treatment of the individuals. However, commitment to equality does not mean to be blind towards human differences. Respect for diversity is one of the guiding principles of UNCRPD. In case of some dimensions like rights, happiness, resources and achievements, equality may seem

attractive, however, other aspects of human personality like skills and abilities, tastes and preferences and social circumstances entertains human diversity.

Diversity may appear to cause troubles for equality because disability limits the performance and achievement of the least or most basic requirements of life making him vulnerable to discrimination, abuse, and assault. Natural interpretation of equality demands to assure people of equal means to achieve their varying aims creating equally good results and equally good lives, although Sen has rejected both instead. A blanket cling of equality is not encouraged. If the diversity of abilities exists, equally desirable aims will need unequal means and these given differences will yield unequal results.⁶⁷ To capture real differences amongst human beings, Sen acknowledges that “society is made up of individuals with unequal abilities and needs and, therefore, its basic underlying premise facilitates its application to disability studies.”⁶⁸ He believes in equality of capabilities and advocates that social structure of the community should respond to human diversity and allow for human development and flourishing. While considering the diversity of PWDs in various fields of their day to day lives, equality and inclusiveness will remain integral part of those elements which governmental policies and institutional structures should aim to equalize.

Sen calls real or effective freedom as person’s capability for functioning and that a wider choice of functioning is itself an improvement in well-being. He emphasizes upon well-being freedom in Chapter 4 of his book “*Inequality Re-examined*,” and underlines on

⁶⁷ Analysis of Inequality Reexamined by Amartya Sen

<https://www.ukessays.com/essays/economics/analysis-inequality-reexamined-amartya-9317.php>

⁶⁸ Andrea Broderick, “Equality of What? The Capability Approach and the Right to Education for Persons with Disabilities,” *Social Inclusion* 6(2018):30.

equally desirable possibilities for functioning and not on ensuring equal means.⁶⁹ For example, with differences in talent, the thing that must be ensured is the equal accessibility to a satisfying and engaging work. It is worth mentioning that he does not mean a formal equality in accessing jobs here or an equal distribution of self-realization which is the subject of the welfare policies of developing countries usually.

In other words, equal treatment of people is not undone by diversity or diversity of conceptions. However, in case of disables, diversity of human capacities elevates problems because of their different abilities and capacities to convert resources and means into functioning to achieve desired ends. Therefore, the blind and the sighted, due to existing human diversity, cannot reach the same level of benefit if provided with the same levels of income and wealth.

1.5 Link Between Disability and Poverty

In developing and low-income countries, living conditions and poverty are two common parameters to identify and measure the socioeconomic conditions of a disabled person. Analyzed through the capability approach of Sen, living conditions of a PWD develop into their “capabilities” and that how these “capabilities” are utilized. The idea of poverty goes beyond the level of material goods/income and is extended to the inability to achieve some standards. Poverty and disability, therefore, together constitute double exclusion. Poverty is a multidimensional concept and cannot be limited to economic measures alone. Significance of the possession of commodities, as examined by Sen, is

⁶⁹ Amartya Sen, *Inequality Re-examined* (Harvard University Press, 1992), 69.

important to the degree that it qualifies the person to do a range of things and that a commodity possesses 'characteristics.'

Applying capability approach of Sen, situation varies among various countries depending on the environment including the average real income of the society in which the person lives though the issue of economic inequality is not of significance on its own but is connected to many other topics in the social science. Therefore, various societies have different aspects of poverty and disability relationship. In a developed world like UK and USA, a vast disabled population live below the poverty level.⁷⁰ Situation deteriorates in low-income countries where disables are poorest of the poor⁷¹ because they encounter levels of economic and social deprivation that is rarely experienced by other sections of the society.⁷²

In Pakistan with high levels of corruption, low human development and rule of law, two aspects of poverty including absolute (notion of the lack of basic needs for life-a global measure of poverty compared across countries and population groups) and relative (unable to live according to the customs and values of the society one lives) poverty may be reviewed in analyzing disability situation.⁷³ However, relative poverty is the most appropriate concept in case of disables which measures the low living standard or a low income in relation to the rest of the society in question. The social model of disability, therefore, is a well-suited model in Pakistan to analyze disability because it pays attention

⁷⁰ Share of persons with a disability in the United States living below the poverty line in 2019 *Disability: share below the poverty line U.S. 2019* | Statista accessed June 20, 2021.

⁷¹ Yeo, R. and Moore, K., "Including disabled people in poverty reduction work: Nothing about us, without us," *World Development* 31(2003),575-78

⁷² Barnes, C., Mercer, G. "Disabled people and community participation", in *Community Participation and Empowerment*, ed. G. Cragic and M. Mayo (London: Zed Books, 1995).

⁷³ World Bank Data, Pakistan, <http://data.worldbank.org/country/pakistan> accessed November 23, 2019.

to consider various aspects of the life of the poor person with a disability is lived with. Thus, providing an opportunity and possibility to focus on the relative as well as the relational aspects of poverty. Sen also investigates in the well-being of people in terms of 'functioning and freedom' rather than in terms of 'goods and services consumed.'⁷⁴ Contrary to '*On Economic Inequality*,' Sen was now declined to draw on more socially than with physiologically determined examples of ethically unjust treatment and experience of PWDs.⁷⁵ Its relevancy with social model of disability is exhibited through the capability approach of Sen that deals with "what people are able to achieve by using these commodities."⁷⁶ He further writes that "we must take note that a disabled person may not be able to do many things that an able-bodied individual can, with the same bundle of commodities."⁷⁷ This makes it possible to evaluate the economic situation of the PWDs in a changed way i.e. not mere "functioning" meaning by "what PWDs are able to achieve within a given context" but "potential functioning" meaning by "what they can choose".⁷⁸ In simple words, it means the "degree of freedom" that a PWD can be advantaged and benefitted from in a given environment.

This shows the connection between the characteristics of PWDs and their level of poverty as a deprivation of basic capabilities.⁷⁹ The growing evidence supports the relationship between disability and poverty, income inequality, social dislocation and

⁷⁴ Jean Francois Trani, Jean Luc Dubois, "Extending the capability paradigm to address the complexity of disability," *Alter-European Journal of Disability Research* 3(2009):3.

⁷⁵ John Cameron, "Amartya Sen on Economic Inequality: the Need for an Explicit Critique of Opulence," *Journal of International Development* 12(2000):1040.

⁷⁶ Ibid

⁷⁷ Amartya Sen, *Commodities and capabilities* (Oxford: Oxford University Press, 1999),7.

⁷⁸ Ibid

⁷⁹ Amartya Sen, *Development as freedom* (New York: Knopf, (1999), 65.

alienation, and homelessness.⁸⁰ Research shows positive correlation between disability and poverty, and both are considered as cause and consequence of each other.⁸¹ If a person is disabled, then most probably s/he may not have completed basic education, lower opportunity to get formal high education qualification and resulting unemployment (paid usually lower if employed and are adjusted in low paid jobs). Conversely, poor are more susceptible to disability physically, economically, and environmentally.⁸² Similarly, there exists additional cost of disability as it reduces the earning potential of the individual. For instance, a PWD may require a higher income to meet additional costs due to disability and cost of assistive devices to attain the same level of functioning as a nondisabled person.⁸³ The modern “rights-based approach” towards relative poverty of PWDs emphasizes on the way in which civil, political, and social rights of PWDs are negatively affected by their poverty. Considering this scenario, the living experience of PWDs in a developing country like Pakistan pose challenge to the advancement and implementation of human rights of PWDs despite the passage of UNCRPD because fruitful exercise of political and legal rights needs a firm base of social and economic rights.

Decent work and full employment of PWDs can help breaking the chain of poverty. However, it is worth noting that any poverty mitigation strategy should aim not only to reduce or eliminate poverty of PWDs but to reduce their vulnerability and decrease the

⁸⁰ Vikram Patel and Arthur Kleinman, “Poverty and common mental disorders in developing countries,” *Bulletin of the World Health Organization* 81(2003): 609-615.

⁸¹ Peter Beresford, “Poverty and disabled people: challenging dominant debates and policy,” *Disability and Society* 11(1996):553–567.

⁸² Jean Francois Trani, Jean Luc Dubois, “Extending the capability paradigm to address the complexity of disability,” *Alter-European Journal of Disability Research* 3(2009):2.

⁸³ Nora Groce, Maria Kett, Raymond Lang and Jean Francois Trani, “Disability and Poverty: the need for a more nuanced understanding of implications for development policy and practice.” accessed December 23, 2020.

possibility of falling back in poverty. This is possible by enhancing the capability of PWDs. As already discussed, that disability is in inverse proportion to capability and “enhancing capability of the individuals reduce the consequences of disability by increasing opportunities for PWDs and allowing them to choose among various opportunity sets.”⁸⁴

1.5.1 Capability Approach as a Solution

As per capability approach, disability is a lack of capability. And lack of capability is a cause of restriction of opportunities available in given context. Sen says that capability is “the various combinations of functioning that the person can achieve.”⁸⁵ Any formulation of capability consists of two parts. These two parts of capability are freedom and functioning. Functioning means various things a person may value and have reason to value doing or being⁸⁶ whereas freedom is the real opportunity to accomplish what we value.⁸⁷ Focusing on freedom, it does not mean “paper freedom” but “effective freedom” and “real possibility” available to individuals with disabilities. It is significant to note that “freedom” will never be effective if it is used to maximize the choices of a concerned individual (PWD) without considering quality of the choices and values of the individuals. Further, freedom is not necessarily a direct control by an individual and groups, but such freedoms can be enhanced by public action and investment. As an evaluative approach, capability approach evaluates activities and guide policy to create choices.⁸⁸ This application of capability approach can be best used when planning and designing new policies and laws

⁸⁴ Ibid,8.

⁸⁵ Amartya Sen, *Inequality Re-examined* (Harvard University Press, 1992),60

⁸⁶ Sabina Alkire, “The Capability Approach and Human Development,” Oxford Poverty and Human Development Initiative (OPHI), University of Oxford <https://www.ophi.org.uk/wp-content/uploads/OPHI-HDCA-SS11-Intro-to-the-Capability-Approach-SA.pdf> accessed December 10, 2020.

⁸⁷ Ibid.

⁸⁸ Ibid.

for PWDs in Pakistan. The participation, choices, and role of PWDs at pre-legislative/policy stage will be more effective in planning and achieving the aim and objectives of such laws and policies. This will have real impact on human development of PWDs in Pakistan which is the expansion of capabilities and choices of PWDs.

1.6 Estimate of Disability Prevalence

It is beyond doubt that PWDs comprise the socially excluded and most marginalized group in any society. The situation gets further worse in developing countries where 80% of the global population of PWDs live in developing and low-income countries⁸⁹ and a large number of them remains unemployed. The total number of PWDs globally was not accurately known. The issue was focused under Article 31 of the UNCRPD that places responsibility on member States for accurate collection of information and data collection. Principles of UNCRPD demand the adoption of methodological tools in accordance with environment of various countries. Capability approach developed by Sen provides new insights in this regard because analysis of disability within capability framework requires particular methods to handle the data. The use of these methodological tools helps to find how the quality of life and aspirations of PWDs are affected by their disability in relation to their social environment. It will in turn help to shape suitable policies to enhance the capability of people living with disabilities.⁹⁰ These methods and data analyzing tools should provide answers to the aim and objectives defined during preliminary stage/meetings of policy designing. These objectives include not only the assessment of

⁸⁹ Janet E. Lord, "The U.N. Disability Convention: Creating Opportunities for Participation," *Business Law Today* 19(2010): 27.

⁹⁰ Jean Francois Trani, Jean Luc Dubois, "Extending the capability paradigm to address the complexity of disability," *Alter-European Journal of Disability Research* 3(2009):3.

disability prevalence and living conditions of PWDs but “also the comparison of their capabilities, their functioning and freedoms.”⁹¹ However, this proved a challenge in Pakistan till date (detailed in chapter three).

The theoretical framework is therefore required to guide both field and analytical operations that may be founded on the choice of a precise definition of disability. It requires adequate definition of disability well-adapted to a given sociocultural context. In adapting such a definition to get the estimate of disability prevalence, it will be needed to define “various impairments, difficulties in functioning, the features of the social environment, the interaction between people with disabilities and their families, communities, and society at large.”⁹² Data collection tools to calculate disability are, therefore, required to be designed accordingly. Adapting the social model of disability along with capability approach as an evaluative framework; three analytical steps can be best used in dealing with analysis of collected data. First step consists of knowing the estimate of the functioning and freedoms that PWDs do or do not possess.⁹³ Second step provides the comparative analysis of capabilities between disabled and nondisabled people in terms of achievements and freedoms to achieve.⁹⁴ Third step involves time analysis to monitor the changes in disability and in the living conditions of PWDs.⁹⁵

This will provide information required for the implementation of relevant projects and policy measures.⁹⁶

⁹¹ Ibid, 14.

⁹² Ibid, 8.

⁹³ Ibid, 14.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

1.7 Human Rights Law in Relation to Capability Approach

The philosophical theorization about human rights is a recent concept. The capability approach is believed to offer a very effective and practical framework for analyzing how normative rights affect the 'PWD's lived experience' i.e., formal rights are converted into everyday capabilities. Taking the capability and function of the PWDs, capability approach can be used to see the difference between their rights on paper and rights in real life. As a flexible framework, it can be used in a variety of context.

PWDs are people and have their own international human rights treaty-UNCRPD- which promotes the importance of their dignity and freedom. Capability approach notion is that people, PWDs in this case, should have real freedom to live the life they value because they have '*capabilities to function*' in a specific way.⁹⁷ *Functioning* is a *doing or being* of a PWD like eating, sleeping, walking, being healthy, and being educated etc. whereas *capability* is *an ability or opportunity to function*. A PWD has capability to be well-educated if she has the opportunity and ability (given his income and access) to get quality education. S/he has the freedom to choose how to function.⁹⁸ This will evaluate and assess the level of welfare or the justice of a society. As a yardstick, it will provide that how well society succeeds in guaranteeing each citizen a set of basic capabilities. Sen, therefore, stresses that capability approach can be seen as a human rights approach where people should have rights to basic human capabilities.⁹⁹ States are made responsible for the

⁹⁷ Rutger Claassen & Anna Gerbrandy, "Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach," *Utrecht L. Rev.* 12 (2016): 4

⁹⁸ Ibid

⁹⁹ Amartya Sen, "Elements of a Theory of Human Rights," *Philosophy & Public Affairs* 32(2004):315-356.

capability level of their citizens. This provides a connection of capability approach to the field of law, including labor and human rights laws.

Human rights law justifies different rights. In case of right against discrimination, they can certainly be justified as a tool to protect a life of minimal decency.¹⁰⁰ Any discrimination that refutes some individuals the same rights as others, is rejected by human rights law. One will be said not treated with dignity when his/her right against discrimination is denied or when his/her due process to avail the right is denied. However, denial of these rights cannot be purely termed as denial of capabilities¹⁰¹ which places more value on human rights than capabilities. Sen's discussion of the human rights concludes that "*human rights are best seen as protections for freedoms.*"¹⁰² Freedoms like opportunity freedoms and process freedoms are protected by human rights. Capabilities are, however, useful in understanding the opportunity aspects of freedom but not the "process aspect."¹⁰³ Capabilities therefore may not explain all essential human rights. Sen gives an example that shows the limitation of capability approach in explaining process freedom that are protected by human rights. He says that when an individual is imprisoned without a trial, the denial of 'due process' is the subject matter of human rights, no matter what the outcomes of a fair trial might have been.¹⁰⁴ This shows that even if the opportunity freedom of an individual has not been affected, because he would have gone to jail anyway, the denial of due process is the violation of process freedom. Capability approach,

¹⁰⁰ Allen Buchanan, *Human Rights, Legitimacy, and the Use of Force* (New York: Oxford University Press 2010), 52,3.

¹⁰¹ Linda Barclay, "The Importance of Equal Respect: What the Capabilities Approach Can and Should Learn from Human Rights Law," *Political Studies* 64(2016):394.

¹⁰² Sen "Theory of Human Rights," 315–56.

¹⁰³ Ibid.

¹⁰⁴ Ibid, 331–2.

therefore, cannot fully replace the significance of human rights (particularly those not concerned with the sphere of individual opportunities).

1.7.1 Interrelation of Capabilities, Human Rights, and the Notion of Obligation

The interconnectivity of the capability approach and human rights is to increase our understanding of both as theoretical paradigms, and as public policy frameworks. Both capability approach and human rights law share a common objective and motivation of enhancing “human dignity and freedom.”¹⁰⁵ In its approach to public policy and law, capability approach emphasizes the critical significance of the substantive “freedoms” and “opportunities” of individuals and groups. Whereas the human rights aspect of the Capability Approach highlights the importance of values such as “freedom, dignity and respect, equality and non-discrimination, participation and autonomy.”¹⁰⁶ To achieve these values in real terms, capability approach emphasizes on the arrangements that are required to protect and promote these values.¹⁰⁷ Accountability and obligation are best tools to human rights approach in this regard but are mostly lacked in policy plans of developing countries. Seen through the lens of human rights law and practice at the domestic, regional, and international level, obligation includes both negative obligations (to respect human rights) and positive obligations (to protect and fulfil human rights).

Apart from traditional dichotomy between positive and negative rights and obligations, the capability-based understanding of human rights helps to provide stronger grounds for the notion of positive obligation. The language of Capability Approach does

¹⁰⁵ Polly Vizard, Sakiko Fukuda-Parr and Diane Elson, “Introduction: The Capability Approach and Human Rights, *Journal of Human Development and Capabilities* 12 (2011):1.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

capture many human rights departing from negative liberty framework¹⁰⁸ and contends the possibility of economic and social rights (positive right for instance, the right of health of PWDs). The obligations that “correspond to rights can take the form of positive obligations to defend and support human rights (as well as negative obligations of omission and non-interference).”¹⁰⁹ The idea of individual dignity and capabilities, therefore, avoids the limitations of traditional theories of rationality and reasoning which were based on e.g., potential exclusion of individuals with poor mental health from the realm of human rights protection. Capability Approach and human rights can be complementary and mutually reinforcing that covers broad spectrum of human rights including economic and social rights and recognition of positive obligations.

For practical value, the interactions between human rights, and capabilities needs the methods in which human rights protections assist in the processes of capability expansion. One such mechanism is legal codification that gather its impact both through legal action and judicial interpretation in addition to consensus-building on aims and goals.¹¹⁰ Other mechanisms include integration of human rights standards into broader public policy and regulatory frameworks. More evaluative approach by some scholars involves the development of human rights monitoring mechanism to move away from “developing international quantitative standards for economic and social rights”¹¹¹

¹⁰⁸ Amartya, Sen. “Human rights and global imperatives,” in *The Idea of Justice*, ed. A. K. Sen (London: Penguin, 2009), 367-72.

¹⁰⁹ Sen., “Elements of a theory,” 325.

¹¹⁰ Polly, “The Capability Approach and Human Rights,” 16.

¹¹¹ Ibid.

1.8 Capability Approach and Labor Laws

Capability approach proves helpful for law discourse particularly labor law theory. To see the impact of the capability framework (as a normative guide) on the adoption of legislation, the question that “what do we, as a society, want people to be capable of” must be addressed. This section will see the potential suitability and usefulness of capability approach at normative level to understand that capability approach justifies labor legislation to support new work-related laws.

Historically, the concept of labor laws possesses philosophical foundations because these laws are centered on theory of justice. Theory of Justice here does not mean the obsolete traditional theory of justice that is “built on the idea of inequality of bargaining power”¹¹² but the one with moral foundation to justify labor laws and help reconsider the field of labor laws. This revolves around the Sen’s basic goal of real, substantive, human freedom – the real capacity to lead a life we have reason to value.¹¹³ Creation and distribution of human capital is a core human freedom which needs labor laws to be structured.

As capability approach of Sen is a moral framework, it suggests that social arrangements- for PWDs in this case- should be assessed in accordance with the extent of “freedoms” individuals with disabilities will have to promote. It correlates with labor laws to enhance workplace democracy, equality, non-discrimination, dignity, justice, or other such goals. Some expectations from the normative theory of labor law can be seen by

¹¹² Guy Davidov and Brian Langille, *Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come?* accessed January 11, 2021

¹¹³ Ibid

presenting several differences that may prove helpful to understand the potential of the capability approach for labor laws.

Through normative approach, there are five possible reasons to understand and justify labor laws (for PWDS in this case). First, it is mandatory to understand the purpose of law when interpreting it to fill the lacunas.¹¹⁴ Second, if a law is defined as unconstitutional, the measure of its unconstitutionality can be evaluated and assessed through means chosen in the light of importance of the goal. Judges and lawyers are best to identify the goal during this process. Third, when labor laws are found to be altered and reformed to meet the new challenges and realities, it is significant to identify what is tried to be achieved through new laws. Fourth, any resulting legal regulations for intervening the labor market will need justification. Fifth, it will need to bring radical changes to the system in a welfare State (not just to alter labor laws as mentioned in third reason).¹¹⁵

The first three reasons mentioned above can be collectively called 'legal' reasons because they all constitute a necessary part of the process of legislation, adjudication, enforcement, and amendment of labor laws. The last two reasons are termed political as are not needed by legal process but political.

If the goal 'to identify justifications for *legal* reasons' is picked from above mentioned reasons, it is essential to show that it illustrates match with the current labor laws. In this case, capability approach can be best used for the achievement of real, vital, and practical tasks such as goal-directed interpretation of laws. Capability approach may

¹¹⁴ Guy Davidov, "The Capability Approach and Labor Law: Identifying the Areas of Fit," in *The Capability Approach to Labour Law*, ed. Brian Langille (OUP, 2019), 4.

¹¹⁵ Ibid, 5.

be used to achieve other purposive tasks including evaluation of the constitutionality of Laws and suggesting reforms to the existing laws to be more adoptive to new realities and new challenges. Similarly, capability deprivations of Sen can be used to focus on needs and rights that are not available to the specific group of workers (marginalized workers with disability in Pakistan in present case). However, capability approach can be best used as a specific justification for labor laws rather than general justification.¹¹⁶ This idea can be analyzed by dividing labor laws into several groups of regulations and then to see the connection between the capability approach and each of these groups. These groups of laws may be

- Collective labor laws (procedural group of labor law ‘to set the rules of the game’)
- Workplace equality laws (anti-discrimination and equity laws like reduction in hours)
- Laws on obligations of fairness (limitations on unjust dismissals)
- Human rights law at work (privacy, expression, adjustments)
- Law on the health and wellbeing of workers (maximum hours, hours relaxation, vacation rights)¹¹⁷

To promote the wellbeing and participation of workers (disabled in this case), philosophical justification is provided by capability approach to develop labor regulation which helps devising policies. Such protective laws curtail the power of employer/management and as a result it enlarges the worker’s freedom to enhance his

¹¹⁶ Lilian Miles, “The Capabilities Approach and Worker Wellbeing,” *The Journal of Development Studies* 50(2014): 1048.

¹¹⁷ Ibid.

capability to functioning (Sen focus more on freedom than equality) to actualize their potential in the market providing support for the capability approach defensive role¹¹⁸ (creating opportunities/open choices for disabled workers). This elaborates the fundamental theme of capability approach which says that;

People should have choices and real opportunities and that the choice of capabilities is based not on one specific high-level goal, but on a variety of justifications that already exist in the labor law or the rich literature on it.¹¹⁹

The significance of utilizing capability approach when structuring laws is that it demands “actual fulfilment” of rights¹²⁰ which supplements effective enjoyment of the laws. The adaption of capability approach, therefore, helps to fulfill the needs of marginalized labors in developing countries particularly.

1.9 Conclusion

Disability as a subject of philosophical interest is relatively new and the philosophical reason for using Sen’s capability approach to disability is that being an open-ended approach, it can be moved into many directions- disability in present study.

Sen’s capability approach, to understand the wellbeing and quality of life of the PWDs, is hardly mentioned in direct way but there is a definite connection between the two. Capability approach provides an alternative concept of well-being as it is a normative theory of social justice. Sen’s view of functioning and capabilities in relation to quite

¹¹⁸ Deakin, *The Law of the Labour*, 180.

¹¹⁹ Miles, “Worker Wellbeing,” 1043–1054.

¹²⁰ Deakin, *The Law of the Labor*, 399.

narrow utility theories and commodity-based theories of the standard of living concludes that the capability attempt of Sen can be best used to know the nature of disability and describe the social marginalization of the labelled individuals- labelled as disabled.

Poverty and disability reinforce each other. The use of Sen's approach, when taken in the scenario of a low-income country like Pakistan, becomes practically effective when it says that ability to function of the individuals rather than resources, should be the chief goal of public policy that can significantly shape the health policy and law of the States. It becomes the best way to realize, understand, and analyze disability issues. However, it becomes more effective and useful when used in combination with social model of disability to address the issue of disability. In connection to law and social policies, capability approach, therefore, enriches the discourse on laws and offers new understanding of the need and the way to structure laws. Identification of the areas of "fit and match" between the capability approach and law offers for further development. In relation to labor laws, it provides a conceptual framework for enhancing worker wellbeing, particularly in the context of developing countries because it pays insufficient attention to resources in society.

CHAPTER 2: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

2.1 Introduction

To address the issue of disability and rights of PWDs, several international attempts have been made since last four decades. A cursory look of the equality clauses of three major human rights instruments of the UN, including the “Universal Declarations of Human Rights 1948”,¹²¹ the “International Covenant for Civil and Political Rights 1966”¹²² and the “International Covenant for Economic, Social and Cultural Rights 1966”,¹²³ do not mention disability as one of the protected characteristics. Any mention to disability in past documents is only in respect of preventive health policy and social security than a human right subject.

The UNCRPD is a significant international legal effort-first of its nature- to protect PWDs against all forms of discrimination faced by them in their day to day lives. To be more effective, UNCRPD stresses on the national and international monitoring and enforcement of the Convention and gives detailed provision on the issue. Chapter explains various features of the UNCRPD particularly non definition of disability and use of terms “disability” and “impairment” in the Convention now and during its negotiation. It also covers innovative provision on “conference of State parties” and “international cooperation.” The significance of the optional protocol to UNCRPD and its “individual

¹²¹ Universal Declaration of Human Rights, GA Res 217, UN Doc A/810 (10 December 1948) 71.

¹²² International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16)52, UN Doc A/6316 (1966), 999 UNTS 171 (23 March 1976).

¹²³ International Covenant on Economic, Social and Cultural Rights, GA Res 2200A, UN GAOR, 21st Session, Supp No 16, UN Doc A/6316 (16 December 1966) 49.

complaint mechanism” with detailed mention of some individual complaint from member States makes a part of this Chapter. The Chapter analyzes the management and general implementation of the UNCRPD in developing countries through discussion of national and international monitoring mechanism of the UNCRPD and the function of the Committee on the rights of PWDs. It needs States Parties to realize their obligations within their domestic legal order. A brief view of the significance of the regional efforts and recommendation for the establishment of a regional court for South Asia region is discussed to minimize if not eliminate the misery of PWDs. The importance of the issue is discussed in the light of impact of UNCRPD on the case law of ECtHR, the most effective regional human rights court in the world.

2.2 Historical Efforts Towards Convention

Since its foundation in 1946, the right to development remained fundamental to the UN. In 1969, the UN General Assembly (GA) declared principles on “social progress and development”. On December 11, 1969, a Resolution 2542(XXIV) as a declaration on “social progress and development” was adopted by GA. It called for its use at national and international level as a common ground for social development policies.¹²⁴ In addition to guidelines on social policies, it provided on the integration of economic and social action. It addressed the concerns of the rights of PWDs and focused on the development of the social environment and well-being of the individuals.¹²⁵ GA adopted another resolution known as “Rights of Disabled Persons” in 1975. It was the 3447th resolution made by the

¹²⁴ United Nation General Assembly Resolution, 2542(XXIV), December 11, 1969.

¹²⁵ Declaration on Social Progress and Development Proclaimed, General Assembly resolution 2542 (XXIV), December 11, 1969 <https://www.ohchr.org/Documents/ProfessionalInterest/progress.pdf>

GA which stated that “both abled and disabled people have same civil and political rights”.¹²⁶ GA declared 1981 as “International Year of Disabled Persons” in 1976 with a theme of full participation and equality. Later, UN declared the decade of disabled persons from 1983 to 1993 aiming better execution and enforcement of the world program of action for PWDs. The human rights perspective towards disability was raised and worked during the decade. The end of the decade was marked by declaring 3rd December as the “International Day of Disabled Persons”. Another major effect of observing the decade of disabled persons was the adoption of resolution No. 48/96 by GA in 1993 titled “Standard Rules on the Equalization of Opportunities for Person with Disabilities.” The instrument consists of 22 rules integrating the human rights perspective of the decade and set out a standard that was to be internationally adopted when devising policies for people with disabilities. It showed solid moral and political commitment of the government for drawing up and accepting equality policies for PWDs, however, it was not a legally enforceable document.

Debate, negotiation and drafting of the UNCRPD¹²⁷ took a six-years-long process. The negotiation process started from the formation of an Ad Hoc Committee by GA under resolution No. 56/168 on December 19, 2001, and concluded on December 13, 2006 by the plenary of the GA. The foundation of the UNCRPD is spread on eight sessions of discussion by the Ad Hoc Committee that included States and all related international, regional, and national organizations with significant input in its drafting process. The

¹²⁶ Rights of Disabled Persons, UN General Assembly, Resolution No. 3447th 1975 <http://www.un-documents.net/a30r3447.htm#:~:text=Disabled%20persons%20have%20the%20right%20to%20economic%20and%20social%20security,and%20to%20join%20trade%20unions>. accessed June 15, 2020

¹²⁷ Convention 2006.

UNCRPD and its optional protocol¹²⁸ (OP-UNCRPD), adopted in the New York headquarters of UN on 13 December 2006, were opened for signature on 30 March 2007. After the requisite number of ratifications, the Convention and the Optional Protocol entered into force on 3 May 2008. Considering the existing core human rights treaties of UN, they rarely focus on the human rights of people with disabilities. These human rights treaties do not sufficiently focus on the physical, social, cultural, economic, and legal barriers to inclusion of, and participation by, people with disabilities in all aspects of life. As a disability specific treaty, UNCRPD focus on the issues of PWDs specifically. Being first legally binding treaty on the rights of PWDs, UNCRPD aimed to empower the largest minority of the world. Being a first thematic UN Convention on disability, UNCRPD focused on human rights objectives for PWDs in a holistic sense. It rejects the notion that disabled people are objects of charity. Rather it entitles PWDs that they have equal rights as much as any other person in society.¹²⁹ It fills the gap in international human rights law and covers new rights such as to awareness raising, universal equality, as well as amplified formulations of rights and positive state obligations.

2.3 An Overview of the Notable Features of the Convention

This first-ever disability specific convention possesses a very wide ambit. UNCRPD consists of twenty-five preambular paragraphs and 50 Article. Among 50 Articles in the UNCRPD, Articles 1 to 4 talks about the aim, definition, principles, and responsibilities of the member states. Articles 5 to 9 gives detailed description on non-discrimination, equality

¹²⁸ Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.U.N. GAOR, 61st Sess, U.N.Doc. A/Res/61/106 (Dec.13,2006), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/500/79/PDF/N0650079.pdf?OpenElement> accessed March 3, 2019.

¹²⁹ Convention 2006, Article 5.

between men and women, rights of children with disabilities (CWDs) and accessibility. Articles 10–30 guarantee the rights of PWDs. Articles 24–28 provides on the protection of fundamental rights such as health, education, and employment. Articles 31–33 provides guidance about the monitoring and implementation process of member states. Articles 34–50 elaborate some other structural issues including ratification process, committee on the rights of persons with disabilities (CRPD), government reporting to CRPD and the cooperation process between states parties. New bodies have been created by UNCRPD. These bodies include the “Committee on the Rights of Person with Disabilities” and “Conference of State Parties.”¹³⁰

The Optional Protocol of the UNCRPD is an additional agreement to the Convention. It needs its own ratification. It consists of eighteen Articles. In case of alleged violations of the Convention by State parties to the Protocol, Optional Protocol to the UNCRPD enables the Committee to examine individual complaints. State party has been given a choice to participate in complaint mechanism as well as inquiry procedure. CRPD as a treaty monitoring body views all this procedure.

UNCRPD proved innovative both in the manner of its drafting and in its substantive provisions. Among many remarkable features of the UNCRPD, the first feature is that it was drafted with a high degree of participation on the part of PWDs and their representatives in form of civil society organizations, disable people organizations and other national human rights organizations rather than only or mainly by States. Second important feature of the UNCRPD is that it replaces intrinsic disadvantage of a PWD with

¹³⁰ Ibid, Article 40.

extrinsic disadvantages of the society as an impediment. Its provisions are based on a “social model” of disability that views societal barriers and discriminations themselves disabling instead of solely focusing on the “impairment” of the individual under narrower and traditional “medical model” of disability.¹³¹ The third most significant feature of the UNCRPD is that it does not involve in traditional dichotomies such as those between “positive and negative rights” and between “public and private action.” Fourth is the warm welcome given to this treaty in manner of rapidity during its drafting and adoption phase.¹³² Purpose of the UNCRPD is to promote, protect, and ensure the full and equal enjoyment of all human rights by PWDs. To ensure its purpose, UNCRPD recognizes that societal barriers and discriminations are themselves disabling and must be removed.

2.3.1 Non-Definition of Disability

The provision of the UNCRPD that attracted extensive discussion, arguments and was the lastly agreed one, is concerned with the “meaning of disability.” The main controversy was to whether include the definition of disability in the Convention. Argument against the inclusion of the precise definition of disability was the flexibility and revisability of the interests of PWDs at later stage. On the other hand, the inclusion of a clear, specific, and precise definition of disability was favored to bound member States to evade real commitments under UNCRPD.¹³³ On the point of inclusion of a clear and precise definition of disability, many NGO’s, during drafting procedure, argued that non-inclusion of disability definition will allow State Parties to avoid inclusion of many disabilities in

¹³¹ Lawson, “The United Nations Convention,” 563.

¹³² The UN Secretary General called UNCRPD to be “the most rapidly negotiated human rights treaty in the history of international law.”

¹³³ Molly Buetz Land, “Protecting Rights Online,” *Yale J. Int’l L.* 34(2009):28

their internal laws and policies.¹³⁴ Finally, it was agreed upon to include a provision on the “meaning of disability” in the first Article of the Convention on “purposes” instead of the second Article on “definitions.”

Disability is not defined by UNCRPD and is recognized as an “evolving concept that results from the interaction between persons with impairments and attitudinal plus environmental barriers that may hinder their full and effective participation in society on equal basis with others.”¹³⁵ UNCRPD does not see the problem with the individual in form of impairment but see it as a socially constructed complex issue and a product of political, social, environmental, and biological discourses. Although disability is not put under the definitional framework of the text itself in Article 2 (definitions), UNCRPD has conceptualized it with the idea outlined in Article 1 (purpose). It says that:

*Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*¹³⁶

This approach adopted in Article 1 clearly follows the social rather than the medical model of disability.

¹³⁴ Ibid.

¹³⁵ Convention 2006, preamble.

¹³⁶ Ibid, Article 1.

2.3.2 Use of terms Disability and Impairment in the Convention

This right-based approach toward disability also believes in social model of disability relating the disadvantage of an individual to the combination of issues including social setting and personal characters. UNCRPD addresses that:

Disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.¹³⁷

where the term “disability” shows “restricted participation in society” and “impairments” means to show “individual level and mode of functioning of the body and mind”. It is to be noted that the term “impairments” is not used again in the remaining provisions of the UNCRPD. The result of the focus on the disabling impact of impairments is the inclusion of a range of disabling conditions and impairment groups, though it is still unclear that on which basis these were included.

The issue of ‘what constitute disability’ was debatable due to confused use of terms ‘disability’ and ‘impairments’ in the negotiation process of UNCRPD adoption. Article 21 (a) on “freedom of expression and opinion, and access to information” can be used as a descriptive example of it. Article calls for information in “*accessible formats and technologies appropriate to different kinds of disabilities.*” The use of word “disabilities” in Article 21 (a) means “*individual diversity to be accommodated in the provision of*

¹³⁷ Ibid, preamble(e).

information”, and not “*different kinds of restricted participation*”¹³⁸ as given in preamble (e). Disability is used in same sense of body and mind functioning in Article 25 (b) on health that “*health services needed by persons with disabilities specifically because of their disabilities*”, and in Article 14 on liberty and security that “*the existence of a disability shall in no case justify a deprivation of liberty*”. Term ‘disability’ is used in sense of ‘impairment’ in several clauses on discrimination that says about “discrimination on the basis of disability.”¹³⁹

The above two-fold use of the term “disability” in draft convention has been removed in final version of UNCRPD by replacing the term “persons with disability” with “persons with disabilities” except in the last example where the dual use of the term ‘disability’ still give rise to a potential inconsistency and contradiction. Julie Smart in *disability, society, and the individual* (2001) summarizes her discussion of disability by placing a smart question, ‘does anyone know what ‘normal’ is’?¹⁴⁰ By asking this pivotal question, she reflect the perception that PWDs differ from rest of us. She further says that time and culture in which the question is asked directly affects the definition of normality. UNCRPD, therefore, defines “persons with disabilities” rather than “disability” which can be called two sides of the same coin. Both provisions i-e preamble (e) and Article 1 have bearing on the meaning of ‘disability’ where the ‘who’s’ is depicted directly through the ‘what’. It can be, therefore, concluded that the two factors given in very start of the UNCRPD to constitute “disability/disabilities” (restricted participation) are “impairments”

¹³⁸ Anna Bruce, *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents* (2014)149.
https://lup.lub.lu.se/search/ws/files/11124019/Anna_Bruce.pdf accessed June 12, 2018.

¹³⁹ Convention 2006, Article 5, 27 (1a) and 28 (2).

¹⁴⁰ R. Bogdan and J. Knoll, “The sociology of disability,” in *Special education and student disability*, ed. Edward. L. Meyen & Thomas M. Skrtic (Denver: Love Pub Co, 1995), 677— 711.

(mentioned in Article 1 as physical, mental, intellectual, or sensory impairments) and “barriers” (stated in preamble (e) as attitudinal and environmental barriers). Both provisions provide for “interaction” as a center between “impairments” and “barriers”; the point where such ‘disability/disabilities’ arise/s.¹⁴¹

2.4 Function of the Committee on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities is the body of experts monitoring and implementing the Convention in member States.¹⁴² First session of the Committee was held from 23-27 February 2008.¹⁴³ It is assigned with the important task of analyzing the periodic reports submitted by member States. First report is due within two years of signing whereas subsequent reports are sent after every four years.¹⁴⁴ With the core task of analysis of report submitted by State parties, CRPD provides guidelines to member States for preparation of reports.

Like other reports submitted under other human rights treaties, report prepared and submitted under Article 35 of the Convention consists of two main parts: a “common core document” and a “treaty-specific document.” “Common core document” is made of general information about the reporting State, general framework and situation of human rights, main population and disability group, and non-discrimination and equality situation with effective remedies.¹⁴⁵ The key part of the report submitted to CRPD is “treaty-specific

¹⁴¹ Bruce, “Which Entitlements,” 150.

¹⁴² Convention 2006, Article 34.

¹⁴³ United Nations Report of the Committee on the Rights of Persons with Disabilities <https://www.refworld.org/pdfid/4eef033a2.pdf> accessed June 12, 2020.

¹⁴⁴ Convention 2006, Article 35.

¹⁴⁵ United Nations Report of the Committee on the Rights of Persons with Disabilities, 25 <https://www.refworld.org/pdfid/4eef033a2.pdf> accessed June 12, 2020.

document.” It does not repeat the information contained in “common core document” or simply listing or describing the legislation adopted by the State party. Rather, it contains specific and detailed information on the enforcement of Articles 1– 33 of the Convention both in law and in fact. Committee requires the document to contain analytical information on recent advances in law and practice affecting the full recognition and realization of the rights of PWDs embedded in the Convention within the territory or jurisdiction of the State party. The resulting progress achieved is an integral part of the reporting document. Committee further demands that “where applicable, this information should be presented in relation to policy and legislation of the PWDs with adequate data indication sources.”¹⁴⁶ To realize the enforcement of the Convention, the “treaty specific document” should indicate details of all adopted policies, strategies, and a national legal framework (comprehensive disability antidiscrimination legislation) for the implementation of each right mentioned in the Convention. Progress monitoring will be exercised towards full realization of the Convention. Mention of the resources available for this purpose and cost-effective methods of utilizing such resources will also be made.¹⁴⁷

In case of submission of initial report after 2 years of signing of the Convention (by Pakistan in 2020), the initial Convention-specific document should contain sufficient precise details of the relevant constitutional, legislative, judicial, and other texts in compliance to UNCRPD to guarantee rights of PWDs. Regular periodic reports are then submitted to the CRPD after every four years. The subsequent Convention-specific document, together with the common core document, forms a subsequent periodic report.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

Unlike initial report, periodic report focuses on the period between the consideration of the State party's previous report and the presentation of the current report. The subsequent Convention-specific document must contain the following three key points:

- i) There will be information on the implementation of "concluding observations" from the previous report along with mention of detail and instances of non-implementation or difficulties confronted (not available in case of Pakistan who submitted an overdue initial report in 2020).¹⁴⁸
- ii) It will have result-oriented examination by the member State of additional legal and other appropriate steps towards the implementation of the UNCRPD.¹⁴⁹
- iii) There will be information on any remaining or emerging problems faced by PWDs in enjoying fundamental freedoms in the civil, political, economic, social, cultural or any other field of life.¹⁵⁰ A Procedure in relation to any exceptional reports requested by the committee is not affected by above guidelines and is regulated by the Committee's rules of procedure.

2.5 Conference of State Parties

UNCRPD is a disability specific human rights treaty and a legally binding agreement. Article 40 of the UNCRPD is an innovative provision that requires States Parties to meet regularly to consider any matter regarding enforcement of the Convention. This meeting of the States Parties is known as "Conference of States Parties" (COSP).¹⁵¹ It is the biggest disability meeting in the world. In "Conference of States Parties,"

¹⁴⁸ Ibid, 27.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Convention 2006, Article 40.

governments talk about how to implement the UNCRPD with participation of civil society to make things better for PWDs. Civil society generally means non-governmental organizations that include people with a disability. Throughout the negotiation and adoption process of the UNCRPD, PWDs and their representative organizations called for “Nothing About Us, Without Us”. This slogan has been articulated in UNCRPD which says that:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.¹⁵²

The Conference of States Parties must consider the voices of PWDs and their representative organizations. Civil society particularly PWDs and their representative organizations, shall be involved in monitoring, enforcement, and execution process. Participants of the “Conference of State Parties” usually include representatives of the State Parties, civil society organizations and disability rights experts (such as the UN Special Rapporteur on the rights of persons with disabilities and academics).

“Conference of State Parties” is assigned with significant responsibilities by UNCRPD to take measures necessary to ensure compliance with the Convention. The meetings are convened twice-yearly or, in case of necessity.”¹⁵³ Since 2008, “Conference of States Parties” are regularly held in at United Nations headquarter at New York. Recently, the 14th session of the “Conference of States Parties” to the UNCRPD was held

¹⁵² Ibid, Article 4(3).

¹⁵³ Ibid, Article 40(2).

in person at United Nations Headquarters in New York on 15 June 2021 and virtually on 16 and 17 June 2021.¹⁵⁴ It included three subthemes entitled Protection of the rights of PWDs in armed conflict and humanitarian emergencies, independent living and inclusion in the community and right to education including challenges with inclusive education and accessibility.¹⁵⁵

Article 40 is deemed an innovative provision of the UNCPRD although the conference of member parties to other international human rights treaties is also held regularly without any explicit provision in treaty for this purpose.¹⁵⁶ The reason for this is purely formal. This mainly includes “to elect the members of the monitoring committee and other minor housekeeping matters, and substantive matters relating to the treaty not discussed.”¹⁵⁷ During the negotiation process of UNCPRD, Article 40 was strongly advocated by “Latin American and Caribbean Grouping of States” as well as by NGO’s. Prior to UNCPRD, “Ottawa Landmines Convention” has such like provision of Conference of State Parties that plays a substantive role because there is no independent monitoring provision or mechanism provided for in that Treaty. UNCPRD, on the other hand, contains a detailed national and international monitoring mechanism. It has also an optional individual complaints procedure under its Optional Protocol. Article 40 proves additional to these, and therefore serves a quite different function from that under the “Ottawa Landmines Convention.”¹⁵⁸ Article 40 is believed to be “designed to allow States Parties

¹⁵⁴ 14th session of the Conference of States Parties to the CRPD <https://www.un.org/development/desa/disabilities/conference-of-states-parties-to-the-convention-on-the-rights-of-persons-with-disabilities-2/cosp14.html> accessed August 28, 2021.

¹⁵⁵ Ibid.

¹⁵⁶ Gráinne de Búrca “The EU in the Negotiation of the UN Disability Convention,” *European Law Review* 35(2010):18.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

to meet regularly to discuss best practices, difficulties, needs, and other matters regarding implementation of the Convention.”¹⁵⁹

2.6 Optional Protocol to the Convention on the Rights of Persons with Disabilities

Optional protocol to the UNCRPD is known an addition to the Convention. Adopted on 13 December 2006, the Optional Protocol entered into force on 3 May 2008 (same date as its parent convention).¹⁶⁰ It provides for “individual complaint mechanism” to CRPD if rights of PWDs under UNCRPD are breached.¹⁶¹ It allows individuals to petition an international expert body with grievances.¹⁶²

It contains 18 Articles. Article 2 of the Optional Protocol contains guideline for making individual complaint to CRPD. Article says that the question in complaint must not have already been considered and examined by CRPD or any other international body.¹⁶³ CRPD, under Article 2(d) ¹⁶⁴considers a communication inadmissible if the domestic remedies are not exhausted. However, this shall not be the rule if “the application of the remedies is unreasonably prolonged or unlikely to bring effective relief.”¹⁶⁵ Similarly, CRPD will declare a communication/complaint inadmissible if it is anonymous,¹⁶⁶ incompatible with the provisions of CRPD,¹⁶⁷ manifestly ill-founded,¹⁶⁸ or

¹⁵⁹ T. Melish “The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify,” *Hum. Rts. Brief* 37 (2007): 23.

¹⁶⁰ <https://www.scoop.co.nz/stories/WO0805/S00048.htm> accessed October 15, 2020.

¹⁶¹ Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 1.

¹⁶² Ibid.

¹⁶³ Ibid, Article 2(c).

¹⁶⁴ Ibid, Article 2(d).

¹⁶⁵ Ibid.

¹⁶⁶ Ibid, Article 2(a).

¹⁶⁷ Ibid, Article 2(b).

¹⁶⁸ Ibid, Article 2(e).

complaint has occurred before or during the entry into force of the present Protocol for the State party.¹⁶⁹

Complaint can be brought by an individual or a group of individuals. Complaint can be made on behalf of another person if his/her written consent is obtained. To help complainants, model complaint form is made available online.¹⁷⁰ Once the complaint is received and examined, CRPD forwards its recommendation and suggestion, if any, to the State and petitioner.¹⁷¹ Concerned State party submits its written explanation within six months of the receipt of recommendation from CRPD.¹⁷² During this period, CRPD can ask government of the concerned member State to take interim measures to avoid possible loss to the victim.¹⁷³

Under Optional protocol to UNCRPD, 37 views are adopted in total by CRPD. States against whom complaints were launched under the Optional Protocol to the UNCRPD includes Germany, Brazil, Spain, Tanzania, Sweden, UK, Mexico, Australia, Greece, Denmark, Austria, Italy, Argentina, Lithuania, Hungary, South Africa and Saudi Arabia. Along with UK and European Union States, Saudi Arab is the only Middle East Muslim State against whom individual complaint titled *Mr. Munir Al Adam and ADHRB vs Saudi Arabia* - Case 38.2016-20.9.2018¹⁷⁴ was brought under Optional Protocol to the UNCRPD. The author of the complaint, who was imprisoned by the State, claimed that his partial hearing disability worsen because of torture during imprisonment. He was convicted

¹⁶⁹ Ibid, Article 2(f).

¹⁷⁰ <https://www.ohchr.org/en/documents/tools-and-resources/form-and-guidance-submitting-individual-communication-treaty-bodies> accessed 3 December 2020.

¹⁷¹ Optional Protocol, Article 6(3).

¹⁷² Ibid, Article 6(4).

¹⁷³ Ibid, Article 4.

¹⁷⁴ *Mr. Munir Al Adam and ADHRB vs Saudi Arabia Case 38.2016-20.9.2018*

<https://www.internationaldisabilityalliance.org/crpd-committee-interpretation> accessed 6 December, 2020.

of death penalty. CRPD requested interim measure of not conducting the death penalty while the case was pending. Later, CRPD concluded that Articles 13(1) (access to justice) read alone and in conjunction with Articles 4 (general obligations), 15 (freedom from torture or cruel, inhuman or degrading treatment or punishment), 16 (Freedom from exploitation, violence and abuse) and 25 (health) of the UNCRPD has been violated by the State.¹⁷⁵

Three complaints from UK include *N.B and M.W.J vs. UK*- Case 43.2017-06.09.2019, *LML vs. UK*- Case 27.2015 – 24.03.2017 and *Kenneth McAlpine vs. UK* - Case 6.2011- 28/09/2012. *Kenneth McAlpine vs. UK* was declared inadmissible “*ratione temporis*” by CRPD.¹⁷⁶ In *LML vs. UK*,¹⁷⁷ the national of UK underwent a discectomy procedure. An allegedly rushed procedure of surgery resulted in rupture of spinal cord membrane. Resulting complications deteriorated as author was not adequately entertained and treated under National Health Service (NHS) of UK.¹⁷⁸ He claimed violation of several provisions of UNCRPD under Article 5 (equality and non-discrimination), Article 10 (right to life), Article 12 (equal recognition before the law), and Article 17 (personal integrity). However, author’s claims were regarded inadmissible under Article 2 of the Optional Protocol to UNCRPD because he could not prove that the conduct of the government amounts to arbitrariness or denial of justice.¹⁷⁹ In *N.B and M.W.J vs. UK*¹⁸⁰, Ms. N.B and

¹⁷⁵ Ibid.

¹⁷⁶ *Kenneth McAlpine vs. UK* Case 6.2011- 28/09/2012)

<https://www.internationaldisabilityalliance.org/crpd-committee-interpretation> accessed 6 December, 2020.

¹⁷⁷ *LML vs. UK*- Case 27.2015 – 24.03.2017 <https://www.internationaldisabilityalliance.org/crpd-committee-interpretation> accessed 6 December 2020.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ *N.B and M.W.J vs. UK*- Case 43.2017- 06.09.2019 <https://www.internationaldisabilityalliance.org/crpd-committee-interpretation> accessed 6 December, 2020.

Ms. M.W.J, who were British nationals launched their complaint for violation of their rights under Article 17 (protecting the integrity of the person), Article 19 (living independently and being included in the community), Article 20 (personal mobility), Article 30 (participation in cultural life, recreation, leisure and sport) and Article 31 (statistics and data collection). The first author, *Ms. N. Baker*, was a wheelchair user with muscular dystrophy. Due to her disability, she was granted 35 hours of assistant support by the “borough of Harrow” (London) along with weekly allowance and other measures. However, she claimed these measures insufficient to provide her with the assistance required to lead an independent life.¹⁸¹ The second author was *Ms. M.W. Jones* who received a brain injury in 2006 which reduced her mobility and the ability to speak. She was provided substantial care support and assistance from Independent Living Fund (ILF). On reassessment in 2009, she was moved from “higher to the middle rate of Disability Living Allowance” and Independent Living Fund was ceased. In 2011, the author and her husband got injured in another road accident. Due to this situation, she received the higher level of Disability Living Allowance again but not the Independent Living Fund. She too complained under Article 17, 19, 20, 30 and 31 for closure of Disability Living Allowance. Complaints of both authors were declared inadmissible under Article 3 of the Optional Protocol to the UNCRPD.¹⁸² All three complaints made to CRPD against UK were declared inadmissible.

¹⁸¹ Ibid.

¹⁸² Ibid.

It is noteworthy that although the recommendations of the Committee are not legally binding, but decisions of the Committee are considered and admitted as authoritative interpretation of the Convention.

2.7 Management and Evaluation of the Convention in Developing Countries

UNCRPD entered into force on May 3, 2008 and made the history of UN for the first time by enjoying the highest number of signatories on its opening day. UNCRPD is, therefore, believed as a model for the implementation and negotiation of any future UN human rights treaty. Despite its unprecedented, positive, and optimistic adoption,¹⁸³ different events like implementation, monitoring and legislative reforms at national and international level have offered an opportunity to reexamine the UNCRPD, its purpose and limits. By reviewing the unprecedented entrance into force of UNCRPD in global south (India and Pakistan in this case), for instance, it is to be noted that there is a large network of well-funded Northern disability rights NGOs who provide funds and resources to accelerate ratification of the UNCRPD. Under disability politics, the 'promises of largess' to global South from the global North including UK may be concluded as one of the incentives behind quick ratification of UNCRPD. Similarly, State policies of the developing countries mostly get their impetus from international aid programs and declarations. The obvious and recent example of this can be the adoption of UPE program

¹⁸³ Rosemary Kayess and Phillip French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities," *Human rights Law Review* 8(2008): 27-29.

(universal primary education) by Indian government because of international aid directives¹⁸⁴ and Australia Awards- Pakistan for inclusive education of PWDs.¹⁸⁵

It has been proved over a period that the UNCRPD as a treaty and a new portfolio of rights, is unproblematic or less problematic for those States which have strong disability rights traditions and is more challenging for States with non-existent disability rights framework. Despite the clear theoretical principles on which human rights treaties and UNCRPD are based, implementation challenges are faced in developing countries (even in a developed nation like UK). The right-based approach of the UNCRPD to be realized, therefore, needs commitment from society and government and requires a move from policy to implementation. Being placed on rights-based development under UNCRPD, disability has been mainstreamed within the development agenda of developing countries. The close connection of disability and poverty in developing world may prove this mainstreaming of disability risky in form of token involvement of PWDs without real equality. Article 4 (2) of UNCRPD obligates States for standard development of “economic, social and cultural rights” along “civil and political rights” which are ranked differently from they were in past. However, despite its detailed monitoring process with some innovations, UNCRPD is unable to overcome the traditional jeopardy existing between negative right inculcated in ICCPR and positive rights inculcated in ICESCR. This contradiction does affect the universal implementation of disability rights in developing countries because the reality, unfortunately, has not followed the theory. And this does not

¹⁸⁴ M. Kalyanpur, “Equality, quality and quantity: challenges in inclusive education policy and service provision in India,” *International Journal of Inclusive Education* 12(2008):245.

¹⁸⁵ Disability inclusion and Australia Awards Pakistan
https://australiaawardspakistan.org/wp-content/uploads/sites/7/2019/03/Australia-Awards_Pakistan_DisabilityInclusion_ebrochure.pdf accessed June 12, 2020.

always mean States' failure in protecting rights or that freedom of PWDs is the non-fulfillment of their obligation, but it may be the very broad and generic specification of the obligations in the instrument leaving grey areas for practical enforcement and implementation. Universality can be achieved by adopting an agreed and separate set of indicators for developing countries to assess their disability-related approaches than aspirational goals and cosmetic changes which are affordable in developed countries only. It is important to note that these indicators will reflect the circumstances in every State party, considering social environment.

2.8 Monitoring Mechanism for the Implementation of the Convention

Progress of societies in protecting human rights can be best analyzed through monitoring mechanism of the human right treaties and conventions. Furthermore, it is the best way of public awareness against discrimination and violations to bring social change.¹⁸⁶ UNCRPD is one among those main international human rights conventions that pays significant importance to the issue of national and international level monitoring of disability legislation and policies.

2.8.1 National Monitoring

The monitoring mechanism and enforcement strategies of the UNCRPD do not focus only on implementation at international level like earlier human rights treaties but extend its attention and focus to national level implementation.

¹⁸⁶ Paula Campos Pinto, "Monitoring Human Rights: A Holistic Approach," in *Critical Perspectives on Human Rights and Disability Law*, ed. Lee Ann Bassar, Malinda Jones, Marcia H. Rioux (Brill: Leiden, The Netherlands, 2011), 455–456.

UNCRPD attaches great importance to the observance of Article 33 that demands monitoring and national level enforcement of the UNCRPD. Article 33 demands the national level implementation and monitoring of the UNCRPD to tell how committed a State is on the adoption of the Convention. After extensive consultation with State, independent experts, Civil Society Organizations (CSOs) in 2009, the “Office of the United Nations High Commissioner for Human Rights” (UN-OHCHR) gave its report on Article 33 and says:

*In all human rights treaties, the implementation obligation is closely linked to a monitoring component. The monitoring of human rights treaties is needed to assess whether measures to implement the treaty are adopted and applied, but also to evaluate their results and therefore provide feedback for implementation. Monitoring mechanisms foster accountability and, over the long term, strengthen the capacity of parties to fulfill their commitments and obligations.*¹⁸⁷

Article 33 provides for national monitoring and gives 4 key provisions to meet this standard including “appointment of one or more focal points for respective domestic implementation, establishment of a coordination mechanism within government, creation of independent mechanism, and full participation of PWDs.” UNCRPD, thereby recognizes that implementation of, and compliance with, international human rights treaties are ultimately domestic issues. States are further required to “give due consideration to the establishment or designation of a coordination mechanism within

¹⁸⁷ United Nations Report 2009, ‘Thematic study by the Office of the United Nations High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities.’ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/177/48/PDF/G0917748.pdf?OpenElement> accessed June 12, 2020.

government to facilitate related action in different sectors and at different levels.”¹⁸⁸ This later provision of the UNCRPD is an explicit recognition by the drafters of the Convention that all government sectors bear responsibility to ensure the rights of PWDs at national level which results in various coordination challenges. Apart from this specific Article 33, Article 16 (3) on “Freedom from exploitation, violence and abuse” and in Article 12 (4) on “equal recognition before the law” also provides for national monitoring and implementation. Article 12 (4) demands judicial measures as part of monitoring process.

Although member States have been given considerable discretion to establish national implementation frameworks, Article 33 provides reference to guidelines for the creation of such national mechanisms. However, it remains unclear on allocation of duties by a given member State to National Human Rights Institutions (NHRI) if any.¹⁸⁹ It is also silent on whether States Parties are likely to adopt different approaches in adopting such mechanism. As crucial actors in domestic implementation, national human rights institutions may participate in drafting of new legislation, review of existing legislation, implement education and awareness-raising campaigns, and undertake investigative and quasi-judicial functions.¹⁹⁰

2.8.2 International Cooperation and National Implementation

The UNCRPD expressly recognizes under Article 32 that “international cooperation aids national efforts to effectively implement States Parties’ obligations.”¹⁹¹

¹⁸⁸ Convention 2006, Article 33 (1).

¹⁸⁹ Janet E. Lord, Michael Ashley Stein, “The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities,” *Faculty Publications* 83(2008): 665.

¹⁹⁰ Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights, G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

¹⁹¹ Convention 2006, Article 32(1).

This gives a comprehensive framework designed by the drafters of the UNCRPD in order to achieve domestic-level change by member States. It is pertinent to note about this path breaking provision that prior to UNCRPD, no other international human rights treaty has included such a mandatory provision on international co-operation, although the “Committee on Economic, Social and Cultural Rights” previously discussed the need for international cooperation specifically with respect to PWD.¹⁹²

During the negotiation process of UNCRPD, Article 32 remained one of the most hotly contested Articles. The inclusion of this Article as a part of the Convention remained a challenge till the last moment of negotiations. Main concern was raised by developed countries particularly the European Union. Their main objection was that the Article will raise the expectations of the developing and transitional States from developed States to increase aid and assistance for the fruitful implementation of the UNCRPD. They further added that the absence of additional aid to facilitate developing States will be used as an excuse for non-implementation of the UNCRPD at national level.¹⁹³ On the other hand, India argued on the status of Article 32(1)(d). The inclusion of phrase “as appropriate” in Article 32(1)(d) was objected by India because such an inclusion will authorize donor agencies and countries to place preconditions on technical and economic assistance given to developing States.¹⁹⁴ Indian proposal was opposed by European Union who favored the retention of the said phrase in Article 32(1)(d). It argued that donor agencies and countries

¹⁹² Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities, 13, 11th session, 1994, U.N. Doc E/1995/22.

¹⁹³ R. Kayess, and P. French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities,” *Human Rights Law Review* 8(2008):23-26.

¹⁹⁴ Article 32, International Cooperation, Working Group Draft Text.
<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-32-international-cooperation.html> accessed 20 Oct, 2020

should be allowed to retain discretion over which programs they were willing to provide aid and cooperation.¹⁹⁵ And the provision on international cooperation was concluded as a supplement to domestic efforts rather to replace them.

Article 32 of the UNCPRD seeks State parties to cooperate internationally through partnership with other States and/or with related international and regional organizations and civil society in support of national measures to give effect to the CRPD.¹⁹⁶ To achieve its purpose, Article 32 mentions a range of measures in respect of international cooperation. These measures include “capacity building, including through the exchange and sharing of information, experiences, training programs and best-practices,”¹⁹⁷ the “facilitation of research programs and of access to scientific knowledge,”¹⁹⁸ and “technical and economic assistance, including the facilitation of access to accessible and assistive technologies.”¹⁹⁹ Article is very clear on participation of PWDs in the cooperation process. International aid programs should completely integrate PWDs from its designing to implementation stage.²⁰⁰ In addition to Article 32, Article 11 on “situations of risk and humanitarian emergencies”²⁰¹ and Article 28(2)(b) on “access....to social protection and poverty reduction programs”²⁰² touch upon the principle and concept of international co-operation. Through Article 32, the UNCPRD mandates international co-operation for the “realization of the purpose and objectives” of the Convention. UNCPRD, through this Article, holds potential for how future international development aid assistance programs are to be

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid, Article 32(1)(b).

¹⁹⁸ Ibid, Article 32(1)(c).

¹⁹⁹ Ibid, Article 32(1)(d).

²⁰⁰ Ibid, Article 32.

²⁰¹ Ibid, Article 11.

²⁰² Ibid, Article 28(2)(b).

developed. The “Conference of States Parties” can be utilized as an ideal vehicle to monitor this requirement. “Conference of States Parties” will also provide a meaningful forum for sharing best practices in inclusive development of the PWDs.²⁰³

2.8.3 International Monitoring

Articles 34-39 of the UNCRPD and the Optional Protocol to the UNCRPD establish framework of monitoring and implementation at international level. To achieve this purpose, CRPD has been established under Article 34 of the UNCRPD.

There are two separately provided implementation and monitoring procedures under the Optional Protocol to the UNCRPD. The first is an inquiry procedure that enables CRPD to carry inquiries when violations of the Convention have been made. For this purpose, CRPD reviews periodic reports submitted by States.²⁰⁴ Periodic report is required to be submitted within two years after the Convention enters into force for that State. Later member State is required to submit report after at least every four years. In addition to periodic reports, CRPD may request further information from the States under paragraph 1 of Article 36. Guidance to State Parties on the preparation of reports is provided by CRPD. The enquiry procedure under UNCRPD is not new and is like other human rights monitoring systems. However, CRPD held a periodic conference of member states that works as a forum to discuss enforcement issues.

Second international monitoring procedure exercised by the Committee is to bring individual complaints/petitions to the Committee on the breach of their rights. To qualify

²⁰³ Ibid, Article 40.

²⁰⁴ Convention 2006, Article 35.

for this, State Parties need ratification of the OP-UNCRPD. The OP-UNCRPD authorizes the CRPD to handle individual complaints when domestic remedies are exhausted.²⁰⁵ Independent investigation may be taken by CRPD once the complaint is admitted.²⁰⁶ The complaint/investigation procedure is very effective in building pressure on States. It entertains complaints not only from aggrieved individuals but also from groups who make claims on the behalf of aggrieved individual that is inherent in both Articles 4 (3) and 33 (3).

The 23rd session of the CRPD which was held online due to COVID 19 Pandemic²⁰⁷ from 17 Aug-4 Sept 2020 adopted views on 7 individual communications under the Optional Protocol to UNCRPD with none about Pakistan, India, or UK. The website of International Disability Alliance shows 37 views on individual communications under the Optional Protocol to the UNCRPD till date to address various procedural and substantive issues.²⁰⁸ No communication is reported from Pakistan, India except the one from UK (*Kenneth McAlpine vs. UK*- Case 6.2011- 28/09/2012) but that was declared inadmissible “*ratione temporis*.” The 24th session of the Committee is to be held on March 8th to 26th, 2021 subject to confirmation,²⁰⁹ however, the countries to be reviewed are France, Bangladesh, Djibouti, Estonia, Jamaica, and Venezuela.²¹⁰

²⁰⁵ Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities 2006, Article 1-5.

²⁰⁶ Ibid, Article 6-7.

²⁰⁷ The UN Committee on the Rights of Persons with Disabilities, 23rd Session (virtual session) 17Aug-4 Sept 2020

<https://www.internationaldisabilityalliance.org/23rd-crpd-session-closes> accessed December 3, 2020.

²⁰⁸ CRPD Committee’s views on individual communications under the optional protocol <https://www.internationaldisabilityalliance.org/crpd-committee-interpretation> accessed December 20, 2020.

²⁰⁹ Ibid.

²¹⁰ https://tbinternet.ohchr.Org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1378&Lang=en accessed December 3, 2020.

2.9 Significant Impact of the Convention on the Case law of European Court of Human Rights

The UNCRPD is a novel human rights treaty that was negotiated and drafted between 2001 and 2006. The one among its many interesting features is in relevance to European Union. It was the first occasion on which the European Community took part in the drafting procedure and signing of an international human rights treaty.²¹¹ Further, UNCRPD became the first international human rights convention to which the European Community is a party.²¹² UNCRPD, therefore, proved to be the first of its nature that is open to ratification by international organizations like EU. Although European Union initially did not favor the multiplication of the number of separate human rights conventions for each potential group and did not favor the adoption of an international legal instrument on disability rights. Rather, it favored to strengthen and support the “UN Standard Rules for the Equalization of Opportunities of Persons with Disabilities 1993.”²¹³ These rules of the United Nations on disability were not legally binding and could be only used as a basic policy making instrument to pave the way for economic and technical cooperation.²¹⁴

Human rights of PWDs have been protected by means of European Convention on Human Rights (ECHR) and the robust case law of the ECtHR. It is noteworthy that the case law of the ECtHR has largely been affected by UNCRPD.²¹⁵ The adoption of the

²¹¹ Burba, Gráinne de. “The EU in the Negotiation,” 18.

²¹² L. Waddington “A New Era in Human Rights Protection in the European Community: The Implications of the UN Convention on the Rights of Persons with Disabilities for the European Community” papers.ssrn.com/sol3/papers.cfm?abstract_id=1026581 accessed June 12, 2019.

²¹³ <https://www.un.org/esa/socdev/enable/dissre00.htm> accessed April 16, 2020.

²¹⁴ Ibid.

²¹⁵ Silvia Favalli, “The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023: from Zero to Hero,” *Human Rights Law Review* 18(2018):517.

UNCRPD by European Union is deemed as a cause to create more sensitivity towards the protection and enforcement of the rights of PWDs both internationally and at regional level (in European context). This can be witnessed through obvious impact of UNCRPD on the case law of the ECtHR on disability issue at regional level. The increasing role of the UNCRPD in influencing and shaping disability case law of the ECtHR shows the interconnectivity of the UNCRPD, ECHR, and ECtHR to offer maximum protection to PWDs.

The influential role of the UNCRPD can be provided through the analysis of the citation and reference made to the Convention in the decisions of the ECtHR. The first case of the ECtHR that referred to the UNCRPD is *Glor vs. Switzerland*.²¹⁶ In *Glor*, the ECtHR referred to the UNCRPD. For the first time, it was stated by the ECtHR that “there is a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment.”²¹⁷ *Glor vs. Switzerland* recognized the violation of Article 14 of the UNCRPD on liberty and security of person²¹⁸ because *Glor*, being a diabetic, was declared medically unfit to serve military. The reference in *Glor* to the UNCRPD was made soon after it was entered into force.²¹⁹ It is noteworthy that the UNCRPD was referred in the decision of *Glor* prior to its entry into force for Switzerland. Following *Glor*, two decisions of the ECtHR in *Alajos Kiss vs. Hungary*²²⁰ and *Jasinskis vs. Lithuania*²²¹ again referred to UNCRPD, even though the relevant facts in both cases occurred before the

²¹⁶ *Glor vs. Switzerland* (Application no. 13444/04)2009.

²¹⁷ *Ibid*, Para 53.

²¹⁸ Convention 2006, Article 14.

²¹⁹ Jarlath, Clifford. “The UN Disability Convention and its impact on European Equality Law,” *The Equal Rights Review* 6(2011) 20.

²²⁰ *Alajos Kiss vs. Hungary*, Application No 38832/06, 20 May 2010.

²²¹ *Jasinskis vs. Lithuania*, Application No 45744/08, 21 December 2010.

UNCRPD had been signed by the respondent States (Hungary and Lithuania).²²² However, these two cases vary from *Glor*. In *Alajos* and *Jasinskis*, the respondent States signed the UNCRPD after the facts of the cases happened but prior to the decision of the Court, while in *Glor*, Switzerland had not yet signed the UNCRPD before the decision.²²³ In the first two cases, judges of the ECtHR referred to and assumed that both respondent States had followed the philosophy of the UNCRPD. Conversely, the Court in *Glor* referred to the UNCRPD notwithstanding that “it was impossible to presume that the respondent State had adhered to the principles of the UN Convention because Switzerland had not even signed the Convention when the Court finally made its judgment.”²²⁴ It reflects the role of the UNCRPD in safeguarding the rights of PWDs, regardless of the observance of the UN Convention by respondent State.²²⁵ In *Stanev vs. Bulgaria*,²²⁶ the Court once again referred to UNCRPD even though Bulgaria had not ratified it by the time the decision was made, although signed. Such references to UNCRPD by ECtHR prior to the ratification of the UNCRPD by respondent States reflects the growing importance of UNCRPD. It further signifies the importance of granting legal capacity (*Stanev vs. Bulgaria*) to PWDs by international instruments.²²⁷ UNCRPD can be, therefore, cited as a groundbreaking instrument that protects the legal capacity of PWDs at international level.²²⁸

²²² Favalli, “The United Nations Convention,” 526.

²²³ Ibid.

²²⁴ Ibid, 527.

²²⁵ Oliver Lewis, “Stanev vs. Bulgaria: On the Pathway to Freedom,” *Human Rights Brief* 19 (2012): 2-7

²²⁶ *Stanev vs. Bulgaria* Application No 36760/06, 17 January 2012.

²²⁷ Ibid, para 244.

²²⁸ Oliver Lewis, “Advancing Legal Capacity Jurisprudence,” *European Human Rights Law Review* 6(2011):704.

In other cases, reference to the UNCRPD is made by the ECtHR showing its ancillary role.²²⁹ In *Valentin Campeanu vs. Croatia*,²³⁰ the ECtHR as well as the Council of Europe Commissioner for Human Rights significantly concluded that “the provisions of the European Convention concerning the human rights of PWDs should be interpreted in the light of the UNCRPD.”²³¹ Apart from its ancillary role to the ECHR in some case, UNCRPD provides foundations to the decisions in ECtHR in other cases. For example, in *S.H.H. vs. United Kingdom*²³² a direct comparison was made between the key provisions of the UNCRPD and the general principles of international law. In this case, an Afghan applicant acquired his disability by a rocket hit. His application for asylum was turned down. He took the plea that his removal to Afghanistan will amount to the breach of Article 3 of the ECHR and that his removal will expose him to more risk of violence due to his disability.²³³ However, Court found no potential violation of Article 3 of the ECHR on inhuman or degrading treatment. However, it admitted that the ECHR needs to be interpreted in accordance with the general principles and rules of international law and cannot be applied in vacuum.²³⁴ It further admitted the significance of UNCRPD that provide help in informing the scope of Article 3 of the ECHR.²³⁵ In *Sergeyeva vs. Russia*,

²²⁹ *Dordevic vs. Croatia* Application No 41526/10, 24 July 2012; *Z.H. vs. Hungary* Application No 28973/11, 8 November 2012; *R.P. and Others vs. United Kingdom* Application No 38245/08, 9 October 2012; *S.H.H. vs. United Kingdom* Application No 60367/10, 29 January 2013; *M.H. vs. United Kingdom* Application No 11577/06, 22 October 2013; *Ruiz Rivera vs. Switzerland* Application No 8300/06, 18 February 2014; *Valentin Campeanu vs. Croatia* Application No 47848/08, 17 July 2014; *M.S. vs. Croatia* Application No 36337/10, 19 February 2015; *Butrin vs. Russia* Application No 16179/14, 22 March 2016; *Blokhin vs. Russia* Application No 47152/06, 23 March 2016; *I.C. vs. Romania*, Application no. 36934/08, 24 May 2016; *Fernandes De Oliveira vs. Portugal* Application No 78103/14, 28 March 2017; *N. vs. Romania* Application No. 59152/08, 28 November 2017; *Mockut_e vs. Lithuania* Application No 66490/09, 27 February 2018.

²³⁰ *Valentin Campeanu vs. Croatia* Application No 47848/08, 17 July 2014.

²³¹ *Ibid*, para 42.

²³² *S.H.H. vs. United Kingdom* Application No 60367/10, 29 January 2013.

²³³ *Ibid*, para 60.

²³⁴ *Ibid*, para 94.

²³⁵ *Ibid*.

ECtHR recognized UNCRPD as standard settler in protecting PWDs against discriminatory practices.²³⁶ *Kacper Nowakowski vs. Poland*²³⁷ and *Hiller vs. Austria*²³⁸ also highlighted the importance of the UNCRPD in setting principles in protecting the rights of PWDs. The dissenting judgment in *Sahin vs. Turkey* affirmed the interpretation of the ECHR in the light of the provisions of the UNCRPD to the possible extent.²³⁹ This particularly reflects the use and role of UNCRPD in developing international consensus on the rights of PWDs.²⁴⁰

A brief overview of the above cases shows the profound influence of the UNCRPD on the case law of ECtHR. It is significant to note that the resulting innovative case law of the ECtHR also led towards the adoption of the new Council of Europe Strategy on the Rights of Persons with Disabilities 2017–2023. The objective of the strategy is to achieve equality, dignity, and equal opportunities for PWDs.²⁴¹ Various priority areas are secured by UNCRPD in its various provisions.²⁴²

2.10 Need for Regional Tribunal of Human Rights in South Asia

UNCRPD sketches the social model framework that apply to all persons with disabilities equally. However, factors like less opportunity and local incapability of States Parties results in severe violations to enforce human rights of PWDs. Article 44 of the UNCRPD provides for the establishment of “regional integration organizations.” “Regional integration organization” shall mean:

²³⁶ *Sergeyeva vs. Russia* Application No 16899/13, 29 March 2016.

²³⁷ *Kacper Nowakowski vs. Poland* Application No 32407/13, 10 January 2017.

²³⁸ *Hiller vs. Austria* Application No 1967/14, Merits, 22 November 2016.

²³⁹ *Sahin vs. Turkey* Application No 3065/12, 30 January 2018.

²⁴⁰ Ibid. at Dissenting Opinion of Judge Lemmens, para 4.

²⁴¹ Council of Europe, Human Rights: A reality for all – Council of Europe Disability Strategy 2017–2023.

²⁴² Favalli, “The United Nations Convention,” 535.

An organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention”²⁴³

To overcome local and domestic incapacity to enforce rights of PWDs, litigation in regional tribunals and the subsequent case law creates an environment that leads to better enforcement of human rights of victims.

According to the new report by the regional arm of United Nations, Asia and the Pacific will not achieve any of the 17 “sustainable development goals” (SDGs) by 2030 for its scattered approach.²⁴⁴ GA of the UN emphasized on the countries in Asia-Pacific region to make regional arrangements and agreements for the advancement and protection of human rights and passed a number of resolutions including resolutions in 1977,²⁴⁵ 1978,²⁴⁶ 1979,²⁴⁷ 1980²⁴⁸ and 1981.²⁴⁹ Since 1980s, GA through its efforts in 1986,²⁵⁰ 1988²⁵¹ and 1990,²⁵² is constantly demanding States in this region to create a regional human rights mechanism. The Vienna Conference also reiterated the demand for regional and sub-regional arrangements.²⁵³ Human rights of PWDS can be best addressed in regional

²⁴³ Convention 2006, Article 44.

²⁴⁴ ESCAP Asia and the Pacific SDG Progress Report 2019 https://www.unescap.org/sites/default/files/publications/ESCAP_Asia_and_the_Pacific_SDG_Progress_Report_2019.pdf accessed August 12, 2019.

²⁴⁵ G.A. Res 32/127, U. N. Doc. A/RES/32/127 (16 December 1977).

²⁴⁶ G.A. Res. 33/167, U. N. Doc. A/RES/33/167 (20 December 1978).

²⁴⁷ G.A. Res 34/171, U. N. Doc. A/RES/34/171 (17 December 1979).

²⁴⁸ G.A. Res 35/197, U. N. Doc. A/RES/35/197 (15 December 1980).

²⁴⁹ G. A. Res. 36/154, U. N. Doc. A/RES/36/154 (16 December 1981).

²⁵⁰ G. A. Res. 41/153, U. N. Doc. A/RES/41/153 (1 December 1986).

²⁵¹ G.A. Res. 43/140, U. N. Doc. A/RES/43/140 (8 December 1988).

²⁵² G. A. Res. 45/168, U. N. Doc. A/RES/45/168 (18 December 1990).

²⁵³ Vienna Declaration and Program of Action (1993)37. <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action> accessed August 12, 2019.

tribunals because they provide a blend of international standards and domestic legal and social situation.

Asia is far the largest continent in the world in terms of area,²⁵⁴ however, Asia and the Pacific is the only region on globe which is without regional court, tribunal, or commission. In comparison to Asian region, there have been visible developments in case laws on disability issue in all three regional tribunals of Europe, Africa, and America. By touching various innovative aspects of disability, rich and productive case law is being produced by these regional courts that helps in realizing the human rights for PWDs. Inter-American Commission in a landmark case of *Victor Rosario*, placed responsibility on the State to ensure moral, physical, and mental integrity of persons with mental illness.²⁵⁵ It was believed that the high court of Ecuador could not decide the Congo case the way the interregional body did it.²⁵⁶ Another unreported case that arose in Paraguay gives another success story of the of American Commission to promote and protect the rights of persons with mental disabilities where Commission granted immediate relief to 460 individuals imprisoned in State-run neuro-psychiatric hospital. Similarly, the European Court of Human Rights (ECtHR) proved to be a tremendous forum and of an alternative legal venue to bring human rights violations of mental and physically disabled directly to it. With its precedent-setting role, ECtHR in *J.D. and A vs. The United Kingdom*²⁵⁷ decided that differential treatment of an individual due to his/her care providing responsibility in

²⁵⁴ Parameshvara Deva, "Mental health and mental health care in Asia," *Journal of the World Psychiatric Association* 1(2002):118-20.

²⁵⁵ *Victor Rosario Congo vs. Ecuador*, Case 11.427, Report No. 12/97, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 257 (1997).

²⁵⁶ Michael L. Perlin, "Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the U.N. Convention on the Rights of Persons with Disabilities," *The Geo. Wash. Int'l L. Rev.* 1(2012):44.

²⁵⁷ *J.D. and A vs. The United Kingdom*, Applications nos. 32949/17 and 34614/17 para 82.

connection with his/her disabled child is a form of “disability-based discrimination” under Article 14 of the ECHR. In *Çam vs. Turkey*, ECtHR held that non selection of the claimant on the ground of her blindness as a music teacher and no attempt by the school to make reasonable adjustment is the breach of Article 14.²⁵⁸ In African region, *Purohit and Moore vs. The Gambia* is a landmark case of the African Commission which found that the legislation in force in the Gambia, namely the “Lunatics Detention Act” (LDA) still uses the term “lunatics” and “idiots,” that contradicts the “African Charter on Human and Peoples Rights”.

In all instances stated above, regional courts better interpreted the law considering international standards and domestic legal and social situation with substantial and considerable impact on the lives of PWDs.²⁵⁹ These courts can not only play a key role in protecting human rights among their Member States but also assist in deciding responsibility of States for violations claimed in complaints submitted by individuals. Regional tribunals also contribute to the understanding of regional human rights treaties through ‘advisory opinions’ on the meaning of treaty provisions for PWDs. However, Asia misses any such tribunal or treaty and, therefore, lacks a forum and structure to provide a blend of international standards and domestic legal and social situation.

A regional tribunal for South Asia under the umbrella or on the pattern of South Asian Association for Regional Cooperation (SAARC) may be created to play distinctive role in safeguarding the rights of PWDs in the region. Numerous common issues affect PWDs in most SAARC members-states. Like Member States to SAARC, disability

²⁵⁸ *Çam vs. Turkey*, ECtHR 2016 Application no. 51500/08

²⁵⁹ Mashood A. Baderin, “Recent Developments in the African Regional Human Rights System,” *Hum. Rts. L. Rev.* 5 (2005):137.

legislation in both Pakistan and India can be better debated and compared in regional tribunal. Similarly, the language of the UNCPRD that invoke a social model by denying a pure medical model, enables and empowers PWDs to be the masters of their own fates with dignity and non-discrimination and such regional tribunal can best play their role in achieving the objective through regional consultation. Litigation in regional tribunals and the subsequent case law may create an opportunity to overcome the local and domestic incapacity to enforce rights of PWDs.

2.11 Conclusion

UNCPRD is perhaps the most extensive and broad human rights instrument because the framework and agenda of its obligations to adopt its shape needs root both in law and society. To be more effective, UNCPRD stresses on the national and international monitoring and enforcement of the Convention and gives detailed provision on issue. At international level, comparison between State's periodic reports, alternative reports by NGO's and DPO's and concluding observation by CRPD gives best picture of UNCPRD implementation (provided in next chapter). At domestic level, local statutes and legislation alone may prove failure in the absence of effective enforcement mechanism. UNCPRD, therefore, attaches great importance to the observance of Article 33 that demands monitoring and national level enforcement of the UNCPRD in the light of some new and special provision i-e. "conference of State parties" and "international cooperation."

Monitoring and implementation of the Convention at national level provides States vast discretions to design its domestic and national frameworks. Besides, a detailed guideline on national mechanism for monitoring and implementation of the Convention

has been provided in Article 33, it is silent on allocation of duties to domestic national human rights entities by State. As a result, the approach towards disability does not remain standardized and varies extremely in different jurisdictions that may result in human rights violation of the PWDs. An effective regional enforcement body in form of regional tribunal can be helpful. In case of infringement of PWDs' rights, regional court as alternative legal venue can take better account of the regional conditions and peculiarities of the PWDs.²⁶⁰ Such a body may help to eliminate or at least reduce the use of the defense of cultural relativism towards universality of PWDs rights. It is witnessed from the interconnectivity of the UNCRPD and case law of the ECtHR which offers for the need of new aspects in protecting the rights of PWDs.

²⁶⁰ Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region, A/RES/41/153 1986 <https://digitallibrary.un.org/record/280940> accessed May 12, 2018.

CHAPTER 3: DISABILITY PREVALENCE AND LAW IN PAKISTAN: SOME LOOPHOLES

3.1 Introduction

Disability as a social and human right issue is relatively new field of interest in the world generally and in Pakistan particularly. This socio-economically-disadvantaged group of society and their right of full participation and equality needs positive action on the part of State as recognized by the UNCRPD, however, government has not paid due attention and publicity to the technical issue of disability.

In Pakistan, disability has different meaning with different barriers of different types that needs different means and approaches to tackle the issue. The chapter covers how the definition of disability in Pakistan is highly contentious for several reasons. Non availability of relevant primary disability data and reliability on secondary data available in literature adds to the austerity of the situation of disables. Little available disability data from census and other sources is far unreliable and uncertain for further purpose.

The only disability specific law with limited application to employment of PWDs in Pakistan have been passed in 1980. It is to see that whether current law is in tune with human rights obligations or not. Similarly, it is to check that whether the creation of few special laws and policies via fragmented efforts is all that should be done. Chapter discusses various Pakistani laws/policies and statutory efforts on disability to see whether disability has turned inclusive topic in Pakistan as per UNCRPD version.

3.2 Data and Magnitude of Disability

Disability data regime in Pakistan over the years is not encouraging and satisfactory. Since its first ever population census in 1951 to the very recent in 2017, country shows fluctuating data collection in respect of duration, enumeration, and sources.

Sixth Population and Housing Census in March 15 to May 25, 2017 was the first national data collection effort since Pakistan has ratified UNCRPD on 5 July 2011 which requires member states to collect statistical and research data on disability.²⁶¹ Census 2017 was the result of the Supreme Court (SC) of Pakistan's Suo moto notice in 2016 directing the government to take no further delays in this regard as it took place after a delay of 19 years.²⁶² According to latest census of 2017, only 0.48 % of Pakistanis are PWDs out of the population of 210 million²⁶³ which is a gross underestimate. The total population of Pakistan is around 210 million and the population of PWDs, therefore, comes to 3,286,630 which includes 21,73,999 and 1,112,631 PWDs for the rural and urban areas respectively.²⁶⁴ Data provided by Election Commission of Pakistan (ECP) shows that total number of PWDs registered as voters is 165,972 (provides an estimate that 87% of the 'Special Computerized National Identity Cards- CNIC-holder' PWDs are registered as voters).²⁶⁵ However, surprisingly only 136,928 PWDs have been registered with "National Database & Registration Authority" (NADRA) and are issued computerized national

²⁶¹ Convention 2006, Article 31.

²⁶² Census 2017 and Disability, February 22, 2017, <http://www.datastories.pk/census-2017-and-disability/> November, 12 2019. accessed March 9, 2020.

²⁶³ Faisal Kamran, Sarah Bari, "No Data on Disability," Dawn Oct 18, 2019, <https://www.dawn.com/news/1511509>

²⁶⁴ Disability Statistics, Federal Bureau of Statistics, 2018.

²⁶⁵ Electoral and Political Rights of Persons with Disabilities in Pakistan; Situation Analysis & Way Forward, 2018.

identity cards which is less than ECP number of PWDs as registered voters. It is worth mentioning that information published was requested under “Freedom of Information Ordinance 2002,” but NADRA had initially refused to share it.²⁶⁶ The information was provided by NADRA only after the intervention of federal ombudsman.

If compared with 1998 census report, the percentage of persons with disabilities in 1998 was 2.49 % which ironically dropped to 0.48 % in 2017 census over the last 20 years. The disability data in 1961 census of Pakistan showed about 0.34 % of the total enumerated population as disabled. The collected data was in respect of persons who were totally blind, deaf, dumb, and crippled.²⁶⁷ A comparative look into the statistics of various census, one loses confidence in the credibility of census data using medical model. Population census adopts general approach because primary goal of the population census is to cover the whole population to collect data about all individuals and their basic demographic characteristics and not disables or any other protected character and their needs. According to global survey, it constitutes 10 to 15 % average of disables in an area whereas this prevalence is comparatively higher for developing countries.²⁶⁸ The report of the World Bank says that PWDs constitute at least 10 % (18 million) of the total population of Pakistan.²⁶⁹ Using a model disability survey method, WHO estimated that 30 million Pakistanis are living with disabilities.²⁷⁰ Model disability survey method can be a best tool

²⁶⁶ Mehak Irfan, “Lahore Businessmen Association for Rehabilitation of the Disabled (LABARD)” Aug 8, 2019 <https://medium.com/@mehak.irfan109/laure-businessmen-association-for-rehabilitation-of-the-disabled-labard-8464cc33ff> accessed September 11, 2018.

²⁶⁷ Mohammad Afzal, “Disability Prevalence and Correlates in Pakistan: A Demographic Analysis,” *The Pakistan Development Review* 31(1992):217-19.

²⁶⁸ Disability Inclusion, The World Bank <https://www.worldbank.org/en/topic/disability> accessed March 22, 2020.

²⁶⁹ Pakistan’s first Model Disability Survey launched <https://www.islamabadscene.com/pakistans-first-model-disability-survey> accessed September 11, 2018.

²⁷⁰ Ibid

to provide a better approximation of the true size and more understanding of the lived experience of persons with disabilities. This view is supported by sample based 1973 Housing, Economic and Demographic Survey (HED) in Pakistan showing enumerated disability percentage of 2.08 %²⁷¹ that is much higher than any estimates provided by all population censuses.

Accurate disability data helps in understanding the severity of the problem and making informed decisions accordingly. Many hopes were attached to recent 2017 census in Pakistan as it took place after a gap of almost eight years because this latest in the series was supposed to be held in 2008. Further, it was the first to collect disability data after Pakistan made its commitment to UNCRPD. However, disability rights activists and organizations who claim 2.6 million PWDs in South Punjab only, has shown concerns that the government has not made enough efforts on a population count of the disabled persons in 2017 census. For instance, the main census form developed by the government did not consist a separate column on disability.²⁷² On 7 February 2017, parliamentary secretary for Finance and Statistics told the national assembly of two separately designed forms by the government- Form 2 and 2-A where form 2-A included a column for disable persons but added that the second form will be administered through sampling method after the end of main census.²⁷³ Pressure was built on government when a petition was filed by six PWDs under Article 184 (3) of the Constitution of Pakistan. All respondents (including federal/provincial governments and national/provincial councils) were directed by the

²⁷¹ The sample for the 1973 Housing, Economic and Demographic was about 255,000 households in the country, 122,000 in urban the Federally Administered Tribal Areas (FATA) and Malakand Province.

²⁷² "Centre, PBS told to include column for disabled in form," Dawn, March 16, 2017 <https://www.dawn.com/news/1320804/centre-pbs-told-to-include-column-for-disabled-in-form> accessed March 5, 2020.

²⁷³ Ibid.

apex court to exhibit their efforts in this regard making government responsible to hold headcount of disabled persons in the spirit of UNCRPD.²⁷⁴ The Supreme Court of Pakistan (SC) ordered “Pakistan Bureau of Statistics” (PBS) for the enforcement of decision of the Lahore High Court (LHC). The LHC Judgement required PWDs to be registered under separate categories of “male”, “female” and “transgender” in the ongoing census in separate and specific column by amending the forms being used in the population census.²⁷⁵ The SC sought an explanation from the PBS on the exclusion of questions on disability information. The reason to court for this was mentioned as lack of manpower and time.²⁷⁶

3.3 Education and Employment Policy Regime in Pakistan

Over a period of time , number of policies were formulated by the government of Pakistan on the subject of education including “report of the commission on national education 1959”, “education policy 1972-80”, “national education policy and implementation program 1979”, “national policy for special education (1986)”- revised in 1988, “national policy for rehabilitation of disables 1986”, “national policy for special education 1999”, “national policy for persons with disabilities 2002”, “national plan of action for persons with disabilities 2006” (NPA 2006), “special citizens act 2008”, “special citizens (right to concession in movement) act 2009” and “national education policy 2017”.

²⁷⁴ *Punjab Public Service Commission and another vs. Mst. Aisha Nawaz and others* (2011 SCMR 1602)

²⁷⁵ Ibid.

²⁷⁶ Haseeb Bhatti, “SC Orders Govt to Count Disabled People in Ongoing Census,” *Dawn*, March 16, 2017 <https://www.dawn.com/news/1320852> accessed March 12, 2020.

National policy on disability in 2002 was a major step by the government on the notion of equality and inclusion whereas NPA 2006 proposes steps and measures to place the National Policy of 2002 in practice with short- and long-term goals by 2009 and 2025, respectively. It proposed special schools for 'severely handicapped' students only. Education Policy 2017 takes both special and inclusive education side by side; although new facilities need to focus on inclusive education to meet international commitment. The policy has set a target of 50% of formal educational institutions at all levels to be converted to inclusive education friendly institutions. The policy further suggests the allocation of at least 5% special education budget of general education budget and recommend 10% development budget of education departments for developing inclusive education facilities at general education institutions.²⁷⁷ However, both special and inclusive education have become devolved subject after 18th amendment to the Constitution in 2010. Devolution of powers to the provinces after 18th amendment altered the division of legislative powers and this policy is no more binding on provinces. Center-based policy papers and pending disability-related legislation is no more federal issue but provincial which are making strides in various directions. For instance, Punjab and Sindh provinces have made special education departments while in Khyber Pakhtunkhwa and Baluchistan, it is still a part of social welfare department.

It is historically evident that too many policies and action plans contribute to the uncertainty of policies. Pakistan encountered same situation. In field of inclusive and special education, for example, the National Policy for Rehabilitation of the Disabled was

²⁷⁷ Pakistan National Education Policy, 2017.

<https://pbit.punjab.gov.pk/system/files/National%20Education%20Policy%202017.pdf> accessed 2 Oct, 2020.

framed in 1986 that recommended for integrated education of CWDs in regular schools.²⁷⁸ However, a new policy in 1988 replaced it that demanded separate and special education for PWDs.²⁷⁹ Again the idea of inclusive education was incorporated in, national policy for special education in 2002.²⁸⁰ Ironically, 2006 witness more changes when the NAP once again dropped the idea of inclusive education.²⁸¹ In 1991, international pressure for inclusive education was built under UN “Convention on Rights of the Child” (CRC) as the policies of special education in Pakistan remained inconsistent and indeterminate with the UN policies and conventions particularly UNCRPD. This uncertainty and inconsistency due to the apathy of policy makers has resulted in non and improper implementation of any one type of policy.

Like the case of education, provinces are extended exclusive policy and legislative powers on social welfare and labor. Changes in the constitutional structure of the State after 18th Constitutional amendment has added to the inconclusiveness of Pakistan's legislation about disability. In *Hafiz Junaid's case*²⁸², court referred to the absence of a comprehensive law protecting the rights of PWDs and that the existing plans and policies clearly endorse charitable approach towards disability in contrast to right-based approach of the UNCRPD. Court criticized the impugned recruitment policy and placed reliance on earlier cases.²⁸³

²⁷⁸ Pakistan National Policy for Rehabilitation of the Disabled 1986.

²⁷⁹ Pakistan National Policy for Rehabilitation of the Disabled 1988.

²⁸⁰ National Policy for Special Education Pakistan 2002.

²⁸¹ National Action Plan 2006.

²⁸² *Hafiz Junaid Mahmood vs. Government of Punjab and others* (PLD 2017 Lahore 1).

²⁸³ *Kawas B. Aga and another vs. City District Government, Karachi (CDGK) through Nazim-e-Ala and others*, (PLD 2010 Karachi 182), *The Postmaster-General, Northern Punjab and (AJ&K), Rawalpindi vs. Muhammad Bashir and 2 others*, (1998 SCMR 2386), *Province of Sindh through Secretary, Home Department and others vs. Roshan Din and others*, (PLD 2008 S.C. 132), *Inayatullah vs. Sh. Muhammad*

The said amendment made the “federal ministry of social welfare and special education” defunct in 2013 shifting the administrative framework for drafting and implementing national policies on PWDs to provinces. Legislative and administrative steps taken in this regard are there but not up to the mark. Promulgation of “Punjab Disabled Persons (Employment and Rehabilitation) (Amendment) Act 2012”, “Sindh Differently Abled Persons (Employment, Rehabilitation and Welfare) Act 2015”, and the “Khyber Pakhtunkhwa Disabled Persons (Employment and Rehabilitation) (Amendment) Act 2012” brings no or little change about the issue. Among all, the Provincial Act of Punjab had little impact on making an inclusive society but lacks administrative and institutional framework for its implementation. The Act still talks about the quota policy and draw no distinction between different types of disabilities such as sensory, physical, or intellectual disabilities in quota allocation. The provision of the Act, that in case of failure to provide employment to PWD, the establishment has “*to pay the sum of money it would have paid as salary or wages to a person with a disability/disabilities had been employed*”,²⁸⁴ plays as a double-edged weapon. On one hand, the Act requires all establishments with one hundred or more employees to employ PWDs. In case of negation, it must pay money to be added to the fund established for inclusive services to PWDs encouraging employers to hire PWDs since they would pay the wage in any case. On the other hand, establishments can ignore to hire PWDs, since hiring a person with a disability may require investing in infrastructure and assistive technology to make the establishment inclusive. This act deters the inclusiveness of PWDs in the workplace, and yet, this action of the employers would

Yousaf and 19 others, (1997 SCMR 1020), *Mst. Afsana vs. District Police Officer, (Operation), and M.D. Tahir, Advocate vs. Federal Government, and others*, (PLD 1999 Lahore 409).

²⁸⁴ Punjab Disabled Persons (Employment and Rehabilitation) (Amendment) Act 2012, Section 11.

be within the law. The recent SC court judgment in “*Sui Southern Gas Company Ltd. v Federation of Pakistan 2018*”²⁸⁵ is remarkable on devolution issue of work and employment. The Court held that despite the devolution of subjects of labor and trade union to provinces under 18th Constitutional amendment, the Industrial Relations Act 2012 is not unconstitutional.

3.4 Disability Law in Pakistan

In contrast to recent census data, the number of individuals with physical disabilities in Pakistan is at sure increase due to terrorist attacks, vulnerability to natural calamities and required broader definition of disability. It requires legislative efforts made in line with constitutional principles and the international obligations of Pakistan. A glance of the existing legal regime and its impact to set out the rights of PWDs in Pakistan in disability context is as under.

3.4.1 Constitution of Pakistan 1973

The present constitution of Pakistan is the supreme law of land. The very preamble of the Constitution guarantees the principles of equality, democracy, social justice, and tolerance and that the fundamental rights shall be fully observed.²⁸⁶ Chapter 1 of the Constitution is comprised of fundamental rights which are justiciable and enforceable in court of law.²⁸⁷ Another important chapter entitled “principles of policy” is a detailed

²⁸⁵ *Sui Southern Gas Company Ltd. vs. Federation of Pakistan*, 2018 SCMR 802., para 27.

²⁸⁶ Constitution of Pakistan 1973, Preamble.

²⁸⁷ Ibid, Articles 8–28. These rights include: “security of person (Article 9), safeguards as to arrest and detention (Article 10), slavery, forced labor, etc. prohibited (Article 11), protection against retrospective punishment (Article 12), protection from double punishment and self-incrimination (Article 13), inviolability of dignity of man, etc. (Article 14), freedom of movement, etc. (Article 15), freedom of assembly (Article 16), freedom of trade, business, or profession (Article 18), freedom of speech, etc. (Article 19), freedom to profess religion and manage religious institutions (Article 20), safeguard against taxation for purposes of any

catalogue of titles (Articles 29 to 40 of the Constitution of Pakistan). “Principles of policy”, for the purposes of research work on PWDs, refers to shield special needs and special groups. Constitution is silent on direct reference to the rights of PWDs but its Article 38 (d) talks about the social and economic well-being of the persons to be promoted by the State. It requires State to

*provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment.*²⁸⁸

However, the character and the working of the principles of policy is very different from fundamental rights. Fundamental rights are justiciable, whereas the “principles of policy” document is not capable of being settled by law and is subject to the proviso of “available resources of the government”. Shaheen Sardar Ali who is a British Pakistani law professor at the University of Warwick, rightly resembles the split of human rights at domestic level into “fundamental rights” and “principles of policy” to the division and separation of human rights at international level in human rights instruments in the form of “International Covenant on Civil and Political Rights” (ICCPR) and the “International Covenant on Economic, Social and Cultural Rights” (ICESCR) respectively.²⁸⁹ She calls this dichotomy of rights as having adverse impact on the lives of PWDs.²⁹⁰ Similarly, the

religion (Article 21), safeguard as to educational institutions in respect of religion, etc. (Article 22), provision as to property (Article 23), protection of property rights (Article 24), equality of citizens (Article 25), non-discrimination in respect of access to public places (Article 26), safeguard against discrimination in services (Article 27), preservation of language, script and culture (28).”

²⁸⁸ Ibid, Article 38(d).

²⁸⁹ Shaheen Sardar Ali, “Disability, human rights and redistributive justice: Some reflections from the North West Frontier Province of Pakistan on popular perceptions of disabled people (ch 6)” in *Disabled People and the right of life: the protection and violation of Disabled People's Most Basic Human Rights*, ed. Luke Clements and Janet Read (London: Routledge, 2008), 17.

²⁹⁰ Ibid.

protection provided under article 38(d) may not be compatible with the shift demanded by UNCRPD in terms of the use of stereotypes of ‘weakness’ or a ‘sickness’ but if it comes to defining the scope of the fundamental rights of PWDs, Constitution is correctly interpreted by courts as evident in “*Hafiz Junaid Mahmood vs. Government of Punjab*”²⁹¹ and “*Barrister Asfandiyar Khan vs. Government of Punjab*”²⁹² although Constitution does not specifically forbid disability discrimination and apply to all citizens.

The dedication of no provision to disability in Constitution, in one sense, is considered that it believes in equality of rights and inherent dignity of a human beings without discriminating between persons with or without disabilities as determined in *Aisha Nawaz and others*²⁹³ invoking Article 5 of the UNCRPD. Article 25 of the Constitution endorses actual participation, inclusiveness, and admits human diversity in a society. In “*Tariq Aziz-ud-Din and others*”,²⁹⁴ the Court held that

we are also conscious of the provision of Article 25 of the Constitution, which guarantees equality of citizens. However, denying such protection in peculiar circumstances of the case on basis of reasonable classification founded on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out.

The notion of “equal protection of laws”, however, does not restrict State’s authority to adopt special laws or policy to address the issue of disability.

²⁹¹ *Hafiz Junaid Mahmood vs. Govt. of Punjab, etc.* W.P. No.2565/2014.

²⁹² *Barrister Asfandiyar Khan vs. Government of Punjab* W. P. No.29131/2017.

²⁹³ *Punjab Public Service Commission and another vs. Mst. Aisha Nawaz and others* (2011 SCMR 1602)

²⁹⁴ *Tariq Aziz-ud-Din and others* (Human Rights cases Nos.8340 of 2009, 2010 SCMR 130.

3.4.2 The Disabled Persons (Employment and Rehabilitation) Ordinance, 1981

The “Disabled Persons (Employment and Rehabilitation) Ordinance 1981”, (the Ordinance) was promulgated in 1981- international year for disabled persons- and can be rightly called an initial step towards employment, wellbeing, and rehabilitation of disabled persons in Pakistan. However, it may not be termed as an exhaustive framework for the enforcement of equal rights notion embedded in UNCRPD. It is worth mentioning that the Ordinance stands defunct and repealed to the extent of territory of Islamabad under “Islamabad Capital Territory (ICT) Rights of Persons with Disability Act 2018”.

Taking the meaning of disability under the Ordinance, it can be elaborated and evaluated from following two aspects.

I. Use of Insensitive Terms in the Definition

A disabled person, under the Ordinance, is

*A person who, on account of injury, disease, or congenital deformity, is handicapped for undertaking any gainful profession or employment in order to earn his livelihood, and includes a person who is blind, deaf, physically handicapped or mentally retarded.*²⁹⁵

Under the Ordinance, PWDs remained to be called ‘handicapped’ like past who remained mostly hidden in their houses or institutionalized in welfare centers and were subject to de jure discrimination.

The use of term handicapped for persons with disabilities is itself labelling as it was generally misunderstood as disabled persons holding their caps out to beg for alms (i.e.,

²⁹⁵ The Disabled Persons (Employment and Rehabilitation) Ordinance, 1981, Government of Pakistan, Section 2(3).

holding their caps in their hands, hence, hand-i-cap). In 20th century, the use of the word generally referred to disadvantage, disfavor and hindrance particularly applied for PWDs. Globally the view too persists that use of the word “handicap” is not in terms of disrespect but is in context of environment that creates challenge or difficulty.²⁹⁶ The definition of a PWD in Ordinance is, therefore, not in lines with UNCRPD and the use of words “disabled, physically handicapped and mentally retarded” mentioned in the Ordinance are challenged being unconstitutional.²⁹⁷ As our Constitution does not make any difference between a person with and without disabilities, the use of such terms as a part of law was challenged by public interest petition. In *Barrister Asfandiyar Khan vs. Government of Punjab*,²⁹⁸ the then Chief Justice Syed Mansoor Ali Shah declared the words “disabled”, “physically handicapped” and “mentally retarded” as violative of Articles 9, 14 and 25 of the Constitution and hence unconstitutional and illegal. Federal and Punjab governments were clearly directed to discontinue the use of such words in directives, circulars notifications, official correspondence, and instead use the terms “persons with disabilities” or “persons with different abilities”.²⁹⁹ Directions were given to the Ministry of Parliamentary Affairs, Islamabad to make sure that the Ordinance is reprinted in compliance with this judgment.³⁰⁰ However, these directions of the Lahore High Court have not been implemented till date.

²⁹⁶ The interesting origin of the word ‘handicap’ <http://www.todayifoundout.com/index.php/2013/12/origin-word-handicap/> accessed July 2, 2020.

²⁹⁷ *Barrister Asfanyar Khan Tareen etc vs. Govt of the Punjab etc W.P. No 29131/2017*.

²⁹⁸ *Ibid*, para 19.

²⁹⁹ *Ibid*, para 20.

³⁰⁰ *Ibid*, para 21.

Barrister Asfandiyar Khan case has been endorsed by the SC in two of its recent judgments. In the case of *Malik Ubaidullah vs. Government of Punjab*,³⁰¹ it was held that the use of insensitive terms deeply bruises and offend human dignity of persons with different abilities. In *Mst. Beena vs Raj Muhammad*,³⁰² where an appeal was moved by a “disabled mother” against the judgment passed by the Peshawar High Court (PHC). The PHC set aside two concurrent judgments of the Family Court and Appellate Court and awarded the custody of minor to his father by giving preference to the Khula deed in which along with dower waiver, the petitioner agreed for not claiming minor’s custody. Court considered the petitioner unfit for the custody and quoted her as “crippled/disabled lady” in its judgement. In Appeal, the SC stripped off the PHC judgment and observed that a mother entitled, under Muslim personal law, for custody cannot be compelled to surrender her right through an agreement of khula. The consideration of such an agreement will be considered unlawful and against public policy. The SC further criticized and termed the conduct/ judgment of the PHC as “inappropriate”. Citing Chief Justice Syed Mansoor Ali Shah in the case of *Asfandiyar Khan Tareen vs. Government of Punjab*, the Supreme Court observed that the use of words like “disabled”, “physically handicapped” and “mentally retarded” is the violation of the Constitution.³⁰³

II. Magnitude and Meaning of Disability

Court while giving the meaning of disability relied on *Hafiz Junaid Mahmood vs. Government of Punjab and others* and on UNCRPD. In *Barrister Asfandiyar Khan Tareen etc vs. Govt of the Punjab etc.*, the court’s approach that disability is what someone has,

³⁰¹ *Malik Ubaidullah vs. Govt of Punjab* Civil Petition No.140-L of 2015, para 19.

³⁰² *Mst. Beena vs. Raj Muhammad* Civil Petition No. 4129/2019 and C. M. A. No. 10406/2019.

³⁰³ *Ibid.*

not what someone is, is a move from pure charitable and medical to social model of disability. However, such a move would require having right definition of disability, but the Ordinance defines it as an impairment with no specific magnitude where the loss of finger and any other serious disability is tackled on same lines. In earlier case of *Aisha Nawaz and others*,³⁰⁴ the apex court directed federal government to “*categorize the types, causes, magnitude, duration and severity of disability of each individual*”. Much of the Ordinance is still medical oriented focusing on physical impairments and disabilities. The medical model of disability still prevails in several approaches towards disability and is not addressed by law and policy framework. For example, impairment is the only criteria and standard that is still used for the registration of PWDs by physician without social participation assessment. Likewise, there is no single Pakistani law or data about the rights of caregivers who are providing unpaid care for their ill, older, or disabled family members, friends, or partners.

Hafiz Junaid Mahmood vs. Govt. of Punjab,³⁰⁵ a blind Hafiz-e-Quran petitioner³⁰⁶ with braille proficiency certificate³⁰⁷ being “fit for job consistent with his experience” and fulfilling all the requirements advertised under various posts of educators, was declared ineligible under “recruitment policy – 2013 for educators” dated 31 July 2013 saying that “blind”, “deaf” and “dumb” will not be eligible to apply under disabled persons’ quota. Paragraph 4-D of the policy reads as under:

³⁰⁴ *Punjab Public Service Commission and another vs. Mst. Aisha Nawaz and others* (2011 SCMR 1602)

³⁰⁵ *Hafiz Junaid Mahmood vs. Government of Punjab and others*. PLD 2017 Lahore 1.

³⁰⁶ As per the Disability Certificate issued by the Assessment Board for the Disabled Persons District Lahore, Social Welfare Women Development and Baitul-Maal, Government of Punjab dated 5-5-2012 read with the Revised Disability Certificate dated 17-12-2016.

2% statutory quota of the total allocated posts of each category will be reserved for disabled person on direct basis. Their disability certificates will be issued by District Officer (Social Welfare) concerned district of disabled person. Disability should not hinder mobility or effective communication or use of blackboard. Disabled candidates fit for teaching profession and able to read, speak, write and use blackboard will be eligible to apply for appointment against this quota. Under disabled persons' quota, blind, deaf & dumb candidates will not be eligible to apply. The vacancies reserved for disabled persons against which disabled qualified candidates are not available, will be treated as unreserved and filled on district merit.³⁰⁸

The recruitment policy was challenged on the ground of definition that stood conflicting to the definition of disability in Section 2(c) of the Ordinance. However, it was supported on the ground that courts cannot interfere in policy matters and placed reliance on earlier petitions in favor of the Policy.³⁰⁹ Giving its remarks, the honorable court held that:

Generally, a governmental policy is enforceable against a citizen when it is translated into legislation, subordinate legislation, or executive action. Any such legislation or executive action is then subject to judicial review. Policy is, generally, a guideline for the internal working of the Government, however, if the Policy impinges upon the fundamental rights of a citizen, it can be judicially reviewed, like any other legislation or executive action.³¹⁰

³⁰⁸ Educators Recruitment Policy 2013 Education Department Punjab. https://schools.punjab.gov.pk/system/files/RECRUITMENT-POLICY-2013_0_0.pdf accessed 2 May, 2019.

³⁰⁹ *Executive District Officer (Revenue), District Khushab at Jauharabad and others vs. Ijaz Hussain and another* (2011 SCMR 1864), *Aqsa Manzoor vs. University of Health Sciences, Lahore through Vice Chancellor and 3 others* (PLD 2006 Lahore 482), *Lt. Muquddus Haider vs. Federal Public Service Commission through Chairman, Islamabad* (2008 SCMR 773), *Punjab Public Service Commission and another vs. Mst. Aisha Nawaz and others* (2011 SCMR 1602) and *Mian Muhammad Afzal vs. Province of Punjab and others* (2004 SCMR 1570).

³¹⁰ *Hafiz Junaid Mahmood vs. Govt. of Punjab* Case No: W.P. No.2565/2014.

whereas court referred to already decided cases.³¹¹ Applying the Doctrine of Severance to have the constitutionally compliant definition, honorable court declared that the use of words “physically handicapped”, “mentally retarded” and “disabled” is unlawful and unconstitutional and is in violation of articles 9, 14 and 25 of the Constitution. Court further said to read the title of the Ordinance as: Persons (Employment and Rehabilitation) Ordinance, 1981 rather than Disabled Persons (Employment and Rehabilitation) Ordinance, 1981³¹²- but of no practical purpose yet.

3.4.3 Special and Inclusive Education

Ministry of Social Welfare and Special Education was formed under the Ordinance. It established opening of almost 100 special education schools for children with disabilities (CWDs). “National Council for the Rehabilitation of Disabled Persons” was designated with the task to shape policies in this regard.³¹³ The scale of disability from different sources in Pakistan suggests that special education facilities-though in contrast to UNCRPD spirit of inclusive education- are not enough to adjust even 10% of the CWDs of the country.³¹⁴

³¹¹ *Human Rights case No.14392 of 2013 (2014 PTD 243)*, *Messrs Al-Raham Travels and Tours (Pvt.) Ltd. vs. Ministry of Religious Affairs, Hajj, Zakat and Usher through Secretary and others* (2011 SCMR 1621), *Messrs Shaheen Cotton Mills, Lahore and another vs. Federation of Pakistan, Ministry of Commerce through Secretary and another* (PLD 2011 Lahore 120) and *Wattan Party through President vs. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others* (PLD 2006 SC 697).

³¹² *Hiral P. Harsora and others vs. Kusum Narottamdas Harsora and others* (2016) 10 SCC 165), *Shahid Pervaiz vs. Ejaz Ahmad and others* (2017 SCMR 206) *R.M.D. Chamarbaugwalla and another vs. Union of India and another* (AIR 1957 S.C. 628), *The Corporation of Calcutta vs. Calcutta Tramways Co. Ltd.* (AIR 1964 SC 1279), *Satyawati Sharma vs. Union of India and another* (2008) 5 SCC 287).

³¹³ The Ordinance, 1981, Section 6.

³¹⁴ Amjid Hafeez, “Special Education in Pakistan: A Critical Analysis,” *A Journal of the National School of Public Policy* 41 (2020):169.

The Ordinance bifurcates between special and mainstream education because people with special abilities have special issues to get education, however, separation promotes segregation which goes against the spirit of UNCRPD. UNCRPD recognizes that

*Disability is an evolving concept that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full active participation in society on an equal basis with others.*³¹⁵

Inclusive education, therefore, must be one of the main strategies to achieve this goal requiring States Parties “to ensure an inclusive education system at all levels.”³¹⁶ John Rynders’ research in 2005 concluded education in inclusive classrooms beneficial for persons both with and without disabilities in respect of costs, accessibility, and changing societal attitudes.³¹⁷ However, in developing countries, the availability of direct funding and resources on the part of govt for the purpose is absent. It is recommended to ease the burden on govts of developing countries through innovative community-based mechanisms. “Lady health worker program” in Pakistan, for instance, was such a program to help bring driving change in societal attitudes via awareness raising. Disability needs such initiatives to be commenced and adopted in community.

3.4.4 Employment Quota

Under the Ordinance, a qualified disabled person has been allocated 1 % employment quota in public and private employment which was later extended to 2% by

³¹⁵ Convention, 2006, Preamble.

³¹⁶ Ibid, Article 24.

³¹⁷ John Rynders, “Down Syndrome: Literacy and Socialization in School. Focus on Exceptional Children,” 38(2005) <https://journals.ku.edu/focusXchild/article/view/6815/6168> accessed July 2, 2019.

government in 2012 Policy under special directive of the Prime Minister.³¹⁸ However, Ordinance is silent on jobs in informal sector and self-employment.

When it comes to implementation, there exists a confusing and complicated forum shared between the ministry of labor, social welfare departments and special education. The 18th Constitutional amendment made “Ministry of social welfare and Special Education” at the federal level defunct resulting into a confusing patchwork through different agencies working at each province. In practice, it includes several tiresome procedures of registration with local employment exchange office.³¹⁹ After registration, a PWD has then to go through a medical test to assess his/her fitness for employment. More ironically, medical board is authorized to recommend a type of job that suits the person³²⁰ and his disability rather than his capability which is the violation of “right to the freedom of choice” under Article 27 of the UNCRPD. In “*Sajjad Ali vs. Vice Chancellor through Registrar University of Malakand at Chakdara, Dir Lower & others*” , the petitioner suffered of the impugned judgment of PHC dated 28.05.2018 who applied for the post of lecturer and was refused to be recruited on the ground that the advertisement contains only one post of lecturer in the subject of Pharmacy that could not satisfy/workout the 2% quota prescribed for the disabled persons against the advertised post.³²¹ Examined under Sections 10 (an establishment should employ no less than two percent of disabled persons) and 12 (mandatory registration of a disabled person with the local employment exchange of the

³¹⁸ The Disabled Persons (Employment) and Rehabilitation (Amendment) Act, (2015).
<https://courtingthelaw.com/2015/05/27/faqs/the-disabled-persons-employment-and-rehabilitation>
accessed Dec 12, 2020.

³¹⁹ Ibid, Section 12.

³²⁰ Ibid, Section 12(2).

³²¹ *Sajjad Ali vs. Vice Chancellor through Registrar University of Malakand at Chakdara, Dir Lower & others*, Civil Petition No.3107 of 2018.

area where provincial council may or may not fit one for recruitment) of the Ordinance (amended by the “Khyber Pakhtunkhwa Disabled Persons (Employment and Rehabilitation) (Amendment) Act 2012), the SC gave 3 months policy formulation time to the university for the allocation of this quota to PWDs. And that the case of the petitioner will be duly considered afresh by the respondent university with no effect from findings of impugned judgment of PHC. The constitutional interpretation in the light of UNCRPD undoubtedly shows that a PWD cannot be debarred from applying on open merit for the general seats and 2% employment quota is an extra advantage for PWDs which does not prohibit them to apply for a job or employment on general quota.

The issue of quota allocation of PWDs was once again considered by the SC in a civil petition *No.140-L of 2015* on an appeal from the order of LHC dated 02.12.2014. *Malik Ubaidullah vs. Govt of Punjab Civil Petition No.140-L 2015* was heard and decided on (14th July 2020) giving detailed interpretation of the allocated 2% disability quota in Jobs. The petitioner applied for the post of “senior elementary school educator Arabic” (SESE [Arabic]) on the disability quota advertised by education department, local government, Multan. A total of 81 posts were advertised and thereafter, only one (Asma Qasim with 62.78 marks) was appointed against the said post under the disability quota and the petitioner (with 43.53 Marks) failed to secure a position. Feeling aggrieved, petitioner invoked constitutional jurisdiction and challenged the selection process under disability quota before LHC. His writ petition was dismissed vide order dated 28.10.2013 and so did his appeal before the LHC vide impugned order dated 01.12.2014. The Apex Court during the hearing of this case, arose a legal question on the manner of allocation of

2% disability quota under the Ordinance.³²² Relying on international laws under UNCRPD, ILO and social model of disability in paras 3-12, the apex court decided on how 2% disability quota should be worked on.³²³ Court said that “Section 10 of the Ordinance provides that not less than 2% of the total number of persons employed by an establishment at any time shall be PWDs.”³²⁴ The ‘total number of persons employed’ means the total sanctioned posts or total workforce³²⁵ of the establishment rather than the advertised posts.³²⁶ Honorable Court further added that:

*The allocation of 2% disability quota on the basis of the advertised posts as compared to the sanctioned posts is averse to the interest of the PWDs for the reasons that 2% disability quota can only be actualized if there is a minimum of 50 posts advertised to secure one post for the PWDs. If the advertisement is for less than 50 posts (due to the vacancies arising at that particular time), Disability Quota on the basis of the advertised posts cannot be worked out, depriving the PWDs of their prospect of employment. It is, therefore, in the interest of the PWDs that the Disability Quota for the establishment is first worked out on the basis of the total sanctioned posts and then apportioned against the total sanctioned strength of different categories of posts.*³²⁷

Based on above explanation, court decided that:

³²² The federal Law is now a provincial topic after the Disabled Persons (Employment & Rehabilitation) (Amendment) Act, 2012, however, as this case pertains to a period before 2012, therefore, the Federal Law would apply in the present case.

³²³ *Malik Ubaidullah vs. Govt of Punjab* Civil Petition No.140-L of 2015, para 14.

³²⁴ *Ibid.*

³²⁵ *Pakistan Tobacco Co. Ltd. and others vs. Government of N. W.F.P. through Secretary Law and others* (PLD 2002 SC 460) and Reference No.01/2012 (reference by the President of Pakistan under Article 186 of the Constitution of Islamic Republic of Pakistan, 1973) (PLD 2013 SC 279).

³²⁶ *Malik Ubaidullah vs. Govt of Punjab* Civil Petition No.140-L of 2015, para 14.

³²⁷ *Ibid.*, para 16.

81 advertised posts of SESE [Arabic] allows for one post in the disability quota, while if the Disability Quota is worked out on the total sanctioned strength of the posts of SESE [Arabic] it comes to 5 posts (cadre wise posts - 2009 contains total 252 sanctioned posts of SESE [Arabic]) and 4 more PWDs could have been appointed against the said posts against the advertisement in question.³²⁸

Most significant of the judgment is that court termed the appointment of PWDs under 2% disability quota as half the story and the most important other half of the story is to provide support, structure, accessibility, and facilities to PWDs to perform all with ease and convenience if they are offered jobs.³²⁹ Court in its landmark ruling upheld the reasonable accommodation principle recognized in UNCRPD although Pakistani law was previously silent on the subject. For analysis, the reasonable accommodation principle and reasonable adjustment duty is thoroughly discussed in Ch 6 in context of UK's modern disability law and court rulings.

3.4.5 Reasonable Adjustment Duty

Reasonable adjustment as a legal and anticipatory duty is a mandatory and significant part of modern disability laws under international standards. It obliges very public sector organization to alter their approach or provision for making services accessible to PWDs as well as everybody else. The failure on the part of employer to make reasonable adjustments for an applicant or worker suffering with a disability constitutes discrimination. The Ordinance and subsequent bills to amend and improve it are all silent upon this important aspect of the employment rights of a PWD or mention of limited

³²⁸ Ibid, para 17.

³²⁹ Ibid, para 20.

circumstances as justification for disability related discrimination. Any case law emphasizing on the issue is almost absent. In the absence of law and judicial interpretation to guide on the circumstances as justification for disability related discrimination, it proves more violating of the rights of PWDs. In *Muhammad Nazak vs. Usman Yousaf Mobeem etc.*,³³⁰ a relief was granted to a PWD via contempt of court application and resulting notification of Government of Pakistan Ministry of Interior instead of invoking any provision of the Ordinance or enforcement of already existing regulations (law does not possess reasonable accommodation provision for disabled workers).

A contempt petition in *Muhammad Nazak vs. Usman Yousaf Mobeem etc.*, was filed on alleged defiance of order dated 07.04.2017³³¹. Petitioner was a certified disabled person with amputated hands from shoulders. His grievance was the issuance of CNIC without foot toe impression that deprived him from availing certain facilities like opening of bank account, issuance of mobile sim card etc. The CNIC was issued contrary to “Regulation No. 13” of the NADRA (application for National Identity Card). Regulation 2002 demands special treatment of certain persons including eunuchs and persons with disability. It says that eunuch should be treated as “male” and an identity card shall be issued accordingly. It further says that

*An applicant with amputated hands shall put the impression of his left foot toe on the application form and, if the left foot toe is also amputated, the impression of the right foot toe shall be put on the application form.*³³²

³³⁰ *Muhammad Nazak vs. Usman Yousaf Mobeem etc.* Case No. CrI. Org. No. 39725-W of 2017.

³³¹ Ibid.

³³² National Identity Card Regulations, 2002., Clause 13.

Deputy Director (Operations), NADRA appeared and informed the court about certain amendments in software module to implement the regulations. Six-weeks' time was given to entertain amendments and issue required CNIC. The above-mentioned contempt petition was filed for non-fulfillment of court's order in letter and spirit (law is silent on reasonable adjustment duty of authorities and employers). The petition, however, was dismissed after the notification of Ministry of Interior, Government of Pakistan on 21 July 2017. In addition to amputated hands, the notification covered the applicants whose fingerprints cannot be computed due to chronic skin disease, old age, worn out or fade fingerprints and shall apply through "problematic fingerprints" option of card processing.³³³

3.4.6 Zakat and Ushr Ordinance 1980

The Zakat and Ushr Ordinance provides for educational and medical expenses of the poorer. "Pakistan Bait ul Maal Act 1991" and later the Provisional Ordinances after 18th Constitutional amendment offers general support to the poorer or PWD including educational, medical, and housing fields, for example, Benazir income support program (BISP).

Section 8(a) of the zakat fund under "Khyber Pakhtunkhwa Zakat and Usher Act, 2011" mentions of providing help in form of zakat to widows, orphans, handicapped and disabled under Sharia either directly or through institutions like religious schools and social institutions.³³⁴ However, its basic idea revolves around a charitable purpose whereas the charity-based approach towards disability is rejected by UNCRPD. Other than charitable

³³³ *Muhammad Nazak vs. Usman Yousaf Mobeem etc.* Case No. CrI. Org. No. 39725-W of 2017.

³³⁴ The Khyber Pakhtunkhwa Zakat and Usher Act, 2011, Section 8(a).

approach towards disability, the Khyber Pakhtunkhwa Zakat and Usher Act, 2011 which was enacted after Pakistan ratified UNCRPD, still use the obsolete terms like 'disabled' and 'handicapped' as were in 1981 Ordinance that goes against the spirit of UNCRPD.

3.4.7 National Policy, 2002 and National Plan of Action, 2006 for Persons with Disabilities

The information contributed to the formation of "National Policy for Persons with Disabilities 2002" on the number of PWDs and CWDs, were based upon WHO estimates and census of 1998.³³⁵ The consultative process included all stakeholders including relevant federal ministries, departments, and prominent NGOs.³³⁶ The main purpose of the policy was to establish an inclusive environment for PWDs by 2025.³³⁷ To operationalize the 2002 national policy and put it in practice, National Plan of Action 2006 (NPA) was designed to propose concrete measures particularly on the issues of accessibility, inclusion, and equalization of opportunities. It identified 17 critical areas of concern and intervention to take short-term steps ((like data bank; sample surveys, promoting inclusive education, employment opportunities, legislative support, improving public opinion) to be achieved by the end of 2009 and long-term measures (like accessible/barrier free environment and revision of construction bye laws) to be achieved by July 2025.³³⁸

³³⁵ National Policy for Persons with Disabilities 2002, 3.

<https://dgse.gov.pk/SiteImage/Downloads/National%20Policy%20for%20Persons%20with%20Disability.pdf> accessed 22 March, 2020.

³³⁶ Mughees Ahmed, Abdul Basit Khan, Fozia Nasem, "Policies for Special Persons in Pakistan: Analysis of Policy Implementation," *Berkeley Journal of Social Sciences* 1(2011):5.

³³⁷ National Policy 2002,3. <https://dgse.gov.pk/SiteImage/Downloads/National%20Policy%20for%20Persons%20with%20Disability.pdf> accessed March 22, 2020.

³³⁸ National Plan of Action for the Persons with Disabilities, 2006; Directorate General of Special Education, Government of Pakistan.

NPA clearly mentions that available data on PWDs is not accurate and distribution of causes is not determined which requires reliable mechanism to collect district level information.³³⁹ Some of its short-term unachieved goals in this regard included adoption of ICF model of WHO for measuring disability, sample surveys in selected districts, databanks on disability at federal and provincial levels and generation, dissemination and posting of such data on the web. Long term steps included enforcement of Occupational Health and Safety (OHS) laws in industries, studies/ research on cousin marriages and on genetically transmitted diseases and conduct of public awareness if confirmed as responsible factor. For inclusive education, it demands one inclusive education unit per Union Council.³⁴⁰ NPA demands clear implementation of existing employment laws and drafting of new laws, however, it identifies the weak implementation status of Disabled Persons (Employment and Rehabilitation) Ordinance, 1981, Workmen' Compensation, Social Security and Occupational Health Safety Acts.³⁴¹

Action No. 2.8 of the NPA not only demands legislation but also its strict enforcement to eliminate quackery to check proliferation of disability.

3.4.8 Special Citizens Act 2008 and Special Citizens (Right to Concessions in Movement) Act, 2009

“Special Citizens Act, 2008” (currently pending) seeks to address the issue of accessibility of PWDs in respect of public buildings and other places, provision of seats in public transport, facilities on footpaths for blinds and wheelchairs, however, the Act is

³³⁹Ibid.

³⁴⁰ National Plan of Action for the Persons with Disabilities, 2006; Directorate General of Special Education, Government of Pakistan, Action No. 6.12.

³⁴¹ Ibid, Action No. 11.

silent on accessibility of use of information and communications technology.³⁴² The vagueness of the Act can be witnessed from the fact that it mentions to reserve seats for PWDs on public transport, however, there is no reference to make vehicles accessible for PWDs. For instance, while designing the new metro bus system in Punjab, government ignored the accessibility issue with no heed paid to make these buses accessible for PWDs.

Special Citizens (Right to Concessions in Movement) Act 2009 aimed to make modes of public and private transport accessible to PWDs on concessional rates including air, railway and others but not seen in practice yet. The Act mentions the reason behind such concession and says that the working force of PWDs is even unable to earn sufficient to pay showing the discrimination faced by PWDs in education and employment.³⁴³ UNCRPD stresses to make disables mandatory part of all activities if specific policies for them are not affordable.

3.4.9 Pakistan Accessibility Code 2006

The dream of equality and full participation of PWDs cannot be realized without resolving accessibility issue. Considering the accessibility issue of PWDs, the “Special Citizens Act 2008” recognize accessibility as “*to everywhere, just like the accessibility of normal citizens of Pakistan*”³⁴⁴(a welfare not right-based approach to disability). PWDs are in fact, not ‘normal’ or like every other normal citizen and require action on the part of government for assuring their certain inalienable human rights.

³⁴² Special Citizens Act, 2008; Government of Pakistan.

³⁴³ Special Citizens (Right to Concessions in Movement) Act, 2009; Government of Pakistan.

³⁴⁴ Special Citizens Act, 2008; Government of Pakistan, Section 2.

As a step forward, Pakistan has an Accessibility Code 2006 (the Code) that provides standards for public infrastructure. However, any greater protection and relief provided for the rights of PWDs in any of federal, provincial, and local laws is not limited by the Code. Easy and safe access for PWDs has been assured in the Code although in theory at least. It reviews comprehensive space standards, design guidelines and building bylaws to create PWDs-friendly environment. To achieve its objective, the Code has made it obligatory for the designers, owners and builders of public buildings/facilities and privately owned public use buildings to adopt the required standards in all new construction.³⁴⁵ Newly constructed buildings should be free of physical barriers. Code demands appropriate and possible measures to modify already existing buildings and facilities. Every public place that can be used by PWDs, has brought under the realm of this Code.³⁴⁶ Keeping in view the chaotic situation of PWDs on environmental accessibility issue, it is ironic enough that “Design Manual & Guidelines” for new as well as existing buildings has also been provided for Accessibility Code 2006 to supplement it. However, the provisions of the Manual are not binding and are used as guidelines only. Non availability of the Manual on any government website to guide owners, contractors, builders, and facilitators further deteriorates the situation. Many of the concerned are unfamiliar of its presence.

NPA that requires public entertainment places and recreational activity centers more accessible, no efforts to draft policies and promulgate laws and regulations are there.³⁴⁷ In *Mian Mohammad Tanvir Ibrahim vs. Parks and Horticulture Authority*,³⁴⁸ the High court required the Parks and Horticulture Authority to ensure that clubs provide

³⁴⁵ The Accessibility Code of Pakistan 2006, Chap 3, section 3.2.

³⁴⁶ The Accessibility Code of Pakistan 2006, Chap 7.

³⁴⁷ National Action Plan 2006, point 11, 12.4 on 29 and point 12.8 on 31.

³⁴⁸ *Mian Mohammad Tanvir Ibrahim vs. Parks and Horticulture Authority* 2016 CLC 1508.

access to persons with physical impairments. Both the Code as well as The Manual lack crucial legislative cover. Infrastructural development under legal obligations and policies as well as effective implementation of the Act is not seen.³⁴⁹ This shows that the Act has not gone beyond welfare and empty approach.

3.4.10 The Disabled Persons Employment and Rehabilitation (Amendment) Act 2015

“The disabled persons (Employment) and Rehabilitation (Amendment) Act 2015,” the bill yet to be passed, seeks to reinforce the rights of PWDs in Pakistan in respect of employment and other livelihood benefits. It demands the Ordinance 1981 to be incorporated with a new Section 2A after Section 2, to ensure the provision of 14 facilities as a top priority list of the government. It requires the government to warrant 2% of disability quota in federal, provincial and districts departments, concession of 75% and 50% in tuition fees in public and private educational institutes respectively, 50% discount to PWDs in PIA, railway, public and private transport fares, 30% discount to PWDs in utility stores. Amount of one lac and three lacs for wedding events and small business opening respectively is also proposed.³⁵⁰ Provided in theory, all is far to be seen in reality.

3.4.11 Islamabad Capital Territory (ICT) Rights of Persons with Disability Act 2020

The most recent legislation on the issue of disability in Pakistan is the “Islamabad Capital Territory Rights of Persons with Disability Act 2020 (ICT Act).” The original draft of the said legislation was first presented before the Standing Committee on Human Rights

³⁴⁹ Fatima Wahla, “Accessibility for PWDs,” *Daily Times*, August 28, 2019.

³⁵⁰ <http://courtingthelaw.com/2015/05/27/faqs/the-disabled-persons-employment-and-rehabilitation-amendment-act-2015/> accessed June 23, 2019.

on April 24, 2019, chaired by the Minister of Human Rights Dr. Shireen Mazari, however, it required certain amendments. To make it more inclusive, the said legislation underwent some changes and was passed by National Assembly on Jan 10, 2020. It is to be noted that the ICT Act is limited only to Islamabad and its benefits to whole country cannot be extended. It repealed the “Disabled Persons (Employment and Rehabilitation) Act 1981” to the extent of Islamabad.

The legislation can be termed as an achievement developed in the light of UNCRPD as apparent from the very name of the Act- the name of the legislation includes the term ‘persons with disability’ instead of disables or handicapped given in previous legislations. However, the term persons with disability is not defined in the Act. New disability definition in Section 1(f) satisfies UNCRPD requirement that takes disability as “an interaction between a PWD and attitudinal and environmental barriers. However, it is silent on recognized disability conditions (whereas Indian RPWD Act 2016 has increased the number of such recognized disability conditions from 7 to 21).

Some salient features of ICT are that it proposes inclusive society and equal rights of PWDs both at institutional and legal forums particularly in education, employment, and health. The “National Council for the Rehabilitation of Disabled Persons” formed under the 1981 Ordinance has been reconstituted as the “Council on Rights of Persons with Disabilities” where PWDs have been given representation (seat of the deputy chairperson of the council will be occupied by a disabled person).³⁵¹ The Act talks of the creation of special disability courts to hear cases under this Act or other laws in which one or more

³⁵¹ Islamabad Capital Territory Rights of Persons with Disability Act 2020, Section 21.

parties are persons with disabilities³⁵² and requires monitoring of disability cases in courts under sub-section (1) by appropriate judicial forums as devised by the respective High Court.³⁵³

The Act requires government to provide free pre-primary to higher education to PWDs with educational institutions to cater their special needs. It demands reasonable and appropriate accommodation to educational institutions, including hostels (all this need comprehensive range of facilities). However, ICT Act is silent on how to achieve it. In employment cases of PWDs, the employer shall ensure the provision of reasonable accommodation. Reasonable accommodation includes necessary assistive aid and equipment reasonably required to perform his/her duties. But the term reasonable meaning by “necessary and appropriate modification” still needs judicial interpretation which is not affordable in many cases. Besides several developments under ICT Act, a PWD desirous of employment still needs to have his name registered with council and get job if the council fit him/her to work. This constitutes clear recruitment discrimination under UNCRPD. Ease of access and mobility under Section 7 requires government to take necessary measures towards accessibility issue via new development and amendments in lines with strategies developed by the Council. The Act, however, seems vague as it does not offer any time limit for such amendments (RPWD 2016 India provides 5-years’ time limit to make existing public buildings accessible).³⁵⁴ On protection from abuse, violence and exploitation, the Act says that “physical violence against a PWD causing even a minor injury shall be deemed as, grievous injury and shall be treated as an act of violence

³⁵² Ibid, Section 32.

³⁵³ Ibid, Section 32.

³⁵⁴ The Rights to Persons with Disabilities Act 2016 India, Section 45.

undersection 335 of the Pakistan Penal Code, 1860 (Act XLV of 1860) and shall attract punishment accordingly.” However, the significant issue of PWDs violation and exploitation and available legal remedies needs a detailed cover under a separate chapter on punishment (RPWD Act 2016 India provides detailed legal remedies available against such incidents).³⁵⁵

Further, the Act is completely silent on the concept, definition, and rights of caregivers to PWDs for their recovery and rehabilitation. In Pakistani society primary caregivers are family members who provide unpaid care but the caregiving burden of a person both effect his/her normal and professional lives. The rights of care givers in respect of hours-relaxation in case of employment are usually violated in Pakistan and no legal provision are seen to address the issue. As an example, India has reviewed the existing legal and civic support systems for these caregivers. As a preliminary step, tax exemptions and travel benefits are the aids provided to caregivers in India. Under recent amendment (Section 80 DD) to India Income Tax Act 1961, the caregiver is eligible for income tax exemption of Rs. 50,000-100, 000 depending on the magnitude of disability.³⁵⁶ Besides defining a caregiver as “*any person including parents and other family members who with or without payment provides care, support or assistance to a PWD*”,³⁵⁷ the RPWD Act 2016 of India establish care-giver allowance to PWDs.³⁵⁸ It also provides to initiate capacity building program and training on care giving.³⁵⁹

³⁵⁵ Ibid, Sections 89-95.

³⁵⁶ India Income Tax Act 1961, Section 80 DD.

³⁵⁷ Disabilities Act 2016, Section 2(d).

³⁵⁸ Ibid, Section 24(3-i).

³⁵⁹ Ibid, Section 47(1) c.

ICT Act, although a limited but very recent attempt on PWDs rights in Pakistan, is silent on this important associative aspect of disabled rights.

3.4.12 National Commission for Persons with Disabilities Act, 2018

“National Commission for Persons with Disabilities Act, 2018” is a bill introduced in National Assembly applicable to whole of Pakistan. It aimed to create disability commission for drafting a national policy by reviewing the condition of PWDs in country. The bill, as an initial step, focus on the implementation of laws and policies with more practical approach to review them and instruct federal agencies for implementation. The disability commission’s chairperson is proposed to be one of equal ranking to a judge of SC with national and international expertise in human rights field and activities. However, the definition and type of disability in the said bill as well as its enforcement has not yet been worked on in accordance with international and human rights standards.

3.4.13 Provincial Legislation

After 18th Constitutional amendment, there has been some provincial laws as well. For instance, attempts to address disability issue at provincial level in Sindh is Sindh Empowerment of Persons with Disabilities Act 2018 that repealed the Sindh Differently Abled Persons Act, 2014. However, the repealed law shall continue and cases for the time being pending in courts and tribunals will be decided under old law.³⁶⁰ It is believed that the new Act adopts right based approach instead of medical and charity-based attitude towards disability. Its preamble cites eight fundamental principles of the CRPD. In addition to many enhancements, the list of disabilities has been extended. The enactment, for

³⁶⁰ Sindh Empowerment of Persons with Disabilities Act 2018, Sec 45(2).

example, is commendable but still needs judicial interpretation which is almost missing under new Act. The framework of courts is usually remained limited to the available text of legislature only. Courts should adopt more elaborative, liberal, and constructive approach when defining physical disabilities. Definition of disability in new Act is an exhaustive one which needs to be inclusive and wide-ranging so that it could be extended to impairments not currently covered by the Act. Exhaustive definition of disability was discouraged by an Indian court ruling in *G. Muthu vs. Tamil Nadu State Transport Corporation*³⁶¹ where color blindness was interpreted as one of the visual impairments (PWD Act does not mentioned colorblindness as impairment). The stated case was used as an authority in later case³⁶² where heart attack-although not specifically the subject of the PWD Act- was deemed as disability by the court under non-discrimination provision of the Act. Court added that non-discrimination provision of the Act possesses such a wider scope to give protection to the petitioners under the PWD Act. Same rare and scattered efforts can be seen under Baluchistan Persons with Disabilities Act 2017.

In Punjab, The Punjab Empowerment of Persons with Different Abilities Act 2021, is the provincial legislation not enacted and notified by assembly till date. However, the law is an effort to give effect to the UNCRPD in Pakistan. Justice Jawad Hassan gave direction in a judgement issued on public interest petition.³⁶³ Court directed that The Punjab Empowerment of Persons with Different Abilities Act 2021 once adopted and announced by the assembly, must be implemented in letter and spirit by the provincial government to preserve the basic rights of PWDs. Court relied on the judgments of

³⁶¹ *G. Muthu vs. Tamil Nadu State Transport Corporation* (2006) 4 MLJ 166.

³⁶² *E Mancharan vs. Tamil Nadu State Transport Corporation* MANU/TN/3016/2009.

³⁶³ *Mst. Sana Khursheed vs. Government of the Punjab through Chief Secretary and 9 others* W.P.No.30364 of 2021.

honorable SC on fundamental rights of PWDs and on the UK Supreme Court in the case of *Paulley versus Firstgroup PLC*³⁶⁴ summarizing that “people who cannot walk to justice, the justice can walk to them.”

Similarly Provincial government of Khyber Pakhtunkhwa has failed to enact draft disability law, which is pending since 2014. In a public interest litigation, PHC is invited to follow the role of the European Court of Human Rights and the jurisprudence of India to recognize a limited right in favor of PWDs.³⁶⁵

In nutshell, some improvements have been seen in theory, but there are many loopholes. Provinces lack disability legislation to protect PWDs. In above mentioned writ petitions, courts usually relied on and referred to case law of UK and India, rulings of European regional court in addition to international treaties for protection and nondiscrimination of PWDs. For better relation and understanding, this research thesis, therefore, includes the significance of the legislation and case law of UK, India, and regional courts.

3.5 Conclusion

UNCRPD takes disability as in evolving concept with no proper definition and the view behind it tends that it may limit the ambit of the convention or that definitions on disability may tend to change. In Pakistan, however, not defining or poorly defining disability may be very risky for its meaning and obligations. Current definition of disability as an ‘abnormality’ under the Ordinance as well as the use of derogatory terms is flatly

³⁶⁴ *Paulley vs. Firstgroup PLC* (2017,SCMR 407.

³⁶⁵ Disable people move court for free health care THE NEWS 15 February 2018.

rejected by UNCRPD (the risk persist that the present definition excludes many). The current definition of disability under the Ordinance jeopardies results in the distraction of judicial and other attention even. Similarly, the data collected about PWDs by government through various censuses is not correct enough for many reasons providing rough estimates about various disabilities as many are unreported disabilities. A comparative look into statistics of various census, one loses confidence in the credibility of census data.

A detailed discussion of Employment Ordinance of 1981, and other segregated efforts made on the issue of disability in form of actions plans and policies, bills with relevant case laws highlights the present unsatisfactory situation and lacunas in law on the rights of PWDs. Pakistan did not have any adequate State legislation or any other consistent mechanism to address and enforce the rights of PWDs. Policies and programs mostly seem to be documents with aspirational goals that gives the sketch of the government's mission statement and vision in an area but no clear steps to achieve practical goals. This situation demands an immediate step for enacting a comprehensive law and policy with practical implementation and intervention at federal level primarily.

CHAPTER 4: DOMESTIC CHALLENGES AND OBLIGATIONS OF PAKISTAN UNDER THE CONVENTION

4.1 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 UNCRPD in addition to harmonize its existing laws with international standards either by abrogation or amendment. UNCRPD ratification is a commendable step on the part of Pakistan but existing laws in Pakistan does not fulfill national and international obligation in true sense.

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. This Chapter considers the significance of the UNCRPD like a process of continuous quality improvement in domestic laws.

Legal lacunas and various other challenges in Pakistan in relation to fulfillment of UNCRPD obligations are debated to evaluate the existing state of PWDs' rights. As the 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. Review of the Pakistan's first periodic report submitted to CRPD, and the relevant list of issues has been provided to throw further light

on the disability situation in Pakistan. Right to inclusive education under Article 24 of the UNCRPD is discussed as inclusive and supportive education right is more important than anything else in upholding civil rights of PWD.

4.2 Challenges in the Realization of the Convention

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

4.2.1 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”.³⁶⁶ It is influenced by various factors such as politics, economics and religion.³⁶⁷ Fulcher³⁶⁸ also 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. She, therefore, says that the notion of disability is dependent upon the views, perceptions, and beliefs of each country, that is society, and is shaped by the broader culture where disabled is defined to get its direct impact from surrounding society. Different attitudes to various anomalies are therefore the outcome of cultural differences that needs social factors within society to be focused on.

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

³⁶⁶ R. Williams, *The long revolution* (Ontario, Canada: Encore editions from Broadview Press, 1961), 57

³⁶⁷ M.F. El-Islam, “Arab culture and mental health care,” *Transcultural Psychiatry* 45(2008): 671–682.

³⁶⁸ Gillian. Fulcher, *Disabling policies? A comparative approach to education policy and disability* (Philadelphia: PA Falmer, 1989), 25.

of the world and has its roots deep in the 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.³⁶⁹ 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.³⁷⁰

In a society with various 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 known as Jinn. Social stigma has been attached to these beliefs under various cultural interpretation. 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.³⁷¹ 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

³⁶⁹ Ali, “Disability, human rights,” 17.

³⁷⁰ Ibid.

³⁷¹ 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.

disabled³⁷² and are an alternative for medical treatment of PWDs. As far as law is concerned, these practices are very common despite that faith-healers and spiritual-healers can be charged with exploitation and use of illegal treatment procedures, punishable with a fine of up to Rs. 50,000 and imprisonment³⁷³ which shows the loopholes of the law in theory and practice in form of implementation gap.³⁷⁴ Awareness and law enforcement can stop this culture from growing. Similarly, 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.”³⁷⁵

There are many superstitious beliefs and cultural myths and towards PWDs in Pakistan. They are, therefore, rarely believed to function as productive and useful members of society. The mobility and access needs of PWDs are seldom catered by public places like shopping malls, bus and railway stations, parks, cinemas, educational institutions, and workplaces. In addition to physical and mental impediments of their disability, PWDs are constantly faced by negative social attitudes and stigma that plays as a hindrance to the integration of PWDs in community. In such a situation, disability affects not only the life of a PWD, but also the family of the PWD for the ridicule attached to disability. As a result, PWDs spend their lives behind closed doors leading to disease like depression, sadness, and hopelessness. Negative attitudes of peers result in tremendous impact on the life of the PWD that force families to hide disability of their family members particularly mental disability. The comparison of disability estimate of 5th Population and Housing Census of

³⁷² Olaf Caroe, *The Pathans 550 B.C.- A.D. 1957*(Oxford University Press: Karachi, 1958),198-99

³⁷³ Mental Health Ordinance 2001 Pakistan, Article 52 (5).

³⁷⁴ Ibid.

³⁷⁵ Pakistan Penal Code (XLV OF1860), Section 417.

1998 and 6th Population and Housing Census of 2017 identifies a sharp decrease in number of PWDs in Pakistan. Population of PWDs is fallen from 2.38% in 1998 to 0.48% in 2017.³⁷⁶ The Supreme Court of Pakistan showed its concern on it. Showing its annoyance, the Supreme Court stated that Pakistan Bureau of Statistics gave many excuses by referring many to various issues for not counting disabled persons after the census had already begun across the country.³⁷⁷ The intervention by the Supreme Court made it possible, although at a later stage, to add disability question as a part of the population survey. Societal stigma and ridicule attached to disability are one of the reasons among many for the so-called drastic fall in disability estimate in Pakistan.

Although cultural differences and their influence on disables do exist in a society but UNCRPD does not broadly define cultural rights. The prescribed social model of disability under UNCRPD, however, address the social issues covering attitudinal, environmental, and institutional behaviors than taking disability as an individual impairment only.

4.2.2 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 calls on States to involve them in the monitoring process. But with almost no background

³⁷⁶ 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.

³⁷⁷ Haseeb Bhatti. "SC orders govt to count disabled people in ongoing census," *Dwan*, March 16, 2017 <https://www.dawn.com/news/1320852> accessed March 10, 2020.

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 than right-based agenda towards PWDs. Being funded by multinational companies and international 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, treaties, protocols and conventions including UNCRPD.

As a developing country and with lack of expertise, government 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 need support and commitment from government and civil society as well. Similarly, PWDs are unable to be best represented through individual effort. A positive trend can be initiated in form of co-operation 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 about 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. The terminology “civil

society organization comprises “different kinds of organizations, including research organizations, organizations of service providers and other private stakeholders.”³⁷⁸ Organizations of persons with disabilities, on the other hand, are specific type of civil society organization. The view of these organizations should be given priority by government when addressing the issues related to PWDs. In accordance with Article 33 (3), all civil society organizations, including organizations of persons with disabilities, 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.³⁷⁹ 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.³⁸⁰ 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.

4.2.3 Legal and Some Other Challenges

There is lack of appropriate legislation and governance to implement policies and plans in accordance with the UNCRPD framework. As a State party, UNCRPD obligates Pakistan to adopt all appropriate legislative, administrative and other measures.³⁸¹ These appropriate measures include new legislation and modification/abolishment of all existing

³⁷⁸ General 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.

³⁷⁹ Ibid, para 15.

³⁸⁰ Convention 2006, Article 4(3).

³⁸¹ Convention 2006, Article 4.

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.³⁸² After 18th Constitutional amendment in 2010, federal level creation and implementation of disability laws and strategies lack in Pakistan. An effective anti-discrimination law provides an efficient ban on discrimination on grounds of disability. But such law lacks in Pakistan. The situation of PWDs turn 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

³⁸² Ibid.

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.³⁸³

II. Disability Certification and Registration

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.³⁸⁴

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 Sindh Province. In addition to disability certificate, special documents like "employment exchange

³⁸³ Convention 2006, Article 22.

³⁸⁴ Employment of Persons with Disabilities <https://paycheck.pk/labour-laws/illness-work/employing-disabled-person> accessed 13 May 2021.

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

As covered in previous Chapter, definition of disability in Pakistan does not cover the advanced theme on the issue. Under UNCRPD, disability include 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 ICT Act 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” is in absolute contrast to UNCRPD. Scattered pieces of legislation in Pakistan cause further confusion where different provinces are making strides in various directions with no visible impact on the lives of PWDs. The 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 employs 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.³⁸⁵ 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.³⁸⁶ Existing law does not address the effective utilization of funds.

³⁸⁵ The Ordinance 1981, Section 1.

³⁸⁶ The Ordinance 1981, Section 20.

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. 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.”³⁸⁷ 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.³⁸⁸ 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

³⁸⁷Convention 2006, Article 33.

³⁸⁸ Ibid.

Persons with Disabilities Act, 2018” has recommended establishment of a Commission for PWDs. A short two-pages 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

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.³⁸⁹ Relevant definition of the discrimination is provided in Article 2 of the UNCRPD which is any distinction, exclusion or restriction on the basis of disability that hinders the recognition of PWDs on equal basis with others.³⁹⁰ 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.

³⁸⁹ Convention 2006, Preamble.

³⁹⁰ Ibid, Article 2.

The Disabled Persons (Employment and Rehabilitation) Ordinance 1981 does not mention or define employment discrimination against PWDs. Disability Discrimination has been defined in new Islamabad Capital Territory 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 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 has been given wide cover in UNCRPD that means “necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden.”³⁹¹ Out of total 37 views adopted by CRPD on individual complaints received to it, 12 cases clearly mentioned of reasonable adjustment duty of the States.³⁹² 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

³⁹¹ Convention 2006, Article 2

³⁹² Committee on the Rights of Persons with Disabilities’ Views on Individual Communications under the Optional Protocol <https://www.internationaldisabilityalliance.org/crpd-committee-interpretation> accessed July 12, 2020.

mentioned the term reasonable adjustment, however, the reference was in respect of fundamental rights available to everyone under the Constitution.

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.”³⁹³ This 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.³⁹⁴

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 focusses 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.’

³⁹³ Convention, Article 5(3).

³⁹⁴ Ibid.

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 assist 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 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 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.³⁹⁵ 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.³⁹⁶ Decision-making processes is guaranteed to all PWDs, including persons with intellectual disabilities, persons with autism and persons with actual or perceived psychosocial impairment, through their representative organizations. To respect the autonomy of a person, government, therefore,

³⁹⁵ Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of India, para 12(a), May 15, 2019.

³⁹⁶ General Comment No. 1 of CRPD Committee on Article 12 on equal recognition before the law (2014).

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. Condonation of Delay

The term ‘condonation of delay’ is characterized under Section 5 of the Limitation Act 1908, (Pakistan) that may be used to avoid genuine hardship faced by PWDs in any case or class of cases. Courts require to be persuaded with an adequate reason to get the condonation of delay and very common ground to grant condonation of delay is ailment of a person that reflects medical oriented approach towards disability (existing legislation on disability is mostly medical oriented and adopts a welfare attitude instead of right based approach). UNCRPD requires social and environmental impediments to be covered by the law when entertaining condonation cases and taking ‘disability’ as is in Article 1(2) of the UNCRPD. There must be extension of the prescribed period in specific cases of disability through court’s general or special order.

X. Accessibility Issue

UNCRPD demands accessibility to justice,³⁹⁷ information and communication services,³⁹⁸ education,³⁹⁹ health,⁴⁰⁰ habilitation and rehabilitation,⁴⁰¹ work and employment,⁴⁰² adequate standard of living and social protection,⁴⁰³ participation in

³⁹⁷ Convention 2006, Article 13,

³⁹⁸ Ibid, 21.

³⁹⁹ Ibid, 24.

⁴⁰⁰ Ibid, 25.

⁴⁰¹ Ibid, 26.

⁴⁰² Ibid, 27.

⁴⁰³ Ibid, 28.

political and social life,⁴⁰⁴ and participation in cultural life, recreation, leisure, and sport.⁴⁰⁵

Article 9 of the UNCRPD particularly talks on physical and environmental accessibility that demands an enabling environment for PWDs.

Employment 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*.⁴⁰⁶ 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.

XI. Participation and Inclusion

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. Although the idea of segregated education and sheltered workshops for PWDs still prevails in Pakistan.

⁴⁰⁴ Ibid, 29.

⁴⁰⁵ Ibid, 30.

⁴⁰⁶ *Simon Bacher vs. Austria*- Case No. 26-2014-16-02-2018.

4.3 General Obligation and General Principles: Case of Pakistan

UNCRPD needs State Parties to realize their obligations within their domestic legal order. Article 4 of the UNCRPD mentions general obligations of the States through various methods including legislative, administrative, and other measures. Under this Article, the State parties guarantee that all human rights equally apply to all people, without any disability-based discrimination. To fulfill this promise, member States will guarantee that “all rights embedded in UNCRPD are put into law, policies and practice in their countries.”⁴⁰⁷ It obliges States to “take action to adopt new laws and rules and change old laws and rules that discriminate against PWDs.”⁴⁰⁸ It further demands that “human rights of PWDs are included in all laws and policies.”⁴⁰⁹ It includes such actions to prohibit individuals, organization, and businesses from discriminating a person because of disability.⁴¹⁰ It requires to promote “research and development of facilities and accessible goods”, “availability and use of technology for PWDs”, “promote training” and “use of aid and assistive devices.”⁴¹¹ Article 4 requires the involvement and consultation of PWDs in the process of development and enforcement of policies and legislation.⁴¹² Regarding economic, social and cultural rights, States will put into practice the laws and rules that relates to these rights.⁴¹³

⁴⁰⁷ Convention 2006, Articles. 4(1) (a).

⁴⁰⁸ Ibid, Article 4(1) (b).

⁴⁰⁹ Ibid, Article 4(1) (c).

⁴¹⁰ Ibid, Article 4(1) (e).

⁴¹¹ Ibid, Articles. 4(1)(f) & (g).

⁴¹² Ibid, Article 4(3).

⁴¹³ Ibid, Article 4(2).

Pakistan ratified UNCRPD on 5 July 2011. As a result, Pakistan acquired an obligation to comply with general obligations of the UNCRPD under Article 4. The fulfillment of these general obligations demands Pakistan to

- i) Adopt various measures including administrative and legislative measure to implement UNCRPD;⁴¹⁴
- ii) Abolish or amend any existing discriminatory laws, regulations, customs, and practices;⁴¹⁵
- iii) Promote and protect the rights of PWDs by enacting inclusive laws, policies, and programs⁴¹⁶
- iv) Abstain from any conduct that is in violation of UNCRPD ensuring public sector respect of PWD;⁴¹⁷

General obligations also demand Pakistan to take progressive steps to recognize economic, social, and cultural rights to the maximum extent of available resources.⁴¹⁸ In this regard, the UNCRPD adopts a similar approach of other human rights treaties, particularly the Convention on the Rights of the Child (CRC). However, the structure of the UNCRPD clarifies the relationship between non-discrimination, equality, and economic, social, and cultural rights insofar as Article 5 (non-discrimination and equality) and Article 3 (General Principles) are not stand-alone articles. Rather they are Articles of general application to be applied horizontally across the rights spectrum of the UNCRPD. Article 3 of the general principles provides basis to design any national-level law and

⁴¹⁴ Ibid, Article 4 (1) a.

⁴¹⁵ Ibid, Article 4 (1) b.

⁴¹⁶ Ibid, Article 4 (1) c.

⁴¹⁷ Ibid, Article 4 (1) d.

⁴¹⁸ Ibid, Article 4(2).

policy framework. It sets the general principles of the UNCRPD to ensure guidance on its application and interpretation. The inclusion of this Article proves innovative that perform double role- guiding on the interpretation of the entire text of the Convention through its committee and the development of national law and policy.

4.4 Pakistan First Periodic Report to the Committee on the Rights of Persons with Disabilities

A very interesting and effective approach to study disability is to examine whether the domestic policy and laws in a Member State are influenced by initiatives of UNCRPD and that disability policy if any is influenced by developments other than emotionally charged approach to these individuals. Progressive realization of the UNCRPD requires Member States to show a domestic action plan over a given period and to submit its periodic report once in the first two years and thereafter every four years.⁴¹⁹ These implementation plans must identify parties responsible for the plan, including people with disabilities, and outline the action taken or planned on being taken under each article. Pakistan, as a Member State to the UNCRPD, is legally bound to comply with its provisions. However, it is unfortunate to mention that Pakistan ratified the UNCRPD in 2011 and its first periodic report under Article 35 on the implementation status of the UNCRPD was due on 4 August 2013 but Pakistan failed to submit the periodic report. The initial country report was submitted and received by CRPD on 18 October 2019 which published it on 31 March 2020.⁴²⁰ No reviews/list of issues of the Committee on Pakistan's

⁴¹⁹ Convention 2006, Article 35.

⁴²⁰ Initial Report Submitted by Pakistan under article 35 of the Convention, due in 2013 [18 October 2019] <https://www.ecoi.net/en/document/2027978.html> accessed July 15, 2020.

periodic report is available. The 23rd session of the CRPD, which was held online due to COVID 19 Pandemic, ended on 4th September 2020 but did not contain any reviews of State parties and the constructive dialogue scheduled for this session are postponed till further notice.⁴²¹

For the national level enforcement and implementation of UNCRPD, the Government of Pakistan in para 218 of the report recognizes the significance of multi-sectoral coordination. To achieve this purpose, a cell has been established on 1st January 2012 by “Directorate General of Special Education” at Islamabad namely “UNCRPD Secretariat” for the implementation of the UNCRPD. A Core Committee was established for federal, provincial and district level coordination for the implementation of UNCRPD. On 14th June 2012, first National Consultative Seminar on Implementation of UNCRPD in Pakistan was held in Islamabad. Later, Ministry of Human Rights was assigned the task of preparing UNCRPD report that also constituted a National Committee for Implementation of UNCRPD under the Chair of Federal Minister for Human Rights on 21st November 2016. The Committee aims to facilitate relevant actions in different areas at various levels and its first meeting was held on 24th January 2018 at Islamabad. The terms of reference (TORs) to be realized are to:

- i) Manage the enforcement of UNCRPD at federal and provincial level,
- ii) Support to implement the actions required in response to the Incheon strategy and Sustainable Development Goals related to Disabilities,

⁴²¹ The UN Committee, 23rd Session, 17Aug-4 Sept 2020.

<https://www.internationaldisabilityalliance.org/23rd-crpd-session-closes> accessed August 12, 2020

- iii) Recommend legislative, policy, and administrative steps to protect PWDs and related rights in line with constitutional and international obligations,
- iv) Improve the coordination mechanism among the stakeholders at the level of provinces and center.⁴²²

The report says that the implementation committee meets on regular basis to implement the TORs but there is no such see with concrete outcomes yet. Report does not mention any implementation challenges though such challenges are evident in almost all aspects. Report still provides a superficial reference to 1998 census data on disability though it admits that reliable statistics on disability are needed⁴²³- 18th amendment to the constitution of Pakistan made it even more difficult to address issues (almost all provinces have made unsuccessful token attempts with no practical impact to address the miseries of PWDs).

The first periodic report of Pakistan explains relevant policies, programs, legal and institutional measures undertaken by Government of Pakistan to ensure human rights of PWDs after detailed consultative meetings with various stakeholders including provincial and central departments as well as NGOs, CSOs, and DPOs. Many aspirational goals are mentioned in almost every para of the report submitted to the CRPD which are yet to be seen and achieved. It is worth mentioning that as per requirement of the “treaty-specific document” of the report, every article of the Convention has been dealt in the report, but it depicts no favorable instances of compliance.

⁴²² Pakistan’s Initial report submitted under article 35 of THE UNCPRD, due in 2013 but received on 18 October 2019.

⁴²³ Ibid, para 207.

Report mentions the efforts of the Government of Pakistan since 1980's in this respect. It speaks of the "National Plan of Action for Persons with Disabilities 2006" which mentioned 17 critical areas of intervention stating some short-term and long-term measures. Many parts of this plan, however, are discriminatory. On the employment of the PWDs, plan mentions of "sheltered workshops". Such working places established for PWDs are excluding and isolating with poor pay and negligible promotion chances. Report also mentions the role and responsibilities of the relevant departments and agencies against each activity. Para 58 of the report states about access to justice under constitution while para 60 mentions of laws and rules about legal aid for the poor and marginalized segments of the society including PWDs (the situation to provide legal aid is dealt through section 13(1-a) of the "Legal Practitioners and Bar Council Act, 1973". In addition, report mentions of the "District Legal Empowerment Committees (constitution & functions) Rules, 2011" that establishes District Legal Empowerment Committees (DLEC). DLEC provides legal aid at the district level but no mention to UNCRPD requirements is made. Other paras of the report also cover legal and constitutional provisions available to ensure freedom from torture or cruel, inhuman, or degrading treatment or punishment, abuse, manipulation, and violence ensuring integrity of the person, living independently, and being included in the community to implement the community-based rehabilitation activities, work, employment, and many others. Throughout, the report refers to various sections of the 1981 Ordinance. However, opportunities and facilities are unable to serve concerned people despite some prompt formulation of law, policies, and action plans.

On work and employment, report refers to the Constitution, Labor Policy 2002, Labor Policy 2010 and Employment Ordinance, 1981 (adopted with some amendments by

all provincial govts after 18th amendment to the Constitution), National Training Centre for the Disabled (NTCD), Pakistan Bait-ul-Mal, Khushhali Bank, Tameer, Micro-Credit Schemes, and many civil society organizations providing financial and social assistance to PWDs. Apart from aspirational goal setting, there can be hardly seen any scheme and policy to explicitly include PWDs in work and employment. Similarly, Government of Pakistan has shown no implementation challenge in any area which shows its aspirational approach. The report also gives a detailed lengthy cover to the education of PWDs (paras 117-146), however, special education against the spirit of UNCRPD is the point of focus (paras 117-143). Only para 144 of the report talks of the inclusive education and mentions of the ‘voucher scheme’ by Punjab govt for inclusive education to mainstream children with special needs, however, the scheme covers pupils with mild disabilities in private sector schools only. Report does not mention the implementation challenge that how schools resist to accept and admit CWDs in practice where the accessibility issue adds to the misery of situation. Referring to Article 26 clause I of the Constitution, report mentions that government has been striving to eliminate all obstacles and barriers to accessibility for PWDs. In Pakistan, for instance, other than the complex and technical process of disability registration (to visit three offices (Social Welfare Department, Labor Department and DHQ Hospital), the most complicated is that the concerned departments are not accordingly equipped and accessible to deal with the issues of PWDs. The situation is further added when the registration certificate is provided in English.⁴²⁴ Government vision 2025 emphasizes on inclusive and sustainable development of PWDs to ensure human dignity,

⁴²⁴ UN Human Rights Treaty Bodies

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en accessed May 20, 2020.

however, most of the aspirational goals in initial report does not serve the purpose in true sense and appropriate manner. In practice, there is hardly any impact indicator and outcome to improve physical environment and transportation.

The UN in its report clearly mentions that the issue of disability in comparison to past, has been paid attention but the efforts made by the governments of developing countries to give statutory cover to disability are not enough and satisfactory. Many of the results mentioned by the government in the report tells of what the government intend or has done instead of what has been achieved by PWDs. In the absence of conflicting statistics of parallel alternative reports and LIOs, the facts and information covered by this report are unorganized, unauthentic, and fragmented to demonstrate systemic performance on UNCRPD implementation.

4.5 List of Issues by United Nations Committee

To monitor the enforcement of UNCRPD by Member States, CRPD works as the body of independent experts that obligates every Member State to submit regular periodic reports. The CRPD began examining the implementation status of States Parties on UNCRPD in Sept 2012. Till October 2019, the Committee has issued 33 recommendations/observations to 32 States.⁴²⁵ The Committee website shows the List of Issues (LOIs) and concluding observations on the initial reports submitted by member states.

The periodic report submitted to CRPD, its subsequent LOIs and the reply of the concerned State to LOI framed by CRPD are the reliable most sources of information on

⁴²⁵ <https://endcorporalpunishment.org/human-rights-law/crpd/> accessed May 20, 2020.

the implementation and enforcement status of UNCRPD. Unfortunately, no LOIs is shown in respect of Pakistan as the initial country report is just submitted and received by CRPD on 18 October 2019 that published it on 31 March 2020. With no LOIs for Pakistan to be used as a guideline for the realization of UNCRPD, reference may be made to the LOIs issued by CRPD in respect of India. Besides same societal and cultural origins, India and Pakistan in both colonial and post-colonial times, has always been seen through the prism of same western laws implemented till date. The observations made on the periodic report of India hold true in respect of Pakistan too. Although the levers of change in both India and Pakistan are same particularly in context of the role of international declarations, working of disability NGOs and general focus on disability relevant issues, the difference lie in the administrative construction, articulated policies, and prioritization structure. India has more clearly articulated policies in comparison to Pakistan though the overall apathy of PWDs in both countries almost matches. The expected LOIs in respect of Pakistan can, therefore, be more demanding and challenging in respect of fulfillment and implementation of the UNCRPD.

LOIs framed by CRPD on the initial report of India gives mention of the key areas pointed by the Committee to be worked on and rectified. CRPD required to be thoroughly informed of the measures taken to adopt the social and human rights model of disability in legislation, policies and practices including assessment criteria and the certification of disability, and measures to abolish the use of derogatory terminology in legislation.⁴²⁶ It did ask an information on progress in harmonizing disability-specific legislation with the

⁴²⁶ Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of India, para-A, 16 May, 2019. <https://digitallibrary.un.org/record/3839762?ln=en> accessed March 16, 2019

provisions of the UNCRPD. On promoting equality and non-discrimination in regards of PWDs, “Para B (b)” of the LOIs requires an amendment to Section 3(3) of the RPDA, 2016. It demands that “PWDs should not be discriminated against on the grounds of disability unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.” It also requires measures to amend discriminatory provisions in the hajj policy for the period 2018–2022, and redress for PWDs who have been prevented from undertaking the hajj.

LIOs demands to show what progress has been realized in executing the judgment of the Supreme Court in *Pankaj Sinha vs. Union of India and others* in 2018 to address discrimination against persons affected by leprosy.⁴²⁷ Para 49 requires government to ensure accessibility and universal design requirements in public procurement legislation and policies for goods and services that needs parallel planning and legislation in Pakistan too. CRPD required government to inform on progress to repeal incapacity and custody laws and to abolish all forms of substitute decision making in guardianship.⁴²⁸ In field of education, CRPD demanded the government of India to inform about the practical steps to implement inclusive education. It required to provide accurate number and exact proportion of CWDs enrolled in mainstream inclusive educational institutions in comparison with the overall student population. As the focus of this research, work and employment requirements needed to grow and increase number of PWDs in the open labor market by replacing sheltered employment and providing reasonable accommodation and individualized support at work. CRPD demanded governments to ensure reliability in

⁴²⁷ Ibid, para 14.

⁴²⁸ Ibid, para 49.

census data by including questions that follow the short and precise set of questions on disability on pattern of “Washington Group on Disability Statistics,” to get reliable data and respect for privacy concerning PWDs throughout the process.⁴²⁹

Pakistan may review its performance in the light of LIOs of other relevant State (India as above) to work on concerned areas. It will help government to channelize its efforts in right direction before submission of another periodic report to CRPD.

4.6 Implementation of the United Nations Convention in Pakistan

In the absence of concluding observations by CRPD on the periodic report of Pakistan and alternative report published by any NGO or DPO, the implementation status of the UNCRPD in Pakistan needs detailed analysis. As a State Party to UNCRPD, Pakistan needs to devise an appropriate law and strategy for the implementation of the UNCRPD. The implementation of the Convention should be assisted by continuous capacity building of the PWDs.

National Committee has been constituted for the enforcement of UNCRPD and other international commitments in relation to disabilities.

The National Committee consists of members who represent human rights ministry, provincial departments, parliament, civil society, DPOs/CSOs/NGOs and relevant UN Agencies.”⁴³⁰It is significant to note that before 18th Amendment to the Constitution of Pakistan, the subject of disability was handled by the then “Ministry of Social Welfare and Special Education.” After the said amendment in 2010, it is now dealt by “Directorate

⁴²⁹ Ibid, pg 30.

⁴³⁰ Ibid, para 11.

General of Special Education” working under Ministry of Human Rights. The mandate of the Committee is to recommend administrative, policy, and legal measures for protection of rights of PWDs in compliance with constitutional and international obligations. However, its responsibility is only limited to the extent of Islamabad Capital Territory to take measures for PWDs. Therefore, It has no apparent impact on the implementation of UNCRPD throughout the country.⁴³¹

The efficacy of law can be observed by examining how law is implemented in practice.⁴³² Policy in Pakistan is mostly proved a very aspirational document with little mention of ground reality and usually does not suggest clear steps to achieve its goal. Being a dualist legal system there is no direct enforceability of international law in Pakistan. The enforceability of international law requires it to be incorporated into national law. However, the use of UNCRPD is accepted and referred by the domestic courts⁴³³ as a support to interpret relevant domestic laws. The required at national level in Pakistan is to move from policy making to adequate monitoring and evaluation of such plans to ensure the implementation of the principles and rights embedded in UNCRPD. This requires adequate intervention in form of monitoring, evaluation, and information at government and societal level based upon “the broader human rights paradigm and the capabilities approach.”⁴³⁴ The experience of previous disability legislation (although poor) shows that

⁴³¹ Concept Paper on National Committee Constituted for the implementation of UNCRPD and Other International Commitments Pertaining to Disabilities, <http://www.mohr.gov.pk/SiteImage/Misc/files/Concept%20Paper%20National%20Committee.pdf> accessed January 5, 2019

⁴³² Dickens, L. “Fairer Workplaces: Making Employment Rights Effective” in *Making Employment Rights Effective*, ed. Dickens, L (Oxford: Hart Publishing, 2012) 208.

⁴³³ *Malik Ubaidullah v Government of Pakistan*, Civil Petition No. 140-L of 2015 PLD (2020) SC 599.

⁴³⁴ Raymond Lang, Maria Kett, Nora Groce, Jean-Francois Trani, “Implementing the United Nations Convention on the rights of persons with disabilities: principles, implications, practice and limitations,” *Alter-European Journal of Disability Research* 5(2011):206.

what holds the key for empowerment of individuals with disabilities is the actual implementation of the laws. Effective implementation of UNCPRD requires adoption of new legislation and effective policies. Integral disability law must cover policies and law covering social protection, education, health, employment and labor, guardianship, non-discrimination, building, and criminal law aspect.

General principles in Article 3 of the UNCPRD are pertinent in this regard. Article 3 of the general principles is fundamental in designing any national-level law and policy framework. The said Article on general principles is about dignity, independence, non-discrimination, ability to choose, equality of genders, respect for children, participation, full inclusion, respect for diversity, equal opportunity, accessibility, and acceptance of disability as part of everyday life.⁴³⁵ Article 3, therefore, can be called a filter through which existing laws of a country should be run to evaluate their consistency with the object and purpose of the UNCPRD. As an example, the review of the electoral code of Pakistan can be filtered and facilitated by using this Article to make the following types of assessments:

- Independence: Does the election rules and regulations provide means for independent voting?
- Participation: Does the election regulation offer for voter registration and equal eligibility to stand for office?
- Accessibility: Is voting facilitated using alternative technology?

⁴³⁵ Convention 2006, Article 3.

- **Non-Discrimination:** Is there any discriminatory practice, policy, and law to prevent PWDs from participation in voting?

This Article can be of help to assess the conformity of existing laws and regulations with the philosophy of the UNCRPD.

4.7 Obligations of Pakistan under Article 24 of the Convention

UNCRPD takes disability as a social issue and acknowledges the human rights perspective of disability issues.⁴³⁶ In recent years, the focus is made on disabling environment in education in form of relation between an individual and environment. The right of persons with disabilities to education has been proclaimed in Article 24 of the UNCRPD. UNCRPD underpins the failure of the social environment to meet the needs and aspirations of PWDs. The solution to the issue is placed in form of principles of non-discrimination and equality of the PWDs in society, which involve the right to reasonable accommodation.⁴³⁷

The right to education of PWDs has been proclaimed in Article 24 of the UNCRPD. However, the wide ambit of this provision needs it to be read in conjunction with other rights available in the text and the general principles of the UNCRPD stated in Article 3⁴³⁸ rather than in isolation. Article 24 demands inclusive education for PWDs at all levels

⁴³⁶ Gauthier, De Beco. "The right to inclusive education according to article 24 of the un convention on the rights of persons with disabilities: Background, requirements and (remaining) questions" *Netherlands Quarterly of Human Rights* 32(2014): 263–87.

⁴³⁷ Delia Ferri, Unveiling the Challenges in the Implementation of Article 24 CRPD on the Right to Inclusive Education. A Case-Study from Italy

⁴³⁸ Article 3 enunciates the general principles of the UNCRPD, which include: respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination; equal opportunity; complete and meaningful participation; accessibility; gender equality; and respect for children's rights and support for their evolving capabilities.

making UNCRPD first legal instrument with reference to quality inclusive education.⁴³⁹

UNCRPD does not define the term inclusive education.

However, the CRPD has tried to fill this gap and defined inclusion as an adoption of dynamic approach which accept individual differences and respond positively to pupil diversity.⁴⁴⁰, CRPD has conceptualized inclusive education⁴⁴¹ in para 10 of the general comments 4 as a fundamental human right of all learners. It is the principle that values the well-being of all students by acknowledging inherent dignity and autonomy and respect to fulfill individuals' requirements. As a result, broader inclusive community is achieved that eliminates barriers impeding the right to education, together with changes to policy, practice, and culture of regular schools to accommodate and effectively include all students. As a result, the right to inclusive education provides means for realizing other human rights. It proves to be a primary mean through which PWDs can lift themselves out of poverty by obtaining means to participate fully in their communities.⁴⁴²

Para 11 of the general comments further elaborates the problem and differentiate between exclusion, segregation, integration, and inclusion in education, and clarifies the actions needed to ensure the participation of CWDs within the mainstream education

⁴³⁹ Andrea, Broderick, *The Right to Inclusive Education: Article 24 of the UN Convention on the Rights of Persons with Disabilities and the Irish Experience*. In *The Irish Yearbook of International Law*. (London: Bloomsbury Publishing, 2014) 25–60.

https://www.researchgate.net/publication/292608248_Broderick_A_'The_Right_to_Inclusive_Education_Article_24_of_the_UN_Convention_on_the_Rights_of_Persons_with_Disabilities_and_the_Irish_Experience'_Irish_Yearbook_of_International_Law accessed March 2, 2020.

⁴⁴⁰ UNESCO, *Guidelines for Inclusion: Ensuring Access to Education for All*, 2005, para 12 <http://unesdoc.unesco.org/images/0014/001402/140224e.pdf> accessed October 20, 2020.

⁴⁴¹ CRPD Committee. 2016b. General Comment No 4 Article 24: Right to Inclusive Education, para 10 (Adopted 26 August 2016). <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-4-article-24-right-inclusive> accessed September 20, 2020).

⁴⁴² Ibid.

system.⁴⁴³ Committee explained the use of two parallel terms exclusion and segregation which are used interchangeably in Pakistan. According to CRPD, exclusion is a direct or indirect prevention of students that denies their access to education in any form whereas segregation is the provision of education in separate environment designed to respond to a particular or various impairments of students with disabilities in isolation from students without disabilities.⁴⁴⁴ In contrast to it, CRPD explains the use of terms integration and inclusion in education. CRPD says that “integration” is process of placing students with disabilities in existing mainstream educational institutions, as long as they can accommodate to the standardized requirements of such educational institutions whilst “inclusion” involves a systemic reform process to bring modifications and alterations in content, teaching methodology, approaches, structures and strategies in education to provide equitable and participatory environment that best suits their requirements and preferences.⁴⁴⁵

Keeping in view the situation of developing countries -Pakistan- CRPD clarified that mere inclusion of students with disabilities within mainstream schools, without catering for their needs does not accomplish the objective of Article 24 of the UNCRPD. It needs structural changes as well as the modifications to curriculum, teaching and learning strategies. After ratification, Pakistan obligates under Article 24(1) to ensure inclusive education for all persons with disabilities at all levels.⁴⁴⁶ Subsection 2 of the Article gives the series of measures in this regard that needs to be read jointly to get benefitted from. Article 24(2)(b) when read in conjunction with the general principle of accessibility,

⁴⁴³ Ibid, para 11.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ Convention 2006, Article 24(1).

prescribes that the entire education system must be accessible. It demands buildings, information, and communication to reflect “universal design.” Pakistan must commit to the prompt introduction of “universal design” which prohibits the sanction of any future education infrastructure that is inaccessible. For this purpose, Pakistan needs to establish an effective monitoring process and time frame for making all existing education institutions accessible.⁴⁴⁷ Both these aspects of inclusive education are missing in Pakistan.

Similarly, the accessibility to education of all students usually absorbs the collective aspect of accessibility without catering the requirements of individual students through reasonable accommodation in education environments when so required.⁴⁴⁸ These modifications further need periodic regulatory and technical adjustments which are nowhere mentioned in education policy in Pakistan. The CRPD has clarified that these accommodations and adjustments include

changing the location of a class, providing different forms of in-class communication, enlarging print, materials and/or subjects in sign, or providing all handouts in an alternative format, providing students with a note-taker, or a language interpreter or allowing students to use assistive technology in learning and assessment situations” or “allowing a student more time, reducing levels of background noise.”⁴⁴⁹

This respects the diversity of students with disabilities and support different abilities in mainstream educational institutions.⁴⁵⁰

⁴⁴⁷ CRPD Committee, General Comment No 4 2016, para 22.

⁴⁴⁸ Convention 2006, Article 24(2)(c).

⁴⁴⁹ CRPD Committee, General Comment No 4 2016, para 30.

⁴⁵⁰ Broderick, “The Right to Inclusive Education”.

The general principle on the right to education is anchored in the Constitution of Pakistan with no specification to students with disabilities. 18th Amendment to the Constitution of Pakistan guaranteed free and compulsory education for all 5–16-year-old as a fundamental right via Article 25 A.⁴⁵¹ The safeguards of the Article 25(A) can be extended to students with disabilities under Article 25 of the Constitution that guarantees the equality of citizens⁴⁵² and preamble on provision of social, economic, and political justice.⁴⁵³ In the absence of disability specific law and policies, these constitutional provisions together can be interpreted to remove the social and economic obstacles limiting the freedom and equality of the students with disabilities and preventing the full development of their human being.

4.8 Conclusion

UNCRPD proved to be the first international and legally binding treaty in respect of human rights entitlement of PWDs. However, it is evident that mere existence of a convention is far from sufficient because ‘stating the rights’ of PWDs is completely different from “the realization of those rights.”⁴⁵⁴

General and concluding observations of the CRPD after examining the periodic report submitted by the member country is a best tool to see how harmonious the law and regulations are to that of UNCRPD requirements. Unluckily no such observations and recommendations are yet produced for report recently submitted by Pakistan to the CRPD.

⁴⁵¹ Constitution 1973, Article 25(A).

⁴⁵² Constitution 1973, Article 25.

⁴⁵³ Ibid, preamble.

⁴⁵⁴ Al Thani, H, "Convention on the Rights of Persons with Disabilities: A Progressive Human Rights Instrument", September 2006, <https://www.un.org/esa/socdev/enable/srstathrc2006.html> accessed June 12, 2018.

In the light 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. Countries like Pakistan that lacks disability legislation are under obligation to draft new laws in lines with UNCRPD.

CHAPTER5: INDIA AND DISABILITY LEGISLATION

5.1 Introduction

The most significant progress in respect of disability was the ratification of UNCRPD by India that made it seventh country to ratify Convention. From then onwards, there existed demand to amend the “welfare approach” of law to a “rights-based approach.” With already existing laws in wake of disability, this constant push has recently resulted in passing of the “rights of persons with disabilities bill 2016.”

This Chapter provides an analysis of the statistical data and definition on disability that how it varies from the situation in Pakistan after the ratification of UNCRPD. Some commonalities of Indian and Pakistani society are given to show the importance of incorporating this chapter. Providing an understanding of the various legislative enactments, this chapter evaluates that how the changing perceptions of disability have influenced judicial interpretation by courts. This Chapter covers the study and analysis of previous and current legislation of India on disability discrimination and associative rights of carers.

5.2 Census Data on Disability in India: Historical Perspective

Like Pakistan, disability in India was not on priority list of the administration before and even after the independence.⁴⁵⁵ But later, regular population census and data enumeration led to an improved approach towards disability particularly its definition over

⁴⁵⁵ Renu Addlakha, “Introduction’, in Disability Studies in India,” in *Global Discourse, Local Realities*, ed. Renu Addlakha (New Delhi: Routledge, 2013),30-34.

the years. Census data based on definition, type and resulting measure of disability during both pre- independence and post- independence period is discussed and analyzed as under.

First systematic census was conducted in India in 1872.⁴⁵⁶ Being a British colony, disability in India was explained and understood through medical perspective prevailed in UK and other western countries covering two categories of disability-physical and mental. The pre-independence terminology used for disables in census was 'infirm'. It was observed by the 1931 Census Commissioner of India that "*the return of infirmities at the Indian census has probably never been satisfactory.*"⁴⁵⁷ Practice of counting disability in the census had been discontinued after 1931 census. However, no administrative data or research is available on discontinuation practice. Disability found its place in national census again in 1981. The main element of including disability in Indian census 1981 after a gap of fifty years was the UN pronouncement of 1981 as an "international year of disabled persons." Another category of disability that is 'dumbness' was also included. Complicated nature of the disability definition in the census and the stigma attached to disability in Indian society resulted in under enumeration of the disabled. Despite raising global awareness about disability, it was once again not included in the census of 1991 due to doubts raised about the reliability of data, definitions and methodology adopted for this purpose.⁴⁵⁸ However, lobbying of disability rights movements and international pressure resulted in the enactment of "Persons with Disabilities Act, 1995" (PWD) and inclusion of disability in census of 2001 with more liberal definition of five categories of disability. To

⁴⁵⁶ Pooja Singh, "Persons with Disabilities and Economic Inequalities in India," *Indian Anthropologist* 44 (2014):47.

⁴⁵⁷ C. Raghava Reddy and K. Pavani Sree, "Situating Census Data in Disability Discourse: An Analysis of Census 2011 and 2001," *Indian Anthropologist* 45(2015): 60

⁴⁵⁸ Singh, "Persons with Disabilities," 67.

⁴⁵⁸ Ibid, 68.

re-define disabilities and to refine the process of enumeration of PWDs, efforts were made in 2011 census.⁴⁵⁹ Suggestions were made for the changes in the types of disability, in the framing of questions under each category for enumeration and in the order of the questions on disability among other questions. Question No. 9 in the Household Schedule in 2011 census, for instance, relates to disability that requires the enumerator to ask it from every member of the household and the responses to be noted accordingly.⁴⁶⁰

According to the report of 2001 census, 2.13% of Indians were suffering from one or other kind of disability. New census 2011 shows only a small increase in number of persons with disability which is 2.21 %.⁴⁶¹ It is surprising to note that disability data of 2011 census is much lower than 15 % percent of world's disabled population estimated by WHO. If WHO report is followed, 15% of Indian population would be much higher than the disability percentage of 2011 census. This clearly shows that how the large-scale studies like census and other national surveys mistakenly grasp the disability related concepts with adverse impact on the lives of PWDs.

5.3 Disability Definition, Types and Estimates: Census 2001 and National Sample Survey

Two key official sources of Indian disability statistics are “National Sample Survey”- (NSS) (administered every 11 years) and the census (administered every 10 years). The census includes listing and counting of the entire Indian population while the NSS uses nationwide sample surveys to represent whole population. The 58th round of the

⁴⁵⁹ Raghava, “Situating Census Data,” 61.

⁴⁶⁰ Ibid.

⁴⁶¹ Singh, “Persons with Disabilities,” 69.

NSS reports that there were 18.5 million PWDs in India in 2002 whereas disability enumeration of 2001 census was reported as 21.9 million. Apparent difference of 20% exists between both recent estimates on disability.⁴⁶²

When it comes to the definition of disability, there is no general definition in 2001 census. It does not define disability and rather a question on the type of disability in its population enumeration section (question 15) was included which says that “if a person is physically/mentally disabled, give appropriate code number from the list below: in seeing, in speech, in hearing, in movement, mental”.⁴⁶³

Instruction Manual for census enumerators define each of the above-mentioned type of disability. The NSS, however, gives a general definition of disability and states that a person is deemed disabled “if the person has restrictions or lack of abilities to perform an activity in the manner or within the range considered normal for a human being”.⁴⁶⁴ NSS defines disability as an “activity limitation” than “impairment limitation” in census.

If the definitions of four out of five major impairments under 2001 census and 2002 NSS are compared, they are found radically different with no proper and matching estimates. The NSS definitions of impairments such as hearing, speech, and locomotion are deeper and more inclusive than census. However, in case of visual impairments, the census definition is broader than one given in NSS. Census definition of disables covers those who uses contact lenses and spectacles resulting into widely different estimates of

⁴⁶² Mitra, “Estimates in India,” 2.

⁴⁶³ India Census 2001, Q 15 of population enumeration section, https://en.wikipedia.org/wiki/2001_Census_of_India accessed October 11, 2020.

⁴⁶⁴ NSS 2002, Disabled Persons in India <https://www.ilo.org/surveyLib/index.php/catalog/916> accessed May 12, 2019.

census and NSS.⁴⁶⁵ In case of youth with disability, census estimate of visual impairments among youth is 2.16 million, whereas the NSS finds only 0.18 million as visually impaired. In case of speech impairments, census data is twice higher than that of the NSS. The overall estimate of disability tends huge as 26.5 million if definition is taken in wider sense whereas it tends lower as 11.8 million if taken in stricter sense.⁴⁶⁶ Estimates from 2001 census and NSS 2002 have been concluded that “prevalence estimates in the census and the NSS are clearly not comparable... and it is unsure what aspects of disability are captured by the census and NSS current disability definition.”⁴⁶⁷ The substantial differences in rates of disability between these two sources contains diverse contextual ways to define and measure disability.

Apart from disability definition, disability types show clear inconsistencies in both the census and the NSS particularly in respect of use of assistive technology and aid. In 2001 census, for instance, locomotor disability refers to “a person's limitation without using aid while for hearing disability; it refers to a limitation experienced despite the use of hearing aid”. In the NSS, the visual definition of disability refers to “a person using spectacles or contact lenses, while the definition of hearing disability considers a person's ability without using a hearing aid”.⁴⁶⁸ As a result of such huge discrepancies, field staff to collect data and researchers to interpret such data results fail to achieve desired outcomes. Such estimates and inconsistencies cannot be trusted when it comes to policy making and

⁴⁶⁵ Roger Jeffery and Nidhi Singal, “Measuring Disability in India,” *Economic and Political Weekly* 43(2008):22.

⁴⁶⁶ Ibid.

⁴⁶⁷ Mitra, “Estimates in India,” 2.

⁴⁶⁸ Ibid.

reports generation (such as of World Bank 2007) that rely heavily on the reanalysis of NSS data. Disability reviews and assessment needs to be increasingly participative in nature.

5.4 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995

There is a list of legislations and laws in India on the issue of disability. Under its international commitment⁴⁶⁹ after participation in the Asian Decade for Promotion of Disability Rights, India enacted “Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995” (PWD Act) that enlisted 7 categories of disabilities aiming to include and integrate PWDs into the mainstream of society requiring positive obligations on the part of State.

5.4.1 Legal Definition of Disability

Seen through the lens of PWD Act 1995, the definition of disability is focused on specific impairments and medical model criterion is used for their assessment. Seven enlisted categories of disability include “blindness, low vision, hearing impairment, leprosy-cured, locomotor disability, mental retardation and mental illness.”⁴⁷⁰ It is up to the medical professionals to notify for the purpose of this Act. The Act, however, does not provide any legal protection to those not covered within 7 mentioned categories. Scope of the Act further narrows down where it requires that at least 40% impairment certified by medical authority must be shown to get the protection of this Act.⁴⁷¹ The presence or

⁴⁶⁹ Constitution of India, Article 249 read with Article 253 read with item 13 of list I (Union List) of the seventh schedule of the Indian Constitution empowers the Parliament to legislate on any subject falling on any list in order to fulfil its international obligations.

⁴⁷⁰ Persons with Disabilities Act 1995, Section 2(i).

⁴⁷¹ Ibid, 2(t).

absence of impairment is used as a reason to reach the conclusion. The power given to medical professionals, therefore, may be used arbitrarily to declare one disabled enough to be the beneficiary under this Act.

Changes to the disability law has always been suggested by disability rights activist, scholars and govt. Courts are comparatively newcomers to this debate in India and their framework remained limited to the available text of legislature. To avoid varying interpretation, the objectivity and certainty was made the main component of disability definition. In "*G. Muthu vs. Tamil Nadu State Transport Corporation*",⁴⁷² periodic health check-ups found a bus driver of the transport company as color-blind. As a result, the plaintiff was dismissed from service who pleaded relief under Section 47 of the PWD Act that says to be adjust in another alternate position or substitute place.⁴⁷³ The argument on the part of employer was that "color blindness" does not constitute disability under PWD Act. Plaintiff while arguing definition clause of the Act claimed that Section 2 of the Act starts with the phrase "unless the context otherwise requires" which shows that the definition of disability is not an exhaustive one but an inclusive and wide-ranging that could be extended to cover impairments not currently covered under or included in the Act. As a usual requirement in such like situation, court adopted the 'principle of interpretation' which says that when court is faced with two possible interpretations of a legal provision, it relies on the interpretation that furthers the objective of the Act- legal protection to the disabled in this case. Madras HC adopted broader and liberal approach towards definition granting protection to the bus driver with the same pay scale and service benefits as

⁴⁷² *G. Muthu vs. Tamil Nadu State Transport Corporation* (2006) 4 MLJ 166.

⁴⁷³ Ibid.

before.⁴⁷⁴ Court prevented employers from treating the employees adversely due to their disability. Distinction was also drawn by the court between “persons with disabilities” and “persons with acquired impairment/disability” due to illness, accident, etc. later in their lives. The focus of the court, however, was that whether definition of disability is exhaustive or not and it did not ask what features/characteristics of a health condition should be deemed as “disability”. Court did not address the question of financial capacity and burden of the State to accommodate many more disabled workers due to wider definition of disability.

The above judgement of Madras HC proved an authority in later cases. In both “*E Mancharan vs. Tamil Nadu State Transport Corporation*”⁴⁷⁵ and “*Ganesan vs. Metropolitan Transport Corporation*”,⁴⁷⁶ petitioners, upon recovery from surgery due to heart attack, requested their respective employers for lighter tasks. Requests were rejected which subsequently resulted in removal from service. Petitioners claimed protection under PWD Act 1995 which was refuted by respondents on the basis that heart attack does not come within disability definition under the Act. Court in both cases relied on Muthu and held that the non-discrimination provision of the Act possesses such a wider scope to give protection to the petitioners under the Act though heart diseases and the subsequent incapacity is not specifically the subject of the Act.

The judgements of Delhi HC in *Disabled Rights Groups vs. Delhi University and Others*⁴⁷⁷ and of Bombay HC in *Vincy D'Silva vs. St Mary's School and Others*⁴⁷⁸ and

⁴⁷⁴ Ibid.

⁴⁷⁵ *E Mancharan vs. Tamil Nadu State Transport Corporation* MANU/TN/3016/2009.

⁴⁷⁶ *Ganesan vs. Metropolitan Transport Corporation* (2008) 5 MLJ 787.

⁴⁷⁷ *Disabled Rights Groups vs. Delhi University and Others*, WP (Civil) 10055/2004.

⁴⁷⁸ *Vincy D'Silva vs. St Mary's School and Others*, WP: 1744/ 2005.

many others provided protection under the PWD Act to PWDs. But all such claims to get disabled status under the PWD Act were not always successful. In “*Harpal Singh vs. Union of India*”,⁴⁷⁹ a cancer patient pleaded the court to give directions to the govt to provide him the protection of a disabled under the PWD Act, but his plea was rejected on the grounds because govt has no financial and rehabilitation policy for poor cancer patients. Rejection of the plea was based on following reasons.

- that “permanent disabilities” and not “diseases” are covered by PWD Act 1995.
- that the petitioner had not specified the nature of disability for being unable to take strenuous activities.
- that it is the mandate of the legislature to include or exclude conditions that constitute disability and hence lies beyond the capacity of the courts to give remarks.

The above judgement signifies the importance of legislation to clarify disability-related concepts instead of blindly relying on courts to interpret.

5.4.2 Reasonable Accommodation to Adjust Disability

The term ‘reasonable accommodation’ has not been specifically used in PWD Act; however, Section 30 makes it mandatory that “*the State shall frame comprehensive education schemes for children with disabilities that would provide transport facilities, remove architectural barriers at school, provide aids and appliances, and restructure curricula and examinations.*”⁴⁸⁰ With no mention of the term, these provisions in Section

⁴⁷⁹ *Harpal Singh vs. Union of India* 50 (2008) DLT 209.

⁴⁸⁰ PWD Act 1995, Section 30.

30 of the PWD Act are nothing but forms of “reasonable accommodation” as present in Article 24 (2) (c) of the UNCRPD. The provisions in Section 30 of the PWD Act have been interpreted positively by the courts. In “*Dhawal S. Chotai vs. Union of India and Others*”,⁴⁸¹ the petitioner had cerebral palsy. Due to his disability, he requested 3 hours’ extra time to write chartered accountancy exam which was rejected by authorities. The Division Bench (DB) of the Bombay HC interpreted Chapter V of the PWD Act “to make necessary facilities available to the persons suffering from these disabilities in the matter of education”.

The concept of “reasonable accommodation” has been interpreted domestically by Bombay HC in line with UNCRPD in the case of *Ranjit Kumar Rajak vs. State Bank of India*.⁴⁸² In this case, the respondent bank refused to give job to petitioner (who previously underwent a renal transplant) as an officer in the State Bank of India. Although fit for performing the duties of the job, he was declared medically unfit for the applied post. The main reason behind the rejection of the petitioner was “his monthly medical expenses, which would be borne by the bank in case of his appointment”.⁴⁸³ Bank’s argument was rejected by the Bombay HC who directed the respondent to offer employment to the petitioner. Bank was further directed to provide reasonable accommodation to the petitioner in the form of medical expenses. The Bombay HC held that,

⁴⁸¹ *Dhawal S. Chotai vs. Union of India and Others* 2 SCC 411 (1993).

⁴⁸² *Ranjit Kumar Rajak vs. State Bank of India* MANU/MH/0452/2009.

⁴⁸³ *Ibid.*

*Reasonable accommodation if read into Article 21 of the Indian Constitution guaranteeing the right to life, based on the Disabilities Convention, would not be in conflict with municipal law and on the contrary, it would give added life and dimension to the ever-expanding concept of life and its true enjoyment.*⁴⁸⁴

The PWD Act, however, mentions that State can avoid its obligations towards PWDs - reasonable accommodation in this case- if enough resources are not available.⁴⁸⁵ This resource linked programmatic aspect of the PWD Act makes it a rather soft articulation of a “rights-based approach to disability rights”. However, in one of the early cases under the PWD Act, the SC directed the grant of 80 % concession to individuals with locomotor disabilities that was being given to blinds by Air India and declined the State’s argument of non-availability of enough resources and economic means.⁴⁸⁶

5.4.3 Adjudicating Disability via Medical Model and Capability

Much of social policy and law under the PWD Act tilts towards medical model and takes disability as personal tragedy which needs special compensation to be given in education and employment fields particularly. Focus on individual body condition/impairment flags the themes of need, capacity and medicalization that weakens the role of “social factors” in the management of disabilities. Judicial adjudication of disability through medical interpretation assigns a vital role to the medical professional in interceding the relationship between the State and disabled persons. Some of the judgments debated below show how the use of medical interpretations of disability to support claims

⁴⁸⁴ Ibid

⁴⁸⁵ “Policies and Institutions for Persons with Disabilities in India”

<http://web.worldbank.org/archive/website01291/WEB/IMAGES/CHAPTE-7.PDF> accessed June 11, 2018.

⁴⁸⁶ *Javed Abidi vs. Union of India* (1999) 1 SCC 467.

and counterclaims in disability adjudication do impact the legal rights of disabled person.⁴⁸⁷

They also highlight the capability theme of disability already discussed in Chapter 1.

In *Naveen Kumar vs. University of Delhi*,⁴⁸⁸ the petitioner- despite being declared eligible in test for admission- was not granted admission in the Bachelor of Engineering Computer Science course because he was physically handicapped and used wheelchair. The University of Delhi, the respondent, argued in the court that Kumar, due to his disability, would be unable to take on the requirements of the course successfully. Court though declared petitioner to be considered for the seats reserved for the disabled, but it did not comment on the suitability issue of the petitioner for the said course.⁴⁸⁹ Instead, medical officer of the university was asked to examine petitioner's ability to pursue the course with special instructions to take the petitioner to the laboratory and workshops to observe, "that while working on machines, he would neither be endangering his own life and limbs nor in ordinary course his presence to pursue studies would cause damage to the instruments and other apparatus in the laboratory and workshop".⁴⁹⁰ The case was decided by leaving the question of admission at the disposal and medical examination of the MO of the university within specified time. This was pure medicalization of the disability by avoiding provisions of the "PWD Act" which demands university to alter the curriculum and bring changes in the existing environment to enable disables to fulfill their right to education.⁴⁹¹

⁴⁸⁷ Renu Addlakha and Saptarshi Mandal, "Law in India: Paradigm Shift or Evolving Discourse?" *Economic and Political Weekly* 44 (2009):65.

⁴⁸⁸ *Naveen Kumar vs. University of Delhi* Writ Petition (civil) 4657/2000 (unreported).

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

⁴⁹¹ PWD Act 1995, Section 38(d).

Another paradigmatic case is "*Virender Kumar Gupta vs. Delhi Transport Corporation*" (DTC) which highlights that how the use of medical opinion results to disadvantage disabled. The case also puts question mark on the use, worth, and relevance of medical opinion as evidence and shows that to what extent is the statutory provision able to achieve its objective independent of "medical proof" supporting it? Petitioner in this case worked with the DTC as a bus conductor. Facts of the case were that the petitioner got injured due to an accident and was admitted to the "All India Institute of Medical Sciences" (AIIMS) in Delhi. On discharge, medical certificate was given to the petitioner which stated his recovery from injuries but recommended him to undertake only a desk job. On re-joining his work, he was asked another medical check-up. He was declared unfit for job by MO of DTC medical board and that "the MO of the DTC is a competent authority as per the regulations binding upon the DTC".⁴⁹² Case was decided in favor of petitioner and reliance was placed on the medical certificate issued by the AIIMS. Court applied the provision of law which requires "the employer to provide alternative tasks to an employee who acquires disability during the course of employment and maintain the same pay scale and service benefits that she was receiving before the occurrence of the disability."⁴⁹³

Although Gupta's case was decided primarily on legal provision where the judge sought to resolve two conflicting medical opinions,⁴⁹⁴ but at the same time the question arises that "how would the case have been decided, if Gupta had been certified medically unfit by the AIIMS or, if he had not produced any medical report at all in his defense"?

⁴⁹² *Virender Kumar Gupta vs. Delhi Transport Corporation* (DTC) 2002 (61) DRJ 355

⁴⁹³ PWD Act, Section 47.

⁴⁹⁴ Renu, "Law in India," 65.

The questions raised above have been answered by "*Life Insurance Corporation of India vs. Chief Commissioner for Persons with Disabilities*". The complainant, Harish Chander Dabral applied for the post of a peon to the "Life Insurance Corporation of India" (LIC) and provided medical certificate for chorea entailing 45% disability. Dabral, after clearing test and interview, appeared before a pre-recruitment medical board who declared him unfit for the post of peon. However, board asked for the opinion of Zonal Medical Referee (ZMR) in this regard. In the light of all three medical reports and opinions, the LIC rejected to appoint Dabral as a peon. Complaint against decision was lodged to the Chief Commissioner for Persons with Disabilities⁴⁹⁵ where Dabral provided already issued medical certificate by the director of the "Vivekananda Institute of Mental Health and Neurosciences" stating that "he appears mentally normal and medically suitable for being employed as a peon". Based on conflicting medical opinions, fresh medical examination of the petitioner was directed by commissioner by the medical board of the government-run "Ram Manohar Lohia (RML) Hospital". The medical board declared Dabral fit for the post of peon. After appearing before four medical boards, LIC was ordered by the commissioner to appoint him without delay. LIC challenged this order before Delhi HC that highlighted the "technical" aspects of the problem alone. Instead of commenting on mere comparison of medical reports, Delhi HC relied on the function and tasks of a peon given and described in the "Establishment Manual" of the LIC and decided in favor of Dabral.⁴⁹⁶

⁴⁹⁵ PWD Act 1995, Section 59.

⁴⁹⁶ *Life Insurance Corporation of India vs. Chief Commissioner for Persons with Disabilities* 101 (2002) DLT434.

Another interesting judgement to unfold the disability-capability debate is “*Government of NCT of Delhi vs Bharat Lai Meena*” where the respondent Meena, after issuing appointment and posting orders on disabled seat as physical education teacher, was issued show cause notice. The show cause notice demanded that “why her services should not be terminated as there had been a mistake in appointing a physically handicapped person to the post of PET”.⁴⁹⁷ Respondent Meena challenged the “government order” and the “show cause notice” before Administrative Tribunal. Administrative Tribunal quashed the government order. Govt (petitioner) appealed Delhi HC against the decision of tribunal. The legislative history and purpose of the PWD Act was reviewed by Delhi HC who commented on the approach and mind set usually adopted by govt and employers in applying provisions of the PWD Act. On capability question of the respondent, Delhi HC admitted respondent’s argument that after acquiring the requisite degree i.e., Bachelor of Physical Education in this case, no question can be raised on the fitness of the applicant for the job which s/he had applied for. HC adopted same approach in *Delhi Transport Corporation vs. Rajbir Singh and Sadh Ram*.⁴⁹⁸

The above selected judgments show the “medical assessment-based approach” of the PWD Act towards disability that is innovatively interpreted by superior courts in India.

5.5 New Disability Legislation in India

It has been constantly questioned by disability rights activists in India that is PWD Act 1995, as social welfare legislation, enough to secure the nondiscrimination,

⁴⁹⁷ *Government of NCT of Delhi vs. Bharat Lai Meena* 100 (2002) DLT157 (DB).

⁴⁹⁸ *Delhi Transport Corporation vs. Rajbir Singh And Sadh Ram* on 19 September, 2002 Equivalent citations: (2003) ILLJ 865 Del <https://indiankanoon.org/doc/30957/> accessed July 24, 2019.

participation, and equalization rights of PWDs particularly in the light of UNCRPD? Enacted prior to the ratification of UNCRPD by India, the PWD Act 1995 proved to be an insufficient legislative attempt in compliance with UNCRPD for guaranteeing the rights of PWDs. The process to replace the PWD Act 1995 and enact and implement a new legislation started in 2010. “Rights of the Persons with Disability Bill, 2011” was proposed as a ray of hope to replace the PWD Act. However, the new law exhibited many gaps and did not extend right-based approach towards all kinds of disabilities. Consequently, a new bill “The Rights of the Persons with Disability Bill, 2012” was introduced but not enacted unfortunately. The legal discourse of the bill has tried to assume judicial approach of justice to enact and enforce the rights of PWDs. However, an obvious change has recently been made in form of “Rights of the Person with Disability Act, 2016” that replaced the PWD Act, 1995. Enacted after the creation of UNCRPD, it seems more in consonance with UNCRPD as compared to the previous legislation of the parliament.

5.6 Rights of Persons with Disabilities Act 2016

After a series of discussions, meeting sessions and long drafting procedure, the “Rights of the Person with Disability Act, 2016” (RPWD Act) was passed by both the upper and lower houses of the Parliament. Acquiring the assent of the president on 27 December 2016, RPWD Act was notified by the govt of India in 2016 as a new and more specified disability legislation that attempts to give effect to the UNCRPD. It contains 17 chapters with 102 sections.⁴⁹⁹

⁴⁹⁹ The Rights of Persons with Disability Act; 2016.
<http://www.disabilityaffairs.gov.in/upload/uploadfiles/files/RPWD%20ACT%202016.pdf>. accessed December 28, 2018.

5.6.1 Important Provisions of the Act

RPWD Act extended the list of disabilities from 7 to 21 conditions which will be further broadened as it authorizes central government of India to add to the types of disabilities.⁵⁰⁰ Very significantly the law, for the first time, recognizes “blood disorders (Thalassemia, Hemophilia, Sickle Cell disease), intellectual disability, disability caused due to neurological conditions and acid attack etc.” as disabilities.⁵⁰¹ PWDs are classified into three categories including persons with disability, persons with benchmark disability,⁵⁰² and persons with disability having high support needs.⁵⁰³ Persons with benchmark disabilities are defined as “those with at least 40% of any of the mentioned disability.”⁵⁰⁴ A disabled person needs to provide a certificate of disability under Section 58(2) if s/he claims “high support needs” under Section 38 of the RPWD Act.

Broadening the definition of disability, new legislation is more gender sensitive which makes it obligatory for the State to formulate such schemes that guarantee the children and women with disabilities to enjoy equal rights. It also demands measures to be taken “for the promotion of sexual and reproductive healthcare of women with disability”.⁵⁰⁵ 4 % quota has been reserved in public sector jobs for persons with benchmark disabilities.⁵⁰⁶ In earlier legislation, the specification of reserved quota was for only three categories of disabilities including “locomotor, visual and hearing disability”. RPWD Act 2016, however, extended it to “people with cerebral palsy, leprosy, dwarfism,

⁵⁰⁰ Ibid, The Schedule.

⁵⁰¹ Ibid.

⁵⁰² Ibid, Chapter VI (Sections 31-37).

⁵⁰³ Ibid, Chapter VII (Section 38).

⁵⁰⁴ Ibid, Section 2(r).

⁵⁰⁵ Ibid, Section 4.

⁵⁰⁶ Ibid, Section 34.

acid attack victims, muscular dystrophy, autism, intellectual disability, specific learning disability, mental illness and multiple disabilities including deafness and blindness”.⁵⁰⁷ Section 37 of the Act reserves not less than 5% quota in poverty alleviation schemes and to allot agriculture and housing land to PWDs.⁵⁰⁸ New legislation brings private sector also in its ambit. The RPWD Act requires all government as well as private hospitals to ensure barrier-free access of PWDs to all parts of hospitals and healthcare institutions⁵⁰⁹ in harmony with “rules on accessibility” formulated by central govt.⁵¹⁰ No building plan is allowed to be permitted if does not fulfill the requirements of the “rules of accessibility”.⁵¹¹ From the date of notification of such accessibility rules, time limit of 5-years is provided under the Act to make existing public building accessible for PWDs although extension may be given by the central government to States varying from case to case. Private sector has been given incentives to engage PWDs at least as 5 % of their work force.⁵¹² To achieve the purpose, job quota in government jobs has been increased to 4 %⁵¹³ and in educational institutions to 5%.⁵¹⁴ The Act is the step toward the economic and social empowerment of PWDs which provides them property rights and acknowledge their legal capacity. Step ahead in this regard is the establishment of “National Fund for PWDs”. In short, the Act makes the law more profound towards the need and well-being of the PWDs in respect of skill development, reintegration, health, education, and employment.

⁵⁰⁷ Ibid, The Schedule

⁵⁰⁸ Ibid, Section 37.

⁵⁰⁹ Ibid, Section (45)2.

⁵¹⁰ Ibid, Section 40.

⁵¹¹ Ibid, Section 44(1).

⁵¹² Ibid, Section 35.

⁵¹³ Ibid, Section 34(1).

⁵¹⁴ Ibid, Section 32(1).

5.6.2 Web Content Accessibility

The need for information and communication technology with all services and innovations has been provided in the Act.⁵¹⁵ Web Content Accessibility for PWD's is relatively new issue, the use of which might require the functioning of the sense of sight and hearing not capable of being performed by several persons with disabilities. The "National Informatics Centre" (NIC) introduced guidelines for Indian government websites⁵¹⁶ making website accessible to all irrespective of technologies, platforms, devices, or disabilities of any kind. The guidelines contain few provisions regarding persons with disabilities about time-based web functions⁵¹⁷ and functions which require keyboard navigation.⁵¹⁸ The World Wide Web (WWW) Consortium works to develop such web contents and standards which are within the reach and access of persons with disabilities making content understandable and navigable. Advanced countries like United States of America have introduced laws that promote access of web content to persons with disabilities.⁵¹⁹

5.6.3 Provision of Justice

The Act also addressed the issue of provision of justice to PWDs and has replaced the old law in this regard. Governments of various States of India in collaboration with chief justice of HCs may notify "district courts of session" as "special courts" for speedy

⁵¹⁵ Ibid, Section 2(n).

⁵¹⁶ National Informatics Centre, Department of Information Technology, Government of India, 'Guidelines for Indian Government Websites', January 2009, [http://darpg.nic.in/darpgwebsite_cms/Document/file/Guidelines for Government_ websites.pdf](http://darpg.nic.in/darpgwebsite_cms/Document/file/Guidelines%20for%20Government%20websites.pdf)? accessed March 6, 2019.

⁵¹⁷ Ibid.

⁵¹⁸ Ibid.

⁵¹⁹ Web Accessibility Guidelines for People with Disabilities, https://darpg.gov.in/sites/default/files/gigw-manual_Revised2018_0.pdf accessed June 13, 2021.

trial of offences and justice provision to PWDs under the Act.⁵²⁰ It gives special powers to the police and executive magistrate to handle complaints of violence, exploitation, and manipulation against the PWDs. Mechanisms and penalties available to aggrieved individuals are also redressed. The most significant provision of the Act in this regard is the right to free legal aid and penal provisions.⁵²¹ It provides for a maximum fine of Rs.5 lacs for discriminating against disabled persons to ensure a better access to justice. “Access to justice” is another significant provision of the Act enabling “National Legal Services Authority” and the “State Legal Services Authorities” to make provisions for reasonable accommodation. Section 7 of the Act gives teeth to disability legislation. Cabinet minister from Uttar Pradesh was the first person being tried under this new legislation for publicly humiliating a disabled employee.⁵²²

5.7 Inclusive Education in India

The Constitution of India contains provisions of social justice and wellbeing. Its education-specific Articles describe education as an essence of social transformation. The Supreme Court of India gave it judicial interpretation in “*Mohini Jain vs. State of Karnataka*.”⁵²³ The case decided that “the right to education” flows directly from the right to life. It adds that “the right to life and dignity of an individual cannot be assured unless it is accompanied by the right to education.”⁵²⁴ Another judgment in “*J.P. Unnikrishnan vs. State of Andhra Pradesh*”⁵²⁵ confirmed the rationality of the aforementioned judgment.

⁵²⁰ RPWD Act, Section 84.

⁵²¹ Ibid, Section 7.4(C).

⁵²² “Delhi University doctor stands up for UP government employee's rights,” *The Times of India*, Jul 15, 2015.

⁵²³ *Mohini Jain vs. State of Karnataka* 1992 AIR 1858, 1992 SCR (3) 658.

⁵²⁴ *Mohini Jain vs. State of Karnataka* 1992 AIR 1858, 1992 SCR (3) 658.

⁵²⁵ *Unni Krishan J.P and Ors vs. State of Andhra Pradesh and Ors.* 1995 AIR 781, 1995 SCR (2) 589.

However, when it comes to the education of Children with Disabilities (CWDs), they hardly get any chance to proceed beyond the primary education. The World Bank report says that only 9% of the disabled Indian children completed their higher education.⁵²⁶ Special education was the only available form of education for disables as it was the oldest and still prevailing model for education of students with disabilities. Special education system in India evolved back in 1880's. It was designed to fulfil exceptional needs of students in a completely different learning environment as there was a common assumption that CWDs may slow down the rest of the class if included in mainstream schools. However, special education system has failed to empower CWDs because it does not provide them with required skills and knowledge to adjust the modern world.⁵²⁷

5.7.1 Right to Education Act 2002

Under 86th amendment to the Indian Constitution in 2002, right to education is recognized as one of the fundamental rights and is placed in part-III of the Constitution. A new Article '21A' was inserted to the Constitution. Addition of this new Article made education compulsory and free to all children within the age of 6-14 years and that "no child is liable to pay any kind of fee/capitation fee/ charges." A consequent legislation in this regard was "Right of Children to Free and Compulsory Education (RTE) Act". RTE Act was passed in 2009 that declared that "all children had a right to full time elementary education of satisfaction and equitable quality in a formal school which satisfies certain essential norms and standards."⁵²⁸ The key word of the RTE Act in Section 3 is "free and

⁵²⁶ Vanmala Hiranandani and Deepa Sonpal, "Disability, Economic Globalization and Privatization: A Case Study of India," *Disability Studies Quarterly* 30 (2010): 3-4.

⁵²⁷ Oliver, "Understanding disability," 33.

⁵²⁸ Right of Children to Free and Compulsory Education, 2009.

compulsory” education. Compulsory education hereby means that the admission, attendance as well as the completion of the elementary level of education is the responsibility of the govt.⁵²⁹ Govt and local authorities has to ensure that all children- admitted into schools and are supported by the government under compulsory education clause- will not pay any fee or undergo any expense which would otherwise prevent the child from completing elementary education.⁵³⁰ Although the use of segregationist terminologies is avoided by the RTE Act, it plays little and insufficient role to encourage inclusive education. For instance, by guaranteeing free education to children between 6 to 14, it avoids children below 6.

5.7.2 Education Policy and Act 2016

The “Education Draft Policy 2016” mentions disabled children as children with special needs (CWSN).⁵³¹ The draft policy states that where the level of disability or of difficulty is great, provisions for special schools and education will be made. Pre-school education, teacher’s training, open and distance learning regulation in higher education and internationalization of education are some salient features of this new policy.⁵³² The policy addressed disability and introduced special and first of its nature program by the government for students with learning disabilities. It emphasizes on inclusive education and student support to avoid any social discrimination and focusses on teachers’ training to be able to teach in an inclusive classroom environment.⁵³³ But, teachers’ training to

⁵²⁹ Right of children to free and compulsory education, Section 3.

⁵³⁰ Ibid, Section 3.

⁵³¹ Draft National Education Policy 2016: 20 Salient features <https://www.financialexpress.com/jobs/draft-national-education-policy-2016-20-salient-features/301984/> accessed February 2, 2020

⁵³² Ibid.

⁵³³ Ibid.

promote inclusive education and to pay individual attention where needed becomes very difficult where the average ratio is about forty students to one teacher.

RPWD Act 2016 made changes to the administrative set up, laws, and policies to safeguard the rights of PWDs. The substantial component of the Act is that it does not focus on physical accessibility only, but it lays down strategies and plans for appropriate pedagogical adaptations in the classrooms. It demands that it will be mandatory for the educational institutions to offer equal educational as well as recreational and sports opportunities in addition to structural accessibility and transport facilities. It significantly talks about the employment of teachers who are trained and have a disability themselves. This concurrently covers the demand for both the proper environment for education and employment of PWD's in the field of teaching.⁵³⁴

5.8 Judicial Trend in Education-Related Cases

The paradigm shifting in disability rights cases has been helped by the SC of India. The SC mentioned time and again to cover the gap between law and reality.⁵³⁵In "*Rajive Raturi vs. Union of India*"⁵³⁶ and *Disabled Right Group and Anr. vs. Union of India and Ors*,⁵³⁷ it reinforced that PWDs can never be empowered by mere enactment of laws.

Both these judgements were about educational institutions regarding quota system and reservation of seats for CWDs. Pakistan lacks such innovative case laws addressing

⁵³⁴ RPWD Act 2016, Sections 16,17 and 18.

⁵³⁵ *Jeeja Ghosh & Anr v. Union Of India & Ors* [Writ Petition (C) No. 98 of 2012] 12 May, 2016. <https://indiankanoon.org/doc/175579179/> accessed April 22, 2019.

⁵³⁶ *Rajive Raturi vs. Union Of India* on 15 January, 2019 <https://indiankanoon.org/doc/5817027/>

⁵³⁷ *Disabled Right Group and Anr. vs. Union of India and Ors* (2018) <https://indiankanoon.org/doc/152494913/> accessed Feb 3, 2019.

the issues of CWDs in educational institutions. SC of India in both cases reiterated what is stated in the preamble of the RPWD Act. SC ordered to make education more accessible in regular education institutions and not just sending CWDs to special school.

In *Rajive Raturi vs. Union of India*, the SC addressed the issue of accessibility requirements and inclusive education of people with visual disabilities. Exhaustive recommendations were also given for inclusive infrastructure in educational institutions.⁵³⁸ In *Disabled Rights Group case*, all higher educational institutions were directed to meet the provisions of Section 32 of the RPWD Act that assures “reservation of not less than 5% of seats for persons with benchmark disabilities” while admitting students each year.

In both cases, rights-based model of disability was adopted by SC. To see the practicability of the judgement, SC directed the higher education institutions to submit a list to the chief commissioner showing the number of admitted disabled persons each year in each institution. Chief Commissioner or the State Commissioner was assigned a duty to enquire that the educational institutions are fulfilling their duty regarding reservation.⁵³⁹

However, in the following Public Interest Litigation (PIL) case, the SC went against the spirit of UNCRPD and RPWD Act 2016. The interim order of the SC seems incorrect in the light of RPWD Act and Article 21A of the Constitution read with Right of Children to Free and Compulsory Education Act, 2009. This mandates inclusive

⁵³⁸ *R Raturi vs. Union of India* Writ Petition (civil) No. 243 of 2005.
<https://indiankanoon.org/doc/5817027/> accessed March 5, 2019.

⁵³⁹ *Jeeja Ghosh & Anr vs. Union Of India & Ors* [Writ Petition (C) No. 98 of 2012] 12 May, 2016.
<https://indiankanoon.org/doc/175579179/> accessed Feb 3, 2019.

education and does not make it mandatory for CWDs to be sent to special schools. Petitioners in *Rajneesh Kumar Pandey vs. Union of India*⁵⁴⁰ have sought directions from the SC to the State government on the issue of shortage of special education teachers. In an interim order in the *Rajneesh Kumar Pandey vs. Union of India*, the SC observed that the children suffering from any kind of disability are to be adjusted in separate schools with distinctly trained teachers and cannot be included in the mainstream schools to get education. This order shatters the very philosophy and purpose of RPWD Act, 2016. It also shows that the SC took “inclusive education” in name only by rejecting the inclusivity in mainstream education. The SC has attempted to read down the scope of the definition of disability present in RPWD Act, 2016.

5.9 Caregiving - An Associative Aspect of Rights

Like a changed disability scenario in Eastern countries and Western World, the perception of caregiving also reflects cross-cultural differences. In countries like India, family support and cohesive living system might have played a role in the perceptions of caregivers about the process of caregiving. Caregiving is traditionally provided by families without or very less external support. Lack of structural and formal institutional services and welfare support organizations leaves no alternative for family members. Contrary, the process of caregiving in West, is more voluntarily than an obligation, wherein the state systems have to step in if there are no caregivers.

⁵⁴⁰ *Rajneesh Kumar Pandey vs. Union of India* [Writ Petition (Civil) No.132 of 2016] 04-12-2017 <https://indiankanoon.org/doc/108427102/> accessed Oct 20, 2021.

Caregiver is usually any person who provides “unpaid care for a friend or family member who due to illness, disability, a mental health problem cannot cope without their support.”⁵⁴¹ Whilst caregiving is “Provision by a family care provider of appropriate personal and health care for a family member or significant other.”⁵⁴² 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 in India because family structure is generally supportive.

As per 2011 census, 2.68 crore people in India are having one or other disability and are, therefore, dependent on others to meet their everyday needs.⁵⁴³ Financial burdens both due to disability related factors of a PWD and difficulties in maintaining job due to caregiving burden directly affects the quality of life started affecting the quality of life of a caregiver. There is a greater need for reviewing the legal and civic support systems for these caregivers in India.

The legal efforts in India on the issue of caregiving to PWDs can be seen soon after ratification of the UNCRPD. Chapter V, Section 29, clause 2(i) of the PWD draft bill, 2012 mentioned about the caregiver allowance. The draft bill suggests that government has considered the loss of work to caregiver due to caregiving responsibilities.⁵⁴⁴ However, this could not be found in the draft bill of PWD Act 2014. Rather, caregiving was deemed as parent’s private responsibility in Section 8, of this bill. It states that “unless the competent

⁵⁴¹ Hareesh, “Civic and Legal Advances,” 28.

⁵⁴² Swanson EA, Jensen DP, Specht J, Johnson ML, Maas M, Saylor D. “Caregiving: Concept analysis and outcomes,” *Sch Inq Nurs Pract* 11(1997):65-76.

⁵⁴³ Hareesh, “Civic and Legal Advances, 29.

⁵⁴⁴ The Draft Rights of Persons with Disabilities Bill; 2012.

court decides the person with special needs should not be separated from a parent.”⁵⁴⁵ The bill remained silent on the kind of other support services available to these caregivers.

Under the RPWD Act 2016 of India, caregiver is “any person including parents and other family members who with or without payment provides care, support or assistance to a PWD”.⁵⁴⁶ The existing reviewed legal and civic support systems for caregivers has taken preliminary steps in form of tax exemptions (Section 80 DD added to India Income Tax Act 1961) and travel. The Act also establish a care-giver allowance for PWDs⁵⁴⁷ through a separate funding agency under Government of India. It also provides to initiate capacity building program and training on care giving.⁵⁴⁸ Although more on paper, the “Rehabilitation Council of India” has recognized and initiated caregiving training program. Another benefit is in the form of child education allowance provided to the government employee having caregiving responsibilities for his/her dependent CWD. The more significant is the exemption of a government employee from transfer due to his/her caregiving responsibility.⁵⁴⁹ A caregiver who accompanies the PWD in Indian railways is eligible to get 25% to 75% fare concession depending upon the type of train and class of compartment.⁵⁵⁰

⁵⁴⁵ The Rights of Persons with Disabilities Bill; as Introduced in the Rajya Sabha
<https://prsindia.org/billtrack/the-right-of-persons-with-disabilities-bill-2014> accessed June 7, 2019

⁵⁴⁶ Disabilities Act 2016, Section 2(d).

⁵⁴⁷ Ibid, Section 24(3-i).

⁵⁴⁸ Ibid, Section 47(1) c.

⁵⁴⁹ Posting of Government Employees Who Have Differently Abled Dependents. Ministry of Personnel, Public Grievances and Pensions Department of Personnel and Training, Government of India; 2014.

⁵⁵⁰ Hareesh, “Civic and Legal Advances,” 32.

5.10 Commonalities Between Pakistan and India as Justification of the Study

After becoming independent in 1947, India and Pakistan both grew up together. Both countries are from same geographic background with many commonalities in culture. Sharing colonial and post-colonial times, India and Pakistan has always been seen through the prism of same colonial laws implemented till date. Both countries have inherited a British civil service structure and local government system.⁵⁵¹

Analysis of disability law and policy situation of India in current Chapter and of Pakistan in Chapter 2 and 4 manifest that India and Pakistan do not stand exactly in same position (at least in theory if not in practice) despite that common law system in both countries is based on English model. Inheriting similar common law system and signatories to UNCRPD, disability law and policy situation in India can be of help to analyze the situation in Pakistan to structure future laws and policies.

Apart from cosmetic changes to law and policy in both territories, Indian position on disability law has shown improvement over the period. Taking the example of education, the focus of India on the matters of CWDs is under the purview of separate ministries: the “Ministry of Social Justice and Empowerment” with overall responsibility for PWDs, and the “Ministry of Human Resource Development” with specific focus on educational provision for CWDs. Taking education as a fundamental right, Right to Education (RTE) Act, 2009 of India provides for free and compulsory education of children in age 6-14 years

⁵⁵¹ Lakhmir Chawla, India and Pakistan: What is the Difference? <https://www.opendemocracy.net/en/india-and-pakistan-whats-difference/> accessed February 21, 2021.

who face issues in admission due to migration, caste, disability.⁵⁵² Law adopts dual approach in educating CWDs supporting both mainstream inclusive education and special schools/institutions where needed.⁵⁵³ Considering various needs of PWDs, RPWD Act too defines individuals with “disabilities”, with “benchmark disabilities” and with “high need disabilities” under separate chapters with separate requirements).

Pakistan lacks disability specific modern legislation. The legislative bill i.e., “Right to Free and Compulsory Education Act”, guarantees free education to children aged 5–16 years, however, it does not make any specific reference to CWDs and their need.⁵⁵⁴ Although Pakistan has made some little and model (Islamabad Capital Territory Rights of Persons with Disability Act 2020) efforts after ratifying UNCPRD, but overall situation is not satisfactory. India on the other hand has made frequent changes to its law and has enacted adequate disability legislation to address the issues of PWDs. RPWD Act 2016 is a living example to integrate and realize the theme of UNCPRD at domestic level.

SC of India, while deciding *Jeeja Ghosh* case under the new Act, commented that gap between the law and reality persists which is yet not filled by legislation.⁵⁵⁵ Like current situation in Pakistan and prior to the enactment of UNCPRD-oriented law in India, relief for disability discrimination was usually sought through courts. Courts play vital role in changing attitude. In *Muthu* case, the use of term “unless the context otherwise requires” in definition clause of PWD Act (Section 2) was positively interpreted by the court to bring

⁵⁵² Right to Education Act, 2009.

⁵⁵³ The Persons with Disabilities Act: Equal Opportunity, Protection of Right and Full Participation, 1996

⁵⁵⁴ Right to Free and Compulsory Education Act 2012 <https://pakistanlawyer.com/2016/06/16/right-to-free-and-compulsory-education-act-2012/> accessed February 18, 2021.

⁵⁵⁵ *Jeeja Ghosh and Anr vs. Union Of India & Ors* [Writ Petition (C) No. 98 of 2012] 12 May, 2016.

more and new categories of disability within the definition of disability.⁵⁵⁶ In *E Mancharan vs. Tamil Nadu State Transport Corporation*⁵⁵⁷ and “*Ganesan vs. Metropolitan Transport Corporation*”,⁵⁵⁸ “Surgery due to heart attack” was accommodated as disability although not defined by law. Earlier, medical certificate based on impairment was used as sole reason to get disability certification. Innovative approach was adopted by the court in *Life Insurance Corporation of India v. Chief Commissioner for Persons with Disabilities*,⁵⁵⁹ when medical opinion was rather placed in the background and shift was observed from immutable body impairment to the nature of the task one is appointed to perform. In another important case, the approach and mind set usually adopted by the government and employers in applying provisions of the Act was criticized.⁵⁶⁰

Pakistan needs immediate legislation to guide the courts in disability rights violation and discrimination. But till such time that the appropriate disability legislation has been drafted and implemented, it may temporarily rely on administrative measures and refer to modern and innovative international case law to tackle disability-related issues. History shows the courts in Pakistan used to refer Indian case law. SC of Pakistan in a landmark case of *Imdad Ali*,⁵⁶¹ while defining the term ‘schizophrenia’, referred to and relied on a 40-year-old Indian case law titled *Amrit Bhushan Gupta vs. Union of India & Ors*.⁵⁶² In addition to court cases in Pakistan, Pakistani courts may refer to landmark Indian

⁵⁵⁶ *G. Muthu vs. Tamil Nadu State Transport Corporation* (2006) 4 MLJ 166.

⁵⁵⁷ *E Mancharan vs. Tamil Nadu State Transport Corporation* MANU/TN/3016/2009.

⁵⁵⁸ *Ganesan vs. Metropolitan Transport Corporation* 2008) 5 MLJ 787.

⁵⁵⁹ *Life Insurance Corporation of India vs. Chief Commissioner for Persons with Disabilities* 101 (2002) DLT434

⁵⁶⁰ *Government of NCT of Delhi vs. Bharat Lai Meena* 100 (2002) DLT157 (DB)

⁵⁶¹ *Imdad Ali case*, Civil Review Petition (C.R.P.) No. 420 of 2016 & C.R.P. No. 424 of 2016 in Civil Petition No. 2990 of 2016 A.

⁵⁶² *Amrit Bhushan Gupta vs. Union of India & Ors* [1976] INSC 308 (29 November 1976).

cases consisting innovative interpretation on disability related issues. However, it is worth mentioning that in “*Harpal Singh vs. Union of India*”,⁵⁶³ plea was rejected by the court on the ground that “*it is the mandate of the legislature to include or exclude conditions that constitute disability and hence lies beyond the capacity of the courts to give remarks.*”⁵⁶⁴ Courts in India, therefore, relied more on “legislation” than sole “interpretation by court” to tackle disability issue and discrimination.

5.11 Conclusion

The above discussion and the developments clarify that India has made attempts to accept disability as an evolving concept as specified in UNCRPD in comparison to past where PWDs were even kept out of the census population till 1980s. Census and NSS as two key official sources to collect disability statistics in India have been analyzed. Disability estimates collected via census and NSS are hard enough to be compared as it is unsure what aspects of disability are absorbed by both the census and NSS while defining disability.

Like Pakistan, educational history in India revolved around special segregated education system. RPWD Act 2016, with other education specific Acts, covers CWDs in a separate chapter with the goal of full inclusion.⁵⁶⁵ However, a recent order of the SC in the *Rajneesh Kumar Pandey vs. Union of India*, seemed disappointing where the SC observed that the children suffering from any kind of disability cannot be included in the

⁵⁶³ *Harpal Singh vs. Union of India* 50 (2008) DLT 209.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ RPWD Act 2016, Chapter 3.

mainstream schools to get education. Rather to be adjusted in separate schools with distinctly trained teachers.⁵⁶⁶

India is among those territories that developed disability discrimination law in past to give legal protection to PWDs. However, the earlier Indian law on disability focused on “causes” of disabling condition and not its “effects.” The superior courts judgments later helped to gradually shift the attention to the “effects” of the disability as evident from most of the cases discussed in this Chapter. Current disability law in India has absorbed the notion of UNCRPD but the SC of India has reiterated that gap between the law and reality persists which is yet not filled.⁵⁶⁷ Indian approach towards disability and court rulings to protect PWDs against discrimination in the field of education and employment can better help Pakistan to protect PWDs against discrimination.

⁵⁶⁶ *Rajneesh Kumar Pandey vs. Union of India* [Writ Petition (Civil) No.132 of 2016] 04-12-2017

⁵⁶⁷ *Jeeja Ghosh & Anr v. Union of India & Ors* [Writ Petition (C) No. 98 of 2012] 12 May, 2016.

CHAPTER 6: UNITED KINGDOM LEGISLATION ON EQUALITY AND DIVERSITY

6.1 Introduction

This chapter will observe how important the law is in struggle for groups seeking social change on the theme of quality and discrimination in an advanced and legally enriched country like UK. The detailed and critical view of UK's past and current disability discrimination legislation with relevant case laws will prove helpful for Pakistan to design and enact future disability specific law.

Caroline Gooding idea of Social Construction of Disability is debated. Her perception of social and political forces covers British society particularly British legal thought in the last two decades of 20th century which forms decisive connection between disabled people as a social movement and the law. This played a crucial role in shaping "Disability Discrimination Act 1995" (DDA). DDA 1995 remained first civil rights law against disability discrimination in England which was substituted by more detailed Equality Act in 2010 after UK ratified UNCRPD which emphasizes on the equality of disables person in being different.

A detailed view of the two main disability legislations in UK in employment-related aspects of disability is discussed with relevant case law to assess their impact on and implications for disability discrimination. The aim of the analysis of some disability cases is to have fruitful understanding on the emerging area of disability jurisprudence in UK

from legal perspective. Chapter will also throw light on significance of Care Act 2014 in realizing new rights of carers in England.

A critical observation of the CRPD on UK's periodic report submitted to UN Committee makes the last part of this Chapter.

6.2 The Concept of Discrimination and Equality

Terms equality and discrimination are usually taken in their general and basic meaning with focus on treating everybody the same or avoid treating somebody differently or like is being treated alike; however, this does not tell the full story. The notion of discrimination and equality varies depending on the discipline it is used in. The economic definition of discrimination, for instance, emphasizes on productivity, a sociological approach focuses on negative attitudes faced by an individual if he/she belongs to a group.

Earlier discrimination was based on various misconceptions including a group-based generalized view to attribute particular characteristics and an incorrect view to groups without adequate classifying tools.⁵⁶⁸ Discrimination, therefore, is the application of generalization to a group of individuals. This direction of the sociological definition has great impact on the legal definition of discrimination. An easily received legal definition of discrimination is "different treatment motivated by prejudice or hostility".⁵⁶⁹

There is main difference between the sociological and the legal definition of discrimination. Its legal definition tends to be limited to a particular ground, however, the

⁵⁶⁸ C. Sunstien, "Three Civil Law Fallacies," *California Law Review* 79(1991): 762

⁵⁶⁹ M. Connolly, *Discrimination Law* (London: Thomson Sweet and Maxwell, 2006), 1.

sociological definition remains unconstrained, and as such is not limited to groups or categories.⁵⁷⁰

Equality in case of disability can be termed as 'protection from discrimination.' Gooding -a radical lawyer and disability activist- says that what is necessary for disability rights is "alternative vision and account of equality".⁵⁷¹ It means that in case of disability, it is required not to just move towards formal equality (celebration of differences) but to adopt a model of substantive equality. In formal equality, the differential treatment based on difference is justified despite it is unequal in effect. Substantive equality, however, emphasizes on the actual impact of the law where the debate shifts from the question of sameness/difference to the issue of "disadvantage owing to the difference."⁵⁷² In other words, substantive equality considers both the "individualized instances of discrimination" and "structural discrimination."⁵⁷³ The law, as a result, transforms from individualized mechanism with conventional legal interventions to collective action with right discourse.⁵⁷⁴ Substantive approach, therefore, considers the systemic and institutional exclusion and tries to remedy it substantively. However, it does not ignore the 'difference' altogether but accommodate it. So, the notion that how this difference is perceived and accommodated in law is important to extend the idea of equality between disabled and non-disabled individuals.⁵⁷⁵

⁵⁷⁰ Charles Jaret, *Contemporary racial and ethnic relations* (Harper Collins: New York, 1995), 254.

⁵⁷¹ Caroline Gooding, *Disabling Laws, Enabling Acts: Disability Rights in Britain and America* (Law and Social Theory: Pluto Press, 1994), 42.

⁵⁷² Ibid, 43.

⁵⁷³ Ibid.

⁵⁷⁴ Ibid, 44.

⁵⁷⁵ Ibid, 44.

Formal equality focus on a single approach to treat likes alike. The substantive equality, however, proposes a four-dimensional approach with the basic idea that the right to equality should be treated in the social context which proves more responsive to those who are demeaned, deprived, ignored, or excluded.⁵⁷⁶ A four-dimensional approach aims to i) compensate disadvantage ii) counter prejudice, stigma, humiliation, and violence iii) raise voice and participation and iv) accommodate variance and attain structural change.⁵⁷⁷

This four-dimensional framework suggests a diagnostic framework to be used to help amend laws and policies and attain substantive equality in a better way.

6.3 Caroline Gooding on Social Construction of Disability

The social model of disability is known for many years to the extent that it was recognized by United Nations in its Convention on the Rights of Persons with Disabilities in 2006 as part of its frame of reference. The idea of disability as social construct sounded relatively new to legal practitioners and scholars in the UK until the idea was disseminated by Caroline Gooding in her book 'Disabling laws, Enabling Acts' in 1994 where she cross fertilized the law and disability theory.

Gooding places 'disability' and 'discrimination' both terms for rethinking. That may be an attempt to dismantle the concept of individualism as construction of disability is a social process for Gooding.⁵⁷⁸ By reviewing the work of various disability writers, she revealed the role of industrial revolution and then the welfare state- replacing police state- in designing and developing the modern meaning of disability. The instance of special

⁵⁷⁶ Ibid, 46.

⁵⁷⁷ Ibid, 46.

⁵⁷⁸ Gooding, Disabling Laws, 3.

educational needs may be taken as a wider reflection on welfare State as a whole. A new category, for example, of “special-needs education” was created to admit the students who fits it, revealing thereby that “the labelling of pupils has much more to do with the needs of the system than with those of individual pupils.”⁵⁷⁹

Though Gooding agrees to the vital role and continuing importance of the welfare State (particularly to fight the giant of poverty), however, she points that the same welfare State, if not reshaped, does serve as a mean of social control over disabled people.⁵⁸⁰ She adds that the existing concept and role of a welfare State can be rebutted by giving opportunity to social and political reconstruction. She reasons that

*... Just as the historical key to the current meaning of disability lies in the welfare state, so the current crisis and restructuring of it may present the key opportunity for a law which redefines the meaning of disability from a rights perspective.*⁵⁸¹

This approach takes the disability categorization to social and legal appropriation in UK. The individual energy can be channelized by legal action to the level that depends fundamentally on the broader context within which the law is operationalized. The strategic operationalization of law, as Goodling see it, requires the role of a statutory commission as an essential component of valid and effective action.⁵⁸² The imaginative response and contribution of Caroline Gooding to social and political forces covering British society- particularly British legal thought in the last two decades of 20th century- formed decisive

⁵⁷⁹ Ibid, 12.

⁵⁸⁰ Ibid, 13.

⁵⁸¹ Ibid, xix.

⁵⁸² Ibid.

connection between disabled people as a social movement and the law. Her work played a crucial role to shape Disability Discrimination Act 1995.

6.4 Disability Discrimination Act 1995

In labor market, Disabled Persons (Employment) Act 1944 became the first piece of legislation that addressed the disability discrimination. The significant point of the Act was that an organization with more than 20 employees must confirm and ensure that at least three percent of their workers were registered disabled people. However, the Act was called “a complete failure”⁵⁸³ which took more than 50 years to give more detailed, effective, and thorough piece of legislation by conservative government called the Disability Discrimination Act 1995. It made it illegal to discriminate against disabled people particularly in the fields of employment and services for the first time in the history of UK, though not to everyone's satisfaction. DDA 1995 was not the first UK statute to encounter discriminatory practices against disabled persons but was first of its nature making it unlawful for providers of good/services and employers to discriminate against disabled people.

6.4.1 Disability Discrimination Act and Disability Definition

The Act utters that a “disabled person is one who has a disability.”⁵⁸⁴ Under DDA 1995, “a person will be deemed disabled if s/he has a physical or mental impairment which

⁵⁸³ Grace James, “An Unquiet Mind in the Workplace: Mental Illness and the Disability Discrimination Act 1995” *Legal Studies* 24 (2004): 517.

⁵⁸⁴ Disability Discrimination Act 1995, UK, Section 1(2).

has a substantial and long-term adverse effect on his or her ability to carry out normal day to day activities.”⁵⁸⁵ This definition contains three particulars:

I. Impairment

The impairment must have substantial impact on daily activities of the person. If a person begins to experience symptoms with a progressive condition, muscular dystrophy for instance, with even slight effect on a person’s normal life and daily activities, s/he will be covered by the definition of disabled person under the Act.⁵⁸⁶

II. Long Term

Long term is “*a situation that has remained or can be expected to remain for more than one year or for the rest of the person’s life.*” It also covers persons with instable and periodic conditions. It includes episodic intervals of duration less than a year (12-month) but are likely to reappear within 12 months.⁵⁸⁷

III. Normal Day-to-Day Activities

Schedule 1 to DDA contains the given and fixed list of normal day to day activities. The list contains mobility; manual dexterity; physical coordination; continence; ability to lift, carry or move everyday objects; speech; hearing; sight; memory; the ability to learn, understand or concentrate; the perception of risk or physical danger; taking part in normal social interaction; or forming social relationships.⁵⁸⁸

⁵⁸⁵ DDA 1995, Section 1(I).

⁵⁸⁶ Caroline Gooding, “Disability Discrimination Act: from statute to Practice” *Critical Social Policy* 20(2000): 540.

⁵⁸⁷ Ibid.

⁵⁸⁸ Ibid.

However, a person unable to do a particular activity required for his or her work is not covered by the Act if it does not affect “generalized activity” of that person.⁵⁸⁹

The above definition of disability faces two main levels of criticism. The first one points the narrowness of the definition which does not cover some kinds of cancers, AIDS, and HIV. However, this was worked and dealt within Disability Discrimination Act 2005.⁵⁹⁰ Second, the Act does not define physical and mental impairments, however, Schedule 1 to the Act partly describe both terms. The definition has also been objected for being medically oriented and could not absorb the social model. In case of social model of disability, it will be the attitude and response of the society that will decide same medical condition either disabling or not resulting in the use of a list of societal reactions than a list of medical conditions for a legal purpose.

6.4.2 Employment Discrimination Under the Act and Some Gaps

DDA 1995 does prohibit employment discrimination as well as discrimination in field of delivery of goods, services, and facilities. Section 4 of the DDA makes it unlawful and criminal for employers to use disability-based discrimination against prospective or current employees. Such discriminatory approach covers employment offers, its terms and conditions, training, promotion, and dismissal.

The “Blackstone's Guide 1996” to the DDA, however, investigated this new law as a hasty and unwieldy political compromise'.⁵⁹¹ Like previous legislation, DDA 1995

⁵⁸⁹ Ibid.

⁵⁹⁰ Disability Discrimination Act 2005, UK, Section, 18.

⁵⁹¹ Caroline Gooding and A. Lawson, Blackstone's Guide to the Disability Discrimination Act 1995 (London: Wm Gaunt & Sons, 1996),632.

prohibit employment discrimination only in those employments consisting of more than 20 employees in total. The overall employment estimate shows that about 70% of the 2.4 million PWDs in UK work for institutions not meeting this requirement, and the disabled employees in such employments bore no idea about the Act or its use in case of discrimination. Similarly, under the extensive exclusions of the Act, its employment provisions do not cover the armed forces members, police officers, barristers, workers who work mainly or partly outside UK, employees on board ships, aircraft and fire-fighters. Section 4(l) of the DDA although provides protection against discrimination to disabled individuals but there were some exceptions to it and most significant are the provision of education,⁵⁹² and public transport⁵⁹³ (leaves it open to transport providers to treat these customers less favorably). In the education and transport field, the availability of goods and services is not expressly the subject of prohibition against discrimination. Furthermore, Section 53 of the DDA restricts its authority and impact on government. It says that anything which otherwise amount to discrimination will be considered lawful if done “in pursuance of an act of parliament.”⁵⁹⁴

Similarly, if the first 18 months of the DDA in respect of decided employment cases are analyzed, the success ratio on definition of disability of decided employment cases was 18 percent only.⁵⁹⁵ Complicated and narrow definition of disability in the DDA with poor understanding of the law by tribunals was the background factor for this. The judgement

⁵⁹² DDA 1995, Section 19(5)(a). Part IV of the Act made limited provision in respect of education: Disability Discrimination Act 1995, Sections. 29–31.

⁵⁹³ Ibid, Section 19(5)(b). Part V of the Act made limited provision in respect of taxi, PSV, and rail vehicles: Disability Discrimination Act 1995, Sections 32–49.

⁵⁹⁴ Ibid, Section 5

⁵⁹⁵ Nigel Meager et al. *Monitoring the Disability Discrimination Act 1995* (London: Department for Education and Employment, 1999),126.

in *Goodwin vs. Patent Office 1998*, however, proved helping as the tribunal took a wider look of disability which was much quoted by subsequent tribunals. The Employment Appeal Tribunal (EAT), while interpreting and defining the “substantial effect” of disability on “normal day to day activities”, quoted that “substantial might mean very large or it might mean more than minor or trivial.”⁵⁹⁶ It explained that the word has been used in the later sense. In case of defining and locating discrimination, DDA adopted two-pronged approach.

6.4.2.1 Discrimination Due to Less Favorable Treatment

Discrimination occurs if a person is treated by his employer less favorably for any reason related to his disability. Discrimination, if made in this case (less favorable treatment)⁵⁹⁷, leaves a question that less favorable than whom? In *Clarke vs. Novacold 1999*⁵⁹⁸ (four months absence on sick leave due to disability and subsequent dismissal), it was undoubtful that disability was the reason for discharge, but the issue was of the comparator with whom he be compared for less favorable treatment? The lenient interpretation of related discrimination simply required the claimant to show less favorable treatment of him than a non-disabled person to whom such treatment does not apply. The industrial tribunal argued that the treatment of plaintiff did not amount to less favorable treatment due to his disability and comparison with non-disabled employee who would be dismissed after same absence does not amount to discrimination. So, it had not amounted to discrimination under the DDA 1995. The judgment was, however, overturned by the appellate court by arguing that “correct comparator for Mr. Clark was someone who

⁵⁹⁶ *Goodwin vs. Patent Office* 3-Feb-99, [1999] IRLR 4, [1999] ICR 302.

⁵⁹⁷ DDA 1995, Section 5.

⁵⁹⁸ *Clark vs. TDG Ltd (t/a Novacold Ltd)* [1999] ICR 951.

had not taken off and the treatment, therefore, established less favorable treatment.”⁵⁹⁹ The leniency of the comparator requirement was declared discriminatory, and the tribunal was asked to consider whether the justification defense could be established.” Consequently, many judgements which apparently seemed neutral for ‘treating everyone the same’ came under fire for the discrimination which cannot be justified.

The disability-based discrimination and the resulting comparator requirement was interpreted for many years in line with standard established by *Clark vs. Novacold Ltd.*⁶⁰⁰ However, this approach to ‘less favorable treatment’ in *Clark vs. Novacold* was reversed in June 2008 by the House of Lords in *London Borough of Lewisham vs. Malcolm*, a housing case, that established a much stricter comparison like the one of direct discrimination. It required that the “less favorable treatment” of the claimant must be compared to a similarly situated non-disabled person who availed and benefited of same time off from work.⁶⁰¹ It was held that there is no breach of the Act on the ground that in deciding “whether the tenant had been treated less favorably, the court must compare his treatment by the Council with how any other tenant would be treated if they sublet.”⁶⁰² So, there is no discrimination because the Council would seek other tenants the same way.⁶⁰³ Disability-related discrimination was therefore reduced to a form of justifiable direct discrimination.⁶⁰⁴

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid.

⁶⁰¹ *London Borough of Lewisham vs. Malcolm*, [2008] UKHL 43.

⁶⁰² Ibid.

⁶⁰³ Ibid.

⁶⁰⁴ *R(on the application of N) vs. London Borough of Barking and Dagenham* Independent Appeal Panel [2009] EWCA Civ 108 and *Aylott vs. Stockton on Tees* BC [2010] 910 for rulings that the Lewisham approach extended to education and employment respectively.

However, the gap in safeguarding disabled is still left by *Malcolm* which was decided under DDA. The said gap was filled by Equality Act 2010- new and novel to address discrimination. The goal of Section.15 of the Equality Act 2010 is to restore the position roughly to one under *Clark vs. Novacold* which was overruled by *LB Lewisham vs. Malcolm in 2008*. “Discrimination arising from disability”⁶⁰⁵ was a new type of claim introduced by Equality Act 2010 and applies if there is an unfavorable treatment of a disabled person by reason of his disability.⁶⁰⁶ Such claims under Section 15 of Equality Act 2010 requires objective justification defense and there is no more a comparator requirement (the phrase “less favorable treatment” is replaced by ‘unfavorable treatment’).

6.4.2.2 Discrimination due to Failure of Making Reasonable Adjustment

Discrimination in case of reasonable adjustment requires employers what to do under the ‘reasonable adjustment duty’? The concept was first introduced under DDA. 1999 onwards, service providers for the first time were needed to bring modification to policies, procedures and practices that hinders the access of disabled people to goods and services. To combat any disability-related limitation and hurdle, ‘reasonable adjustment’ to working conditions or the working environment are required by the employers. Service providers were required to provide auxiliary aids and services. To realize it, some reasonable steps were taken in 2004 to overcome physical and environmental barriers and ease accessibility. Major development was Disability Discrimination Act 2005, which brought housing sector under reasonable adjustment duty abandoning public authorities to

⁶⁰⁵ Equality Act 2010, UK, Sectio.,15.

⁶⁰⁶ Ibid, 15 (1) a.

discriminate against disabled people. Public sector equality duty (PSED) was formulated under the Act that was a significant change imposing a positive duty on public authorities.

The scope of reasonable adjustment does have some limitations. First limitation is to disclose the disability and that the employer has knowledge of the substantial disadvantage because of disability. In *Ridout vs. T C Group 1998*,⁶⁰⁷ the applicant had a very rare form of epilepsy-photo-sensitive epilepsy. Employment Appeal Tribunal (EAT) established against Ms Ridout on the ground that Ms Ridout adjustment requirement during interview could not be known and expected to employer and placed the burden of requesting an adjustment on the applicant. Second limitation on reasonable adjustment duty of the employer is that it mostly arises and is confined to job related matters only. In the case of *Kenny vs. Hampshire Constabulary*,⁶⁰⁸ Mr Kenny who suffered from cerebral palsy, required to use wheelchair and a support worker to assist him with using the toilet and eating. Having required qualification and experience, Mr. Kenny was appointed and special equipment for adjustment and a car parking space were arranged. Personal assistance was anticipated to be provided by team member for which Rota was prepared. Shortly an application to pay 2 extra hours for giving personal assistance was received by Access to Work Scheme increasing the financial responsibility of the manager. As a result, the offer of job to Mr. Kenny was withdrawn before the application was decided. Mr. Kenny's application to the Employment Tribunal (ET) was dismissed justifying the failure to make reasonable adjustment. EAT sustained the decision of ET.⁶⁰⁹ EAT argued and provided that the reasonable adjustment duty of the employer is limited to job related matters. In case of

⁶⁰⁷ *Ridout vs. T C Group* [1998] Irlr 628; EAT 3 Feb 1999.

⁶⁰⁸ *Kenny vs. Hampshire Constabulary* [1998] IRLR 352.

⁶⁰⁹ *Ibid*

employment litigation, therefore, the disabled worker must first demonstrate his disability to an ET under the terms of the Act placing the onus to bring an action against an employer on disabled person.⁶¹⁰

6.5 Equality Act 2010

Equality Act 2010 is a key piece of legislation and is the newest of the United Kingdom's civil rights statutes. The Labor government manifesto in 2005 election displayed that how committed the government is towards equality. To meet this purpose, "Discrimination Law Review" was established to recommend the government to make the discrimination law of UK more updated and simpler. The major contributor for this huge effort was the "Framework for a fairer future" in 2008- The Equality Bill" that was the White Paper by the govt.⁶¹¹ The paper gives the efforts of the then Labor Government highlighting the indispensability of equality for individuals, society, and the economy. "New Opportunities: Fair Chance for the Future" was another wide-ranging paper published in 2009⁶¹² which was later transformed into the provisions of the Equality Act 2010 (Sections 1-3).

Primary purpose of the Equality Act 2010 of UK is to codify the array of complicated statutes and rules- nearly one hundred different pieces of equality legislation-⁶¹³ widely

⁶¹⁰ C. Woodhams, *Disability in the Workplace: Hidden Disabilities and HR Practice, Working paper.* (Manchester: Metropolitan University Manchester, 2003), 167.

⁶¹¹ Harriet Harman, "Framework for a Fairer Future – The Equality Bill" June 2008 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238713/7431.pdf accessed August 24, 2019.

⁶¹² New Opportunities: Fair Chances for The Future, a policy paper presented to UK Parliament by the Minister for the Cabinet Office by Command of Her Majesty, January 2009. Foreword of the Prime Minister.

⁶¹³ Stephen Hunt, "Negotiating Equality in the Equality Act 2010 (United Kingdom): Church-State Relations in a Post-Christian Society" *Journal of Church and State* 55(2013): 692.

criticized for being outdated, fragmented, inconsistent, inadequate, and inaccessible. This new harmonized framework to adjust disability gave rise to many challenges particularly structural differences but the main intention of the law was to harmonize and strengthen the efforts on the growth and advancement of discrimination and equality laws. The effort in the form of Equality Act 2010 was to bring law in line with “Equal Treatment Directives 2008”⁶¹⁴ of the European Community. The focus of all these laws was on equal treatment in work, employment, and other areas by standardizing existing concepts and definitions.⁶¹⁵ A detailed discussion of this legislation will help how situation in UK has changed after DDA is replaced by Equality Act 2010 which will thus help as a guideline to design disability discrimination law in Pakistan.

6.6 Equality Act on Protected Characteristics-Some Crucial Aspects

Section 4 of the Equality Act 2010 gives a list of nine different “protected characteristics” including disability. The collection of various protected characteristics in a single Act may cause to oversee the critical difference between other characteristics and disability and that formally equal treatment may cause potential discrimination and merger may place disabled people at clear disadvantage. The Discrimination Law Association adds that the blend of disability with nine other protected characteristics in Equality Act 2010 will divert the focus of resources to bring equality. There are concerns that the blended approach towards disability can result in disability discrimination particularly when legal

⁶¹⁴ Equal Treatment Directives, European Community, 2008. <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52008PC0426> accessed November 16, 2019.

⁶¹⁵ Government Equalities Office, The Equality Bill: Government Response to the Consultation (London: Stationery Office, 2008), para 7.3.

prohibitions and duties are applied.⁶¹⁶ However, the merger of disability and other protected characteristics made it easy for advisers to consult a single piece of legislation than a fragmented array of legislation. but unified approach to equality may cause discrimination itself.

Being enacted in 2010, number of provisions in Equality Act are not entered into force yet. For instance, it is added with a new provision -Section 1 in part 1- requiring public bodies to reduce socio economic disadvantage when making strategic decisions- but the effect of the law has not yet been seen. The reasonable adjustments provisions in Section 36 and Schedule 4 of Equality Act 2010-that needs adjustments to the common parts of the buildings- are not fully initiated.⁶¹⁷ During the passage of “Disability Discrimination Bill” which later resulted in “Disability Discrimination Act 2005”, strong cross-party pressure was observed for more provision of alterations for disabled people, but scarcity of time and complex legal issues proved to be main constraints in making amendments. The demand to review the issues and to be reported by the end of 2005 was made. For detailed examination, the government subsequently established the Review Group. The Review Group consisted of various members of former Disability Rights Commission, representatives, and officials of disability organizations and government departments respectively and landlord organizations. The Group gives its views in the form

⁶¹⁶ Written evidence from the Discrimination Law Association
<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/equality-act-2010-and-disability-committee/equality-act-2010-and-disability/written/20875.html> accessed November 15, 2019.

⁶¹⁷ The Equality Act 2010: the impact on disabled people, Report of Session 2015–16, 12.

of both legislative and non-legislative measures.⁶¹⁸ But the text of Sections 160 to 173 of the Equality Act with many other provisions are still partly enforced only.

6.6.1 Equality Duty

Before Equality Act 2010, there was no equality legislation to redress and cure discrimination and harassment cases before they happened as the legal focus was on rectifying them after they occurred with onus of proof on disabled individual. The equality duty in Equality Act 2010 was a tremendous effort in transferring this onus to employers and organizations. More significantly, public organizations and authorities were brought in its domain for the first time and the new law required them to tackle discrimination and inequality and contribute to make society fairer. It is equality duty in addition to the statutory prohibitions against discrimination, harassment, and victimization.

Section 149 of the Equality Act 2010 established “Public Sector Equality Duty” (PSED) which came into force on 5 April 2011. PSED requires public authorities to eradicate all types of harassment, discrimination, and oppression against individuals with protected characteristics including disabled to provide them equality of opportunity. If equality gap is predicted and recognized, anyone performing public function/duty is under obligation to ‘have due regard to the matters mentioned in subsection (1)’⁶¹⁹ and therefore anything done in contradiction to it would amount to a breach of that duty. It is also made obligatory for public bodies to regularly consider and know the impact of their policies and

⁶¹⁸ Government Equalities Office, Equality Act Impact Assessment, Version 5 (Royal Assent), April 2010, 115,116: <http://www.parliament.uk/documents/impact-assessments/IA14-02F.pdf> accessed March 11, 2019.

⁶¹⁹ The Equality Act 2010, Section 149(2).

strategies on individuals with different protected characteristics. More important in this regard is that public authority must provide evidence how it has done this.

Equality duty created under the Equality Act 2010 extended to all other protected characteristics throughout UK. The application of PSED, however, varies in England, Scotland, and Wales. There is same and equal ‘general duty’ across all three realms, but power has been devolved in case of “specific duties” decisions making to provide better support and help towards the performance of general duty. Section 153-155 authorizes Welsh and Scottish ministers to impose “specific duties” on anyone performing public function through secondary legislation. It is to be noted that legislation on creating specific duties is decided by the Welsh Assembly.⁶²⁰ These include mandatory registration of disabled persons in UK. The information collected leads to better decision-making and policy development. Not only the information is needed to be collected under the Act but it requires to explicate and answer ‘why’ and ‘how’ question on the collection and use of information in order to protect privacy⁶²¹ and enhance better performance of the general duty.

6.6.2 Implementation and Enforcement Limitations

It is worth mentioning that Equality Act 2010 gives legal details on implementation and enforcement of legislation. Chapters 2 and 3 of part 9 on enforcement of the Act gives details of the court a case can be brought in. It gives details on courts’ jurisdiction, time

⁶²⁰ Paul Chaney, *Equal Opportunities and Human Rights: The First Decade of Devolution in Wales A Report Commissioned by the Equality and Human Rights Commission* (April 2009):86 https://www.academia.edu/30733655/Equal_Opportunities_and_Human_Rights_The_First_Decade_of_Devolution_in_Wales_A_Report_Commissioned_by_the_Equality_and_Human_Rights_Commission accessed March 15, 2020.

⁶²¹ Equality Act <http://www.legislation.gov.uk/ukpga/2010/15/contents> accessed March 12, 2020.

limits and available remedies. In addition to it, it emphasizes on general rules and laws such as court proceedings, legal aid, and costs for the operation of courts and tribunals that effect enforcement.

Section 137 of Equality Act clarifies that “a finding in relevant proceedings in respect of an act which has become final is to be treated as conclusive in proceedings under this Act,”⁶²² discouraging reopening of cases decided under previous legislation; however, the rule of *res judicata* has been codified.⁶²³ It says that a finding becomes final “when an appeal against the finding is dismissed, withdrawn or abandoned, or when the time for appealing expires without an appeal having been brought.” Section 140 of Equality Act 2010 gives a new law that provides permission to tribunals and courts to transfer connected cases providing more relief to disabled individuals. Section 142 and 143 of the Act provides for the removal and modification of unenforceable terms.

Violation and breach of general equality duty and its remedy provides for compliance notices and judicial review.⁶²⁴ However, it is not entertaining to encourage individual litigation to protect a disabled claimant against discrimination as it places a significant burden on individual. Individual enforcement may have a problem that individual compensation for an individual act in case of disability discrimination is not the solution. For instance, lack of accessible information and inaccessible websites for a blind person amounts to disability discrimination and “relying on individual enforcement”

⁶²² Equality Act 2010, Section,137.

⁶²³ Ibid.

⁶²⁴ Ibid, part 9(enforcement) Chap 1(proceedings).

(compensation in this case) is not effective.⁶²⁵ However, the importance of individual cases like *Plc vs. Paulley*⁶²⁶ cannot be overlooked that ended up with “public transport having to make provision for disabled people”⁶²⁷ and other examples of case law that places obvious obligations on public authorities, service providers and employers than disabled individual.

However, it is noteworthy that many of individual cases goes unchallenged without meeting the required obligations. Being a strong supporter of proactive enforcement and a litigant in person in bringing discrimination claim against the Local Government Ombudsman, Jeanine Blamires said that “organizations are not fearful of breaching the Equality Act and [...] behave with impunity.”⁶²⁸

The evidence shows that proceedings at court and tribunals are also challenging, difficult, complex, daunting, and undoubtedly costly. The executive summary of “Equality and Human Rights Commission” shows the estimated cost for an individual case. The given estimate is between £4,000 and £80,000,⁶²⁹ though Equality Act 2010 provides a substantial way to meet costs in form of legal aid. Civil legal aid takes two forms of legal help and legal representation. However, there is no availability of legal representation by

⁶²⁵ Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission Tenth Report of Session 2017–19

<https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed May 3, 2019.

⁶²⁶ *Plc vs. Paulley* [2017] UKSC 4.

⁶²⁷ *First Group Plc vs. Paulley* UKSC 2015/0025.

⁶²⁸ Court awards disabled woman ‘aggravated’ damages for ombudsman discrimination <https://www.disabilitynewsservice.com/court-awards-disabled-woman-aggravated-damages-for-ombudsman-discrimination/> accessed April 28, 2018.

⁶²⁹ Executive Summary, Equality and Human Rights Commission <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/enforcing-the-equality-act-the-law-and-the-role-of-the-equality-and-human-rights-commission/written/91482.html> accessed April 28, 2018.

lawyer at ET other than on appeal which necessitate individuals to either represent themselves or pay privately.⁶³⁰

Academics, lawyers, and campaigners have viewed how successfully disabled people can find their rights under Equality Act 2010 because the inadequate enforcement of the Act could not root out routine discrimination. The landmark report on the impact of the Equality Act 2010 of “Lords Committee” was debated in seminar at Leeds university. It concluded that laws on disability discrimination were “not working in practice”. Catherine Casserley, who is practicing law since 1996 and is currently a barrister, talks of the significant problem faced by disabled persons in enforcing their rights under the Equality Act 2010⁶³¹ (progress may be there but at very low pace to make new legislation work).

6.6.3 Disability Interpretation in the Light of Equality Act

When it comes to the contents and detail of the definition of disability, Equality Act 2010 adopts the DDA approach. The requirements of the definition of disability jeopardies resulting in the distraction of judicial and other attention. One can estimate the severity of this risk from the fact that the disability definition results in failure of almost a fifth of all disability cases.⁶³² The definition needs to focus not only on functional limitations of the

⁶³⁰ Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission Tenth Report of Session 2017–19 <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf> accessed April 28, 2018.

⁶³¹ Enforcement is Key on Equality Act <https://disability-studies.leeds.ac.uk/news/enforcement-is-key-on-equality-act/> accessed April 28, 2018.

⁶³² N. Meagre et al, *Monitoring the Disability Discrimination Act 1995* (London: Department for Education and Employment, 1999),126.

victim but the behavior of the alleged discriminator.⁶³³ Taking reasonable adjustment as an example, it is not compensation to a disabled person but it is a device requiring employers and others to fulfil their duty to remove specific hindrances and disadvantages caused by their rules, policy, criteria, practices and premises. These concerns led to expand the disability definition resulting in amendments in 2005 to the DDA. Definition was further broadened as it removed the requirement that impairment needs to be long term or must have a substantial effect.⁶³⁴ The Equality Act 2010, however, did not change the law in this regard. Although the Act now provides some consistency regarding reasonable adjustment, for example, by requiring individuals with disabilities to show ‘substantial disadvantage’,⁶³⁵ however, the condition is still there that an impairment must influence normal everyday activities (Irish⁶³⁶ and Australian⁶³⁷ definitions of disability have no such requirement). The obvious outcome of this is the less favorable treatment of litigants whose impairment has no “substantial impact” on their day-to-day but only negligible and trivial or future impact of impairment (for example disability due to a genetic predisposition). However, this issue is omitted from the Equality Act 2010.⁶³⁸

In ET case of *Aderemi vs. London and Southeastern Railway Limited 2012*⁶³⁹, Mr *Aderemi* was dismissed of his job of station attendant. He developed back problem in late 2007 after prolonged standing due to the required nature of his work resulting in on and off

⁶³³ Anna Lawson, “Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated,” *Industrial Law Journal* 40(2011): 372.

⁶³⁴ Disability Rights Commission, Consultation on Definition of Disability in Anti-Discrimination Law (London: DRC, 2006); and House of Commons Work and Pensions Committee, The Equality Bill: How Disability Equality Fits Within a Single Equality Act (London: Stationery Office, 2009) paras 84–5.

⁶³⁵ Equality Act 2010, Section 20(3).

⁶³⁶ Irish Employment Equality Act 1998, Section 2(1).

⁶³⁷ Australian Disability Discrimination Act 1992, Section 4.

⁶³⁸ Ruth Wilkinson, “The Single Equality Bill: A Missed Opportunity to Legislate on Genetic Discrimination?” *Studies in Ethics, Law, and Technology* 3(2009):6.

⁶³⁹ *Aderemi vs. London and Southeastern Railway Limited [2012] UKEAT/0316/12/KN*.

absence from work during 2009-10. He was eventually dismissed by employer for being unfit for his job. On his access to ET as disability discrimination claim, tribunal rejected his claim of been unfairly dismissed.⁶⁴⁰ ET decided that “*Mr Aderemi* was not disabled under Equality Act 2010 definition for his back problem did not amount to have substantial impact on his ability to carry out normal day-to-day activities”. On approach to EAT, ET judgement was criticized for focusing only on the work he could do and not at what he could not do, however, EAT said that long standing should be deemed as a normal day-to-day activity.⁶⁴¹ The EAT found in *Banaszczyk vs. Booker* in February 2016 too that Mr. Banaszczyk’s normal work activities were ‘normal day to day activities’ and was disabled.⁶⁴² These judgements led to settle a standard that activities that are common across many works and occupations should constitute “normal day to day activities”.⁶⁴³

The overall approach of Equality Act 2010 to interpret disability may set a low-level standard in comparison to UNCRPD. Although, UNCRPD does not define disability, but Article 1 (the purpose clause) says that “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” The word “may” thereby express that definite suffering and difficulty of participation in society is not necessary as UNCRPD suggest that such hindrances might be the result of “an impairment in interaction with social barriers.”

⁶⁴⁰ Ibid.

⁶⁴¹ Ibid.

⁶⁴² Lesley Furber, “Disability Discrimination – what makes a worker disabled under the Equality Act 2010,” Jan 9, 2019 <https://www.crunch.co.uk/knowledge-employment/disability-discrimination-what-makes-a-worker-disabled-under-the-equality-act-2010> accessed April 2, 2018.

⁶⁴³ *Banaszczyk vs. Booker Ltd* UKEAT/0132/15/RN <https://www.employmentcasesupdate.co.uk/site.aspx?i=ed30603> accessed April 10, 2018.

6.6.4 The Reasonable Adjustment Duty in Employment

DDA preceding the Employment Equality Directive⁶⁴⁴ was the first legislation in UK which talked of the reasonable adjustment duty in context of employment and the requirements of UNCRPD.⁶⁴⁵ Under Equality Act 2010, if a person is disabled within the scope and meaning of the Act, employers need to bring “reasonable adjustments” to the premises to create possibility for him to continue at work. In addition to the changes in environment and conditions, it includes to arrange trainings and provide flexible working hours and time off for treatment. However, the Equality Act 2010 does not cover that the time off for treatment should be paid. Reasonable adjustment is addressed by DDA separately in all its parts while Equality Act 2010 set this duty in its Sections 20–22 and in its detailed schedule which applies to all including institutions, transport providers, and sports bodies. Section 20 set out the contents of reasonable adjustment duty. Section 21 says that “a failure to comply with a reasonable adjustment duty constitutes unlawful discrimination.”

With the capacity to harmonize the previous reasonable adjustment duties, Equality Act 2010 focused on bringing changes to mostly non-employment contexts. In case of employment reasonable adjustment duty, it tried to bring changes in consonance with the DDA approach. Justification defense to meet the failure of making reasonable adjustment was, therefore, removed and what is used is the duty of “substantial disadvantage”.⁶⁴⁶

⁶⁴⁴ Directive 2000/78/EC, Article 5.

⁶⁴⁵ Convention 2006, Article 5.

⁶⁴⁶ Equality Act 2010, Section 20.

Equality Act 2010 defines the word “substantial” as “more than minor or trivial” setting the level of required hindrance and disadvantage at a comparatively low level.⁶⁴⁷ The employment cases of *Lamb vs. The Garrard Academy* 2019 for reasonable environmental arrangements remained unsuccessful⁶⁴⁸ and *Home Office vs. Kuranchie* 2017⁶⁴⁹ for reduced and flexible working hours was termed successful where both sought to be reasonably adjusted. In employment perspective, Equality Act 2010 too covers possible future disability claims. In *Chief Constable of Norfolk vs. Coffey*, 2018, EAT gave ruling on possible future disability and declared that the rejection of a non-disabled applicant on perception that a condition could become a disability in future is unlawful and called it disability discrimination by perception amounting to direct disability discrimination.⁶⁵⁰

In the light of UNCRPD, it can be established that both requirements of establishing substantial disadvantage and of the justification of discrimination are incompatible with the UNCRPD. There is evidence that there exist few main reasons why the reasonable adjustment duty is not or less respected in practice. First reason includes the barriers faced by individual disabled person in enforcing their rights granted under the duty (implementation becomes too difficult).⁶⁵¹ Second reason is the lack of familiarity and understanding towards the provisions of the Act in contrast to the view of government.⁶⁵² The obvious example is the confused use of terms ‘disability’ and ‘impairment’

⁶⁴⁷ Equality Act 2010, Section 212(1).

⁶⁴⁸ *Lamb vs. The Garrard Academy* [2019] UKEAT/0042/18/RN.

⁶⁴⁹ *Home Office vs. Kuranchie* [2017] Appeal No. UKEAT/0202/16/BA

⁶⁵⁰ *Chief Constable of Norfolk vs. Coffey* [2018] UKEAT/0260/16/BA. <https://www.mind.org.uk/news-campaigns/legal-news/legal-newsletter-march-2018/chief-constable-of-norfolk-v-coffey-ukeat-0260-16-ba/#:~:text=The%20Claimant%20was%20a%20serving,neural%20hearing%20loss%20with%20tinnitus.> accessed April 28, 2019.

⁶⁵¹ Written evidence from the Equality and Human Rights Commission (EQD0083), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/equality-act-2010-and-disability-committee/equality-act-2010-and-disability/written/20699.html> accessed January 28, 2019.

⁶⁵² Ibid.

(dangerously used as alternative terms). Bob Williams-Findlay, a former chair of the British Council of Disabled People, termed the approach of law to disability as outdated and said that how service-providers and employers can differentiate between the use of the two if the legislation itself cannot understand the difference.⁶⁵³ Third, the absence of standard reasonable adjustment criteria also leads to a problem because the proportion of reasonableness varies from case to case. Fourth, if the costs in case of reasonable adjustment duty are considered, disabled person under Equality Act 2010 is not required to pay the costs of meeting the reasonable adjustment duty. However, costs of making reasonable adjustment play a central role in deciding the nature of adjustment to be reasonable or not. In EAT case of *Cordell vs. Foreign and Commonwealth Office*, it was decided that “the estimated cost of £250,000 for the provision of lip speakers for the purposes of a diplomatic posting in Kazakhstan, was not reasonable”.⁶⁵⁴ In reality, adjustments to be reasonable are usually those that do not require substantial cash investment.

6.6.5 Pre-Employment Disability/Health Enquiries

Disability rights groups and nursing and medical Royal Colleges in UK build pressure on government to contain within Equality Act 2010 a provision that provides for enquiries about disability and health. It restricted the use of “pre-employment medical questions” and placed legal limitations on pre-employment medical checks. Equality Act 2010 imposes new ban on enquiries about health and disability of an applicant before a job

⁶⁵³ Jhon Pring, “Enforcement is key on Equality Act,” Apr 28, 2016

<https://www.disabilitynewsservice.com/enforcement-is-key-on-equality-act/> accessed October 18, 2020.

⁶⁵⁴ *Cordell vs. Foreign and Commonwealth Office*, Appeal No. UKEAT/0016/11/SM, 5 October 2011.

has been offered,⁶⁵⁵ except in “prescribed circumstances”.⁶⁵⁶ Medical questions before employment will still be allowed particularly in case of making reasonable adjustments. However, if the purpose of those questions is not clearly explained with reference to the statutory exceptions, then refused job applicants who have been disadvantaged by those questions may bring legal proceedings to claim damages. But this provision will be effective only in case of applicant’s non selection for the job because he/she is disable or may be thought disabled by employer. In respect of a disabled employee, the duty to make “reasonable adjustments” of the employer only arise if s/he knows or reasonably be expected to know about the disability of the person. In many cases, the knowledge of disability is obvious (physical disability) but it may not be in other (mental disability like depression) or the employer may not be aware that its impact is substantial and have lasted for at least 12 months. In *Donelien vs. Liberata*⁶⁵⁷ in 2015, the EAT reached the judgement that absence of constructive knowledge by the employer of the disability of an employee, exempts him/her to make reasonable adjustments.⁶⁵⁸

6.7 Carers-A Nutshell Overview

According to an estimate of Carers UK, 6.5 million people are providing unpaid care to family members or friends who are either disabled, ill or older.⁶⁵⁹ Recent estimate shows that this number will increase to 9 million individuals by 2037 and every three out of five people will provide care at some point in their lives.

⁶⁵⁵ Equality Act 2010, Section 60 (1).

⁶⁵⁶ Ibid, 60 (6).

⁶⁵⁷ *Donelien vs. Liberata UK Limited* [2015] UKEAT/0297/14

⁶⁵⁸ Ibid.

⁶⁵⁹ Carers UK, “Facts About carers 2015 <https://www.carersuk.org/for-professionals/policy/policy-library/facts-about-carers-2015> accessed March 2, 2019.

Carers are viewed and treated differently from the people they care for under existing law in UK. The word “carer” (termed as ‘caregivers’ in USA) does not carry a single definition. Care Act 2014 defines the term “carer” as those “who provide or intends to provide unpaid care to a family member, friend or partner”⁶⁶⁰ (the Act does not include those who provides care on paid basis or are formal volunteers). The phrase “intend to care” in carer definition has no further detail either in Act or the statutory guidance. Similarly, the word “care” has also not been defined although, the statutory guidance adds that care includes “both the practical and emotional support.”⁶⁶¹

It is to be noted that the Care Act 2014 defines a carer in respect of his/her caring role in context of an “adult needing care”,⁶⁶² however, the term “adult needing care” has not been defined but the eligibility criteria.⁶⁶³ Adult carer under the Act means people over eighteen years who are providing care for another adult. Young carers below 18 years and providing care to disabled children are dealt under children’s law.⁶⁶⁴

Under the Care Act 2014, it is the responsibility of local public authorities to provide estimates of a carer’s needs for support. This replaces the old law which made it obligatory for the carer to show provision of “*a substantial amount of care on regular basis*” to qualify for an assessment. This requirement of carer assessment first appeared in Section 8 of the “Disabled Persons (Services, Consultation and Representation) Act 1986”, and was later

⁶⁶⁰ Care Act 2014, Section10(3).

⁶⁶¹ Statutory Guidance, <https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance> accessed April 15, 2019

⁶⁶² Luke Clements, “*Carers and their rights*,” chap 11 and 12 (pre-publication draft – March 2018) <http://www.lukeclements.co.uk/wp-content/uploads/2018/05/7th-ed-draft-Carers-Guide-11.pdf> accessed December 2, 2020.

⁶⁶³ The Care and Support (Eligibility Criteria) Regulations 2015.

⁶⁶⁴ Guidance Care Act Fact Sheet <https://www.gov.uk/government/publications/care-act-2014-part-1-factsheets/care-act-factsheets> accessed December 2, 2020.

adopted in Section 1 of the “Carers (Recognition and Services) Act 1995” and all other Care Acts which were adopted subsequently. Under the new Care Act 2014, eligibility criteria for an assessment are expanded. Unlike previous Acts, it covers those carers who are providing emotional support⁶⁶⁵ in form of visits to adult disabled or elderly people living elsewhere.

6.8 Employment-Related Consequences of a Carer Role

As discussed above, the Care Act extends the eligibility criteria. The eligibility criteria measure that how the care taking responsibility of a carer affects the key tasks and role at home household activities, education, employment, recreation. Ability of people to work is directly affected by unpaid family care.

In employment context, it is significant to investigate the importance of carers who are engaged in paid employment. If seen in the context of UK economy, it sustains as many carers in work as is possible. But it is unfortunate that although it is treasury that enjoy the economic benefits from such a policy, the cost to make it possible in practice is born by local government. It is estimated that the common type of employment among carers is part-time and that many of them quit working altogether.⁶⁶⁶ As per the report of Public Accounts Committee in 2014, 2 million people quit employment and work every year in order to provide care which puts an additional cost on the government through the benefits

⁶⁶⁵ Care Act 2014, Section 9,10.

⁶⁶⁶ Carers UK, “Facts about,”

bill with no prospect of quality of life improving'.⁶⁶⁷ As the carers provide unpaid care and if there is decline in support by the State, the numbers of unpaid carers inevitably goes up.

The Flexible Working Regulations Statutory Instruments 2014 No. 1398 provides that most of those people employed continuously for 26 weeks or more are entitled to flexible working request. Previously the eligibility for entitlement of this right bore some limitations. For example, it was mandatory that the worker had to take care of a disabled child or had to be an adult carer, however, these limitations have been removed or relaxed since June 2014. Flexible working can be requested under many guides⁶⁶⁸ but mandatory is that preliminary application is in writing and is made under Equality Act 2010 under reasonable adjustment duty. Such requests must be considered by employer who is under statutory duty to consider such requests seriously except when there is clear business reason⁶⁶⁹ not to do or where an application for flexible working by employee has already been made in the past 12 months, though business-based refusal can be challenged in an Employment Tribunal⁶⁷⁰ on the grounds of unlawful discrimination based on disability.

The only provisions that directly protect carers as carers, under Equality Act 2010, are those on direct discrimination⁶⁷¹ and harassment which is a long-established principle of equality law. Direct discrimination can include employer's refusal to offer a job or less favorable treatment because of one's caring role. Associative discrimination is a form of direct discrimination and pose a challenge to the DDA 1995 provisions that requires the

⁶⁶⁷ House of Commons Committee of Public Accounts Adult social care in England HC 518 (Stationery Office 2014),6.

⁶⁶⁸ Advisory, Conciliation and Arbitration Service (ACAS) The right to request flexible working: an ACAS guide (2014).

⁶⁶⁹ Employment Rights Act 1996, Section 80G.

⁶⁷⁰ Ibid, 80H.

⁶⁷¹ Equality Act 2010, Section 13.

claimant to be a disabled person himself as in *Coleman vs. Attridge Law (A Firm)*.⁶⁷² There will be associative discrimination if a policy or practice has disadvantaged someone due to his association and caring role to a disabled or aged person. Sharon Coleman claimed her forced resign from job as a legal secretary who was refused flexible working hours to provide care to her disabled son. She brought her case under the DDA which said that discrimination plea can be taken on the grounds of the claimant's disability not the carer.⁶⁷³ The Attridge Law firm took the defense that the DDA could not be interpreted in the light of EU Directive⁶⁷⁴ irrespective of its meaning/aim. The defense was declared wrong by EAT; however, it reserved its judgment and referred the case to the European Court of Justice (ECJ) to correctly interpretate the Directive where Ms. Sharon Coleman's suit against the law firm succeeded and termed as great success in both common sense and legal clarity.⁶⁷⁵

Similarly, in July 2015 in *Truman vs. Bibby Distribution Ltd*,⁶⁷⁶ an employee with satisfactory performance and good reviews was suddenly dismissed by employer due to his time off for his caring responsibilities for his disabled daughter.⁶⁷⁷ It was held by ET that direct discrimination was made against Mr. Truman on the basis of his daughter's disability. A remedy hearing was arranged to decide on compensation to the carer.⁶⁷⁸

⁶⁷² *Coleman vs. Attridge Law (A Firm)* (C-303/06) [2008] All E.R. (EC) 1105.

⁶⁷³ Ibid.

⁶⁷⁴ EU Equal Treatment Framework Directive 2000.

⁶⁷⁵ *Coleman vs. Attridge Law (A Firm)* (C-303/06) [2008] All E.R. (EC) 1105.

⁶⁷⁶ *Truman vs. Bibby Distribution Ltd* ET/2404176/2014 <https://www.crunch.co.uk/knowledge-employment/disability-discrimination-what-makes-a-worker-disabled-under-the-equality-act-2010> accessed March 12, 2020.

⁶⁷⁷ Ibid.

⁶⁷⁸ Ibid.

On care and support for PWDs, Care Act and supporting guidance provides detail on new duties and responsibilities of local authorities to improve the wellbeing and independence of carers in UK.

6.9 Concluding Observation on the Progress Report of United Kingdom

Concluding observation of the CRPD on UK's progress report gives an image of the monitoring and realization situation of UNCRPD in a developed country having appropriate legal framework. It may be used to give a glance of the apathy in developing world with no or underdeveloped laws on disability. In August 2017, the group of international experts in Geneva reviewed the UK's progress against the UNCRPD to see how it is being put into practice. The report of the CRPD known as "Concluding Observations" was published containing a list of issues about disability rights in the UK. The government of UK was given 80 recommendations for action and realization of UNCRPD.⁶⁷⁹

Concluding observations begin with the concern of CRPD on UK's performance for consistent application and implementation of the UNCRPD in all fields of PWDs' life. A direct concern was shown on the incomplete review of laws and policies in UK. It was recommended to implement a measurable and fully funded action plan to abolish any discriminatory practice, custom, regulations, policy, and law. CRPD suggested to enforce all the provisions of the Equality Act 2010 specifically the "reasonable adjustments duty" (more significantly to the shared parts of residential properties).⁶⁸⁰ Any disadvantage to

⁶⁷⁹ How well is the UK performing on disability rights? The UN's recommendations for the UK, https://equalityhumanrights.com/sites/default/files/ehrc_un_crp_report.pdf accessed Dec 12, 2020.

⁶⁸⁰ Ibid.

PWDs should be rectified by changing criteria, provisions, standards, and practices in addition to changing the physical environment.

CRPD recommended the review of the criteria for “accessing social security and support”. Since 2010, the UK government introduced a range of measures including the bedroom tax and cuts to disability benefits which threw negative impact on PWD’s lives.⁶⁸¹ The campaign group “Disabled People Against Cuts”, termed the act shameful for UK if such backward move is happening in one of the richest nations of the world.⁶⁸² CRPD recommended the protection of the income levels of PWDs and their families and that the government must consider and pay extra costs attached with disability. It too recommended to repeal the Personal Independence Payment (Amendment) Regulations of 2017. Some UK laws on legal capacity of a PWD under Article 12 and on low awareness on access to justice under Article 13 were criticized.

Concern was shown on UK’s reservations on Article 18 of “liberty of movement and nationality” and Article 24 of education. CRPD objected UK’s reservations as they limit not only the impact of these Articles but the whole convention in the UK with respect to immigration and education. CRPD recommended development of laws and policies to support inclusive education and removal of the reservations. CRPD observation on Article 27 regarding work and employment says that PWDs are still less likely to be in employment in UK and not enough is done to gain and maintain employment. It mentioned that

⁶⁸¹ Carers UK : Making Life Better for Carers, <https://www.carersuk.org/help-and-advice/financial-support/help-with-benefits/bedroom-tax?gclid=EAIaIQobChMIIn8nZjben7gIVAevtCh253AyVEAAAYASAAEgKUD> accessed November 3, 2019.

⁶⁸² Ellen Clifford, “Disabled People Against Cuts,” <https://finance.yahoo.com/news/tuesday-night-kitchener-ellen-clifford-142355099.html>

“employment and support allowance” is not adequate and that “work capability assessment” is not an enough remedy to address all work-related issues and barriers faced by PWDs.

In addition to some general obligations discussed above, CRPD made observations on few specific obligations on data-collection, inter-State co-operation and monitoring progress covered in Articles 31 to 33. It recommended joined-up system of data collection to better measure and compare of the circumstances of PWDs. On the point of international cooperation, the CRPD expressed its concern on the non-systematic support of UK to developing countries on the inclusion of PWDs in all its programs. CRPD demanded UK to update the “department for international development’s disability framework”, requiring all concerned public bodies and government departments to assign overseas development aid in all programs related to PWDs. While reflecting on national monitoring and implementation under Article 33, CRPD observed that the ODI, a focal point within UK government under UNCRPD, lacks funds and resources required for the coordinated enforcement of the UNCRPD across the UK. UK Independent Mechanism (UKIM) which is an independent monitoring framework to monitor UK’s compliance with the UNCRPD also lacked income and resources.⁶⁸³ The UK govt was stressed by CRPD to involve PWDs and DPOs when implementing all its recommendations and to include and provide information on the implementation progress of the CRPD’s recommendations along next progress report of UK by July 8, 2023.

⁶⁸³ How well is the UK performing on disability rights? The UN’s recommendations for the UK. https://equalityhumanrights.com/sites/default/files/ehrc_un_crpdr_report.pdf accessed December 12, 2020.

6.10 Investigation of the Committee Against United Kingdom

In addition to review procedure of the periodic reports received from the States, the Optional Protocol to the UNCRPD- signed by UK government- enables CRPD to carry out an investigation and inquiry after receiving reliable evidence about the serious and systematic violations of PWDs' rights.

The CRPD began receiving information in early 2012 regarding the alleged negative impact on persons with disabilities of the UK's legislative and policy reform process. In 2014, evidence from a variety of sources, especially DPOs, was received by CRPD against UK for nonfulfillment of PWDs' rights. According to reports, the welfare reform's execution has resulted in the introduction of severe reductions in social assistance, jeopardizing numerous of the rights of people with disabilities. In 2015, the CRPD opened an investigation for breaching its obligations under UNCRPD. The investigation was initiated under Article 6 of the optional protocol, which provides that an investigation will be carried out once the CRPD receives "reliable information indicating grave and systematic violation of the human rights of persons with disabilities."⁶⁸⁴ The government of the United Kingdom was investigated. CRPD launched an inquiry based on the overall impact of changes to law and policy in the UK since 2010 particularly in respect of Article 19, Article 27, and Article 28. In relation to Article 27 of the UNCRPD, the inquiry report mentioned that the collected evidence indicates several flaws in the processes related to the employment and support allowance.⁶⁸⁵ Para 113 of the report talks about the systematic

⁶⁸⁴ Optional Protocol to Convention 2006, Article 6.

⁶⁸⁵ Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 6 of the Optional Protocol to the Convention (Follow-up report submitted by the United Kingdom of Great Britain and Northern Ireland) , para 102 <https://digitallibrary.un.org/record/1311200?ln=en#record-files-collapse-header> accessed June 12, 2021

violation of the UNCRPD. A concern among many was that large number of PWDs have been reliant and dependent on social benefits which must be discouraged. It also mentioned lack of a comprehensive human rights-based cumulative impact assessment despite being feasible.⁶⁸⁶ CRPD recommended UK to set up a mechanism and a system of human rights-based indicators to track the effect of various policies and programs relevant to disabled people's access to and enjoyment of the right to social inclusion.⁶⁸⁷

6.11 Conclusion

It is significant to believe that law and resulting public attitudes to disability in UK has improved in the past two decades in both social and legal aspects, but discrimination is still experienced by PWDs. Equality Act 2010 aimed to be UK legislation for equality and diversity. By replacing the previous legislation i.e., DDA 1995, it created one general Act to follow instead of lots of smaller ones. The Act pushes for a consistency across the board. It legally protects people with protected characteristic from discrimination in wider society particularly in workplace in the light of rich disability discrimination case law under the Act (DDA too). However, disability-based discrimination varies from that of other protected characteristics under Equality Act 2010 which may cause loss of focus on disability discrimination. Reviews of the CRPD on law and policy situation of UK says that the number of PWDs in employment is less with low payment on average than non-disabled persons. Committee showed dissatisfaction on UK's efforts to ensure that disabled people can gain and maintain employment.⁶⁸⁸

⁶⁸⁶ Ibid, para 113.

⁶⁸⁷ Ibid, para 114.

⁶⁸⁸ How is the UK performing on disability rights- The UN's recommendations for the UK.
https://www.equalityhumanrights.com/sites/default/files/ehrc_un_crpdp_report.pdf accessed April 29, 2018.

Care Act 2014, as adult social care law in England, has given tremendous upward shift to carers rights in UK after 2014. It takes carers no more as unpaid care-service providers for PWDs but recognize them as right holder that have same rights to reasonable adjustments, for instance, as are currently available to PWDs. A simple change to the Equality Act 2010 will turn the situation more helpful for cares where reasonable adjustment should not be generally perceived as a form of compensation to a disabled person or carer.

CHAPTER7: LEGAL REFORMS AND PROPOSED FEDERAL DISABILITY LEGISLATION

7.1 Introduction

Disability legislation and Acts work as a direct instrument to address and abolish discrimination against PWDs. UNCRPD manifests that adoption of social model of disability through legal reforms is an effective tool to bring change in PWDs lives.

The only outdated federal law for the welfare of PWDs in Pakistan was passed in 1981 that proved to be a token law over the period because it does not meet the legal and administrative advancement for the rehabilitation and mainstreaming of PWDs. Courts in Pakistan have attempted to address some of the disability issues, but these are not up to the mark. SC has reiterated and directed the federal and provincial governments to implement its orders, but this alone proves to be an insufficient tool to curb disability discrimination if legislation and its implementation is not ensured on urgent basis.

Keeping in view the above situation, Government of Pakistan requires to guarantee compliance with UNCRPD and other standard human rights instruments by enacting federal model legislation on disability discrimination. As a model templet, the following proposed legislation provides insight as to which issues may be sensibly examined in future to shape modern disability specific legislation. Besides, a comprehensive and specified disability rights legislation, significance of CA is discussed as a source to offer new understanding of the need and way to structure laws.

7.2 Significance of the Capability Approach in Structuring Laws

The significance of the capability approach is that it pays significant attention to implementation of laws/policies and takes the enforcement of development efforts as a path to the realization of disability rights enshrined in UNCRPD.⁶⁸⁹ Capability approach enriches the discourse on laws and offers new understanding of the need and the way to structure laws. Identification of the areas of “fit and match” between the capability approach and law on current legal and social status of disability in Pakistan offers for more development. For example, it throws light on the justice aspect of features of labor law such as affirmative action, importance of flexibility, learning, and freedom/autonomy at work.

Unlike other theories of Justice, capability approach does not revolve around income, commodities, and basic needs only but address core UNCRPD issues such as discrimination, social injustice and inequality, non-participation, and vulnerability. As a subject of the welfare policies of the developing countries, equal distribution of primary goods is therefore not enough for this purpose. The required is the need of capacity and capability to convert resources into activities one value because it varies among different people. It insists on the “*equity and efficiency of the substantive opportunities that people can enjoy*”.⁶⁹⁰ Capability approach, therefore, considers and demands universal access to basic capabilities that are valued by all because they are essential for survival. This reflects the idea of equality and equal participation embodied in UNCRPD.

⁶⁸⁹ Implementing the United Nations Convention on the rights of persons with disabilities: principles, implications, practice and limitations
<https://www.sciencedirect.com/science/article/pii/S1875067211000204> accessed May 6, 2019

⁶⁹⁰ Amartya Sen, “Human rights and capabilities,” *Journal of Human Development*, 6(2005): 151–166.

Capability approach can be used as a substantial tool to assess the adverse impact of the use of rejected disability approach (segregation) in the field of education, employment, and day to day lives of PWDs. For instance, there is a limited access of PWDs in Pakistan to quality education who are mostly bound to low quality special education schools. Poor education creates limited employment opportunities for PWDs that results in provision of limited skills for the labor market. Education in this case is a “personal characteristic” that influences work as a “capability or as functioning” of a PWD with adverse and discriminatory impact on their routine lives.

7.3 Capability Approach on Human Development and Freedom

After UNCRPD ratification, some little disability efforts have been made but their impact on PWD’s day to day life is very limited or even negligible. Many factors impede the struggle in the field of disability policy and legislation in Pakistan. Public policies designed to tackle disability issues remained limited to the provision of few services. The transition of action plans into visible and workable actions is also a challenge. For instance, if accurate disability data is collected with improved methodology, problem persists on translation of these findings into effective policy to initiate social change in a visible and workable manner.

Capability approach is concerned and connected with the advancement of human development and freedom. It takes human freedoms as primary ends as well as the principal means of development and offers a new basis for evaluating disabling situations.⁶⁹¹ It emphasizes on the need to strengthen potentialities and enhance capabilities of PWDs by

⁶⁹¹ Amartya Sen, *Development as Freedom*, (Oxford, UK: Oxford University Press, 1999)11.

considering their diversity and working towards equality of opportunities, empowerment, and participation.⁶⁹² This notion of capability approach helps in constituting a relevant ideal framework for disability law/policy and its implementation. Vulnerability of PWDs would be reduced in this way. In other words, the vulnerability of PWDs will be reduced when social model of removing societal barriers is blended with CA's basis of disabling situations.

7.4 Required Domestic Change

Steering away from traditional frameworks of human rights treaties, UNCRPD provides for comprehensive action at domestic level. Its effective implementation needs disability to be fitted in a comprehensive human rights practice both in form of national disability-law adoption and reform and strategic disability litigation in courts. The transposition of international human rights standards and incorporation of a disability rights perspective into the constitutional framework of the country results in strengthening the rights that may already have existed but were neglected. This, for example, may be achieved through the incorporation of international human rights standards into the constitutional framework through legislative approach instead of judicial approach only. As a result, this will offer both substantive and procedural change.

Similarly, the domestic incorporation of disability rights law through legislative change is an essential and significant step in bringing international human rights law home. UNCRPD demands the manifestation of engagement of the States with their own domestic-level disability laws and policies on at least three correlated stages. At first stage, the State

⁶⁹² Ibid.

must decide whether it will ratify the UNCRPD, and then adjust its own national level schemes accordingly⁶⁹³ or adopt some interim measure. Secondly, each State needs to evaluate its individual sociolegal circumstances and replace all discriminatory practices with equality measures.⁶⁹⁴ At third stage, each member State must resolve unsettled interpretations of existing disability-related law or those not addressed by domestic laws. CRPD provides a detailed structure for this within which disability-law framework of a country may be placed to be developed in accordance with a given legal system and culture.

7.5 Two Recent Supreme Court Judgments on Need for Disability Specific Legislation

Two important judgements of the SC in July 2020 can be termed innovative for disability legislation in Pakistan. However, the legal issue in both cases was the manner of allocation of 2% disability quota for employment under Disability Persons (Employment and Rehabilitation) Ordinance, 1981. Both these judgements of the SC reflected the demand and significance of the adoption of UNCRPD.

In first case titled *Dr. Shahnawaz Munami & Others*,⁶⁹⁵ the SC ordered the federal and provincial governments to ensure equal participation of PWDs in the society. Government was directed to take specific/concrete steps in this regard. Para 11 of the judgment demands government to “make every possible effort to ensure that existing laws

⁶⁹³ Anne-Marie Mooney Cotter, *This ability: An International Legal Analysis of disability Discrimination* (Routledge: 2007):100-20

⁶⁹⁴ Take, for example, the E. U. Framework Directive, prohibiting discrimination in employment on the basis of disability. See Council Directive 2000/78/EC, art. 12, 2000 O.J. (L 303) 17 (EU).

⁶⁹⁵ *Dr. Shahnawaz Munami and Others* vs. The Federal Government of Pakistan and others Constitution Petition No.64 2013 https://www.supremecourt.gov.pk/downloads_judgements/const.p._64_2013.pdf accessed June 7, 2019

are vigorously implemented”.⁶⁹⁶ It imposed positive duty on State and various public agencies. In another judgement of the SC titled *Malik Ubaidullah vs. Government of Punjab*,⁶⁹⁷ Justice Mansoor Ali Shah directed the discontinuation of the use of “derogatory words” in official documents. On the status of laws, the existing framework of disability laws was declared medical oriented in para 4 of the judgment. It required the laws to be based on “social model” of disability which needs society to remove and alter discriminatory barriers rather focusing on individual impairment.⁶⁹⁸

SC exercised its jurisdiction under Article 184(3) of the Constitution in pronouncing both these judgements and examined the rights of PWDs in context of fundamental human rights of persons under Part II of the Constitution. These decisions have the status of law under Article 189 of the Constitution meaning that relief for infringement of these decisions can be sought in high courts. However, the need for a modern legislation to bring positive and innovative changes to PWD’s lives cannot be substituted. Reference may be made to Indian HC judgment which says that “*it is the mandate of the legislature to include or exclude conditions that constitute disability and hence lies beyond the capacity of the courts to give remarks.*”⁶⁹⁹

Above judgements elaborate the need for a comprehensive well debated disability discrimination legislation in Pakistan. At present, SC has given recommendations relating to the individual claimants, but they can be hardly of direct benefit for other PWDs. The new elaborative proposed Act will let courts and tribunals to make wider interpretations

⁶⁹⁶ Ibid.

⁶⁹⁷ *Malik Ubaidullah vs. Government of Punjab* PLD 2020 SC 599.

⁶⁹⁸ Ibid.

⁶⁹⁹ *Harpal Singh vs. Union of India* 50 (2008) DLT 209.

and recommendations in discrimination cases preventing similar types of discrimination occurring in the future.

7.6 New Law to Curb Disability Discrimination

Developed countries have created anti discriminatory disability laws over the past decade particularly after entering into force of the UNCRPD in 2008. UNCRPD proved to be a quickly supported human rights instrument in UN history. The quick entry into force of the Convention shows the miserable situation of PWDs over the globe generally and in developing world particularly that needs legal intervention both at national and international level.

The principal aim of disability law is to curb disability discrimination in all fields of life enabling PWDs to live independently and be protected against all forms of abuse, violence, and exploitation. Developing countries either did not have laws or have inadequate obsolete laws to address the rights of PWDs. Pakistan is not an exception. Some moves in the form of inadequate bills and provincial Acts have been made under political pressure, but it does not meet the required standards of disability legislation. In Pakistan, judgments of the superior courts on the issues and rights of disables are used to fill the gaps only but this cannot substitute rationally developed plans; adequately resourced facilities and above all a well debated legislation about PWDs. All that is needed is to recommend new and updated law in respect of disability.

Disability laws and Acts are the instruments through which disability discrimination can be abolished. Newly enacted law and other measures will prove a direct source to contribute to the realization of UNCRPD and other international human right standards.

These standards for PWDs particularly include their political participation and social inclusion, equity in education and employment, equality before the law, ease of access and mobility and fulfillment of reasonable adjustment duty.

7.7 Proposed Federal Legislation

The new proposed Act may be called “Pakistan Disability Act” (PDA) that will be in the form of a federal legislation helping Pakistan achieve its obligations under UNCRPD. The Act will give effect to UNCRPD, and other matters connected therewith or incidental thereto. It will fulfill the theme of UNCRPD and other benchmark international standards to overcome social, legal or any other impediment and discrimination faced by PWDs in Pakistan. The new legislation will treat disability discrimination on preventive, proactive and investigative grounds.

The said model Act will be a bridge of collaboration among various organizations and establishments working on a non-political and non-commercial basis. It will provide for the creation of a special body/department to work in close liaison with human right ministry. This special department will limit its operations exclusively to the rights of PWDs in the light of UNCRPD.

Act will contain noteworthy improvements in the field of education and employment of PWDs. Following principles for the empowerment of PWDs will be embodied in the Act.

- Non-discrimination,
- Inclusive society with full and active participation of PWDs,

- Respect for inherent dignity and individual autonomy,
- Respect for difference and acceptance of PWDs as part of human diversity,
- Equality of opportunity,
- Freedom of choice,
- Accessibility and reasonable adjustment,

The model Act will cover areas and issues of disability under various titles/chapters. Title I, for instance, will cover issues of employment and education of PWDs. Title II will be on provincial and local government activities. Title III may address public accommodation. Title IV may cover telecommunication services for PWDs.

7.8 Salient Features of the Proposed Act

To make disability discrimination law more effective and vibrant, new proposed Act will entertain innovative legal reforms to address all challenges of disability discrimination in Pakistan (previous law is almost silent on these aspects and issues of disability discrimination). Main features of the Act are as below.

I Purpose of Disability Legislation

The Act will be 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.”*⁷⁰⁰

II Participation During Consultation on Legislation

PWDs in personal and representative capacity will be made a direct part of the consultation process. The 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

The issue of disability enumeration will be addressed by the Act. Act will 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

⁷⁰⁰ Convention 2006, Article 1.

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 will 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 will 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 restricts its coverage to specific individuals and use the term “includes”⁷⁰¹ to keep its application open. Act will 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” will 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

⁷⁰¹ Convention 2006, Article 1

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 will be clear enough that a PWD is a person who possess physical or mental impairment limiting one or many of the main activities of life. It may include person who maintains a history or record of any such impairment.

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 in true sense, definition of disability can be placed into two groups. One may be the official definition of disability developed 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. Nonfulfillment 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 UNCRPD 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, 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 UNCPRD 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.⁷⁰² It will prohibit the employer to draw conclusions about disability where conditions exist. The proposed model 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.

⁷⁰² *Chief Constable of Norfolk vs. Coffey*, [2018] UKEAT/0260/16/BA.

X Rights of the Caregivers

Laws and courts in Pakistan are completely silent on the innovative idea of caregiving 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, caregivers may have to look after the financial, social, and personal needs of a PWD. Caregiving 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.

A “caregiver” in new proposed model Act will be a person who “provide or intends to provide unpaid care to a family member, relative or friend.”⁷⁰³ 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 needs to 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 caregiving 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

⁷⁰³ Care Act 2014, Section 10(3).

“reasonable adjustment duty” of the employer/service providers based on caregiving 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 caregiving 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 caregiving allowance. In advanced countries on the globe, the caregiver should provide at least 20 hours per week caregiving to be entitled to said allowance.⁷⁰⁴ Caregiving should not be placed as family’s private responsibility. The new model 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 caregiving 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).

The representative organizations like NGOs catering to the needs of PWDs and their caregivers, will stay active and vocal in advocating the policies for Newly Proposed Act i.e., family care policies.

⁷⁰⁴ BW, 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.

XI Accessibility Issue

The Act will contain a separate section in detail 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.

Model 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, a transportation and telecommunication accessibility with modification to discriminatory policies to make them accessible will be covered by the law. An accessible information technology system can be used as a tool to be operated in number of ways as

it is not dependent on a single sense or ability of the user. 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.⁷⁰⁵ Language of the Act will not entertain “standard reasonable adjustment criteria” because the proportion of reasonableness may vary from case to case.

Nonfulfillment of “reasonable adjustment duty” in traditional sense is usually met by compensation to a PWD. However, the Act will take it as a device requiring employers and others to fulfil 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” (discussed in context of UK law and court cases in Chapter 6).

Act will accommodate very new forms of reasonable adjustments including pay protection,⁷⁰⁶ poor memory caused by disability,⁷⁰⁷ reduction in hours,⁷⁰⁸ expectation to

⁷⁰⁵ *Vikash Kumar vs. Union Public Service Commission & Ors.* [Civil Appeal No. 273 of 2021 Special Leave Petition (C) No. 1882 of 2021].

⁷⁰⁶ *G4S Cash Solutions (UK) Ltd vs. Powell* [2016] IRLR 820 EAT.

⁷⁰⁷ *Perratt vs. City of Cardiff Council* EAT/0079/16.

⁷⁰⁸ *Ring vs. Dansk almenntilgitt Boligselskab DAB; Skouboe Werge vs. Dansk Arbejdsgiverforening* Cases C-335/11 and C-337/11 ECJ.

work late,⁷⁰⁹ and employer's duty to consider all reasonable adjustments before performance reviews.⁷¹⁰ 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 justice⁷¹¹ 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

⁷⁰⁹ *Carreras vs. United First Partners Research* EAT/0266/15.

⁷¹⁰ *South Staffordshire and Shropshire Healthcare NHS Foundation Trust vs, Billingsley* EAT/0341/15.

⁷¹¹ Convention 2006, Article 13.

duty and escape justice 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 new model 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.⁷¹² Amendments to the existing codes in Pakistan will improve the situation.

To facilitate all this, Act will contain another 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 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.

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 form of notification by the chief justice of the High Court.

⁷¹² *Robinson vs. Farley* 1:15-cv-00803-KBJ (D.D.C.).

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.

XVI Penalties for Offences Against Disables

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.

7.9 Employment Discrimination-Related Provisions of the Act

Act will cover various employment discriminations in separate chapters/sections. It will have separate chapters on

- Law preventing local public organizations from discriminating against PWDs.
- Private businesses to prohibit discriminatory standards.
- Employment practices not to be discriminatory.

In addition to specific chapter on employment and workplace discrimination, the Act will be assisted by following documents and bodies.

I. Explanatory Guide/Schedule

The Act will be provided with a guide for employers and employees to understand their obligations and rights. It will focus on the impact of disability on the person in relation to the working. The guide will be based on constitutional principle of non-discrimination. The said guide may be read in conjunction with already existing codes, laws and by laws issued or followed by ministry of labor.

II. Pre-employment Medical Checks and Queries

The guide will provide for a detailed procedure on enquiries about disability and health. The provision will restrict the use of “pre-employment medical questions” and will place legal limitations on pre-employment medical checks. If the purpose of the pre-employment questions is not clearly explained with reference to the statutory exceptions, then refused job applicants who have been disadvantaged by those questions may bring legal proceedings to claim damages.

III. Work Confidentiality

The Act will have a Schedule to address the issue of confidentiality and privacy of a disabled employee that is almost a neglected aspect of existing employment and labor laws. Employers and medical services personnel will ask personal and health info only necessary to obtain legitimate purpose that include employment and reasonable adjustment duty of the employer. Employer can not disclose any disability related information of the employee without written consent of the concerned employee unless legally required. The information will be destroyed when no longer required.

IV. Employment Equity Planning

The guide will contain a separate part/chapter entitled “Employment Equity Planning” which will contain guidance on additional affordable measures by the establishment to ensure the equitable presentation of a disabled employee in the workforce.

V. Specific Employment Exchange

There will be a “Specific Employment Exchange” established by the government for the collection and furnishing of information about PWDs which will be utilized during employment phase of the PWDS. To facilitate the process, it will contain the record of employers who seek and engage PWDs as employees.

The labor department through specific employment exchange will be made responsible to ensure the availability and accessibility of the copies of the Act and explanatory guide to PWDs.

7.9.1 Employment Quota for Persons with Disabilities

Existing disability law on employment quota to PWDs in Pakistan is not clear in respect of both allocation and implementation. If analyzed under the spirit of UNCRPD, it too does not mention any quota allocation in employment and education. UNCRPD makes no mention of quotas. It believes in the provision for equal educational and employment opportunities particularly to overcome negative stereotypes about the working capacity of PWDs. However, in a developing country like Pakistan, quota system or else pay a penalty to encourage employment can be used as a starter and an initial step to change attitudes towards PWDs.

New federal disability law should contain a well-elaborated provision containing that employer of all public and private establishments with more than 50 employees must recruit 3% of their total staff from among disabled workers if s/he holds the essential and required qualifications for the job one has applied. Such quota must be judicially enforced through the imposition of a civil fine between Rs. 20000-40000. In case of violation of this provision of the proposed Act, an employer will be compelled by law to deposit the amount equal to their minimum remuneration in the rehabilitation fund established for PWDs. In collaboration with national labor law, effective utilization of such fund will be ensured. Such fund will be used to finance small, medium, and micro enterprises targeting to eliminate the workplace discrimination against PWDs.

Quota schemes will be in place along with anti-discrimination legislation. Act will too contain a detailed provision on quota scheme for PWDs who can claim seats on merit. Act will address to ensure productive jobs for PWDs by highlighting the significance of employment promotion, employment security and working time under a separate provision titled as “fair recruitment.”

7.10 Monitoring and Enforcement

New Act will give legal details on the implementation of the legislation because the inadequate enforcement of the Act could not root out routine discrimination. A separate chapter will give details of the court a disability discrimination case can be brought in with details on its jurisdiction, time limit and available remedies. New legislation will contain provision to allow tribunals and courts to transfer connected cases providing more relief to disabled individuals.

Most of the disability discrimination cases go unchallenged under the current individualized approach and enforcement. Solution to the individual litigation and enforcement can be the proactive enforcement bringing a successful disability discrimination claim against the Local Government Ombudsman as a Litigant in Person. It is important that such claims must contain a plea that organizations are not fearful of breaching the disability law.

Following tools based on both “hard” and “soft” methods can be used to make sure new legislation is followed and enforced.

- **Recognition of Efforts and Incentives** – Organizations and individuals should be rewarded for their efforts when they succeed in improving access for PWDs.
- **Intervention Procedure** – If an organization encounters problem in following the legislation, PWDs, their representative organization and the government can mediate to find a solution.
- **Fines and Penalties** – A culture of penalties and fines should be introduced if organizations avoid following legislation and make no efforts to address issues faced by PWDs’

7.11 Monitoring Body and its Organization

A robust and vigorous monitoring framework is mandatory to evaluate the implementation status of the law. The Act will provide operational foundation for monitoring. There will be work collaboration between officials at federal, provincial, and local levels.

7.11.1 Disability Rights Department

There will be a proposed “Disability Rights Department” (DRD) under the Act. It will be an independent federal statutory body mandated to promote and protect the rights of PWDs in all fields of life. As a statutory body, DRD will advise the government on the effectiveness of the new legislation. It will receive complaints based on jurisdiction and disability status. The DRD will have the authority to make formal and informal settlements of the discriminatory matters or may file a lawsuit in disability tribunal to facilitate PWDs to be equally treated in the justice system.

The DRD may file lawsuits in federal court to enforce the Act. The cases in which DRD is not a party, it may file briefs (amicus brief) in selected cases to guide courts in interpreting the Act.

In case of formal settlement, the DRD will have a pecuniary jurisdiction to fine and then pay the individual harmed by the discriminatory action. Other than formal settlements, it will be authorized to accomplish tasks through informal settlements that may include extensive negotiations or promptly agreed settlements. “Referrals of complaints” for mediation will be made to professional mediators who have been trained in the legal requirements of the Act.

Law will be clear enough on the point that no suit will be filed unless the DRD has first unsuccessfully attempted to settle the dispute through negotiations either formal or informal.

The Information Line of the DRD will contain an information line to provide knowledge, information, and publications to the public about the requirements of the Act.

It will contain automated recorded services providing information on Act available to public 24 hours as a consultative forum.

7.11.2 Organizational Framework of the Department

Federal officials of the DRD will include

- PM Online or call the PM House,
- Federal Human Right Minister,
- Federal Human Right Representatives

In addition to the above three honorary members, DRD will contain;

- **Chief Commissioner:** Federal government will appoint Chief Commissioner for PWDs by notification in the manner prescribed by the Act. Chief Commissioner will be a full-time member appointed for a term of not less than three or more than five years. He will be a chief executive officer of the department who will preside at meetings of the DRD. He will also have a supervisory role over staff and directions of the DRD.
- **Deputy Commissioners:** To assist the Chief Commissioner, federal government will appoint two Deputy Commissioners for PWDs through notification. One of the Deputy Commissioners will be a person with disability. Deputy Commissioners will also be full- time members with same proposed tenure as of the Chief Commissioner.
- **Secretary-General:** Secretary-General will be chosen for a term of two-years.

- In addition to above mentioned 3 honorary members, there will be 2 more honorary members from DPOs or various organizations in relevancy to the issue considered by DRD.
- Not less than three and more than six other part-time members of the department will be appointed for a period of not more than three years.
- On the recommendation of Chief Commissioner, federal government will notify appointment of officers and other employees required to assist the Chief Commissioner in fulfilling his functions- dependent on the nature of the task.
- In the absence, incapacity of the Chief Commissioner or on vacancy of his office, any of the Deputy Commissioner has all the powers to execute all the duties and functions of the Chief Commissioner.
- Any member of the Committee will be eligible to be re-appointed in the same or another capacity.

7.11.3 Sub-Branches of the Department

DRD will have five sub-branches as under,

I. Complaint Service Branch

It will cover investigation, reconciliation, and mediation in discrimination cases.

II. Corporate Service Branch

It will manage administrative and financial matters. Under this branch, federal and provincial funds will be created to manage financial matters of the DRD and provide financial support to PWDs as well. To defeat the lazy provisions of Ordinance 1981 in

form of nominal penalty funds, practical and measurable goals will be mentioned to collect and utilize all discrimination penalty funds effectively.

III. Legal and Policy Branch

It will contain legal service division providing legal services on pro bono basis. It may include free legal aid to enforce laws and by-laws. It will ensure consistent and coordinated legal and policy efforts, advice, and support to the Chief Commissioner and all others in the Department. This branch, in collaboration with Information and Communication Branch, will prepare annual performance report to be submitted to Chief Commissioner.

IV. Employment Equity Branch

Employment equity will be checked through performance measurement, policy evaluation, and international status of affairs.

V. Information and Communication Branch

It will deal in human resources, information management, and information technology. It will provide information to public through the Committee website, media engagement, and social media platforms.

7.11.4 Role and Mandate of the Department

The Department will target to achieve core principle of equal opportunity and works to prevent discrimination. It will work closely with federally regulated employers and service providers, unions, and provincial, territorial, and international disability rights bodies to promote understanding of their rights.

It will also be mandated with “case and complaint management” to promote public interest of the PWDs. Following areas must be highlighted.

I. Power of the Chief Commissioner

Chief Commissioner in discharging his function under the Act, will be assigned the power of civil court as are vested in any other court under the Code of Civil Procedure, 1908 while trying a suit, who may: -

- Summon and enforce the attendance of witness,
- Need production of any document,
- Require and ask any public record from any court or office,
- Receive evidence on affidavit and
- Appoint a commission to examine witness.

Every proceeding before the Chief Commissioner will be deemed equivalent to a judicial proceeding within the meaning of sections 193 and 228 of the Pakistan Penal Code

II. Online Grievance Redress Mechanism

The proposed Act will contain disability discrimination complaint mechanism against the State or local government or a public and private body where a PWD can register online complaint with the DRD on an already available complaint form. ‘Federal Grievance Redress System’ will be a detailed online program to give relief to victims of criminal law system. The complaint mechanism needs to be very clear and accessible to allow PWDs to access it without trouble. To improve standards of access to the justice

system and accommodate various disabilities, specific format will be provided in large print, Braille, electronic documents, or communications by video phone as required.

III. Annual Report and Evaluation

Annual report of performance will be submitted to Chief Commissioner who will provide it to the federal government. He may submit special reports if submission cannot be deferred till the submission of annual report.

Annual and special reports of the Chief Commissioner will be placed before both Houses of Parliament, along with a memorandum of action taken or proposed to be taken. It will require government to make annual report public on how well the legislation is working and what needs to be improved with focus on outcomes and results.

The report will contain a sub report on “incapacity Laws in Pakistan” that would be the compilation of national laws providing for the incapacity of PWDs.

The report will contain details on

- The follow up of legislation by establishments and organizations.
- The effect of legislation on the lives of PWDs.
- The complaints made and actions taken by government, DRD and courts to ensure compliance of establishments and institutions.
- The progress in realizing and executing the judgments of the SC.
- The transposition of the UNCRPD principles in national legislations.
- The performance of Pakistan to curb disability discrimination in comparison to other relevant countries (may be used as a model and example).

Report will be prepared and finalized after reviewed by each local jurisdiction to assure the accuracy of the data and its interpretation. A law involving local government in generating these reports based on complaint/investigation procedure is suggested.

- There will be a sub commission to DRD to work particularly on the preparation of periodic reports to be submitted to CRPD without delay. It will contain a review of Pakistani disability discrimination case law since Pakistan's ratification of the UNCRPD. The report should tell of what has been achieved by PWDs instead of what the govt intend or has done.

7.12 Provincial Disability Advisory Board

Provincial Disability Advisory Board will work at provincial level under DRD.

The Board at provincial level will consist of

- Governor of the Province
- Provincial Minister
- Provincial human right representatives.

The Board will have other officials as

- Chairman
- Deputy Chairmen (two)
- Part-time members (three)
- Honorary members (three)
- District Disability Officer (DDO)

The Board will do same function with provincial Jurisdiction as DRD will do at federal level in addition to special task assigned to the Board by DRD via notification. It will include annual progress report to DRD on provincial status and progress in respect of PWDs.

The Board will have a DDO as his member in each district who will be the head of District Disability Committee. Committee will work in collaboration with local government so that PWDs rights are recognized at gross root level and their voice is heard from neglected sector of the society. This will help to locate and appoint disability rights entities in each district to communicate PWDs voices to provincial and federal levels.

7.13 Conclusion

Disability law prevents discrimination against disabled person. Well debated legislation and properly planned and channelized policies can be the most effective mean to empower PWDs. Pakistan needs to make legal reforms considering UN disability standards and international best practices.

This Chapter covers how capability approach can be used as a source to understand the need and way to structure laws. A model federal disability legislation has been proposed. It highlights and absorbs all significant aspects of disability discrimination law in compliance with UNCRPD objectives and standard international practices. As an original contribution, the model federal disability legislation suggests proposals to create future disability legislation in Pakistan.

CONCLUSION AND RECOMMENDATIONS

Conclusion

The aim of this research was to suggest advancements in the legal framework on disability discrimination in Pakistan. To achieve the purpose, the past and current disability legislation of UK (an advanced, developed country and member State to UNCRPD) and India (a neighboring country with many social, cultural, and legal commonalities with Pakistan and member State to UNCRPD) on disability discrimination was studied and analyzed to draw insights from the UK and Indian legislation. Pakistan, with no comprehensive federal disability legislation, can thoroughly examine and evaluate the situation in above mentioned territories before designing its new model federal disability discrimination legislation. It will help new legislation to absorb such charms that will turn it into a practical law with definite outcome on the lives of PWDs than a piece of a legal document rather. Being an important legal tool for promoting the human rights of PWDs, UNCRPD provides global legal standards on disability rights. Pakistan, UK, and India have ratified this important convention. This needs them to bring paradigm shift in their disability legislation by adopting the standards of the Convention.

The situation of the PWDs in respect of social and legal status is not satisfactory in Pakistan. Currently, there is no comprehensive federal disability law except the obsolete Disabled Persons' (Employment and Rehabilitation) Ordinance, 1981. The Ordinance does not address the specific aspects of the rights of PWDs enshrined in UNCRPD and other advanced international standards. In such situation, judgments of the superior courts of Pakistan on the rights of PWD played a significant role and made noteworthy contributions

to address the issue. However, in the absence of a well debated legislation, this can fill gaps only.

Besides, no attempt is made to enact disability specific legislation, the existing laws are not tried to be amended to absorb the spirit of UNCRPD. The law still revolves around the welfare and charity-based approach for PWDs rejected by UNCRPD. Derogatory terms and poor definition of disability are still in use. Law does not provide for clear and precise legal definitions, concepts, and standards of disability. Law needs to be clear on the aspects of disability captured in the definition because well-being is affected by the characteristics on which the disability classification is based. Existing legal approach towards disability is based on medical model of disability that focus on the impairment of a person only rather than skills and capabilities. It needs to be addressed by law where “pure medical assessment” should be replaced by “social participation assessment.” Sole reliance on medical opinion can be placed in background if courts rely to resolve issues on claim and counterclaim basis instead of medical opinion.

Many new aspects of the employment discrimination and resulting law for PWD are unknown to existing law. It includes reasonable adjustment duty of the employer, constructive knowledge of disability by the employer, proof of substantial disadvantage, justification defense for failure to make adjustments/accommodations and less favorable treatment of the employee. It is important for Pakistani legal framework to include specific provisions on these aspects of disability law. Rights of caregivers have no mention in law in Pakistan and therefore are not invoked or referred in court cases of disability discrimination.

To channelize the existing plan and policies in right direction, it is necessary to have an exact count of persons living with disabilities. No hopes for the inclusive development, provision of services and equalization of opportunity for PWDs and monitoring can be made in the absence of an accurate estimate of their number. The State of Pakistan is unaware of the number of PWDs living within its territory. Law does not address the mechanism to be adopted to have sound disability statistics. Accurate collection and careful handling of all types of disability data must be addressed by law.

Enactment of laws is one thing; their implementation is another. The mere enactment of laws will not be considered an achievement unless they are implemented in their true spirit as well. PWDs can never be empowered by mere enactment of laws.⁷¹³ UNCRPD signifies the importance of monitoring and enforcement of the disability laws at national as well as at international level. The enacted law on disability discrimination will contain a detail on the role of government in enforcing the legislation. Clear enforcement tools like compliance notices, assessments, agreements, judicial review, and legal interventions must be practiced. All regulatory options in the legislation needs to be in consistence with the purpose and objectives of the legislation. Rather taking disability as a technical issue, four-pronged intervention must be practiced tackling the problem. It includes political (consistent policies), legal (effective laws and regulations) economic (financial resources) and social (awareness campaign) intervention simultaneously.

In the absence of advanced legislation on disability discrimination in Pakistan, the federal government of Pakistan has a responsibility to not only implement the orders of the

⁷¹³ *Rajive Raturi vs. Union Of India* , 15 January, 2019 <https://indiankanoon.org/doc/5817027/> ; *Disabled Right Group and Anr. vs. Union of India and Ors* (2018) <https://indiankanoon.org/doc/152494913/>

Supreme Court but also reform the laws and policies to ensure that they are in compliance with the international human rights obligations of the country. The required is to enact a comprehensive federal law to cater the needs of PWDs in pace with the advancement of UNCRPD.

Recommendations

Law:

- Law will address social and environmental impediments as discriminatory to full and equal participation of PWDs. The law therefore needs not to do more with the individuals (PWDs) but with the system and society.
- Under new legislation, Government of Pakistan should have a plan of action to abolish any customs, practices, regulations, and laws that discriminate against PWDs. All the obsolete laws discriminating against PWDs in their political and social participation are needed to be amended.
- Existing laws that do not specifically mention disability or PWDs but are very relevant to persons with disabilities must be amended to the extent to include PWDs. These include construction laws, family laws, contract laws, and guardianship laws.
- Those general laws that govern the rules and operation of the tribunal and courts system should be amended to adjust PWDs. Rules on legal aid, costs of the proceeding, and court processes and procedure may be amended to facilitate PWDs.
- Civil legal aid to PWDs should take two forms of legal help and legal representation.

- Law should give special relief to PWDs for not losing their appeal in disability discrimination cases by not having the right paperwork filed or any such technicality.
- Court will adopt the “principle of interpretation.” It says to opt one between two possible interpretations of a legal provision that enhances the objective of the Act to give legal protection to a PWD.
- On equal recognition before the law, supported decision-making law should be adopted than obsolete substituted decision-making law.
- Registration of PWDs will be made mandatory under the law.
- There should be unified way to measure and define disability.
- Statutory provision should be able to achieve its objective (proof of disability) independent of medical opinion and proof.
- Courts and tribunals by virtue of new Act should be empowered to remove or modify unenforceable and derogatory terms.
- Employment policy for PWDs will be brought under the direct cover of the new law with clear rules for decent work, equal pay, and reasonable adjustment duty.
- Law should create a proactive duty on employers to assure employment right of PWDs. Legislation should emphasize on rectifying cases of discrimination before their occurrence in the first place rather than after they occurred.
- New law must cover all workers with disability who work mainly or partly outside Pakistan.
- In case of violation of the disabled worker’s rights by employer, the onus of proof of discrimination and to bring an action against an employer is on the disabled

person in addition to the cost and the stress of providing medical by potential applicants. Law needs to shift this onus from individuals to organizations and employers.

- Regular and separate reporting on the success ratio of decided employment cases should be there to see how successful the new law is to address the challenges faced by PWDs in their day to day lives.
- Law will make it unlawful and criminal for employers to use disability-based discrimination against prospective or current employees.
- Legislation will adopt disability equality law in education than ineffective policies and programs.
- Education will be made inclusive with fully funded plan/policy stating tangible goals with concrete timelines.
- It should be a mandatory part of the higher education curriculum (law particularly) that country reports to CRPD will be at least evaluated and debated in seminars and workshops at university level. Report analysis and consequent recommendations by academic and disability subject experts should be sent to the concerned govt department/ministries to help to overcome the challenges.
- The new law should provide legal details on implementation and enforcement of the legislation, the most avoided segment of law making. National policies and plans, all responsible departments and government agencies should evolve names, purpose and functions that satisfy human right and UNCRPD aspect of disability laws.

- Adequate time frame for enforcement and sanctions for violations by public or private authorities should be devised to obligate authorities to perform positive duty instead of avoiding inequality and discrimination only.
- Basic human rights of PWDs such as right to education, employment and accessibility to public spaces can be administered and handled through administrative measures till such time that the appropriate laws have been drafted and implemented. Similarly, effective public awareness programs can also be utilized.
- In addition, Pakistan needs to domesticate UNCPRD. The said incorporation can be in any form such as the traditional and standard form (Act of Parliament), mentioning and borrowing the treaty language in drafting statutory provisions, mentioning relevant treaty in the preamble of the Act, and to refer to the treaty indirectly.⁷¹⁴

Education and Awareness

- In spectrum of social model of disability, awareness is the most important initial change. Pakistan needs to improve and strengthen its awareness-raising campaigns to bring positive change in society towards PWDs.
- To change the mind set on disability, people should be made aware of disability and disability laws in country.

⁷¹⁴ Niaz A Shah, "The Application of Human Rights Treaties in Dualist Muslim States," *Human Rights Quarterly*, 2(2022): 257 - 285.

- Disability camps for early detection and prevention of disability at federal, provincial, and district levels are recommended. Collected data should be divided by disability components across all sectors including housing, living arrangements, social protection schemes and accessibility to make plans, policies, and resources more result-oriented (Sen's view).
- Sensitization programs on inclusion, tolerance, empathy, and respect for diversity are recommended. Schools, colleges, and universities may be used as an initial forum for the purpose so that disability is perceived something beyond medical condition. Awareness on "causes of disabilities" instead of "effects of disabilities" will be best to sensitize society about the needs of PWDs.
- Efficient training on disability related issues for prosecutors, lawyers and judges by professional trainers may help to ease the situation for PWDs. The training component must cover innovative themes like recognition of the rights of family caregivers. Besides, refresher course may also be arranged for judges, lawyers, prosecutors.
- Greater awareness of the responsibilities of public servants towards PWDs in discharging their duties will improve the delivery of services to them.
- There should be increased awareness in the form of seminars, workshops. Courses be introduced at educational institutes. Universities shall promote teaching and research in disability studies including establishment of study centers for such studies.
- Celebrations of people with disabilities and their contributions to society at the national or local level is recommended to raise awareness. The celebration of

“International Day of Persons with Disabilities” or other relevant days and occasions may help.

- Alongside electronic and print media, religious institution can help in raising social awareness about PWDs and their rights. Religious institution such as seminaries and mosques in Pakistan can be best used to disseminate religious teachings to change societal attitude towards PWDs and address disability stigma and misconception existing in general masses.
- Furthermore, in the presence of strong faith of society in spiritual healers, laws forbidding practice by traditional, or faith healers to cure disability can be impossible to enforce.
- It is recommended to include spiritual healers in the mainstream healthcare and referral system as they are frequently the ones having first contact with individuals who are mentally or physically ill.

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