

**IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

**Present:**

Mr. Justice Manzoor Ahmad Malik  
Mr. Justice Syed Mansoor Ali Shah  
Mr. Justice Qazi Muhammad Amin Ahmed

**Civil Petition No.140-L of 2015**

*(on appeal from the order of Lahore High Court  
dated 02.12.2014, passed in ICA No.336/2013)*

Malik Ubaidullah

.....**Petitioner**

**Versus**

Government of Punjab, etc.

.....**Respondents**

For the Petitioner: Mr. Ishtiaq A. Ch.  
Advocate High Court  
appeared with permission of the Court  
a/w petitioner

For the respondents: Mr. S.N. Khawar, Addl. A.G.  
Mr. Asif Mahmood Cheema, Add. A.G.  
a/w Tariq Habib, DEO/D.R.

Date of hearing: 14.07.2020

**JUDGEMENT**

**Syed Mansoor Ali Shah, J.-** The Petitioner applied for the post of Senior Elementary School Educator Arabic ("**SESE [Arabic]**") on the disability quota ("**Disability Quota**") in pursuance to the advertisement put out by the Education Department, Local Government, Multan. According to the advertisement, in addition to the other posts, a total of 81 posts of SESE [Arabic] were advertised with 42 posts in female category and 39 posts in the male category at the Girls and Boys schools, respectively. Thereafter, only one Mst. Asma Qasim was appointed against the said post under the Disability Quota and the petitioner failed to secure a position. Admittedly, Mst. Asma Qasim with 62.78 Marks topped the merit list for the post of SESE [Arabic] under the Disability Quota and the petitioner with 43.53 Marks could not be offered a post. Aggrieved of not being offered a place,

the petitioner challenged the selection process under Disability Quota before the High Court by invoking its constitutional jurisdiction. His writ petition was dismissed vide order dated 28.10.2013 and so did his appeal before the High Court (ICA) vide impugned order dated 01.12.2014.

2. After hearing the parties and having gone through the record, the legal question that arises in this case is the manner of allocation of 2% Disability Quota for employment under the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 ("Ordinance").<sup>1</sup> The Ordinance requires that 2% of the total number of persons employed by an establishment at any time shall be "disabled persons".<sup>2</sup> In order to fully understand the allocation mechanism of the Disability Quota under the Ordinance, it would be useful to first understand the concept of Disability and the importance of role of employment in the lives of persons with disabilities ("**PWDs**") as compared to persons without disabilities.

#### CONCEPT OF DISABILITY

3. Disability means lacking one or more physical powers, such as the ability to walk or to coordinate one's movements, as from the effects of a disease or accident, or through mental impairment.<sup>3</sup> According to the UN Convention on the Rights Of Persons With Disabilities ("**CRPD**" or "**Convention**") ratified by Pakistan in 2011, 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.

#### Medical and Social model

4. There are two main threads to the concept of disability: the *medical model* and the *social model*. Both models regard disability as a difficult predicament commonly faced by people; however, while the medical model looks at disability as a

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<sup>1</sup> The Federal Law is now a Provincial Law 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.

<sup>2</sup> As described in the statute. The more socially acceptable term is persons with disabilities or persons with different abilities.

<sup>3</sup> Collins Dictionary – complete and unabridged, 12<sup>th</sup> edition 2014.

condition requiring medical intervention, the social model looks at it as a condition that requires the transformation of societal attitudes and state policies.<sup>4</sup> The medical model views disability as an impairment due to various health related factors which can be identified and eradicated through medical treatment.<sup>5</sup> While the social model identifies systemic barriers, negative attitudes and exclusion by society and argues that societal attitudes and environment are the main barriers for people with disabilities.

5. The social model argues that Disability is the loss or limitation of opportunities to participate in activities – social, economic and political – on an equal footing with those with no impairments. "Disability is the outcome of an oppressive relationship between people with impairments and the rest of society".<sup>6</sup> It has been argued that society is the cause of disability and reject the idea of it being a personal tragedy.<sup>7</sup>

6. The social and economic inclusion of people with disabilities in development has not been realized, despite the fact that disability belongs to the socio-economic development agenda. There is a reluctance to consider disability from the viewpoint of investment. Human capital development such as education and employment are among the most important factors for inclusion and economic empowerment. When these factors are made inclusive and accessible to persons with disabilities, it not only leads to an improvement in their livelihoods but also improves the prospects of their families and of society as a whole.<sup>8</sup> Disability is thus not just a health problem. It is a complex phenomenon, reflecting the interaction between features of a person's body and features of the society in which he or she lives.<sup>9</sup>

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<sup>4</sup> *Silvers, Anita*. 2010. 'An Essay on Modeling: The Social Model of Disability.' In *Philosophical Reflections on Disability, Philosophy and Medicine*, 104, edited by Christopher D. Ralston, and Justin Ho. Berlin: Springer.

<sup>5</sup> *Oliver, Mike*. 1983. *Social Work with Disabled People*. Basingstoke: Macmillan & 1990. *The Politics of Disablement: A Sociological Approach*. London: Macmillan.

<sup>6</sup> *Finkelstein, Victor*. 1980. *Attitudes and Disabled People*. New York: World Rehabilitation Fund.

<sup>7</sup> *Oliver, M., and C. Barnes*, 1998. *Disabled people and socially. From exclusion to inclusion – London LPC Group*

<sup>8</sup> *Kamal Lamichhane*. *Disability, Education and Employment in Developing Countries- From charity to investment*. Cambridge University Press. 2005

<sup>9</sup> World Health Organization (2016). See <http://www.who.int/topics/disabilities/en/>

Employment for persons with disabilities

7. According to International Labour Organization (ILO) an estimated 386 million of the world's working-age are PWDs. The unemployment among the PWDs is as high as 80 per cent in some countries. Often employers assume that persons with disabilities are unable to work. In Pakistan, estimates of the number of persons living with disabilities vary between 3.3 million and 27 million.<sup>10</sup>

8. Employment is equally important to all people, without it, social inclusion and economic independence are unlikely to be achieved. Among the crucial social functions that employment can facilitate are financial independence and social inclusion. It has also been found to improve social status, provide social support and enable workers to make a contribution, thereby leading to an increase in self-worth<sup>11</sup>. Employment has the potential to improve a person's financial situation, open up opportunities for social contact, build (new) friendships and increase people's self-esteem. By contrast, unemployment can cause not only poverty and social exclusion but also result in a lower sense of self-worth. The effects of unemployment on physical health like symptoms of somatization disorder, depression and anxiety were significantly greater in unemployed than employed individuals.<sup>12</sup> The situation for people with disabilities may have consequences of a greater extent as they tend to be looked upon as dependents of their families and relatives and are not expected to be gainfully employed or independent. Work has been, and will undoubtedly continue to be, central to all human societies.

9. One of the major difficulties faced by persons with disabilities is that employers have the erroneous assumption that these people will probably underperform in most areas of their duties – something which is actually not the case. Another

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<sup>10</sup> Moving from the margin – Mainstreaming persons with disabilities in Pakistan. British Council & The Economist Intelligence Unit- 2014

<sup>11</sup> O'Day, B., and M. Killeen. 2002. 'Does U.S. Federal Policy Support Employment and Recovery for People with Psychiatric Disabilities?' Behavioral Sciences and the Law 20: 559–83.

<sup>12</sup> Linn, M. W., R. Sandifer, and S. Stein. 1985. 'Effects of Unemployment on Mental and Physical Health.' American Journal of Public Health 75 (5): 502–06.

plausible issue is that when the majority of workplaces are not made accessible to people with disabilities, employers may feel that they will have to make an unwarranted investment to provide facilities for people with disabilities, and some do not believe in the employment potential of such people.<sup>13</sup>

*Rights based approach towards disability*

10. The paradigm in disability has shifted from charity to investment, exclusion to inclusion and sympathy to rights-based approach towards disability.<sup>14</sup> Disabled people initially were not considered worthy of any rights. The disabled were treated as abnormal or different from society, and thus needed to be given medical treatment under the medical model. Under the social model, disability is explained as a condition created by society and the environment, and not the result of an individual's impairment. The human rights model or rights-based model embodies the values or principles of dignity, respect, equality, and social justice to the disabled. The UN Convention on the Rights of Persons with Disabilities of 2006 (“**CRPD**” or “**Convention**”) created a binding framework for the rights-based model of disability law. Disabled persons by virtue of being a human have the right to enjoy life, liberty, equality, security and dignity.<sup>15</sup>

11. In Pakistan, policy approaches to disability have largely been focused on rehabilitation, welfare handouts and related charity. This has been changing since CRPD, which Pakistan ratified in 2011, but progress around building an inclusive society has been woefully slow. The Convention, which became operational in 2008, is the first human rights treaty of the 21st century and the first UN treaty protecting the fundamental rights of persons with disability. In line with the general discourse

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<sup>13</sup> *Ewa Giermanowska, Mariola Racaw, Dorota Szawarska - Employing People with Disabilities*, Palgrave, Macmillan, 2020

<sup>14</sup> *Kamal Lamichhane. Disability, Education and Employment in Developing Countries- From charity to investment*. Cambridge University Press. 2005

<sup>15</sup> *Tushti Chopra, 'Expanding the Horizons of Disability Law in India: A Study from a Human Rights Perspective'* (2013) 41 J.L. Med. & Ethics 807

around development-related issues today, the treaty is a move towards viewing disability from a rights-based approach.<sup>16</sup>

12. CRPD works to promote and protect the human rights of people with disabilities. With Article 27 explicitly recognizing their right to work on an equal basis with others. The same article further emphasizes the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to people with disabilities. CRPD also prohibits all forms of employment discrimination, promotes access to vocational training, promotes opportunities for self-employment and calls for reasonable accommodation in the workplace. The new dimension in the treatment of persons with disabilities, which the Convention sanctions, is the departure from the perception of people with disabilities as “objects” of mercy, treatment and social protection, to the perception of disabled people as “subjects” possessing rights, which they are able to claim, make decisions and be active members of society. This legal act is based on values arising from fundamental human rights. It guarantees people with disabilities equal access to institutions and the possibility of pursuing social activities and fulfilling the roles on the same principles as those who are able-bodied.<sup>17</sup>

#### DISABILITY AND OUR CONSTITUTION

13. Our Constitution, as a whole, does not distinguish between a person with or without disabilities. It recognizes inherent dignity of a human being; equal and inalienable rights of all the people as the foundation of freedom, justice and peace. Every person is entitled to all the rights and freedoms set forth therein, without distinction of any kind. It, therefore, applies equally to persons with disabilities, guaranteeing them full enjoyment of their fundamental rights without discrimination. The triangular construct of the right to life, dignity and equality under the Constitution provides a robust platform for mainstreaming

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<sup>16</sup> Moving from the margin – Mainstreaming persons with disabilities in Pakistan. British Council & The Economist Intelligence Unit- 2014

<sup>17</sup> Cotter, Anne M. 2007. This Ability: An International Legal Analysis of Disability Discrimination. Aldershot, Hampshire: Ashgate.

persons with disabilities.<sup>18</sup> “The purpose of the constitutional right to human dignity is to realize the constitutional value of human dignity; to realize a person's humanity; his free will; the freedom to shape his life and fulfill himself. It is a person's freedom to write his life story.”<sup>19</sup> Such vibrancy and vitality is the hallmark of a living constitution in a democracy.<sup>20</sup>

#### 2% DISABILITY QUOTA – HOW TO BE WORKED OUT.

14. Understanding Disability and the importance of employment for PWDs, we now examine the relevant provision of the Ordinance. The preambular statement of the law is that it is an Ordinance to provide for the employment, rehabilitation and welfare of PWDs. Section 10 of the Ordinance provides as under:-

#### **10. Establishments to employ disabled persons.<sup>21</sup>**

(1) **Not less than two percent of the total number of persons employed by an establishment at any time shall be disabled persons**

whose names have been registered with the Employment Exchange of the area in which such establishment is located and against whose names in the register maintained under section 12 an endorsement exists to the effect that they are fit to work.

(2) The disabled persons employed against any post in pursuance of subsection (1) shall be entitled to the terms and conditions which are not less favourable than those of the other persons employed by the establishment against similar posts.

(3) When calculating the percentage of the posts in an establishment for the purposes of employment of disabled persons, the fraction of 0.5 and above shall count as a whole number. (emphasis supplied)

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. The total number of persons employed means the total sanctioned posts<sup>22</sup> of the establishment, i.e., an Organization, Authority, Department or Ministry. 2% of the total sanctioned posts or workforce of the establishment becomes the *Disability Quota* for the establishment. Every establishment has a variety of

<sup>18</sup> see Junaid Mahmood v. Government of Punjab (PLD 2017 Lahore 1)

<sup>19</sup> Aharon Barack- Human Dignity- The Constitutional Value and the Constitutional Right, Cambridge 2015 p.144.

<sup>20</sup> See: Pakistan Tobacco Co. Ltd. and others v. 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).

<sup>21</sup> Phrase "disabled persons" is not approved should be persons with disabilities. See Barrister Asfandiyar Khan Tareen, etc. v. Govt. of the Punjab, etc. (PLD 2018 Lahore 300)

<sup>22</sup> See: Sajjad Ali v. Vice-Chancellor through Registrar University of Malakand at Chakdara, Dir Lower and others (2020 PLC (C.S.) 235).

posts with different qualifications; job descriptions and skill sets. Appointments to these posts are based on different selection criteria and separate merit lists. The mechanism for appointment against 2% *Disability Quota* is also to work side by side with the general recruitment process for every category of posts. Therefore, the total *Disability Quota* for the establishment is further apportioned and allocated against the sanctioned strength of various category of posts which have a separate selection criteria. For example in the instant case the *Disability Quota* in the respondent Education Department is as follows, including the *Disability Quota* for the post of SESE [Arabic]:

CADRE WISE POSTS - 2009

<b>SR. #</b>	<b>POST</b>	<b>SANCTION</b>	<b>2% DISABILITY QUOTA</b>
1	SSE/SST	1326	<b>27</b>
2	EST/SESE (Arts, Science)	1699	<b>34</b>
3	EST (OT)	299	<b>6</b>
4	EST (ARABIC)	252	<b>5</b>
5	EST (DM)	159	<b>3</b>
6	EST (Phy)	291	<b>6</b>
7	ESE/PST	5900	<b>118</b>
8	NON TEACHING POSTS	2306	<b>46</b>
TOTAL Sanctioned Posts		12,232	<b>245</b>

15. There may arise a situation where the posts in a particular category are less than 50, in that case it will be upto the establishment to allocate *Disability Quota* to respective categories



of posts even though they are less than 50 posts in a particular category in order to maintain the overall *Disability Quota* of the establishment. It may also be the case that a particular category of posts in an establishment may not be fit for a person with disability, in that case the establishment may shift the *Disability Quota* to posts which are fit for PWDs. The prime objective is to maintain a 2% *Disability Quota* within the establishment and it is for the establishment to allocate the posts against respective categories in case they are less than 50 in a particular category or not suited to PWDs.<sup>23</sup>

16. The Allocation of 2% *Disability Quota* on the basis of the advertised posts as compared to the sanctioned posts is adverse 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. This can go on for a longtime as posts are advertised as per vacancies which vary from time to time, therefore, if *Disability Quota* were to be based on the advertised posts, the fate of the PWDs would continue to hang in the balance and remain uncertain unless the posts advertised happen to be above 50. 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. Thereafter, the posts can be successively filled as and when the vacancies arise through advertisement, keeping the total *Disability Quota* in mind rather than the number of posts advertised.

17. In the present case the posts advertised for SESE [Arabic] were 81 which 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 (see chart above) and 4 more PWDs could have been appointed against the said posts against the advertisement in question. Filling the

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<sup>23</sup> TYH-2020

*Disability Quota* on the basis of advertised posts is, therefore, detrimental to the interest and welfare of the persons with disabilities; is against the letter of the law and offends their fundamental right to life and livelihood and their right to dignity.

18. Summarizing the above we hold that: (i) The 2% (and now 3%)<sup>24</sup> *Disability Quota* is to be calculated on the basis of the total sanctioned posts of the establishment. (ii) In order to ensure fair and equitable representation of persons with disabilities (PWDs) in every tier of the establishment, the total *Disability Quota* is to be further apportioned and allocated amongst different categories of posts in the establishment. The determination of different categories is on the basis of their distinct qualifications, selection criteria and separate merit list. (iii) In case the sanctioned strength of a post is less than 50, it will be for the establishment to allocate seat(s) from the overall *Disability Quota* against such a post (iv) if a particular post is not fit for a PWD, the establishment may shift the *Disability Quota* and adjust it against another post in the establishment so that the overall Disability Quota is not disturbed and maintained at all times. (v) The advertisement for any category of post must clearly provide the total *Disability Quota* for that category of posts and the number of seats vacant under the said *Disability Quota* at the time of the advertisement.

*Use of inappropriate and insensitive words*

19. It is also observed that words like “*disabled*,” “*physically handicapped*” and “*mentally retarded*” deeply bruise and offend human dignity of persons with different abilities. The Federal Government and the Provincial Governments are directed to discontinue the use of these words in official correspondence, directives, notifications and circulars and shift to “*persons with disabilities*” or “*persons with different abilities*”. The view taken by the Lahore High Court in *Barrister Asfandiyar Khan case*<sup>25</sup> is approved and must be given effect to.

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<sup>24</sup> After the Disabled Persons (Employment & Rehabilitation) (Amendment) Act, 2012

<sup>25</sup> *Barrister Asfandiyar Khan Tareen, etc. v. Govt. of the Punjab, etc.* (PLD 2018 Lahore 300)

Employment is half the story

20. Appointing persons with disabilities under *Disability Quota* of 2% is half the story. The other half and perhaps the more important half is to provide the infrastructure, access, support, and facilities, so that persons with disabilities, once appointed to a post, can perform their job without feeling physically or emotionally incapacitated in any manner. The biggest barriers to the employment of persons with disabilities is the accessibility and their social acceptability at the workplace. The Government and the concerned establishment is bound to make provisions for it, for otherwise, the *Disability Quota* and the purpose of the Ordinance will stand frustrated and serve no useful purpose. This support and facilitation for persons with disabilities has been recognized as *Reasonable Accommodation* under the Convention on the Rights of Persons with Disabilities (CRPD) that Pakistan has ratified in 2011. It means necessary and appropriate modification and adjustments where needed in a particular case to ensure persons with disabilities the enjoyment on an equal basis with others of all human rights and fundamental freedoms.

21. It is elaborated that *Reasonable Accommodation* can be through assistive technology, which is an umbrella term that includes assistive, adaptive, and rehabilitative devices for people with disabilities. Assistive technology promotes greater independence by enabling PWDs to perform tasks that they were formerly unable to accomplish, or had great difficulty accomplishing, by providing enhancements to, or changing methods of interacting with, the technology needed to accomplish such tasks.<sup>26</sup> The Convention provides that no one can be discriminated on the ground of disability and obligates the State to take steps to provide *Reasonable Accommodation* in order to provide inclusion and access to persons with disabilities in the society.

Relief

22. In the present case the Disability Quota for 252 posts<sup>27</sup> of SESE [Arabic] is 5 posts but only one post out of this

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<sup>26</sup> Dr. K. Thyagu, *Assistive Technology & Inclusive Education*, Laxmi Book Publications, 2014

<sup>27</sup> In the year 2009

*Disability Quota* has been filled by Mst. Asma Qasim. Therefore, respondents are directed to reconsider the case of the petitioner, preferably alongwith the other applicants with disabilities who had applied for the said posts (if they can be reached out) and fill the *Disability Quota* for SESE [Arabic] only if petitioner and other applicants (if any) meet the selection criteria fixed for the said post. Let this exercise be completed within a period of one month from the receipt of this judgment through a speaking order. For the above reasons the impugned orders of the High Court are set aside. This petition is converted into an appeal and allowed in the above terms.

Judge

Judge

Lahore,  
14<sup>th</sup> July, 2020.

*Iqbal*

**Approved for reporting**

Judge