P L D 2017 Lahore 1

Before Syed Mansoor Ali Shah, CJ

Hafiz JUNAID MAHMOOD---Petitioner

Versus

GOVERNMENT OF PUNJAB and others---Respondents

Writ Petition No.2565 of 2014, heard on 19th December, 2016.

(a) Constitution of Pakistan---

----Art. 199--- Constitutional petition--- Maintainability--- Public/ Government policy----Judicial review---Scope---Government policy was generally enforceable against a citizen when it was translated into legislation, subordinate legislation or executive action, and such legislation or executive action was then subject to judicial review---Policy, generally, was a guideline for the internal working of the Government, however, if such Policy impinged upon the Fundamental Rights of a citizen, then the same could be judicially reviewed, like any other legislation or executive action.

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

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

(b) Words and phrases---

----"Disability" and "disabled person"---Meanings---"Disability" meant 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---"Disabled person" was a person who, on account of injury, disease or congenital deformity, was handicapped for undertaking any gainful profession or employment in order to earn his livelihood and included a person who was blind, deaf, physically handicapped or mentally retarded---Persons with disabilities included those who had 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---"Disability" was an evolving concept and resulted from interaction between persons with impairments and attitudinal and environmental barriers that hindered their full and effective participation in a society---"Disabilities" was an umbrella term, covering impairments, activity limitations and participation restrictions---Impairment was a problem in body function or structure---Activity limitation was difficulty encountered by an individual in executing a task or action, while a participation restriction was a problem experienced by an individual in involvement in life situations---"Disability" was not just a health problem, and was a complex phenomenon reflecting the interaction between features of a person's body and features of the society in which he or she lived.

UN Convention on the Rights of Persons with Disabilities (CRPD or Convention) and World Health Organization (2016) Disabilities, Retrieved on December 19, 2016 from http://www.who. int/topics/disabulities/en/ rel.

----Arts. 9, 14, 25, 8, 2A, 4 & Preamble---United Nations Convention On The Rights Of Persons With Disabilities, Ratified by Pakistan in 2011---Fundamental Rights in the context of persons with disabilities---Constitutional values of universality, indivisibility interdependence and interrelatedness of all human rights and fundamental freedoms---Concept of "reasonable accommodation" for disabled persons---Constitutional obligations of the State with regard to disabled persons---Scope---Constitution proactively reached out to persons with disabilities with force and vigour and the wisdom of the United Nations Convention On The Rights Of Persons With Disabilities, was already embedded in the soul of the Constitution and could be easily rediscovered by using principles of the said Convention to purposively interpret the Constitution---Right to life, dignity and equality were further emboldened, illuminated and vitalized when interpreted in the context of the said Convention---Right to life and dignity were epicenters of the Constitutional architecture and recognized the importance of accessibility to physical, social, economic and cultural environment, to health and education, and to information and communication---Fundamental right to life, therefore, enabled persons with disabilities to fully enjoy all human rights and fundamental freedoms, and a disabled person, like every human being, had an inherent right to life and its effective enjoyment at par with others---Right to life and dignity of a person with disabilities could only be realized if the State and its institutions took steps provide "reasonable accommodation" that would facilitate and ensure that a person with disabilities could enjoy life with honour and dignity like others---Inherent in Art. 25 of the Constitution was the recognition that discrimination against any person on basis of disability was a violation of the inherent dignity and worth of a human being---Article 25 of the Constitution promoted inclusiveness, effective participation and recognized human diversity in a society and therefore mandated that reasonable accommodation be provided by the State and other institutions to actualize such Constitutional goal and to avoid exclusion of persons with disabilities from effective participation in the society---Constitutional values of social, economic and political justice recognized free choice and individual autonomy and therefore, there existed a bold and passionate Constitutional support for persons with disabilities---State and its institutions had a Constitutional obligation to ensure, within means available, that a person with disabilities got reasonable accommodation and to provide

the architecture, structure, assistive and adaptive technology, system and equipment and facilitative support to persons with disabilities in order to enable them to actualize their Constitutional rights and freedom.

Pakistan Tobacco Co. Ltd. and others v. Government of N.-W.F.P. through Secretary Law and others PLD 2002 SC 460; 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); M/s. Entertainment Network (India) Ltd. v. Millieum Chennai Broadcast (Pvt) Ltd. 2008 (13) SCC 30; Aharon Barrack-Human Dignity---The Constitutional Value and the Constitutional Right. Cambridge 2015 P.144 and Jeeja Ghosh and another v. Union of India and others AIR 2016 SC 2392 rel.

(d) Constitution of Pakistan---

----Preamble & Art. 8---Fundamental Rights guaranteed by the Constitution---Nature---Interpretation of Constitutional provisions containing Fundamental Rights---Fundamental Rights were the heart and soul of a living Constitution and must at all times, be ready to embrace and protect the sensibilities and sensitivities of the people---Fundamental Rights must be progressively and purposively interpreted to advance frontiers of freedom, individual autonomy and free choice, and such vibrance and vitality were the hallmark of a living Constitution in a democracy.

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) rel.

(e) Constitution of Pakistan---

----Arts. 9, 14 & 25---Recruitment Policy (2013) For Educators, Para. 4D---Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981), Ss. 10, 2(c) & Preamble---United Nations Convention On The Rights Of Persons With Disabilities, Ratified by Pakistan in 2011---Vires of Recruitment Policy (2013) For Educators, Para. 4D---Constitutional obligations of the State with regard to disabled persons---Interpretation of Arts. 9, 14 & 25 in the context of Constitutional protections of disabled persons---Recruitment to public/Government posts for disabled persons---Reasonable accommodation for disabled persons---Scope---Petitioner, who had permanent visual impairment, impugned the Provincial "Recruitment Policy-2013 for Educators", which barred blind persons from applying to posts of educators---Contention of the Provincial Government, inter alia, was that it was not possible for a blind teacher to use the blackboard to teach or to control the classroom---Validity---Fundamental Rights to life, dignity and equality mandated that State and its organs should make serious endeavors to provide reasonable accommodation to persons with disabilities so that they can be mainstreamed and made useful and productive members of the society---Impugned recruitment policy was devoid of any such thought or realization and lacked openness, inclusiveness and accessibility for persons with disabilities---Provincial Education Department, in the present case, had failed to consider that the petitioner could have been made able enough to teach with the help of

assistive technology and qualification of the petitioner was not otherwise questioned---Ability to use a blackboard and maintain discipline could be easily achieved through assistive technology and additional human resource---Department did not take the plea that reasonable accommodation could not be provided or that the same was burdensome or cumbersome and paid no heed to the rights of the petitioner under the Constitution, United Nations Convention On The Rights Of Persons With Disabilities, And The Disabled Persons (Employment and Rehabilitation) Ordinance, 1981---High Court observed that the impugned Recruitment Policy to the extent of its Para. 4D, impaired Fundamental Rights of the petitioner and was accordingly declared unconstitutional and illegal and hoped that Provincial Government will set a healthy precedent for others to follow---Advocate General shall place the judgment before the authorities, so that the anguish and pain of persons with disabilities in the Province was redressed and the Government succeed in making the Province a disability sensitive Province---High Court directed the Provincial Government and the Provincial Education Department to reframe the relevant portion of the impugned Recruitment Policy accordingly, keeping in view observations of the High Court and the wisdom of the United Nations Convention On The Rights of Persons With Disabilities---Constitutional petition was allowed, accordingly.

Assistive Technology for Visually Impaired and Blind People. Marion A Hersch, Michael A Johnson. Springer. p.670 rel.

(f) Constitution of Pakistan---

----Arts. 25, 9 & 14--- Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981) S. 10---United Nations Convention On The Rights Of Persons With Disabilities, Ratified by Pakistan in 2011---Fundamental Rights in the context of persons with disabilities---Recruitment to public/Government posts for disabled persons---Establishments to employ disabled persons---Reserved quota for employment of disabled persons---Nature---Scope---Interpretation of Fundamental Rights in the light of United Nations Convention On The Rights Of Persons With Disabilities, indubitably showed that a person with disabilities could not be debarred from applying on open merit for the general seats and the three percent quota under the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 was an additional benefit and did not restrict a person with disabilities to apply for the general quota---To restrict a person with disabilities to a limited quota of three percent, which may or may not be available, depending on the sanctioned posts, would amount to depriving equality, accessibility and opportunity to a person with disabilities and offended Art. 25 of the Constitution---Such restriction was opposed to the Constitutional mandate and the United Nations Convention On The Rights Of Persons With Disabilities.

(g) Constitution of Pakistan---

----Art. 199---Recruitment Policy (2013) For Educators, Para. 4D--- Civil Procedure Code (V of 1908) Ss. 35 & 35A---Constitutional petition---Awarding of costs to petitioner---Scope---Petitioner, who with permanent visual impairment had to approach the High Court to impugn the Recruitment Policy of a Department of the Provincial

Government under Art. 199 of the Constitution could be awarded costs, which were to be paid to the petitioner by the Provincial Government.

Kawas B. Aga and another v. City District Government, Karachi (CDGK) through Nazim-e-Ala and others PLD 2010 Kar. 182; The Postmaster-General, Northern Punjab and (AJ&K), Rawalpindi v. Muhammad Bashir and 2 others 1998 SCMR 2386; Province of Sindh through Secretary, Home Department and others v. Roshan Din and others PLD 2008 SC 132; Inayatullah v. Sh. Muhammad Yousaf and 19 others 1997 SCMR 1020; Mst. Afsana v. District Police Officer, (Operation), Khairpur and 5 others 2007 YLR 1618 and M.D. Tahir, Advocate v. Federal Government and others PLD 1999 Lah. 409 rel.

Harris Azmat and Ali Khalid Sindhu along with Petitioner in person.

Anwaar Hussain and Ahmad Hassan Khan, Assistant Advocates-General, Punjab.

Iftikhar Ahmad Mian for Respondent No.2.

Rana Muhammad Younus Aziz, Senior Law Officer, School Education Department.

Zubair Khan, Deputy Secretary, School Education Department, Government of Punjab.

Tariq Ismail, Litigation Officer, Social Welfare Department, Punjab.

Iqbal Hussain, EAD o/o EDO (Education) Lahore.

Date of hearing: 19th December, 2016.

"It is not the eyes that are blind, but the hearts"

Holy Quran (22:46)

JUDGMENT

SYED MANSOOR ALI SHAH, C.J.---Petitioner has permanent visual impairment or Bilateral Permanent Blindness which in ordinary parlance means that the petitioner is physically blind.1 This disability did not dissuade the petitioner from becoming a Hafiz-e-Quran and pursing higher education and successfully obtaining Bachelor of Arts (Honours) in English from Forman Christian College, Lahore in the year 2012. He also holds a Braille Proficiency Certificate from the Directorate of Special Education, Government of Pakistan dated 26-2-2016. According to the Disability Certificate dated 17-12-2016 the Assessment Board for the Disabled Persons2 has recommended that the petitioner is 'fit for job consistent with his experience."

2. In response to a public advertisement in the year 2013, for the entry test for recruitment of educators, in all districts of Punjab, issued by National Testing Service (NTS) on behalf of School Education Department, Government of Punjab, the

petitioner applied and successfully passed the NTS test. Thereafter, the local government advertised various posts of educators including the post of Senior Elementary School Educator ("SESE"). Having passed the NTS test the petitioner thought that he was eligible to apply for the said post, till he realized that the advertisement itself barred blind persons from applying. Upon further inquiry the petitioner found out that the bar is contained in the "Recruitment Policy-2013 for Educators" ("Recruitment Policy") dated 31.07.2013.

3. The petitioner has challenged the Recruitment Policy before this Court on the ground that the definition of disabled person in the Recruitment Policy is against the definition of a disabled person as given in section 2(c) of the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 ("Ordinance"). It is submitted that the petitioner is entitled to be considered on open merit at par with the other candidates and in addition to that a person with disabilities enjoys a 3% special quota under section 10 of the Ordinance. He submits that the Recruitment Policy is violative of the fundamental rights and hence unconstitutional.

4. Learned Law Officers and the learned counsel for respondent Local Government along with the Deputy Secretary, School Education Department, present in Court, submit that it is not possible for a blind teacher to "control the class" or maintain discipline, therefore, he is not eligible to apply for the said post. Furthermore, the right of the petitioner to seek employment has to be proportionately balanced with the rights of the children to get proper education, while the right to education is the dominant right. While supporting the Policy, they submitted that courts cannot interfere in Policy matters and placed reliance on Executive District Officer (Revenue), District Khushab at Jauharabad and others v. Ijaz Hussain and another (2011 SCMR 1864), Aqsa Manzoor v. University of Health Sciences, Lahore through Vice- Chancellor and 3 others (PLD 2006 Lahore 482), Lt. Muquddus Haider v. Federal Public Service Commission through Chairman, Islamabad (2008 SCMR 773), Punjab Public Service Commission and another v. Mst. Aisha Nawaz and others (2011 SCMR 1602) and Mian Muhammad Afzal v. Province of Punjab and others (2004 SCMR 1570).

5. I have heard the arguments and have gone through the record, the supporting materials and case law relied upon by the parties.

6. Facts are admitted and have been briefly narrated above. At a subjective level, the question before this Court is the legality of the Recruitment Policy that has deprived the petitioner, a blind man, from applying for the post of SESE inspite of having successfully qualified the NTS test, a pre-requisite for applying for the above post. But, viewed objectively, the question of more importance is, whether a person with disabilities, enjoys protection under the Constitution?

7. Taking up the question of maintainability of the petition first. It has been argued by the Respondents that courts do not interfere in policy matters, hence this Court cannot examine the impugned Recruitment Policy and as a result this petition is not maintainable. Generally, 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 judicial reviewed, like any other legislation or executive action. Reliance is placed on Human Rights case No.14392 of 2013 (2014 PTD 243), Messrs Al-Raham Travels and Tours (Pvt.) Ltd. v. Ministry of Religious Affairs, Hajj, Zakat and Ushr through Secretary and others (2011 SCMR 1621), Messrs Shaheen Cotton Mills, Lahore and another v. Federation of Pakistan, Ministry of Commerce through Secretary and another (PLD 2011 Lahore 120) and Wattan Party through President v. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others (PLD 2006 SC 697). It has been argued in this case that the Recruitment Policy has deprived the petitioner of his right to life including right to livelihood, right to dignity and right to equality. Additionally, this case also revolves around interpretation of fundamental rights in the context of persons with disabilities. The case laws relied upon by the learned counsel for the respondents have been considered and have little relevance to the case in hand because they turn on totally different factual matrices. For these reasons, the Court can examine the said Policy and, therefore, the instant petition is maintainable.

8. At the very outset it is important to examine the meaning of disability. 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.3 A disabled person under the Ordinance is defined as 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.4 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. 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. Disabilities is an umbrella term, covering impairments, activity limitations, and participation restrictions. An impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations. 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.'5

9. As a matter of background, around 10 per cent of the world's population, or 650 million people, live with a disability. They are the world's largest minority. Eighty per cent of persons with disabilities live in developing countries, according to the UN Development Programme (UNDP). Ninety per cent of children with disabilities in developing countries do not attend school, says UNESCO. The global literacy rate for adults with disabilities is as low as 3 per cent, and 1 per cent for women with disabilities, according to a 1998 UNDP study. An estimated 386 million of the world's working-age people are disabled, says the International Labour Organization (ILO). Unemployment among the disabled is as high as 80 per cent in some countries. Often

employers assume that persons with disabilities are unable to work.6 In Pakistan, estimates of the number of persons living with disabilities vary between 3.3 million and 27 million, depending on whether they are based on government statistics (the last census which measured the prevalence rates was taken in 1998) or whether they come from other agencies.

10. In Pakistan, there is no comprehensive law protecting the rights of persons with disabilities. The one and only piece of legislation that exists for persons with disability was passed in 1981 and focuses on employment and segregated education (in the form of special education schools). In the 33 years since then only minor adjustments have been made to the law, and it continues to be poorly implemented. Meanwhile, a number of policies and plans have been drafted, but once again, they remain only on paper. The law, policies and plans squarely underline a medical and charity approach to disability.7

11. Globally, and in Pakistan, policy approaches to disability have largely been focused on rehabilitation, welfare handouts and related charity. This has been changing since the UN Convention on the Rights Of Persons With Disabilities which offers a blueprint for a rights-based approach to mainstreaming persons with disabilities. Pakistan ratified the CRPD in 2011, but progress around building an inclusive society has been slow.8 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 around development-related issues today, the treaty is a move towards viewing disability from a rights-based approach.9

UN Convention on the Rights Of Persons With Disabilities

12. The Convention promotes, protects and ensures the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and promotes respect for their inherent dignity. The relevant provisions of the Convention are instructive, hence relevant portions are reproduced hereunder:-

Preamble

> (a) Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,
>
> (b) Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,
>
> (c) Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for

persons with disabilities to be guaranteed their full enjoyment without discrimination,

(g) Emphasizing the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,

(h) Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

(i) Recognizing further the diversity of persons with disabilities,

(j) Recognizing the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

(k) Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

(m) Recognizing the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and insignificant advances in the human, social and economic development of society and the eradication of poverty,

(n) Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

(o) Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,

(p) Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,

(v) Recognizing the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,

(x) Convinced that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,

(y) Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries.

Article 3 (General Principles)

The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(b) Non-discrimination;

(c) Full and effective participation and inclusion in society;

(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(e) Equality of opportunity;

(f) Accessibility;

(g) Equality between men and women;

(h) Respect for the evolving capacitated of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4 (General obligations)

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

(d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in

conformity with the present Convention;

(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

(f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in Article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

(g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

(i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights.

Article 5 (Equality and non-discrimination)

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention

Article 27 (Work and Employment)

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to 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 persons with disabilities. States Parties

shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

(emphasis supplied)

13. Under CRPD, "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with

others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation. The Convention explains that "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedom. The Convention also defines "Communication" to include languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.

14. Reasonable accommodation can be through assistive technology, which is an umbrella term that includes assistive, adaptive, and rehabilitative devices for people with disabilities and also includes the process used in selecting, locating, and using them. Assistive technology promotes greater independence by enabling people 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. Assistive Technology is a generic term for devices and modifications (for a person or within a society) that help overcome or remove a disability. The first recorded example of the use of a prosthesis dates to at least 1800 BC. The wheelchair dates from the 17th century. The curb cut is a related structural innovation. Other examples are standing frames, text telephones, accessible keyboards, large print, Braille and speech recognition software.

15. The term adaptive technology is often used as the synonym for assistive technology; however, they are different terms. Assistive technology refers to "any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities," while adaptive technology covers items that are specifically designed for persons with disabilities and would seldom be used by non-disabled persons. In other words, "assistive technology is any object or system that increases or maintains the capabilities of people with disabilities," while adaptive technology is "any object or system that is specifically designed for the purpose of increasing or maintaining the capabilities of people with disabilities." Consequently, adaptive technology is a subset of assistive technology. Adaptive technology often refers specifically to electronic and information technology access.10 Many people with serious visual impairments live independently, using a wide range of tools and techniques. Examples of assistive technology for visually impairment include screen readers, screen magnifiers, Braille embossers, desktop video magnifiers, and voice recorders. 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.

Our Constitution

16. Our Constitution is prefaced by timeless and immutable constitutional values, which reflect the will and resolve of the people of Pakistan. These preambular

constitutional values provide that principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be observed. Wherein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality. These constitutional values, inter alia, flow into fundamental rights, like the right to life (Article 9), the right to dignity (Article 14) and the right to equality (Article 25) making our Constitution evergreen, organic and a living document.

17. 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. Our Constitution embodies universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms. It 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 persons with disabilities.

18. Fundamental rights are the heart and soul of a living Constitution and must at all times be ready to embrace and protect the sensibilities and sensitivities of the people. They must be progressively and purposively interpreted to advance the frontiers of freedom, individual autonomy and free choice. Such vibrance and vitality is the hallmark of a living constitution in a democracy. 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). Our Constitution proactively reaches out to persons with disabilities with force and vigour. The wisdom of the Convention is already embedded in the soul of our Constitution and can easily be rediscovered by using the principles of the Convention to purposively interpret the Constitution. Right to life, dignity and equality are further emboldened, illuminated and vitalized when interpreted in the context of the Convention. See M/s. Entertainment Network (India) Ltd. v. Millieum Chennai Broadcast (Pvt.) Ltd (2008 (13) SCC 30).

19. Right to life and right to dignity are the epicenters of our constitutional architecture. Right to life recognizes the importance of accessibility to physical, social, economic and cultural environment, to health and education and to information and communication. Such a right enables persons with disabilities to fully enjoy all human rights and fundamental freedoms. Every human being has the inherent right to life and to ensure its effective enjoyment, this includes persons with disabilities, at par with the others. Right to life and right to dignity are deeply interwoven. "The purpose of the constitutional right to human dignity is to realize the constitutional value of human dignity. Thus its purpose is to realize a person's humanity. The dignity of a human being is his free will; the freedom to shape his life and fulfill himself. It is a person's freedom to write his life story.11" Right to life and dignity of a person with disabilities can only be realized if the State and its institutions take steps to provide reasonable

accommodation that will facilitate and ensure that the person with disabilities can enjoy life with honour and dignity like others in the society.

20. The Constitution abhors discrimination and holds that all citizens are equal before law and are entitled to equal protection of law. Inherent in Article 25 is the recognition that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of a human being. Article 25 of the Constitution promotes inclusiveness, effective participation and recognizes human diversity in a society. Non discrimination as a fundamental right guarantees elimination of discrimination at all levels and, therefore, mandates that reasonable accommodation be provided by the State and other institutions, to actualize this constitutional goal and avoid exclusion of persons with disabilities from effective participation in the society. "There should be a full recognition of the fact that persons with disability are integral part of the community, equal in dignity and entitled to enjoy the same human rights an freedoms as others."12 Our Constitution promotes and protects the human rights of all persons inclusive of persons with disabilities. The constitutional values of social, economic and political justice recognize free choice and individual autonomy for all. Our Constitution is a living document and provides a bold and a passionate constitutional support for persons with disabilities.

21. This constitutional construct creates an obligation on the State and other institutions of the State to make all possible endeavours to mainstream persons with different abilities and to embrace the diversity in the society. The State and its institutions are under a constitutional obligation to go the extra mile and ensure, within the means available, that person with disabilities get reasonable accommodation in order to enjoy their fundamental rights in the same manner as enjoyed by other citizens of Pakistan. It is for the State and its institutions to provide the architecture, the structure, the assistive and adaptive technology, the system, the equipment and the facilitative support to persons with disabilities, so they can actualize their constitutional rights and freedom. In the present case, the department should have considered the possibility of providing necessary technical and human support to ensure that the petitioner was able to perform as an educator and was not discriminated on the ground of disability. The Recruitment Policy is devoid of any such sentiment.

The Recruitment Policy

22. Now I come to the relevant portion of the Recruitment Policy. Paragraph 4-D of the Policy reads as under:

4 D. Reserved Quota

> (i) 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 and 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. (emphasis supplied)

According to the position taken by the respondents a blind person is not eligible to apply for the post of teacher because he cannot write on a blackboard. Further in the comments filed by the School Education Department (Respondent No.1) paragraphs 2 and 5 states as follows:-

> "2. That para 2 of the writ petition under reply is corrected [sic] to the extent of advertisement. However it is stated that a blind person cannot teach, therefore, he cannot be appointed as a Teacher.
>
> 5. That para No.5 of the writ petition under reply is correct. However, the blind persons have been excluded due to the reason that the blind persons cannot be appointed as a Teacher because in teaching profession Audio Visual Aids have been used and a blind person cannot use them in a proper manner due to which a policy has been made by the department for excluding the blind persons from appointment of teachers."

23. Right to life, dignity and equality mandate that State and its organs will make serious endeavours to provide reasonable accommodation to persons with disabilities so that they can be mainstreamed and made useful and productive members of the society. The impugned Recruitment Policy is devoid of any such thought or realization. It lacks openness, inclusiveness and accessibility for persons with disabilities. The School Education Department, Government of Punjab has failed to consider that the petitioner could have been made able enough to teach with the help of assistive technology as elaborated above. No one has questioned the qualification of the petitioner. His ability to use blackboard and maintain discipline can be easily achieved through assistive technology and additional human resource. It is not the case of the department that reasonable accommodation cannot be provided or that it is burdensome or expensive. The ground urged by the department is that the petitioner being blind cannot write on the blackboard and will not be able to control the class. These reasons hold out a merciless and heartless Department that has paid no heed to the rights of the petitioner under the Constitution, the Ordinance and the Convention. The Department has failed to realize that in considering the social integration of people with disabilities, access to employment is often considered to be of a particular importance. There are a number of reasons for it, including the need for a good or at-least an adequate income and the self-respect gained through being self-supporting. In addition, employment can provide a structure to the day and sense of purpose and often a sense of identity, as well as, providing the opportunity to make social contact.13

24. The impugned Recruitment Policy to the extent of para. 4D impairs the fundamental rights of the petitioner and is therefore declared to be unconstitutional and illegal. Respondents are directed to reframe the relevant portion of the Recruitment Policy keeping in view the import of this judgment and the wisdom of the Convention.

3% Quota under The Disabled Persons (Employment and Rehabilitation) Ordinance, 1981

25. Departmental Representative submits that the petitioner never applied for the post of SESE and even otherwise there are not seats under the disabled quota of the said post. Respondents have failed to appreciate that the petitioner could not apply as per the terms of the advertisement and the Recruitment Policy. It is also made clear that the constitutional interpretation in the light of the Convention indubitably shows that a person with disabilities cannot be debarred from applying on open merit for the general seats. The 3% quota under the Ordinance is an additional benefit and does not restrict a person with disabilities to apply for the general quota. To restrict persons with disabilities to a limited quota of 3%, which may or may not be available, depending upon the sanctioned posts, will amount to depriving equal accessibility and opportunity to the person with disabilities and offend Article 25 of the Constitution. Any such restriction is opposed to the constitutional mandate and also offends the Convention. Therefore, respondent No.1 is directed to consider the candidacy of the petitioner against the post of SESE on open merit and if need be against the additional 3% quota for persons with disabilities by disregarding para. 4D of the Recruitment Policy. Let this exercise be completed within a month from now, with intimation to the Registrar of this Court.

26. I am hopeful that the Government of Punjab will set a healthy precedent in this case for others to follow. The Advocate General shall place a copy of this judgment before the Chief Minister, Punjab, as well as, the Chief Secretary, Government of the Punjab, so that the anguish and pain of persons with disabilities in the Province is passionately redressed and the Government succeeds in making the Province of Punjab, a disability sensitive Province.

27. In the end it is important to point out that words like "mentally retarded" to describe persons with intellectual disorders and "crippled" to describe persons with mobility issues underline the grave stigma in society. Globally, the nomenclature around persons with disabilities has shifted from "disabled person" or "handicapped person" to "person with disability" or persons with "different abilities."

28. This petition is allowed subject to costs of Rs. 50,000/-, which shall be paid by respondent No.1 to the petitioner, who with permanent visual impairment had to approach the Court due to the impugned Recruitment Policy. Reliance is placed on Kawas B. Aga and another v. City District Government, Karachi (CDGK) through Nazim-e-Ala and others, (PLD 2010 Karachi 182), The Postmaster-General, Northern Punjab and (AJ&K), Rawalpindi v. Muhammad Bashir and 2 others, (1998 SCMR 2386), Province of Sindh through Secretary, Home Department and others v. Roshan Din and others, (PLD 2008 SC 132), Inayatullah v. Sh. Muhammad Yousaf and 19 others, (1997 SCMR 1020), Mst. Afsana v. District Police Officer, (Operation), Khairpur and 5 others, (2007 YLR 1618) and M.D. Tahir, Advocate v. Federal Government and others, (PLD 1999 Lahore 409). Copy of the deposit slip shall be placed on the record of this file by respondent No.1 latest by 9th January, 2017. Thereafter, this file shall be put up before this Court on the administrative side for information or necessary orders, as the case may be.

KMZ/J-11/L Petition allowe

;