

Reservation in Employment for the Disabled in India: A critical analysis of Rights of Persons with Disabilities Act, 2016

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Introduction

According to the Census 2011, in India, out of the 121 Cr population, about 2.68 Cr persons are 'disabled' which is 2.21% of the total population. Among the disabled population, 56% (1.5 Cr) are males and 44% (1.18 Cr) are females. In the total population, the male and female populations are 51% and 49% respectively. Majority (69%) of the disabled population resided in rural areas (1.86 Cr disabled persons in rural areas and 0.81 Cr in urban areas). In the case of total population also, 69% are from rural areas while the remaining 31% resided in urban areas¹. This shows that there is a connection between poverty and disability in light of which the empowerment of the disabled persons becomes important. For the empowerment of disabled population, the attainment of education and participation in economic activity are extremely important. Out of these, the field of employment is one in which disability-based discrimination has been prominent and persistent. In most countries the unemployment rate among persons with disabilities is two to three times higher than the unemployment rate for persons without disabilities. Where persons with disabilities are employed, they are mostly engaged in low paying jobs with little social and legal security and are often segregated from the mainstream of the labor market. In light of the above, this paper focuses solely upon the employment status and opportunities available for the disabled as mandated by the new legislation - The Rights of Persons with Disability Act, 2016² (hereinafter "The RPWD Act") that repealed the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995³ (hereinafter "The PWD Act") in fulfilling its obligation as a signatory to

the United Nations Convention on the Rights of the Persons with Disability (hereinafter "UNCRPD"). Talking about the present disabled workforce, the Census 2011 highlighted that, nearly one third of the total disabled persons are working. At all India level, 36% of the total disabled persons are workers of which 31% are agricultural labourers. Among the male disabled persons, 47% are working and among female disabled, only 23% are working. In rural India, 25% of the female disabled are working, while in urban India, the corresponding figure is 16%⁴. Thus, it can be said that majority of disabled population is deprived of high paying jobs, say Group A and B posts in government establishments, and are thus destined to live in poverty gripped by the stigma attached to their deformities. After perusing the provisions of the RPWD Act, it can be said that the Act broadly covers three situations: *Firstly*, it provides reservation for disabled persons who are yet to secure employment and in an effort to ensure the visibility of the disabled in total workforce, Parliament of India enacted the RPWD Act in 2016 that increased the existing employment reservation quota of 3% (the PWD Act) to 4% but restricted this reservation only for disabled persons meeting the benchmark criteria. *Secondly*, where disabled persons have already secured employment are also ensured with some basic protections like non-discrimination, reasonable accommodation, barrier-free conducive environment, promotions on similar footing as others, etc⁵. *Thirdly*, the Act covers the situations where a non-disabled employee of a government establishment acquired disability during his or her service⁶. This paper analyses the provisions of RPWD Act and the connected Official Memorandums of Government of India in this behalf in relation to the reservation in employment for the disabled persons who are yet to secure employment.

Defining the Beneficiaries of Reservation in Employment

UNDER THE RPWD ACT

The RPWD Act provides rights and protection to all persons with disability but reservation in employment can be made only for persons with benchmark disability. The term *persons with disability* has been defined as "a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others"⁷. Thus, the scope of disability under the present Act has been expanded from 7 conditions under the previous Act⁸ to 21 conditions and it now also includes cerebral palsy, dwarfism, muscular dystrophy, acid attack victims, hard of hearing, speech and language disability, specific learning disabilities, autism spectrum disorders, chronic

¹ Government of India, Report: *Disabled Persons in India: A Statistical Profile 2016* (Social Statistics Division, Ministry of Statistics & Programme Implementation, 2017).

² The Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016). ("The RPWD Act")

³ Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996) ("The PWD Act").

⁴ *Supra* Note 1.

⁵ S. 20, the RPWD Act.

⁶ S. 20 (4), *Ibid*.

⁷ S. 2(s), *Ibid*.

⁸ S. 2(i)- 'disability', The PWD Act.

neurological disorders such as multiple sclerosis and Parkinson's disease, blood disorders such as haemophilia, thalassemia, and sickle cell anaemia, and multiple disabilities.⁹ This is explicit upon a combined reading of the definition of PwD with the Schedule¹⁰ appended to the Act that defines specific cases of certain disabilities. The term *persons with benchmark disability* has been defined as “a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority”¹¹ A distinction has been made within the definition with respect to those disabilities where measure is not defined in the Schedule such as cerebral palsy, muscular dystrophy, acid attack victims, speech and language disability, intellectual disability, mental illness, Parkinson's disease, blood disorders etc. and in cases of locomotor disability, dwarfism, blindness and multiple disabilities where the measure of specified disabilities is given within the Schedule itself. In both the cases, the disability has to be certified in terms of percentage by the Certifying authority¹² and the benchmark of 40 percent will be applicable. Thus, those certified to have at least 40 per cent of the disabilities specified above¹³ are defined as persons with benchmark disabilities. This means that a benchmark has been set for such persons with disabilities whose extent of disability measures up to 40 percent or above of any of the specific disabilities defined in the Schedule.

Any person with specified disability can submit his application¹⁴ for disability certificate either online through Unique Disability Identity Portal (www.swavalambancard.gov.in) or submit the physical application along with the requisite documental proofs¹⁵ to a medical authority or any other notified competent authority to issue such a certificate in the district of residence of the applicant or to the concerned medical authority in a government hospital where he may be undergoing or may have undergone treatment in connection with his disability.¹⁶ On receipt of such application, the Certifying authority¹⁷ shall verify the information provided and shall assess the disability in terms of the relevant guidelines¹⁸ issued by the Central Government in this regard and after satisfying itself that the applicant is a person with disability, issue a certificate¹⁹ of disability in his favour within a month of receiving the application. This disability certificate can

either be temporary or permanent having regard to the nature of disability certified thereby.²⁰ Thus, only those persons with disability whose disability percentage is 40 or above, as per the disability certificate, are entitled to the benefit of reservation in appointment to posts in government establishment as per the provisions of the Act.

International Obligations & Legal Framework

Ever since the inception of the United Nations in 1945, there has been a gradual yet continuous evolution of International Human Rights Law. Although the inherent worth of every human being was recognized and declared in 1948, it took almost 58 years for the international community to agree and conclusively define the rights of the differently abled persons. The journey of this evolution may be summarized as below:

UN Charter

The weak and ambiguous Human Rights provisions²¹ of the Charter laid down the inception of the present International Human Rights Law including the UNCRPD by encouraging respect for human rights, their promotion by the member states and by setting out the principle of non-discrimination.

UDHR

What started as an endeavour to frame international bill of rights, under the chairmanship of Eleanor Roosevelt, in furtherance of the obligations under the UN Charter, got reduced to a non-binding document recognizing and declaring thirty human rights *inherent* in all human beings by virtue of being born so and wherein *freedom from fear and want has been proclaimed as the highest aspiration of the common people*. It endorses the spirit of brotherhood²², principle of non-discrimination²³, equality²⁴ and recognition as a person²⁵ everywhere, privacy²⁶, social security²⁷ and *right to work*²⁸ among other rights. The right to work is declared a human right available to everyone and includes *free choice of employment, just and favourable conditions of work and also protection against unemployment, equal pay for equal work, just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Right to rest and leisure, including*

⁹ Narayan, Choudhary Laxmi, and Thomas John. “The Rights of Persons with Disabilities Act, 2016: Does It Address the Needs of the Persons with Mental Illness and Their Families.” *Indian Journal of Psychiatry* 59.1 (2017): 17–20. PMC. Web. 15 Sept. 2017.

¹⁰ The Schedule on *specified disability*, The RPWD Act.

¹¹ S. 2(r), The RPWD Act.

¹² S. 2(e) and S.57, *Ibid*.

¹³ S.2 (s), *Ibid*.

¹⁴ Rule 17(1) and Form IV, Rights of Persons with Disabilities Rules, 2017, published in the Gazette of India on 15th June, 2017. (“The RPWD Rules”).

¹⁵ Rule 17(2), Rules 2017- AAdhar and 2 pp size photos, The RPWD Rules.

¹⁶ Rule 17(1), The RPWD Rules.

¹⁷ S. 2(e) and s.57, The RPWD Act.

¹⁸ S.56, *Ibid*.

¹⁹ Rule 18, Form V, VI and VII, as the case may be, The RPWD Rules.

²⁰ Rule 18(3), The RPWD Rules,

²¹ Art 1(3), 55(c), 56,13(1)(b),66,73,78, Charter of the United Nations, 1945.

²² Art 1, Universal Declaration of Human Rights, 1948.

²³ Art 2, *Ibid*.

²⁴ Art 7, *Ibid*.

²⁵ Art 6, *Ibid*.

²⁶ Art 12, *Ibid*.

²⁷ Art 22, *Ibid*.

²⁸ Art 23, *Ibid*.

reasonable limitation of working hours and periodic holidays with pay is also recognized as a human right.²⁹

International Covenant on Economic, Social and Cultural Rights, 1966

The Covenant is a step forward from the 1948 Declaration as it *guarantees* right to work³⁰ among other rights to all individuals of the signatory State parties and imposes *obligation* in the nature of progressive realization, to the maximum of its available resources, to implement these rights. It also guarantees non-discrimination, right to just and favourable conditions of work³¹, social security³², adequate standard of living³³, etc. that have to be read in conjunction with the right to work in order to acquire economic security by engaging in gainful employment on the basis of equality with others.

Pre UNCRPD Framework

There have been a number of efforts at international level since the establishment of ILO concerning various issues in connection to the employment of the disabled including discrimination in *Occupation and Employment*³⁴ and *Vocational Rehabilitation and Employment*³⁵. Further, the year 1981 was proclaimed the International Year of Disabled Persons (IYDP) by the United Nations that called for a plan of action with an emphasis on equalization of opportunities, rehabilitation and prevention of disabilities. Perhaps the major outcome of this year was the formulation of *World Programme of Action concerning Disabled Persons*³⁶ that emphasised on equalization of opportunities for the disabled persons. Additionally, *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*³⁷ were passed as a result of UN decade of the disabled persons (1983-1992) that elaborated upon preconditions for equal participation, target areas for equal participation, implementation measures and monitoring mechanism. The ICESCR *General Comment No. 5 on Persons with Disabilities*³⁸ and ICESCR *General Comment No. 18: Right to Work*³⁹ were also fundamental in leading up to enactment of UNCRPD.

²⁹ Art 24, *Ibid*.

³⁰ Art 6, International Convention on Economic, Social and Cultural Rights, 1966.

³¹ Art 7, *Ibid*.

³² Art 9, *Ibid*.

³³ Art 11, *Ibid*.

³⁴ *ILO Convention on Discrimination in Occupation and Employment 1958, (No. III)*, which was ratified by India on 3 June 1960.

³⁵ *ILO Convention No. 159 on Vocational Rehabilitation and Employment (Disabled Persons)*, 1983. For the purposes of this Convention, Article 1 defines the term disabled person as an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment.

³⁶ *World Programme of Action concerning Disabled Persons*, 1982 available at

<http://www.un.org/documents/ga/res/37/a37r052.htm> (last accessed on 20 September, 2017)

UNCRPD

Until UNCRPD, there was a sort of invisibility of people with disability in the international human rights system despite the 1948 declaration and successive conventions revolving around the economic, social and cultural rights of people that though emphasized that people with disabilities have the same human rights as everyone but offered little guidance & seldom applied to people with disabilities. Furthermore, the reports and individual complaints to treaty monitoring bodies seldom addressed the disability issues and the standard rules of 1993 lacked the element of enforceability as they were not legally binding of the member states. The drafting process of UNCRPD started in Dec 2001 and the convention was finally adopted by UN General Assembly on 13th December, 2006. It was opened for signature 30th March, 2007 wherein over 80 States including India signed this treaty on the opening day which remains a record-breaking number for any human rights treaty. India ratified this convention on 1st October, 2007 but the convention came into force on May 3, 2008 upon attaining the 20th ratification.

The convention provides for the monitoring mechanism by establishing a *Committee on the Rights of the Disabled*⁴⁰ however its power to receive and address upon Individual Complaints is limited to only those States parties who have signed the Optional Protocol to this Convention. India, having signed and ratified the convention, has deliberately abstained from signing the Optional Protocol as it has for any human rights treaty. Nonetheless, the convention in itself is legally binding upon States Parties.

The Guiding principle of the convention as laid down in its Preamble and relevant to the present discussion are *respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; reasonable accommodation, mainstreaming disability issues as an integral part of relevant strategies of sustainable development and the negative impact of*

³⁷ *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* was adopted by the General Assembly on 20 December 1993, available at <http://www.un.org/disabilities/documents/gadocs/standardrules.pdf> (last accessed on 20 September, 2017)

³⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities*, 9 December 1994, E/1995/22, available at: <http://www.refworld.org/docid/4538838f0.html> (last accessed on 18 September 2017) See specifically pp.7-8 .

³⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, available at: <http://www.refworld.org/docid/4415453b4.html> (last accessed 18 September 2017).

⁴⁰ Article 34, United Nations Convention on Rights of Persons with Disability, 2007.

poverty on persons with disabilities. Article 1 of the Convention sets out its purpose, which is "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." The convention does not provide any definition of disability because it is believed and endorsed 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.* The convention does not create new or special rights for people with disabilities and rather elaborates existing human rights in the context of disability. Article 27⁴¹ explicitly recognizes and guarantees the right of persons with disabilities to work, on an equal basis with others. This includes the *right to 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.* It also puts a mandate upon the State parties to *enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services etc. and to 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; promote opportunities for self-employment, Employment in the public sector and the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.* A holistic approach to right to work is emphasized by ensuring that *reasonable accommodation* is provided to persons with disabilities in the workplace.

Indian Legal & Policy Framework

Constitution of India, 1950⁴²

While the fundamental rights stress on the existing rights, the Directive Principles provide the dynamic movement towards the goal of providing Human Rights for all. Right to employment under Indian Constitution can be considered in the light of relevant provisions of part III and IV of the Constitution and in particular Equality before the law and equal protection of laws within India (Art.14), Equality of opportunity in the matters of public employment (Art.16), Living wage etc. for workers (Art.43). Art.41 directs the State to ensure the people within the limit of its economic capacity and development, right to work, to education and to public assistance in certain cases.

Net effect of RPwD Act 2016, RPwD Rules 2017 and related Office memorandums

Quantum of Reservation

⁴¹ *Ibid.*

⁴² The Constitution of India, 1950.

⁴³ S. 34, The RPWD Act.

⁴⁴ S.34 (1), The RPWD Act.

⁴⁵ Proviso I to S.34 (1), *Ibid.*

⁴⁶ Government of India, Office Memorandum No.36035/02/2017-Estt (Res) Dated the 20th June, 2017 :

The RPWD Act provides for reservation of 4 percent for the persons with benchmark disabilities in appointments on identified posts in all Government establishments.⁴³ For instance, there are a total of 10,000 vacancies for a post in a given year in a government establishment. A total of 400 posts i.e. 4% will be reserved (horizontally) for the persons with benchmark disabilities out of which one percent each i.e. 4 posts each has to be reserved for the persons with benchmark disability relating to- (a) blindness and low vision, (b) deaf and hard of hearing, (c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy and (d) autism, intellectual disability, specific learning disability, mental illness and multiple disabilities of any of the above nature such as deaf-blindness in the posts identified for each disabilities.⁴⁴ Thus, in this example, the remaining 384 posts will be available for all kinds of disabilities provided their extent is 40 percent or above. In case of promotion, the RPWD Act does not explicitly provide for quantum of reservation that can be made in favour of persons with disabilities but leaves it open to be declared by the appropriate government in the form of instructions that can be made as well as altered from time to time.⁴⁵ Consequently, an Office Memorandum⁴⁶ was issued by the Government of India that provides for similar reservation in promotion as is provided for in the appointments i.e. 4 per cent of total number of vacancies in the cadre strength in identified Group C and D posts (each), in which the element of direct recruitment if any, does not exceed 75%, shall be reserved for Persons with Benchmark Disabilities of which one per cent each shall be reserved for persons with benchmark disabilities under clauses (a), (b), (c) and (d) as above. Thus, reservation in promotion is limited to Group C and D identified posts only whereas reservation in appointment is permissible in Group A and B identified posts as well in a government establishment.

Exemption from Reservation

If any Department/Ministry in the Central Government considers it necessary to exempt any establishment partly or fully from the provisions of reservation for persons with benchmark disabilities, it shall make a reference to the Department of Empowerment of Persons with Disabilities giving full justification for the proposal, who having regard to the type of work carried out in any Government establishment by notification and subject to such condition, if any, as may be specified in the notification, in consultation with the Chief Commissioner of Persons with Disabilities ("CCPD")

Reservation for Persons with Benchmark Disabilities - Suggestions, if any, from all concerned including general public (Public Grievances & Pensions Department of Personnel & Training, Ministry of Personnel). Available at http://document.ccis.nic.in/WriteReadData/CircularPortal/D2/D02adm/36035_02_2017-Estt.Res.-20062017.pdf (Last accessed on 15 October, 2017)

may exempt any Establishment from the provisions of reservation for persons with benchmark disabilities.⁴⁷

Establishment

The RPWD Act⁴⁸ defines establishment as “*establishment includes a Government establishment and private establishment*” which is a progressive departure from earlier definition in PWD Act⁴⁹ that defined it as “*establishment means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 617 of the Companies Act, 1956 and includes Departments of a Government*”. Thus, the scope of establishments has now been made wide enough to include private sector as well but as far as the reservation in employment is concerned, only government establishments are under the mandate. Thus the net effect remains the same under the new Act as well. The employers in private sector are to be encouraged by the way of incentives to employ atleast five percent of their workforce from amongst persons with benchmark disability.⁵⁰

Identification of Jobs/Posts

One of the major problems with the previous PWD Act⁵¹ was that reservation in appointments as well as in promotion was limited for identified posts only. Hence, the reservation could have been made only for those posts that have been notified by the appropriate government as capable of being held by persons with benchmark disabilities. The new RPWD Act⁵² retains this retrograde provision despite the clear mandate upon India when it signed the UNCRPD that principles of equality, non-discrimination and most importantly of *acceptance and inclusion in the society* are fundamental in empowering the persons with disabilities. If the government, who has the negative duty of not violating the human rights as well as the positive duty to ensure their protection, decides to hold the differently abled persons to be not par with the able bodied persons by holding out that there are certain things or jobs or posts that cannot be held by the former category of persons then the problem regarding their inclusion and acceptance in the society remains to be a far-fetched dream despite enhanced reservation, new legislations and international commitments.

The only new provision in this regard under the RPWD Act is that the appropriate government will constitute an expert committee, comprising of persons with benchmark disabilities among the other members of the committee, which shall be responsible for such identification. However, nothing more is provided

regarding the qualifications, total membership, number of the disabled members etc. It is pertinent to note here that such a committee has already been in existence and has derived its mandate from the PWD Rules⁵³ passed in consonance with the previous PWD Act. The Constitution of this expert committee is as follows:⁵⁴

- I. Additional Secretary, M/o Social Justice & Empowerment - Chairperson
- II. Representatives, not below the rank of Joint Secretary from the following Ministries/Departments of Govt. of India-
 - (i) Department of Personnel & Training, North Block, New Delhi - Member
 - (ii) M/o Health & Family Welfare, Nirman Bhawan, New Delhi - Member
 - (iii) Department of Public Enterprises - Member
 - (iv) M/o Social Justice & Empowerment, Disability Division - Member
- III. Representative not below the rank of Joint Secretary of the Ministry/Department concerned in respect of which identification of jobs and related matters are to be reviewed - Member
- IV. Director General of Employment & Training, M/o Labour - Member
- V. Head of the Department, PMR, Safdarjung Hospital - Member
- VI. Representatives of NIs on each disability-
 - i. Director, National Institute for the Visually Handicapped, Dehradun - Member
 - ii. Director, Ali Yavar Jung National Institute for the Hearing Handicapped, Mumbai - Member
 - iii. Director, Pandit Deendayal Upadhyaya Institute for Physically Handicapped, Delhi - Member- Secretary
- VII. Representatives of Non-Governmental Organizations-
 - i. Ms Shivani Gupta - Member
 - ii. Shri S.K. Rungta - Member
 - iii. Shri Alok Kejriwal - Member

This expert committee identified the jobs or posts suitable to be held by persons with benchmark disabilities and the physical requirement for all such jobs/posts by a Notification⁵⁵. The Office memorandum⁵⁶ relating to the new RPWD Act carries this Notification forward and is thus presently applicable with slight modification as to the quantum⁵⁷ of reservation in determining the identified posts for persons with benchmark disabilities. It may, however, be noted that the nomenclature used for any job/ post shall mean and include nomenclature used for other comparable jobs/posts having identical functions and this list is not exhaustive as the concerned Ministries/ Departments shall have the discretion to identify jobs / posts *in addition* to the jobs/ posts already identified by

⁴⁷ S.34 (1) Proviso II, *Ibid*.

⁴⁸ S.2(i), The RPWD Act.

⁴⁹ S.2(k), The PWD Act.

⁵⁰ S.35, The RPWD Act.

⁵¹ S.32, The PWD Act.

⁵² S.33, The RPWD Act.

⁵³ The RPWD Rules.

⁵⁴ Ministry of Social Justice and Empowerment (Department of Disability Affairs), Notification No.16-15/2010-DD-III

dated 29th July, 2013, available at

<http://www.ccdisabilities.nic.in/content/en/docs/newnoti2013.pdf> (last accessed on 15th October, 2017).

⁵⁵ *Supra* Note 54. See particularly Annexure-C.

⁵⁶ *Supra* Note 46.

⁵⁷ 3% for PWD by the PWD Act 1995 and is now 4% for benchmark PWD by the RPWD Act 2016

Department of Empowerment of Persons with Disabilities.⁵⁸ On a perusal of annexures⁵⁹ to this notification, a total of 881, 312, 1512 and 249 posts have been identified for posts in Group A, B, C and D respectively as capable of being performed by the persons with benchmark disability having regard to the nature of work it entails.

Computation of Reservation

Reservation for persons with benchmark disabilities in appointment as well as promotion shall be computed on the basis of total number of vacancies, *whether identified or not* as such, occurring in the concerned Group Post in the establishment although the recruitment of the persons with benchmark disabilities would only be in the posts identified as suitable for them.⁶⁰ Further, the reservation for persons with disabilities in accordance with the provisions of section 34 of the RPWD Act shall be horizontal and the vacancies for persons with benchmark disabilities shall be maintained as a separate class.⁶¹ Here it is pertinent to note that since reservation is limited to identified posts only and number of vacancies reserved is computed on the basis of total vacancies (in identified posts as well as unidentified posts), it is possible that number of persons appointed by reservation in an identified post may exceed four per cent.

Inter se Exchange and Carry forward

The RPWD Act⁶² provides for carrying forward of vacancies reserved for persons with benchmark disabilities if such reserved vacancies were not filled up in the previous year owing to non-availability of a suitable person with benchmark disability or for any other sufficient reason which has to be duly recorded in writing by the head of the establishment. If in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the identified categories⁶³. If still some reserved vacancies remain unfilled after carrying forward and inter exchange, the vacancies will first have to be offered to persons with disabilities i.e. persons whose extent of disability as per the disability certificate does not measure upto 40% but are suffering from long term impairments as defined under the Act⁶⁴ and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability. Thus, if any vacancy reserved for any category of benchmark disability cannot be filled due to non-availability of a suitable person with *that* benchmark disability or for any other sufficient reason, such vacancy shall be carried forward as a '*backlog reserved vacancy*' to the subsequent recruitment year wherein such backlog reserved vacancy shall be treated as

reserved for the category of disability for which it was kept reserved in the initial year of recruitment. However, if a suitable person with that benchmark disability is not available, it may be filled by interchange among the categories of benchmark disabilities identified for reservation. In case no suitable person with benchmark disability is available for filling up the vacancy in the succeeding year also, the employer may fill up the vacancy by a person other than a person with benchmark disability. If the vacancy is filled by a person with benchmark disability of the category for which it was reserved or by a person of other category of benchmark disability by inter se exchange in the subsequent recruitment year, it will be treated to have been filled by reservation. However, the Office Memorandum⁶⁵ adds that if the vacancy is filled by a person other than a person with benchmark disability in the subsequent recruitment year, reservation shall be carried forward for a further period upto two recruitment years whereafter the reservation shall lapse. In these two subsequent years, if situation so arises, the procedure for filling up the reserved vacancy shall be the same as followed in the first subsequent recruitment year. In order to ensure that cases of lapse of reservation are kept to the minimum, the older carried forward reservation would be filled first and the current vacancies would be carried forward if not filled up. As far as promotions go, the RPWD Act⁶⁶ clearly states that "*no promotion shall be denied to a person merely on the ground of disability*" but a clear procedure that has been provided regarding carry forward and inter se exchange in reserved posts for promotion by the Office Memorandum⁶⁷ is that the candidates with benchmark disabilities, who are within the normal zone of consideration, shall be considered for promotion. Where adequate numbers of the candidates with benchmark disabilities of the appropriate category of disability are not available within the normal zone, the zone of consideration may be extended to *five times* the number of vacancies and the candidates with Benchmark disabilities falling within the extended zone may be considered. In the event of non-availability of candidates even in the extended zone, the reservation can be exchanged so that vacancy can be filled by a person with other category of benchmark disability, if possible. If it is not possible to fill up the post by reservation, the vacancy in the post may be filled by a person other than a Person with Benchmark disability and the reservation shall be carried forward for up to three subsequent recruitment years, where-after it shall lapse.

Horizontality of Reservations

Reservation for backward classes of citizens (SCs, STs and OBCs) is called vertical reservation and the reservation for categories such as persons with

⁵⁸ *Supra* Note 46.

⁵⁹ *Supra* Note 54. Annexure C.

⁶⁰ Rule II(1), the RPWD Rules and *Supra* Note 46.

⁶¹ Rule II(4), the RPWD Rules.

⁶² S.34 (2), the RPWD Act.

⁶³ *Ibid*, See S.34(1)(a)-(e): Blind and low vision, hearing impairment, locomotor disability, mental disabilities and multiple disabilities.

⁶⁴ S.2(s), The RPWD Act.

⁶⁵ *Supra* Note 46.

⁶⁶ S.20 (3), the RPWD Act.

⁶⁷ *Supra* Note 46.

benchmark disabilities and ex-servicemen is called horizontal reservation. Horizontal reservation cuts across vertical reservation (in what is called interlocking reservation) and persons selected against the quota for persons with benchmark disabilities have to be placed in the appropriate category viz. SC/ST/OBC/General candidates depending upon the category to which they belong in the roster meant for reservation of SCs/STs/OBCs. To illustrate, if in a given year there are two vacancies reserved for the persons with benchmark disabilities and out of two persons with benchmark disabilities appointed, one belongs to a Scheduled Caste and the other to general category, then the benchmark disabilities SC candidate shall be adjusted against the SC point in the reservation roster and the general candidate with benchmark disability against unreserved point in the relevant reservation roster. In case none of the vacancies falls on point reserved for the SCs, the benchmark disability candidate belonging to SC shall be adjusted in future against the next available vacancy reserved for SCs.

Case Law

In a catena of judgments, Supreme Court of India has clearly emphasized on the need to protect the Rights of Persons with Disabilities in employment sector and that any form of discrimination to such differently abled persons is forbidden. Most recently, it has issued directions to the Central Government, State Governments and Union Territories to comply with the judgment rendered in Justice Sunanda Bhandare Foundation vs. Union of India and Another. In *Indira Sawhney*⁶⁸, the Supreme Court held that reservation made under Article 16(1) of the Constitution of India, 1950 such as reservation for physically handicapped persons and ex-servicemen may be classified as Horizontal reservation. This Horizontal reservation cuts across vertical reservation that has been made for SC/ST/OBC under Article 16(4) of the Constitution. Thus, the 3% reservation mandated for persons with disabilities⁶⁹ in public employment being horizontal reservation, is given within various categories of vertical reservation such as SC, ST, OBC, respectively. Interestingly, in its decision, Supreme Court in the case of *Mahesh Gupta v. Yashwant Kumar Ahirwar*⁷⁰ held that “a disabled is a disabled”. The question of making any further reservations on the basis of caste, creed or religion ordinarily may not arise. They constitute a special class. In the aforesaid case, the posts of Assistant Teacher reserved for persons with disability were erroneously advertised as posts reserved for scheduled caste persons with disability. The court held that there should not be any further reservation within the quota of disabled persons on such basis. This judgment is of great importance as state-wise

reservations of posts, even those reserved for persons with disability are often further divided in to disabled persons from SC/ST and other categories. However, it would have been more useful if the court instead of using the word ‘may’ used the word ‘shall’ as it would have served a mandate. In the case of *Kunal Singh v. Union of India*⁷¹, where appellant Kunal Singh was a head constable with special services bureau, suffered an injury to the leg while he was on duty and as a result his leg had to be amputated. This resulted in Kunal Singh’s invalidation from service. The court holding in his favor highlighted the clear provision of Section 47 of Persons with Disabilities Act, 1995 according to which “the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service”. The court opined that if such an employee is not protected, he would not just suffer alone but all his dependents would also undergo suffering. Therefore, merely granting him pension would not suffice, but there must also be an attempt to secure him alternative employment. In *Deaf Employees Welfare Association v. Union of India*⁷², a petition was filed seeking a writ of Mandamus to direct the Central and state governments to grant equal transport allowance to its government employees suffering from hearing impairment as what was being given to blind and other disabled government employees. The allowance given to the hearing impaired employees was significantly lower than the allowance granted to other employees with disabilities. The Supreme Court allowed the petition and directed the Respondents to grant transport allowance to speech and hearing impaired persons also on par with blind and orthopedically disabled government employees. The court held that there cannot be further discrimination between a person with disability of ‘hearing impairment’. Such discrimination has not been envisaged under the Disabilities Act. It held that equality of law and equal protection of law afforded to all persons with disabilities while participating in government functions. *The dignity of persons with hearing impairments must be protected by the state as even a presumption that a hearing or speech impaired person is suffering less is, in effect marginalizing them; they must be treated at par with persons suffering from visual impairment to fulfill the broad objects of Article 14 of the constitution.*⁷³ In *Union of India v. National Federation of the Blind*⁷⁴, an Appeal was filed from the decision of the Delhi High Court wherein a PIL had been filed which sought the implementation of Section 33 of the PWD Act alleging that the Appellants herein failed to provide reservation to the blind and low vision persons and they are virtually excluded from the process of recruitment to the government posts as stipulated under the PWD Act. The court looked into the calculation of the 3% reservation- whether it refers to

⁶⁸ *Indira Sawhney v. Union of India and others* AIR 1993 SC 477: 1992 Supp 2 SCR 454.

⁶⁹ The PWD Act.

⁷⁰ *Mahesh Gupta v. Yashwant Kumar Ahirwar*, C.A. NO 3984 of 2007 [Arising out of SLP (Civil) No. 16291 of 2004] with C.A. Nos. 3985 and 3986 of 2007 [Arising out of SLP (Civil) Nos. 19391 and 20321 of 2004], decided on 30.8.2007.

⁷¹ *Kunal Singh Vs Union of India* AIR 2003 SC 1623

⁷² *Deaf Employees Welfare Association v. Union of India* (2014) 3 SCC 173

⁷³ *Ibid*

⁷⁴ *Union of India Vs National Federation of the Blind* (2013) 10 SCC 772

cadre strength, or number of vacancies. It was held that 3% refers to a part of the total vacancies in cadre strength. The court also observed "It is clear that while Section 33 provides for a minimum level of representation of 3% in the establishments of appropriate government, the legislature intended to ensure 5% of representation in the entire workforce both in public as well private sector". The Supreme Court once again came to the aid of persons with disabilities in *Rajeev Kumar Gupta & others v. Union of India*⁷⁵. In this case, the background of controversy comprised of Section 32 of the Persons with Disabilities (Equal opportunities, protection of rights and Full participation) Act, 1995 which provided that the Government will identify posts that will be reserved for persons with disabilities. Also, section 33 states that minimum 3% reservation has to be provided for PWDs in all such posts that are identified. In the present case, the government had identified various posts from Grade A to D in Prasar Bharti for reservation for PWDs. Some of these posts were filled through direct recruitment, some through promotion and some through a mix. A departmental memorandum did not extend the reservation for PWDs to Grade A and Grade B posts that were filled by promotion. As a result, PWDs were not able to get the benefit of 3% reservation for these posts. The Supreme Court on interpreting the challenge put up by the employees of Prasar Bharti, struck the memorandum that did not allow reservation for PWDs in posts in Grade A and Grade B that are filled through promotion. It chastised the authorities for denying the benefit of reservations to PWDs in the posts that were identified as suitable for them. The court also observed that the Government identifying a post as suitable for reservation under the Disabilities Act means that a PWD is fully capable of discharging all functions associated with that post. Once identified, all appointments to such post are then subject to a minimum 3% reservation irrespective of the mode of appointment. The court also instructed the government to scrutinize the barriers to entry for PWDs and that they should be integrated into the society and be the "agents of their own destiny". Also, that the benefit cannot be denied to them by denying reservation in posts filled by promotion. However, reservation in employment is just the first step towards integrating PWDs into the society. *The entire system has to be made more accessible and enabling, with paternalistic attitude* adopted towards PWDs being discarded for a more sensitive attitude.

Conclusion

The RPWD Act, on one hand, nominally increases reservation quota for the disabled persons and on the other, qualifies the beneficiaries of such reservation as being those having 40 percent or above of a specified disability. Thus, now reservation in employment is not available to persons with disabilities less than 40 percent. Further, although it brings private establishments within the ambit of the Act but the

mandate of providing reservation is still upon government establishments only. However, a new provision in this regard is inserted through the said Act that directs the appropriate governments to provide incentives to the employers in private sector so that at least 5 % of their work force is comprised of persons with benchmark disability. This is to be done by the appropriate governments only as per their economic capacity and development and is hence not mandatory⁷⁶. Furthermore, the archaic practice of *identification* of job posts that can be held by the disabled persons has been retained in the new Act which goes on to show that India, though a signatory to UNCRPD, still believes that disability puts a constraint upon the amount and type of work a person can do and thus the government failed to do away with the practice of identification of posts that can be reserved for employing the disabled persons. This is especially ironic since the Act itself provides for principles of equal participation, reasonable accommodation, accessibility, non-discrimination, etc. The RPWD Act, as its predecessor, allows exemption to government establishments from reserving vacancies if *having regard to the type of work carried out* in such establishment, disabled persons cannot be employed by it. Although the number of posts identified by the Government of India in Group A, B, C and D category are huge and the list seems to include all professions one may think of, the embargo of identification of posts nevertheless deters the empowerment of the disabled. Thus, the new Act fails to deliver the much needed reform in securing employment of the differently abled persons at par with the able bodied persons. However, it is submitted that making requisite reforms in reservations for the disabled will still not be adequate and a shift from *incentive based approach to rights based approach* is required in achieving the equal participation of the disabled in total workforce of India. The practice of providing reservation can be said as providing incentives while the practice of providing equipment, accessible places of work, advanced technologies that are substitution of manual work etc. are examples of rights based approach where the differently abled persons are able to secure employments on their own and can work with the help of these aids in a like manner as the non-disabled persons. Meanwhile, in the present Indian context, the practice of providing reservation is a necessary evil, at the same time the long term solution would lie in making the places of work more accessible and providing more opportunities of education to the disabled. Only then can we integrate the differently abled persons into the Indian society and change their overall status by eliminating the stigma attached to the disability.

⁷⁵ *Rajeev Kumar Gupta & others v. Union of India*, W.P.(Civil) 521 of 2008, decided on 30.6.2016

⁷⁶ S. 35, The RPWD Act.