



The Rights of Persons with Disabilities Bill, 2014

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The Rights of Persons with Disabilities Bill, 2014 (hereinafter, RPD Bill), introduced in the Rajya Sabha in February, 2014, is currently before the Parliamentary Standing Committee on Social Justice and Empowerment. After several fits and starts, the disabled people of the country are likely to get a new legislation that promises to offer a wider set of rights than what they currently have. This inaugural issue of the Law & Policy Brief presents a critical evaluation of the promises made by the RPD Bill.

At present, the rights of the disabled in matters of education, employment, accessibility and social security are primarily governed by the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter, PWD Act). Besides the PWD Act, physical and mental disability is regulated by the Mental Health Act, 1987; the Rehabilitation Council of India Act, 1992; the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999; and a number of other legislations not centrally concerned with disability, but which nonetheless affect the lives of disabled individuals.

Any legislation aimed at protecting the rights of the disabled must take note of four issues. Firstly, disability is not a monolithic condition but comprises of a wide range of impairments and health conditions, and individuals with different impairments/health conditions face different types of barriers and discriminations. Thus, instead of only providing for standardized remedies such as reservation, the architecture of the legal protections envisaged must be such, that they are able to accommodate a wide range of individualized measures to target those barriers. Secondly, over the last

eighteen years, the PWD Act has been interpreted by the judiciary in a creative manner to address some of the shortcomings of the original Act. The result is that today there is a considerable body of progressive judgments on disability rights in India. Any new legislation on the subject must be designed to preserve and build on this existing disability rights jurisprudence, instead of providing a new framework altogether. Thirdly, as already mentioned, disability in India is not governed by a single legislation. There are myriad of laws in the statute book, where disability continues to be a criterion for disqualification. For instance, all the laws governing marriage and divorce single out leprosy and mental illness as grounds for divorce. Unless the new legislation explicitly overrides all other legislative provisions dealing with disability, its progressive potential would be undercut by these other legislations dealing with specific situations. And finally, there is the United Nations Convention on the Rights of Persons with Disabilities (hereinafter, CRPD), that the Indian government ratified in October 2007. India being a party to the Convention, the RPD Bill must meet the standards set forth in the Convention.

With this background in place, we will now look at a few key areas of the RPD Bill.

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Identification and Certification

Any legislation containing redistributive measures such as preferential treatment or providing specific services for certain classes, also provides mechanisms to identify the beneficiaries of such measures. The current PWD Act does it by specifying the seven impairments that are covered by the Act. In order to have a valid claim under the Act, the claimant must have at least 40% of any of the specified impairments, assessed and certified by government medical boards. The RPD Bill has increased the number of specified impairments to nineteen, which includes conditions such as hemophilia, learning disabilities and thalassemia, among others (Schedule I).

While a disability certificate is a prerequisite to claiming legal protection or welfare benefits, not all disabled people have disability certificates. As per the 2013-14 report of the Department of Disability Affairs, Government of India, only 40% of the disabled in the country have disability certificates. This is on account of several reasons. Firstly, the location of the medical boards at the district level, poses a problem of accessibility for those living in far flung areas. Secondly, the narrow clinical focus of the identification process is such that it gives a lot of discretion to the medical professionals to decide who should be an appropriate beneficiary under the Act. Thirdly, it is not possible to quantify the extent of disability in case of mental disabilities, who are then left out of the ambit of legal protection.

While the RPD Bill enlarges the umbrella of legal protection by including a larger number of impairments than before, the scheme of the Bill does not address the other issues associated with the certification process, namely, the inaccessibility of the district based medical boards, the clinical focus of the identification process, the problem of not getting a disability certificate within a definite time period and lack of accountability of the personnel involved in the certification process. The accessibility issues can be tackled by authorizing Public Health Centers to assess and disburse disability certificates and an online application system. While these steps require policy decisions, legislative steps can be taken to lay down measures to ensure accountability of the medical personnel and a definite period for the delivery of disability certificates.

Equality and Non-Discrimination

In an improvement over the PWD Act, the RPD Bill contains a clause prohibiting discrimination against the disabled and obligating the government to ensure that

they enjoy their right to equality (Section 3). On closer reading, this clause does not adequately protect the rights to equality and non-discrimination.

The clause contains an impoverished and outdated notion of non-discrimination. Contemporary non-discrimination law, requires the duty holder to take individualized measures to remove the barriers that might hinder a person's full enjoyment of an opportunity or participation in social life, unless those measures impose an "undue burden". This is known as the duty of "reasonable accommodation". For instance, an employer is required to take steps – ranging from the installation of a ramp to making adjustments in job duties – to accommodate the individual needs of a disabled person so that he/she is able to perform his/her duties. Denial of such steps constitutes discrimination, unless they pose an undue burden on the employer.

In order to realize the goal of equality, especially in case of disability, the concept of reasonable accommodation must be part of the legal conception of equality and non-discrimination. The concept not only has a central presence in legal systems with highly evolved jurisprudence on equality and non-discrimination, such as Canada, United Kingdom and South Africa, it is also one of the main pillars of the CRPD. Yet, the duty of reasonable accommodation is absent from the RPD Bill. Although the Bill contains a definition of reasonable accommodation [Section 2(t)], the concept itself has been used only twice in the Bill – in the context of access to justice and duty of the education provider. Even in these cases, reasonable accommodation is not available as a right to the disabled individual, but only as a weakly defined duty ("shall endeavor to provide").

Legal Capacity and Guardianship

Legal capacity refers to the attribute of an individual to act on the basis of his/her own will, without any limitation arising out of his/her status or legal condition. This concept is critical for any articulation of the rights of the disabled, especially those with mental disabilities, since they are thought to lack the ability to act rationally and independently, both in legal transactions and in their everyday affairs. A large number of laws in India dealing with marriage, property, employment, economic transactions and political rights disqualify persons with mental disabilities from these areas, irrespective of the nature and extent of their disability. Article 12 of the CRPD on the other hand places an obligation on state parties to recognize that all disabled people are endowed

with legal capacity in every area of life; to provide appropriate support measures so that they are able to exercise legal capacity on an equal basis with others; to ensure that such support measures do not end up in depriving the disabled of their legal capacity and to provide effective safeguards against the abuse of such support measures.

Section 12(1) of the Bill recognizes legal capacity of disabled people, but only with respect to property and financial matters. What is needed however is an unambiguous recognition of the inherent right of all disabled people to equal legal capacity, in all aspects of life, including medical treatment, marriage, employment, place of residence, property rights and voting rights. In the absence of such a recognition, all other rights become meaningless for those with mental disabilities, a concrete example of which, we will see below.

Section 12(3) empowers the disabled person to modify any existing support arrangement and take the support of another person. However, the proviso to the clause states, that a change in arrangement does not affect the rights of the third parties to the transactions carried out by the disabled person with the help of the former support provider. One wonders whose interest the RPD Bill is meant to protect. If the support provider and a third party collude to defraud a disabled person, and the collusion is masked well, then this clause will afford protection to the interests of the wrongdoer instead of the victim. Section 12(4) provides that a support provider shall not exercise undue influence on the disabled person and respect his/her autonomy, dignity and privacy. Curiously, there is no remedy provided in this or any other Section in the Bill, if the support provider violates this prohibition or the duty cast upon him/her under this Section.

Section 13 of the Bill deals with guardianship. Two terms need to be clarified before proceeding. Guardianship could be either limited or plenary. In case of the former, the ward retains some rights and decisions are taken based on mutual understanding between the ward and the guardian. In case of the latter, the guardianship is total and hence all decision with respect to the ward is taken by the guardian. Section 13 states that any person with mental illness who is found by a District Court to be incapable of taking care of his/her person or taking legally binding decisions on his/her own, may be placed under the limited guardianship of another person. In exceptional circumstances, plenary guardianship is also

allowed. At present, persons with mental illnesses are governed by a system of plenary guardianship under the Mental Health Act, 1987, which goes against the recognition of legal capacity and supported decision making mandated by the CRPD. Instead of dismantling the existing system whereby persons with mental illnesses are divested of all their rights, this Section seeks to preserve plenary guardianship. Even the articulation of limited guardianship in this Section, exceeds the scope of the idea of support system with minimal restrictions that the CRPD mandates. This Section should be redrafted altogether to abolish plenary guardianship and provide for the appointment of limited guardians for a specific period and specific purpose, subject to appeal by the disabled person concerned.

Employment

In the RPD Bill, employment is addressed in two ways. The first cluster of Sections are general provisions relating to employment, such as non-discrimination, equal opportunity policy, mechanisms for grievance redressal at workplace, and so on. These are found in Chapter IV (Sections 18-22) of the Bill. As discussed earlier, the guarantee of non-discrimination at workplace, especially in the context of disability, is difficult to achieve, if it does not involve the duty of reasonable accommodation. A weak and limited form of reasonable accommodation is found in Sections 19(2) and 19(4). The former states that every establishment shall provide “appropriate environment” to the disabled employees. But there is no way to infer if the denial of the same would amount to workplace discrimination. The latter, which is a reproduction of a similar clause in the PWD Act, states that if an employee after acquiring disability is found unsuitable for the position, he/she was holding, must be shifted to some other post with the same pay scale and service benefits, and if no such post is available, a supernumerary position must be created to accommodate such employee. While this clause provides protection against dismissal on acquiring disability, which is extremely crucial, and mandates job restructuring to accommodate a disabled employee, it does not encompass the broad spectrum of individualized measures that are enabled by the concept of reasonable accommodation, ranging from lowering the height of a desk to allowing the employee to work from home.

The second cluster of provisions are those relating to reservation in employment and all issues incidental thereto, such as identification of posts and rules for

carrying forward unfilled vacancies, which are found in Sections 32-35. These provisions apply to only those individuals, who have a disability certificate showing a minimum of 40% of any of the specified impairments. Some of the provisions in this cluster require greater clarity, while some others are framed in such a way, that their goals are impossible to achieve. Section 33(1) of the Bill provides for five percent reservation in every establishment for those with specified impairments. The term “reserve” used in this clause is problematic. The corresponding term under the PWD Act, is “appoint”, the meaning and scope of which has been subject to litigation. A three judge bench of the Supreme Court of India, in *Union of India v National Confederation for Development of Disabled* (13 September, 2014) clarified the legal position and observed that the term “appoint” is not restricted to appointment by direct recruitment alone, but includes appointment by promotion and deputation as well. This judgment confirmed the 2013 verdict of the Bombay High Court on this question and a 2010 judgment of the Supreme Court of India, which supported the above interpretation. The drafting of a similar clause in the new legislation, must be informed by this history and interpretation, which the use of the term “reserve” does not accomplish. Section 33(1) should therefore be amended, to reflect the September 2014 Supreme Court verdict, in the following manner:

*“Every appropriate government shall **appoint either through direct recruitment or promotions, in every establishment under them...**”*

The same clause contains another instance revealing the contradictory spirit of the RPD Bill. The clause directs the government to provide reservation in employment, to persons with “autism, intellectual disability and mental illness” [Section 33(1)(d)]. This provision upholds the promise of employment to a disempowered and stigmatized group of people with mental disabilities. People with mental disabilities, however, are explicitly debarred from formal employment by the laws of the country. To remove these disqualifications, the Bill should have explicitly recognized the legal capacity of all disabled people in every area of life, overriding all other laws. But as discussed earlier, Section 12 of the Bill, which deals with legal capacity, is limited to economic transactions alone. The result is an anomalous situation where the Bill seeks to guarantee a right to a section of disabled people, which they will not be able to exercise, due to the restrictiveness of another provision in the same Bill.

Section 33(2) of the RPD Bill lays down the exceptional circumstances under which posts reserved for persons with disabilities can be filled by other means, including by appointing non-disabled persons. At present, vacancies meant for the disabled are not filled up as per the requirements of the PWD Act. This has been noted by various High Courts and the Supreme Court of India as well as by several studies in recent years. Given the structural biases associated with filling posts reserved for the disabled, this part of the clause which explicitly allows establishments to fill posts identified for the disabled with non-disabled candidates, provides a way to circumvent the main provision altogether. In light of the functioning of the PWD Act, it is safe to say that if this clause is allowed to remain in the legislation, establishments would find excuses not to fill vacancies meant for the disabled, and subsequently fill them with non-disabled candidates.

Conclusion

The complete title of the PWD Act 1995 contains three terms to convey its guiding philosophy: 'equal opportunities' 'protection of rights' and 'full participation'. Although the PWD Act aspired to achieve these goals, there were inherent limitations in the Act. The CRPD added a few more goals to the existing ones, such as 'full legal capacity' and 'self-determination'. The 'new' legislation was expected to further build on these and facilitate a legal and policy shift from a paternalistic attitude towards disabled people to one based on human rights. But as the above analysis shows, the RPD Bill in its current form, fails to accomplish that. ■

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