'UNDUE BURDEN' UNDER THE RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016: IN SEARCH OF A DEFINITIVE LEGAL STANDARD

Rahul Bajaj, Ishika Garg & Ahsnat Mokarim[*]

The Rights of Persons with Disabilities Act, 2016, ('the Act') in India grants essential rights and protections to individuals with disabilities, anchored in the principle of reasonable accommodation. At the same time, the Act clarifies that a failure to provide reasonable accommodation is justified when providing the accommodation would cause 'disproportionate or undue burden'. This standard encompassing factors such as financial constraints and resources to implement such measures. However, varied interpretations and implementation of what makes a burden disproportionate or undue often result in a conceptually incoherent application of the principle of reasonable accommodation among different jurisdictions. This paper attempts to address this ambiguity surrounding the determination of 'disproportionate or undue burden' in the application of the principle of reasonable accommodation. By undertaking a cross-jurisdictional analysis of historical and legislative contexts, case laws, and considering international standards, the paper identifies key interpretational tools used in unpacking the 'undue burden' defence. Thereafter, the paper proposes a clear framework outlining factors for the Indian courts to consider when interpreting this standard. The scope of this paper is confined to a consideration of the undue burden defence in the realm of disability rights law. An examination of this standard in other areas of law, such as religious accommodations, is beyond the scope of this paper.

TABLE OF CONTENTS

[*] Rahul Bajaj is a practicing advocate in the courts of Delhi, co-founder Mission Accessibility, and Senior Associate Fellow (Disability Rights) at the Vidhi Centre for Legal Policy. Ishika Garg is a 4th-year law student at NALSAR University of Law, Hyderabad, while Ahsnat Mokarim is a 4th-year law student at MNLU, Mumbai. Views are strictly personal. All errors, if any, are solely attributable to the authors. The authors may be contacted at rahul.bajaj1038@gmail.com, ishikagarg2020@nalsar.ac.in, and ahsnat.mokarim@mnlumumbai.edu.in, respectively, for any feedback or comments.

I. INTRODUCTION

The enactment of the Rights of Persons with Disabilities Act, 2016, ('the RPwD Act') was hailed as a watershed moment for the disability rights movement in India. With this legislation, the principle of reasonable accommodation ('RA') came to be firmly grounded in the Indian legal framework. Modelled after Article 2 of the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD') which was ratified by India on October 1, 2007,[1] §2(y) of the RPwD Act defines RA as any "necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others".[2] Broadly, the RA principle encompasses the positive duty on the part of the State and private parties to furnish additional support to persons with disabilities to facilitate their full and meaningful participation in society.[3] Founded in the norm of inclusion, this principle acknowledges that the task of embracing equality does not end with preventing discrimination but extends to remedying discrimination by respecting differences.[4] While the RA principle has come a long way in its objectives of dismantling barriers faced by persons with disabilities, much remains to be done. Many governments and corporations are able to altogether escape the obligation to make RAs that the RPwD Act imposes on them.[5] One way through which this has been made possible is the 'disproportionate or undue burden' defence available under §2(y).[6]

The purpose behind the introduction of this defence was perhaps to create a bidirectional form of reasonableness that accounts for the needs of both persons with disabilities and the entities who have a duty to accommodate them.[7] On one hand, persons with disabilities have a legitimate interest in demanding adjustments in their day-to-day lives that can help realise their right to dignity.[8] On the flipside, entities such as employers of such persons may be discouraged from making such accommodations if they prove to be, in their subjective assessment, too expensive, inconvenient or otherwise burdensome. Thus, while placing an obligation on such organisations to make modifications to create more accessible environments, the RPwD Act alleviates their concerns by allowing them an exemption if discharging this duty would cause them to bear an 'undue burden'.

This paper delves into the issue of the precise scope of the aforesaid defence of 'undue burden'. This is because neither does the RPwD Act nor do the Right of Persons with

[1] The United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (May 3, 2008).
[2] The Rights of Persons with Disabilities Act, 2016, §2(y).
[3] *See* Vikash Kumar v. Union Public Service Commission, (2021) 5 SCC 370, ¶35 ('Vikash Kumar').
[4] Jeeja Ghosh v. Union of India & Ors. (2016) 7 SCC 761, ¶40.
[5] Tony Kurian, *It Took a Pandemic for India to Adopt the Work Solutions People with Disabilities Have Long Sought*, May 1, 2020, available at https://amp.scroll.in/article/959661/it-took-a-pandemic-for-india-to-adopt-the-work-solutions-people-with-disabilities-have-long-sought (Last visited on 26 September 2023).
[6] *Id*.
[7] Donald A. Hantula & Noreen A. Reilly, *Reasonable Accommodation for Employees with Mental Disabilities: A Mandate for Effective Supervision?*, Vol. 14, BEHAVIORAL SCIENCES & THE LAW, 107–120 (1996).
[8] Vikash Kumar, *supra* note 3.

Disabilities Rules, 2017 ('the Rules') framed thereunder provide any guidance as to how the standard of 'undue burden' is to be defined.[9] The Parliamentary debates on the RPwD Act remained focused on questions surrounding reservation for persons with disabilities in higher educational institutions and government establishments and did not delve into §2(y).[10] The lack of any operational guidance on the interpretation of the 'undue burden' standard can lead to two major consequences. *First*, persons with disabilities looking to demand accommodations may prematurely decide to not do so since they are unsure of whether the adjustments sought will constitute a disproportionate burden.[11] *Second*, the State and organisations may make use of the ambiguous nature of the defence to wiggle out of their obligation to reasonably accommodate persons with disabilities. In order to avoid such undesirable repercussions, it becomes crucial to propound a reliable test for the 'disproportionate or undue burden' standard enshrined under §2(y) of the Act.

Part II of the paper studies case laws on RA and undue burden to obtain greater clarity on how courts have construed this phrase, examining the key uncertainties currently existing in its interpretation. Part III goes on to analyse how some other common law countries have understood the phrase, as well as standards laid down in this regard by the United Nations Committee on the Rights of Persons with Disabilities. Based on this analysis, Part IV then outlines some factors for Indian courts to consider in interpreting this phrase, addressing the challenges and ambiguities we identify in Part II, aligning the RPwD Act with its fundamental principles. To illustrate the practical impact of this framework, the authors present some hypothetical case situations that showcase how it can effectively safeguard the rights of persons with disabilities. Finally, Part V offers concluding remarks on the relevance of this 'phrase' in the ongoing legal discourse surrounding disability rights in India.

II. IMPLEMENTATION OF THE 'UNDUE BURDEN' TEST BY THE INDIAN COURTS

This part examines the approaches adopted by Indian courts while balancing the principles of RA and 'undue burden' in cases related to violations of the rights of disabled individuals.

While the provisions of 'non-discrimination' and RA were expressly only added in the RPwD Act, the courts dealt with cases of lack of accommodative measures especially in issues related to education and employment policies even before the enactment of the said legislation. One instance is the case of *Ranjit Kumar Rajak* v. *State Bank of India*,[12] where the Bombay High Court for the first time recognised the doctrine of 'RA at the workplace' to be applicable in the country in light of India's recent ratification of the UNCRPD.[13] In this case, the petitioner, who had a renal transplant in 2004, was denied a probationary officer position at the State Bank of India due to concerns about the high potential medical expenses.[14] The High Court, however, noted that RA as defined under the UNCRPD can be read under Article

[9] Rule 3(4) of the RPwD Rules, 2017, mandates that no establishment can compel a person with disability to partly or fully pay the costs incurred for RA. However, the rule provides no guidance on how it is to be interpreted subject to undue burden.

[10] Lok Sabha Debates, *The Rights of Persons with Disabilities Bill, 2016*, 79, Session Number 10, December 16, 2016, available at https://eparlib.nic.in/bitstream/123456789/758961/1/lsd_16_10_16-12-2016.pdf (Last visited on September 26, 2023).

[11] Subhashini K. Rangarajan et al., *Reasonable Accommodation at the Workplace for Professionals with Severe Mental Illness: A Qualitative Study of Needs*, Vol. 42, INDIAN J PSYCHOL MED., 445-450 (2020).

[12] (2009) 5 Bom CR 227.

[13] *Id*., ¶¶21, 24, 25.

[14] *Id*., ¶¶3-19.

21 of the Indian Constitution, 1950, as the convention is not in conflict with any of the existing municipal laws of the country.[15] Additionally, the court observed that RA flows from the constitutional principles of right to life with dignity.[16]

In order to analyse the components of RA and undue burden test, the High Court relied on the definitions provided under the UNCRPD along with RPwD Act of other jurisdictions.[17] It further referred to a paper released by the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, and emphasised on a proportionality test to balance the rights, burdens and benefits of persons affected by the proposed accommodation.[18] The paper had highlighted that the burden of proof for a RA claim lies with the claimant, while the burden for an 'unjustifiable burden' claim rests with the employer or defendant.[19] Applying the same principles, the High Court ruled in favour of the petitioner on the grounds that the bank failed to present evidence on how accommodating the petitioner's needs would financially burden the organisation, considering factors such as its size, financial implications, and impact on employee morale.[20] The judgment stands out for its thorough consideration of the RA guarantee at a time when India had not even domesticated the RA guarantee formally in its laws.

Similarly, in *Syed Bashir-ud-Din Qadri* v. *Nazir Ahmed Shah*,[21] the appointment of the appellant who was a B.Sc. graduate with cerebral palsy for the job of a 'Teaching Guide' in Jammu and Kashmir was opposed by the State government on the grounds that the appellant's disability causing speech and writing difficulties would make it difficult for him to perform his duties as a teacher.[22] The Supreme Court, in this case, rejected this contention and held that the disability of the appellant can easily be accommodated by providing access to external "electronic aid which could eliminate the need for drawing a diagram and the same could be substituted by a picture on a screen, which could be projected with minimum effort".[23] While the court did not delve into the discussion on the doctrine of RA, it noted that locomotor disabilities are recognised under §21 and §22 of the erstwhile Persons with Disability Act, 1995, along with §31 which mandates the State to make provisions related to aids and appliances to persons with disabilities.[24]

The courts, thereafter, applied the principle of RA and undue burden on numerous occasions but without indulging in an extensive discussion on the parameters of the concept. These involve both judicial interventions aimed at providing relief to the petitioners against the violation of their rights along with suggestions directing the policymakers to fulfil their positive obligations in implementing provisions that ensure RA to the disabled. Some notable instances include the directives to the executive pertaining to granting travel allowance to the employees of Central and State governments suffering from hearing impairments, equal to the allowance provided to employees who were orthopaedically disabled or blind;[25] suggestions to the Ministry of Civil Aviation to modify the erstwhile Civil Aviation

[15] *Id*., ¶30.
[16] *Id*., ¶40.
[17] *Id*., ¶¶22-32.
[18] *Id*., ¶22.
[19] *Id*.
[20] *Id*., ¶42.
[21] (2010) 3 SCC 603.
[22] *Id*., ¶37.
[23] *Id*., ¶52.
[24] *Id*., ¶¶48-51.
[25] Deaf Employees Welfare Association v. Union of India, (2014) 3 SCC 171, ¶29.

Requirements and Aircraft Rules, 1937, to be accommodative to the needs of persons with disabilities; [26] and directives to the competent authorities to ensure that the physical infrastructure of all government buildings,[27] educational institutions,[28] transport vehicles such as railways[29] and buses[30] are made accessible to the disabled population within a stipulated time-period.[31] However, the implementation of these orders still remains at a glacial pace, posing a persistent cause of concern.[32]

A substantial engagement with the tests of 'undue burden' and RA was recently done in the landmark case of *Vikash Kumar* v. *Union Public Service Commission*[33] ('Vikash Kumar'). In the said case, the Supreme Court allowed the appellant, affected by dysgraphia or writer's cramp which was not classified as a benchmark disability under the RPwD Act, to the grant of a scribe in India's Civil Services' Examination.[34] The court, relying on the elements of RA and undue burden as defined under General Comment No. 6 ('GC6') released by the United Nations Committee on the Rights of Persons with Disabilities ('CRPD Committee') – the treaty body set up under the UNCRPD – noted that the test of undue burden should be assessed in an objective manner that covers all the pertinent considerations.[35] As will be later discussed in Part II, some of these considerations include the practical feasibility of providing the accommodation, as measured by factors such as financial costs, available resources, third-party benefits, size of the accommodating party, amongst others.

The court also cited the CRPD Committee's views in the cases of *Ms JH* v. *Australia*,[36] and *Gemma Beasley* v. *Australia*,[37] where a hearing-impaired juror was denied access to an Australian sign language interpreter by the State; [38] and *Michael Lockrey* v. *Australia*,[39] where a hearing-impaired juror was denied access to a stenographer to conduct real-time steno-captioning.[40] The CRPD, in all these cases, had opined that the State claiming

[26] Jeeja Ghosh v. Union of India, (2016) 7 SCC 761, ¶26.
[27] Rajive Raturi v. Union of India, (2018) 2 SCC 413, ¶34.
[28] Disabled Rights Group v. Union of India, (2018) 2 SCC 397, ¶¶9-17.
[29] Court on its Own Motion v. Union of India, 2017 SCC OnLine Del 9968.
[30] Nipun Malhotra v. State (NCT of Delhi), 2018 SCC OnLine Del 12005; Vaishnavi Jayakumar v. State of T.N., 2022 SCC OnLine Mad 6654; Integrated Disabled Employees' Association (I.D.E.A.) v. State of W.B., 2013 SCC OnLine Cal 9978.
[31] More examples on RA as a relief can be traced in cases such as National Association of Deaf v. UOI, 2011 SCC OnLine Del 4954 (wherein the lack of availability of sign language interpreters in all the major departments of ministries was challenged); Bhagwan Dass v. Punjab SEB, (2008) 1 SCC 579 (wherein the termination of the petitioner on attaining blindness during employment was held invalid and the appellant was entitled to all the service benefits); Ritesh Sinha v. State of Haryana, 2013 SCC OnLine P&H 15024 (wherein the petitioner, a judicial clerk with locomotor disability, was reinstated to his position and was allowed to carry out tasks suitable to his capabilities. Additional instructions related to installations of ramps were also made to the competent authority); Kritika Purohit v. State of Maharashtra, 2011 SCC OnLine Bom 2145 (wherein the petitioner was allowed to continue her admission in a Bachelor Course of Physiotherapy which was challenged in light of the then passed guidelines by the Maharashtra State Council for Occupational Therapy and Physiotherapy that had rendered visually impaired students as being ineligible for the course).
[32] Dhruva Gandhi highlights this to be a "limitation of judicial review as a strategy to maximise the enforcement of RA", *see* Dhruva Gandhi, *Litigating Reasonable Accommodation in Indian Courts – A Comment on the Transformative Ability of Judicial Review*, Vol. 13, JOURNAL OF INDIAN LAW AND SOCIETY (2023).
[33] Vikash Kumar, *supra* note 3.
[34] *Id.*, ¶74.
[35] *Id.*, ¶61.
[36] GE.18-22328(E), 31.08.2018.
[37] GE.16-08383 (E) 290716 290716.
[38] Ms JH v. Australia, ¶¶2.1-2.9; Gemma Beasley v. Australia, ¶¶2.1-2.7.
[39] CRPD/C/15/D/13/2013.
[40] *Id.*, ¶¶2.1-2.11.

undue burden defence failed to furnish any substantial evidence as to how the said accommodation would constitute a disproportionate burden on them.[41]

The Supreme Court, thus, rejected the respondent's arguments that the facility of a scribe can potentially be misused by the appellant as they did not submit any empirical data for supporting their assertion, thereby, failing to satisfy any 'objective criterion' for their undue burden claim.[42] It further noted that the absence of such facilities would deprive the persons with neurological conditions of their right to equal opportunity to public services.[43] The court also highlighted how the respondent's contentions for the conduct of "multiple examinations [as to existence of disability]" results in obstacles for the disabled to access RA.[44] Responding to the contentions of the wide interpretation of the provision of granting scribes, the court emphasised that the needs of those whose disability may not meet the benchmark threshold should not be trivialised to deny them access to any RA.[45]

While Vikash Kumar provides valuable insights into the judicial interpretation of undue burden, the case fails to provide a comprehensive guide on the application of the undue burden defence. The courts have only made references to the need for undue burden to be assessed in an objective manner. What is lacking is a thorough articulation of the kind of objective justification that would satisfy the undue burden defence, to facilitate an understanding of the contours and parameters for evaluating whether or not a particular accommodation would constitute undue burden. This gap is compounded by the lack of guidance on this front in the legislation or rules, as stated previously. This dearth of precedence and legislative guidance makes undue burden an evolving concept with a lot of discretion remaining with the courts. This is because such discretion has to be exercised by courts for evaluating whether or not a particular seemingly objective justification is simply a smokescreen for denial of RA. Thus, in order to develop a deeper comprehension of this concept, the following part will explore how this principle is applied by the courts of other jurisdictions.

III. INTERNATIONAL PERSPECTIVES ON 'UNDUE BURDEN'

A. *EVALUATION OF 'UNDUE BURDEN' UNDER GENERAL COMMENT 6 BY THE CRPD COMMITTEE*

One useful reference point in regard to the ambit of the test of 'disproportionate or undue burden' standard is the guidance offered by the CRPD Committee. Within the framework of GC6, the CRPD Committee has highlighted the principle of RA as the fundamental obligation of the State Parties to implement measures that enable individuals with disabilities to exercise their human rights equitably and without discrimination.[46] The CRPD Committee has embraced Sandra Fredman's model of transformative equality,[47] with four key dimensions to shape the concept of 'inclusive equality' which includes,

---

[41] Ms JH v. Australia, ¶7.5; Gemma Beasley v. Australia, ¶8.5; Michael Lockrey v. Australia, ¶8.5.
[42] Vikash Kumar, *supra* note 3, ¶62.
[43] *Id*., ¶66.
[44] *Id*., ¶61; *See also* CRPD Committee, *Concluding Observations on the Report of India*, GE. 19- 18639[E], ¶7[b] (September 24, 2019).
[45] *Id*., ¶59.
[46] Committee on the Rights of Persons with Disabilities, *General Comment No. 6 on Equality and Non-Discrimination*, April 26, 2018, available at https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no6-equality-and-non-discrimination (Last visited on October 6, 2023).
[47] In her submission to the CRPD Committee for General Comment No. 6 on Article 5 of the UNCPD, Fredman has suggested for the adoption of a more coherent definition of 'transformative equality' that goes beyond the

> "(a) a fair redistributive dimension to address socio-economic disadvantages;
>
> (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
>
> (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
>
> (d) an accommodating dimension to make space for difference as a matter of human dignity."[48]

In order to delineate the scope of application of RA, the CRPD Committee has distinguished RA from other obligations of the States including 'accessibility duties', 'affirmative action measures' and 'procedural accommodations in the context of access to justice'. In relation to the distinction between accessibility duties and RA duties, the former is categorised as an *ex ante duty* which refers to the systemic obligation of the State Parties to build accessibility into their systems without regard to the need of a particular person with a disability.[49] RA, on the other hand, is categorised as an *ex nunc duty* and refers to the individualised reactive duty that is applicable from the moment a person with disability requires access to non-accessible environments.[50] Similarly, RA is distinguished from affirmative action measures as it is a non-discrimination duty whereas the affirmative measures involve a preferential treatment of individuals with disabilities to address past or systematic exclusion from exercising their rights.[51] Further, 'procedural accommodations in the context of access to justice' refers to such adjustments and modifications to legal and judicial proceedings that ensure equal participation of persons with disabilities.[52] However, unlike RA, these are not limited by the concept of 'disproportionality'.[53]

The CRPD Committee, thus, divides the duty of RA into two components – the *first* part imposing a positive legal obligation on the duty bearer to introduce necessary adjustments to ensure the implementation of rights of persons with disabilities, and the *second* part referring to the assessment of this positive legal obligation on the grounds of 'disproportionate and undue burden'.[54] The burden of proof, however, lies on the duty bearer who claims such accommodation to be "disproportionate".[55] Further, the denial of RA must be based on "an objective criteria and analysed and communicated in a timely fashion to the

---

practice of equality in opportunities and mandates a stronger positive obligation on states to implement measures that redress the social and economic disadvantage associated with disability, address stigma, stereotyping, prejudice and violence, enhance participation of persons with disabilities, and accommodate difference by achieving structural change; *See* Sandra Fredman FBA, et. al., *Achieving Transformative Equality for Persons with Disabilities: Submission to the CRPD Committee for General Comment No.6 on Article 5 of the UN Convention on the Rights of Persons with Disabilities*, available at https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRPD/GC/Equality/OxfordHumanRightsHub.doc#:~:text=This%20conception%20requires%20that%2C%20to,people%20with%20disabilities%20and%20(iv) (Last visited on October 6, 2023).

[48] General Comment No. 6, *supra* note 46, at ¶11.

[49] *Id*., ¶¶24, 24(a).

[50] *Id*., ¶¶24, 24(b).

[51] *Id*., ¶25(c).

[52] Catalina Devandas, *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, (Special Rapporteur on the Rights of Persons with Disabilities, August 2020).

[53] General Comment No. 6, *supra* note 46, ¶25(d).

[54] *Id*., ¶¶25(a)-25(b).

[55] *Id*., ¶26(g).

person with a disability concerned".[56] This objective criterion includes the tests of feasibility, relevancy, and proportionality.[57]

According to the CRPD Committee, this analysis of the test of undue burden should be done on a case-by-case approach which considers a broad set of factors such as "financial costs, resources available (including public subsidies), the size of the accommodating party (in its entirety), the effect of the modification on the institution or the enterprise, third-party benefits, negative impacts on other persons and reasonable health and safety requirements".[58] However, the end objective should be to ensure that persons with disabilities do not bear the costs in exercising their rights to equality and non-discrimination.[59] Thus, any accommodation will be concluded as 'reasonable' only "if it is tailored to meet the requirements of the person with a disability".[60]

In the authors' pursuit of a clearer legal interpretation of 'undue burden' within the RPwD Act, it is instructive to broaden the perspective beyond the Indian legal landscape. The next three sub-parts survey the legal position on the undue burden test in the United States of America ('USA'), the United Kingdoms ('UK') and South Africa. These three jurisdictions have been chosen for the following reason. The USA, as it has an extremely well-developed disability rights jurisprudence under the Americans with Disabilities Act, 1990 ('ADA'). The UK, as it continues to remain an important point of persuasive reference for Indian courts on diverse areas of law, including disability rights. South Africa has been chosen as the material conditions in the said jurisdiction are broadly similar to India which can, therefore, facilitate an informed analysis. It is well-settled that foreign law is only a persuasive source of authority for Indian courts and as such these cases must be applied in Indian conditions with circumspection, after having regard to the differences between the two countries. On the basis of this cross-jurisdictional survey, the paper outlines some key learnings flowing from this analysis which feed into the discussion as to the standards that Indian courts should develop to assess the undue burden defence.

B. POSITION IN THE UNITED STATES

1. LEGISLATIVE POSITION

The ADA delineates RA as encompassing two main components – *first*, ensuring that the current facilities used by employees are easily accessible and usable for individuals with disabilities, and *second*, offering options such as job restructuring, flexible work hours, reassignment to vacant positions, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, providing qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[61] The list of potential accommodations is a helpful cue to the fact that the ADA recognises that providing RA marks a departure from the one-size-fits-all approach and requires that provisions be put in place as per individual needs. In order to ascertain whether providing RA would cause undue hardship for a covered entity, the ADA outlines a set of factors as follows:[62]

[56] *Id*., ¶27.
[57] *Id*., ¶¶26(b), (c), and (d).
[58] *Id*., ¶26(e).
[59] *Id*., ¶26(f).
[60] *Id*., ¶25(a).
[61] *See* The Americans with Disabilities Act, 1990 (U.S.A.), §12111(9).
[62] *Id*., §12111(10).

> (1) The accommodation's nature and cost;
>
> (2) The wherewithal of the concerned facility [as well as the broader institution of which the facility is a part] to provide RA, as measured by metrics such as overall resources, number of people employed and the expense/resource implications of providing the requested accommodation; and
>
> (3) The linkage/relationship between the concerned unit which has to provide the accommodation and the broader institution and details as to the work that the concerned institution does.

The enunciation of these factors appears to have been aimed at facilitating a balanced and objective determination as to whether or not a given accommodation can be provided. The ADA further adds that a failure to provide the accommodation would constitute discrimination against the applicant "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity".[63] The declaration that a failure to provide an accommodation itself constitutes discrimination is a pointer to the importance of RA within the ADA.

Additionally, while requiring public entities to make available alternative transport facilities for the disabled, the ADA carves out an exception where the public entity is able to "demonstrate to the satisfaction of the Secretary" that such facilities would impose an "undue financial burden on the public entity".[64] Further, the ADA states that, for public accommodations,[65] it is discriminatory to fail to take such steps "as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services".[66] This principle is applied unless the entity can demonstrate that taking such steps would "fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered" or would result in an undue burden.[67]

In 2002, the Equal Employment Opportunity Commission ('EEOC') issued guidance to construe the phrase 'undue hardship'. It reiterated, relying on the ADA, that undue hardship means significant difficulty and expense. It stated, "Undue hardship refers not only to financial difficulty, but to RAs that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business".[68] A determination as to undue hardship cannot be based on generalised conclusions but must instead be based on the specific facts of each case. Crucially, undue hardship determinations have to be based on the net cost to the employer. Relevant for this enquiry are external funding sources, available tax concessions as well as the ability of the employee to pay any remaining costs for the RA to be provided.[69]

---

[63] *Id*., §12112(5)(a).
[64] *See Id*., §12143(4)(iii) (the provision states, "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden").
[65] *See Id*., §12181(7) (the Act defines 'public accommodations' very broadly, as including even privately run hotels, lecture halls, bars, restaurants, amongst others).
[66] *Id*., §12182(2)(a)(iii).
[67] *Id*.
[68] *See* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, 7 (2003).
[69] *Id*., 54-55.

Two examples provided by the EEOC are instructive. *First*, in order to allow her to direct her limited energy toward her essential tasks, the employer reassigns three less critical responsibilities to another employee during her chemotherapy treatment. The second employee is not pleased about taking on additional duties, but the employer concludes that this extra workload would not substantially hinder the second employee's ability to complete their own tasks in a timely manner. Since the employer's operations are not significantly affected, it does not constitute undue hardship.[70]

Second, a clerk in a convenience store who gets diagnosed with multiple sclerosis, and therefore, wishes to work part-time rather than full-time as a RA. Since the store typically schedules two clerks for each shift, thus, if the first clerk's hours are reduced, the workload for the second clerk would increase to a point where they would not be able to manage their responsibilities effectively. The store determines that such an adjustment would lead to inadequate customer service, difficulties in keeping shelves stocked, and a potential compromise in store security. This clearly presents a significant disruption and falls under the category of undue hardship. Nevertheless, the employer is obligated to explore alternative solutions to accommodate the clerk without causing undue hardship.[71]

2. Approach Of The American Courts

It would now be instructive to examine the American case laws on undue burden so as to ascertain the principles that American courts have spelt out and practical examples of what does and does not constitute an undue hardship.

A leading American case on RA and undue hardship is *US Airways, Inc.* v. *Barnett*.[72] The US Supreme Court held that, at the summary judgment stage, the plaintiff needs to show that "an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases".[73] Once this is showcased, the defendant then has to provide case-specific evidence to show that the accommodation asked for would cause undue hardship in the particular circumstances at issue.[74]

In *Barth* v. *Gelb*,[75] the US Court of Appeals for the DC Circuit held that "As a general matter, a RA is one employing a method of accommodation that is reasonable in the run of cases, whereas the undue hardship inquiry focuses on the hardships imposed by the plaintiff's preferred accommodation in the context of the particular agency's operations".[76]

In the case of *Vande Zande* v. *State of Wisconsin Department of Administration*,[77] ('Vande Zande') the US Court of Appeals for the Seventh Circuit established a framework for determining the reasonableness of accommodations for disabled individuals, emphasising a cost-benefit analysis. They clarified that accommodation costs need not always be precisely quantified, but should not greatly outweigh the benefits.[78] The ruling aimed to address concerns that the undue hardship provision might hinder employers, particularly government entities, from justifying accommodation costs. The court argued that even large or

[70] *Id*., 55.
[71] *Id*., 56.
[72] 535 U.S., 122 S. Ct. 1516 (2002).
[73] *Id*., 401.
[74] *Id*., 402.
[75] 2 F.3d 1180 (D.C. Cir. 1993).
[76] *Id*., 1187.
[77] 44 F.3d 538 (7th Cir. 1995).
[78] *Id*., 542.

well-funded employers, including government bodies, should not be required to make exorbitant expenditures for minor improvements in a disabled employee's life. This interpretation aimed to prevent potentially overwhelming financial burdens on employers under the ADA. In trying to determine how to define 'undue hardship', the court stated that undue hardship is a term of relation, "We must ask, 'undue' in relation to what? Presumably (given the statutory definition and the legislative history) in relation to the benefits of the accommodation to the disabled worker as well as to the employer's resources."[79]

In *Borkowski* v. *Valley Central School District*,[80] the US Court of Appeals for the Second Circuit endorsed a relational understanding of undue burden, holding that the judicial focus must be not only on the costs to the employer, but also the benefits to others that will result.[81] The court also made the pragmatic observation that there is no complex formula, and instead, courts should undertake a common-sense balancing of the costs and benefits.[82]

In a nutshell, the following principles can be culled out from the above cases,

(1) Courts have to conduct a cost-benefit analysis to ascertain if providing a particular accommodation would constitute an undue hardship.
(2) This determination does not have to be made with mathematical precision but in a commonsensical and pragmatic manner.
(3) The judicial ascertainment of reasonableness has to be made on an *ex-facie* basis, i.e. whether the accommodation appears reasonable in the run of cases. The determination of undue hardship has to be made in the particular facts of each case.

Having analysed the cases that have spelt out the factors that inform the undue hardship inquiry, it would be instructive to also look at a few cases in which the undue hardship defence was held applicable and inapplicable.

a. Cases Holding the Undue Hardship Defence Applicable

In *D'eredita* v. *ITT Corporation*,[83] ('D'eredita') the plaintiff, initially unaware of his mild dyslexia, made significant errors in a commercial job. His struggles with reading designs and using instruments led to a disciplinary record and eventual layoff. He proposed two accommodations: more co-workers and color-coded motors. The court ruled both would impose excessive burden on the employer. The *first*, adding employees, would incur unnecessary labour costs, impacting the company's profit margins.[84] The *second* accommodation was also deemed unreasonable given that colour coordinating the manufacturing process with fifty complex motors of different types would be excessively burdensome, constituting an undue hardship for the employer.[85] This judgment lacks an attentiveness to the employee's additional needs and a desire to accommodate them. Further, the court fails to note that providing RA always requires a departure from the *status quo*. Calling the accommodation of hiring an additional person to support the person with disability in question as being 'superfluous' reflects the court's limited imagination and insensitivity.

[79] *Id*., 543.
[80] 63 F.3d 131 (2d Cir. 1995).
[81] *Id*., 138.
[82] *Id*., 140.
[83] 11-CV-6575-CJS-MWP (W.D.N.Y. November 5, 2015) as affirmed in D'eredita v. ITT Corporation, No. 15-3935 (2d Cir., January 26, 2017).
[84] *Id*., 15.
[85] *Id*., 16.

This is also evidenced by the fact that the court did not instruct the employer to specify the expenses for such the claim.

In *Dey* v. *Milwaukee Forge*,[86] the plaintiff was facing restrictions including bending and lifting after having back surgery due to a work injury. His employer considered reassignment to another position, but the court held that there was no position that could have been accommodated enough for the plaintiff to be able to perform the functions. The court stated that reallocation of job duties requiring other employees to perform them would cause those employees to be unable to perform their own duties and would result in an undue hardship on the employer's business.[87]

Another factor noted was difficulty in modifying the structural norms of the workplace such as the shift hours. For instance, in *Switala* v. *Schwan's Sales Enterprise*,[88] ('Switala') the plaintiff was a route manager for a frozen food delivery company, responsible for driving delivery trucks on sale routes. The court held that the employer's refusal to accommodate one of the plaintiff's physical therapy appointments after a work-related injury did not violate the ADA because accommodating this request would have meant that the delivery route does not get completed, as an inexperienced driver would go on the route alone, or that one of the two available supervisors would have had to accommodate the trainee on the delivery run. Thus, the court held that all of these options would have caused an undue hardship on the defendants.[89]

b. Cases Holding the Undue Hardship Defence Inapplicable

In *Bryant* v. *Better Business Bureau of Greater Maryland, Inc*,[90] ('Bryant') the plaintiff, affected by hearing loss, transferred to a new role at BBB (defendant). She struggled to hear callers' information using her usual device. She requested a teletypewriter ('TTY') system which would facilitate the communication. BBB refused, claiming undue hardship. The court's analysis of undue hardship, here, was slightly different from other courts. The court first noted that several courts have treated RA and undue hardship as flip sides of the same coin, meaning RA would not cause undue hardship and unreasonable accommodation would cause undue hardship.[91]

The court presently, however, found that an accommodation could be reasonable and still cause an undue hardship. It held that material differences exist between inquiries about whether an accommodation is reasonable and whether the accommodation would cause an excessive or undue hardship on the employer. The undue hardship defence was held to focus on the impact that an accommodation would have on the specific employer at a particular time.[92] This, according to the court, is a multifaceted, fact-sensitive inquiry requiring consideration of: (1) financial cost; (2) additional administrative burdens; (3) complexity of implementation; and (4) any negative impact that the accommodation may have on the operation of the business, including the effect of the accommodation on the employer's workforce.[93] In this progressive ruling, the court rejected the undue hardship defence, holding that the argument that the use of the TTY device would slow down operations and adversely

[86] 957 F.Supp. 1043 (E.D. Wis. 1996).
[87] *Id*., 1054.
[88] 231 F. Supp. 2d 672 (N.D. Ohio 2002).
[89] *Id*., 686.
[90] 923 F.Supp. 720 (D. Md. 1996).
[91] *Id*., 733.
[92] *Id*., 736-737.
[93] *Id*.

affect the business was an argument rooted in stereotypes which the ADA seeks to combat and did not meet the undue hardship standard based on the material on record. [94]

American courts have usually held that attendance is an essential function of the job and that requiring the employer to accommodate an employee's disability-related erratic attendance would cause an undue hardship.[95] However, in the case of *Dutton* v. *Johnson County Board of County Commissioners*,[96] ('Dutton') the District Court held otherwise. The plaintiff, who held various labour-intensive roles, experienced migraine headaches leading to his dismissal due to frequent absences. He requested to use vacation time for unplanned sick leave after exhausting his sick leave. The employer argued this would be unreasonable and cause undue hardship.[97] The court rejected the claim on the grounds that the employer failed to demonstrate that regular attendance was crucial to the plaintiff's job, and that he had not exceeded his permitted leave.[98]

In *Lovejoy-Wilson* v. *Noco Motor Fuel Inc.*,[99] ('Lovejoy-Wilson') the plaintiff, who suffered daily seizures due to epilepsy, could not drive. She sought a promotion to assistant manager at a nearby gas station but was denied because the role required driving to the bank.[100] The employer rejected her RA requests and even called her requests 'slanderous', threatening legal action.[101] Eventually, they offered her an assistant manager position at a location with armoured car service, but it was in a less safe area and far from her home.[102] While the District Court deemed found this practice as reasonable, the US Court of Appeals for the Second Circuit disagreed emphasising upon equal opportunities for disabled individuals. The court noted that the employer failed to provide evidence on how the plaintiff's proposed accommodations would cause undue hardship, especially since one of her proposed suggestions involved her covering her own transportation costs.[103]

In *Puckett* v. *Park Place Entertainment, Corp*.,[104] the court held that the employer's reasons for not allowing the plaintiff (who was a cocktail waitress) to push a drink cart after her multiple sclerosis precluded her ability to carry trays did not amount to an undue hardship because the defendant was required to abide by fire codes and disability access laws. Thus, adequate space for a small cart should be available.[105] Similarly, in *Searls* v. *Johns Hopkins Hospital*,[106] the court held that the allocation made by the employer towards providing RA was irrelevant. This was because allowing an employer to prevail on its undue hardship defence based on its own budgeting decisions would effectively cede the legal determination

[94] *Id*., 739-740.
[95] *See* Thomas v. Trane, A Bus. of Am. Standard, Inc., 2007 WL 2874776, at 8 (M.D. Ga. September 27, 2007) (holding that plaintiff's requested accommodation of a last-minute excused absence whenever he needed time off for his disability would cause an undue hardship because it could potentially cause the assembly line to back up and increase overtime hours for other employees who would have to step up); Lu Frahm v. Holy Family Hosp. of Estherville, Inc., No. C95-3011, 1996 WL 33423407, at 6-7 (N.D. Iowa October 30, 1996) (holding that attendance is an essential function of the job and that plaintiff's proposed accommodation for flexible scheduling because of her severe migraines would impose an undue hardship on the employer).
[96] 859 F.Supp. 498 (D. Kan. 1994)
[97] *Id*., 1264.
[98] *Id*., 1265.
[99] 263 F.3d 208 (2d Cir. 2001).
[100] *Id*., 213.
[101] *Id*.
[102] *Id*., 214.
[103] *Id*., 218.
[104] 2006 WL 696180.
[105] *Id*., 16.
[106] 158 F. Supp. 3d 427.

on this issue to the employer.[107] It was also held that the cost of the RA being twice the salary of the employee concerned was irrelevant.[108]

Based on an exhaustive summary of the case laws on undue hardship, in an illuminating article in 2019, Nicole Buonocore Porter had categorised these case laws in three categories:[109]

> (1) cases in which the RA enquiry and the undue hardship defence is wrongly conflated;
>
> (2) cases delving into whether an accommodation places burdens on other employees [special treatment stigma]; and
>
> (3) withdrawn accommodation, i.e. cases in which accommodations are provided but later withdrawn.

Porter finds that cases on whether the cost of the accommodation would cause undue hardship are quite rare, given that the cost of providing most accommodations is not very high in the first place.

In sum, a survey of the US case law reveals that the undue hardship determination is a highly fact-sensitive and multi-dimensional enquiry that turns on the nature of the accommodation claimed, the resource implications of providing those accommodation, their impact on other employees, amongst other factors. While the statute spells out some factors for making this determination and illustrations of what constitutes RA, the ultimate determination as to whether or not a particular RA would cause undue hardship is fact-sensitive. A perusal of these case laws demonstrates that the answer as to whether or not a particular accommodation will constitute undue hardship turns on the evidence put forward by the defendant in support of this defence and how persuasive the court finds it.

C. POSITION IN THE UNITED KINGDOM

Prior to 2005, the duty to make reasonable adjustments was codified under §6 of the Disability Discrimination Act, 1995 ('DDA'). It stated that, where any arrangements made by or on behalf of an employer, or any physical feature of premises occupied by the employer, have the effect of placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, the employer is duty bound to take such steps, as are reasonable in all the circumstances of the case, to prevent the arrangement or feature from having that effect.[110] The provision iterates nine illustrations of such steps which include making adjustments to premises, allocating some of the disabled person's duties to another person, and altering of working hours, among others.[111]

In order to ascertain whether taking a particular step would be 'reasonable', the statute spells out five factors to be taken into account:

> (1) How far taking the step would prevent the disadvantaging effect;
> (2) The practicality of taking the step;

[107] *Id*., 438.
[108] *Id*., 439.
[109] Nicole Buonocore Porter, *A New Look at the ADA's Undue Hardship Defense*, Vol. 84, MO. L. REV., 121 (2019).
[110] *See* Disability Discrimination Act, 1995, §6(1) (United Kingdoms).
[111] *Id*., §6(2).

(3) Financial and other costs involved in taking the step;
(4) Extent of the employer's financial and other resources; and
(5) Availability of financial and other assistance in taking the step.[112]

The DDA creates a defence for an employer to comply with the reasonable adjustment duty where the failure is, "both material to the circumstances of the particular case and substantial".[113]

One of the reasonable adjustments contemplated by the DDA is transferring a disabled person to an unfilled vacancy. It is this duty which was at issue in the case of *Archibald* v. *Fife Council.*[114] Herein, the claimant, after suffering a disability following minor surgery, was unable to continue her employment as a road sweeper and sought alternate employment within the Council. Since the posts in the Council were awarded through competitive interviews (a stage she could not reach), she contended that the Council should have adjusted reasonably by exempting her from interviews and assigning a suitable job. The House of Lords deliberated on whether this constituted a reasonable adjustment, despite the Council's argument against preferential treatment.[115] Their Lordships disagreed, holding that the reasonable adjustments duty could be engaged even where the employee was no longer capable of performing the duties she had been contracted to do. The duty could in principle extend to placing her in a different, even higher grade, post without a competitive interview if that was reasonable in all the circumstances.

In her lead judgment, Lady Hale opined that transferring Mrs. Archibald to a sedentary position which she was qualified to fill was amongst the steps which, all things considered, would be reasonable for the Council to have to take, given that she could no longer walk or sweep.[116] She held that the case should be looked as one of a 'sideways' transfer, rather than 'upward' transfer, in response to the Council's argument that they would have to transfer the claimant to a post higher than the one she had previously occupied.[117] Further, she held that the Council's reliance on the statutory language stating that it was not dutybound to treat a disabled person more favourably than others was misplaced. This is because the same language was hedged in with a caveat that, where the duty of reasonable adjustment so requires, the concerned authority is not only permitted, but also obliged, to treat a disabled person more favourably.[118] She also held that the requirement of a competitive interview was subject to the requirement of compliance with disability rights law.[119] The case was remitted to the employment tribunal in order for the reasonableness question to be determined. The judgment is remarkable for the court's sensitivity in understanding the dilemma that a manual worker with a disability might be put in who sustains a disability after being employed. The Court's observations are aimed at ensuring that the guarantee of reasonable adjustments (of being accommodated in alternative posts) is not rendered illusory for such persons.

Under the current legal framework, §20 of the Equality Act, 2010, ('EA') states that the duty to provide reasonable adjustments has three components. *First*, the provision, in essence, requires duty bearers to make reasonable adjustments where they apply a provision, criterion or practice that places a person with disability at a substantial disadvantage when

[112] *Id*., §6(3).
[113] *Id*., §5(4).
[114] [2004] UKHL 32.
[115] *Id*., ¶54.
[116] *Id*., ¶67.
[117] *Id*., ¶70.
[118] *Id*., ¶68.
[119] *Id*., ¶69.

compared to a person who is not disabled, to alleviate the disadvantage. Further, such duty bearers are required to undertake reasonable adjustments when a physical feature places a disabled person at a substantial disadvantage or where the absence of an auxiliary aid would place a disabled person at a substantial disadvantage.[120] A failure to make reasonable adjustments constitutes discrimination against a disabled person if the duty bearer fails to comply with the duty in relation to the given person.[121] Compared to the 1995 version, this formulation focuses, not on 'arrangements', but on 'provisions, criteria or practices'. This is a much tighter formulation.

Second, the EA, unlike the DDA, does not provide illustrations of reasonable adjustments or factors for considering whether or not a particular adjustment is reasonable. Rather, it merely provides a list of what reasonable adjustments as to physical features would look like.[122] Third, the EA covers persons possessing other protected characteristics, such as age, gender, as opposed to the DDA which was specifically focused on disability. Whether this difference would be material to the jurisprudence that develops on the interpretation of the EA remains to be seen.

It would be instructive to examine a few judgments that interpret the above scheme under the EA. In *Paulley* v. *First Group*,[123] the UK Supreme Court had to construe the scope of the reasonable adjustment duty. At issue in this case was the question on the responsibility of bus companies to provide, by way of reasonable adjustment, space for wheelchairs on buses. The bus company at issue had a first come, first serve policy which Mr. Polly contended was not legally appropriate and he prayed that, by way of reasonable adjustment, there should be a more effective policy. What the contours of that policy would be was the subject matter of contestation.

The court, through Lord Neuberger's lead judgment, rejected the policy of "require and if necessary enforce", holding that requiring able-bodied passengers to give up their seat to make space for a wheelchair user would give rise to a range of practical complications.[124] It then considered the policy of 'require and pressurise', requiring the bus company to mandate that able-bodied users make way for wheelchair users and pressurise them to do so in case of non-compliance. He held that the policy in place was effectively a 'require and pressurise' policy,[125] and that the duty of reasonable adjustment requires bus drivers to insist on non-wheelchair users making space for wheelchair users unless the bus driver concludes that the reason given for a refusal to make such space is reasonable.[126] The judgment is instructive in that it sheds light on the manner in which UK courts deal with the application of the reasonable adjustment duty to the complex realities of everyday life, more particularly when the needs of the disabled have to be balanced with other competing interests.

In *O'Hanlon* v. *Revenue & Customs Commissioners*,[127] the Court of Appeals held that lengthening the period of claiming full pay while on sick leave was not a reasonable adjustment. This was particularly so in that case because the reason why the claimant alleged that the employer had this duty was because the claimant was personally experiencing financial hardship as a result of the reduction in her sick pay which she said caused her stress and

[120] *See* The Equality Act, 2010, §§20(3)-(5) (United Kingdoms).
[121] *Id*., §21(2).
[122] *Id*., §§20(1), 20(9).
[123] [2017] UKSC 4.
[124] *Id*., ¶¶46-54.
[125] *Id*., ¶63.
[126] *Id*., ¶67.
[127] [2007] EWCA Civ. 283.

exacerbated her illness.[128] Hooper LJ held that this was not a reasonable adjustment, not least because it would mean that the employer would have the invidious task of having to assess the financial means of his disabled employees and the stress suffered as a result of any hardship.[129] More generally, Hooper LJ also approved an observation made by the Employment Appellate Tribunal in this case to the effect that the aim of the RA guarantee is not simply to treat the disabled as objects of charity and grant them benefits.[130] This judgment is helpful in understanding the outer limits of the reasonable adjustment duty and in defining the scope of the legal guarantee.

In *The Home Office (UK Visas & Immigration)* v. *Kuranchie*,[131] ('Kuranchie') Ms. Kuranchie, who suffered from dyslexia and dyspraxia, discussed her disabilities with her manager in 2013. She requested accommodations, including specialised equipment and a fixed desk, as well as a flexible work schedule where she would work longer hours over four days instead of five. The Home Office approved her compressed hours request but did not reduce her workload. The employment tribunal determined that the Home Office's practice of assigning Ms. Kuranchie the same workload as her non-disabled colleagues put her at a significant disadvantage due to her disabilities, causing her to work longer hours. They ruled that reducing her workload would have been a reasonable adjustment to prevent this disadvantage.[132] The Employment Appeal Tribunal upheld this decision, stating that although Ms. Kuranchie's compressed hours helped, it did not fully alleviate the disadvantage she faced. They concluded that reducing her workload would have been a reasonable adjustment, and the Home Office's failure to do so constituted a breach of their duty under the EA.[133] The judgment is a pointer to the manner in which a capacious interpretation of the reasonable adjustment duty can be adopted.

The above cases provide a helpful interpretation of the manner in which UK courts have construed the RA duty in diverse fact situations. It is also clear that UK courts typically assess whether or not a particular RA is warranted at the stage of construing the scope of the RA duty as opposed to at the stage of considering potential defences to the said duty.

D. POSITION IN SOUTH AFRICA

In South Africa, RA is ensured through the Employment Equity Act No. 55 of 1998 ('the 1998 Act') and is defined as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment".[134] The scope of RA in the employment context has been defined in South Africa in the Code of Good Practice on Disability in the Workplace by the Department of Labor, 2002 ('the Code').[135] The Code specifies that RA applies to applicants and employees, and may be required during the recruitment and selection processes, in the working environment, in the way work is usually done and evaluated and rewarded, and in the benefits and privileges of employment.[136] It also specifies that employers may adopt the most cost-effective means that are consistent with effectively removing the barrier to a person

[128] *Id*., ¶64.
[129] *Id*.
[130] *Id*., ¶69.
[131] UKEAT/0202/16/BA.
[132] *Id*., ¶4.
[133] *Id*., ¶10.
[134] *See* The Employment Equity Act, 1998, §1 (South Africa).
[135] Code of Good Practice on Employment of Persons with Disabilities, 2002 (South Africa) .
[136] *Id*., Cl. 6.3.

being able to perform the job, and to enjoy equal access to the benefits and opportunities of employment.[137]

The Code elaborates in a 'non-binding' manner the scope of RA found in the 1998 Act. The Code is non-binding as it states that a failure to comply with it does not by itself render a person liable in any proceedings.[138] According to the Code, 'unjustifiable hardship' is defined as "action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business".[139]

The Department of Labour of South Africa has noted that 'unjustifiable hardship' is a higher standard than that of 'undue hardship' used in other countries.[140] While the Department does not explain why it considers this standard higher, this is presumably so as the unjustifiable hardship standard means that only hardships that are unjustified cannot be imposed on duty bearers. Any burden short of that is permissible. This creates a much narrower defence than the undue burden standard which only focuses on the burden being onerous. Despite the distinctions between these two standards, it is worthwhile to examine the South African perspective on unjustifiable hardship. This is because South African jurisprudence is notable for its sensitive and progressive handling of claims related to RA, as elaborated below. The Department justifies this higher standard on the basis that it is necessitated by the low employment and accommodation of persons with disabilities in South Africa.[141]

It would be instructive to examine a few South African judgments to understand how this 'unjustifiable hardship' standard has been practically applied. In *Standard Bank of South Africa* v. *Commission for Conciliation Mediation and Arbitration*,[142] ('Standard Bank of South Africa') the court noted that unjustifiable hardship refers to hardships that are of a substantial character and would be sufficient for justifying a denial to provide RA.[143] In this case, the employee of a bank had been in an accident and as a result, suffered severe back pains and accordingly found it hard to complete her normal work tasks. The employer sympathised with the employee and provided her with light administrative work. The employee, however, found the work to be uninspiring and accordingly requested to be moved to telephone sales, which the employer approved.

The employee found it challenging to sit for long periods of time and then requested the employer to provide her with a headset in order for her to work properly. The employer, however, refused and instead relegated her to a paper shredding job.[144] The employee was subsequently absent from work frequently and the employer acknowledged that she would most likely never be able to resume her normal work functions. The damage to her back made it impossible for her to carry on with her normal duties leading to her frequent absenteeism. The employee was eventually dismissed for incapacity.[145]

The Court noted that the bank could not establish how the employee's days of absence caused it unjustifiable hardship. While her absence meant there was a decline in

[137] *Id*., Cl. 6.2.
[138] *Id*., Cl. 3.1.
[139] *Id*., Cl. 6.12.
[140] Technical Assistance Guidelines on the Employment of People with Disabilities, Department of Labour (South Africa).
[141] *Id*., ¶6.11.
[142] 2008 4 BLLR 356.
[143] *Id*., ¶9.
[144] *Id*., ¶¶3-10.
[145] *Id*., ¶¶13, 16.

productivity, no evidence was led to prove how this hardship was unjustifiable. The court therefore concluded that it would have been more prudent for the bank to provide her RA instead.[146] The judgment stands out for the court's recognition of the proposition that accommodating persons with disabilities necessarily entails a hardship but that is not a sufficient basis to refuse to accommodate them.

In *Smith* v. *Kit Kat Group*,[147] the employee sustained injuries during a failed suicide attempt. After being termed 'not facially acceptable'[148] and 'cosmetically unacceptable'[149] by his employer, the employee was prohibited from returning to work.[150] From the date that he was released from hospital, the employee did everything in his power to try and resume his duties. Initially, it appeared as though he would be permitted to do so. However, as time progressed it became apparent that the employer had no intention of allowing him to return to work.[151] Although the employer prohibited the employee from returning to work and resuming his duties, he was not dismissed. The employee was effectively left in limbo.[152]

In this instance, the court found that the employer adopted the wrong approach. Although the employer did not actively terminate the employee's employment, its refusal to allow the employee to resume his duties was, according to the court, tantamount to a dismissal.[153] On RA, the court noted that it could not accept that accommodating Mr. Smith would constitute unjustified hardship, given that he was fit to return to work. Given that no replacement for Mr. Smith had been appointed in the interim, no disruption to the respondent's business would be caused by Mr. Smith returning to work.[154] The court held that, if the applicant, on resuming his work, was found unable to perform his job, he could be subjected to incapacity proceedings. But simply refusing to allow him to resume his work caused him substantial hardship.[155] What is notable about this judgment is the court's ability to adopt an interpretation of the 'unjustifiable hardship' defence in a manner that ensures that RAs must be provided except in very rare cases. This is in line with the ethos of having a RA duty.

The South African jurisprudence concerning unjustifiable hardship is both forward-thinking and balanced. It is forward-thinking in that it foregrounds the lived realities of the concerned disabled person in evaluating whether or not they are entitled to a particular RA and in construing whether doing so would constitute an unjustifiable hardship. Equally, it does not subscribe to the view that the unjustifiable hardship defence is a dead letter. Rather, it underscores that meeting this defence is a high legal bar and that ordinary hardships that RAs entail are insufficient for discharging this burden. The South African approach is a valuable model for India to consider, in that it helps make the RA guarantee effective and meaningful, as demonstrated by the cases above.

IV. THE WAY FORWARD: TOWARDS A STRUCTURED APPROACH TO 'UNDUE BURDEN'

[146] *Id*., ¶138.
[147] (JS787/14) [2016] ZALCJHB 362.
[148] *Id*., ¶19
[149] *Id*., ¶20.
[150] *Id*.
[151] *Id*., ¶¶21-28.
[152] *Id*., ¶31.
[153] *Id*., ¶¶48-49.
[154] *Id*., ¶63.
[155] *Id*., ¶64.

A. NAVIGATING REASONABLE ACCOMMODATION: ASSESSING UNDUE BURDEN THROUGH FACT-SENSITIVE INQUIRY

The UNCRPD was formulated with a vision to promote the full and equal enjoyment of all human rights and fundamental freedoms by the disabled, while securing respect for their inherent dignity.[156] In 2016, India enacted the RPwD Act to give effect to the CRPD and its vision.[157] In ensuring that the RPwD Act meets this purpose, the intricate landscape of RA under it must be navigated in a manner that promotes a structured and comprehensive approach towards assessing the 'undue burden' defence. While a fact-sensitive inquiry in relation to the interpretation of this burden is important, the same must not take away from its predictability as it arguably has in the USA. To understand what brings in a degree of predictability in the American jurisprudence on the issue, a brief revisitation of the cases discussed in Part III(B) would be in order.

In the case of Bryant the American court outlined that an examination of evidence as to the financial costs to be borne by the employer was a crucial component of the fact-sensitive inquiry into whether an accommodation would meet the threshold of undue hardship.[158] While the court in Vande Zande had earlier clarified that there was no need for a precise quantification of the costs involved,[159] the decision in Bryant suggests that some amount of evidence as to the monetary costs to be borne by the employer in making the requested accommodation is a necessary factor in the examination of an undue hardship defence. This component of the fact-sensitive inquiry chalked out in Bryant has been applied varyingly by different courts, causing some amount of unpredictability.

For instance, in the case of D'eredita, the employer sought to deny the accommodations being sought by the employee for the undue hardship defence.[160] In accepting the employer's defence, the court's analysis primarily hinged on the question of costs. Instead of demanding any specific evidence of the approximate expenses that the employer would have to incur, the court simply arrived at the conclusion that such costs would be excessively burdensome. To the contrary, in the case of Lovejoy-Wilson, the court harped upon the need for the employer to provide evidence to the effect that the proposed accommodations would cause undue hardship, especially given that the employee was willing to cover a part of the costs that would be associated with the accommodation.[161] Apart from the element of financial costs, other prongs of the four-factor analytical framework for assessing undue burden that Bryant laid down have also led to varying decisions in cases with similar facts. One such prong is that which requires an analysis of the negative impact that an accommodation may have on the operation of the business in question.

In the case of Switala, the employee in question sought for the accommodation of their physical therapy appointments that were required due to a work-related injury.[162] The court found that accommodating these appointments would mean that a certain delivery route would be left unfinished, negatively affecting the employer's business.[163] Instead of exploring the option of training another driver in performing that route, the court held that allowing the

[156] The United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (May 3, 2008) Preamble.
[157] The Rights of Persons with Disabilities Act, 2016, Preamble.
[158] Bryant v. Better Business Bureau of Greater Maryland, Inc, 923 F.Supp. 720 (D. Md. 1996).
[159] Vande Zande v. Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995), 542.
[160] D'eredita v. ITT Corporation, No. 15-3935 (2d Cir. Jan. 26, 2017).
[161] Lovejoy-Wilson v. Noco Motor Fuel, Inc, 263 F.3d 208 (2d Cir. 2001).
[162] Switala v. Schwan's Sales Enterprise, 231 F. Supp. 2d 672 (N.D. Ohio 2002).
[163] *Id*., 686.

accommodation would mean that an inexperienced driver would have to go on the route instead, which would cause the employer undue hardship.[164] In Dutton, the employee was unable to perform their labour-intensive roles due to migraine headaches.[165] This led the employee to seek unplanned sick leave, which the employer thought would affect the business negatively. However, the court noted that regular attendance of the employee was not absolutely crucial to their job.[166] Thus, despite the disruptions that such leave would cause to the employer's business, the court found that the undue hardship defence was not established. Even in Switala, the possibility of training a different employee to perform that one specific delivery route could have been explored, as that route may not have been crucial to the job of the person seeking accommodation.

In essence, these differences in the conclusions reached in the aforementioned cases from the American courts demonstrate how the factors for conducting the undue burden inquiry laid down in Bryant can lead to differing results even in situations involving similar facts. This highlights the unpredictability that comes intertwined with such an inquiry. Thus, it is the authors' opinion that while a fact-sensitive inquiry would add value if viewed as one step of the larger analysis of whether an accommodation is causing undue hardship, it must not be seen as the sole basis of conducting such an examination. Instead, it must be complemented with other components leading to a more structured approach, that can effectively counter any negative effects of unpredictability that may arise at the stage of conducting the fact-sensitive inquiry proposed in Bryant. In this regard, it is crucial to have some predictability in ascertaining how the different factors laid down by the court are typically interpreted. For instance, jurisprudence from the UK is reflective of an approach that relies on the black letter of the statute in addition to a fact-specific inquiry.

The DDA was the first to codify the duty to make reasonable adjustments in the UK. In England, several components of Bryant's multifactorial inquiry came to be crystalised in the form of §6(3) of the DDA.[167] Thereafter, §20 of the EA weaved in principles using which the duty to provide reasonable adjustments could be better constructed.[168] Progressive in their vision, these principles aim to outline situations where the duty to reasonably accommodate persons with disabilities is to kick in. For instance, if an individual is put at a substantial disadvantage compared to their peers who are not disabled due to a particular practice or by virtue of the absence of an auxiliary aid, a duty to modify such a practice or provide the requisite aid is established. To better understand how these principles interact with Bryant's multifactorial inquiry, one can take the example of the case of Kuranchie.[169] In that case, the employer did not find the reduction of the disabled employee's workload to be a reasonable adjustment. However, upon appeal, the Employment Appeal Tribunal found that not adjusting the employee's workload would put her at a significant disadvantage when compared to her non-disabled colleague. This finding would probably not have been arrived at if the Tribunal strictly confined itself to the Bryant factors. Doing so would most likely lead to a decision similar to that reached in Switala. Instead, delving into the statutorily codified principles allowed the Tribunal to move past a fact-sensitive inquiry and instead take into account the question of substantial disadvantage faced by the disabled employee.

[164] *Id*.
[165] Dutton v. Johnson Cty. Bd. of Cty. Comm'rs, 859 F. Supp. 498, 501 (D. Kan. 1994).
[166] *Id*., 508.
[167] The Disability Discrimination Act, 1995, §6(3) (United Kingdoms).
[168] The Equality Act, 2010, §§20(3)-(5) (United Kingdoms).
[169] The Home Office (UK Visas & Immigration) v. Kuranchie, UKEAT/0202/16/BA.

While instructive in its principle-based approach towards the duty of reasonable adjustment, the repository of judgements from the UK are lacking in their guidance on how the undue hardship defence is to be approached. The inevitable consequential difficulty is that the interplay between such principles and the components of a multifactorial inquiry can become muddled. For instance, one may question the extent to which the duty of making reasonable adjustment will be engaged in cases where the employer raises an undue hardship defence based on one of the Bryant factors such as that of excessive financial costs. Neither statutory principles nor a multifactorial inquiry can adequately address such questions. Jurisprudence from South Africa shines a guiding light in this regard.

Official guidance in South Africa promotes the adoption of the unjustifiable hardship standard instead of the lower threshold of undue burden.[170] The difference in stringency lies in the fact that the former infuses a principle of proportionality, which expels the possibility of minor inconveniences leading to the refusal of a request for RA.[171] This difference was identified in the case of Standard Bank of South Africa.[172] Building on this understanding, the court dealt with the question of allowing a reasonable adjustment in spite of the financial costs involved. As outlined above, this question requires navigating the interplay between the fact-sensitive component of financial difficulty and the principle of identifying the substantial disadvantage of the employee in question. Following the unjustifiable hardship standard allowed the court to move beyond what was merely in the statute, and instead adopt a lens of proportionality. The final holding in that case allows us to derive that a defence of unjustifiable hardship based on the difficulty of monetary costs is more likely to fail if the employer is financially sound. In such cases then, the push for RA is stronger, and is to be seen as being in the mutual interest of both the parties involved.

In aiming for predictability and consistency in the interpretation of the undue hardship standard, Indian courts too must similarly look to move beyond both a purely fact-sensitive inquiry and the black letter of the law. Instead, a larger sense of proportionality should be instilled in any such interpretative exercise. It is important to clarify that the authors are not advocating for a legislative or official recognition of the unjustifiable hardship standard as it exists in South Africa. Instead, the authors believe that the standard of undue burden that presently exists can be broadly interpreted by the judiciary in line with the higher threshold of unjustifiable hardship. Approaching the standard in this manner would help achieve the desired goal of a more progressive interpretation, while also rendering a long-drawn process of legislative change unnecessary.

B. A STEP-WISE APPROACH TO INTERPRETING UNDUE BURDEN IN INDIA

As discussed in Part II, there is a dearth of precedence and legislative guidelines on the interpretation of undue burden standard in India. While Vikash Kumar has attempted to provide some insights into the judicial interpretation of the concept, the case lacks explanation in its references to the 'objective criteria' test in relation to the factors listed in the GC6 particularly on their application in the Indian context. This further makes the precise scope of the RA ambiguous. With this background in mind, the authors suggest the following five-step approach that courts faced with the task of interpreting the defence of undue burden may adopt.

[170] Code of Good Practice on Employment of Persons with Disabilities, 2015 (South Africa).
[171] Standard Bank of South Africa v. Commission for Conciliation, Mediation, and Arbitration, 2008 4 BLLR 356, ¶98.
[172] *Id*.

First, courts should aim to delineate the precise scope of the RA required in any particular case. Care must be taken to ensure that the focus remains on the accommodation required and not merely on the one that is requested. To better understand this, let us take the example of a physically disabled employee working in an office located on the fourth floor of a multi-storey building. The employee moves the court, demanding that his employer reasonably accommodate him by providing for a wheelchair-friendly lift. In assessing the facts, the court realises that even if this accommodation is provided, there is another flight of stairs that the employee will have to get past in order to reach the lift. In this case, if the court simply focuses on the requested accommodation, the same, even if provided, will not render the office space accessible for the employee. Instead, the authors submit that the court should examine the scope of the RA that is needed in light of the facts of the case.

In our example, the installation of a ramp would meet the requisite standard of accessibility. That the duty of making reasonable adjustments can extend beyond merely what is requested is not a novel suggestion and is reflective of the position followed in the English case of Kuranchie. This approach would also be consistent with the text of the RPwD Act that imposes a duty of RA in order to ensure that persons with disabilities are able to "enjoy or exercise" their rights "equally with others", with no requirement of explicit requests on their end.[173]

Second, after sufficiently defining the scope of RA, the court may proceed to test the undue hardship claim against a set of specific factors. While it is not possible to list out all factors that may potentially be considered in this inquiry, the focus of the authors presently shall remain on those that are likely to be relevant in all cases involving a claim of undue burden. As outlined in the ADA, it would be useful to consider the factor of the type of operation of the employer in question.[174] This would entail accounting for the composition, structure, and functioning of the workforce of the employer. Building on this factor, the court in Bryant outlined the necessity of analysing any negative impact that an accommodation may have on the operation of the employer's business.

To better unpack this factor, we can consider the example of a unit of a paper manufacturing business that exclusively focuses on the stage of debarking wooden logs before the subsequent processes can be performed on the wood pulp. By its very nature, the function of this unit can only be performed by way of a debarking machine. An employee, who loses her limbs a few years after joining the unit, will no longer be able to run the machine with the speed and efficiency that is required to meet the daily debarking target of the unit. If this target is not met, the business would generate significant losses. Given the industry specifications, there are also no adjustments that can be made to the machine to accommodate the employee's disability. In this case, the court may find that accommodating the employee within this unit could cause undue hardship to the employer by negatively impacting the operation of the business. Following this analysis, it may be possible for the court to explore the possibility of reasonably accommodating the employer by way of a transfer to a different unit of the manufacturing business. However, a claim for accommodation within the specific debarking unit is likely to meet with the hurdle of the factor of negative impact on the operation of the business.

Another factor that emerges from the Bryant multifactorial inquiry, is that of additional administrative burdens.[175] Let us take the case of a person with disability employed

[173] The Rights of Persons with Disabilities Act, 2016, §2(y).
[174] The Americans with Disabilities Act, 1990, §12111(10) (U.S.A.).
[175] Bryant v. Better Business Bureau of Greater Maryland, Inc, 923 F.Supp. 720 (D. Md. 1996) at 737.

in a law firm. The remuneration in the firm works by way of disbursement on the basis of the hours clocked in by the employees in a time sheet. The disabled individual claims the manner in which the time sheet is structured is not accommodative of their circumstances. For instance, the individual spends additional periods of time trouble-shooting the accessibility challenges that arise in accessing documents on a particular task for which there exists no corresponding categories in the time sheet. In response, the employer may claim that while it is possible to improvise the time sheet, adding new categories would mean that newer ways of monitoring the time spent by the employee would have to be devised. The court would then have to balance the additional administrative burden that the employer would have to bear in effectuating a new monitoring mechanism when deciding if the accommodation requested would be unduly burdensome.

In addition to these factors, in line with the position followed in other jurisdictions, the employer's overall size and financial resources should be considered. Larger organisations with substantial resources can be reasonably expected to furnish more extensive accommodations without incurring undue hardship. The availability of external sources of funding, tax credits, or incentives should also be considered by the courts as these can offset accommodation costs thereby mitigating the employer's financial burden.

As held in Vikash Kumar, care must be taken to measure this burden against the resources of the concerned entity as a whole, and not in relation to a particular unit of the organisation.[176] For instance, let us take the case of a disabled employee working for the tax department of an oil and gas company. The cost of the employee's demand for a particular accommodation can then not be labelled as unduly burdensome if it is within the reach of the oil company's resources, even if it requires finances beyond what the tax department can afford. In addition to resource-based considerations, an assessment of the impact that the RA may have on the concerned entity's routine business operations can prove to be an important factor. An accommodation that significantly disrupts workflow or poses a threat to the safety of the workplace may be deemed more likely to constitute undue hardship.

At this juncture, it becomes important to clarify the actor on whom the burden of proof to demonstrate the existence of an undue burden shall lie. While the disabled individual seeking an accommodation has a first-level obligation to establish that the adjustment sought is reasonable, the burden of proof shifts. Thereafter, it becomes the responsibility of the authority on which duty of RA is placed to prove that the above-mentioned factors lead to the imposition of an undue burden. In analysing the accommodation through the lens of these factors, the authority must use objective criteria and not mere 'conjecture'. This underscores the proposition outlined in Vikash Kumar, regarding the necessity for employers to furnish objective criteria for substantiating why a particular RA would cause undue hardship. Without this requirement, there is a risk that unfounded biases about accommodating persons with disabilities may creep into the court's decision-making process.

Third, having tested the RA against the standard of undue burden in line with the above-outlined factors, courts have an opportunity to breathe life into the text of the RPwD Act by drawing upon the South African approach. At the risk of repetition, it must be mentioned that the stricter standard of unjustifiable hardship in South Africa was introduced due to the low rate of employment of persons with disabilities.[177] The situation in India is no different, with a recent study revealing that a meagre thirty-six percent of the country's entire disabled

[176] Vikash Kumar, *supra* note 3, ¶76.
[177] Code of Good Practice on Employment of Persons with Disabilities, 2015 (South Africa).

population is employed.[178] The undue hardship defence was formulated to give 'reasonable' accommodation a bidirectional meaning – one that ensures that the accommodation should be feasible for the entity on whom the obligation is placed. However, in making the accommodation reasonable for entities, courts must not lose sight of the spirit of introducing the principle of RA, which was to allow the disabled to enjoy their rights on an equal standing with others.

In line with the South African position, Indian courts too can then adopt a more stringent approach towards the undue hardship defence. To put the wheels of this approach into motion, courts can perform a balancing act after they have tested the defence against the above-outlined factors. This balance may be rooted in the principle of proportionality as it was in the case of Standard Bank of South Africa.[179] This principle recognises that proportionality is to be imported not just in the notion of RA, but also in the concept of undue hardship.[180] Consequently, allowing minor hardships to justify a denial of a requested RA would be considered disproportionate. The application of this principle would also be in line with §2(y) of the RPwD Act, which mentions undue hardship as being synonymous with a 'disproportionate' burden.[181] The result would then be an acknowledgment of the fact that some level of hardship is inevitable in making RAs. As the Supreme Court noted in the case of Vikash Kumar, accommodations by their very nature depart from the status quo and thus entail some complications.[182] In that judgment, it was clarified that avoidable complications are an inevitable consequence of making provisions for RA.[183] As a sequitur, only if such complications cause a substantial interference with the rights of others, they should qualify for the undue burden defence.

Fourth, even if all the levels of inquiry outlined above lead to a finding in favour of the existence of undue hardship, the courts must engage in a last-ditch effort. Academicians have focused on the need to construe the undue hardship standard from the point of view of persons with disabilities in order to avoid a long-term denial of accessibility.[184] This may then require courts to allow accommodations that impose an undue burden if the same stands a chance to benefit multiple persons with disabilities. The authors acknowledge that this may be an idealistic position to take in light of the current state of disability rights jurisprudence in India. It is their submission that courts should at least attempt to diligently explore all possible alternatives to the suggested RA before denying the same on grounds of undue burden.

For the purposes of the identification of such alternatives, courts can engage experts. The court should empanel disability rights experts as well as domain experts in the

---

[178] Business Standard, *Only 36 per cent Disabled People Employed in India: TRRAIN survey*, January 30, 2019, available at https://www.business-standard.com/article/news-ians/only-36-per-cent-disabled-people-employed-in-india-trrain-survey-119013001304_1.html (Last visited on January 1, 2024).

[179] Standard Bank of South Africa v. Commission for Conciliation, Mediation, and Arbitration, 2008 4 BLLR 356, ¶98.

[180] *Id*.

[181] The Rights of Persons with Disabilities Act, 2016, §2(y).

[182] Vikash Kumar, *supra* note 3, ¶54.

[183] *Id*.

[184] Amita Dhanda, *"In a Class of My Own": Reasonable Accommodation from a Disability Perspective*, OHCHR, 2017, available at https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRPD/EqualityNonDiscrimination/presentations/AmitaDhanda_NalsarUniversity.pdf (Last visited on January 1, 2024); National Law School of India University, Oxford Human Rights Hub, Harvard Law School Project on Disability, and Vidhi Centre for Legal Policy, *Recommendation and Comments on the Draft National Policy for Persons with Disabilities*, September 5, 2022, available at https://www.nls.ac.in/wp-content/uploads/2022/09/Chapter-wise-recommendations.pdf (Last visited on January 1, 2024).

concerned line of work to which the accommodation at issue relates. This panel should be asked to consider potential pathways that would enable the person with disability to obtain the accommodation that they seek, in a manner that is as less resource-intensive for the entity from which the accommodation is sought, as possible. Specifically, the panel should be tasked with finding a robust balance point between the competing interests at play by drawing upon industry practices, international examples and stakeholder consultation.

Illustratively, assume that the owner of a small shop concludes that providing a blind employee a screen reader would cause an undue burden and is able to demonstrate this based on the size of the business and the cost of the accommodation. The court could then task this panel with determining what accommodations can be made available to the employee in such a case. The panel might find that while the employer cannot fully fund the cost of the screen reader, it can bear half the costs involved. It may also recommend purchasing a low-cost or freely available screen reader, as a RA. In this exercise, the aim has to be to ensure that the disabled person is not left in the lurch for want of the accommodation they seek. In addition to discussions with an expert panel, consultations with the concerned individual seeking to be reasonably accommodated can also offer invaluable insights. Ultimately, the focus should be on undertaking a good faith attempt at locating solutions that are beneficial for all actors involved.

Finally, if all efforts to identify practicable accommodations prove to be unfruitful, courts may deny the requested RA as a last resort. The authors acknowledge that there may be apprehensions to the structured approach suggested herein. It may be argued that the approach makes it extremely difficult for an employer to establish the presence of undue hardship. Consequently, they would have to reasonably accommodate employees with disabilities in a larger number of scenarios. This may lead employers to find the hiring of persons with disabilities onerous, further lowering their employment rate. However, it is the authors' case that this consequence would be a reflection of the insensitivity of certain employers, and should not come in the way of allowing persons with disabilities to realise the full potential of the RA guarantee.

It may further be contended that the structured approach seeks to make the adjudication of any undue hardship claim to a certain degree one-sided, and is thus, anathematic to the adversarial nature of litigation which presupposes that there are two sides to every case. In unpacking this contention, it must be borne in mind that the approach suggested by the authors should not be mistaken for one that advocates for each and every case to be decided in favour of persons with disabilities. Rather, the focus of the approach is to enhance the levels of sensitivity, objectivity and empathy in the decision-making process of the courts in order to ensure that the process remains attentive to the transformative potential of RAs in levelling the playing field for the disabled. The authors acknowledge that there may be cases in which the undue burden standard is legitimately met, and to that extent, the proposed approach does not render the undue hardship defence a dead letter. In sum, the structured approach of the nature outlined by the authors carries the potential to use the existing statutory language as a basis to foster a more inclusive and equitable society for persons with disabilities.

V. CONCLUSION

An important jurisprudential advance that the RPwD Act brought about was the express introduction of the principle of RA into the landscape of Indian disability rights law. In introducing this principle, the defence of undue burden found its place in the statute. In this paper, the authors have highlighted the scant judicial elucidation on the interpretation of the

undue hardship defence in India. Consequently, discretion has presented itself as the only tool to fill this notable lacuna in the Indian jurisprudence. In an attempt to advocate for a more structured interpretative approach, the authors have analysed precedents from other jurisdictions.

Tracing American case laws, the authors have established that the approach towards undue hardship in the USA presents itself as a fact-sensitive inquiry. Over the years, several American courts have arrived at varying conclusions in relation to the success of an undue burden defence depending upon the factual circumstances of the case and the evidential material presented before them. In the UK, courts have typically relied upon statutorily outlined principles in construing the RA duty. As demonstrated by the authors, neither of these two countries have churned out precedents that can comprehensively provide structured guidance on the interpretation of undue burden standard. The cases from South Africa are more helpful as they attempt to move beyond mere factual circumstances or black letter law and apply the RA guarantee with an eye to the reasons for its incorporation. Drawing from the key approaches in other jurisdictions, the authors have built a step-wise roadmap that can help courts navigate the path of the undue hardship defence. It is the authors' hope that their contribution will assist Indian courts in construing this limitation in a manner that helps the disabled in getting the additional support they need in competing on a platform of equality with their able-bodied counterparts.