HOW ACCOMMODATING IS REASONABLE ACCOMMODATION: ANALYSING INDIA'S RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016

*Adya Jha & Jasel Mundhra**

Over one billion people worldwide suffer from a disability. Equal access in education and employment for this community of people is a primary focus of the disability rights movement. The barriers to achieving this are compounded in developing nations, where jurisprudence on this issue remains lacking. Foremost among these barriers is the definition of disability adopted in varying jurisdictions, which often focuses on the medical, rather than social, model of disability. One of the most significant ways to combat discrimination against persons with disabilities remains the right of reasonable accommodation, first proposed in the United States of America ('USA') in the landmark Americans with Disabilities Act, 1990. This paper adopts a cross-jurisdictional approach to the issues of defining disability and adoption of the right of a reasonable accommodation in the spheres of education and employment, comparing the construct of the Americans with Disabilities Act, 1990 against the (Indian) Rights of Persons with Disabilities Act, 2016, with the aim of providing suggestions to fortify Indian jurisprudence in this area of law.

Table of Contents

I. Introduction *450*
II. Definition of 'Person With Disability': What is in a Name? *451*
A. Erstwhile Disability Legislation: Medical Model *452*
B. Social Model of Disability: The USA and Europe *453*
1. Physical or Mental Impairment Substantially Limiting one or More Major Life Activities of Such Individual *454*
2. Extending the Scope of 'Disability' to Persons with a Record of Impairment and Deemed Disabilities *455*
C. The Approach of the New Rights of Persons with Disabilities Act, 2016 ..... *456*
III. Substantive Equality in Matters of Employment through Reasonable Accommodation *459*

* The authors graduated from the West Bengal National University of Juridical Sciences, Kolkata in 2020. Adya Jha is an LLM candidate at Harvard Law School (Class of 2024) and practiced as an advocate in New Delhi, India. Jasel Mundhra is an associate at Talwar Thakore & Associates, Mumbai. All views expressed here are the authors' views and do not represent the views of any organisations or institutions to which the authors may be affiliated. All errors, if any, are solely attributable to the authors. The authors may be contacted at adyajha2103@gmail.com and mundhrajasel@gmail.com, respectively, for any feedback or comments.

A. Reasonable Accommodation in Employment under ADA – Title I.....460
1. RA Request and the Interactive Process.....462
2. Determining Reasonable Accommodation.....463
3. Undue Hardship.....464
4. Contours of Undue Hardship Under the ADA.....465
B. Reasonable Accommodation in Employment in India.....470
1. Erstwhile Legislation.....470
2. New Legislation.....471
IV. Exclusion of Children with Disabilities from Inclusive Education.....475
A. Reasonable Accommodation for Inclusive Education under the ADA.....475
B. Reasonable Accommodation for Inclusive Education in India.....477
1. Inconsistencies between the RPWD and RTE Act, 2009.....478
2. Lack of Guidance on Equal Educational Opportunities in Examinations and Higher Education.....480
V. Conclusion and the way Forward..481

I. INTRODUCTION

In the present day, over one in seven people worldwide suffers from a disability.[1] Of these, a significant number– nearly eighty percent– live in the Global South, where they are faced with entrenched stigma and ostracism, which leads to violence and discrimination.[2] This compounds the barriers to education, employment, and healthcare faced by this community of people, reducing them to a lower stratum of society. For instance, a study by the World Health Organization and the World Bank has found that persons with disabilities are fifty percent more likely to face catastrophic health costs.[3]

The disability rights movement was born out of the discrimination faced by persons with disabilities, in an attempt to secure for them an equal position in society. Some of the first steps in this movement were taken in the United States of America ('USA'), beginning with the Social Security Act, 1935, which provided social security benefits for individuals with disabilities.[4] This was followed by legislations such as the Rehabilitation Act, 1973, and the Individuals with Disabilities Education Act, 1975, which are discussed at a later stage in this paper. The turning point for the disability rights movement, however, was the Americans with Disabilities Act of 1990 ('ADA'), which was intended to eliminate discrimination against people with disabilities and increase access to employment and edu-

1 Human Rights Watch, *Disability Rights*, available at www.hrw.org/topic/disability-rights (Last visited on May 29, 2023).

2 Sam Hillestad, *The Global Disability Rights Movement*, August 22, 2014, available at www.borgenmagazine.com/global-disability-rights-movement/ (Last visited on May 29, 2023).

3 *Id*.

4 The Social Security Act, 1935 (United States of America); Social Security Administration, *Benefits for People with Disabilities*, available at www.ssa.gov/disability/ (Last visited on May 29, 2023).

cation.[5] One of the most significant aspects of this legislation was the concept of reasonable accommodation ('RA'), which is now an accepted aspect of disability legislations across jurisdictions.[6]

India's first foray into disability legislation was the People with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ('PWD 1995'). Although an important step forward, the statute was rather narrow in scope, adopting a medical model of disability that disadvantaged a significant number of individuals.[7] It took over two decades to adopt a more modern approach– the Rights of Persons with Disabilities Act, 2016 ('RPWD').

This paper is a cross-jurisdictional analysis of two aspects of the law on the right to reasonable accommodation disability rights, focusing on the spheres of employment and education. Part II of this paper focuses on the definition of disability, analysing the social and medical models and contends that although the RPWD broadly adopts the social model of disability, it retains facets of the medical model, resulting in a narrower conception of the definition of disability. Part III elaborates on substantive equality in matters of employment through RA for persons with disability. We trace the contours of RA under the ADA and the RPWD and argue that although the right to RA has been interpreted in a broad manner by courts in India, there persists a need for enactment of regulations on RA in order to bridge the gap between law and implementation. Part IV focuses on RA in the sphere of education and analyses relevant provisions of USA and Indian laws in this regard. This paper argues that Indian jurisprudence on RA in education suffers from contradictions and vagueness and does not succeed in providing equality in educational opportunities to persons with disabilities. Part V of this paper sums up the concerns surrounding RA in India and concludes with suggestions on the improvement of Indian legislation on these aspects.

II. DEFINITION OF 'PERSON WITH DISABILITY': WHAT IS IN A NAME?

Definitions of terms, as contained in legislations, assume significance as they are the touchstone based on which rights, entitlements, and liabilities are imposed. However, a statutory definition that limits the scope of applicability of beneficial provisions often becomes a contentious issue. Disability is colloquially understood to cover such diverse conditions that it becomes challenging to justify a common concept of disability for a particular statute. This manifests into several difficulties faced by legislators.

---

5 The Americans with Disabilities Act, 1990 (United States of America).

6 *Id*.

7 V. Sudesh, *National and International Approaches to Defining Disability*, Vol. 50(2), Journal of the Indian Law Institute, 220 (2008); Abhilash Balakrishnan et al., *The Rights of Persons with Disabilities Act 2016: Mental Health Implications*, Vol. 41(2), Indian Journal of Psychological Medicine, 119 (2019).

First, it is a relatively recent phenomenon for the term 'disability' to be associated with a specific class of people who are impaired in the context of certain functions. In previous years, 'disability' was used synonymously with 'inability' or associated with legal limitations imposed on the rights of a people.[8] *Second*, in modern parlance as well, the term 'disability' has been associated with an array of conditions, ranging from loss of limb to congenital blindness or deafness to psychiatric disorders such as schizophrenia.[9] The nature of such conditions leads to a situation wherein the class of disabled people so created would be individually unique and, consequently, as diverse as the difference between disabled persons and those who are not disabled.[10] Hence, it may be difficult to justify a common concept of disability.

Disability, therefore, differs in meaning across legislations depending on their purported object and purpose. This part attempts to analyse the differing concepts of disability across jurisdictions, culminating with an analysis of the definition adopted in the RPWD. Further, this part also analyses the medical and social models of disability in the context of the RPWD, the erstwhile PWD 1995 as well as legislations in the USA.

A. ERSTWHILE DISABILITY LEGISLATION: MEDICAL MODEL

The aim of PWD 1995 was to give effect to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region and, hence, to provide rights and entitlements to persons with disabilities in education, employment, and accessibility.[11] PWD 1995 defined a "person with disability" as one who suffers from at least forty percent of a specified disability, as certified by a medical authority according to objective criteria.[12] The statute itself provided an exhaustive list of seven specified disabilities, comprising blindness, low vision, cured leprosy, hearing impairment, locomotor disability, mental retardation, and mental illness.[13] The primary criticism of PWD 1995 was centred around the exhaustive list of impairments recognised by it, which precluded persons with disabilities other than those mentioned in PWD 1995 from obtaining any rights, entitlements, or benefits. This issue was compounded by the forty percent criterion, which further narrowed the scope of the legislation.[14]

---

8 Stanford Encyclopedia of Philosophy Archive, *Disability: Definitions, Models, Experience*, May 23, 2016, available at plato.stanford.edu/archives/sum2016/entries/disability/ (Last visited on May 29, 2023).

9 *Id.*

10 *Id.*, *see also* Jonas-Sébastien Beaudry, *Beyond (Models of) Disability?*, Vol. 41(2), The Journal of Medicine and Philosophy, 210 (2016).

11 The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Preamble.

12 *Id.*, §2(t).

13 *Id.*, §2(i).

14 Saptarshi Mandal, *Adjudicating Disability: Some Emerging Questions*, Vol. 45(49), Economic and Political Weekly, (2010).

PWD 1995 is an example of the medical model of disability. The defining characteristic of the medical model is that it considers a person's impairments to be the cause of any disadvantages faced by them and, thus, focuses on ways to treat or cure these impairments.[15] The disability is seen as "a defect in or failure of a bodily system and as such is inherently abnormal and pathological".[16] This model, therefore, considers the source of the problem to be the disability of the individual themselves, necessitating the need for such individuals to subject themselves to medical treatment. This view has been the source of certain dubious forms of medical intervention that persons with disabilities have been subjected to, including sterilisation and involuntary euthanasia.[17] The medical model allows medical professionals to determine whether a person can be classified as a person with disabilities based on medical criteria, which are, in turn, determined based on what is considered to be the biological norm for society.[18] It places the onus on the disabled individual themselves to ensure that they do not inconvenience society.[19]

B. SOCIAL MODEL OF DISABILITY: THE USA AND EUROPE

The medical model can be contrasted with the social model of disability. The social model views disability as a construct created by society, with the disabling phenomenon being the failure of society to accommodate persons with disabilities, rather than a factor stemming from the disabled individual themselves.[20] This model makes a key distinction between impairment and disability, as first expressed by The Union of the Physically Impaired Against Segregation ('UPIAS') in a seminal work published in 1976.[21] As opined by the UPIAS, "It is the society which disables physically impaired people. Disability is something imposed on top of our impairments; by the way, we are unnecessarily isolated and excluded from full participation in society".[22] Impairment, therefore, refers to a lacking or defective limb, organ, or other bodily mechanism, and disability is the phenomenon resulting from the marginalisation of impaired persons due to societal barriers or the failure of society to accommodate their particular needs.[23]

---

15 Liz Crow, *Including All of Our Lives: Renewing the Social Model of Disability* in Exploring the Divide: Illness and Disability, 57 (Colin Barnes and Geoffrey Mercer, 1996).

16 Rhoda Olkin, What Psychotherapists Should Know About Disability, 26 (The Guilford Press, 2001).

17 *Id*.

18 Christine Durham & Paul Ramcharan, Insight into Acquired Brain Injury: Factors for Feeling and Faring Better, 31 (Springer, 2017).

19 University of Leicester, *The Social and Medical Model of Disability*, available at www2.le.ac.uk/offices/accessability/staff/accessabilitytutors/information-for-accessability-tutors/the-social-and-medical-model-of-disability (Last visited on May 29, 2023).

20 Olkin, *supra* note 16, 26.

21 The Union of the Physically Impaired Against Segregation and The Disability Alliance, *Fundamental Principles of Disability*, November 22, 1975, available at https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/UPIAS-fundamental-principles.pdf (Last visited on October 30, 2023).

22 *Id*.

23 *Id*., *see also* Claire Tregaskis, *Social Model Theory: The Story So Far*, Vol. 17(4), Disability & Society, 457 (2002).

Thus, the social model recognises that the problem does not lie with the disabled person; rather, it accumulates due to societal barriers and hence, focuses on increasing education and access and ensuring equal opportunities for persons with disabilities through legislation.[24]

The primary example of the social model of disability is the Americans with Disabilities Act of 1990 ('ADA'). Following from the definition of 'handicap' in the Rehabilitation Act of 1973, the ADA adopted a unique three-pronged definition of 'disability' in order to ensure that the definition of disability remained as broad as possible,[25] defining it as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) or being regarded as having such an impairment,"[26] ('deemed disability').

1. Physical or Mental Impairment Substantially Limiting one or More Major Life Activities of Such Individual

The US Congress had the expectation that definition of 'disability' in the ADA, along with terms such as 'substantially limits' and 'major life activities' would be interpreted in an expansive manner.[27] The original version of the ADA did not specifically define the scope of these terms. As such, the expectation of broad interpretation did not come to fruition. Through the 1990s and early 2000s, courts in the USA significantly narrowed the scope of 'disability'.

In *Sutton* v. *United Air Lines, Inc.* ('Sutton'),[28] the US Supreme Court took a narrow view and stated that whether an impairment affects major life activities must be determined only after taking into account mitigating measures that may ameliorate the impairment. Subsequently, in *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams* ('Toyota'),[29] the US Supreme Court held that the terms 'substantially' and 'major' must be interpreted in a narrow manner, so as to create a demanding standard of disability, and that a substantial limitation must be construed to mean that "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives".[30] These restrictive rulings were coupled with the 1991 Equal Employment Opportunity Commission ('EEOC') Guidelines on the

---

[24] Olkin, *supra* note 16, 27.

[25] United States Senate Statement of Managers, *Statement to Accompany S. 3406, The Americans with Disabilities Act Amendment Act of 2008*, September 22, 2010, available at www.apse.org/wp-content/uploads/docs/ADAA%20Final%20Draft%20Senate%209.08.doc (Last visited on May 29, 2023); The Interpretive Guidance on Title I of the Americans with Disabilities Act, 2000 (United States of America) ('Interpretive Guidance').

[26] The Americans with Disabilities Act, 1990, §12102(1) (United States of America).

[27] Interpretive Guidance, *supra* note 25.

[28] 1999 SCC OnLine US SC 73 : 527 US 471 (1999).

[29] 2002 SCC OnLine US SC 2 : 534 US 184 (2002).

[30] *Id*., 198.

ADA, which defined the term 'substantially limits' as 'significantly restricts', thus statutorily limiting the extension of the ADA to a broad range of affected people.[31]

This situation was amended by the US Congress with the passage of the ADA Amendment of 2008 ('2008 Amendment Act'), which reinstated a broad definition of disability. The decisions in Sutton and Toyota, as well as the 1991 EEOC guidelines, were rolled back. The 2008 Amendment Act defined "major life activities" to include a broad, inclusive list of activities such as sleeping, eating, thinking, communicating, and the operation of major bodily functions, including reproductive functions.[32] In addition, the 2008 Amendment Act also clarified that it would not be necessary to adopt the high standard of significant restriction for an impairment to be considered as substantially limiting major life activities; the extent of limitation would depend on an analysis of the nature, severity, duration, and impact of the impairment on the individual.[33] This first prong must be read together with the second and third prongs, which further extend the scope of disability under the ADA to persons with a record of impairment and persons who are regarded as having a deemed disability.

2. Extending the Scope of 'Disability' to Persons with a Record of Impairment and Deemed Disabilities

The term "record of" covers persons who have a history of, or have been misclassified as having, a substantially limiting disability, even though such person may not have the disability at present.[34]

Persons may be regarded as having a deemed disability even if they do not have a substantially limiting impairment.[35] These persons are entitled to rights under the ADA if they demonstrate that their actual or perceived physical or mental impairment has led to them being subjected to discrimination.[36] Illustratively, a person with severe cosmetic disfigurement might not have a substantially limiting impairment, such as in the case of blindness, but the disfigurement might be a cause of discrimination, thus acting as a disability.

---

31 Sheila D. Duston, *Definition of Disability under the ADA: A Practical Overview and Update*, September, 2001, available at https://ecommons.cornell.edu/server/api/core/bitstreams/35f55e8b-48fa-4d3a-a9c0-6f8b51742fae/content#:~:text=The%20ADA%20defines%20disabil%2D%20ity,having%20such%20an%20impair%2D%20ment (Last visited on May 29, 2023) ('Duston').

32 The Americans with Disabilities Act, 1990, §12102(1) (United States of America); *Id*.

33 *Id*.

34 *What does a "Record of" a Disability Mean?*, ADA National Network, available at www.adata.org/faq/what-does-record-disability-mean#:~:text=%E2%80%9CRecord%20of%E2%80%9D%20means%20that%20the,not%20currently%20have%20a%20disability.&text=FAQ%3A%-20What%20is%20the%20definition%20of%20disability%20under%20the%20ADA%3F (Last visited on May 29, 2023).

35 The Americans with Disabilities Act, 1990, §12102(3) (United States of America).

36 *Id*.

The ADA, therefore, is an excellent example of the social model, focusing on the impact of an impairment on an individual, rather than a quantification of the impairment itself.

Another example of the social model is the United Kingdom Equality Act 2010 ('Equality Act') that defines disability to refer to a situation where "the impairment has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities".[37] As with the ADA, the Equality Act also attempts to define disability in the context of the social impact of an impairment on the individual, as opposed to locating the source of the disadvantages faced by persons with disabilities in their impairment itself.

Finally, although legislation in the European Union does not provide a specific definition of disability, countries have attempted to define the term in their individual jurisdictions. The Disability Act of 2005 (Ireland) defines disability as any physical, sensory, mental health or intellectual impairment that causes a substantial restriction in one's capacity to carry on any profession, business, or occupation in the State.[38] It also includes cases where the impairment 'substantially' restricts the participation in social or cultural life.[39] Thus, it locates a person's impairment in the context of surrounding factors that hinder a person's ability to participate in a specific kind of work as well as general ability to participate socially and culturally.

While the test of 'substantial restriction' is based on the social model, when interpreted narrowly, it excludes those individuals who are treated unfairly owing to a disability that does not substantially alter their life. This has been considered in German legislation, where §2 of Sozialgesetzbuch (SGB, Germany) IX states that an individual is considered disabled if two conditions are met.[40] *First*, their physical functions, mental capacities, or psychological health deviate from a typical condition for their respective age for a period of six months. *Second*, such deviation leads to restriction of their participation in the life of society. The second condition, therefore, excludes the requirement of substantial restriction.

C. THE APPROACH OF THE NEW RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016

In India, the RPWD defines "persons with disability" based on the 'functional limitations' caused by the interaction of 'long-term impairments' with 'societal barriers'.[41] Recognition of the role of society in the causation of disability

[37] The Equality Act, 2010, §6(1)(b) (United Kingdom).
[38] The Disability Act, 2005, §2(1) (Ireland).
[39] *Id*.
[40] Theresia Degener, *The Definition of Disability in (German and) International Discrimination Law*, Vol. 26(2), DISABILITY STUDIES QUARTERLY, (2006).
[41] The Rights of Persons with Disabilities Act, 2016, §2(s).

marks the shift of the Indian definition of disability from the medical model to the social model.

A functional limitation is viewed as a hindrance to a person's full, effective, and equal participation in society.[42] The RPWD states that such limitations are induced by several societal factors, including communicational, cultural, political, and structural factors.[43] The reference to functional limitations have the consequent effect of making the definition of disability inclusive in nature, covering a wide range of impairments and consequent disabilities.

The RPWD's approach is similar to the definition adopted by the ADA, which views disability as an impairment that substantially limits one's major life activities. However, while the ADA focuses on a subjective assessment of the functional limitation[44] caused by impairment, the RPWD's assessment discounts individual experiences. The ADA assesses the functional limitation caused by the impairment based on an individualised inquiry wherein it provides that the "major life activities" must be those "of such individual". In contrast, the RPWD does not qualify functional limitation with the requirement that it must be assessed based on an individual's idea of full and effective participation. It assesses the extent of limitation caused by impairment from the standpoint of a reasonable person.

Thus, even though a person may perceive an impairment, in interaction with societal barriers, to be hindering their participation in the society, they may not enjoy the rights and entitlements of 'persons with disability' if it does not hinder a reasonable person's standard of participation in society. The reasonable person standard does not take into account the fact that every individual interacts differently in society, which makes it difficult to conclusively determine an objective standard of participation in society. For instance, a diabetic condition is not considered to be a disability *per se*. However, in the case of *Baert* v. *Euclid Beverage Ltd.*,[45] the US Court of Appeals, Seventh Circuit, recognised that this specific medical condition could qualify an individual for ADA entitlements while declining to hold that insulin-dependent diabetes, or any other disease for that matter, is a disability as a matter of law. The court noted that the plaintiff, in this case, faced a unique situation– he would require hospitalisation without insulin and, as a result, be unable to work. The court thus acknowledged that while insulin-dependent persons may not automatically meet the legal definition of a person with disability, the individual's circumstances and the critical impact of the condition on their ability to work or perform a life activity must be taken into account.

Further, the RPWD also does not prescribe standards for assessing what would constitute functional limitations, long-term impairments, and societal

---

42 *Id*.

43 *Id*.

44 Bragdon v. Abbott et al., 1998 SCC OnLine US SC 84 : 524 US 624 (1998) (2018) (per J. Rehnquist).

45 149 F 3d 626 (7th Cir 1998).

barriers. This results in uncertainty owing to the lack of legislative clarity. For instance, the term "long term" could refer to an uninterrupted period of two to three years or a lifelong health condition.

Unlike the RPWD, various legislations such as the Equality Act of the United Kingdom prescribe standards for disability assessment. Schedule 1 of the Equality Act states that an impairment that has lasted or is likely to last for at least twelve months would amount to long-term impairment.[46] Furthermore, it provides standards for examining adverse effects on normal functioning. As discussed above, countries such as Germany similarly prescribe standards to prevent a restrictive reading of their disability laws.

The absence of reference to one's own experience of limitation of life activity and uncertainty prevents the RPWD from fully ensuring that persons with disabilities are able to participate in society in the same manner as other persons.

The reasoning behind adopting a narrower approach could be due to the differences between the objectives of the statutes. While the purpose of the ADA is to eliminate experiences of discrimination faced by people with disabilities and the obligations imposed are shared between the government and private entities, the purpose of the RPWD is the creation of rights and entitlements, most of which are obligations cast upon the government.[47] Therefore, a narrower approach could be based on the government's economic capacity.[48]

It is also relevant to consider two subcategories of persons with disabilities created by the RPWD.

The first of these categories are "persons with benchmark disability". The rights provided to the individuals in this category range from free education for children to reservations in educational institutions.[49] To qualify for such rights, one's disability must fall under the list provided in Schedule I of the RPWD.[50] This list is based on the medical model as prescribed under the erstwhile PWD 1995 and recognises only those persons whose impairments fulfil the forty percent criterion.[51] However, unlike PWD 1995 which only provided for seven entries in the list of disabilities, the RPWD defines 'persons with benchmark disability' based on an expanded, albeit exhaustive list of twenty-one specified disabilities assessed based on clinical standards. Schedule I, however, exemplifies a disconnect between the understanding of disability by a medical professional and understanding

46 The Equality Act, 2010, Sch. I (United Kingdom).

47 The Rights of Persons with Disabilities Act, 2016, §3(5) (placing the obligation on the appropriate government to ensure reasonable accommodation for persons with disabilities); *See also* The Rights of Persons with Disabilities Act, 2016, §§3(1), 4 & 5.

48 Mandal, *supra* note 14.

49 The Rights of Persons with Disabilities Act, 2016, Ch. VI.

50 *Id*., §2(r).

51 *Id*., Sch. I.

by a legislature and, subsequently, the judiciary. For instance, it categorises learning disabilities under the umbrella of 'intellectual disability', despite an explicit exclusion of learning disabilities by the Diagnostic and Statistical Manual of Mental Disorders issued by the American Psychiatric Association.[52] In such a situation, where the power to certify the presence of a disability is vested in medical professionals, with no discretion provided to the judiciary, it is likely, and natural, that the scope of the definition is narrowed in its application.

The underlying rationale behind the narrow approach could be attributed to the primary purpose of the creation of the category, which is providing reservations. Rights and entitlements confer benefits from the standpoint of the individuals, whereas reservation is, in essence, a form of affirmative action meant to elevate sections of society. Hence, the creation of this category allows the government to extend the benefit of reservations only to an identified subset, as opposed to the entire gamut of persons with disabilities.

The second subcategory is of "persons with disability having high support needs". This category also requires persons to fulfil the 'benchmark disability' condition. Therefore, similar to the PWD 1995, this is indicative of the fact that substantial rights of persons with disabilities will only be recognised if the 'benchmark disability' criterion is fulfilled by the person.[53] This approach, as with the approach adopted for 'persons with benchmark disability' is attributable to the financial considerations of the State and the costs involved in providing 'high support'.

Therefore, the conception of 'persons with disabilities' differs across statutes, broadly aligning to either the medical or the social model of disability. The PWD 1995 characterised disability in accordance with the medical model. However, statutes such as the ADA adopt a more beneficial approach through the social model, focusing on the impact that an impairment would have on a particular individual in the context of their major life activities. While the RPWD does mark a shift from the medical to the social model in India, this is circumscribed by several factors, including the absence of the subjective assessment of the impact of an impairment on an individual.

III. SUBSTANTIVE EQUALITY IN MATTERS OF EMPLOYMENT THROUGH REASONABLE ACCOMMODATION

Once the ambit of persons covered under the term 'person with disability' is addressed, it becomes necessary to discuss the rights accorded to such

---

[52] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th edn., CBS, 2013).

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

persons. This discussion takes on particular significance within the field of employment, as it constitutes a pivotal stride towards advancing equal opportunities. The United Nations Convention on the Rights of Persons with Disabilities, 2008 ('UNCRPD') requires State Parties to recognise the right of persons with disabilities to work on an equal basis with others.[54] One of the safeguards to promote the equal right to work is ensuring that RA is provided to persons with disabilities in the workplace.[55] It includes all necessary and appropriate modifications and adjustments that do not impose a disproportionate or undue burden.[56] Both the USA and India are parties to the UNCRPD.

A. REASONABLE ACCOMMODATION IN EMPLOYMENT UNDER ADA – TITLE I

The focus of the ADA is to prevent discrimination against individuals on the basis of disability. The statute defines 'discrimination' to include seven categories of behaviour, of which one is the denial of RA to "qualified individuals with a disability" who are potential or existing employees.[57] This obligation is imposed upon all employers– public and private– who employ over fifteen persons.[58]

The ADA adopts both the sameness and difference models of discrimination. The sameness model postulates that discrimination occurs when individuals who are essentially the same are treated differently for illegitimate reasons.[59] Discrimination under the sameness model could occur, for instance, if a white-collar applicant whose disability necessitates the use of a wheelchair is passed over in favour of an individual who does not require such accommodation, even if the employment specifications do not involve a physical aspect.

The second type of prohibited discrimination is based on the difference model. The difference model is based on the proposition that treating individuals who possess certain characteristics in the same manner as those who do not possess those characteristics is a form of discrimination.[60] As stated in the case of *Regents of the University of California* v. *Bakke*, "in order to treat some persons equally, we must treat them differently".[61] This is the model of discrimination in

---

[54] *The Convention on the Rights of Persons with Disabilities*, May 3, 2008, A/RES/61/106, Art. 27(1).

[55] *Id*., Art. 27(1)(i).

[56] *Id*., Art. 2.

[57] The Americans with Disabilities Act, 1990, §12112(b)(5)(A) (United States of America).

[58] U.S. Equal Employment Opportunity Commission, *Fact Sheet: Disability Discrimination*, January 15, 1997, available at https://www.eeoc.gov/laws/guidance/fact-sheet-disability-discrimination#:~:text=The%20ADA%20covers%20employers%20with,amended%2C%20and%20its%20implementing%20rules (Last visited on May 30, 2023).

[59] Sonia Liff & Judy Wajcman, *'Sameness' and 'Difference' Revisited: Which Way Forward for Equal Opportunity Initiatives?*, Vol. 33(1), Journal of Management Studies, 79 (1996).

[60] *Id*.

[61] Regents of the University of California v. Allan Bakke, 1978 SCC OnLine US SC 154 : 57 L Ed 2d 750 : 438 US 265 (1978).

which a justification for RA may be found. In order to give persons with disabilities the same opportunities as other individuals, accommodations must be made for disabilities so as to allow them to perform their jobs.

The EEOC, in its Interpretive Guidance to Title I of the ADA, describes RA as "any change in the work environment or in the way things are customarily done" to enable people with disabilities to have access to equal employment opportunities.[62]

Accordingly, there are three broad categories of RA: *first*, those that allow qualified applicants with disabilities to apply for the position; *second*, those that modify the work environment or employment circumstances to allow employees with disabilities to perform the functions of their position; and *third*, those that allow employees with disabilities to enjoy benefits equivalent to those enjoyed by other employees.[63]

The ADA entitles "qualified persons with a disability" to RA. This term refers to those persons who are able to perform the essential functions of the job with or without RA.[64] It is only for the marginal functions of a position that RA is deemed relevant.[65] An individual who is unable to perform the position's essential functions would not be eligible to claim RA under the ADA[66] and such functions cannot be delegated as RA. These essential functions are determined by the employer and may be gleaned from various elements, including job descriptions prepared before an individual is selected for the position in question.[67]

Accordingly, RA not only guarantees equal access to employment but also facilitates an environment where all employees have an equitable opportunity for job performance. This balanced approach seeks to ensure that persons with disabilities receive the accommodations required to perform their jobs effectively while upholding the principles of equality and non-discrimination. By embracing both sameness and difference models, the ADA acknowledges that, in certain cases, different treatment is necessary to provide persons with disabilities equal opportunities. Thus, RA serves to level the playing field for persons with disabilities in the workplace.

---

62 Interpretive Guidance, *supra* note 25.

63 *Id*., U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, October 17, 2022, available at www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada (Last visited on May 30, 2023) ('Enforcement Guidance').

64 The Americans with Disabilities Act, 1990, §12111(8) (United States of America).

65 Enforcement Guidance, *supra* note 63.

66 Duston, *supra* note 31.

67 The Americans with Disabilities Act, 1990, §12111(8) (United States of America).

1. RA Request and the Interactive Process

The first step required to trigger the process of claiming RA in the workplace is for the employee to inform the employer of their disability or the employer being made aware of the same in any other manner. RA can be requested at any time during the application process or the term of employment.[68] However, the employer's obligation to provide RA arises only when the employer is made aware of the problem faced by the employee.[69] Although a formal notice would be ideal, it is not necessary for the employee to disclose the medical condition. Informing the employer that a disability exists and help is required is sufficient to trigger the employer's obligation in this regard.[70] This notice need not be in writing or specifically state that RA is required.[71] Further, it is not necessary for the employee to make such disclosure in all cases; it would be sufficient if a relative, friend, medical professional or other representative of the employee were to clearly inform the employer that the employee requires accommodation.[72]

The employer has no affirmative obligation to approach a disabled employee to discuss RA.[73] However, in certain cases, courts have adopted a flexible approach toward RA even in cases where the employee has not made the employer aware of their disability. For instance, an employer might be held liable if they have knowledge of the employee's condition or if they know or should know that the employee is facing issues in the workplace due to the disability and that the disability prevents the employee from requesting RA.[74] This was the case in *Katherine Taylor* v. *Phoenixville School District*,[75] where the court held the employer would be deemed to have received notice that their employee suffering from bipolar disorder would require RA when the employee displayed symptoms at work, the employer knew that she had been hospitalised and the hospital had contacted the employer. Arguably, this might be the case for several mental health conditions where persons suffering from such conditions might be unaware of their condition even whilst displaying symptoms.

Upon notice of an employee's requirement of RA, employers may be required to initiate an "informal, interactive process" to determine the exact

---

68 Enforcement Guidance, *supra* note 63.

69 D'Amico v. City of New York, 132 F 3d 145 (2nd Cir 1998) ('D'Amico'); *See also* PollyBeth Proctor, *Determining ''Reasonable Accommodation'' under the ADA: Understanding Employer and Employee Rights and Obligations during the Interactive Process*, Vol. 33, SOUTHWESTERN UNIVERSITY LAW REVIEW, 51 (2003) ('Pollybeth Proctor').

70 Michael A. Faillace, DISABILITY LAW DESKBOOK: THE AMERICANS WITH DISABILITIES ACT IN THE WORKPLACE, ¶¶4-16 (Practising Law Institute, 2000).

71 Enforcement Guidance, *supra* note 63.

72 *Id*., Katherine Taylor v. Phoenixville School District, 184 F 3d 296 (3rd Cir 1999).

73 D'Amico, *supra* note 69.

74 PollyBeth Proctor, *supra* note 69, 62; *See also* Katherine Taylor v. Phoenixville School District, 184 F 3d 296 (3rd Cir 1999); Robert Bultemeyer v. Fort Wayne Community Schools, 100 F 3d 1281 (7th Cir 1996).

75 184 F 3d 296 (3rd Cir 1999).

scope of the employee's disability and potential accommodations. The aim of this interactive process is to determine an accommodation that allows the employee to fulfil their job requirements without placing an undue burden on the employer.[76]

The primary issue relating to the interactive process as emphasised by the ADA and the EEOC is that the US Supreme Court has failed to clarify whether the process is mandatory in nature, despite diverging decisions from various circuit courts. In *Robert Barnett* v. *US Air Inc.*,[77] the Ninth Circuit court held that the interactive process was mandatory, based on the fact that a failure to impute liability upon employers for their failure to initiate the interactive process might weaken the ADA's provisions on RA. On the other hand, courts have also held that a failure to engage in the interactive process does not attach liability *per se*, where engaging in the process would not have led to RA under any circumstances. In *Cheryl A. Gile* v. *United Airlines, Inc.*[78] it was held that in order to impute liability on the employer, it must be shown that not only did the employer fail to engage in the interactive process, but that this failure to engage was responsible for the failure to determine RA.

Accordingly, a middle path[79] was adopted by the US Supreme Court in *US Airways, Inc.* v. *Barnett*,[80] while overturning the decision of the Ninth Circuit court which held the interactive process to be mandatory, Justice Stevens opined that summary judgment in favour of the employer on a RA issue might be denied where the employer has failed to participate in the process. This view is supported by the EEOC Interpretive Guidance, which states that an employer 'must' make reasonable efforts to determine appropriate accommodation, for which the interactive process 'may' be required.[81] Thus, the interactive process may not be mandatory, unless it is the only way in which RA may be determined.

2. Determining Reasonable Accommodation

The nature of the interactive process would depend on, *inter alia*, the nature of the disability.[82] In certain cases where the disability, the workplace barriers created, and the potential accommodations are clear, there may be no need for an interactive process.[83] In cases where the disability may not be obvious, the

---

76 Duston, *supra* note 31.

77 228 F 3d 1105 (9th Cir 2000); *See also* PollyBeth Proctor, *supra* note 69, 60.

78 213 F 3d 365 (7th Cir 2000).

79 Ellen Fjellestad v. Pizza Hut of America Inc., 188 F 3d 944 (8th Cir 1999) (wherein it was held that the employer's refusal to engage in the interactive process was evidence of bad faith sufficient to deny the employer's application for summary judgment in the case); *See also* Stephen F. Belfort & Tracey Holmes Donesky, *Reassignment under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, Vol. 57, Washington and Lee Law Review, 1045 (2000).

80 2002 SCC OnLine US SC 33 : 535 US 391 (2002).

81 Interpretive Guidance, *supra* note 25.

82 Enforcement Guidance, *supra* note 63.

83 *Id*.

employer may require a more protracted interactive process and documentation regarding the employee's disability. The latter would include reasonable documentation to prove that the individual has a disability covered by the ADA and information regarding his or her functional limitations. It would not, however, extend to obtaining their entire medical history, which may include information extraneous to the inquiry at hand.[84]

During the interactive process, it is the employer's right to suggest or choose between different RA options, as long as the options are effective in removing the workplace barrier.[85] Therefore, the employer may choose the option that is least expensive or easier to provide. In doing so, they are not required to show that the provision of the more expensive option is an undue hardship on the business.[86] In addition, it must be noted that although an employer cannot impose a RA upon an employee with a disability, the latter would not be eligible to remain in the job if they refuse an accommodation that is needed to allow them to perform the essential functions of their job or to eliminate a direct threat posed by them to the workplace.[87]

Job applicants must be provided RA for the application process if required, even if the employer is of the opinion that they would not be able to provide accommodation for the job– RA for the application process is required to be adjudged separately from that required for the job.[88] Finally, RA must be made available in the context of the benefits and privileges of the position in question, including training, services such as cafeterias and lounges, and social events associated with the work environment.[89]

3. Undue Hardship

To reiterate, under the RA process, the employee with a disability bears the responsibility of showing that RA is possible to provide under the circumstances. Once this burden has been discharged by the employee, the employer must provide the accommodation or prove that this would be an undue hardship on the business.[90] The rationale behind this shifting burden is based on the fact that the employee is in a better position to gauge the appropriate accommodation

---

84 *Id*.

85 *See* Stewart v. Happy Herman's Cheshire Bridge Inc., 117 F 3d 1278 (11th Cir 1997); Vande Zande v. State of Wisconsin Deptt. of Admn., 851 F Supp 353 (WD Wis 1994); Hankins v. Gap Inc., 84 F 3d 797 (6th Cir 1996) ('Hankins').

86 Enforcement Guidance, *supra* note 63.

87 Hankins, *supra* note 85.

88 The Americans with Disabilities Act, 1990, §12112(d)(3) (United States of America).

89 *See* Interpretive Guidance, *supra* note 25, §1630.9.

90 US Airways Inc. v. Barnett, 2002 SCC OnLine US SC 33 : 535 US 391 (2002); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, Vol. 46(1), DUKE LAW JOURNAL, 13 (1996).

to suit their condition, while the employer is more able to evaluate the costs of the accommodation.[91]

The undue hardship defence excuses employers from making RA, where this would require "significant difficulty or expense" in light of certain factors such as the nature and cost of the accommodation, the financial resources of the employer, the number of persons employed by the employer, and the impact of the accommodation on the expenses, resources, and operation of the entity.[92] Notably, the employer is required to consider external sources of funding, such as federal funding, available for financing the RA,[93] if the employer is otherwise unable to fund the RA. It is also required to consider the employee's offer to pay for the accommodation themselves.[94] The EEOC has stated that an undue hardship defence would also consider the impact of the accommodation on the ability of other employees to perform their job and the employer's ability to conduct business.[95] However, such a defence cannot be sustained based on a claim that other employees or customers of the employer might be fearful or prejudiced towards the employee with the disability, or that the accommodation would be prejudicial toward the morale of other employees.[96] The only exception might be in a case where the accommodation is "unduly disruptive to other employees' ability to work".[97]

4. Contours of Undue Hardship Under the ADA

Early case law on undue hardship under the ADA focused primarily on the burden of proof shouldered by each party and the relationship between RA and undue hardship. These early cases tended to focus on providing clarity on basic concepts surrounding RA and undue hardship inquiries.

One of the most significant of these cases is *Vande Zande* v. *State of Wisconsin Deptt. of Admn. R*,[98] which adopted a cost-benefit approach to determine whether an accommodation is reasonable or poses an undue hardship. The rationale of the court was that although it is not necessary for costs and benefits to be exactly quantifiable or for an accommodation to be deemed unreasonable if the cost exceeds the benefits slightly, the cost and benefit cannot be disproportionate. Employers are not "required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee".[99]

---

91 *Id*.

92 The Americans with Disabilities Act, 1990, §12111(10) (United States of America); Interpretive Guidance, *supra* note 25, §1630.2(p); *See also* Equal Employment Opportunity Commission v. Eckerd Corpn., No. 1:10-cv-2816-JEC (ND Ga 2012).

93 Interpretive Guidance, *supra* note 25, §1630.2(p).

94 *Id*.

95 Nicole Buonocore Porter, *A New Look at the ADA's Undue Hardship Defense*, Vol. 84, Missouri Law Review, 121 (2019).

96 Enforcement Guidance, *supra* note 63.

97 *Id*.

98 44 F 3d 538 (7th Cir 1995).

99 *Id*., 543.

In *Borkowski* v. *Valley Central School District*,[100] the Second Circuit court was tasked with determining the burden of proof in a RA inquiry. The plaintiff was a teacher, who after suffering major head trauma, was left unable to control her students in the class. It was held that it is the plaintiff who bears the initial burden of demonstrating that she is capable of performing the functions of her job, which would include putting forward any accommodation that could assist her.[101] Further, the plaintiff also bears the burden of showing that the cost of the accommodation is not, *prima facie*, disproportionate to its benefits;[102] it is only upon fulfilment of this factor that an accommodation may be termed reasonable. Thereafter, the burden of proof shifts to the defendant employer, who must show that the accommodation is unreasonable or an undue hardship.[103]

An important case in clarifying the difference between RA and undue hardship was *Bryant* v. *Bureau of Greater Maryland*,[104] which clarified that while an RA inquiry focuses on whether the accommodation would be effective and allows an employee with disabilities to access the same opportunities as any other employee, the inquiry into undue hardship is focused on considering the impact that such an accommodation would have on the employer.

As seen above, while early cases on undue hardship focused more on conceptual clarity, later cases have focused on specific aspects of undue hardship, such as financial cost, job restructuring, and structural changes to jobs, which include changes to timings, absences, and the like.[105]

a. Financial Cost

Most ADA cases on undue hardship are not, in fact, decided based on the financial costs involved.[106] Additionally, a significant number of cases that discuss financial costs in the context of undue hardship are not dispositive; rather, they are decisions to deny summary judgment for the defendant employer due to lack of evidence of undue hardship.[107]

One example of this is the case of *Alabi* v. *Atlanta Public Schools* ('Alabi').[108] Here, the plaintiff, a teacher with a hearing disability, required a full-time interpreter in class. The employer claimed that this would be an undue hardship as the cost of the interpreter was more than USD 30,000 over the teacher's

[100] 63 F 3d 131 (2nd Cir 1995).
[101] *Id*., 135.
[102] *Id*., 138.
[103] *Id*.
[104] 923 F Supp 720 (D Md 1996).
[105] These are also the terms used to define undue hardship in the ADA.
[106] Porter, *supra* note 95, 139.
[107] *Id*., Reilly v. Upper Darby Township, 809 F Supp 2d 368 (ED Pa 2011).
[108] No. 1:12-CV-0191-AT (ND Ga 2011); *See also* Porter, *supra* note 95, 140.

salary.[109] It did not, however, provide information on whether this amount could be negotiated or otherwise ameliorated and the impact of the cost on the school district's budget.[110] Based on this and despite the fact that the accommodation was costly, the court refused to grant summary judgement for the defendant, citing a lack of evidence of undue hardship.[111]

The case of *Searls* v. *Johns Hopkins Hospital*,[112] dealt with similar facts. Here, the employer compared the cost of the proposed accommodation to the budget of a specific unit of the hospital, arguing that it did not have the requisite amount of money in the budget it had allocated for RA.[113] The court, however, stated that the budget allocated by an employer for RA has no bearing in determining whether a particular accommodation causes an undue hardship, as this would effectively allow the employer to determine the legalities of this issue.[114] Additionally, unlike Alabi, the court here clearly stated that the fact that the interpreter cost twice the plaintiff's salary was irrelevant.[115]

There are also cases where the parties themselves dispute how much accommodation costs. An example of this is *Garza* v. *Abbott Laboratories*.[116] Despite a large disparity between the estimates of the two parties in this case, the employer argued that since it made the "cost estimate in good faith, it does not matter whether the estimate was objectively wrong".[117] The court disagreed, holding that this was an objective issue, and therefore, had to be determined by the jury.

On the whole, what may be determined from this body of case law is that courts are usually inclined towards requiring employers to prove why a particular accommodation is costly enough to meet the burden of undue hardship.[118]

b. Job Restructuring

This part deals with case law that involved restructuring job tasks, which the employer claimed to be an undue hardship for reasons other than cost. A simple example of this is *Hill* v. *Clayton County School District*,[119] where the plaintiff was a bus driver with lung disease. The bus did not have air-conditioning, which caused breathing problems in hot weather. The employer refused to accom-

---

109 *Id*., 6-8.
110 *Id*., 10.
111 *Id*.
112 158 F Supp 3d 427 (D Md 2016) ('Searls').
113 *Id*., 438.
114 *Id*., 438-439.
115 *Id*., 439.
116 940 F Supp 1227 (ND Ill 1996).
117 *Id*., 1241.
118 Porter, *supra* note 95, 144.
119 619 F App'x 916 (11th Cir 2015).

modate the plaintiff's request for a bus with air-conditioning, arguing that this would cause undue hardship by disrupting the allocation system, which was based on seniority.[120] The court, however, did not accept this argument, stating that the employer had been unable to show how this would amount to undue hardship.[121]

In *Diane Lovejoy-Wilson-Cross* v. *Noco Motor Fuel Inc.-Cross*,[122] the plaintiff, who was an employee at a gas station located near her home, suffered from epilepsy, which rendered her prone to daily seizures and unable to drive. Her application to be promoted to the post of an assistant manager was rejected because she would be unable to drive to the bank for work.[123] All her RA requests were denied until the employer finally offered her an assistant manager position at a different location. This location was serviced by an armoured car, which would negate the need for her to drive; it was, however, significantly further from her house and in a bad part of town.[124] The district court held that the employer had fulfilled its burden by providing RA.[125] This was overturned on appeal, with the appellate court stating that the employer had not shown how promoting the employee at her original location would create an undue hardship, especially considering the employee had already offered to pay for her transport to the bank.[126]

There have been cases where courts have accepted the undue hardship defence in such situations. One instance is in *Equal Employment Opportunity Commission* v. *Eckerd Corpn*.,[127] where the plaintiff's arthritis made it difficult for her to stand for long periods of time or walk without the assistance of a cane.[128] She was a cashier, which required her to remain standing through her shift. In addition, her job description also involved restocking the shelves and cleaning the shop during lean hours.[129] As RA, she requested to be allowed to sit on a stool for half her shift.[130] However, the court deemed that this would be an undue hardship for several reasons. *First*, despite the fact that the employer company as a whole could sustain the cost of the accommodation, the particular store the defendant worked at would not be able to sustain this.[131] *Second*, the plaintiff would be unable to fulfil the essential functions of the job.[132] *Third*, such an accommodation would cause productivity issues and morale loss among other employees.[133]

---

120 *Id*., 5, 12.
121 *Id*., 12.
122 263 F 3d 208 (2nd Cir 2001).
123 *Id*., 213.
124 *Id*., 214.
125 *Id*., 215.
126 *Id*., 221.
127 No. 1:10-cv-2816-JEC (ND Ga 2012).
128 *Id*., 2.
129 *Id*., 3.
130 *Id*., 3-6.
131 *Id*., 21; *See generally* Searls, *supra* note 112.
132 *Id*., 14.
133 *Id*., 20.

c. Structural Changes

This part refers to case law dealing with the structural rules of a workplace, such as the work schedule, hours, absences, leaves, and the like.[134]

A number of cases deal with attendance-related issues. In most of these cases, courts have consistently held that attendance is an essential job function, and it would be an undue hardship for a business to have to bear inconsistent attendance related to the employee's disability. However, one significant aberration is the case of *Dutton* v. *Johnson County Board of County Commissioners*.[135] Here, the employee suffered from migraines, which led to erratic attendance, based on which he was dismissed from his job.[136] He argued that he should be allowed to use his available vacation leave on the days he was absent, even if he had already exhausted his sick leave.[137] The employer countered that this would be an undue hardship. Surprisingly, the court sided with the employee in this case– it determined that the employer had not proven that regular attendance is an essential job function and the employee still had available leave days.[138] Hence, he would be allowed to use those days to excuse his absences. This case is an aberration for two reasons: *first*, it is fairly irregular for a court to determine that regular attendance is not a requirement for any job, and *second*, the plaintiff's unscheduled absences had indeed caused undue hardship for the employer.[139]

In *Michael Ward* v. *Massachusetts Health Research Institute Inc.*,[140] the plaintiff required flexible working hours for his arthritis.[141] The employer argued that it would cause undue hardship to find a supervisor to match the employee's working hours.[142] However, the court did not consider this to be an undue hardship based on the fact that the employee did not usually require supervision.[143] Further, the employer had failed to prove how accommodating and flexible working hours would amount to an undue hardship– financial or otherwise.[144]

Other accommodations that have been frequently requested are the allowance to work from home or leaves of absence to treat their symptoms. When it comes to leaves of absence, courts have usually held that indefinite leaves

---

134 Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, Vol. 91, Denver Law Review, 963 (2014).
135 868 F Supp 1260 (D Kan 1994).
136 *Id*., 1261-1262.
137 *Id*., 1264.
138 *Id*., 1264-1265.
139 Porter, *supra* note 95, 150.
140 209 F 3d 29 (1st Cir 2000).
141 *Id*., 32.
142 *Id*., 37.
143 *Id*.
144 *Id*.

would be an undue hardship,[145] as opposed to leaves with definitive return dates.[146] Requests to work from home have usually been accepted, as long as the employee does not work in a field where physical presence is a requirement, such as healthcare or hospitality.[147]

We may conclude this part with two comments derived from the case law discussed. *First*, courts are still developing RA and undue hardship standards, with differing verdicts on similar facts. *Second*, courts are usually unwilling to grant accommodations that would impact employees other than the plaintiff employee, based on stigma against special treatment.[148]

B. REASONABLE ACCOMMODATION IN EMPLOYMENT IN INDIA

This sub-part deals with the legislative history and the interpretation of RA by the courts in India.

1. Erstwhile Legislation

The PWD 1995 did not contain the principle of RA, however, courts provided this relief based on the UNCRPD.[149] The Supreme Court in *Suchita Srivastava* v. *State (UT of Chandigarh)*,[150] held that since India ratified the UNCRPD on October 1, 2007, its provisions would be binding on its legal system. The Bombay High Court in *Ranjit Kumar Rajak* v. *SBI*,[151] recognised that while the principle of RA as contained in the UNCRPD had not been enacted into municipal law, it could still be read into Article 21 of the Constitution of India,[152] as long as it did not conflict with any municipal laws. It held that the State has the duty to provide RA unless it can prove that this would be a "burden of hardship".[153] Accordingly, the court ordered the State Bank of India to appoint the petitioner, who had been previously declared medically unfit due to a renal transplant.[154] It was decided that the higher amount of medical expenses incurred by the bank for

---

[145] *See* Alston v. Microsoft Corpn., 851 F Supp 2d 725 (SDNY 2012); Graves v. Finch Pruyn & Co. Inc., 2009 WL 819380 (NDNY 2009).

[146] *See* Gibson v. Lafayette Manor Inc., 2007 WL 951473 (WD Pa 2007); Rogers v. New York University, 250 F Supp 2d 310 (SDNY 2002).

[147] Porter, *supra* note 95, 153.

[148] *Id*.

[149] Jayna Kothari, *Post– CRPD Development of the Principle of "Reasonable Accommodation"*, January 6, 2012, available at www.clpr.org.in/blog/post-crpd-development-of-the-principle-of-reasonable-accommodation (Last visited on May 30, 2023).

[150] (2009) 9 SCC 1.

[151] 2009 SCC OnLine Bom 732 : (2009) 5 Bom CR 227.

[152] The Constitution of India, Art. 21.

[153] 2009 SCC OnLine Bom 732 : (2009) 5 Bom CR 227, 234.

[154] *Id*., 238.

this particular employee, which it pays for all its employees under the State Bank of India Officers Service Rules, was not an undue burden.[155]

The position that the UNCRPD's principles on accommodation forms a composite part of Article 21 of the Indian Constitution was also accepted by the Delhi High Court in *National Assn. of the Deaf* v. *Union of India*.[156] However, the judgement did not specifically refer to the concept of RA, much like the lack of reference in other cases, which provided relief without expressly elaborating on or recognising the principle.[157] This lack of express recognition resulted in a situation where the right to RA was not sufficiently safeguarded, precluding the possibility of future petitioners successfully relying on these judgements to seek relief.

2. New Legislation

The issue was taken up during the preparation of the RPWD Bill, and consequently, the right of RA was incorporated into the RPWD. The statute defines discrimination to mean denial of RA, among other forms of exclusion and restriction.[158] RA is defined as "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".[159] Therefore, the two primary components of RA under the RPWD is that it should be necessary and appropriate and should not impose a disproportionate or undue burden on the employer.

Accordingly, one of the duties of the appropriate government is to take the necessary steps to ensure RA for persons with disabilities.[160] It is in furtherance of their duty to ensure that persons with disabilities enjoy their right to equality, life with dignity and integrity like other persons.[161]

It is imperative for every government establishment to provide RA and an appropriate barrier-free and conducive environment to employees with disabilities.[162] In terms of the Rights of Persons with Disabilities Rules, 2017, a government establishment cannot compel a person with a disability to pay, in full or part, the cost of RA required by the individual.[163] All costs for RA are to be borne by the establishment itself.

---

155 *Id*.
156 2011 SCC OnLine Del 801 : (2011) 177 DLT 707.
157 *See* Syed Bashir-ud-Din Qadri v. Nazir Ahmed Shah, (2010) 3 SCC 603; Bhagwan Dass v. Punjab SEB, (2008) 1 SCC 579; Municipal Corporation of Greater Mumbai v. Shrirang Anandrao Jadhav, 2009 SCC OnLine Bom 1739.
158 The Rights of Persons with Disabilities Act, 2016, §2(h).
159 *Id*., §2(y).
160 *Id*., §3(5).
161 *Id*., §3.
162 *Id*., §20(2).
163 The Rights of Persons with Disabilities Rules, 2017, R. 3(4).

One of the first cases to provide relief based on RA under RPWD was the Delhi High Court case of *Bank of Baroda* v. *Susmita Saha*.[164] The petitioner bank invited applicants for admission to a one-year diploma course in banking through the Baroda Manipal School of Banking. All selected candidates who successfully completed their course within twelve months and cleared all the back papers within three additional months were to be appointed in the bank's service. The respondent had a fifty percent locomotor disability. She was selected for the programme under the 'physically handicapped' category and was required to clear all papers by January 2016. However, she fell seriously ill in December 2015. Her request for a change in the date of examination was denied, and she could complete her course only in September 2016, eight months after the prescribed timeline. Consequently, the petitioner bank claimed that she did not satisfy the condition of clearing all papers within fifteen months of selection and hence, could not be appointed to the bank's services.[165] It was contended that appointing the respondent would open the door for all candidates who were disqualified in the past due to non-completion of course within the prescribed timeline.[166]

Herein, the Delhi High Court noted that "special considerations are given to physically disabled persons in the matter of employment so that they are not left out of the social mainstream and are also made to contribute to the social and economic development of the nation".[167] While referring to the bank's duty to provide RA under RPWD, the bank's expectation that a person with a disability could equally compete with general category candidates with the same timeline was held to be contrary to the intent and purpose of RPWD.[168] Acknowledging that the respondent had agreed to the condition while obtaining admission to the course, it highlighted that she did not have a meaningful choice but to accept the standard form even with unreasonable and unconscionable terms.[169] Accordingly, the court directed the petitioner bank to provide employment to the respondent based on its duty to provide RA.[170]

While the case before the Delhi High Court pertained to disability acquired prior to employment, the Bombay High Court in 2020 adjudicated on a matter relating to disability acquired during employment.

In *Vikas Khanderao Keng* v. *State of Maharashtra*,[171] fourteen drivers of the Maharashtra State Road Transport Corporation ('MSRTC') filed a writ petition against the MSRTC's decision to discontinue the services of the petitioners

[164] 2019 SCC OnLine Del 7846.
[165] *Id*., 2.
[166] *Id*., 3.
[167] *Id*., 20.
[168] *Id*.
[169] *Id*., 26.
[170] *Id*., 34.
[171] 2020 SCC OnLine Bom 801 : (2021) 2 Mah LJ 131.

on the ground that they had been diagnosed with colour blindness.[172] The court held that the petitioners are entitled to 'alternate jobs' as RA in accordance with §20(2) of the RPWD.[173] The court also read the rights provided in §20(3), which deals with non-denial of promotions on the ground of disability, into the concept of RA, holding that a person who acquires a disability during their service cannot be dispensed with or reduced in rank.[174] In cases where the person is no longer suitable for their existing post, they must be provided an alternate post with the same pay scale and service benefits.[175] These persons are to be adjusted on a supernumerary post until such an alternate post becomes available, or they attain the age of superannuation.[176]

The court also determined that a person who acquires disability during employment is distinguishable from a "person with disability". Therefore, even if a person does not satisfy the requirements of §2(s) to qualify as a 'person with disability', they would be entitled to rights under §20(4),[177] if they acquire any form of disability during their service.[178]

The underlying rationale behind this holding was that this interpretation would further the objectives of RPWD, which is further to the pronouncement by the Supreme Court that,

> "In construing a provision of a social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act".[179]

Further, the Kerala High Court in 2014 in the case of *Ravindran K.M.* v. *State of Kerala*,[180] decided that a case of discrimination against a 'person with disability' may be made even in cases where disability is not the direct but an underlying cause of denial of employment.[181] The petitioner, having a seventy-five percent locomotor disability, was appointed to the Life Insurance Corporation for eighty-five days on being sponsored by the Employment Exchange of Kerala. The State Government then issued a notification stating that 'physically handi-

[172] *Id*., 132.
[173] *Id*., 157.
[174] *Id*., 140.
[175] *Id*.
[176] *Id*.
[177] The Rights of Persons with Disabilities Act, 2016, §20(4) (stating "No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service.").
[178] 2020 SCC OnLine Bom 801 : (2021) 2 Mah LJ 131, 156.
[179] Kunal Singh v. Union of India, (2003) 4 SCC 524.
[180] 2018 SCC OnLine Ker 20774 : (2019) 1 KLT 331.
[181] *Id*., 12.

capped persons' who have worked for 179 days or more on being sponsored by the Employment Exchange would be reappointed against supernumerary posts. The petitioner's representation to appoint him under the scheme was rejected.[182] The State contended that the petitioner's request was not refused on the grounds of disability but simply because he was not entitled to be considered for reappointment as his previous appointment was for less than 179 days.[183]

The court held that getting sponsored by the Employment Exchange for an appointment to Life Insurance Corporation for less than 179 days was not on account of any fault of the petitioner or even his option but, in fact, out of necessity.[184] Discrimination was held to have arisen on account of the fact that persons with a lesser disability were appointed for the relevant period which qualified them for reappointment despite having less registration seniority.[185] The underlying cause of the petitioner's non-appointment under the circular was his disability. Accordingly, the State was ordered to reasonably accommodate the petitioner. In this case, therefore, the court looked beyond the *prima facie* cause of denial of employment to a person with disability, highlighting that the petitioner accepted employment for less than 179 days only out of necessity.[186] This is similar to the ruling in *Bank of Baroda* v. *Susmita Saha*,[187] which demonstrated that persons with disabilities often agree to unconscionable terms because of a lack of meaningful choices.

The principle of RA in employment has also been extended to caregivers of 'persons with disabilities'.[188] The Guwahati High Court in *Netramoni Kakati* v. *State of Assam*,[189] held that when applying normal rules of transfer, the government should also give consideration to the problems faced by the parents on account of their dependent being a person with a disability.

Therefore, it can be seen that after the introduction of the right to RA in Indian disability legislation, the High Courts have interpreted the right in a broad manner. They have followed a mode of interpretation that furthers the objectives of RPWD, founded on the principle of non-discrimination, equality and full, and effective participation in society. Thus, when assessing if denial of RA amounts to discrimination, the judiciary has looked into the underlying cause of such denial and not merely the *prima facie* ground. The right to RA has also been extended to the caregivers of persons with disabilities.

---

[182] *Id*., 1-2.
[183] *Id*., 4.
[184] *Id*., 8.
[185] *Id*., 12.
[186] *Id*., 10.
[187] 2019 SCC OnLine Del 7846.
[188] The Rights of Persons with Disabilities Act, 2016, §2(d).
[189] 2019 SCC OnLine Gau 5649 : (2019) 8 Gau LR 181 : (2019) 4 GLT 243.

Now while the Indian courts have passed directions in individual cases to ensure a level playing field for persons with disabilities in matters of public employment and provided relief through RA, it is important for the government to bring out regulations on RA to strengthen the link between law and implementation for three main reasons. *First*, the judicial decisions are by High Courts in different States in India, and hence, are only binding law for those States. *Second*, even for those States, the High Courts do not analyse the facts against the concept of RA. Instead, they provide unique solutions specific to the facts available. The absence of any guidance on the interpretation of RA as a concept increases the possibility of denial of the same without application of mind. *Third*, regulations would ensure that there is higher accountability on establishments to provide RA even before a matter reaches the judicial system, or, in fact, to prevent this from occurring.

IV. EXCLUSION OF CHILDREN WITH DISABILITIES FROM INCLUSIVE EDUCATION

The UNCRPD envisions free, quality, inclusive education as the fundamental human right of every child with a disability.[190] The oldest form of education system for children with disabilities is to segregate them into 'special schools' with special teaching styles and curriculum.[191] While these schools aim to address the specific needs of children with disabilities, a major drawback is that this often leads to their exclusion from society. Children with disabilities may learn alongside children without disabilities within the mainstream education systems in two ways.[192] *First*, the traditional integrated education system, wherein the focus is on the student to fit into the regular school system. *Second*, the modern, inclusive education system that aims to adapt to the needs of children with disabilities.

A. REASONABLE ACCOMMODATION FOR INCLUSIVE EDUCATION UNDER THE ADA

The ADA is a comprehensive legislation. While Title I focuses on disability discrimination in employment-related matters, the provisions of the ADA are also applicable in a similar manner to a large number of educational institutions, including schools and universities. Title II of the ADA, which aims to prevent discrimination on the basis of disability by public entities (including public schools and universities), is supplemented by §504 of the Rehabilitation Act, 1973, and the IDEA to comprehensively cover educational institutions. This part discusses these legislations to understand the scope of disability law in this sphere.

---

[190] *The Convention on the Rights of Persons with Disabilities*, May 3, 2008, A/RES/61/106, Art. 24.

[191] Norah Frederickson et al., *Mainstream-Special School Inclusion Partnerships: Pupil, Parent and Teacher Perspectives*, Vol. 8(1), International Journal of Inclusive Education, 37 (2004).

[192] *Id*.

The primary legislation covering disability discrimination in educational institutions is Title II of the ADA, which prohibits discrimination based on disability against qualified individuals by all public entities.[193] This includes public school districts and public universities.[194] 'Qualified individuals' include students, employees, and parents and guardians.[195] This is supplemented by Title III, which prohibits discrimination in places of public accommodation and commercial facilities, which covers private schools and universities.[196] Titles II and III define 'disability' in the same manner as Title I, as discussed above. In addition, new regulations on Titles II and III create a list of "predictable assessments," which is a list of impairments that are deemed to almost always cause a disability. This includes mental disorders such as bipolar disorder, schizophrenia, and attention deficit hyperactivity disorder, as well as physical ailments such as blindness, deafness, cancer, HIV, and the like.[197] It imposes an obligation upon covered institutions to provide RA, which includes, *inter alia*, interpreters, specialised computer software and hardware, change in schedules, and modification of testing.[198] It also includes changes to the physical facilities of educational institutions, such as the installation of ramps, handicapped parking spaces, widened doorways, and elevators.[199] As with Title I, the only exceptions to the provision of RA is if it would fundamentally alter the services offered by the institution or if it would be an undue burden.[200]

§ 504 of the Rehabilitation Act, 1973, is substantially similar to Title II of the ADA. The only difference is that this provision applies to entities that receive federal funds, such as grants and loans.[201] In general, compliance under §504 is the same as that under Title II. However, where Title II is also applicable to an entity, it would also have to fulfil any additional obligations under this statute.[202] Read together, Titles II and III and §504 cover virtually every educational institution in the US, thus providing comprehensive disability protection.

---

193 The Americans with Disabilities Act, Title II Regulations, 2016 (United States of America); U.S. Department of Justice, Civil Rights Division and U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*, available at www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.htm (Last visited on May 30, 2023).

194 *Id*.

195 U.S. Department of Education, Office for Civil Rights, *Disability Discrimination*, available at www2.ed.gov/about/offices/list/ocr/frontpage/faq/disability.html (Last visited on May 30, 2023) ('Disability Discrimination').

196 Peter J. Maher, *New Title II and Title III ADA Regulations Take Effect October 11, 2016*, October 4, 2016, available at www.ctschoollaw.com/2016/10/new-title-ii-and-title-iii-ada-regulations-take-effect-october-11-2016/ (Last visited on May 30, 2023).

197 *Id*.

198 Law Offices of Stimmel, *Americans with Disabilities Act (ADA) and Educational Accommodation*, Stimmel & Roeser, available at https://www.stimmel-law.com/en/articles/americans-disabilities-act-ada-and-educational-accomodation (Last visited on May 30, 2023) ('Stimmel').

199 *Id*.

200 Southeastern Community College v. Frances B. Davis, 1979 SCC OnLine US SC 114 : 60 L Ed 2d 980 : 442 US 397 (1979).

201 The Rehabilitation Act, 1973, §504 (United States of America).

202 Disability Discrimination, *supra* note 195.

Finally, it is also relevant to consider IDEA. The primary purpose of IDEA is to ensure that disabled children get a free appropriate public education, which includes special education and other services to meet the specific needs of each individual child.[203] IDEA stipulates that each State that receives federal funds through the programme must identify and evaluate children who might have a disability and create a specialised educational programme for them. Unlike Title II and §504, however, IDEA is a grant-based statute, rather than one aimed at non-discrimination.[204]

B. REASONABLE ACCOMMODATION FOR INCLUSIVE EDUCATION IN INDIA

In line with the UNCRPD, RPWD recognises the right to inclusive education for children with disabilities (below eighteen years of age).[205] Inclusive education is defined as a system of learning that is "suitably adapted to meet the learning needs of different types of students with disabilities".[206] In furtherance of the same, educational institutions funded or recognised by the government must "provide reasonable accommodation according to the individual's requirements".[207] However, RPWD does not specify the meaning of 'educational institutions' or lay down standards of 'reasonable accommodation' and 'inclusive education'.

While the contravention of provisions or rules under RPWD is punishable with a fine,[208] it is difficult to establish such contravention in the absence of any definitional or conceptual standards. Moreover, in the specific case of educational institutions, RPWD does not contemplate the derecognition of non-compliant institutions, leading to a situation where the consequences of non-compliance by a covered educational institution are also unclear.

The primary legislation that governs free and compulsory education of children from six years to fourteen years of age in India is the Right of Children To Free And Compulsory Education, 2009 ('RTE Act, 2009').[209] It guarantees "full-time elementary education of satisfaction and equitable quality in a formal school which satisfies certain essential norms and standards".[210] The right is available to every child in the specified age group, which includes 'children belonging to a disadvantaged group,' which in turn includes a 'child with disability' among other children.[211]

---

[203] The Individuals with Disabilities Education Act, 1990 (United States of America).
[204] *Id*., Stimmel, *supra* note 198.
[205] The Rights of Persons with Disabilities Act, 2016, §16.
[206] *Id*., §2(m).
[207] *Id*., §16(iii).
[208] *See id*., Ch. XVI.
[209] The Right of Children to Free and Compulsory Education Act, 2009, Preamble.
[210] *Id*., §3(a).
[211] *Id*., §§3, 2(ee).

The duty lies on the government to ensure the availability of a 'school' in the neighbourhood of the child and their admission to such an institution,[212] and that children belonging to disadvantaged groups are not discriminated against or prevented from pursuing elementary education on any ground.[213] It covers schools that are established, owned, controlled or aided by the government, schools belonging to a specified category under the RTE Act, 2009, and unaided schools receiving any kind of aid or grants to meet its expenses from the government.[214] All schools established, owned or controlled by the government are required to provide free elementary education to all children admitted therein, whereas, other recognised schools are required to provide free and compulsory elementary education to a number of students proportionate to recurring aid or grants received by such schools from the government, or strength of the class of students, as the case maybe.[215]

Note that the RTE Act, 2009, also specifies the norms and standards to be maintained by schools. Recognition is withdrawn from any school (other than government schools) that does not comply with these norms and standards.[216]

While this whole scheme of free and compulsory elementary education extends equally to children with disabilities, it does not deal with the issue of primary education. Moreover, the question of how these children will be provided equal access is not addressed in the RTE Act, 2009. Specifications of the norms and standards applicable to schools only require (in the context of access) the presence of an all-weather building for barrier-free access.[217] No other form of RA for children with disabilities are discussed beyond the requirement of such building.

Thus, while the RPWD obliges entities to provide RA for inclusive education but does not specify any standards for the same and is toothless in case of non-compliance by schools, the RTE Act, 2009 does not provide any means for ensuring free and compulsory education for children with disabilities on a level playing field with other children. This is despite the fact that the RTE Act, 2009 is the primary legislation delegating power to ensure compliance from education institutions.

1. Inconsistencies between the RPWD and RTE Act, 2009

The provision of RA in matters of education gets more complicated owing to the inconsistencies between the RPWD and the RTE Act, 2009.

[212] *Id*., §6.
[213] *Id*., §8(c).
[214] *Id*., §2(n).
[215] *Id*., §12.
[216] *Id*., §19.
[217] Prianka Rao et al., *Towards an Inclusive Education Framework for India: An Analysis of the Rights of Children with Disabilities and the RTE Act*, April 8, 2020, available at www.vidhilegalpolicy.in/wp-content/uploads/2020/07/InclusiveEducationReport_29May2020.pdf (Last visited on May 30, 2023); *Id*., Sch. I, Item 2(ii).

The Department of Empowerment of Persons with Disabilities under the Ministry of Social Justice and Empowerment ('MSJE') is the nodal department for coordinating all matters pertaining to persons with disabilities.[218] However, the nodal department of education is the Ministry of Human Resource Development.[219] Although this could have been a great opportunity for both ministries to coordinate, utilise powers flowing through both statutes and work together towards providing equal learning opportunities to children with disabilities, there exist substantial differences in their objectives and functioning.

As discussed above, the RPWD aims to ensure 'inclusive education'. However, as the RTE Act, 2009, was enacted prior to the enactment of RPWD, it carries forward the approach of 'integrated education' as mentioned in the erstwhile PWD 1995 which imposed the duty on the government "to promote the integration of students with disabilities in the normal schools" and set-up special schools.[220] In contrast to inclusive education, the integrated education system, as referred to at the beginning of this section, focuses on the student fitting in the system rather than the system adapting to the needs of the student. The RTE Act, 2009, continues to define a 'child with disability' in terms of PWD 1995 which focused on the medical model and not the amended social model of RPWD.[221] In fact, the Supreme Court of India, which, while observing that access to education has already been recognised as a fundamental right, also held that,

> "We are of the *prima facie* view that the children with special needs have to be imparted education not only by special teachers but there has to be special schools for them. […] It is impossible to think that the children who are disabled or suffer from any kind of disability or who are mentally challenged can be included in the mainstream schools for getting an education".[222]

The law on education for children with benchmark disabilities and children with high support needs is also riddled with vagueness. In terms of § 31 of RPWD, children with benchmark disabilities between the age of six to eighteen years have the right to free education in a neighbourhood school or a special school notwithstanding anything contained in the RTE Act, 2009.[223] However, such 'special schools' are not covered under the definition of 'schools' in RTE Act, 2009,[224]

---

[218] Standing Committee on Social Justice and Empowerment, Sixteenth Lok Sabha, *Fifty-First Report on Demand for Grants (2018-19) Pertaining to the Ministry of Social Justice and Empowerment (Department of Empowerment of Persons with Disabilities)*, Fifty-First Report, 4 (March 8, 2018), available at https://eparlib.nic.in/handle/123456789/762403?view_type=browse (Last visited on May 30, 2023).

[219] Ministry of Human Resource Development, *Report to the People on Education (2009-10)*, 11 (July, 2010).

[220] The Persons with Disability Act, 1955, §26 read with §29; Rao, *supra* note 217, 1.

[221] The Right of Children to Free and Compulsory Education Act, 2009, §2(ee).

[222] Rajneesh Kumar Pandey v. Union of India, 2017 SCC OnLine SC 2079.

[223] The Rights of Persons with Disabilities Act, 2016, §31.

[224] The Right of Children to Free and Compulsory Education Act, 2009, §2(n).

and are instead regulated by the National Trust Act, 1999, and accordingly, by the MSJE as opposed to the Ministry of Human Resource Development. The complete disconnect from the RTE Act, 2009, "reinforces the idea that special schools are in fact not 'schools' and hence outside the purview of the primary ministry responsible for overseeing education".[225] Moreover, there is no specified standard for special schools even under the RPWD. The issue of access to education for children with high support needs is also not recognised in the RTE Act, 2009 or the RPWD.

2. Lack of Guidance on Equal Educational Opportunities in Examinations and Higher Education

To add to the palette of denial of equal opportunities, even once RA is made to gain access to a school, the law does not create a level playing field for writing exams to progress further or enter the field of higher education.

On 23 November, 2012, the Chief Commissioner of Persons with Disabilities pursuant to decisions in *Shri Gopal Sisodia, Indian Assn. of the Blind* v. *SBI*,[226] and *Score Foundation* v. *Deptt. of Disability Affairs*,[227] directed the MSJE to circulate guidelines for conducting written examination for persons with disabilities. Accordingly, the Department of Disability Affairs prepared guidelines on the same for all government recruitment agencies, academic and examination bodies.[228]

The guidelines recognise the importance of advanced technology in the field,[229] which include assistive devices such as talking calculators, braille slate, abacus, geometry kit, and augmentative communication devices such as communication charts and electronic devices. The guidelines also state that persons with disabilities should be given the option of choosing the mode (braille, in computer, large print, recording answers) of examination.[230] One of the most important contributions of the guidelines is to state that restrictions based on educational qualifications, marks, and age, among other things, should not be fixed for scribes/readers/lab assistants.[231] The focus should instead be on strengthening the invigilation system to avoid using unfair means.[232] The term "extra or additional time" should be changed to "compensatory time" being at least twenty minutes per hour.[233]

---

[225] Rao, *supra* note 217, 13.
[226] Case No. 3929/2007.
[227] Case No. 65/1041/12-13 (unreported).
[228] Ministry of Social Justice & Empowerment, *Guidelines for Conducting Written Examination for Persons with Disabilities*, F. No. 16-110/2013-DD.III (February 26, 2013).
[229] *Id*., 12.
[230] *Id*., 7.
[231] *Id*., 5.
[232] *Id*.
[233] *Id*., 11.

These changes take away the burden of finding a qualified scribe from persons with disabilities. Further, they recognise the idea of RA as rights of persons with disabilities as opposed to just being additional benefits. However, these guidelines were not incorporated into the RPWD or notified as rules or regulations made under the statute. Although the Delhi High Court in *Sambhavana* v. *Union of India*,[234] held that these guidelines would be binding on all government bodies conducting examinations, this judgement is not binding on the whole of India.

Therefore, the Indian jurisprudence has failed children with disabilities due to its non-uniformity, vagueness or its toothless nature. The effects are apparent in the data available on the education of persons with disabilities.[235] According to the national sample survey of 2018, only nine percent of persons with disabilities have completed secondary education post-elementary school. Over forty-five percent of persons with disabilities are illiterate and only 62.9% of persons with disabilities between the ages of three to thirty-five have attended a regular school. Out of the remaining, around four percent have attended special schools.

V. CONCLUSION AND THE WAY FORWARD

RA is a means to compensate for the flaws in social and political structures so that these structures are more adaptable to the needs of persons with disabilities.[236] This paper elaborates the change of law in India from PWD 1995 to RPWD, which paved the path for effective participation by and inclusion of persons with disabilities into society. However, there exist certain particularities that are a cause for continuing concern in the movement to build a more inclusive society.

While the definition of 'persons with disabilities' is now based on the inclusive social model, it gives a wide discretion to the judiciary to interpret the term based on the reasonable person's understanding of participation in society. It excludes the possibility of relief based on a subjective enquiry of one's own experience of exclusion from society. The policy consideration for this, as discussed above, could be due to the financial obligations of the State.

Even so, it is important that standards for the various requirements to qualify for rights under the RPWD should be specified, albeit perhaps in a

[234] Sambhavana v. Union of India, 2015 SCC OnLine Del 7790.

[235] Ministry of Statistics and Programme Implementation, *National Sample Survey Report No. 583 of 2018-Persons with Disabilities in India*, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.mospi.gov.in/sites/default/files/publication_reports/Report_583_Final_0.pdf (Last visited on November 8, 2023).

[236] Kristin Henrard, *Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities*, Vol. 14(4), International Journal of Constitutional Law, 982 (2016).

narrower sense as compared to the ADA so as to account for the financial considerations of the government. This change will ensure that a person with a disability is not denied a right that was intended to be provided to them owing to a narrow interpretation by the judiciary.

The issue of uncertainty in defining and contextualising RA for employment under the RPWD is also a crucial point of consideration that needs a relook. The principles around the new regulations may be borrowed from the American jurisprudence on RA. The ADA has a wider ambit of application as it concerns both private and public entities as opposed to the RPWD, which only governs government establishments. However, as the provisions already oblige governmental institutions to provide RA to persons with disabilities, amended regulations would not increase obligations but give greater elucidation to it in the context of public employment.

First, similar to the relief provided in *Ravindran K.M.* v. *State of Kerala*,[237] it must be clarified that the right of RA operates even at the stage of entry to the government establishment and is not restricted to the existing employees.

Second, the point at which the process for claiming RA would be triggered must be specified. Regulations must clarify whether notice has to be given in writing to the employer or whether any other form of knowledge would be sufficient to trigger the obligation. Further, the issue of whether the disclosure has to only be made by the employees themselves or whether notice by a relative, friend or a medical professional would suffice must be addressed. Legislation must also cover aspects of confidentiality, a timeline for response to a request for RA, and the requirement of application of mind in granting or denying RA.

Third, the law must aim to define the scope of "necessary and appropriate modifications and adjustments" as contained in the definition of 'reasonable accommodation'. Similar to the ADA, this scope could incorporate the distinction between marginal and essential functions of the job where RA is deemed relevant only for marginal functions. It would ensure that appropriate RA is not denied without examining whether the function for which an RA is claimed is marginal or essential.

Fourth, it is important to examine whether the provision of RA would prove to be an undue burden on the employer. This could primarily deal with three aspects: financial cost, restricting job requirements, and structural changes in the establishment. An establishment should not deny RA merely because the quantum of financial cost appears to be objectively high; it should, instead, compare the figure against its resources before making such a determination. When the cost is not relatively high, it will become important to assess the possibility of restructuring the job requirements to accommodate a person with disabilities, such as a change

[237] Ravindran K.M. v. State of Kerala, 2018 SCC OnLine Ker 20774 : (2019) 1 KLT 331.

of workspace or event location. To balance interests, it must also be considered that the restructuring does not pertain to an essential function.

Finally, structural changes to the rules of the establishment in matters of schedule, hours, absences, leaves, and the like should be considered. The yardstick of measuring whether the structural change would be an undue hardship would include the impact on employees other than the employee with disability.

The analysis and suggestions set out above pertain to employment in government establishments. It is also important to consider the role of the private sector in generating job opportunities. The RPWD, alongside the Rights of Persons with Disabilities Rules, 2017, places loose obligations on private establishments. It mandates all private establishments to notify an equal opportunity policy detailing measures to be taken by such establishments in pursuance of the provisions on RA and non-discrimination.[238] However, the law neither clarifies the standards of such accommodation nor provides for an effective and robust grievance redressal mechanism.[239] Thus, it would be advisable for the government to take stock of the existing employment policies regarding persons with disabilities in the private sector, accordingly, notify a policy framework for the application of the principle of RA in the private sector and ensure statutory compliance.

In the context of inclusive education for persons with disabilities, the Union Cabinet has passed the new National Education Policy ('NEP') to address the challenges posed to the education system in India in July 2020. Although the NEP's objective is to ensure 'inclusive education,' it continues to use this term interchangeably with the integration of children with disabilities. It recognises all three forms of schooling for children with disabilities: neighbourhood schools, special schools, and home-based schools. However, it refers back to the RPWD for the norms to be set for these schools and barrier-free access even though the statute itself does not recognise home-based schools or provide standards for the first two types of recognised schools. Thus, it is important to bring changes to the primary legislation itself.

The RTE Act, 2009 should be amended to adopt the social model definition of disability as well as the inclusive education approach of the RPWD. Further, similar to the ADA, both the RTE Act, 2009 and RPWD should recognise all forms of schooling, including special schools controlled or funded by the government, to ensure compliance with norms. The norms should be notified under the relevant statute to cover a broad range of issues such as physical access, technological access, scribes, readers, lab assistants, qualification of special educators,

---

[238] The Rights of Persons with Disabilities Act, 2016, §21(1) read with the Rights of Persons with Disabilities Rules, 2017, R. 8.

[239] Nishith Desai Associates, *India's New Law on Disability Extends to Private Employers*, June 30, 2017, available at www.nishithdesai.com/information/news-storage/news-details/article/indias-new-law-on-disability-extends-to-private-employers.html (Last visited on May 30, 2023).

and their regularisation. Borrowing from statutes such as IDEA, it would also be beneficial for the government to attempt to create and fund schemes to ensure specialised systems for children with disabilities, focusing on their particular and individual impairments, rather than providing assistance in a generalised manner. In addition to these specifications, both statutes should uniformly prescribe the consequences of non-compliance.

The Delhi Government on August 28, 2019, passed an order[240] directing all private aided and unaided schools to implement inclusive education in line with the provisions of the RPWD, after a direction[241] from the Delhi High Court. The obligations include the appointment of special educators and the requirement to provide physical access. The Directorate of Education has been given the power to derecognise all erring schools. The inclusion of children with disabilities into mainstream education cannot be complete without the provision of inclusive education in private schools. Thus, similar to Delhi's model, it is suggested that other State governments also release orders to ensure inclusive education for children with disabilities. In addition to special educators and physical access, aspects of technological access and specialised systems focusing on the individual need of every child with a disability, as discussed above, must also be considered.

The future potential of obligations to provide RA to persons with disabilities in Indian jurisprudence seems rather limited, given the legislature and judiciary have explicitly only identified the presence of duties of government establishment. It remains to be seen to what extent the legislature will be willing to extend the obligation to private entities. This may become especially relevant now with the recognition of horizontal application of fundamental rights.

[240] Directorate of Education, Government of NCT of Delhi, *Implementing Inclusive Education in Private Unaided Recognized School of Delhi in the Line of the Provisions under the Right of Persons with Disabilities (RPWD) Act, 2016*, No. F.16/DDE(IEB)ADMN.Cell/2019/10839-43 (August 28, 2019).

[241] Social Jurist v. State (NCT of Delhi), 2012 SCC OnLine Del 4651.