

LITIGATING REASONABLE ACCOMMODATION IN INDIAN COURTS: A COMMENT ON THE TRANSFORMATIVE ABILITY OF JUDICIAL REVIEW

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I. INTRODUCTION

‘Reasonable accommodation’ has been characterised as a doctrine that may help realise the transformative ideals of the Constitution of India, 1950 (‘Constitution’). In *Vikas Kumar v Union Public Service Commission*,¹ a Division Bench (‘DB’) of the Supreme Court of India (‘SCI’) described it as a positive obligation cast both upon the State and the society to enable persons with disability² to enjoy the constitutional guarantee of equality and non-discrimination.³ It was defined as an instrumentality without which the fundamental rights and freedoms guaranteed by the Constitution might ring hollow.⁴ In this essay, I argue (albeit cynically) that the potential of ‘judicial review’ as a method to enforce this instrumentality may have been exhausted.

Before this essay proceeds to flesh out this argument, why ‘judicial review’ is of critical importance in the enforcement of ‘reasonable accommodation’ needs to be appreciated. Naturally, one of the factors on which the success of transformative potential of ‘reasonable accommodation’ hinges is the extent to which

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¹ *Vikas Kumar v UPSC* (2021) 5 SCC 370 (Supreme Court of India).

² While the petitioner, in this case, had a condition called ‘dysgraphia’, and hence, the judgment focuses on the implications of the doctrine of ‘Reasonable Accommodation’ for persons with disability, I am of the view that this doctrine need not only be confined to the concerns of persons with disability. Inherently, there is little which prevents an application/adoption of this doctrine even when addressing concerns of persons bearing other identity markers conventionally recognised in discrimination law. Having said that, in this paper, I do not consider the enforceability of accommodative measures in the context of marker beyond disability.

³ *Vikas Kumar* (n 2) 44.

⁴ *ibid.*

the State and the society adopt and implement measures that may help reduce or remove barriers (of whatever nature they might be) that hinder a complete enjoyment of rights and freedoms. When the efficacy of the State and society in this regard is examined, a grim picture emerges.

In 2005, the National Human Rights Commission ('NHRC') published a Disability Manual. This Manual had two telling observations,

"Despite having a progressive Constitution, an enlightened and alert judiciary, and a fast evolving legal regime with a clear disability focus, the ground level situation in the country leaves much to be desired. There is little impact of recent changes in law and policy, and that too is limited to small pockets of urban India.

*In conclusion, although legislative initiatives in India promote equality of people with disabilities by granting them basic social, economic and cultural rights and by taking various affirmative and special measures to achieve real equality, corresponding improvements in the lives of people with disabilities are not yet noticeable."*⁵

In 2013, the NHRC then published a Report on Implementation of the Persons with Disabilities Act, 1995 ('2013 Report').⁶ In particular, this Report examined the status of the implementation of the statute in the areas such as education, employment, and barrier-free access. The 2013 Report contained some telling findings. A few of these can be considered here illustratively. In the State of Madhya Pradesh, the Report found that the Government Braille Press, where classes were held for blind children, was in a pathetic condition and that it was managed by only two persons.⁷ In the State of Uttar Pradesh, the Report found that "*most mainstream schools were yet not accessible, let alone genuinely inclusive.*"⁸ In Orissa, the Report found that whilst the State Government had conducted an access audit of around 54 government buildings, the access audit had not been implemented.⁹ Overall thus, whether it be education or public access, the 2013 Report painted a grim picture of the enforcement of the Persons with Disabilities Act, 1995 ('PwD 1995'). In *Vikas Kumar*, as well as in judgements preceding it, the SCI has recognised the PwD 1995 (and thereafter, the Rights of Persons with Disabilities Act, 2016) as a statute that embodies the principle of reasonable

⁵ *National Human Rights Commission: Disability Manual*, 34, 36 (2005).

⁶ National Human Rights Commission, Report on Implementation of the Persons with Disabilities Act, 1995 (2013) ("2013 Report").

⁷ *ibid* [23].

⁸ 2013 Report, *supra* note 7, at 25.

⁹ 2013 Report, *supra* note 7, at 36.

accommodation.¹⁰ Consequently, therefore, the 2013 Report painted a grim picture of the executive enforcement of ‘reasonable accommodation’.¹¹

The ability of reasonable accommodation as a doctrine to allow the realisation of constitutional rights and guarantees, therefore, hinges not only on the extent to which the State and the society implement accommodative measures, but hinges also on the tool of ‘judicial review’. In the event of an executive lapse, it is the judiciary which can hold the executive accountable. Judicial review thus, can be a catalyst for a more robust adoption of accommodative measures. Alternatively, it can also be a medium to reinforce status-quo. What matters is the nature of scrutiny undertaken by the courts. For instance, if one were to undertake a comparative exercise, commentators have observed how the threshold put in place by the courts in the United Kingdom and the European Union for the State and employers to escape the clutches of reasonable accommodation has historically been low.¹² In those cases, judicial review may only preserve status-quo. It may even be counter-productive. For instance, it has been observed that the balancing exercise which courts in the United States of America undertake when determining whether an accommodative measure was ‘reasonable’ has resulted in creating uncertainty surrounding an employer’s obligations.¹³ Be that as it may, what comes to the fore is that judicial review matters.

In this essay, I contend that the picture which emerges from an examination of case law in India is that unlike other comparative jurisdictions, courts have not always set a low threshold for exempting a duty bearer from undertaking reasonably accommodative measures. Judicial review has therefore at least intended to serve as a catalyst for a more robust adoption of these measures.

When I examine the body of precedents in this essay though, I am primarily interested in the nature of relief accorded by the courts. Based on the relief awarded, I believe that cases decided by Indian courts can broadly be categorised into three. I do not argue that any of these categories are water-tight

¹⁰ *Vikas Kumar* (n 2) [52].

¹¹ Pertinently, the reluctance to undertake a behavioural change on part of both State as well as other social institutions has been witnessed even in other jurisdictions. Consider, for instance, a Report prepared by the Government Equalities Office, United Kingdom, on the implementation of the Equality Act, 2010. The Report found that only about 22% of the organisations covered by its survey had the experience of implementing accommodative measures. Moreover, several employers were found to be reluctant to accommodate additional sick leaves for employees with disabilities when considering promotions. Government Equalities Office, *Evaluation of the Implementation of Equality Act, 2010* 17, 25 (2012).

¹² Sandra Fredman, “Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?” in Elizabeth Emens & Michael Stein (eds), *Disability and Equality Law* 209 (2016).

¹³ Samuel Issacharoff & Justin Nelson, ‘Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act’ (2001) 79 North Carolina L. Rev. 307, 340.

compartments. However, compartmentalising cases in this manner does, in my opinion, add analytical value.

The *first* category comprises cases where courts have primarily been asked to deal with an individual's interest, and where the individualised requirement does not entail a balancing of multiple third-party interests, or a sizeable fiscal expenditure. The *second* category comprises cases where the reliefs sought necessarily required courts to weigh countervailing third-party interests. The *third* category comprises those cases where the eventual relief not only called for a balancing a group's interest against countervailing third-party interests or public policy considerations, but also required substantial fiscal expenditure.

Now, I will proceed to analyse each one of these categories.¹⁴ I will pay particular attention to the eventual relief awarded by the courts in each case. Not only is the eventual relief awarded what matters the most to litigating parties, but from our perspective, it also allows us to examine the extent to which the executive has been held accountable. In fact, it even furthers the argument which I seek to advance in this essay, namely, that the potential of 'judicial review' as a method to enforce an adoption of accommodative measures may have been exhausted.

A. A CAVEAT TO THE ANALYSIS

Before I proceed to analyse precedents touching upon this issue, it would be germane to note that there are several cases, other than the ones discussed in this essay, where although the principle of 'reasonable accommodation' is discussed or cited, the cases themselves have little to do with 'reasonable accommodation'. This is predominantly seen in cases where petitioners are aggrieved by the non-implementation of a reservation policy, or a wrongful denial of reservation benefits.¹⁵ Additionally, this is also seen in cases where petitioners are wrongfully denied a job because of an impairment, even though there is no rational nexus between the impairment and the job requirements. Whilst the denial is struck down as

¹⁴ In this essay, I have only considered reported judgements of the Supreme Court of India and of the High Courts. Further, I have confined myself to judgements reported on two online databases (i.e. SCC OnLine and Manupatra). The daily orders I have examined are daily orders passed in those reported judgements. This essay therefore is not exhaustive because cases where the implementation/enforcement of a measure of 'reasonable accommodation' was dealt with through daily orders/unreported judgements have not been considered.

¹⁵ See: *Arun Sarkar v State of W.B.* 2022 SCC OnLine Cal 2282 (Calcutta High Court); *Union of India v Ravi Prakash Gupta* (2010) 7 SCC 626 (Supreme Court of India); *Patel Suleman Gaibi v State of Maharashtra* 2014 SCC Online Bom 4639 (Bombay High Court); *State of Kerala v Leesamma Joseph* (2021) 9 SCC 208 (Supreme Court of India); *Sunanda Bhandare Foundation v Union of India* (2014) 14 SCC 383 (Supreme Court of India); *Union of India v National Federation of the Blind* (2013) 10 SCC 772 (Supreme Court of India); *Net Ram Yadav v State of Rajasthan* 2022 SCC OnLine SC 1022 (Supreme Court of India).

irrational or discriminatory by courts; in essence, these cases do not involve the enforcement of an accommodative measure.¹⁶

These cases have been left out of the purview of this paper, because the principle of reasonable accommodation was not instrumental in how the case was decided. This is not to suggest that a reservation policy cannot qualify as an accommodative measure. However, since reservation benefits in these cases were spelt out by a statutory instrument itself, the outcome of the case was determined by an interpretation and enforcement of the applicable statute. This essay looks at accommodative measures which are fact specific and which require an adoption of measures not spelled out in the statute. These measures could range from providing extra time to a student to complete an exam, or to the construction of a ramp in a public building.

Needless to state, there have also been several instances when courts have been called upon to enforce an accommodative measure, but the relief has been denied.¹⁷ Certainly, a case can be made for why courts ought to have directed the implementation of an accommodative measure, and the judicial approach ought to be faulted, where required, in these cases. These cases though, do not form a part of my examination because what I am interested in are cases that lie at the other end of the spectrum. My argument is that in cases where accommodative measures were directed, we may have reached the outer limits of what judicial review, as a political or litigative strategy, may be able to achieve.

II. PART I: REASONABLE ACCOMMODATION CLAIMS WITHOUT EXTERNALITIES

In this Part of the essay, I intend to peruse cases where courts have been called upon to grant reliefs that do not require a sizeable shift in state policy or a substantial fiscal expenditure or a balancing of countervailing third-party interests. I will analyse these cases in a chronological manner. One of the first cases in this category was a decision of the DB of the Bombay High Court in *Dhawal Chotai v Union of India*.¹⁸ The petitioner, in this case, suffered from ‘cer-

¹⁶ See: *Desh Deepak Dhamija v Union Bank of India*, 2015 SCC OnLine Raj 1271 (Rajasthan High Court); *Syed Abdul Wahab Abdul Aziz v State of Maharashtra* 2013 SCC OnLine Bom 2145 (Bombay High Court); *M Dinesan v SBI* 1998 SCC OnLine Kar 322 : ILR (1999) Kar 3411 (Karnataka High Court); *MX of Bombay Indian Inhabitant v ZY* 1997 SCC OnLine Bom 137 (Bombay High Court); *Udbhav Kumar Jain v High Court of Delhi*, Writ Petition (Civil) No. 13807/2019, judgement dated 2nd March 2020 (Delhi High Court; *Union of India v Satwinder Kaur* 2014 SCC OnLine Del 3541 (Delhi High Court).

¹⁷ See: *Anand Bihari v Rajasthan SRTC* (1991) 1 SCC 731 (Supreme Court of India); *S. Thenmozhi v IDBI Bank Ltd.*, Writ Petition No. 20899/2018, Judgement dated 31st January 2020 (Madras High Court); *Kaubak Naqvi v Union of India* 2001 SCC OnLine Del 1330 : ILR (2001) 2 Del 770 (Delhi High Court).

¹⁸ *Dhawal S. Chotai v Union of India* 2003 SCC Online Bom 444 (Bombay High Court).

ebal palsy'.¹⁹ Whilst he had completed his graduation and had even cleared the examination for a foundation course for chartered accountants, he then wanted to appear for an intermediate examination.²⁰ The petitioner had written to the body conducting the examination, asking for three extra hours to complete the examination. This request had been denied.²¹ The Bombay High Court held that it was incumbent upon the State to make available all the necessary facilities to persons with disabilities which would allow them to complete their education.²² The petition was allowed, and the petitioner was granted three extra hours to complete his exam.

The next case, which is of some significance, too, is a decision rendered by a DB of the Bombay High Court. In *Ranjit Kumar Rajak v SBI*,²³ the petitioner had undergone a renal transplant.²⁴ He was denied employment as a probationary officer with the State Bank of India on account of the financial burden which his medical condition would impose on the bank. Under the rules framed by the bank, any medical expenses incurred by an employee on account of an illness or injury would be reimbursed by the bank. The petitioner's medical condition was likely to impose a financial burden potentially to the tune of Rs. 13,000/- per month on the bank.²⁵ However, the expert medical opinion before the court attested to the petitioner being fit to discharge the duties of the post.²⁶ The court, in this case, held that it was permissible to read the concept of 'reasonable accommodation' into employment contracts. It further held that only when an employer was able to establish that undue hardship would be caused by adopting the accommodative measure, could relief be denied.²⁷ The court then went on to state that the State Bank of India had failed to place any material which would establish that medical expenses to the tune of Rs. 13,000/- a month were likely to cause any undue hardship to the bank.²⁸ It thus concluded that on applying the principle of reasonable accommodation, the petitioner would have to be employed, and allowed the petition.²⁹

Notably, it is not that on every occasion courts have indulged in a robust discussion on 'reasonable accommodation' when applying the principle. Consider the decision of the Supreme Court in *Deaf Employees Welfare Assn. v Union of*

¹⁹ *ibid* [1]

²⁰ *ibid*.

²¹ *ibid* [2].

²² *ibid*.

²³ *Ranjit Kumar Rajak v SBI* 2009 SCC Online Bom 732 (Bombay High Court).

²⁴ *ibid* [1].

²⁵ *ibid* [5] [19].

²⁶ *ibid* [41].

²⁷ *ibid* [37].

²⁸ *ibid* [42].

²⁹ *ibid* [42-43].

India.³⁰ The petitioners in this case sought a writ of mandamus to be issued to the government, directing it to provide transport allowance to those employees suffering from a hearing impairment.³¹ While the petitioners were also aggrieved by the fact that a similar allowance was already in place for employees who were visually impaired, the court took note of the fact that a hearing-impaired person would find it difficult to communicate with taxi and auto-rickshaw drivers, and bus conductors, and may thus have to spend more time, effort and money in commuting from one place to another.³² It thus allowed the writ petition, and directed the government to provide travel allowance at par with that provided to employees with a visual impairment.³³

The importance of these cases certainly cannot be denied. As per the last available census data (i.e. the 2011 census data), only one-third of persons with disabilities were employed in the country. More worryingly, this figure was less than the rate in 2002 (37.6%), which in-turn was less than that in 1991 (42.7%). Moreover, even out of 33% employed, as per the 2011 census, 31% were employed in the agricultural sector, and only 2% were formally employed.³⁴ Viewed in this backdrop, cases where the executive was directed to implement accommodative measures, whether in the form of allowances or absorption of medical costs, are of critical significance.³⁵

A more recent exposition of the doctrine of reasonable accommodation has been seen in the case of *Vikas Kumar*. The petitioner in *Vikas Kumar* suffered from dysgraphia, commonly known as a writer's cramp. The petitioner, who had graduated with an MBBS degree, now wanted to appear for the Civil Services Exam. For this purpose, he had applied to the Union Public Service Commission, the body in-charge of overseeing the Civil Services Exam, to be provided with a scribe for the written component of the exam.³⁶ His application, though, was rejected on the ground that he did not satisfy the benchmark prescribed to be

³⁰ *Deaf Employees Welfare Assn. v Union of India* (2014) 3 SCC 173 (Supreme Court of India).

³¹ *ibid* [1].

³² *ibid* [24-25].

³³ *ibid* [29].

³⁴ N. Vasanthi, "The Right to Work for Persons with Disability in India: A Critical Disability Theory Perspective" in Nilika Mehrotra (eds), *Disability Studies in India* 251 (Springer 2020).

³⁵ Following close on the heels of the Supreme Court's decision in *DEWA*, the Delhi High Court dealt with the issue of 'reasonable accommodation' in *Akhilesh Kumar v University Grants Commission*. 2014 SCC Online Del 935 (Delhi High Court)]. The petitioner was visually handicapped, and had applied for the post of a lecturer in English. Initially, the University Grants Commission had provided a two years extension for the petitioner to acquire the necessary educational qualification for the post, being an MPhil degree. Much before the expiry of this two years period, the petitioner acquired this qualification. However, the University Grants Commission withdrew the extension. [Paras 1-1.4]. The court cited the principle of reasonable accommodation and held that the relaxation in time frame was an accommodative measure. It found there to be no justification for the University Grants Commission to withdraw this relaxation, and eventually quashed it. [Para 8.2]

³⁶ *Vikas Kumar* (n 2) [3].

provided with a scribe.³⁷ The court observed that the principle of reasonable accommodation demanded that the conditions which serve to exclude persons with disability from full and effective participation must be customised so as to meet the individual needs and requirements of each person.³⁸ After considering the justification sought to be provided by the State, the court went on to declare that the petitioner was entitled to the facility of a scribe.³⁹

This decision has thereafter been followed by a DB of the Bombay High Court in *Nigel Anthony S. Fernandes v State of Goa*.⁴⁰ In this case, the petitioners had impugned the validity of a Memorandum dated 16th March 2017, whereby the Superintendent of Police had withdrawn the offers of appointment for the post of Scientific Assistant in the Forensic Science Laboratory on the ground that the petitioners were 'medically unfit'.⁴¹ While one of the petitioners had severe amblyopia in one eye, the other did not have any vision at all in one eye.⁴² After extensively citing *Vikas Kumar*, the court held that the difficulties faced by the petitioners could have easily been overcome if the State had displayed a higher degree of sensitivity. It observed that the petitioners could have been provided with devices to magnify not only computer screens but also microscopic observations, especially when they were otherwise suitably qualified for the job.⁴³ Eventually, the State was directed to appoint the petitioners as Scientific Assistants in the Forensic Science Laboratory within four weeks.⁴⁴

A. FINDING THE THREAD THAT CUTS ACROSS THESE CASES

When one closely looks at the facts of each of these cases, what emerges is that there is a common thread that cuts across them. In each one of these cases, the reliefs sought did not involve (a) a substantial fiscal expenditure on part of the State, (b) a change in policy or (c) a balancing of countervailing third-party interests. In fact, the only case where economic hardship was even in issue was *Ranjit Rajak*. Even there, the bank only had to incur additional medical expenses to the tune of Rs. 13,000/- a month. For the State Bank of India, being the biggest bank in the country, this was hardly a sizeable expenditure. In *Dhawal Chotai*, the State was asked to provide extra time to the petitioner to complete an examination. In *Akhilesh Kumar* and *Nigel Anthony*, the State was called upon to provide jobs for which the petitioners were duly qualified. In fact, in *Akhilesh Kumar*, nobody other than the petitioner had even applied for the vacancy reserved for

³⁷ *Vikas Kumar* (n 2) [4].

³⁸ *Vikas Kumar* (n 2) [62-65].

³⁹ *Vikas Kumar* (n 2) [90].

⁴⁰ *Nigel Anthony v State of Goa* 2022 SCC Online Bom 661 (Bombay High Court).

⁴¹ *ibid* [4].

⁴² *ibid* [20].

⁴³ *ibid* [66].

⁴⁴ *ibid* [77].

visually impaired candidates.⁴⁵ Therefore, I contend that none of these cases required the State to make any systemic or structural changes.

A few observations on these cases though, are certainly in order. There is a case to be made that some of these cases could have been argued and decided as cases of direct discrimination on the grounds of disability. Consider, for example, *Ranjit Rajak*. In this case, it could have been held that, but for the petitioner's disability, the bank would have employed him. However, the court understood the reluctance to absorb the medical costs of the petitioner to be a reluctance to take accommodative measures. Similarly, *DEWA* and *Vikas Kumar* too could have been decided differently. Instead of rationalising why the petitioners required accommodation, the court could have held that there was a violation of Article 14 of the Constitution because the policy measure or executive decision was under-inclusive. However, since this essay is primarily concerned with how courts have enforced the principle of 'reasonable accommodation', I do not wish to digress into whether this case could have been decided differently.

As far as the final reliefs awarded are concerned, what emerges is that the courts have directed the State to adopt the accommodative measures prayed for. Given that a majority of the lawsuits filed in India by persons with disabilities relate to the issue of employment,⁴⁶ the value of judicial review as an instrumentality to secure the enjoyment of rights related to employment and education is readily apparent. A telling feature of the accommodative measures at play in these cases, though, was that almost all of them were (at least from the perspective of an able-bodied policymaker) in the nature of an exemption or a concession. In *Dhawal Chotai*, the petitioner had asked for extra time to write an examination. In *Akhilesh Kumar*, the petitioner had sought the enforcement of a grace period provided to acquire the necessary educational qualifications. Similarly, in *DEWA*, the petitioner had asked for a travel allowance, and in *Vikas Kumar*, he had asked for a scribe. It is thus that I state that the accommodative measures at hand were either in the nature of an exemption or a concession.

This is not to suggest that these exemptions or concessions were not important. Historically, even these reliefs have been difficult to secure. Needs or requirements, even in the nature of exemptions, or reservations, were labelled as positive discrimination or unfair discrimination and were met with resistance. As Chander illustrates, it took eighteen years from the time the Office Memorandum of 1977 first carved out a quota of 3% in Grade 'C' and Grade 'D' Central Government Services and Public Undertakings for the PwD 1995 to be enacted.⁴⁷ Although the Justice Baharul Islam Committee, set up in 1986, had recom-

⁴⁵ *Akhilesh Kumar* (n 36) [8.2].

⁴⁶ Jagdish Chander, "The Disability Rights Movement in India: Its Origin, Methods of Advocacy, Issues and Trends" in Nandini Ghosh (eds), *Interrogating Disability in India* 176 (Springer 2016).

⁴⁷ *ibid* [169-72].

mended that a disability law be introduced; even then, it took another seven to eight years of rallying and protesting for this law to actually come into being.⁴⁸ Various groups and organisations had to come together under a cross-disability umbrella and petition the government.⁴⁹ Organisations like the Disability Rights Group actively lobbied for the passage of the PwD 1995.⁵⁰

However, understanding what the nature of the accommodative measure was, from the viewpoint of an able-bodied officer or judge could perhaps explain why courts have been prompt to award reliefs. It has been argued that the approach of the Indian State towards the rights of persons with disabilities has been a top-down approach. Its orientation has been one of 'charity'.⁵¹ Much of the social and legal policy in India has viewed disability as a '*personal tragedy*' that needs to be compensated.⁵² An extra three hours to complete an examination, or an additional travel allowance are then merely ways to compensate for a petitioner's '*personal tragedy*' or are simply charitable handouts to be distributed amongst deserving candidates. To take this argument one step forward, it can be said that when courts directed the implementation of accommodative measures in the cases discussed thus far, they were only effectively directing the State to hand out compensatory measures which had otherwise already been accorded legitimacy by the executive.

However, in *Vikas Kumar*, the SCI has categorically veered away from a charity-based model, and has placed 'reasonable accommodation' within the larger rubric of substantive equality, whereby a more participative and inclusive approach is adopted. Moreover, if courts today approached cases primarily from the purview of a 'charity-based' model, there would have been a marked difference in the final outcome in some of the cases studied in the subsequent portions of this essay. Therefore, as of today, this explanation may not provide a complete answer.

Be that as it may, the short point which emerges from these precedents is that while enforcing reasonable accommodation as a principle in cases involving admissions to educational institutions or appointment to a post, courts have been willing to direct the executive to grant such accommodative measures that may help redress individual grievances,⁵³ and which do not require a balancing of countervailing third-party interests or a sizeable fiscal expenditure.

⁴⁸ *ibid* [171].

⁴⁹ Martand Jha, 'The History of India's Disability Rights Movement' (*The Diplomat*, 21 December 2016) <https://thediplomat.com/2016/12/the-history-of-indias-disability-rights-movement/> accessed on October 28, 2023.

⁵⁰ Nilika Mehotra, 'Disability Rights Movement in India: Politics and Practice' (2011) 46(6) *Eco. and Pol. Weekly* 65, 67.

⁵¹ Roger Jeffery and Nidhi Singal, 'Measuring Disability in India' (2008) 43(12) *Eco. and Pol. Weekly* 22, 23.

⁵² *ibid* [24]; See also Renu Addlakha and Saptarshi Mandal, 'Disability Law in India: Paradigm Shift or Evolving Discourse?' (2009) 44(41) *Eco. and Pol. Weekly* 62, 64.

⁵³ See: Addlakha and Mandal (n 53) [65-66].

III. PART II: CHALLENGES WITH THIRD PARTY INTERESTS

In this Part, I analyse two recent cases, which serve to further illustrate the point I wish to canvass. In both these cases, the courts were called upon to grant reliefs, which would require them to balance countervailing third-party interests. Unlike the cases analysed in the previous part, in both these cases, the courts adopted a deferential approach.

The first decision is that of the Delhi High Court in *Vaibhav Bajaj v Sri Guru Gobind Singh College of Commerce*.⁵⁴ The petitioner, in this case, suffered from dyslexia. The petitioner's case was that he needed substantial familial support during the course of his education, and therefore, it was necessary that he be admitted (against the quota of seats reserved for candidates with disabilities) to a college as close to his place of residence as possible. Sri Guru Gobind Singh College of Commerce was the college closest to the petitioner's residence. The other college which was near his place of residence was Kirori Mal College. Both these colleges had published a uniform cut-off mark for all candidates with disabilities. Since the petitioner's score was far below this cut-off mark, he could not secure admission to either college.⁵⁵ As a consequence, the petitioner was compelled to take admission in a college 28 kilometres away from his family residence.⁵⁶

Interestingly, the court found the publication of a uniform cut-off mark for all candidates to be *ex-facie* arbitrary.⁵⁷ The court then proceeded to ask what it could do next. It observed that whilst it was appropriate that a separate cut-off mark be published for candidates suffering from learning disabilities, a court could not go the extra mile and determine the level at which the cut-off mark was to be fixed.⁵⁸ It also observed that a court could not simply direct the admission of the petitioner to one of his preferred colleges either.⁵⁹ It would be for the college in question to fix a separate cut-off mark for persons suffering from intellectual or learning disabilities.⁶⁰ Therefore, even though the court returned a finding of a violation of law in favour of the petitioner, it deferred to the wisdom of the college in determining what the appropriate cut-off mark was, and which candidate (out of those who had scored more than the cut-off mark) was most suitable to be admitted.

⁵⁴ *Vaibhav Bajaj v Sri Guru Gobind Singh College of Commerce* 2019 SCC Online Del 9270 (Delhi High Court).

⁵⁵ *ibid* [4].

⁵⁶ *ibid* [7].

⁵⁷ *ibid* [29].

⁵⁸ *ibid* [31].

⁵⁹ *ibid*.

⁶⁰ *ibid* [42].

In cases such as *Vaibhav Bajaj*, a grant of admission to a college close to a person's place of residence would certainly be an accommodative measure. However, there could have been candidates similarly placed who may have scored a higher mark. Alternatively, there could have been candidates with more pressing concerns who may have applied to the same college. Variables such as these can be multiplied. The point remains that it is not always possible for a court to weigh such competing interests. More so, when those interests are not represented before it.

This rationale is more explicit in the decision of the SCI in *Avni Prakash v National Testing Agency*.⁶¹ The appellant, in this case, suffered from dysgraphia. She wanted to take the National Eligibility cum Entrance Test for admission to an undergraduate medical course.⁶² Given that she suffered from dysgraphia, she had claimed an additional one hour (over and above the three stipulated hours) to complete the test. While the test conducting agency had initially assured her that this one hour would be provided to her, at the end of three hours, her paper was forcibly collected.⁶³ The appellant thus approached the Bombay High Court, contending that a fresh examination, with all the necessary relaxations, be conducted for her.⁶⁴ This prayer was refused by the Bombay High Court,⁶⁵ and hence an appeal was preferred to the SCI.

The SCI took note of its decision in *Vikas Kumar* and held that the appellant was entitled to reasonable accommodation.⁶⁶ It held that she had been denied this reasonable accommodation, and that thus, the State had violated its positive obligation.⁶⁷ When it came to framing the reliefs that the appellant would be entitled to, the court held that its hands were bound by precedent, and that it could not direct a re-examination.⁶⁸ The court then took note of the written submissions filed by the respondent. The respondent had mentioned how the appellant had secured a rank of 1721 out of 2684 candidates in the category of persons with disabilities.⁶⁹ Awarding her additional marks, even in proportion to the marks she had scored, would disturb the ranks of those candidates placed above her. It would also have an impact on the timeline of the counselling sessions conducted as a part of the admissions process.⁷⁰ Eventually, the court held,

⁶¹ *Avni Prakash v National Testing Agency* (2023) 2 SCC 286 : 2021 SCC OnLine SC 1112 (Supreme Court of India).

⁶² *ibid* [4].

⁶³ *ibid*.

⁶⁴ *ibid* [5].

⁶⁵ *ibid* [8].

⁶⁶ *ibid* [44].

⁶⁷ *ibid* [50].

⁶⁸ *ibid* [56].

⁶⁹ *ibid* [61].

⁷⁰ *ibid*.

*“This Court would eschew the course of dictating the manner in which the grievance should be rectified, leaving it to the discretion of the testing agency which is entrusted with the overall responsibility of conducting the examination.”*⁷¹

The SCI, thus, left it to the testing agency to take suitable steps to redress the appellant’s grievance. While at first blush, this does not seem to be the ideal outcome, it appears that it was not possible for the court to take any approach other than a deferential one. Any relief which the court may have awarded to accommodate the appellant’s needs would have invariably had an impact on other candidates who were not represented before it. There may have been other similar cases which have come up before our courts. However, the point I wish to make, and which comes to the fore from these two cases, is that in situations such as these, a deferential approach may be the only approach available to the courts. Once we arrive at the conclusion that a deferential approach may be the only viable course of action available, the sequitur would be that judicial review is not as attractive an instrumentality to secure the enjoyment of rights when conflicting third-party interests are also at stake. The wisdom of the authority which refused to be accommodative in the first instance retains primacy.

What we have seen thus far is that judicial review as a device or a strategy has successfully been used to secure the enjoyment of rights related to employment and education, as long as the enforcement of these rights did not have an adverse impact on third-party interests. When third-party interests are involved, the executive has, at the highest, been asked to re-visit its decision. However, the cases studied thus far constitute only a small sub-set of scenarios wherein the enforcement of accommodative measures may be warranted. There have also been several cases wherein the enforcement of accommodative measures has also involved a shift in policy, or an expenditure of monies by the executive.

Interestingly though, courts have not adopted the same deferential approach in these cases. The reason I say ‘interesting’ is because courts in other jurisdictions when faced with similar fact situations have followed the same deferential approach seen above, even in cases involving apportionment of finances or questions of policy.

A. A DEFERENTIAL APPROACH IN COMPARATIVE DISCOURSE

In *Alexander v Choate*,⁷² the Supreme Court of the United States (“SCOTUS”) was called upon to test the legality of a reduction from 20 to 14 in the number of annual inpatient hospital days that would be covered

⁷¹ *ibid* [60].

⁷² *Alexander v Choate* 1985 SCC OnLine US SC 18 : 83 L Ed 2d 661 : 469 US 287 (1985) (Supreme Court of the United States).

by Tennessee's Medicaid Plan. This move was necessitated by the fact that Tennessee's Medicaid budget was projected to be around 42 million dollars in excess of the budget limit.⁷³ The SCOTUS *inter-alia* observed, "*It should be obvious that administrative costs of implementing such a regime would be well beyond the accommodations that are required...*"⁷⁴

More recently, in *Toplak v Slovenia*,⁷⁵ the European Court of Human Rights ('ECHR') was called upon to consider a case where applicants, who had muscular dystrophy and who used an electric wheelchair, were aggrieved by a lack of adequate measures that would allow them to vote in a national referendum, and in elections to the European Parliament.⁷⁶ While the ECHR eventually dismissed the application, in doing so, it observed that "*States enjoy a margin of appreciation in assessing the needs of people with disabilities in respect of elections and the means of providing them with adequate access to polling stations within the context of the allocation of limited State resources*".⁷⁷

Subsequently, in *Arnar Helgi Larusson v Iceland*,⁷⁸ the ECHR was presented with an application that concerned the lack of access for wheelchair users to socio-culturally relevant public buildings.⁷⁹ The applicant had approached the domestic courts seeking a declaratory judgement which would require the local municipality to improve the accessibility in two public buildings.⁸⁰ The domestic courts found that even though the two buildings in question required improvements, separation of powers prevented them from directing the municipality from taking action in areas in which the municipality enjoyed an element of discretion.⁸¹ While the ECHR did conclude that a lack of accessibility in the buildings in question affected the applicant's right to personal development,⁸² it did not return a finding of discrimination. It observed that the municipality had made considerable efforts to improve access to public buildings in general, and that the authorities had chosen to prioritise a certain set of buildings as a part of these efforts. Imposing an additional obligation, the court felt, would tantamount to imposing a disproportionate burden.⁸³

Therefore, when faced with situations where allowing the reliefs prayed for would have required the court to delve into the domain of executive policy, or

⁷³ *ibid* [289].

⁷⁴ *ibid* [308].

⁷⁵ *Toplak v Slovenia* (2021) ECHR 34591/19 (European Court of Human Rights).

⁷⁶ *ibid* [1].

⁷⁷ *ibid* [119].

⁷⁸ *Arnar Helgi Larusson v Iceland* (2022) ECHR 23077/19 (European Court of Human Rights).

⁷⁹ *ibid* [1].

⁸⁰ *ibid* [5].

⁸¹ *ibid* [11].

⁸² *ibid* [61].

⁸³ *ibid* [63].

would have required the imposition of a financial burden on the State, courts in comparative jurisdictions have adopted a more deferential approach. According to me, and as may be seen from the cases discussed in Part III, courts in India have not adopted as deferential an approach.

While a deferential approach may at times be important to preserve the separation of powers amongst institutions of the State; from the perspective of a litigant, it could mean that they are only marginally better off (or not better off at all) than they were before approaching the court. Since the emphasis in this essay is on the final relief secured by an individual, I argue that a non-deferential approach or an exacting standard scrutiny would certainly be welcomed by litigants. In the next part, I show that even though Indian courts have adopted a non-deferential approach, there is no cause to celebrate.

IV. PART III: REASONABLE ACCOMMODATION IN THE DOMAIN OF STATE POLICY

One of the first cases that I will study in this Part of the essay is the decision of the SCI in *Jeeja Ghosh v Union of India*.⁸⁴ This case arose out of a public interest litigation filed by an eminent activist who had cerebral palsy.⁸⁵ Due to her disability, the petitioner had been asked to de-board a flight.⁸⁶ In her petition, she cited numerous instances wherein passengers had been denied boarding or had been humiliated on an aircraft because of their disability.⁸⁷ In light of the discrimination which had been meted out to her, and in light of how commonplace this discrimination was, the petitioner had approached the SCI asking for a direction to be issued to the effect that the requirements/rules stipulated by the Ministry of Civil Aviation as regards persons with disabilities be followed.⁸⁸

The SCI took note of a report prepared by an expert committee appointed by the Ministry of Civil Aviation on how the extant civil aviation rules could be modified to accommodate the needs of persons with disabilities.⁸⁹ The court thereafter conducted a detailed analysis of how some of the recommendations made by this committee would address many of the grievances aired by the petitioner.⁹⁰ While these recommendations were to be incorporated into a fresh set of rules proposed to be enacted, the court issued eight further suggestions on

⁸⁴ *Jeeja Ghosh v Union of India* (2016) 7 SCC 761 (Supreme Court of India).

⁸⁵ *ibid* [2-3].

⁸⁶ *ibid* [4].

⁸⁷ *ibid* [15].

⁸⁸ *ibid* [16].

⁸⁹ *ibid* [19].

⁹⁰ *ibid* [25].

how the new civil aviation rules could provide for additional accommodative measures.⁹¹

According to me, it is self-evident that the approach of the court, in this case, was anything but deferential. The question, though, which I seek to ask is, ‘*Was this non-deferential approach enough?*’. As mentioned previously, the court issued eight recommendations for the rule-making authorities to consider. One of these recommendations pertained to the issue of off-loading passengers with disabilities from aircrafts. This, in fact, was the very issue that had served as a catalyst for the public interest litigation in the first place.

Despite this being the case, the Civil Aviation Requirements, as issued by the Directorate General of Civil Aviation, continued to allow an airline to refuse transportation services to a passenger with disabilities if the airline was of the opinion that doing so would be inimical to the safety of the flight. Not only that, the same humiliation which the petitioner in *Jeeja Ghosh* had to suffer repeated itself. In May 2022, six years after the decision in *Jeeja Ghosh*, a wheelchair-bound child was denied boarding by an airline only because he appeared to be in a state of panic.⁹² It was only then, and more particularly in light of the public outrage that ensued, that the Directorate General of Civil Aviation amended the Civil Aviation Requirements to withdraw the discretion that airlines enjoyed.⁹³

A similar tale of executive apathy emerges when the decisions of the SCI in *Disabled Rights Group v Union of India*⁹⁴ (DRG) and *Rajive Raturi v Union of India*⁹⁵ are considered. At the time, both these decisions were hailed as instances of ‘*momentous judicial support*’.⁹⁶ In *DRG*, a public interest litigation had been filed before the SCI, and one of the issues raised pertained to providing proper access to orthopaedic disabled persons in educational institutions.⁹⁷ The court discussed suggestions put forth by the petitioner to improve accessibility at length. Eventually, it directed the University Grants Commission to appoint an expert committee, and further directed this committee to undertake “*a detailed study for making provisions in respect of accessibility as well as pedagogy and would also suggest the modalities for implementing those suggestions, their funding and monitoring etc.*”⁹⁸ A deadline was set for this committee to prepare its report, and for the matter was to be placed before the court once the report had been filed.

Similar directions were also passed in *Rajive Raturi*, which was a connected matter. In *Rajive Raturi*, the issue before the court pertained to the provision of facilities to improve the accessibility which visually disabled persons would have to roads, public buildings and transport facilities.⁹⁹ In this case, the court undertook a detailed review of the action that had already been taken by the executive,

⁹⁸ *Disabled Rights Group* (n 95) [35.2].

⁹⁹ *Rajive Raturi* (n 96) [1].

and then examined what remained to be done.¹⁰⁰ For instance, the court took note of how an accessibility audit of 50% of the government buildings in the most important towns and cities had not been completed, and how many of these buildings had not been made fully accessible. Notably, the SCI observed how several of these obligations had even been encapsulated in the Rights of Persons with Disabilities Act, 2016.

Thereafter, the court proceeded to issue detailed directions to the executive branch of the State. For instance, it directed that “*all government buildings providing any services*” were to “*be made fully accessible by June 2019*”.¹⁰¹ Similarly, the court also directed the state governments to “*identify 10 most important cities/towns and complete accessibility audit of 50% of government buildings in these cities/towns*”.¹⁰² Overall, the court issued eleven such directions. As in the *DRG* case, the court directed the concerned governments to file an action taken report as per its directions and listed the matter for directions after three months.¹⁰³

A striking feature of the decisions in *Jeeja Ghosh*, *DRG* and *Rajive Raturi* has been that unlike decisions in *Choate* or *Toplak*, courts in India have not cited the separation of powers or the increased administrative costs, and left the reliefs prayed for to the discretion of the executive. However, what followed consequently as a result of these decisions is worrisome.

A. THE AFTERMATH OF A PRO-ACTIVE APPROACH

Both in *DRG* and in *Rajive Raturi*, the court listed the matter for directions or for compliance after a few months. However, there is no record of a report having been filed in *DRG* and the matter being listed before the SCI once again. In *Rajive Raturi*, the matter was listed before the SCI on ten occasions thereafter.¹⁰⁴ However, when the matter came up on the first four occasions, several of the states had not filed a compliance report. On one occasion, the SCI was even constrained to observe, “*We fail to understand the indifference of the other States in not complying with the orders.*”¹⁰⁵ After the governments had filed their compliance reports and the court had perused them, it found the reports to be “*vague and*

¹⁰⁰ *Rajive Raturi* (n 96) [26].

¹⁰¹ *Rajive Raturi* (n 96) [34.1].

¹⁰² *Rajive Raturi* (n 96) [34.3].

¹⁰³ *Rajive Raturi* (n 96) [35].

¹⁰⁴ On a study of the case records on the website of the SCI, it emerges that the matter was listed before it on 16th March 2018, 9th April 2018, 14th May 2018, 17th July 2018, 25th July 2018, 5th September 2018, 5th October 2018, 13th November 2018, 15th January 2019, and 12th February 2019.

¹⁰⁵ *Rajive Raturi v Union of India* Writ Petition (C) No. 243/2005, Order dated 9th April 2018 (Supreme Court of India).

sketchy".¹⁰⁶ Despite this being the case, the SCI furnished an additional opportunity to the various governments to file status reports and furnish complete information. However, there was little improvement. When the matter came up on 15th January 2019, the SCI remarked that several affidavits had not been filed in the prescribed format, and that many state governments had furnished incomplete information. It even went on to observe,

*"The indifferent attitude of the States and the Union Territories shows that they are not serious in complying with the directions contained in the judgement."*¹⁰⁷

After that, the matter came up before the SCI on only one occasion, and has remained pending ever since. Therefore, while the approach of the SCI in cases such as *DRG* and *Rajive Raturi* may (from one perspective) have been laudatory,¹⁰⁸ it did not result in any tangible change.¹⁰⁹

¹⁰⁶ *Rajive Raturi v Union of India* Writ Petition (C) No. 243/2005, Order dated 5th September 2018 (Supreme Court of India).

¹⁰⁷ *Rajive Raturi v Union of India* Writ Petition (C) No. 243/2005, Order dated 15th January 2019 (Supreme Court of India).

¹⁰⁸ At this juncture, it is important to perhaps take note of the fact the judicial approach in these cases has its own set of pitfalls. While the judiciary may be lauded for compelling the executive to discharge its positive obligations, the solution devised by the courts in many of these cases was to appoint a committee of 'experts'. Not all of these committees contained representatives or voices from the affected group. The problematic nature of such committees is captured poignantly by Anita Ghai when she observes,

"...Rather the disabled's quality of life is never equal. As a result disabled people are expected to see their impairment as their problem, something they will have to make the best of and accept that there are many things they cannot do. Often, disabled people's lives are handed over to these professionals. Their decisions affect where disabled people go to school; what support they get; where they live; what benefits they are entitled to; whether they can work; and even, at times, whether they are born at all or allowed to have children..."

This criticism can, for one, be attached to the judicial approach in *DRG*. [See: Anita Ghai, *Re-Thinking Disability in India* (Routledge 2015) 306.

¹⁰⁹ The orders passed by the Delhi High Court in *Court on its Own Motion v Union of India* [Writ Petition (C) No. 5666/2017] ("Indian Railways case") are also illuminative in this regard. By an Order dated 24th July 2017, the court took *suo-motu* cognisance of the need to re-fashion the Indian Railways, and to make it a more 'disabled friendly network'. Thereafter, by an Order dated 27th July 2017, the court took note of the fact that measures sought to be put in place by the Indian Railways were insufficient. It, therefore, appointed a committee, and directed this committee to suggest recommendations which would 'ensure complete accessibility at all level of the Indian Railways network to persons with any disability'. Evidently, this approach can be described as anything but a deferential approach. The committee was given time till 5th September 2017 to submit its report. However, as the orders passed by the court from time to time make apparent, this report was eventually finalised only sometime in the second week of November of 2017. When the matter came up before the court on 21st December 2017, a timeline was submitted by the Indian Railways for implementing the recommendations made by the court-appointed committee. The matter was thereafter adjourned by two months for the filing of a status report.

When the matter came up on 13th February 2018, additional time was sought to file a status report. The court also directed the Indian Railways to place on record measures taken to make railway stations and platforms disabled-friendly, and to improve overall accessibility. On the next

date, i.e. on 21st February 2018, further time was sought on behalf of the Railways to place a status report on record. When the matter came up after the filing of a status report, i.e. on 20th April 2018, the *amicus curiae* appointed by the court stated that contrary to the report, wheelchair facilities were only provided on a chargeable basis, and there was no staff designated to provide assistance to persons with disabilities. The court even noted that it was imperative for the Railways to examine the needs of persons with other impairments as well. On 24th May 2018, it was confirmed that the Railways was, in fact, levying a fee for a wheelchair facility. There was still a stoic silence on the overall measures taken to improve accessibility. It is only in the Order dated 29th August 2018 that we observe a submission made on behalf of the Indian Railways that it is in the process of acquiring newer user-friendly coaches. After that, the record illustrates that the matter was adjourned on a few occasions. When the matter was heard on 15th July 2019, a suggestion was put forth by the court to reserve lower berths in coaches for persons with disabilities. The Indian Railways was also directed to look into the issue of appointing designated staff to address the concerns of those in need. Notably, this issue of designated staff members had even been discussed on 20th April 2018. It appears then that even a year on in, a direction to simply designate staff members to address concerns of persons with disabilities had not been addressed.

The matter came up on four occasions thereafter. As the Order dated 16th September 2022 indicates, even four years after the issue was first discussed, the direction to provide a wheelchair facility and to designate staff members specifically to address the concerns of persons with disabilities had not been addressed. A tale of executive apathy, therefore, once again comes to the fore. When one considers measures beyond these to improve accessibility, one is only met with despair. Despite the court having adopted a non-deferential approach, there is a palpable silence on measures beyond the provision of wheelchair facilities, and designating of specific employees, to improve accessibility.

When one travels across the length of the country, and considers a recent case before the Madras High Court, a similar story of executive recalcitrance comes to the fore. In *Vaishnavi Jayakumar v State of T.N.*, 2022 SCC OnLine Mad 6654, the court was called upon to deal with the issue of making public transport buses more accessible for persons with disabilities. By its Order dated 22nd July 2021, the court directed the executive to file an affidavit indicating the measures taken in this regard. The court also observed that the executive was required to ensure that “new buses procured as part of the public transport system” were “disabled friendly; and that it” would “not suffice to only have a percentage of the proposed number of buses acquired to be disabled friendly”. When the matter came up for hearing on 26th August 2021, a submission was canvassed on behalf of the executive to the effect that procuring disabled-friendly buses would be far costlier, and would also require better road conditions than what was prevalent. Instead of deferring to the wisdom of the executive completely, the court observed that while the economic burden and the poor state of roads may be a reality, the mandate of the law could not be ignored. Thereafter, whilst extending some latitude to the executive, it asked the concerned officers to indicate a timeline within which the procurement of new buses could be completed.

The court eventually dealt with the writ petition by a detailed judgement dated 5th July 2022. The court took note of the rules framed under the Rights of Persons with Disabilities Act, 2016. The rules spelt out the specifications (in terms of floor height, width, railings, wheelchair spaces and the like) for the buses to be procured by the State. The court disposed of the writ petition with a direction to the executive to ensure that all government buses plying in the state of Tamil Nadu were in conformity with these specifications, and with the directions issued by the Apex Court in *Rajive Raturi*.

The response of the executive to this judgement though, was not one of cooperation. Instead of complying with this judgement, the next step taken by it was to file an affidavit seeking a clarification to the effect that the executive be permitted to acquire these buses in a phased manner. The executive even reiterated the reason which it had been cited a year ago, i.e. the cost price of buses with these specifications being twice the cost price of a bus which was otherwise purchased. While the court refused to clarify its judgement dated 5th July 2022, it remains to be seen as to how and when its directive is implemented by the executive.

As much is apparent from an admission on the part of the executive as well. The Department of Empowerment of Persons with Disabilities, Ministry of Social Justice and Empowerment, Government of India had launched the Accessible India Campaign in December 2015. On its website, one of the targets set was,

*“Conducting accessibility audit of at least 25-50 most important government buildings and converting them into fully accessible buildings in the selected 50 cities by June 2022”*¹¹⁰

One of the directions issued by the SCI in *Rajive Raturi* was that all government buildings were to be made fully accessible by 2019. If the Orders of the SCI themselves were not sufficient, a mere glance at the webpage of the Accessible India Campaign though, makes it clear that this direction had only been adhered to in the breach.

The findings provided by the NHRC in the Disability Manual and in the 2013 Report, which I have analysed above, only serve to underscore why these breaches have severe consequences, and why they cannot simply be brushed aside. Both these studies, which were conducted before the decisions of the SCI in *Jeeja Ghosh*, *DRG* and *Rajive Raturi*, highlighted the apathetic attitude on part of the executive when it came to making public spaces more accessible and inclusive. More recently, the Executive Director of the National Centre for the Promotion of Employment for Disabled people remarked that even after the enactment of the Right of Persons with Disabilities Act, 2016, less than 1% of the employees in white collar jobs are persons with disabilities, and a primary cause for this is the sheer absence of accessibility.¹¹¹ He even went so far as to say that this legislation has only remained on paper.¹¹² Similarly, a study conducted in 2018 on the implementation of the Right of Persons with Disabilities Act, 2016 found that 87.5% of the states in India did not have a designated authority to decide what support could be provided and in what manner to persons with high support needs.¹¹³ This study, too, painted a grim picture of executive indifference.

What a study of the precedents examined in this part shows, though, is that there may not have been a significant improvement even after a judicial intervention, and this is what leads me to the argument that I wish to canvass in this essay — there is an outer limit to the extent to which ‘reasonable accommodation’

¹¹⁰ Accessible India Campaign, Ministry of Social Justice and Empowerment (Aug. 24, 2021), <<https://disabilityaffairs.gov.in/content/page/accessible-india-campaign.php>>.

¹¹¹ Arman Ali, ‘Three Years on, the Implementation of the RPWD Act Remains an Issue’, (*LinkedIn*, 20 April 2020) <<https://www.linkedin.com/pulse/three-years-implementation-rpwd-act-remains-issue-arman-ali>> accessed October 28, 2023.

¹¹² *ibid.*

¹¹³ DEOC, ‘An assessment of the Rights of Persons with Disability (RPWD) Act’, 2016, (*DEOC*, 3 December 2018) <<https://deoc.in/view-point/an-assessment-of-the-rights-of-persons-with-disabilities-rpwd-act-2016/>> accessed October 28, 2023.

as a constitutional mandate can be enforced by the judiciary (at least in the context of disability rights), and we may have hit this limit in India. While judicial review may be a successful political strategy or tool to secure a reservation of posts, or a change in hiring patterns, or an enforcement of educational rights, for example, it may not be as efficacious in the enforcement of accommodative measures that require a shift in state policy, or a disbursement of finances. Arguably, if there was only one odd instance when an exacting scrutiny by the courts did not lead to a tangible difference, this argument would not have held water. However, we now have evidence from multiple constitutional courts spread across a decade.

One of the fallouts of this situation is that we are left with exclusionary public spaces and a culture of othering. Ghai puts it poignantly when she observes,

*“The archetype is the Jim Crow system, which denies participation in the public life of the community to people who are socially defined as disabled. Education and employment are the classic cases of exclusion but in many other areas of life, such as movie theatres, restaurants, local transportation, and other places of public accommodation, disabled people are simply not to be seen, except in segregated group environments. Thus, the patterned exclusions create a huge group-centred pattern of ablest supremacy”*¹¹⁴

Can courts then not enforce the implementation of their directives and remedy the morass? This is certainly a question that can be posed at this juncture.

B. THE ENFORCEMENT CONUNDRUM

To answer this query, I believe it would be fruitful to foray into the law on specific performance of contracts. It is now a settled position in law that courts are wary of directing the specific performance of those obligations which would require constant supervision by the court.¹¹⁵ The rationale underlying this principle is one of pragmatism.

Firstly, it is not possible for a court to micro-manage the discharge of some obligations. To take an example, a court cannot supervise the discharge of an obligation that requires a judgement debtor to operate a supermarket, and to earn a minimum revenue each month. The court cannot ensure that the judgement debtor would hire the requisite staff, purchase the requisite number of goods and advertise its supermarket well enough so as to reach a minimum revenue.¹¹⁶

¹¹⁴ Ghai (n 109) [302].

¹¹⁵ See: The Specific Relief Act, 1963, s 14(b).

¹¹⁶ The facts of this example have loosely been borrowed from *Co-op Insurance Society Ltd. v Argyll Stores Holdings Ltd.* 1997 UKHL 17 (United Kingdom House of Lords).

Secondly, and to circle back to our principles of specific performance, the only remedy for a decree holder in the event of non-performance of a continuous duty would lie in invoking the powers of contempt. A decree holder would thus have to rush to the court every time an obligation or a duty was breached, asking for the judgement debtor to be held in contempt. Not only would this flood the judiciary's docket with contempt petitions, even the contempt petition would not necessarily ensure the enforcement of the court's directives. This is simply because in a contempt petition, a court can only punish a party. It cannot direct the performance of the directive that has been breached.¹¹⁷

According to me, there is a close parallel between the law on the specific performance of a contractual obligation and the enforcement of a positive obligation to take accommodative measures. Cases involving the enforcement of a positive obligation are fundamentally different from those that impugn a law, policy, or practice as discriminatory. Ordinarily, when a court strikes down a law or a practice as being discriminatory (and, therefore, unconstitutional), a declaration by the court lends finality to the issue. Upon being so declared, the law, policy or practice in question is no longer valid. The same is not the case when a court directs the executive to implement an accommodative measure. Finality is only achieved when the executive specifically implements that measure.

In a case like *Rajive Raturi*, the implementation of the court's directive of making some government buildings accessible would depend on the executive making a budgetary provision, disbursing the necessary funds, engaging architects and civil construction contractors and ensuring that the construction work was undertaken. It is not possible for a court, and more so, a constitutional court, to micromanage the discharge of these obligations. Similarly, in the *Indian Railways* case, it is not possible for the Delhi High Court to ensure that (i) an allocation is made in the budget approved by the legislature for the construction of ramps at every railway station, (ii) a disbursement to this effect is made to the Ministry of Railways, (iii) the disbursed monies are allotted to the concerned departments, and in-turn to the regional heads, and (iv) the monies are spent at every railway station to construct a ramp.

It is thus that I advance a cynical argument in this essay, and contend that the potential of judicial review as a strategy to maximise the enforcement of reasonable accommodation may have been exhausted.¹¹⁸

¹¹⁷ See: *Ashok Kumar Aggarwal v Sumit Bose* (2014) 13 SCC 215 (Supreme Court of India).

¹¹⁸ Pertinently, this is not the first time this question has been posed. Albeit in the United Kingdom, it is worthwhile at this juncture to consider the transcript of the inquiry conducted on 7th July 2015 by the *Select Committee on Equality Act 2010 and Disability*. A portion of this transcription has been extracted here to amplify my contention,

"Baroness Thomas of Winchester: One important matter in relation to buildings is Part M of the building regulations, which we all know by the back of our hands. But a lot of hotels seem not to be following Part M particularly well, and they are not being pulled up by the building inspector, because

C. NOT ALL GLOOM

Before I conclude this essay, it is pertinent to point out that exacting scrutiny on part of the SCI has, at times, led to the implementation of accommodative steps. For instance, in *Pranay Kumar Podder v State of Tripura*,¹¹⁹ the SCI was called upon to deal with a situation wherein two students had been declared ineligible to take admission to an MBBS programme on the ground that they suffered from partial colour blindness.¹²⁰ The guidelines issued by the Medical Council of India were silent in this regard. The High Court had adopted a deferential approach, and observed that it could not grant relief merely because the guidelines were silent on a particular issue.¹²¹ Thus, the petitioners approached the SCI in appeal.

The SCI held that a total exclusion of students who suffered from colour vision deficiency would be discriminatory.¹²² At the same time, it appears that the court was sensitive to the fact that it did not possess the tools or the material to decide what areas could persons with colour vision deficiency practise in. While the court does not say this in as many words, this is certainly an inference that can be drawn from the final relief awarded.

a lot of building inspectors have not been employed by local authorities because local authorities are now very strapped for cash. What are the government offices doing about making sure that Part M of the building regulations is being followed by, say, new-build hotels?

Pot Russell: On the specifics of whether an individual building going through the planning process is for local authorities to pick up, we would certainly expect people locally to be challenging local authorities...

Baroness Thomas of Winchester: How is it enforced is what we want to know.

Pot Russell: We can certainly get advice, and I guess the Committee can decide whether it wants to call officials from that department to give further evidence....

Baroness Campbell of Surbiton:.... It seems we are spending a lot of time on the various campaigns that already exist and not enough time enforcing the Equality Act....

Lord McColl of Dulwich: I think this question has been answered quite a bit already but, specifically, is reliance on individual litigation an effective means of enforcing compliance with the Equality Act?

Tracey Kerr: It is difficult to see how else once can enforce rights, that fall on individuals..."

The Select Committee on the Equality Act 2010 and Disability, Inquiry on Equality Act 2010 and Disability (House of Lords, 2015).

Thus, the question on the enforcement of reasonably accommodative measures has been posed in the past, albeit in a foreign jurisdiction. What is also pertinent to note is that a question that has troubled policy makers is whether litigation (and thereby, judicial review) is an effective means to enforce these measures. My argument in this essay has been that while it is effective, there is a limit on the extent to which accommodative measures can be enforced through judicial review.

¹¹⁹ *Pranay Kumar Podder v State of Tripura* (2017) 13 SCC 351 (Supreme Court of India).

¹²⁰ *ibid* [1].

¹²¹ *ibid* [4].

¹²² *ibid* [29].

The court directed the Medical Council of India to constitute a committee of experts.¹²³ It thereafter directed this committee to *inter-alia* focus on a study of,

*“what are the available prosthetic aids to assist CVD medical practitioners and what areas of practice could they undertake with these aids.”*¹²⁴

The committee was asked to submit its report to the SCI within three months, and the petition was listed for a further hearing thereafter.¹²⁵ The committee filed its report in due course. It concluded that students with colour vision deficiency could be admitted to an MBBS programme. As far as the petitioners before the court themselves were concerned, the court exercised its inherent powers of justice and directed that they be provided admission in the next academic year.¹²⁶

More recently, in *Ashutosh Kumar v Film and Television Institute of India*,¹²⁷ the SCI called upon the respondent to tweak its curriculum to accommodate students with colour blindness,¹²⁸ based on the findings of a committee appointed by the court.¹²⁹ Notably, though, in neither of these cases was the final relief contingent upon an ongoing supervision or micromanagement by the courts. A declaratory relief by the court, based on the findings of a court-appointed committee, sufficed to lend finality to the issue.

V. CONCLUSION

The argument advanced by me in this essay can be viewed against the backdrop of the various phases of the disability rights movement in India, as outlined by Chander. Chander traces the origins of the movement to a demand for employment opportunities and reservations for the blind.¹³⁰ The second phase, according to him, commenced as this demand gathered momentum and cross-disability groups entered the fray. The second phase culminated in the enactment of the PwD 1995.¹³¹ While Bhambani differs from Chander on the trajectory of the movement before the 1990s, both agree that towards the end of the 20th century, there were more rights-based demands, and the deployment of Gandhian

¹²³ *ibid* [30.1].

¹²⁴ *ibid* [30.4].

¹²⁵ *ibid* [31].

¹²⁶ *Pranay Kumar Podder v State of Tripura* (2017) 13 SCC 351 (Supreme Court of India).

¹²⁷ *Ashutosh Kumar v Film and Television Institute of India* (2022) 13 SCC 40 : 2022 SCC OnLine SC 474 (Supreme Court of India) (“Ashutosh Kumar”).

¹²⁸ *ibid* [28].

¹²⁹ *Ashutosh Kumar* (n 128) [4].

¹³⁰ Chander (n 47) [168-70].

¹³¹ Chander (n 47) [171-2].

techniques.¹³² Chander then states that after the enactment of the PwD 1995, a third phase commenced. In this third phase, the action shifted to the courts, with activists filing court cases and complaints to enforce their rights.¹³³

Naturally, then, the trajectory of the movement would be contingent on the outcomes of these court cases, and it is in this context that I wish to place my argument. Strategically, petitioning the courts to secure the enforcement of legal and constitutional rights will not be as efficacious if even after the deployment of an exacting standard of judicial scrutiny, there is little improvement in ground realities.

In this essay, while confining myself to cases involving the mandate of 'reasonable accommodation', I have established that petitioning the courts in cases that do not involve conflicting third-party interests has been a viable option to secure the enforcement of accommodative measures, especially in the context of employment and educational rights. However, the same cannot be said to be the case when conflicting third-party interests are involved. In these cases, courts are left with little choice other than to adopt a deferential approach. Interestingly, this deferential approach appears to, by and large, have been confined to this narrow set of cases. Courts in India have been comfortable travelling beyond a deferential approach even when the case required a shift in state policy or a question of financing. Unfortunately, though, this has not proved to be sufficient. Despite an exacting standard of judicial scrutiny being deployed, executive indifference has meant that the directives issued by the courts are merely paper decrees. What complicates matters, though, is that in situations such as these, courts lack the necessary tools to enforce their own directive. Neither can they supervise the performance of a continuous duty, nor is contempt a feasible solution. Simply put, beyond a point, judicial review cannot cure executive apathy. Therefore, if incremental gains are to be made in terms of implementing accommodative measures beyond the paradigm of education and employment, alternate strategies may have to be devised. The potential of judicial review, I submit, may have been exhausted.

¹³² See: Meenu Bhambhani, 'The Politics of Disability Rights Movement in India' (2005) 1(1) INT'L. J. DISABILITY ST. 3.

¹³³ Chander (n 47) [173] [180].