Enabling Legal Order: Exploring Recent Trends In Disability Rights Adjudication In India

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Abstract

In this paper, authors have delved into contemporary judicial trends in disability rights adjudication. They seek to establish the claim that the Indian judiciary, despite certain progressive strides, is still largely in the grip of medical model of disability. Moreover, that judicial outcomes are mostly contingent on the sensitivity and compassion of the judges thereby exposing the Indian legal order to the vice of unpredictability. The paper makes out a case for the reconfiguration of epistemology with interface of law and science invoking the doctrine of quantum entanglement. A general duty of disability-based non-discrimination on the state is conceived by characterizing the debasement of physical and mental disability as a hyper object.

Keywords:

Disability rights adjudication, UNCRPD, RPwD Act, Quantum Entanglement, Persons with disability, Medical model of disability, Social model of disability.

PROLOGUE

In this paper, we would engage with judicial approaches to the rights of the persons with disabilities. We argue that before the ratification of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter "UNCRPD"), the courts were inclined towards providing reliefs in individual cases rather than using the litigation to effect structural changes. Critics like Amita Dhanda criticized the courts for evolving principles, standards, and doctrines to evolve disability rights jurisprudence and argued that by pursuing firefighting mode, the courts mostly

viewed disabled litigants as victims deserving compassion and paternalistic treatment.[1]

Another factor compounding the growth of disability rights jurisprudence in India is the prevalence of ableist elements in the Constitution. The Constitution, apart from having no provision prohibiting disability-based discrimination, explicitly debases disability by considering it as a ground of disqualification for occupying public offices.[2] Unlike for the elevation of other weaker sections like SCs and STs, the Constitution does not have any mandate for initiating affirmative action programmes for persons with disabilities.[3] In other words, the Constitution of India maintains a stoic silence on the question of disability justice.[4] The identity of disabled citizens as a constituency for setting an agenda of empowerment did not figure as a matter of discussion during the framing of the Indian Constitution. This is surprising particularly when the Indian constitution is viewed as a bridge for transition from a society with socio-political disabilities into one, more egalitarian and inclusive.[5] It would not be an exaggeration to contend that disabled continued to remain the objects of charity and their stigmatization persisted even after the onset of the Constitution till the enactment of the Persons with Disabilities Act 1995 (hereinafter "PwD Act"). This long and winding road to attain equality has a history of struggles and agitation launched by both groups of the persons with disabilities as well as the members of civil society having empathy for the cause.

The PwD Act was the first major legislation enacted by the Parliament in response to the commemoration of the Asia-Pacific decade of disability. However, this law was predominantly inclined towards the medical model of disability, i.e. locating

1 Amita Dhanda, 'According Reality to Disability Rights: Role of the Judiciary' in Rights of Persons with Disabilities (Indian Law Institute, 2002); Sanjay Jain, 'Models of Disability and Judicial Interpretation in India' in M.H. Rioux et al., (eds) Handbook of Disability (Springer, Singapore 2023).

2 Constitution of India, 1950, Articles 102, 191, 317(3)(c), and 326.

3 See generally, Sanjay Jain, 'Exploring the Jurisprudential and Public Law Foundation of Human Rights of Persons with Disabilities in India,' Vol. 20, Journal of The National Human Rights Commission, India (2021).

4 See generally, Sanjay Jain, 'Disability Rights at a Crossroads: Reflections on Evolution of Public Law of Physical and Mental Disability,' in M.P. Singh (ed), Indian Yearbook of Comparative Law (Oxford University Press 2016) 352-391.

5 See generally, Oscar Vilhen, et al., 'Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa' (Pretoria University Law Press 2013).

disability within the body of individuals rather than focusing on the interaction of socio-economic barriers with bodily impairments. Disability was seen as akin to a disease or badge of misfortune requiring sympathy and charity.

This approach completely overlooked the influence of external barriers, social, economic and political, on the lives of individuals with bodily impairments. Rather, the bodily impairments were seen singularly as the barriers for the persons with disabilities to live the life of normalcy. Since, disability was seen as an unfavourable and negative condition of life, medical practitioners, therapists, and rehabilitation experts were provided exclusive prerogative to determine the course of the life of persons with disabilities so as to bring them to normalcy or to enable them to overcome their disabilities.

This approach began to receive backlash in the West with the evolution of the social model of disability viewing disability as external to the body.[6] This model which now drives the agenda of the empowerment of persons with disabilities perceives disability in the societal barriers rather than in the bodily impairment. One of the hallmarks of this model is to draw a distinction between bodily impairment and disability. According to this model, impairments per se in absence of societal barriers do not result in disability. Rather, disabilities are caused due to interaction of bodily impairments and the social economic barriers. The proponents of this model argue that society, by normating able-bodism, privileges ableist design and undermines measures to accommodate differences and diversity resulting from the bodily and mental variations. In the phase before the ratification of UNCRPD, a number of cases agitating against discrimination on the ground of disability were brought before the Supreme Court and High Courts and although, in most of the cases, the court is purported to provide remedies, their approach was reactive rather than proactive. The courts largely acted as fire fighters simply coming to the rescue of persons with disabilities otherwise abandoned to their fate by the state and civil society alike.[7] The courts rather than questioning the ableist design or contesting the unilaterally assumed privilege of the state

6 See generally, M Oliver, 'The Politics of Disablement' (Red Globe Press London 1990); M Oliver, 'Understanding Disability: From Theory to Practice' (Red Globe Press London 1996).

7 AmitaDhanda, 'According Reality to Disability Rights: Role of the Judiciary' in Rights of Persons with Disabilities (Indian Law Institute, 2002).

for evolving the parameters of suitability and eligibility for the participation of persons with disabilities in the mainstream of society, somehow, tried to provide way forward to them with ad hoc, sympathetic and charitable measures.

For instance, the Bombay High Court refused to attribute mala fide to the state action to allow hysterectomy planned in large number of cases for young girls in a home for girls with conditions of "mental retardation". The court even did not go into the questions of legal, scientific and other aspects of the matter. Although, the notice was issued by the court to the government, not much happened. [8]Similarly, in National Federation of Blind v. Union Public Service Commission[9], although the Supreme Court directed the UPSC and the Government of India to allow blind aspirants to appear in competitive exams like that of IAS, with the help of a scribe or to write the exam in the Braille script thereby negating the wholesale embargo imposed by the government on them from appearing in the competitive exams, the judgement was very cryptic in terms of advancement of jurisprudence of rights or evolution of standards, principles and doctrines or the evolution of the identity of disabled students as worthy constitutional subjects. Moreover, the court even did not fully question the embargo and merely confined its relief in respect of posts identified by the government to be suitable for blind persons. The court also limited the scope of this holding by confining it merely to the initial appointments and not to promotions. The government further eroded this holding by truncating the scope of this decision to avail scribe by the blind persons and by withdrawing the privilege to take the exam in Braille script, it decided against allowing them to write their exams in Braille on the ludicrous assumption that "it would not be possible to distinguish the script of one person from that of another"[10]

Again, although the Supreme Court rebuffed the State of Orissa for invoking paucity of funds to run a school for "the deaf and dumb" and directed it to restore the grant, the reluctance of the court to go into the vires of the policy

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8 As reported in Times of India p.6, 29 June 1994 (Delhi) cited by AmitaDhanda in 'According Reality to Disability Rights: Role of the Judiciary' in Rights of Persons with Disabilities (Indian Law Institute, 2002).

9 AIR 1993 SC 1916.

10 AmitaDhanda, 'According Reality to Disability Rights: Role of the Judiciary' in Rights of Persons with Disabilities (Indian Law Institute, 2002)

of exclusion and alienation of persons with disabilities from allocation of funds or grants spoke volumes about its lack of interest to drive forward the disability rights jurisprudence.

All these cases very clearly demonstrate the absence of any strategies on part of the court to recognize disabled persons as active constitutional agents and to locate their rights and interests into the constitutionally sanguine principle of attaching inherent worth to every person as a being imbued with dignity. There was also hardly any evidence in the adjudicatory stance of the courts to either question the stigmatic stance of the state towards persons with disabilities or to problematize it to view their presence in the society mostly through their exclusion. Judicial consciousness was unreceptive of the idea of recognition of the constitutional identity of disabled citizens, evolution of which is a "gradual process which is characterized by a dialogue between the institutions of governance (such as the legislature, the executive, the courts, and the statutory commissions) and the public over internal and external dissonances. There is external dissonance when there is an apparent conflict between Constitution's aspirational ideals and the socio-political reality. It is characterized by internal dissonance when there is a conflict between the provisions of the Constitution."[11]

In respect of the former, it is arguable that the courts did not notice the wedge between socio-political realities about persons with disabilities and Constitution's aspirational ideals. Nor, the courts were able to engage with the contradiction within the provisions of the Constitution vis-à-vis persons with disabilities. For example, there was incongruity between the mandate of Article 14 emphasising on equality before laws and equal protection of the laws with certain other provisions of the Constitution using physical and mental disability to entirely keep persons with disabilities from holding certain public offices.

In the next section, we will evince the occurrence of paradigmatic shift with the ratification of UNCRPD by India and enactment of Rights of Persons with Disabilities Act 2016 (hereinafter 'RPwD Act').

11 Supriyo @ SupriyaChakraborty v. UOI, 2023 INSC 920 at para 161.

SECTION I: TOWARDS EVOLUTION OF DISABILITY RIGHTS JURISPRUDENCE IN INDIA

With the categorical ratification of UNCRPD, it was incumbent on India to incorporate its mandate in letter and spirit as part of Indian laws. For the same, a complete overhauling of PwD Act was imperative. In substance, eschewing of the medical model of disability and embracing its social model was the clarion call. Besides, the Indian Parliament was also enjoined to infuse into the legal order transformative and diversity-fostering principles, standards and doctrine. Moreover, to realise the mandate of UNCRPD in its essence, the Parliament was also required to endow full political and legal capacity and personhood on all the persons with disabilities. Taking cognizance of these pertinent considerations and resonating with the overarching principles underlying UNCRPD and the spirit of human dignity stemming from its Preamble, the Parliament addressed the disenchantment amongst persons with disabilities and enacted RPwD Act after thorough deliberation and consultation with the stakeholders across the country.

The RPwD Act categorically recognizes the principles: respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities, for empowerment of persons with disabilities in its preamble.[12]

Through the alignment of the preamble with the afore mentioned principles, the Parliament has conveyed its unmistakable intention to view the same to be overarching and permeating the provisions of the Act. Besides, the law has also deepened the spirit of substantive equality with recognition of principle of

12 See the Preamble, RPwD Act 2016.

reasonable accommodation as inherent to non-discrimination.[13] Moreover, the definition of 'person with disability' clearly signifies how Parliament has infused into RPwD Act, the mandate of social model of disability by emphasizing on the interaction between impairment and barriers to hinder the full and effective participation of the persons with disabilities in society equally with others. [14] The phrase 'equally with others' has both horizontal and vertical dimensions. Horizontally, it implies equal treatment to all the persons across disabilities, and vertically, it means equal protection of laws to persons with disabilities at par with the non-disabled groups.

A careful look at the substratum of this law denotes how Parliament has been able to address both external and internal dissonance vis-à-vis persons with disabilities by engaging with the wedge between socio-political reality around their lives and Constitution's aspirational ideals and internal contradictions within its provisions. In a way, this law is seen as reconfigurement of the fundamental rights permeating the ideals of reasonable accommodation, accessibility, full legal capacity, and personhood. It would be demonstrated below that although judiciary has taken progressive strides in some cases, in others, the traditional medical model of disability continued to grip the judicial consciousness. Often the outcome of the cases is contingent on the sensitivity and compassion of the judges thereby exposing the Indian legal order to the vice of unpredictability.

Vikash Kumar vs. UPSC[15] was a watershed in the history of disability rights adjudication and has provided impetus to thicken the spirit of substantive equality to combat disability-based discrimination and to accelerate the journey towards elimination of structural inequalities in the governance. In this case, the bone of contention was whether a student with a condition of 'writers' cramp' was within his right to seek the assistance of a scribe to write an examination.

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13 See generally, Sanjay Jain, 'Exploring the Contours of Principle of Reasonable Accommodation: Critique of Exclusion of Blind Persons as Judges by the Supreme Court' in Arvind P. Datar (ed), Essays & Reminiscences: A Festschrift in Honour of Nani A. Palkhivala (LexisNexis 2020) 51-72.

14 Sanjay Jain, 'Reflections on Constitutional and Legal Conception of Disability in India' in Sanjay Jain (ed) Critical Essays on Disability Rights Jurisprudence: Combating Exclusion, Embracing Inclusion (Bloomsbury 2021).

15 2021 SCC OnLine SC 84. (One of us, Dr. Sanjay Jain, has been cited by Justice Chandrachud, as he then was, in this judgement. See footnotes 41and 46.)

The stand of the Union Public Service Commission (hereinafter "UPSC") was that the privilege of a scribe could be claimed only by those persons with disabilities who were covered under the rubric of benchmark disabilities under the RPwD Act. Upon the scrutiny of the relevant provisions of the RPwD Act and the UNCRPD, the court rejected this argument and directed the UPSC to avail the privilege of a scribe to the Petitioner.

The Court held that the sub-category of benchmark disability has been created by the legislature in a particular context and for a particular purpose, i.e. to prioritize classes of persons with disabilities with conditions of severe impairments to be worthy of affirmative action and other allied benefits privileges. The legislature did not intend to expand this sub-categorisation to diminish the scope of overarching principles such as reasonable accommodation undergirding the RPwD Act, 2016. Attaching weight to the reasonable accommodation as providing a threshold for attainment of disability equality, it was held that its ambit could not have been narrowed down to apply only in respect of persons with benchmark disabilities.

To arrive at this finding, the court recognized the pertinence of the principle of reasonable accommodation as equality-enabling and justice-individualising concept. For the same, the court invoked the social model of disability by amplifying the inclusive definition of "persons with disability" enshrined in the RPwD Act 2016. Departing from the pattern of its earlier judgements, in this case, the court went beyond providing relief to the petitioner and by directing UPSC to formulate a revised scribe policy, it virtually effected a structural change in the ableist policy framework. In response to the judgement, the Department of Disability Affairs, Government of India, has notified Guidelines to avail scribes by all persons with specified disabilities to appear in written examination thereby widening the ambit of its earlier guidelines issued in 2018 confining this privilege only to people with benchmark disabilities[16].

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16 See generally, Guidelines for conducting written examination for persons with specified disabilities covered under the definition of Section 2(s) of the RPwD Act, 2016, issued by Ministry of Social Justice and Empowerment, Department of Empowerment of Persons with Disabilities (Divyangjan), Government of India and adopted by all government establishments like Union Public Service Commission and All India Council for Technical Education. (https://www.aicte-india.org/sites/default/files/Guidelines%20for%20conducting%20written%20examination%20for%20persons%20with%20specified%20disabilities%20covered%20under%20the%20definition%20of%20section%202%28s%29_0.pdf)

In a departure from its earlier decisions, the court, in this instance, went beyond addressing the petitioner's relief by instructing the Union Public Service Commission to develop a revised scribe policy.The court's judgment, thus, exerted a significant influence on the policy framework.

This judgement is also significant for expounding the scope and ambit of reasonable accommodation and to entrench it as part of non-discrimination under RPwD Act 2016. The court alluded to the observations of the UNCRPD Committee in General Comment No. 6 that "reasonable accommodation is a component of the principle of inclusive equality. It is a substantive equality facilitator."[17] The court also amplified the importance of reasonable accommodation as a bulwark against perpetuation of ableism[18] by observing:
"...the relevant question, under the reasonable accommodation analysis, is not whether complications will be caused by the grant of a reasonable accommodation. By definition, reasonable accommodation demands departure from the status quo and hence 'avoidable complications' are inevitable."[19]

To quote one of us:
"To put the point philosophically, principle of RA is an instrument of fostering 'recognition respect', the point is more elaborately spelled out by Ian Carter, "the status of a person as a moral agent is something 'to be reckoned with'in our practical deliberations. To say that it is something 'to be reckoned with' is to say that it is a particularly high status compared to those of the various other animate and inanimate objects that we encounter in living out our lives". There are two approaches to accord recognition and respect to people with disability. The first approach defends the criteria of social justice distributing resources to people with disabilities for eliminating discrimination, not making up for so-called natural disadvantage. Whereas, the second approach, which may be characterized as redistributive or compensatory, defends the idea that "resources for people

17 Vikash Kumar v. UPSC [2021] 11 S.C.R. 281 at para 49; See generally, Andrea Broderick, 'The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities' (Intersentia Ltd 2015).

18 See generally, Fiona Kumari Campbell, 'Contours of Ableism: The Production of Disability and Abledness' (Palgrave Macmillan London 2009); Bob Pease, 'Undoing Privilege' (Bloomsbury Publishing Plc 2022) Chapter 11

19 Ibid at para 54.

with disabilities must sometimes be justified on the grounds that some natural endowments pose disadvantages even in societies that do not discriminate.""[20]

Amita Dhanda, while analysing this judgment, very pithily observes:
"The delinking of reasonable accommodation from benchmark disability has not just expanded the breadth of the entitlement but also enabled persons with disabilities to live as themselves. They need to neither play up nor play down their variation from the 'dominant normal'."[21]

So far so good, but when it came to providing full throated impetus to the right based approach with a categorical recognition of right to scribe to every person with disability as part of reasonable accommodation, the court somewhat backslided on its own discourse by requiring the Ministry to:
"...lay down appropriate norms to ensure that the condition of the candidate is duly certified by such competent medical authority as may be prescribed so as to ensure that only genuine candidates in need of the facility are able to avail of it." [22]

In a way, the court throttled the human rights advancement by falling back on "suspicion ridden medical expertise driven model" [23]. However, despite this regress, this judgement is salutary and has ramifications for structural entrenchment of reasonable accommodation as one of the inherent elements to the realization of substantive equality.[24] The court very categorically held that any decision innocent to the principle of reasonable accommodation amounts to disability-based discrimination and is also in deep tension with the ideal of inclusive equality.

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20 See generally, Sanjay Jain, 'Exploring the Contours of Principle of Reasonable Accommodation: Critique of Exclusion of Blind Persons as Judges by the Supreme Court' in Arvind P. Datar (ed), Essays & Reminiscences: A Festschrift in Honour of Nani A. Palkhivala (LexisNexis 2020) 51-72.

21 Amita Dhanda, 'Has there been a Slip Between Cup and Lip?:Vikash Kumar v UPSC' Oxford Human Rights Hub, 2022, available at: https://ohrh.law.ox.ac.uk/has-there-been-a-slip-between-cup-and-lip-vikash-kumar-v-upsc/.

22 Vikash Kumar v. UPSC [2021] 11 S.C.R. 281 at para 75.

23 Amita Dhanda, 'Has there been a Slip Between Cup and Lip?:Vikash Kumar v UPSC' Oxford Human Rights Hub, 2022, available at: https://ohrh.law.ox.ac.uk/has-there-been-a-slip-between-cup-and-lip-vikash-kumar-v-upsc/.

24 See generally, Sandra Fredman, 'Substantive Equality Revisited' Vol. 14 (3), International Journal of Constitutional Law (2016) 712–738.

The same led the court to overrule its earlier decision in V. Surendra Mohan vs. State of Tamil Nadu[25] wherein the Supreme Court had upheld the decision of Madras High Court disqualifying blind persons from the appointment of judges. [26]

This judgement is path breaking for recognizing that reasonable accommodation is crucial for the individualization of justice. It cannot be availed in a predetermined manner and has to be evolved on case-to-case basis.[27]

Thus far the courts had engaged with the litigants with conventional disabilities like blindness, locomotor disabilities, etc., however, Vikash Kumar proved to be game changer in respect of recognition and enforcement of rights of less known and much more chronic conditions.

In *Avni Prakash*,[28] a woman student with condition of dysgraphia claimed relaxation in terms of an additional hour of compensatory time as against the total time of three hours prescribed for the regular candidates in the NEET exam. The authorities and the Bombay High Court did not accede to this request. Departing from the High Court's view, the Supreme Court observed that the right to inclusive education under the RPwD Act must be realised through the principle of reasonable accommodation. Of particular interest is the Court's approach in reiterating that a student cannot be made to suffer for no fault on her part. While declining to order a re-examination, the Court directed the NEET authorities to take compensatory measures such as extrapolation of marks etc., to ensure that the injustice caused was duly remedied.[29]

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25 (2019) 4 SCC 237.

26 See generally, Sanjay Jain, 'Exploring the Contours of Principle of Reasonable Accommodation: Critique of Exclusion of Blind Persons as Judges by the Supreme Court' in Arvind P. Datar (ed), Essays & Reminiscences: A Festschrift in Honour of Nani A. Palkhivala (LexisNexis 2020) 51-72.

27 AmitaDhanda, 'Has there been a Slip Between Cup and Lip?:Vikash Kumar v UPSC' Oxford Human Rights Hub, 2022, available at: https://ohrh.law.ox.ac.uk/has-there-been-a-slip-between-cup-and-lip-vikash-kumar-v-upsc/.

28 Avni Prakash v National Testing Agency (NTA), 2021 SCC OnLine SC 1112, also see Ravindra Kumar Dhariwal v UOI, 2021 SCC Online SC 1293.

29 Sanjay Jain, 'Right to Higher Education of Persons with Disabilities: Indian Scenario' in V.K.Ahuja et al., (eds), Disability: A Journey from Welfare to Right (Satyam Law International 2024) 11-40; Dr. Sanjay Jain, 'Right to Higher Education of PWDs: Critical Reflections' in M J Vinod and S Y Surendrakumar, " EmpoweringMarginlised Communities in India (Sage 2021) 155- 208.

In yet another interesting case, Ashutosh Kumar[30], the question before the Supreme Court was whether the course curriculum provided for diploma in Editing can be successfully completed by the appellant with condition of"color blindness". To deal with this question and to explore the possibility of application of reasonable accommodation to remedy the grievance of appellant, the court constituted a committee for its assistance. The court was in agreement with the assessment of the Committee that:

"The appellant Mr. Ashutosh Kumar who has Red and Green color vision deficiency and has color perception of CP4, as per the AIIMS Medical Board report, will have difficulty in completing the existing course curriculum of the diploma in Film and Editing course offered by the FTII. This is more particularly due to a twenty-minute 'color grading module' which is part of the Film Editing curriculum. However, the color grading module has no relevance to either the film editing course or to the film editor's professional role."[31]

The Court also noted with approval the suggestion of the Committee to avail reasonable accommodation to the appellant. The Committee observed:

"FTII should make reasonable accommodation in their curriculum for candidates with colorblindness, in all courses where there is a bar to the admission of colorblind individuals. For example, by providing elective/optional modules in the curriculum for those core credits which may require intensive color appreciation or in any other way."[32]

In Ravinder Kumar Dhariwal vs. Union of India[33], the Supreme Court went into the legality of the suspension of an Assistant Commandant on grounds of misconduct and 'mental disability' under the PwD Act. The petitioner had a medical background of undergoing continuous treatment for 'obsessive compulsive disorder, secondary major depression, and bipolar affective disorder' since 2009. He argued that he was continuously posted in insurgency areas for a long time due to which, he developed the condition of 'mental disorders' in

30 Ashutosh Kumar v Film and Television Institute of India, 2022 SCC OnLine SC 557.

31 Ibid at para 26.

32 Ibid.

33 2021 SCC OnLine SC 1293.

2008. The Central Reserved Police Force department instead of applying Section 47 of PwD Act mandating alternative employment in case of acquiring disability during service to his case, suspended him from his duties in 2010.

Taking exception to the same, the Court opined:
"While a causal connection may need to be established between the ground for discrimination and the discriminatory act, it is not required to be shown that the discrimination occurred solely on the basis of the forbidden ground. As long as it can be shown that the forbidden ground played a role in the discriminatory action, the action will violate the guarantee against non-discrimination."[34]

Extending the above law to the disability context, the court observed:
"A person with a disability is not required to prove that discrimination occurred solely on the basis that they had a disability. Disability needs to be one of the factors that led to the discriminatory act. Thus, in the present case, the appellant is only required to prove that disability was one of the factors that led to the institution of disciplinary proceedings against him on the charge of misconduct."[35]

Applying this law to the facts of the instant case, the court opined:
"An interpretation that the conduct should solely be a result of an employee's 'mental disability' would place many 'persons with mental disabilities' outside the scope of human rights protection... The over-emphasis on the choice or agency of a person with a mental health disorder furthers the stigma against them."[36]

While analysing this case, one of us observed:
"Evidence does not support the indiscriminate association of "mental impairment" with violence or the notion that someone with a "mental disability" is a danger to society. Therefore, a complex and customised approach to discrimination claims

34 Ibid at para 116.

35 Ibid at para 119.

36 Ibid at para 120.

based on "mental impairments" is necessary, with a focus on the disadvantage resulting from the same."[37]

Taking into account the continuous and long-standing condition of the petitioner, the Court observed:
"a person with a mental disability is entitled to the protection of the rights under the RPWD Act 2016 as long as they meet the definitional criteria of what constitutes a 'person with a disability' under Section 2(s). Having regard to the complex nature of mental health disorders, any residual control that persons with mental disabilities have over their conduct merely diminishes the extent to which the disability contributed to the conduct, it does not eliminate it as a factor."[38]

This judgement is germinal for the critique of the court on the social construction of disability. The court observed:
"Disability, as a social construct, precedes the medical condition of an individual. The sense of disability is introduced because of the absence of access to facilities." [39]

The case also assumes significance for evolution of the idea of full and universal legal capacity with the invocation of UNCRPD, socio-human rights model of disability and General Comment No.1[40]. The court observed that in order to fully recognise the 'universal legal capacity' "where all persons inherently possess legal capacity regardless of disability or decision-making skills.18 They may however be provided with support (and not substitution) to exercise their legal capacity. This shift from the substituted legal capacity model to the supported legal capacity model is important for two reasons. It recognises the agency held by disabled persons; and adopts a social model of disability."[41]

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37 Dr. Sanjay Jain (ed), M.P. Jain, 'Indian Constitutional Law,' 9th edition (LexisNexis 2024) Chapter 21(forthcoming).

38 Ravinder Kumar Dhariwal vs. Union of India, 2021 SCC OnLine SC 1293 at para 123.

39 Ibid at para 34.

40 The court cited para 25 of this General Comment.

41 Ravinder Kumar Dhariwal vs. Union of India, 2021 SCC OnLine SC 1293 at para 46.

With the infusion of the spirit of this comment under UNCRPD, the Court deduced "the recognition of the legal capacity of persons with psychosocial disabilities confers on them legal personhood, where they can be a bearer of rights and exercise those rights"[42].

The Court held that as the appellant was receiving treatment for mental health disorders for a long time since 2009 and diagnosed with 40 to 70 percent of permanent disability by a government hospital, he is more vulnerable than non-disabled people to engage in behaviour that could be classified as misconduct because of his mental disability. In such circumstances, his interests must be protected against both direct and indirect discrimination. Accordingly, the court set aside the disciplinary proceedings as discriminatory on the ground of disability in violation of the RPwD Act and availed him the reasonable accommodation by directing the respondents to assign him an alternate post not involving the use of or control over firearms or equipment which may pose a danger to the appellant or others in or around the workplace.

A careful analysis of this case evinces the deployment of socio-human rights model of disability along with doctrines, standards and principles like reasonable accommodation and indirect discrimination underlying UNCRPD to transform both the life of the petitioner and the service conditions of Central Reserved Police Force by setting up parameters to deal with like cases in future. The case is particularly notable for reliance on socio-human rights model of disability to bust the myth of the ableist view that persons with 'mental health conditions' pose danger to the society.

This case has proved to be revolutionary to break the glass ceiling around productivity of persons with cognitive and mental disabilities. To demonstrate the same, let us examine yet another path breaking judgement of the Delhi High Court in Bhavya Nain vs. High Court of Delhi[43].

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42 Ibid at para 59.

43 W.P.(C.) No. 5948/2019.

In this case, in resonance with *Vikash Kumar,* the Delhi High Court denied the plea of the Delhi High Court in its administrative capacity to disqualify a person with bipolar disability from holding the office of a judge in Delhi Judicial Services. While the court did not specifically refer to either UNCRPD or the social or human rights model of disability, it nevertheless integrated the spirit of the same in its rationale:

"The mere apprehension that the respondent has - that the petitioner may not be able to handle the responsibility and stress which a Judicial Officer faces, cannot be a reason to declare him medically "unfit", or to say that he is not entitled to claim reservation. There is no medical opinion placed on record, or considered by the respondent, to come to the conclusion that a person - who is suffering from BPAD, and is under remission, would not be able to discharge his responsibilities as a Judicial Officer. Pertinently, there is no exemption granted by the appropriate Government referable to the provison to Section 20(1) of the RPwD Act"[44].

On appeal, the Supreme court upheld the same in Akanksha Singh vs High Court of Delhi[45], in a very brief order.

In our opinion, it was a missed opportunity on part of the Supreme Court to have explicitly embed disability equality as part of the process of the appointment of judges. Nevertheless, the Supreme Court by sustaining the judgement of the Delhi High Court was able to break the stereotype that PwDs are ineligible and incompetent to be appointed as judges.

Recently, the court has extended the envelope further by giving inclusive push to the frontiers of medical education to encompass persons with locomotor and speech disabilities with the invocation of the doctrine of reasonable accommodation. This is significant because medical education has hitherto been perceived to be an enterprise exclusively for able-bodied persons.

44 Ibid at para 53.

45 W.P.(C) 11747/2019 decided on 1st October 2020.

In some earlier cases like Purswani Ashutosh v UOI[46] and Parmod v UOI[47], the Supreme Court was anxious to seek the compliance of reservations for persons with disabilities in accordance with the provisions of the RPwD Act in MBBS course. However, the position of the court underwent radical change with the revision of admission regulations by MCI. Taking a U-turn from its earlier position, the Supreme Court in Vidhi Himmat v State of Gujarat[48] refused to accord with the contention of the disabled student petitioners that while denying admission to them, the State Government and/or authorities did not consider the relevant parameters and failed to take note of their ability and competence to perform well while pursuing medical education. Implicit in this argument was the submission of the petitioner to avail them, reasonable accommodation for pursuing medical education. However, showing complete innocence to the same, the court fell back on suspicion ridden expertise driven model of disability by holding that since "all the expert bodies including the Medical Board, Medical Appellate Board and even the Medical Board of AIIMS, New Delhi…have opined against the petitioners and their cases are considered in light of the relevant essential eligibility criteria as mentioned in Appendix 'H' – 'Both hands intact, with intact sensation, sufficient strength and range of motion'. Therefore…the Court would not be justified in sitting over as an appellate authority against the opinion formed by the experts… more particularly when there are no allegations of mala fides."[49]

It is striking how the court decided to attach unquestioned pre-eminence to the opinion of the experts without examining in any way, whether the criteria or opinion is incompatible with RPwD Act and UNCRPD.[50] Stoic silence of the courts on the applicability of reasonable accommodation was particularly troubling.

Fortunately, this bleak state of affairs took a positive turn with assumption of office of the present Chief Justice of India, Dr. D.Y. Chandrachud. Justice Chandrachud,

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46 Purswani Ashutosh v UOI, 2018 SCC OnLine SC 1717.

47 Parmod v UOI, (2019) 13 SCC 721.

48 2019 INSC 1137.

49 Ibid at para 8.

50 SaptarshiMandal, 'Adjudicating disability: Some emerging questions' Economic and Political Weekly (2010) 22-25.

while grappling with the question of possibility to provide reservation in MBBS course to a speech impaired student, adopted a stance akin to social model of disability. [51] There was a paradigmatic shift in the order in that the court did not perceive that the competence, eligibility and suitability of the candidate could be assessed exclusively from the medical lens. Justice Chandrachud specifically directed the authorities to induct "one or more specialists, having domain expertise pertaining to the impairment faced by the petitioner".

In its final order, the court noted that the report submitted by the Medical Board indicates that the petitioner is in a position to pursue the MBBS Degree course. The court observed, "In exercise of the jurisdiction of this Court under Article 142 of the Constitution of India, we direct that the petitioner shall be admitted"[52] to the college of her choice. While upholding this relief the court also observed, "Since the dispute has been resolved without the Court being required to enquire into the issues of law involved, we clarify that all issues of law are kept open to be adjudicated upon in an appropriate case." [53]

One of the important features of this order is the direction to authorities to induct the domain expert which is nowhere to be seen in the earlier two aforementioned judgments. Although it is an unprecedented outcome for the petitioner, ironically it is not a precedent under Article 141. This raises a question whether Court should indulge in ad-hocism on part of the authorities or should it press for laying down a settled law. It is also not clear why the court did not cite the arguments raised by the petitioner. She had argued that "the notification stands in clear derogation of the rights of persons with disability contemplated in Rights of Persons with Disabilities Act, 2016 as well as mandates under the UN Convention on Rights of Persons with Disabilities, 2007. The petition also claims that the determination of disability set out as cut-off is also without any scientific basis and is thus arbitrary, and discriminatory."[54]

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51 Vibhushita Sharma v UOI &Ors W.P.(C) No. 793/2022.

52 Ibid at para 6.

53 Ibid at para 7.

54 See SohiniChawdhury, "MBBS : Supreme Court To Examine Validity Of Rule Excluding Persons With Speech Disabilities From Medical Courses, Laments Girl Losing Admission" (LiveLaw 2022) available at: https://www.livelaw.in/top-stories/mbbs-supreme-court-to-examine-validity-of-rule-excluding-persons-with-speech-disabilities-from-medical-courses-laments-girl-losing-admission-210330.

Bambhaniya Sagar Vasharambhai and Anr. vs UOI[55] involved four disabled petitioners seeking admission in MBBS programs. There was consensus among the board members regarding the competence and eligibility of two of the petitioners and accordingly it recommended for their admission. The court endorsed the same without incorporating the detailed reports in the judgement. However, in respect of the remaining two petitioners, the matter was vexed. In respect of these two petitioners, the expert committee had merely evaluated the extent of their impairments while holding both to be ineligible for admissions into MBBS program. The board opined that the disability of both the petitioners was severe enough to find them unsuitable to pursue medical education.

While debunking both the reports the court made following observations in its initial order:

"This Court is of the opinion that these reports only quantitatively assessed or evaluate the petitioners' extent of disability. In both the cases the detailed evaluation aside from the quantification of the disability is not reflected in the reports. In other words, the reports are bereft of any reasoning which impelled the experts to say that these candidates are not capable of pursuing medical courses or how the impairments they suffer from would impede or prevent them from effectively pursuing the courses which they wish to study in." [56]

Implicit in these observations is the disinclination of the court towards the medical model of disability. At the same time, the court also guarded against mischaracterizing certain conditions like deformity and webbed neck. The court observed that "Although the Court is conscious that some of the conditions such as deformity and webbed neck are not "usual" or "usually understood" disabilities, yet in the absence of any elaboration, or reasoning, one is left wondering why these candidates (who have been fairly capable of pursuing rigorous academic courses and even reaching a certain level of attainment) would be unable to do so in the opinion of such experts …"[57]

55 2023 LiveLaw (SC) 956.

56 Ibid at para 7.

57 Ibid

Although, this observation is ambivalent on the notion of disability, it guards the authorities not to conflate the distinction between disability and impairment[58]. Former being predominantly 'societal' manifested through external barriers, whereas the latter being predominantly, physiological, and internal to the body of person. In this light, the court directed the AIIMS to carry out the qualitative assessment of both the aspirants. However, regrettably, neither the court referred to principle of reasonable accommodation nor any reference was made to the ethos of UNCRPD. It is submitted that the court ought to have found it imperative to induct experts from disability rights domain as part of the Expert Committee to demedicalise its mandate and to enable the committee to appreciate the non-medical considerations. As a follow up to this order the Expert Committee took a U-turn in respect of one of the petitioners, who is the person with Cerebral Palsy, the committee, having done the qualitative assessment in accordance with the order of the court, declared the petitioner to be eligible for admission. This outcome, though favorable to the petitioner, also reinforces the critique against the expert driven evaluation without proper representation to the interests of disabled in the committee. In absence of a detailed order, there is no clarity on the nature of the qualitative assessment.

However, despite these weaknesses in reasoning, utmost importance must be attached to this initial order to invite attention of the state towards the anomalies in the RPwD Act in respect of the definition of disability.

The court made the following germinal observations:
"In the opinion of this Court in cases even of specified disabilities, in all cases the standard of 40% may result in "one size fit all" norm which will exclude eligible candidates. The Union, therefore, shall consider the steps to mitigate such anomalies, because a lower extent of disabilities bar benefits and at the same time render them functional, whereas higher extent of disability would entitle benefits, but also result in denying them the benefit of reservation. The National Commission and the Central Government are directed to consider the problem and work out suitable solutions to enable effective participation..."[59]

58 See generally, Bob Williams-Findlay, 'Disability Praxis: The Body as a Site of Struggle' (Pluto Press 2023).

59 BambhaniyaSagarVasharambhai and Anr. vs UOI, 2023 LiveLaw (SC) 956 at para 13.

It is submitted that these observations are loaded with wisdom to mainstream the difference and recognize disability as one of the markers of diversity. If the State is unable to activate itself in a time bound manner to take appropriate action in this matter, the court must take upon itself to pursue the path of collaborative activism through the means of continuous mandamus to initiate the process of reforms. Jurisprudentially, the curial adjudication in these cases demonstrates how judges must be vary of the obsession of generality of law. However, to accomplish materially and gainfully, the court is also required to appoint domain experts as amicus.

This order has been influenced by the jurisprudence evolved in *Vibhushita Sharma*[60] with its emphasis on qualitative assessment of the competence of disabled students. However, the learned judges somewhat digressed from its transformative trajectory by not attaching significance to the opinions of domain experts.

While disposing of this petition, the court dealt with the claim of the fourth and the last petitioner to seek admission in MBBS course. The court noted that the Medical Board consisting of "expert doctors in various fields"[61] reiterated their earlier report "by giving adequate reasons"[62] for its recommendation that the petitioner is not eligible to pursue the course.

The court to opined that even though the upper limit of disability has been raised to 80% for admissions in MBBS courses, it is confined to "candidate having both hands intact, with intact sensations and with sufficient strength.[63]" Based on the same, the court concluded:

"This range of motion is essential to be considered for medical course. Unfortunately, the aforesaid criterion is not fulfilled by the petitioner due to the lack of such sensation."[64]

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60 Vibhushita Sharma v UOI, W.P.(C) No. 793/2022.

61 BambhaniyaSagarVasharambhai and Anr. vs UOI, Writ Petition (C) NO.856 of 2023, decided on 31st October 2023 at para 2.

62 Ibid at para 2.

63 Ibid at para 2.

64 Ibid at para 3.

Adopting a kid gloves approach, the court provided a long rope to the government by observing:
"However, the issue with regard to finding a suitable solution to facilitate the effective participation of persons with disabilities, by the Central Government, as suggested by order dated 22.09.2023 has not been addressed and therefore the same is required to be complied with."[65]

In our respectful opinion, this final order completely diluted the rigour of the initial order in this case while dismissing the petition. While giving a regressive turn to the adjudication, the court unabashedly embraced the medical model of disability and relegating the hopes and aspirations of a disabled citizen aspiring to pursue medical education to tragedy and misfortune. The overall tonality of the judgement demonstrates judicial pessimism with the use of terms like "suffered"[66], "unfortunate"[67], "sufficient strength"[68], etc.

Last but not the least, by approving quantitative assessment of the disability and smoke screening the qualitative assessment with the epithet "adequate reasons", the court completely watered down its earlier order.

In our opinion, Vidhi Himmat, and Bambhaniya Sagar are per incuriam as being two-judge benches for nonadherence to Vikash Kumar and Vibhushita Sharma dicta on reasonable accommodation.

It is submitted that to resolve the conflict between these three judgments, the Supreme Court must constitute a constitution bench of five or more judges so that ambiguity and indeterminacy about applicability of principle of reasonable accommodation may be authoritatively settled.

It is also to be seen that the Guidelines issued by the Medical Council of India (now National Medical Commission) have been allowed to prevail over section

65 Ibid at para 6.

66 Ibid at para 1.

67 Ibid at para 3.

68 Ibid.

32 of the RPwD Act, 2016 by the Supreme Court. The court has also not found anything wrong or illegal in sub-classification of impairments at administrative level. In our opinion, this approach of the court is untenable as it runs counter to the elementary principle of administrative law that regulations cannot supersede the statutes enacted by the legislatures as the former derive its authority from the latter. This issue must also be settled by the set constitutional bench.

At this place, it is also important to mention briefly the stigma faced by people with invisible disabilities. The plight of such individuals is much graver, and they are comparatively more vulnerable to discrimination, exclusion and alienation because their impairments are not visible and often they find it extremely difficult to convince the so-called typicals about their invisible impairments. For example, the impairments arising out of Multiple Sclerosis results not only in physical issues but also affects person mentally and intellectually. Similarly, people with Autism and Down Syndrome due to their hyperactivities are subjected to indignity and stigma. Even noted philosophers like Ronald Dworkin and John Rawls have found it difficult to recognize the differences arising out of physical and mental conditions as mainstream markers of diversity, rather they have openly attributed physical and mental disability to bad luck and tragedy.

Vulnerability of People with conditions of Leprosy

The discussion on disability rights would be hollow if we do not highlight the plight and the stigma faced by the survivors of Leprosy. As late as in 2009, the Supreme Court unabashedly adopted hands-off approach against the challenge to the civic law disqualifying Leprosy cured people from occupying public offices. In Dhirendra Pandua v State of Orissa[69], the Supreme Court perpetuated the stereotype around the long-standing myth that Leprosy is an incurable and infectious disease requiring segregation and special treatment. In the aforementioned case, the criteria for selection of persons to civic offices under sections 16(1)(iv) and 17(1)(b) of the Orissa Municipal Act, 1950 was discussed. The two sections disqualify persons who is of "unsound mind or is a leprosy or a tuberculosis patient" from occupying civic offices under the said Act.

69 Dhirendra Pandua v State of Orissa, AIR 2009 SC 163 : 2008 (12) Scale 612.

Holding the constitutional validity of these provisions against the challenge of Article 14, the court opined that in order for a classification to be arbitrary, it must not be based on a real or substantial difference nor it should be reasonable. However, the court found the classification between persons with and without aforementioned conditions not only to be reasonable but even non-arbitrary. To allude to the court:

"The obvious object and the purpose sought to be achieved by the said restriction appears to be that being a contagious disease, it [1959] 1 S.C.R. 279 (1978) 2 SCC 1 (2003) 8 SCC 369 can be transmitted via droplets from the nose and mouth during close and frequent contacts with untreated infected persons, therefore, the other elected Councillors or the members of the public with whom they are required to have day-to-day close contact as Municipal Councillors, may also get affected by the disease."[70]

It is submitted that the aforementioned approach of the court is deeply problematic for a number of reasons:

Firstly the court has conflated the notions of arbitrariness and unreasonableness thereby seriously diluting the Royappa dicta[71].

Secondly, it treated unequal equally by totally ignoring the inherently different nature of the above conditions. Thus, it is inconceivable to observe that the reasonableness and non-arbitrariness of conditions prohibiting persons with unsound minds and leprosy patients from contesting elections are judged by the parameter exclusively related to tuberculosis, its being a communicable disease. This is not only void of logic, but false foul of medical science.

In other words, the classification in the instant case does not rest on any intelligible differentia, rather it deploys difference as a smokescreen to condone segregation of certain socially oppressed groups. Such classification is based on myths and stereotypes which are not only unscientific and lacks credibility even medically. It would not be an exaggeration to equate the outcome of this

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70 Ibid at para 28.

71 E.P Royappa v. State of Tamil Nadu, AIR 1974 SC 555 (Royappa was handed down by a five-judge constitution bench and therefore the division bench in this case was bound by it).

case with the notorious US Supreme Court judgement in Plessy v. Ferguson[72] upholding the constitutionally abhorrent doctrine of separate but equals. Clearly, a post-colonial constitutional court is seen invoking Article 14 to constitutionally tolerate segregation and political alienation of certain groups, a purpose totally incompatible and alien to its conception.

The Supreme Court noted that although scientific developments now have a cure for Leprosy, few studies demonstrated that nearly 10%of the patients continue to harbour viable persisters of the disease, despite two years of regular therapy.[73] The Court further noted that in light of available sources, it was evident that despite various measures, at the relevant time, relapse of Leprosy could not be completely ruled out and was dependent on a multiplicity of factors.[74] In light of its findings, the Court upheld the disqualification of the petitioner by observing that the legislature in its wisdom has rightfully retained the provisions in the statute that bar persons affected by Leprosy from occupying civic offices, as there is a reasonable concern of the disease being contagious.[75]

It is pertinent to pinpoint here the strange juxtaposition and the political correctness in the stance of the court:

"…having regard to the changed concept and knowledge gained about the disease of leprosy, on the recommendation of the Working Group on Eradication of Leprosy, appointed by the Government of India, many State Governments and Union Territories have repealed the antiquated Lepers Act, 1898 and subsequent similar State Acts, providing for the segregation and medical treatment of pauper lepers suffering from infectious type of disease. Therefore, keeping in view the present thinking and researches carried on leprosy as also on tuberculosis, and with professional input, the Legislature may seriously consider whether it is still necessary to retain such provisions in the statutes."[76]

72 163 U.S. 537 (1896).

73 Ibid at paras 19-21.

74 Ibid.

75 Ibid at paras 27-9.

76 Ibid at paras 30-31.

It is submitted that the rhetoric of the court is nothing less than a very feeble damage control exercise. In our opinion, the reasoning is empirically and analytically flawed. It is inconceivable to see the court drawing a sweeping inference about the contagious nature of leprosy by reposing faith in "few studies" reportedly cited in the bulletin issued by the Indian Council of Medical Research in 2002. It is submitted that the narrative of the bulletin relied on by the court sounded more political than empirical. Clearly, reference to the findings of the few studies in the bulletin was more like a postscript to its prominent findings that "MB (multibacillary disease) patients when treated with Multi-drug therapy (MDT) – a three drug combination, till smear negativity or for two years, the results have generally been very satisfactory. The MB patients treated and with regular follow up for over two to five years have responded well with very few relapses."[77]

The fact of the bulletin being nearly a decade old made the reasoning of the court even more suspect. The reasoning also falls foul of one of the fundamental duties enshrined in Article 51 A(h) obligating every citizen of India to foster "scientific temper..." We submit that the fundamental duties are not mere platitudes and in a plethora of cases the courts in India have elevated their status as interpretative tools.[78] In this light, we must reflect whether the adjudication of the court was in furtherance of scientific temper. Alas! It was not. In the ultimate analysis, the reason behind the denial of equality to Leprosy-cured persons was grounded in unverified source referred to anonymously as "few studies" in the bulletin which was unquestionably endorsed in the judgement. Unfortunately, the Court did not find it appropriate to find out whether the observation in the bulletin was sporadic or guarded by authentic literature. We are constrained to observe that such an adjudicatory approach cannot, but, be described as unempirical thereby making the citizen-cum-judges of the Apex court exposed to criticism for being innocent to the letter and spirit of the aforementioned fundamental duty.

Understood thus, it is a regressive slide from the principles of transformative constitutionalism and constitutional morality. Finally, this decision is in deep

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77 Ibid at para 21.

78 Sachidananda Pandey vs State of West Bengal &Ors., 1987 AIR 1109, 1987 SCR (2) 223; Goa Foundation v State of Goa AIR 2001 Bom. 318, etc.

dissonance with the categorical decision of the Government of India to ratify UNCRPD which had entered into force prior to this pronouncement. In the teeth of Article 5 of UNCRPD obligating the observance of equality and non-discrimination on the ground of physical and mental disability, the unconditional imprimatur of the court towards 'legislative wisdom' in enduring socio-political alienation and exclusion of Leprosy-cured persons is appalling to say the least. Unfortunately the court harped back to its tendency to attach unconditional wisdom and latitude to the opinion of so-called experts, in this case, Indian Council of Medical Research.

Clearly, the case proved to be a missed opportunity to eliminate and combat de facto inequality vis-à-vis leprosy patients mandated by paragraph 4 of Article 5 of UNCRPD. On the footing of Vishakha v State of Rajasthan[79], the court could have entrenched the doctrines of equality under the law and equal benefit of the law undergirding the aforementioned paragraph. The court could have also relied on the progressive jurisprudence of the Canadian Supreme Court involving the interpretation of this doctrine as part of Section 15[80].

Unfortunately, the judgement did not also take cognizance of the previous initiatives, advocating repeal of discriminatory provisions in the laws against the Leprosy of affected persons. In 2004, the High Court of Gujarat in a Public Interest Litigation, Suo Moto v/s Union of India[81], passed an order that the issue of discriminatory provisions in the laws against the Leprosy affected persons should attract the attention of the Central and State Governments. In response to this order, the Ministry of Health and Family Welfare wrote a letter to the Central and State Governments and UTs to identify and dispense with such provisions against persons affected by Leprosy.

In 2007, "Mr. Ram Naik, along with Dr. P. K. Gopal (President, National Forum of Leprosy), Dr.Sharad Gokhale (President, International Leprosy Union),

79 (1997) 6 SCC 241.

80 See generally, Andrews v Law Society of British Columbia, [1989] 1 SCR 143; Law v Canada [1999] 1 SCR 497; Laverne Jacobs,'Equality Rights Instruments and the Importance of a Disability Lens'in Laverne Jacobs (ed), Law and Disability in Canada: Cases and Materials (LexisNexis 2021).

81 Public Interest Litigation (Special Civil Application No.12403/2003).

Mr.UdayThakar (Treasurer, Kushthrog Nivaran Samiti), Shri Shantaram Bhoir (President, Maharashtra Kushthpidit Sanghatana), and Mr.Bhimrao Madhale (President, Sanjay Nagar Rahivasi Sangh) submitted a petition for medico-socio-economic empowerment of persons affected by Leprosy to Rajya Sabha through Mr.Ved Prakash Goyal, M.P. from Mumbai."[82]

Its Committee on Petitions investigated the matter and presented the Report No. 131 in October 2008. It, inter alia, recommended repeal of such discriminatory provisions in the concerned enactments[83].

Since the pronouncement of this forgettable *Pandua* judgement, ample water has flown under the bridge. In 2010, a petition was filed by the Federation of Leprosy Organisations (FOLO) before the Supreme Court of India reiterating the matter advocated before the Rajya Sabha[84].

The advocacy to combat leprosy based discrimination got impetus on international front with the adoption of the U.N. General Assembly Resolution on the elimination of discrimination against persons affected by leprosy and their family members[85]. This was followed by the passage of 249th Report of the Law Commission of India recommending, inter alia, the repeal of the outmoded and antiquated Lepers Act 1898 which was finally acted upon in 2016[86]. Ironically, this report was presented by the very judge who was the author of the Pandua judgement in 2009, i.e. Justice D. K. Jain.

82 See generally, Discriminatory Laws against Persons Affected by Leprosy: A Compilation of Efforts and Progress Made to Repeal/Amend the Laws, Disabled People's International, Supported by The Nippon Foundation (2015), available at: https://deoc.in/wp-content/uploads/2018/03/NCPEDP-Report-on-Discriminatory-Laws-Against-Leprosy.pdf.

83 Ibid.

84 Federation of Leprosy Organisations (FOLO) vs. Union of India, Civil 83 of 2010. (The data is not available on the website of the Supreme Court of India about the status of the case.)

85 Leprosy, United Nations Human Rights Council, available at: https://www.ohchr.org/en/hr-bodies/hrc/advisory-committee/leprosy#:~:text=In%20December%202010%2C%20the%20General,and%20prepared%20by%20the%20Advisory.

86 Repealing and Amending Act, 2016.

In a full turn of events, giving a push back to the regressive judicial insight in *Pandua*, Justice AP Shah as a Chairman of the 20th Law Commission of India made a fervent appeal to the Government of India to provide legal framework to deal with all aspects of rights of 'Persons affected by Leprosy'. The Law Commission of India recommended the enactment of the Elimination of Discrimination against Persons Affected by Leprosy Bill, 2015. In this regard, Justice Shah, inter alia, opined: "This stand-alone law, apart from comprehensively covering the repeal/ modification of the specified statutes, shall contain principles of non-discrimination and equal protection before law."[87]

The Bill prohibits specific kinds of discrimination, calls for the repeal or amendment of other laws that discriminate against persons affected by leprosy, imposes positive duties on government to take measures for their welfare and sets up Central and State Commissions to make recommendations to guarantee their rights.[88]

In 2016 with enactment of the RPwD Act, the Parliament clearly recognizes the condition of leprosy cured as one of the specified disabilities and, apart from prohibiting discrimination on the same, also made provision for affirmative action in favour of leprosy cured persons[89]. Despite this categorical mandate of the Parliament, many states continued to enforce disqualification against leprosy patients, including leprosy cured persons, from holding public offices, and from effective socio-political intercourse.

The same led to the filing of yet another petition in the Supreme Court of India in Pankaj Sinha v. Union of India[90].

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87 Para 7.13, 256th Report on Eliminating Discrimination Against Persons Affected by Leprosy, Government of India (2015), available at: https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081662.pdf.

88 See also, 256th Report on Eliminating Discrimination Against Persons Affected by Leprosy, Vidhi (2020), available at: https://vidhilegalpolicy.in/research/2015-6-7-256th-report-on-eliminating-discrimination-against-persons-affected-by-leprosy/.

89 Section 34 and Paragraph 1 clause (a), Schedule, RPwD Act 2016.

90 2018 SCC OnLine SC 1502.

In this petition, apart from contenting to afford life of dignity and equality to the leprosy patients and leprosy cured persons, it was also prayed before the court to initiate awareness campaigns to dispel the fear associated with leprosy, and support and encourage the people afflicted by the said disease to lead a life of equality and dignity. The petition also emphasized on to conduct periodic national survey for determining new cases relating to detection rate of leprosy and to publish and bring in the public domain the reports of National Sample Survey on Leprosy conducted in 2010-2011.

Implicit in the petition was the contention that despite the mandate of WHO, states in India were cavalier in tackling the spread of leprosy and to meet the target of less than one leprosy case per 10,000 persons. Despite these cohesive contentions, the judgement did not overrule the Pandua dicta[91]. On the other hand, the court issued a slew of directions to raise awareness about the myths and stereotypes around this disease. Inter alia, the court directed:
"Health care to leprosy patients, at both Government as well as private run medical institutions, must be such that medical officials and representatives desist from any discriminatory behaviour while examining and treating leprosy patients…"[92]

It is evident from the tenor of the judgement that it viewed the issue mainly through the lens of medical model of disability, though there was emphasis on treatment of equality and dignity to the 'leprosy affected persons'. In sharp contrast, with Vikash Kumar, the judgement merely iterates the medical dimension of the problems and discrimination faced by the 'leprosy affected persons'; however, it almost completely leaves to the society and the legislature to remedy the ill effects of law on this vulnerable group. By not overruling *Pandua*, it virtually abetted its side effects on legal consciousness. This is particularly irksome and strange if it is noticed that one of the authors of this judgement is Justice DY Chandrachud (present CJI), who authored the *Vikash Kumar* judgement in 2021. If disability rights adjudication is evaluated on a spectrum, then Vikash Kumar and Pandua are the two extremes. The former transforming the equality

91 Although the court referred to this judgement in para 10.

92 Ibid at para 18(vii).

jurisprudence, whereas the latter perpetuating the status quo with unconditional and unquestioned allegiance to the opinions of the experts. In between these two extremes are ambivalent judgements like Pankaj Sinha, which are neither here nor there, causing a sort of saturation in the adjudicatory process.

However, there is a larger point which needs to be brought home, i.e. inability of the conventional model of law and reasoning along with doctrines, standards, and principles to probe into the deep-rooted and socially, culturally, and politically embedded structural discrimination, stereotypes and stigma against vulnerable groups like one at hand. The resolution, therefore, does not lie in relying on the same. The need of the hour is a leap of faith to transform jurisprudence with innovations and alterations of the existing approaches of reasoning and legal framework.

In fact, jurists and thought leaders like Justices Bhagwati and Krishna Iyer had given a clarion call to the Supreme Court in its new role of a post-colonial constitutional court to evolve new tools of effecting social transformation and eliminating structural injustice from the socio-political interstices in plethora of cases and extra judicial writings. We will follow the suit in the epilogue by venturing to evolve alternative model of reasoning and legal framework with the synthesis of law and science.

In this connection, it is important to mention that in 2021, again, a bill namely, the Rights of Persons Affected by Leprosy and Members of their Family (Protection Against Discrimination and Guarantee of Social Welfare) Bill 2021, was introduced in the Rajya Sabha. However, the opportunity went begging.

High Courts and Disability Rights Jurisprudence

Before concluding this section, it would be pertinent to investigate whether the High Courts continued the Supreme Court's craftsmanship for the advancement of disability rights jurisprudence through their pronouncements. In TR Ramanathan v Tamil Nadu State Mental Authority,[93] GR Swaminathan, J recognised the trauma

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93 TR Ramanathanvs Tamil Nadu State Mental Authority, 2022 4 Mad LJ 641: LNIND 2022 MAD 1247.

suffered by persons with condition of "mental illnesses" when they were required to be physically brought to congested hospital wards for physical examination for the purposes of obtaining a disability certificate. Holding that persons with disabilities are entitled to a barrier-free access to rights and services, the High Court held that persons with "mental retardation" or "mental illness" are entitled to have the assessment done at the place where they reside.

In R Ravikumar v Government of India,[94] six applicants with various forms of disabilities approached the Madras High Court alleging that the process of selection of notaries under the Notaries Act, 1952 was invalid as it was conducted without providing the requisite reservation for disabled candidates as mandated by section 34 of the RPwD Act. Disputing this contention, the State argued that as the position of a Notary is a public privilege and not a post under the Government within the meaning of section 34 of the RPwD Act, it would have no application. In simpler terms, the argument was that the two prerequisites for application of section 34 were that the appointment should be to a post and that it should be in a Government establishment, which was not fulfilled in the case at hand.

This contention of the State did not impress M Sundar, J who justifiably, and in our view rightly, declined to play a pedantic interpreter of law. Instead, he resorted to the teleological method and found that notaries were appointed by the Central Government under the Act with a cap on the number of notaries per State akin to cadre strength. On this basis, he construed the term "appoint" occurring in section 34 of the RPwD Act to include the appointment of notaries under the 1952 Act[95].

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94 R RavikumarvsGovt of India, (2020) 5 Mad LJ 150: LNIND 2019 BMM 10311.

95 This reason is reminiscent of a decision of the Supreme Court in IMA vs. Union of India (2011) 7 SCC 179 at paras 185-186, where Sudarshan Reddy J placed a similar teleological interpretation on the word'shop'occurring in article 15(2) to safeguard reservations to the backward classes in medical colleges (non-minority higher educational institutions); See generally, Gautam Bhatia, Exclusionary Covenants and the Constitution – IV: Article 15(2), IMA v. UOI, and the Constitutional Case against Racially/Religiously Restrictive Covenants, Indian Constitutional Law and Philosophy (2014), available at: https://indconlawphil.wordpress.com/2014/01/14/exclusionary-covenants-and-the-constitution-iv-article-152-ima-v-uoi-and-the-constitutional-case-against-raciallyreligiously-restrictive-covenants/#:~:text=The%20logic%20of%20IMA%20v,–%20they%20are%20unconstitutional.

It is submitted that this decision of the High Court was rendered in 2019, and consequently did not have the benefit of the decisions of the Supreme Court in Vikash Kumar and Avni Prakash. Though the principle of reasonable accommodation, which permeates the RPwD Act, was not expressly invoked, the interpretative process of the High Court is undoubtedly in consonance with it. As was also pointed out by Chandrachud, J in Vikash Kumar:
"Accommodation implies a positive obligation to create conditions conducive to the growth and fulfilment of the disabled in every aspect of their existence."[96]

The Government of India, however, in an adversarial spirit, unlike a welfare state, appealed against this decision before the Division Bench.[97] Adopting a very strange course, the Division Bench, set aside the well-reasoned order of M Sundar J running into fifty-four paragraphs, on the interpretation of section 34 by resorting to pedantic interpretation. The division bench purported to characterize grammatical construal of section 34 of the RPwD Act, confining it to the context of reservation in jobs offered by government as prima facie legal view. However, the bench, writing sketchily and cryptically, did not furnish any rationale to dispense with the teleological interpretation placed by Sundar J on section 34. This is uncharacteristic of a constitutional court because conventionally a welfare enactment is construed liberally to extend the benefit to its intended beneficiaries. Lastly, while setting aside the findings of the single judge, the Division Bench indulged in paternalism and sympathy-mongering by stating that though the bench concurred with the State in principle, it would not disturb the original relief considering the "writ petitioners are suffering from disabilities".[98]

An SLP against this decision of the Division Bench at the instance of the Government, was also dismissed[99] probably on account of the fact that the Union Government had accepted the interpretation of the learned single judge by amending the

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96 Vikash Kumar vs. UPSC, [2021] 11 S.C.R. 281 at para 46.

97 R Ravikumar v Govt of India, (2020) 5 Mad LJ 150.

98 See generally for criticism of this approach, Sanjay Jain, 'Exploring the relationship of law and emotions in the context of Disability Rights Jurisprudence', Vol. 12(2), Jindal Global Law Review (2021) 263-292.

99 Govt of India v R Ravi Kumar, SLP Civil 7649-7654 of 2021, decided on 25 February 2022 (UU Lalit, SR Bhat and PS Narasimha, JJ).

Notaries Rules inserting clause 3(ac) thereby extending the application of the RPwD Act to applicants under the Notaries Act.[100]

In Shivam Soni v State (GNCTD),[101] the Delhi High Court directed the Delhi government to make necessary arrangements for providing the court documents in a readable language to visually impaired in all cases wherever the circumstances so warrant. The Court in this regard observed:
"On a clear reading of Section 12 of the RPwD Act, 2016 it can be seen that a positive duty has been cast upon the appropriate government under sub-section 4 to ensure that all public documents are in accessible formats. Further it is mandated to make available all necessary facilities and equipment to facilitate recording of testimonies, arguments or opinion given by persons with disabilities in their preferred language and means of communication."[102]

In Manish Lenka v UOI,[103] the Delhi High Court through Pratibha Singh J has held that children with disabilities are entitled to basic facilities such as uniform, computer fee and transportation cost in Kendriya Vidyalaya Schools under sections 16 and 17 of the RPwD Act.

These two cases demonstrate how the Delhi High Court emphasised on creation of enabling conditions for the materialization of rights guaranteed by RPwD Act. The court was also able to identify the socio-economic dimensions of these rights.

We have demonstrated through the survey of these cases, the consistent inconsistency on part of both the Supreme Court and the High Courts to take strides for the advancement of disability rights jurisprudence. Although in number of cases, the Supreme Court and High Court have made valuable contribution to foster and harness disability equality in large number of cases, the courts have been found wanting in furthering this constitutionally and socially overlooked cause.

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100 Notaries Amendment Rules, 2021 (GSR 341 (E) dated 25 May 2021).

101 ShivamSoni v State, (2022) 2 HCC (Del) 403.

102 Ibid at para 13.

103 Manish Lenka v UOI, 2022 SCC OnLine Del 4403.

EPILOGUE

To quote Prof Upendra Baxi to provide enabling context to the law apart from legal transformation, we also have to emphasise on paradigmatic shift in education and religion about the perception of physical and mental disability. Arguably, even the God does not have reservations to bodily impairments as is evident from the three statues of Gods with atypical bodies in Lord Jagannath Temple at Puri. Why this positive religious vibe be not transferable in education and law is a real question.

We argue that epistemological headway is possible to make legal order more responsive, effective and sensitive to those vulnerable sections of society requiring its protection the most. To draw analogy from quantum physics, disability-based discrimination is a hyper object and the conventional model of law with emphasis on linearity and generality, and mediated by proximity and causation is too innocuous to capture its super complexity. For example, conventional legal reasoning cannot capture the intersection of various grounds, compounding the pathology of disability-based discrimination. At the most, law can capture the patent disability-based discriminatory behaviour by one group against another. However, it is beyond the reach of law to arrest latent disability-based discrimination deeply rooted in the societal structure and embedded as a shared value. The law therefore has to be expanded to address this structural menace. For the same, we may draw on quantum physics and employ the doctrine of quantum entanglement to arrest the super complexity of deeply rooted, social prejudice, stigma, and structural discrimination against persons with disabilities.

Kate Galloway articulates three limbs of this doctrine as:
"1. Where a phenomenon is:
a) evident all around us so that wherever we go it is apparent (viscous);
b) distributed over time and space so that only one facet or aspect of the phenomenon is visible at any one time (non-local, time-stretched); and
c) interconnected with multiple objects and phenomena, that phenomenon is known as a hyperobject.

2. Where a legal subject has undertaken activity that contributes to or exacerbates the existence of the hyperobject or its manifestation through any facet or aspect, the law recognises the inherent interconnectedness of the activity to the hyperobject.

3. Where a legal subject suffers harm as a result of an event and that event is part of a hyperobject, the law will recognise the inherent interconnectedness of the event to the hyperobject resulting from its non-locality and temporal undulation."[104]

We make a case for capturing the phenomenon of disability-based discrimination through this doctrine to make the institution of law more receptive. Firstly, disability-based discrimination is ubiquitous and manifests itself, both patently and latently in socio-political structures. But its visibility is impenetrable for the conventional legal standards, doctrines, and principles. Moreover, disability-based discrimination is infused with super complexity and is too diffused to be captured in its entirety by any single or few instances over a period of time and space. It is needless to say that it is intertwined with complex socio-political frameworks and deeply entrenched behavioral practices.

Secondly, when by act or omission the degree or effect of discrimination is exacerbated then the law must evaluate the connection between the act and the hyperobject, disability-based discrimination in this case. Thirdly, when a legal subject suffers physically and mentally or when she is inhibited from full participation, the law will recognise the inherent interconnectedness of the discriminatory acts or omissions to the broader phenomenon of the disability-based discrimination contingent on its evaluation and verification and forge appropriate remedy for the same.

In other words, disability-based discrimination in its structural, cultural and personal context is too nuanced and complex to be captured by conventional legal framework and needs to be arrested by recognizing a general duty of non-discrimination on the state. This duty can be inferred from the unconditional ratification of UNCRPD by the Union of India. The obligation of non-discrimination

104 Kate Galloway, 'The Doctrine of Quantum Entanglement' in Nicole Rogers & Michelle Maloney (eds), The Anthropocene Judgments Project: Futureproofing the Common Law (Routledge 2024), page 71

stemming from Article 5 of UNCRPD can further be bolstered by placing reliance on Article 27 of the Vienna Convention on the Law of Treaties which reads:
"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

We argue that the Union of India with its inaction on specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities is clearly in breach of the aforementioned duty of non-discrimination. This duty coupled with the principle of equal protection of laws, enshrined in Article 14 of the Indian Constitution, exposes the Government of India to the constitutional liability for its omission to dispense with the discriminatory provisions of laws qua certain groups of persons with disabilities. We may also anchor this obligation of the Government of India to Article 51A, one of the directive principles obligating the state to promote and foster international law.

We are conscious that these transformative epistemic strides may appear prefigurative, but we argue with conviction that what is prefigurative and utopian for the time being may serve as a blueprint for action in future. It has to be borne in mind that by casting obligation on the state parties to combat and eliminate de facto inequality, UNCRPD has broken new ground of jurisprudence, and it is no longer suffice to harp on formal equality. State parties in order to fulfil the mandate of elimination of de facto inequality have to evolve new tools.

To begin with, we propose to deepen the conception of equality under the Indian Constitution with incorporation of doctrines of equality under law and equal benefit of law under Article 14. To allude to the General Comment No. 6 of Article 5 of UNCRPD, ""Equality under the law" is unique to the Convention. It refers to the possibility to engage in legal relationships. While equality before the law refers to the right to be protected by the law, equality under the law refers to the right to use the law for personal benefit. Persons with disabilities have the right to be effectively protected and to positively engage."[105] In other words, the doctrine envisages to capture the lived experiences of persons with disabilities.

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105 Para 14, General comment No. 6 (2018) on equality and non-discrimination, Committee on the Rights of Persons with Disabilities, United Nations, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/119/05/PDF/G1811905.pdf?OpenElement.

In respect of the doctrine of equal benefits of law, the General Comment lays down "To ensure equal opportunity for all persons with disabilities, the term "equal benefit of the law" is used, meaning that States parties must eliminate barriers to gaining access to all of the protections of the law and the benefits of equal access to the law and justice to assert rights."[106] The direct fallout of these doctrines is to saddle the state with affirmative obligation to eliminate barriers and to deepen the thicket of substantive equality to provide the safety valve of the institution of law to those who need it the most.

Finally, if it is assumed that Article 15 is one of the facets of the meta-constitutional principle of equal protection of laws, then it follows that the pro-difference and diverse nature of equality paradigm under the Constitution of India must transcend the specified grounds of non-discrimination under Article 15(1) and (2). The courts must evolve standards, principles, and doctrines to break law free from the strangle-hold of ableism.

106 Ibid at para 16.